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CASES DETERMINED

IN THE

Supreme Court of Arkansas

FROM

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JAMES V. JOHNSON
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1917

JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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*Resigned November 15, 1916.
†Appointed and Qualified November 15, 1916.
‡Term Expired January 9, 1917.
§Elected November 1, 1916. Qualified, January 9, 1917.

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

NEELEY *v.* MARTIN.

Opinion delivered October 30, 1916.

1. HOMESTEAD—DEED BY WIDOW—ABANDONMENT.—A deed to the homestead, executed by the widow, operates as an abandonment thereof by her, and when she held the lands as dower, her grantee obtained only an estate during her life.
2. DOWER—LENGTH OF ESTATE.—The widow to whom land is assigned as dower becomes a life tenant thereof, and the estate thus created ceases only at the death of such tenant.
3. ADVERSE POSSESSION—AGAINST REVERSIONER—LIFE ESTATE.—The possession of a life tenant or his successor in title does not become adverse to the reversioner until after the death of the life tenant.
4. HOMESTEAD—SALE—MINORITY OF HEIRS.—The sale of the homestead during the minority of the children is void.
5. HOMESTEAD—ABANDONMENT BY WIDOW—RIGHTS OF MINORS.—The homestead rights of minors is not affected by the widow's abandonment of the homestead.

Appeal from Prairie Chancery Court, Southern District; *John M. Elliott*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellant filed his petition in the chancery court of Prairie County to confirm title to certain tracts of land therein described. The appellees asked to be made parties, and contested the petition as to certain tracts of the land. To these tracts it appears that appellant and the appellees deraigned title from one Jesse Martin, deceased.

Appellant grounded his claim of title through a sale of the land made by the administrator under the orders of the probate court and a deed by the admin-

istrator to the purchaser, one H. P. Vaughan, and also a deed to Vaughan from the widow of Jesse Martin, to whom the lands had been allotted as dower, and mesne conveyances from Vaughan to appellant, and by adverse possession of himself and those under whom he claimed. Appellees claimed that they were the owners of the lands through inheritance as the sole and only heirs of Martin. The facts are substantially as follows:

Jesse Martin died on the 25th of September, 1872, leaving his widow, Narcissa Martin, and his children, Elizabeth Lanford (*nee* Martin), an adult, Joseph Martin, A. B. Martin, Henry Martin and Artimissa Martin, minors, surviving him.

Joseph Martin died, leaving a widow, Annie Martin, and one child, Viola Martin, who has since died. Also Henry Martin died, leaving a widow, but without issue. Artimissa Martin married one C. C. McDaniel. A. B. Martin, Elizabeth Lanford and Artimissa McDaniel, at the time of the decree, were the sole and only heirs of Jesse Martin, deceased.

Jesse Martin, at the time of his death, lived with his wife and minor children upon a portion of the lands in controversy as his homestead. At the February term, 1874, of the probate court, the lands in controversy were allotted to Narcissa Martin as dower in the estate of her deceased husband. Soon after the allotment of dower the widow and minor children moved away from the homestead to Faulkner county, where they resided for about twenty years.

On the 20th day of January, 1877, the reversionary interest in the lands in controversy, together with other lands, were sold by the administrator *de bonis non* under an order of the probate court for the purpose of paying the debts of the estate of Jesse Martin, deceased, and were purchased by one H. P. Vaughan, who received his deed the 31st day of December, 1879.

On the 4th day of October, 1877, Narcissa Martin, the widow, conveyed her dower interest in the lands in controversy to H. P. Vaughan. Appellant obtained

his claim of title through mesne conveyances from Vaughan. Vaughan went into actual possession of the land in 1879, and he and those claiming under him, including the appellant, have been in the actual possession of the land since that time, paying taxes and making improvements thereon.

Narcissa Martin, the widow of Jesse Martin, died on the 4th day of January, 1906, and appellant filed his petition to confirm title at the November, 1906, term of the court.

The court found that the sale of the lands in controversy by the administrator *de bonis non* of the estate of Jesse Martin, deceased, under the order of the probate court to pay the debts of the estate was void, and entered a decree confirming and quieting title in the appellees and appointed a master to state an account of the betterments, taxes and rents and directed him to report at the next term, and the appellant duly prosecutes this appeal. Any other facts necessary will be stated in the opinion.

Roy D. Campbell, for appellant.

1. The conveyance by Narcissa Martin of her homestead and dower interest in the lands of her deceased husband was an abandonment of her claim, and thereupon the right of action of the heirs became complete and the statute of limitations began to run against them. 48 Ark. 235, 237; 65 Ark. 70; 72 Ark. 540; 79 Ark. 410; 105 Ark. 646.

2. Appellant's title by adverse possession is good as to A. B. Martin, Artimissa McDaniel (*nee* Martin), and Elizabeth Lanford (*nee* Martin). A. B. Martin became of age July 15, 1891, and the three years allowed him by law in which to bring suit after reaching his maturity, expired July 15, 1894; Artimissa McDaniel became of age July 2, 1890, and her three years expired July 2, 1893, and Elizabeth Lanford, as appears by the record was of age at the time of the death of her father. As to her it does not appear when she married, or that her husband is living, but since it is neither

pleaded nor brought into the evidence that she is under the disability of coverture, that fact can not be relied upon as a bar in this action. 22 Ark. 164; 72 Ark. 543.

3. The sale of the lands in question having been ordered by the probate court after they had been abandoned by the widow, the same became assets in the hands of the administrator for the payment of the debts of the Martin estate. 48 Ark. 237; 65 Ark. 68.

W. A. Leach, for appellee.

1. Sale of the homestead during the minority of the children to pay debts of the estate is void. 29 Ark. 412; 28 Ark. 485; 29 Ark. 635; 1 Ark. Law Rep. 291; 115 Ark. 359; 56 Ark. 574; *Id.* 563; 52 Ark. 213; 50 Ark. 329; 49 Ark. 78. If the widow abandoned the homestead prior to the order of sale, that did not constitute an abandonment by the minors, nor did the land thus become assets in the hands of the administrator. A minor can neither waive nor abandon his homestead. 37 Ark. 633; 29 Ark. 633; *Id.* 280; 92 Ark. 142.

2. Appellant has not acquired title by adverse possession. The widow to whom land is assigned as dower becomes a life tenant, and this life estate she may sell or lease. In this case the widow's deed to Vaughan vested him with this life estate, which ceased only at her death. 14 Cyc. 1013; 93 Ark. 353; 31 Ark. 576.

The possession of a life tenant or one who holds under him is not adverse to those who hold in reversion. 115 Ark. 359; 116 Ark. 233; 98 Ark. 30; 74 Ark. 81; 69 Ark. 539; 65 Ark. 90; 60 Ark. 70; 58 Ark. 510; 43 Ark. 427; 35 Ark. 84. See, also, 1 Cyc. 1057; *Id.* 1058; 87 Ark. 428; 83 Ark. 196; 58 Ark. 400.

WOOD, J., (after stating the facts). The deed from Narcissa Martin, the widow of Jesse Martin, to H. P. Vaughan, recites that for the consideration named, she sold the lands allotted to her as dower (describing the lands in controversy), and at the conclusion of the deed is this recital: "I am only selling

whatever claim or interest I have therein, said lands having been previously sold for taxes."

In *Killeam* v. *Carter*, 65 Ark. 70, we said: "The law wisely grants to the widow the privilege of occupying the homestead as long as she desires. But it is a privilege purely personal to her, which she can neither convey to nor share with another. She may enjoy the rents and profits only so long as she intends it as a home. Strictly speaking, she has no estate in the land itself, but only the privilege of occupancy. Alienation by her confers no rights, but it means abandonment, and the termination of her right of homestead. Not so with an estate for life. That terminates only upon the death of the life tenant."

(1) The deed of Narcissa Martin to H. P. Vaughan constituted an abandonment of her homestead, and at the same time it conveyed to Vaughan the only estate which she held in the lands, towit, her dower interest, which vested in Martin an estate in the lands during her life.

Appellant contends that Vaughan and those claiming under him had adverse possession of the lands from October 4, 1877, the date of the deed of Narcissa Martin, to H. P. Vaughan.

Jesse Martin died in 1872, and appellee A. B. Martin was born in 1870. He became of age the 15th of July, 1891, and he could have instituted suit three years thereafter, towit, on the 15th day of July, 1894.

Appellee Artimissa McDaniel was born July 2, 1872, and became of age July 2, 1890, and could have instituted suit for these lands July 2, 1893. Although she married in 1900, her coverture is not alleged to defeat the claim of adverse possession.

Appellee Elizabeth Lanford was an adult at the time of her father's death, and her coverture also is not alleged to defeat the claim of adverse possession.

Appellant therefore contends that all the appellees, after they were entitled to sue, had to take notice of the abandonment of the lands by Narcissa Martin in 1877, and of the adverse possession thereof since

that time by appellant and those under whom he claims title; that more than seven years' adverse possession by the appellant, and those under whom he claims title, had intervened since the time when appellees were entitled to sue and November, 1906, the date when they filed their petition to have the title confirmed in them.

(2) This contention is unsound. The allotment of dower to Mrs. Narcissa Martin of the lands in controversy vested in her a freehold in those lands for life. Through successive conveyances this estate was vested in appellant, and he continued to hold the same until the estate terminated with the death of Mrs. Martin on January 4, 1906. "The widow to whom land is assigned as dower becomes a life tenant," and the estate thus created ceases only at the death of such tenant. 14 Cyc. 1013. See also *Nashville Lumber Co.* v. *Barefield*, 93 Ark. 353; *Tate* v. *Jay*, 31 Ark. 576; *Killeam* v. *Carter*, *supra.*

(3) The possession of Mrs. Narcissa Martin and those claiming under her through successive deeds to and including appellant was not adverse to the appellees, for the possession of a life tenant or his successors in title does not become adverse to the reversioner until after the death of the life tenant. *LeSieur* v. *Spikes*, 117 Ark. 366; *Rogers* v. *Ogburn*, 116 Ark. 233, and cases cited; *Martin* v. *Conner*, 115 Ark. 359. Appellant had been in possession of the land after the death of Narcissa Martin about eleven months when appellees contested his petition for confirmation, and sought by cross action to have title confirmed and quieted in themselves. It follows that appellant acquired no title by adverse possession.

(4) At the time of the sale of the land in suit by the administrator of Jesse Martin to pay the debts of his estate, these lands constituted the homestead of his minor children and the sale was therefore void. *Tipton, Admr., Ex parte*, 123 Ark. 389; *Martin* v. *Conner*, *supra.*

(5) The homestead right of the minors was not affected by the widow's abandonment of the homestead. *Smith* v. *Scott*, 92 Ark. 143; *Martin* v. *Conner*, *supra*. Vaughan therefore acquired no title to the lands in suit by his purchase at the probate sale, and appellant obtained no title from that source.

There is no testimony in the record to warrant a finding that appellees were estopped from maintaining this suit. What we have already said shows that they are not barred by laches. Appellant was entitled to the possession of the lands until Narcissa Martin died. The appellees, reversioners in title, could not have maintained a suit for possession thereof until after the death of the life tenant. 1 Cyc. pp. 1057-58; *Ogden* v. *Odgen*, 60 Ark. 70; *Martin* v. *Conner*, *supra*; and other cases cited in brief for appellees. Appellees challenged appellant's efforts to destroy their title as soon as he began them, and affirmatively set up their own title in opposition to his claim in less than a year after the date when they could first do so.

The decree is correct and is affirmed.

AMERICAN NATIONAL BANK OF FORT SMITH v. DOUGLAS.

Opinion delivered October 30, 1916.

GARNISHMENT—DISMISSAL OF—NOTICE OF APPEAL—RELATION BETWEEN GARNISHEE AND DEFENDANT.—Appellee had a deposit in appellant bank, subject to check. One C brought an action against appellee, and garnished the funds held by appellant. Thereafter the court made an order dismissing the action and releasing the garnishee. *Held*, it was appellant's duty thereafter, upon demand of appellee, to pay over the amount of appellee's deposit, and that it had no right to refuse to do so, because it had been notified by C that it intended appealing from the judgment of the court, such appeal not having been actually taken nor a supersedeas bond filed.

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

STATEMENT BY THE COURT.

The United Mine Workers of America, District 21, is a voluntary unincorporated association, composed of many members. The appellees were members of that organization and appellee Douglas was its secretary and treasurer. We will hereafter, for convenience, designate the organization as the district.

On September 1, 1914, the district had on deposit with the American National Bank, of Fort Smith, Arkansas, which, for convenience, we will hereafter designate "Bank," the sum of $8,557.37. These funds were a general deposit and subject to the check of the district through Douglas, its treasurer.

In September, 1914, the Coronado Coal Company sued the district in the United States District Court for damages alleged to be due it on account of certain torts allleged to have been committed by the members of the district. Writs of garnishment and attachment were issued out of the district court and served on the bank on September 2, 1914. On October 20, 1915, the district court sustained a demurrer to the complaint of the coal company and entered a judgment dismissing same.

On October 25, 1915, the United States court entered a judgment dismissing the attachment and the garnishment against the bank and discharging the bank.

On October 27, 1915, the district drew its check on the bank and presented same for the full amount of its deposit, which the bank declined to pay, and the check was protested for nonpayment. On the same day the district instituted suit in the Sebastian Circuit Court for the money. The bank answered, admitting that it had on general deposit the amount of funds claimed by the district, but alleged that said check had not been paid for the reason that the writ of garnishment had been issued by the United States court in a suit pending in that court between the coal company and the district, whereby the bank was ordered

to hold the funds subject to the orders and directions of the United States court, and that the bank had been informed that the Federal court had dismissed the action wherein the writ of garnishment was issued, but that before demand was made upon the bank for the payment of the check, the coal company notified the bank that it had prayed an appeal from the judgment of the Federal Court dismissing the garnishment, and that the appeal would be perfected within the time allowed by law, and that a supersedeas bond would be given in the Federal Court, and that the coal company would hold the bank liable if it paid out the funds in its hands belonging to the district.

The president of the bank testified that the bank had declined to cash the check for the reason that a day or two before it was presented, he had been notified by the attorneys for the coal company in the Federal court that an appeal would be taken immediately in that cause from the judgment of that court, and that a supersedeas bond would be given. The bank was notified that in the event the money was paid out before their appeal could be perfected and before the appellate court could pass upon the judgment dismissing the action of the coal company, that the bank would be held liable by the coal company for the fund. He had not only been notified orally, but the bank had been served with written notice. That on the 28th of October, 1915, the attorneys for the coal company had served the bank with written notice that they were preparing to take an appeal or writ of error from the judgment rendered by the United States District Court, and to supersede the judgment, which appeal, in their opinion, would have the effect to hold the funds in the hands of the bank pending such appeal. He stated that the bank was perfectly willing to pay over the funds to the district, but that its attorney had advised that it would not be safe to do so, and that the bank only wished to protect itself and had no other interest in the funds; that it feared that it might have to pay the same twice.

One of the attorneys for the coal company testified that as soon as he learned that demand had been made on the bank by the district for the payment of the funds which had been garnisheed, he notified the bank that the plaintiffs in the Federal Court case had appealed from the judgment of that court dismissing the suit therein, and that he later handed to the attorney for the bank a letter to that effect; that he had been instructed by his clients, the plaintiffs in the Federal court case, to perfect the appeal immediately therein, and that he had notified the bank that the appeal would be perfected at the earliest possible moment and supersedeas bond given for the purpose of tying up and holding the funds garnisheed and attached in the hands of the bank.

A certified copy of the judgment of the Federal court was introduced in evidence, showing that that court, on October 25, 1915, entered a judgment dismissing the writs of garnishment and attachment and discharging the bank from said writs.

The record also shows that "Plaintiffs at the time requested the court to allow a reasonable time in which to present to the appellate court the question of tendering a supersedeas bond so as to hold the attachments and garnishments herein in their present status. This request the court denied, and the plaintiffs at the time excepted to the ruling of the court in discharging the attachments and garnishments, and also in the refusal of the court to allow the above named."

Upon the above facts the court rendered a judgment in favor of the plaintiffs below (appellees here) for the full amount of their claim, and from that judgment this appeal comes.

Hill, Fitzhugh & Brizzolara, for appellants.

Upon the dismissal of the complaint and the dissoiution of the attachment, the plaintiff in that proceedlng gave the bank notice that an appeal would be perfected and supersedeas bond given, which was done, within the statutory period, and this action suspended

the dissolution of the attachment. 39 Am. Dec. 609; Drake on Attachments (7 ed.), section 428; 118 Ark. 497; 107 *Id.* 142; 42 N. W. 298.

The plaintiff's suit was prematurely brought.

Covington & Grant, for appellee.

The appeal of the coal company was from an order dismissing its complaint and not from the order dismissing the attachment, which was a separate judgment and hence the bank was not protected in its refusal to pay appellee's demand. K. D. 412-419. It is too late not to appeal from the order dissolving the attachment.

WOOD, J., (after stating the facts). In *Lewis* v. *Faul*, 29 Ark. 407 this court, speaking of the remedy by attachment and garnishment, said: "It is at best an extraordinary and harsh remedy, in derogation of the common law, depending upon positive legislation for its existence, and he who invokes it must follow the law at least in substance."

And in *Giles* v. *Hicks*, 45 Ark. 271, 276, we said: "Garnishment is a purely statutory proceeding which can not be pushed beyond the authority of the statute."

Our attention has not been directed to any statute, and we know of none, that authorizes the garnishee to hold funds in his hands belonging to the defendant in the action after judgment had been rendered dismissing the cause of action against the defendant and discharging the writ of garnishment. The effect of a judgment dismissing the cause of action against the defendant and discharging the writ of garnishment was to place the garnishee bank and the defendant district in the same relation that they sustained to each other before the writ of garnishment was served upon the bank. The bank, according to the undisputed proof, before the writ of garnishment was served, held the funds of the district as a general deposit, subject to the check of the district. Inasmuch, therefore, as it appears that no appeal had actually been taken from the judgment of the district court dismissing the writ

of garnishment at the time the check of the district was presented to the bank for payment, the bank had no right to refuse such payment.

Of course, if an appeal had been actually taken from the judgment dismissing the writ of garnishment, or if a supersedeas bond had been given, then the bank would have been justified in refusing to cash the check, under the doctrine announced by this court in *Harrison* v. *Trader*, 29 Ark. 85. In that case, speaking of a lien by attachment, this court, quoting from Mr. Drake, on Attachments, said: "The dissolution of an attachment necessarily discharges from its lien the effects or credits on which it may have been executed, whether reduced to possession by the officer, or subjected in the hands of garnishees. When dissolved, the defendant is entitled to a return of the property on demand, unless the judgment of dissolution be suspended by writ of error or appeal. This, it is said, takes away the defendant's right to demand the property, and the officer, if he have notice of the writ of error or appeal, would not be justified in returning the property."

And, further: "Our statute extends only to supersedeas of executions, all other features of the court's action are suspended by an appeal or writ of error; and if the cause is reversed, the rights of parties stand as though no action had ever taken place in the inferior court."

But the facts disclosed by this record are that at the time the district made demand on the bank for the payment of its check, there was no appeal actually pending from the judgment dismissing the writ of garnishment; neither had there been any supersedeas bond filed, or any order of the district court suspending or superseding the effect of the judgment dismissing the writs of attachment and garnishment. On the contrary, the record here shows that the district court in which the judgment was rendered expressly refused to grant the plaintiffs in the action time in which to present a supersedeas bond. True, the testimony showed that at the time the district presented its check to the

bank, the latter had been notified that an appeal would be taken immediately from the judgment dismissing the writ of garnishment, and that same would be perfected and a supersedeas bond given for the purpose of holding the funds in *statu quo*. But this testimony only shows that an appeal had not in fact been taken, but was only contemplated, and that no supersedeas bond had been filed, and that, in fact, no order of the district court had been made suspending or superseding the judgment dismissing the writs of attachment and garnishment.

It thus appears that at the time the district presented its check to the bank for payment, the bank occupied precisely the same relation to the district as it did before the writs were served.

In the absence of a statute prescribing that where a judgment had been entered dismissing a writ of garnishment and discharging the garnishee that the garnishee may retain possession of the property of the defendant during the time allowed for an appeal, or until a reasonable time within that period has elapsed for the perfecting of the appeal or filing a supersedeas bond, the garnishee would have no authority under the law, and therefore no right, to deprive the defendant of the possession of his property.

In *Sherrod, Clerk*, v. *Davis, Sheriff*, 17 Ala. 312, it is said: "But after the judgment of the court is final and complete in favor of the defendant, unless it is superseded by writ of error or appeal, the right of the defendant to have the property restored to him is unquestionable, and it is therefore the duty of the sheriff on demand to deliver it to him." See, also, 6 C. J., section 1091, note 83, and other cases there cited.

The necessary consequence of the judgment in favor of the district dismissing the cause of action against it and discharging the bank from the writs of attachment and garnishment was to restore to the district the right to check out the funds deposited by it with the bank, and it follows from what we have said that simple notice to the bank that an appeal would

be immediately prosecuted and supersedeas bond filed would not justify the bank in refusing to pay over the money to the district. The judgment of the circuit court so holding is therefore correct, and it is affirmed.

DODD v. AXLE-NUT SIGN COMPANY.

Opinion delivered October 30, 1916.

1. BILLS AND NOTES—FAILURE OF CONSIDERATION—EFFECT OF RENEWAL.—One who gives a note in renewal of another note with the knowledge at the time of the partial failure of the consideration for the original note, is estopped from setting up the defense of failure of consideration, in an action on the renewal note.
2. CONFLICT OF LAWS—VALIDITY OF CONTRACT.—A contract, executed in another State, and valid under that law, will be enforced and adjudicated in the courts of this State, just as it would be adjudicated in the courts of the State where it was made.
3. BILLS AND NOTES—EFFECT OF EXECUTION OF A RENEWAL NOTE.—The time when a debt, represented by a note, is created, is not when a renewal note is executed, but when the original debt was made and the original note given.
4. BILLS AND NOTES—RENEWAL NOTE.—The mere renewal of a note does not, as between the original parties, affect the essential nature of the transaction represented by it; and as between the maker and payee, any defense that would be good against the original note, would be equally good against a note taken in renewal without additional consideration.
5. BILLS AND NOTES—RENEWAL.—A renewal note is valid, if the original debt and note are valid.

Appeal from Marion Chancery Court; *T. H. Humphreys*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellee, which is a corporation organized and doing business under the laws of the State of Kentucky, instituted this action in the chancery court against appellant to recover an amount alleged to be due on a promissory note and to foreclose a mortgage on real estate situated in Marion County, Arkansas, given to secure it. Appellant defended the action on the ground of a failure of the consideration, and also on the ground

that the note sued on was given for patent right territory and was not executed in conformity with the provisions of section 513 of Kirby's Digest, and is therefore void. The material facts are as follows:

Appellee is a corporation organized and doing business in the State of Kentucky, and was the owner of a patented advertising device known as the Axle-Nut Sign. J. H. Ditto was the selling agent of the corporation for said device. On the 22d day of July, 1911, Ditto and the appellant, Dodd, met in the city of St. Louis, in the State of Missouri, and there entered into a written contract whereby the former sold to the latter a one-third interest in the advertising device above referred to, for the State of Kansas, and about one-half of the State of Missouri, for the sum of $2,000, and also agreed to lend appellant the sum of $500. It was also agreed that Ditto should organize a corporation for the purpose of selling the patented device in said territory and that the appellant should have one-third of the capital stock of the corporation to be organized. Appellant executed to Ditto his note for $2,500 and gave him a mortgage on a tract of land owned by him in Marion County, Arkansas, to secure it. Appellant was at the time a resident and citizen of the State of Arkansas, but the contract was entered into and the note and mortgage executed in the city of St. Louis. Ditto assigned and transferred the note and mortgage to appellee. Appellant was unable to pay the note when it became due and asked and obtained an extension of time on his indebtedness. He executed a new note and mortgage in place of the old one, and the old note and mortgage were surrendered to him. The new note and mortgage were executed at Dodd City, Arkansas, on January 22, 1912. The note was payable six months after date. As above stated, the present action was instituted to foreclose the mortgage and to recover judgment on the note which was due and unpaid.

The chancellor found in favor of appellee and from a decree entered in its favor appellant prosecutes this appeal.

S. W. Woods, for appellant.

The note being given for patent right territory, by a citizen of Arkansas, is void under section 513-514, Kirby's Digest. Neither the contract nor the account was assigned to appellee, hence it could not sue on same. Kirby's Digest, § 6000. The payee of the note was not a party to the suit. The note being void as to $2,000 of the amount, the deed of trust given to secure it is also void.

Had Ditto's contract been valid, the suit should have been brought in the law court on an action for debt. 70 Ark. 200; 97 *Id.* 19. In any event Ditto should have been made a party.

The note being void, the only action that could be maintained would be one on an oral contract. 97 Ark. 19; 106 *Id.* 102; 102 *Id.* 568.

The note in suit was only a renewal of the first note, which was void, and therefore no liability existed on the note sued on.

Appellant offers to confess judgment for $200, the amount which he received as a loan.

Williams & Seawel, for appellee.

1. The note in suit was not executed in payment of a patent right nor patent right territory, but was to cover purchase price of stock in corporations, together with a loan of $500, and appellant secured all the benefits from its execution. 65 Ark. 204; 89 *Id.* 239.

2. The note was not an Arkansas, but a Missouri contract, and is governed by the laws of that State. 66 Ark. 77; 47 *Id.* 54; 60 *Id.* 269; 44 *Id.* 230; Const. U. S., Fourteenth Amendment, section 1.

3. It is immaterial whether the note is valid or void. It was only an evidence of the indebtedness which did not destroy the debt. 70 Ark. 200; 97 *Id.* 19; 102 Ark. 568. The indebtedness still existed and the deed of trust was security therefor. 46 Ark. 70; 96 *Id.* 604.

4. Transfer of the case to the law court was not asked and the chancery court had jurisdiction. 102 Ark. 326; 60 Ark. 510.

5. Ditto was not asked to be made a party to the suit, and that issue was waived. 95 Ark. 32-38. The contract and note were properly assigned and appellee was the proper party to bring this suit. 43 Ark. 275; 26 *Id.* 152; 31 *Id.* 140; 5 C. J. 948, section 124.

6. Appellant is estopped to assert the invalidity of the note because he waived any defense he might have had to the original note by executing the renewal. 118 Ark. 465; 111 *Id.* 358; 62 *Id.* 362.

HART, J., (after stating the facts). It is first insisted by counsel for appellant that there was a failure of consideration, and for that reason appellee is not entitled to recover on the note, and to have a foreclosure of the mortgage given to secure it. He bases his contention on the fact that Ditto agreed to lend him $500, and only let him have $200, and that he also agreed to organize a corporation for the purpose of selling the patented device in the territory described in the contract and that he failed to do so. The record shows that appellant knew that his note had been transferred to appellee, and that he sought and obtained a renewal of his note with the knowledge that there had not been a compliance with the contract in the matters that he now complains of. Even if it be considered that these matters amounted to a total failure of consideration, appellant is not entitled to defeat a recovery on this ground. In *Stewart* v. *Simon*, 111 Ark. 358, and *Haglin* v. *Friedman*, 118 Ark. 465, the court held that one who gives a note in renewal of another note with the knowledge at the time of the partial failure of the consideration for the original note is estopped from setting up the defense of failure of consideration, in an action on the renewal note. Again, it is contended that the renewal note sued on is void because section 513 of Kirby's Digest was not complied with in its execution. The section reads as follows:

"Any vendor of any patented machine, implement, substance or instrument of any kind or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this State on a credit, and takes any character of negotiable instrument in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was issued in consideration of a patented machine, implement, substance or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void." The note in question was not executed on a printed form, and did not show on its face that it was issued in consideration of a patented machine as required by the statute. This statute was intended for the protection of the citizens of the State, and makes void all notes given for patent rights or territory which are executed in this State, and do not comply with the statute. This court has upheld the statute as a valid exercise of the police power. *Woods* v. *Carl*, 75 Ark. 328. We do not think, however, the section has any application to the facts of the instant case. The original contract was executed at St. Louis in the State of Missouri. It was a Missouri contract. No attempt is made to show that the original note and contract was not valid under the laws of the State of Missouri. Consequently, the contract was valid under the laws of that State, and it will be enforced and adjudicated by the courts of this State precisely as it would be adjudicated in the courts of the State of Missouri. *Parsons Oil Co.* v. *Boyett*, 44 Ark. 230; *Grider* v. *Driver*, 46 Ark. 50; *Sawyer* v. *Dickson*, 66 Ark. 77. But it is contended that the execution of the renewal note brings the case within the prohibition of section 513 of Kirby's Digest. We do not agree with counsel

in this contention. The execution of the renewal note did not constitute a new indebtedness. The time when the debt was contracted was not when the renewal note was executed, but when the original debt was made and the original note given. When a note or debt is renewed by the execution of a new note therefor, it is but an extension of the time of payment of such prior note or debt. *Griffin* v. *Long*, 96 Ark. 268. The mere renewal of a note does not, as between the original parties, affect the essential nature of the transaction represented by it. For that reason the principle is well established that, as between the maker and the payee, any defense that would be good against the original note would be equally good against a note taken in renewal without additional consideration. *King* v. *Doane*, 139 U. S. 166. By analogy, the renewal note would be valid, if the original debt and note were valid. There was no new consideration for the note sued on, it was merely a renewal and extension of time for the debt evidenced by the original note. It was not the making of a new contract for the sale of patent right territory, and does not fall within the prohibition of section 513 of Kirby's Digest.

It follows that the decree must be affirmed.

PLANTERS FERTILIZER & CHEMICAL COMPANY *v.* COLUMBIA COTTON OIL COMPANY.

Opinion delivered October 30, 1916.

1. CONTRACTS—PRINTED AND WRITTEN PROVISIONS—CONSTRUCTION.—Where a contract is partly written and partly printed, and these provisions conflict, the written provisions will control.
2. COMMERCIAL TERMS—"F. O. B. AT SELLER'S FACTORY."—A provision in a contract of sale containing the words "f. o. b. at seller's factory, New Orleans, La.," the goods being sold to a purchaser in Arkansas, *held* to mean that the goods were to be placed on cars for shipment at the seller's warehouse in New Orleans without any expense or act on the part of the buyer, and that as soon as so placed that the title was to pass absolutely to the buyer, and it is to pay the freight.

3. CONTRACTS—PRINTED AND WRITTEN PROVISIONS—CONSTRUCTION.—A contract of sale provided in a printed portion that the seller should pay the freight, and in a written portion that the buyer should pay the same. *Held,* the written provision would control, and there being no ambiguity in the contract, its construction was for the court.

Appeal from Columbia Circuit Court; *C. W. Smith,* Judge; reversed.

Stevens & Stevens, for appellant.

In construing a contract executed on a printed form, if there are printed and written words in the contract differing in meaning, the written words will control. Bishop on Contracts, § 413; Lawson on Contracts, § 389; 9 Cyc., § 584; 11 Cent. Dig., tit. Contracts, 745; 112 S. W. 332.

"Where there are two clauses of a contract in any respect conflicting, 'that which is specially directed to a particular matter controls in respect thereto.' " 72 Ark. 633. See, also, 107 S. W. 282, 283. The erasure appearing in the contract sued on is explained by the witness Turner as not having been made on the copy introduced in evidence because of the short carbon, and clearly establishes the contract sued on as the original, which is the best evidence. 79 Ark. 475. Before this copy could be in evidence, it should have been shown to be in fact a copy. 17 Cyc. 517-18. The failure of the defendant to produce any evidence to show a change in the contract after it was signed, left no facts to be settled by the jury, and the court should have directed a verdict. 69 Ark. 562, 568; 104 Ark. 267; 89 Ark. 239.

Rose, Hemingway, Cantrell, Loughborough & Miles, for appellant.

It is for the court to construe a written contract. 101 Ark. 469; 105 Ark. 213; 89 Ark. 239; 78 Ark. 574-577. By the terms of the contract, as the blanks were filled in writing, the parties agreed on a price of $8.25 per ton, f. o. b. cars at seller's factory, New Orleans. By this agreement the defendant was bound for the freight

charges, becoming the owner of the goods when delivered at the place stipulated. Where there are two repugnant provisions in a contract, the first will control. 120 Ark. 121. Where a contract is made up on a printed form, and blanks are filled out in writing, in construing the contract, the written part controls. 38 N. E. 907; 4 So. 197-199; 83 N. Y. 518-523; 60 N. W. 844, 845; 108 Pac. 952.

C. W. McKay, for appellee.

It appears from the contract or order that it was made subject to approval of appellant at New Orleans, and the evidence shows that it was given to its agent at Magnolia, and forwarded to New Orleans for appellant's signature and approval. It was a mere proposal to buy, and, until accepted by the seller, not binding. The acceptance must be identical with the terms of the order to render it binding. 74 Ark. 16; 76 Ark. 371; 86 Ark. 27; 13 Cyc. 52, 53; 96 Ark. 606; 98 Ark. 81; 110 Ark. 123.

If it be conceded that the clause stipulating that the second party should pay the freight, the amount thereof to be deducted from the purchase price in settlement, was erased from the original, etc., still, the copy returned to appellee containing that clause is the contract that is binding upon the parties. If an acceptance on the part of the seller is necessary to bind the buyer, then the contract as accepted in this instance is the one returned to the buyer.

There is no contradiction between the clauses in dispute as to the payment of freight. F. o. b. cars at seller's factory, New Orleans, means free on board cars at that point and nothing else. It would mean also that that was the point of delivery, the buyer to pay the freight thence to destination, if it were not for this further clause which requires him to pay the freight, but, having done so, it authorizes him to deduct it from the stipulated price in settlement therefor.

Appellant placed the two clauses in the contract itself. A contract will be construed most strongly

against the party who drafted it. 73 Ark. 338; 74 Ark. 41; 84 Ark. 431; 90 Ark. 88; 87 Ark. 522; 105 Ark. 518; 112 Ark. 1; 171 S. W. 136.

HART, J. The Planters Fertilizer & Chemical Company sued the Columbia Cotton Oil Company *et al.* to recover $2,813.36, which it alleges was the balance due it for 1,250 tons of acid phosphate sold by defendant to the oil company. The material facts are as follows:

The Planters Fertilizer & Chemical Company is a corporation organized in the State of Louisiana. It is located at New Orleans and is engaged in the business of selling fertilizers. The Columbia Cotton Oil Company is a corporation organized under the laws of the State of Arkansas, engaged in business in Magnolia, Arkansas. On the 30th day of July, 1914, the two corporations entered into a written contract, whereby the former agreed to sell the latter 1,250 tons of acid phosphate. The contract was drawn up on a printed form of the selling company which was represented by its vice president and manager, W. E. Turner. The purchaser was represented by J. W. Bird, its manager. That part of the contract which is necessary for a determination of the issues raised by the appeal is as follows:

"Witnesseth: That the party of the first part hereby sells to the party of the second part and the second party hereby purchases from the said first party the amount of fertilizer named below at the prices set opposite the respective brands per ton, in car lots, f. o. b. cars at seller's factory, New Orleans, La.

"Quantity—1,250 tons acid phosphate. Brand—16% avail. Price—$8.25 per ton. Size of bags,.... pounds.

"Second party agrees to pay freight, amount of such freight to be deducted from above prices in settlement. Shipments to be made in car lots."

The words, "Seller's Factory, New Orleans, La., 1,250 tons acid phosphate, 16% avail. $8.25," were

written in the contract with an indelible pencil. The contract was executed in triplicate. The copy retained by the selling corporation had a pencil mark through all that part of the contract quoted above which begins with, "Second party agrees to pay freight," etc. The copy of the contract sent to the purchaser did not have the pencil mark run through this part of the contract, which was in printing in all the copies.

W. E. Turner testified substantially as follows: I am vice president and manager of the plaintiff corporation and made the contract with the defendant corporation. The contract was executed at Magnolia, Arkansas, July 30, 1914, by J. W. Bird, for the Cotton Oil Company, and by myself for my own company. I filled out the contract with an indelible pencil, and then handed the pencil to Mr. Bird for him to sign the contract for his corporation. I noticed that the printed part, "Second party agrees to pay freight, amount of such freight to be deducted from above prices in settlement. Shipments to be made in car lots," had not been marked out of the contract, and I picked up an ordinary lead pencil and marked it out. The reason I did not mark it out with the indelible pencil was because I had handed it to Mr. Bird to sign the contract. The contract was signed in triplicate. I had to slip the carbon down for Mr. Bird to sign the contract, and in doing so, it went down below the words marked out in the copy held by my company, and because the carbon had been pulled down below the clause which was marked out by me on what we called the original contract, is the reason why the clause is not marked out on the other two copies of the contract. It was our intention that the clause in question should be marked out of all the copies." The question involved in the appeal is whether or not the purchaser or seller is bound for the freight under the terms of the contract. If the purchaser is bound for the freight, it owes the seller a balance of $2,645.31. If the seller is bound to pay the freight, there is nothing due it. There was a verdict

and judgment for the defendant, and the plaintiff has appealed.

(1-2) It is a well recognized rule of construction that where a contract is written in part and printed in part, as where it has been filled in upon a printed form, the parties usually pay much more attention to the written parts than to the printed parts. Accordingly, if the written provisions can not be reconciled with the printed, the written provisions control. It has been said that this rule is but the teaching of human experience crystallized into law. The reason given is that the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and thus more safely and clearly indicate the intention of the contracting parties. On the other hand the printed words are a general formula adapted equally to their case, and that of all other contracting parties upon similar occasions and subjects. *American Express Co.* v. *Pinckney*, 29 Ill. 392; *Atlantic Terra Cotta Co.* v. *Goetzler*, 150 Wis. 19, A. & E. Annotated Cases 1913, E. p. 958 and case notes. Numerous cases from the courts of last resort of the various States and from the Supreme Court of the United States are cited in support of the rule. The rule has also been recognized by this court in the case of *Leader Co.* v. *The Little Rock Ry. & Elec. Co.*, 120 Ark. 221. In the application of this rule, it is readily apparent from reading the contract quoted above that the written words are inconsistent with the printed words and in application of the rule governing such cases, the printed words in the contract must yield to the written words. The printed words provide, in effect, that the purchaser shall pay the freight and deduct the same from the price of the fertilizer. The written language of the contract provides that the fertilizer shall be paid for at the prices set opposite the respective brands f. o. b. at "Seller's factory, New Orleans, La." The words, "At the prices set opposite the respective brands f. o. b. cars at seller's factory, New Orleans, La.," mean that the seller was to load the fertilizer on the

cars at its warehouse in New Orleans, La., and that the purchaser was to pay the freight from there to the place of destination.

The words f. o. b. literally mean, free on board, and with the added words, "at seller's factory, New Orleans, La.," etc., mean that the fertilizer was to be placed on cars for shipment at the seller's warehouse in New Orleans without any expense or act on the part of the buyer, and that as soon as so placed, the title is to pass absolutely to the buyer, and it is to pay the freight. *Phoenix Packing Co.* v. *Humphrey-Ball Co.*, 108 Pac. (Wash.) 952; *Vogt* v. *Schienbeck*, 122 Wis. 491, 2 A. & E. Ann. Cas. 814; *Hurst* v. *Altamount Mfg. Co.*, 73 Kan. 422, 9 A. & E. Ann. Cas. 549; *R. J. Menz Lbr. Co.* v. *E. J. McNeeley & Co.*, 108 Pac. (Wash.) 621, 28 L. R. A. (N. S.) 1007.

(3) If it be considered that the printed portion of the contract providing in substance that the seller should pay the freight is still in the contract, it is, as we have already seen, in conflict with the written part of the contract which means that the buyer shall pay the freight. Hence there was no ambiguity in the contract, and its construction was for the court, and not for the jury. *Starnes* v. *Boyd*, 101 Ark. 469; *Clouston* v. *Maingault*, 105 Ark. 213; *Mann* v. *Urquhart*, 89 Ark. 239; *Thomas* v. *Johnson*, 78 Ark. 574-577.

Judgment reversed and the cause remanded for a new trial.

TUGGLE *v.* HOLMAN REAL ESTATE COMPANY.

Opinion delivered October 30, 1916.

1. PLEADING AND PRACTICE—TIME FOR FILING ANSWER IN CIVIL ACTION.—Under Kirby's Digest, § 6188, as amended by Act 290, p. 1081, Acts of 1915, the answer or defense to any complaint or cross complaint must be filed before noon of the first day the court meets in regular or adjourned session where the summons has been served twenty days in any county in the State; and judgment by default may be rendered on any day of any regular or adjourned session when the defense has not been filed on or before noon of the first day of

court twenty days after the service of summons. (For good cause, however, the trial court has a discretion to allow further time.)

2. CONTRACTS—ACTION FOR BREACH—SUFFICIENCY OF COMPLAINT.—A agreed to purchase property from B and paid him a certain sum as part of the consideration. Thereafter B agreed to return this sum in consideration of A's giving B a quitclaim deed to the property; this A did. *Held,* where A set these facts out in a complaint praying judgment against B for the amount he agreed to pay to A in consideration of the quitclaim deed, that a demurrer thereto was improperly sustained on the ground that the complaint did not state a cause of action.

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

Troy W. Lewis for appellant.

W. T. Tucker of counsel.

1. Pleadings must be filed within twenty days after service by summons. Kirby's Digest, § 6037, Act 290, Acts 1915; Kirby's Digest, §§ 6038, 6111. Appellee was in default and judgment by default should have been rendered against it. 79 Ark. 252; 28 *Id.* 204; 102 Ark. 205; 97 *Id.* 38.

2. The Act does not attempt to deprive the trial judge of his discretion when a good cause is shown. Kirby's Digest, §§ 6111, 6188. But it does fix a limit on such discretion. Here there was an abuse of the court's discretion.

3. No pleading was filed within the time limit and no good cause shown for failure. The demurrer should have been overruled. The complaint stated a cause of action and the court had jurisdiction. 27 Oh. St. 366; 26 Cal. 11. A consideration was shown. 2 Kent Com. 465; Newman on Pl. & Pr. 327; 24 Ark. 201; 21 *Id.* 20; 1 *Id.* 228. There was a legal, binding obligation to pay the $323.30.

Carmichael, Brooks, Powers & Rector for appellee.

1. The demurrer was filed in time and was a defense to the suit. The Act gives the court discretion to grant further time. Kirby's Digest, §§ 6111, 6118

and Act 290, Acts 1915; 79 Ark. 252, 254; 42 *Id.* 269; 4 *Id.* 526; 125 Fed. 269, 270.

2. The provisions of the Act are not mandatory on the Courts. 49 Ark. 163; 79 Ark. 252.

3. The complaint does not state a cause of action, nor that the amount claimed is more than $100.00. The letter was no part of the pleadings. 85 Ark. 223; 38 *Id.* 127; 97 *Id.* 546.

SMITH, J. Appellant, who was the plaintiff below, filed the following complaint:

"Comes the plaintiff, E. E. Tuggle, and for his cause of action against the defendants, Holman Real Estate Company, complains and alleges:

"That the defendant is a corporation existing under and by virtue of the laws of Arkansas relating to corporations and is doing a general real estate business in Pulaski County, Arkansas.

"That the plaintiff bought from or through the defendant the house and lot described as follows: Lot four (4), block eleven (11), Braddock's Addition to the City of Little Rock, Arkansas, and received a bond for the title or contract of purchase. That so much of the purchase money paid was to be rent and the remainder of it to be equity of the plaintiff.

"That plaintiff made payments on said place until his equity, according to the said agreement, amounted to $323.20 as shown by the defendant's books and by the officers and agents of the defendant, acknowledging the equity of the plaintiff for said amount.

"That on the 18th day of January, 1915, the plaintiff accepted from the defendant a proposition to make it a quitclaim deed to the said property. The proposition was set out in a letter by the defendant and partly expressed the agreement that was finally reached before the making of the quitclaim deed. Said letter is hereto attached and made a part of this complaint the same as if here recited in full. The defendant was to pay $323.20 to the plaintiff and give him the right to sell the property for more if he could do so in sixty days,

and it was to make effort to sell it for him in said sixty days, less commission and paying for transfer papers, and if it failed to sell for him within the said sixty days then its moral obligation was satisfied. That the consideration promised for said quitclaim deed has not been paid though often demanded.

"Wherefore, the plaintiff prays judgment for the said sum of $323.20 and for all just and proper relief."

And attached thereto was the following exhibit:

"Little Rock, 1-18-1915.

"Mr. E. E. Tuggle, City.

"Dear Sir:

"In regard to the amount which you are due us on the cottage at 3813 West 16th St., will say that when you and your wife have executed the quitclaim deed to the property we will then hold it in the following manner: If you are personally successful in disposing of this property within 60 days (sixty) to a buyer capable of carrying out your contract then all above the amount you are due us will go to you.

"It is also agreed that we are to use our efforts to dispose of this property and if within 60 days (sixty) we are successful in so doing then all above the expense (such as 5% commission, transfer of papers, etc.) and amount of your debt will go to you.

"At the end of 60 days from date if neither have made sale then this moral obligation will have been satisfied in full.

"Yours truly,
"HOLMAN REAL ESTATE CO.
"By *W. E. L., Secy.*"

Upon this complaint summons issued and was served on August 17, 1915.

On September 11, 1915, appellee filed a demurrer and for cause said:

"First. That the complaint does not state facts sufficient to constitute a cause of action.

"Second. That the court has no jurisdiction to hear and determine said cause."

On September 27, 1915, appellant filed a motion for a default judgment in which he alleged that more than twenty days had elapsed between the date of the service of summons and the filing of the demurrer. This motion also alleged that it "is filed on the first day of the term the first day the court has been in session since said default for general business."

A motion was also filed by appellant to strike the demurrer from the files of the court on the ground that it was not filed within twenty days of the date of the service of the summons.

Both motions filed by appellant were overruled, and the demurrer to the complaint was sustained, and upon appellant declining to plead further the complaint was dismissed, and this appeal has been duly prosecuted from that order.

Appellant insists that appellee was in default in pleading to his complaint and that judgment should have been rendered in his favor under the provisions of Act No. 290 of the Acts of 1915, p. 1081. This is an Act entitled "An Act to regulate pleading and practice in the circuit and chancery courts of the State of Arkansas."

Section 6 of this Act amends Section 6111 of Kirby's Digest to read as follows:

"Section 6111. The defense to any complaint or cross-complaint must be filed before noon of the first day the court meets in regular or adjourned session after service: First. Where the summons has been served twenty days in any county in the State: Second * * * ; Third * * *".

Section 6188 of Kirby's Digest is amended to read as follows:

"Section 6188. Judgment by default shall be rendered by the court on any day of any regular or adjourned session in any case where the defense has not been filed within the time allowed by sections 6111

and 6116, provided, that the court may for good cause allow further time for filing a defense."

(1) The effect of these amendments is to require the defense to any complaint or cross-complaint to be filed before noon of the first day the court meets in regular or adjourned session where the summons has been served twenty days in any county in this State; and judgment by default may be rendered on any day of any regular or adjourned session when the defense has not been filed on or before noon of the first day of court twenty days after the service of summons. There is a proviso, however, that for good cause the court may allow further time. And we are not prepared to say that an abuse of discretion is shown here in permitting the demurrer to be filed, even though the pleading was not filed in time, inasmuch as no action could have been taken by the court prior to the day on which the demurrer was filed.

We conclude, therefore, that the court below properly overruled both motions filed by appellant.

(2) Counsel for appellee insist that the demurrer was properly sustained upon both grounds assigned. It is argued that if default had in fact been made judgment could not have been pronounced for any given sum. But we do not agree with counsel in this contention. The complaint alleges, in substance, that a quitclaim deed was executed and delivered to the property there described for the agreed consideration, $323.20, and that there had been a refusal to pay this consideration, although frequent demand therefor had been made. There is attached to the complaint and made an exhibit thereto a letter from appellee to appellant containing certain propositions, which appellant has approved as being satisfactory to him; and while there are no allegations in the complaint which show that any rights have accrued to appellant under the provisions of this exhibit, there is nothing in its recitals which contravene the allegation of the complaint that appellee agreed and promised to pay $323.20 for the execution and delivery of this deed.

As a second ground of demurrer appellee says that it does not appear that the amount sued for exceeds $100.00 and that the circuit court, therefore, had no original jurisdiction of this cause of action.

It follows, however, from what we have just said, that the sum sued for is $323.20, and this second ground of demurrer is not, therefore, well taken.

The judgment of the court below sustaining the demurrer is reversed and the cause will be remanded with directions to overrule it.

McCulloch, C. J. and Kirby, J., dissent.

WIEGEL v. ROAD IMPROVEMENT DISTRICT NO. 1, OF PRAIRIE COUNTY.

Opinion delivered October 30, 1916.

1. CONTRACTS—SALE OF COMMODITY—INABILITY OF OBLIGOR TO FURNISH AMOUNT REQUIRED.—Appellant agreed to furnish crushed rock to appellee in certain quantities, but failed to do so because his plant was incapable of furnishing that amount. *Held*, it was appellant's duty to furnish rock, according to the terms of his agreement, and if he was unable to do so, from his own plant, it became his duty to supply the deficiency from some other source, and it was proper for the court to so tell the jury.
2. CONTRACTS—SALE OF ROCK—PROPORTION OF GRADES TO BE FURNISHED.—Appellant agreed to furnish appellee "blue trap rock crushed in sizes one (1), two (2), three (3) and four (4), in such proportion as ordered by the engineer" for appellee. Appellant's plant furnished these four grades in about equal quantities. *Held*, appellee's engineer might order one grade of rock to the exclusion of other grades, and that under the contract, appellant could not compel the appellee to accept the grades of rock in equal quantities.
3. APPEAL AND ERROR—NON-SUIT WHERE COUNTER-CLAIM IS FILED.—In an action for damages for breach of contract, the defendant filed a counter-claim, and prayed for judgment thereon. *Held*, the plaintiff could take a non-suit at any time if he so elected, but he could not thereby dismiss and dispose of appellee's counter-claim, and it is the duty of the trial court to submit that cause of action to the jury.
4. CONTRACTS—BREACH—COUNTER-CLAIM—NON-SUIT BY PLAINTIFF—QUESTION FOR JURY.—Appellant sued appellee for damages for breach of a contract and appellee filed a counter-claim against the

appellant. After the testimony was taken, appellant prayed, and was granted a non-suit. *Held*, the issues involved in the counterclaim being questions of fact, that they should have been submitted to the jury, and that it was prejudicial error to withdraw the case from the jury.

5. CONTRACTS—BREACH—SALE OF CHATTELS—MEASURE OF DAMAGES—QUESTION FOR JURY.—Appellant agreed to furnish crushed rock of a certain grade to appellee, at 62 cents per cu. yard, the agreement providing that if the rock was below standard that appellee might procure the rock elsewhere, and exact the difference in price from the appellant. Appellee was required to procure other rock, for which he paid $1.00 per cu. yard. *Held*, the measure of appellee's recovery was the difference between the market and contract price, that the ascertainment of that amount was for the jury, and that it was prejudicial error for the trial court to withdraw that question from the jury.

Appeal from Prairie Circuit Court, Southern District; *Thomas C. Trimble*, Judge; reversed.

Jno. D. Shackelford for appellant.

1. The peremptory instruction given by the court was erroneous. The amount of the counterclaim was stoutly denied by plaintiff. The sole right of the defendant to recover on the counterclaim was based on the plaintiff having forfeited the contract. This was a question of fact for the jury. When plaintiff took a non-suit there were two questions remaining, both of which were questions of fact for the jury.

First. Was defendant entitled to recover on its counterclaim?

Second. If so, what was the amount it should recover? These were not questions of law, but of fact, and should have been submitted to the jury.

2. The amount fixed by the court was erroneous and arbitrary. The remarks of the court were prejudicial.

3. No forfeiture by appellant was proven. He only agreed to furnish the output of his mill.

4. The court erred in its instructions to the jury. The court was wrong on the law and the jury was wrong in its verdict. No breach by appellant was shown and he did not forfeit his contract. He shipped

the output of his mill in good faith and no question was raised until he demanded his money.

J. G., C. B., and *Cooper Thweatt* for appellee.

1. The peremptory instruction to find for defendant on the counterclaim was proper as to the amount but was not peremptory as to the right to recover. 22 Enc. Pl. and Pr. 897, p. 911; 32 Ark. 616. There was no issue as to the amount of defendant's claim.

2. Wiegel agreed to furnish the rock. Failure to get cars is not an excuse under the contract. 1 Beach on Cont. Art. 216, 217; 108 Pac. 621; 149 U. S. 1.

3. Wiegel breached the contract daily. 105 Ark. 238. He was in default when payments became due. 88 Ark. 497. When he failed to deliver the rock the district had the right to buy elsewhere and charge him with the increased cost. 88 Ark. 497.

SMITH, J. Appellant, operating as the Pulaski Stone Company, entered into a contract with the appellee road improvement district whereby he undertook to furnish the rock required by the district in the construction of its roads. The portions of the contract which are material here read as follows:

"1st. That for and in consideration of the sum of 62c., per estimated cubic yard of 2,300 pounds, Western Weighing Association weights, f. o. b. cars Little Rock, Arkansas, said contractor agrees to furnish blue trap rock crushed in sizes one (1), two (2), three (3) and four (4) in such proportion as ordered by the engineer for said district.

"2nd. Deliveries of rock are to commence and be made when the Commissioners for said district authorize the engineer or the contractor for said district to place orders with the rock contractor, it being understood that the contractor for said district is to order rock as needed and that all orders placed by him are to be filled promptly.

"3rd. Payments for rocks are to be made in cash on or about the first and fifteenth of each month and

are to cover the total amount of rock used the preceding month; provided, however, if any defective rock is shipped to the district that the engineer for said district is authorized to refuse or accept any car or part of any car on behalf of the district and notify the rock contractor. It being understood that the district is not to be responsible for any freight on said defective rock or the unloading thereof, but that any expense incurred by the district in handling same may be deducted out of the estimate due rock contractor. * * *

"5th. It is further understood that this contract shall not be terminated until the entire length of the road in said District is completed, and in the event the contractor fails at any time to supply the rock as needed the said district is authorized to purchase rock elsewhere and charge same to said rock contractor, charging said contractor with the difference between the price herein set out and that paid elsewhere."

The parties began operating under this contract, and there soon arose a controversy over the quantity of the rock being furnished by appellant. The first complaint about the quantity of rock furnished was adjusted upon the representation that the rock was being shipped as rapidly as cars were furnished by the railroad company; but later the complaint was renewed, not only as to the quantity of the rock, but also as to the grade. The engineer of the district made requisition for large quantities of No. 3 rock, and for only relatively small quantities of the No. 1. Appellant says that in crushing rock four grades are manufactured, and that it was the duty of the district to take the entire mill run and that the district had no right to order one grade to the exclusion of others, and he also insists that inasmuch as he was devoting his entire output to appellee's demands that he was not guilty of any breach of the contract in his failure to furnish rock in sufficiently large quantities to meet the road district's demands. After the controversy arose appellee ceased making payments regularly, but

professed its willingness to do so if the rock was furnished according to contract, and it excuses its failure to pay by saying that when appellant failed to furnish rock, as he had contracted to do, that the sum then due him was reserved to pay the increased price which the district would be compelled to pay in order to procure the necessary quantity of rock.

(1) Appellant insisted in the correspondence which was offered in evidence that he had complied with his contract, but that appellee's failure to make payments for the stone furnished rendered it impossible for him to continue to do so. At the time of the institution of this suit there had been furnished a quantity of rock which, at the contract price, amounted to $2,078.47, and judgment was prayed for this amount. Appellee did not deny owing the sum sued for, but filed a counterclaim in the sum of $5,219.12. Of this sum $403.80 represented the amount the district had been required to pay the owner of the teams who had contracted to distribute the rock, for loss of time due to the failure of appellant to deliver the rock. The remainder represented the difference in the price of the rock which the district had been required to pay to obtain the necessary quantity of rock to complete the building of the roads.

In his argument to the jury counsel for appellant said:

"He (appellant) gave them all the mill produced, and that was all he could do. It was not his duty to go out and buy it from some one else."

Whereupon the court said:

"That contract does not depend on the ability of that mill to produce the material. When he made the contract it was his duty to carry it out, and if he could not furnish it himself it was his duty to get it somewhere else."

Appellant excepted to this remark of the court.

We think no error was committed in this ruling of the court, for we are of the opinion that the court

correctly defined appellant's duty under the contract. The parties had not contracted merely for the output of appellant's plant, but the contract provided that "it being understood that the contractor for said district is to order rock as needed and that all orders placed by him are to be promptly filled." It was, therefore, the duty of appellant, as stated by the court, if he found himself unable to furnish the rock as required by the district to obtain the deficiency from some other source.

(2) Instructions were asked by apellant to the effect that the district was in duty bound to accept the mill run of the rock. It was shown by appellant that he was furnishing the district all of the No. 3 rock which he could manufacture, but in the manufacture of this grade of rock the other grades were also manufactured. The engineer of the district testified that the district proposed to use only two kinds of rock on the road, those being Nos. 1 and 3. No. 3 was a more expensive rock than No. 1.

These instructions were properly refused. The contract did not require the district to take the entire output of the plant, but it required appellant to furnish the rock "in such proportion as ordered by the engineer for said district."

In one of the instructions given by the court it was stated that "the whole question here seems to be as to who committed the first breach," and the case was tried and presented to the jury upon this theory, each excusing himself and blaming the other for the breach of the contract.

After the jury had been deliberating for some time they came in and the following proceedings were had:

Juror: "We have agreed to find on the counterclaim, and we wanted to know if we allowed any damage whether we had to allow the full amount of the damage or not."

Whereupon the court said:

"If you decide for the plaintiff, you will allow him the amount he claims. If you decide on the counterclaim, you will allow him whatever the testimony showed was due. And if there is not any contradiction you will find whatever the evidence showed on the counterclaim."

Appellant excepted to this ruling of the court, and thereupon asked and obtained permission to take a non-suit, and the court then charged the jury as follows:

"Gentlemen of the jury, the plaintiff has taken a non-suit as to his claim, and you will not consider that any further, but will return a verdict for the defendant on its counterclaim for whatever you believe has been proven. You will not consider the plaintiff's part of this case any further. The only case that stands now is the counterclaim of the defendant. You will return a verdict for the defendant for any amount you think has been proven."

Later the jury returned into court with the statement that they had been unable to agree upon a verdict, whereupon the court directed the jury to return a verdict for appellee in the sum of $4,885.69, and this appeal has been duly prosecuted from the judgment rendered upon the verdict so returned.

(3) Appellant had the right to take a non-suit if he so elected; but he could not thereby dismiss and dispose of appellee's counterclaim, and the court should have submitted that cause of action to the jury. *Lay* v. *Collins*, 74 Ark. 536. We are not here called upon to say what effect appellant's action in taking the non-suit under the circumstances of this case will have upon his right of action hereafter if it is not further prosecuted upon the remand of this cause; but having taken the non-suit the court properly submitted the counterclaim to the jury.

(4-5) We think, however, the court should have permitted the jury to pass upon the question of the amount to be recovered upon the counterclaim. We

think it cannot be said that the evidence upon that question is undisputed, nor can it be said that the verdict was directed for a sum so small that no prejudice could have resulted, and unless one or the other of these conditions obtained a verdict should not have been directed. It is true the district paid $1.00 per cubic yard for the rock which appellant had agreed to furnish at 62 cents; but it does not necessarily follow that the district should recover this difference. There is some conflict in the evidence as to the value of the rock and the extent of the advance in the market price. But in any event the district could recover only the difference between the contract price and the market price, and the jury should have been permitted to say whether the district had bought rock at the cheapest price at which it could be obtained in quantities provided in the contract.

We are also of the opinion that the jury should have been permitted to pass upon the other item in the counterclaim.

And for the error of the court in not submitting those questions to the jury the judgment will be reversed and the cause remanded for a new trial.

CITIZENS BANK BUILDING v. L. & E. WERTHEIMER, INC.

Opinion delivered November 6, 1916.

1. LEASES—RESERVATION OF RIGHT TO CANCEL UPON HAPPENING OF CONDITION.—Defendant leased premises from plaintiff to be used for the sale of intoxicating liquors, the lease providing that in the event prohibition was established in the county in which the premises were, then at the option of the lessee, and upon written notice given by it, that the lease should terminate and be at an end. *Held*, where defendant desired to exercise this option after Act 59, p. 180, Acts of 1913, went into operation Jan. 1, 1914, that he would be required to do so within a reasonable time, and that where he did exercise the option and notified the lessor on or about Feb. 18, 1914, that it would be held that he had exercised the option in apt time.

2. LEASES—TERMINATION—VERBAL NOTICE.—Where a lease provides that it might be terminated by the lessee, upon his giving written notice thereof, verbal notice will be held sufficient, when the lessor by his words and conduct led the lessee to believe that the formality of a written notice was waived.

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

Taylor, Jones & Taylor for appellant.

Instruction No. 2 asked by appellant should have been given.

Prohibition was established on January 1, 1914. 117 Ark. 50, and appellee's right to cancel the lease arose on that date. Notice of an intention to terminate the lease should have been given before that date, as appellee knew that the contingency was bound to happen at that time. Certainly notice should have been given within a reasonable time thereafter and 30 days was beyond question a reasonable time. The lease provides that "when the event shall occur *then* at the option of the lessee, and upon written notice given by it, this lease shall terminate." In order to avail himself of the privilege of terminating the lease there must have been a strict compliance with the terms thereof. 24 Cyc. 1339-1340. No notice to terminate was given till after February 1, a lapse of more than thirty days, and appellee must be held to have elected to continue the lease. 71 Ark. 255; 61 *Id.* 377; 29 L. R. A. (N. S.) 174 and note.

There was no written notice of an intention to quit and no waiver of such written notice on the part of appellant and instruction No. 1 should have been given.

Instructions 1 for defendant and 4 for plaintiff are in conflict and are misleading to the jury. 43 N. E. 114; 137 Mass. 13; 7 Neb. 73; 13 N. Y. Supp. 650.

Coleman & Gantt for appellees.

Appellees had the right to cancel the lease as the condition had arisen against which they had contracted. 117 Ark. 50.

The notice was sufficient. Written notice was waived by the acts of appellant. 70 Ark. 401; 88 Ark. 138; 179 S. W. 369. The oral notice not having been questioned, nor written notice demanded, appellant is estopped to claim that notice was not given in accordance with the terms of the contract. 113 Mass. 531; 32 Atl. 64; 24 Cyc. 1336.

There is no conflict between instructions 1 and 4.

The lease was terminated by operation of law and notice was not necessary, the business for which the building was leased having become an unlawful one. 3 Elliott on Contracts, Sec. 1901; 66 Atl. 212; 123 N. W. 24; 60 So. 876; 118 Ark. 239; 134 S. W. 364.

McCULLOCH, C. J. Appellee rented a store room from appellant for a term of five years, beginning January 1, 1911, to use in the operation of a wholesale and retail liquor business. The contract provided for monthly payments of rent, and also contained the following clause: "It is further understood and agreed between the parties that in case the prohibition of the sale of liquor in Jefferson County or in the city of Pine Bluff should be established and the said lessee prohibited from carrying on its business as wholesale and retail liquor dealers in said building by operation of law, then at the option of the lessee and upon written notice given by it, this lease shall terminate and be at an end."

Appellee moved out of the building on March 1, 1914, and paid the rent up to that date, having given verbal notice a short time before of intention to terminate the lease.

This is an action instituted by appellant to recover on the notes for monthly payments of rent accruing subsequent to the removal of appellee from the building. Appellee filed an answer, alleging in substance that on January 1, 1914, when the Act of February 17,

1913 (p. 180), went into effect, prohibiting the issuance of license to sell intoxicating liquors unless a majority of the adult white inhabitants within the incorporated limits of the town or city should file a petition asking therefor, that a petition in conformity with the statute was filed with the county court, but was withdrawn on February 18 without being passed on by the county court, and that a second petition was filed on February 28, 1914, and the prayer thereof was granted on April 6, 1914, and that on or about the first of February, 1914, appellee elected to terminate the said lease and gave notice to appellant to that effect. The court sustained a demurrer to the answer, and on appeal to this court it was held that the answer stated a good defense and the judgment was reversed and the cause remanded with directions to overrule the demurrer. 117 Ark. 50.

In disposing of the case this court said: "Appellant could not have conducted the business for which it leased appellee's building without violating the law, and each and every sale of intoxicating liquors which it might have made prior to April 6, in that year, would have constituted a violation of the law and subjected it and its employees and servants to the fines and penalties prescribed by the statute. The condition, therefore, had arisen against which appellant had contracted. It having become unlawful to sell liquor, appellant had the right to exercise the option of cancelling the lease."

On the remand of the cause, there was a trial before a jury which resulted in a verdict in favor of appellee. The evidence adduced on the part of appellee tended to show that during the first half of the month of February, 1914, the president of appellant corporation was verbally notified by agents of appellee that the latter had elected to terminate the lease and would remove from the building on March 1, succeeding, and that the president when so notified made no request for a written notice and said nothing about a

written notice being given. Mr. Speers, the president of the appellant corporation, testified that the latter part of February Mr. Hanf, the manager of appellee's business, came to him and spoke about cancelling the lease but did not say that he was going to cancel it but merely said that he wanted to do so, and that he (witness) replied that he would expect appellee to comply with the contract.

(1) One of the chief grounds urged for reversal is the ruling of the court in refusing to give the following instruction: "2. The lease introduced in evidence provides that in case the prohibition of the sale of liquor in Jefferson county or in the city of Pine Bluff should be established and said lessee prohibited from carrying on its business of wholesale and retail liquor dealers in said building by operation of law, then, at the option of the lessee, and upon written notice given by it, this lease shall terminate and be at an end. The General Assembly of the State of Arkansas, on the 17th day of February, 1913, passed the act known as the Going Law, and this act became effective on the 1st day of January, 1914, and by the terms of that law it became unlawful for defendants to sell intoxicating liquors in the city of Pine Bluff from the beginning of that day until the terms of the law should be complied with and license issued by the Jefferson County Court, which was done according to a decision of that court, on the 6th day of April, 1914. Accordingly, on the 1st day of January, 1914, the contingency arose which, under the terms of the lease, permitted the lessee, or defendant, to exercise its option and cancel and determine the lease, if it so desired, and the lessee was bound to exercise this option on the 1st day of January, 1914, or within a reasonable time thereafter, and a failure on the part of the lessee to exercise its option in the manner provided for in the lease on the 1st day of January, 1914, or within a reasonable time thereafter, would constitute a waiver of its option and an election by the lessee to hold for the remainder

of the term of the lease. What period of time would constitute a reasonable time is a matter to be determined by you under all the circumstances of the case, and may be defined generally to be so much time as is necessary under the circumstances for a reasonably prudent and diligent man to do, conveniently, what the contract or duty requires should be done, having a regard for the rights and possibility of loss, if any, to the other party to be affected. Unless you find, therefore, from a preponderance of the testimony, that defendant did, on the 1st day of January, 1914, or within a reasonable time thereafter, exercise its option to cancel and terminate the lease contract by giving notice to plaintiff, then you will find for plaintiff in the sum claimed."

We are of the opinion that the instruction just quoted embodies a correct statement of the law. The former decision of this court, which has become the law of the case, declares that at the time the verbal notice was alleged to have been given prohibition had been "established" within the meaning of the contract, and that appellee had the right to terminate the lease. The question of the time when the notice should be given was not passed on in the opinion delivered in that case. Now, taking the law as established by that decision, we think that while appellee had the right to terminate the lease under the conditions then existing, the right was not a continuing one but must have been exercised at the time the new conditions arose, or within a reasonable time thereafter. If the facts had justified it, we think appellant would have been entitled to an instruction submitting to the jury the question whether or not the notice was given within a reasonable time.

But after mature consideration we have reached the conclusion that under the undisputed testimony in the case the time was reasonable and the facts did not call for a submission of that issue to the jury. Prohibition existed in Pine Bluff, under the undisputed proof, on and after January 1, 1914, but it appears from

the proof that on that day a petition of adult inhabitants of the city was presented to the county court asking for the issuance of license. That petition was not acted on finally by the county court, but was withdrawn on February 18, and ten daysthereafter the new petition was filed. About that time—the precise date is not given—appellee made an election to terminate the lease, and gave verbal notice accordingly. There was a dispute whether such notice was given at all, but we must treat that issue as being settled in appellee's favor. Under the circumstances, we think that the notice, if given at all, was a timely one, and that, as before stated, the proof did not call for a submission of that issue to the jury. Appellee had the right to wait a reasonable length of time to ascertain whether or not there was any probability of license being granted, so that it could continue its business, and it could not in any view of this evidence be said that waiting until the middle or latter part of February, with the petition for license pending, was an unreasonable length of time to wait before making the election to cancel the lease.

There are assignments of error with respect to the rulings of the court in giving and refusing instructions on the subject of the giving of notice. The court gave the following instruction on the request of appellant: "4. The parties have stipulated in their contract of lease for a written notice of the intention of lessee to terminate the lease upon the happening of the contingency named therein and a bare acquiescence or silence on the part of plaintiff, or lessor, when informed orally by defendant of its intentions to cancel the lease and surrender the premises, even though you believe that defendant did inform plaintiff of its intention to terminate said lease, would not constitute a waiver of the written notice provided for in the lease." This instruction was, we think, more favorable to appellant than it was entitled to, and that there was

no error in refusing to give the other instruction on the same subject.

(2) The court, on the request of the appellee, gave the following instruction: "1. While the written lease between plaintiff and defendant provides that the defendant might at its option terminate the lease in the event that prohibition should be established in the city of Pine Bluff, upon written notice given by it to the plaintiff, the informality of a verbal notice could be waived by the plaintiff by its acceptance or acquiescence therein. If you find from the evidence that defendant by its agents gave verbal notice to the plaintiff that it terminated the lease on and after March 1, 1914, under the terms of the option contained in the lease by so stating to the president of the plaintiff company who executed the lease on behalf of plaintiff, and that plaintiff, through its president, knowing that the notice was intended to terminate the tenancy on and after March 1, 1914, made no objection to the form of the notice and that it was not in writing and by his words and conduct led the defendant reasonably and properly to understand that the informality of the verbal notice was waived and that lessee did so understand it, then this was such acquiescence on the part of plaintiff that it cannot now object that the notice was insufficient."

It is contended that this instruction is erroneous and in conflict with the one given at appellant's request. We do not think the instructions are necessarily conflicting. But, at any rate, the instruction last quoted correctly states the law applicable to the case and there was no error in giving it. The doctrine stated in that instruction is one which has received the approval of this court in numerous cases. *St. L., I. M. & S. R. Co.* v. *Nunley*, 120 Ark. 268.

This disposes of all the attacks upon the trial court's rulings, and no error being found the judgment must be affirmed, and it is so ordered.

POLZIN v. BEENE.

Opinion delivered November 6, 1916.

1. TIMBER DEEDS—EXPEDITIOUS CLAUSES—TIME FOR CUTTING.—One J. deeded certain timber to appellant, the deed requiring that the timber be cut as expeditiously as possible, and providing that if it was not cut within twenty-five years, that appellant should thereafter pay the taxes on the said lands. Some years later appellees acquired title to the said lands. *Held*, although the timber deed did not give appellant the absolute right to twenty-five years in which to cut the timber, that since appellee recognized his right under his deed from J. to cut the timber, that appellant had the right from the date of appellee's purchase, to cut the timber as expeditiously as possible.
2. TIMBER DEEDS—EXPEDITIOUS CLAUSES—FINDING OF CHANCELLOR.—Where appellant claimed the right to cut timber from certain land under a deed requiring him to cut the same as expeditiously as possible, and it appeared that the timber might have been cut during a period of one and one-half years, a delay of three years in beginning to cut will be held to bar appellant's right under the expeditious clause.
3. CONTRACTS—DELAY IN COMPLYING WITH TERMS.—Inconvenience or the cost of compliance with the terms of a contract, cannot excuse the obligor from the performance of an absolute and unqualified undertaking to do that which is both possible and lawful.
4. TIMBER DEEDS—EXPEDITIOUS CLAUSE—MISTAKE—LACHES.—A deed granting the right to cut certain timber provided that the same be cut as expeditiously as possible. *Held*, although this clause was inserted through the mutual mistake of the grantor and grantee, that the grantee had lost his right to a reformation thereof by reason of laches.

Appeal from Columbia Chancery Court; *James M. Barker*, Chancellor; affirmed.

STATEMENT BY THE COURT

R. O. Beene, Y. D. Sanders, E. C. Wynne, *et al.* Mrs. M. A. Tomlin, *et al.*, instituted separate suits in the chancery court against Fred Polzin to cancel and set aside certain timber deeds executed to him. Beene and Sanders each deraigned title by mesne conveyances from T. S. M. Jordan. The immediate deed to Beene was from Henry Stevens and was executed on January 18, 1912. One of the deeds to Sanders was executed on the 29th day of March, 1909, and the other on the 19th day of November, 1912. On March 5, 1906,

T. S. M. Jordan conveyed to Fred Polzin all the pine timber on certain tracts of land in Columbia County, Arkansas. Among the lands described in the timber deed were the Sanders and Beene lands above referred to. The timber deed contained a clause providing for the removal of the timber. It reads as follows:

"The party of the second part shall cut and remove said timber as expeditiously as possible and it is agreed that unless it shall have removed all the same within a period of twenty-five (25) years from the date hereof, that it shall be responsible for and pay to the first party the full amount of taxes assessed against said lands after the expiration of said period of twenty-five years from this date until such time as said timber is removed and said possession returned to said first party."

On the 5th of March, 1906, O. Wynne, the husband of Mrs. E. C. Wynne and the father of the other plaintiffs in the suit of *Wynne* v. *Polzin*, executed a deed to Polzin to a part of the timber on his homestead. It contained the same clause as copied above in the timber deed of Jordan. The plaintiffs in the Tomlin case also executed a timber deed to Polzin on March 5, 1906, and it also contained a like clause in regard to the removal of the timber. The four cases were consolidated for the purpose of trial. The chancellor found the issues for the plaintiffs in each case and from a decree entered in their favor the defendant prosecutes this appeal. Other facts will be stated or referred to in the opinion.

C. W. McKay for appellant.

1. Under the facts and circumstances Polzin was proceeding with proper dispatch to remove the timber as expeditiously as possible within the meaning of the deeds, and the reasonable time had not expired. 120 Ark. 105; 118 Ark. 94; 116 Ark. 393; 111 Ark. 253; 99 *Id.* 112; 77 *Id.* 116.

2. But if not, plaintiffs have waived the forfeiture of his right to enter upon these lands and cut the timber. In the Jordan deeds the timber was reserved

for twenty-two years. All had notice of Polzin's rights. 97 Ark. 397; 94 *Id.* 503. The conduct of Jordan constitutes a waiver. 51 Ark. 491; 59 *Id.* 405; 77 *Id.* 168.

3. There was a mutual mistake in the timber deeds by which they failed to express the terms of the contract, which calls for a reformation. 28 L. R. A. (N. S.) 792 to 796; 6 Pomeroy Eq. § 677-8.

The distinct understanding was that Polzin was to have the full 25 years to cut and remove the timber. If Jordan did not read the deeds at the time of their execution, that fact has no bearing here. 110 Ark. 306; 6 Pom. Eq. Jur. § 680.

4. Polzin is not barred by laches.

George M. Le Croy for appellee.

1. Appellant did not proceed to cut and remove the timber as expeditiously as possible within the meaning of the deeds. 99 Ark. 115; 173 S. W. 819; 93 Ark. 447; 7 *Id.* 130; 61 Ark. 315.

2. Appellees have never waived the forfeiture. 77 Ark. 116; 98 *Id.* 328; 94 *Id.* 503.

3. There was no mutual mistake in the deeds that calls for reformation. But if so, appellant was guilty of laches. 120 Ark. 105. If he did not read the deeds it was his fault. 105 Ark. 37; 91 U. S. 50. Deeds cannot be waived by parol testimony. 83 Ark. 283; 105 *Id.* 459; 102 *Id.* 428; 88 *Id.* 213; 99 *Id.* 218.

4. No mistake was made. 99 Ark. 480; 39 S. W. 236; 94 Ark. 130. Appellant failed to comply with the terms of his contract and a reasonable time had long since elapsed, and thereby he forfeited all further right to the timber. The decree is right and should be affirmed.

HART, J. (after stating the facts).

(1) It is first contended by counsel for defendant that if Polzin did not proceed as expeditiously as possible to remove the timber from the Beene and Sanders lands within the meaning of the deeds, that

Beene and Sanders have waived the forfeiture of their right to enter upon the lands and cut and remove the timber. That Beene and Sanders recognized the right of Polzin to have a reasonable time after they purchased the land to cut and remove the timber. If this be true it does not mean that Polzin would have the balance of the 25 years after that to cut and remove the timber, but that he must cut and remove the timber as expeditiously as possible from that time. In construing a similar clause in other timber deeds the court has held that it was not contemplated that the vendee should have twenty-five (25) years absolutely in which to cut and remove the timber, but that he should cut and remove the timber as expeditiously as possible and that if it required more than twenty-five years to do so he should pay the taxes thereafter assessed against the land. *Louis Werner Saw Mill Co.* v. *Sessoms*, 120 Ark. 105, and cases cited. So then Beene and Sanders having recognized that Polzin had not at the time of their purchase forfeited his right to cut and remove the timber from the land purchased by them, the most Polzin could claim is that he should only be required to cut the timber as expeditiously as possible from that date.

(2) This then brings us to the question as to whether or not Polzin cut and removed the timber as expeditiously as possible after the purchase of the land by Beene and Sanders. Beene purchased the land on January 18, 1912. His suit involved the timber on three forty acre tracts of the land. The present suit was instituted on the 22d day of June, 1915. At that time no effort had been made by the defendant, Polzin, towards cutting and removing the timber from the land. The timber was five and one-half or six miles from the main line of a railroad. There had been other timber in the same neighborhood cut and sold in the market. There was a saw mill situated in the neighborhood. Beene said that if Polzin had begun cutting the timber on his land and had used as much as

one cross-cut saw regularly he could have removed the timber in one or one and one-half years. He has let over three years elapse and has not begun to remove it. So we think the finding of the chancellor that Polzin did not cut and remove the timber on the Beene tract of land as expeditiously as possible is not against the preponderance of the evidence and under our settled rules of practice his finding will not be disturbed on appeal.

Polzin claims that he bought the land for speculation; that he did not have any mill and for that reason would not be required to cut and remove the timber until he had a market for the timber standing. We do not agree with him in that contention. It is true that in the construction of a similar clause in other timber deeds in determining whether or not the vendee had cut and removed the timber as expeditiously as possible, we have taken into consideration the fact that the vendee had a saw mill and was cutting and removing the timber as quickly as the practical operation of its mill would admit. This was but taking into consideration the circumstances and conditions as they existed at the time the contract was made. We held that it was in the contemplation of the parties that the timber should be removed by the mill company in the ordinary course of business. Here Polzin had no mill and admits that he bought the land for speculation. It became his duty under the contract to commence to cut and remove the timber at once and remove it as expeditiously as possible. There is no clause in the contract to indicate that he should not commence to cut the timber until after he found a market for it.

(3) Inconvenience or the cost of compliance with the contract or other like thing cannot excuse a party from the performance of an absolute and unqualified undertaking to do that which is possible and lawful. *Ingham Lumber Co.* v. *Ingersoll*, 93 Ark. 447, and cases cited. What we have just said applies with equal force to the Sanders land. It was also located about

five or six miles from the railroad. Other parties had been in there something like a mile from this timber and cut and removed the timber. There was a saw mill three or four miles from there, to which the timber could have been carried and sawed into lumber. There were about fifty acres of timber on the Sanders land. His land joined the land of R. O. Beene and no effort was made by Polzin to cut and remove the timber up to the day the suit was brought.

Wynne and Tomlin sold the timber on their homesteads to Polzin on March 5, 1906. Their land was situated close to the Sanders land and the testimony shows that this timber could have been easily removed before the present suit was instituted.

It is next contended that there was a mutual mistake in the execution of the timber deed and that Polzin is entitled to a reformation thereof. Both he and Jordan from whom he purchased the timber on the Beene and Sanders tracts testified that it was their intention that he should have twenty-five years absolutely to cut and remove the timber.

We do not deem it necessary to decide whether or not the proof was sufficient to warrant a reformation. We are of the opinion that Polzin would be barred of this relief by laches.

(4) Polzin testified that he came south to buy timber lands. He evidently had a printed form, for this same clause is contained in the deeds taken from Wynne and from Tomlin. It is not claimed, or at least it is not proved, that there was any mutual mistake in the execution of the Wynne or Tomlin deeds. Then it will be taken that Polzin knew the legal effect of the clause in question in those deeds. They were executed on the same day as the Jordan deed. They were specially prepared by Polzin and he had had copies of the deeds in his possession ever since. There seems to be no good reason why he should desire a different contract with Jordan to that which he made with the other parties in regard to the timber. Of course he had a right to make a different contract with him, but

there is nothing in the record here which would excuse his long delay, in not discovering the alleged mistake. It seems that he held the deed from the date of its execution until after deeds containing similar clauses had been construed adversely to his present contention. It was his duty to have examined the deeds within a reasonable time and discovered any mistakes that were in them. He has shown no excuse for not doing so. Therefore we are of the opinion that it would now be inequitable to allow a reformation of the deed. *Louis Werner Saw Mill Co.* v. *Sessoms, supra.*

From the views we have expressed it follows that the decree must be affirmed.

HART, J. (on re-hearing). Counsel for appellant earnestly insists that the court erred in its opinion, especially as to the timber owned on the tracts of land, of Beene and Sanders. They base their contention on the state of the record as follows:

It will be remembered that Jordan conveyed the timber on the tracts of land now owned by Beene and Sanders to Polzin on March 5, 1906, and that this deed contained what is commonly called the "expeditious" clause in regard to the removal of the timber. On October 1, 1908, Jordan conveyed the land now owned by Beene to P. H. Dean, reserving all merchantable pine timber from twelve inches up for twenty-two years. Beene deraigned title to the land by mesne conveyances from Dean. On the 6th day of January, 1912, Henry Stevens executed a deed to him to the land and reserved all the timber which had been conveyed by the deed of Jordan to Polzin and on February 22, 1915, Jordan conveyed the land in question to Beene by a quitclaim deed. The rights of Polzin must be tested by the terms of the deed from Jordan to himself. He cannot gain any additional rights in subsequent reservations of timber made by Jordan when he conveyed the land to other parties. Hence in determining the rights of Polzin, we need not consider the reservations made in the deed of Jordan to Dean

or to his grantees. Beene acquired title to the land on the 6th day of January, 1912, and if Polzin owned the timber, it was his duty to have removed it as expeditiously as possible from that date. The testimony shows that he did not do so. According to the testimony of Beene, the timber could have been removed in one and one-half years. Beene testified that Polzin made no effort whatever to remove the timber from the land. If it be assumed that Beene did not acquire title to the timber by the deed from Stevens to himself still he did acquire it by the quitclaim deed from Jordan on February 22, 1915, and this was before he instituted this suit. Hence he had title to the timber as well as the land when he instituted the action and Polzin having failed to cut and remove the timber from the land within the time provided by the terms of his deed, the court below properly granted appellees the relief prayed for. What we have said with regard to the Beene tract applies with equal force to the Sanders tract; for the record is the same in all essential respects in regard to it. We adhere to what we said in our original opinion on the question of laches barring Polzin of any relief by way of reformation of the deed from Jordan to him and do not deem it necessary to add anything to what we have already said on that subject.

The motion for a rehearing will be denied.

HARRINGTON v. COOPER.

Opinion delivered November 6, 1916.

1. WILLS—INTENTION OF TESTATOR—RULE OF CONSTRUCTION.—In construing the provision of a will, the intention of the maker must first be ascertained, and, when not at variance with recognized rules of law, must govern; the intention of the testator must be gathered from all parts of the will, and such construction be given as will, if possible, give force and meaning to every clause of the will.
2. WILLS—DEVISE OF LIFE ESTATE—DEVISE OF FEE, WHEN.—Where an estate is devised to one for life, with remainder to another, with the further provision that, if the remainderman should die without having a child, then to a third person, the words "die without having a

child," are restricted to the death of the remainderman before the termination of the particular estate.

3. WILLS—DEVISE TO WIFE AND DAUGHTERS—CONSTRUCTION OF LANGUAGE USED.—One W. devised certain land to his wife "during her natural life and to our daughter, 'G. A. W.,' as a *joint support for* my wife and daughter during the lifetime of my wife, and at the death of my wife I desire and intend that my daughter shall take in her own right the entire interest should she survive her mother, and should my daughter die childless then in that case the whole shall revert to my estate and be equally divided between my other children or their descendants * * * ." *Held,* the will devised to the daughter a fee simple estate, to take effect upon the death of her mother.

4. WILLS—CONSTRUCTION OF TERMS—"DIE CHILDLESS."—Where the words "die childless" are used in a will they mean "without having had or without having a child."

5. WILLS—CONSTRUCTION—ESTATE IN FEE—MORTGAGE.—Under the facts stated above in syllabus No. 3, a mortgage made by the daughter of the testator held valid as against her heirs.

Appeal from Lee Chancery Court; *E. D. Robertson*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellants instituted this action in the chancery court against appellees, G. W. Cooper and Arthur Cotter, trustees, to restrain them from selling certain lands under the power of sale contained in a mortgage. Appellants allege that they were the children and sole heirs at law of Georgia Ann Harrington, born Wood, and that by the terms of the will of Dr. Geo. Wood, her father, she owned a life estate in said lands and they own the reversion. A copy of the will is made an exhibit to the complaint and a part of it. The property embraced in this suit is that devised by the second item of the will.

They further allege that their mother mortgaged the land to appellee, Cooper, and that Cooper is attempting to sell the land under the power of sale contained in the mortgage. That if the sale is made there will be a cloud upon their title. Appellees answered and asked that Mrs. Georgia Ann Harrington be made a party to the suit, that she be declared to have

a fee simple title in the land and also prayed for a foreclosure of his mortgage and judgment for the amount of his mortgage debt. The will reads as follows:

"I, George Wood of the county of Lee, and State of Arkansas, being of sound mind and disposing memory do make and publish this my last will and testament hereby revoking and annulling all others, heretofore made by me.

First Item: It is my will and desire that all of my just debts shall be promptly paid.

Second Item: I give to my beloved wife Mary Jane Wood during natural life and to our daughter Georgia Anna Wood that portion of the tract of land on which we reside lying north and east of Jacks Creek containing about five hundred acres, including the dwelling and gin house and other improvements as a joint support for my wife and daughter during the lifetime of my wife and at the death of my wife I desire and intend that my daughter Georgia Anna Wood shall take in her own right the entire interest should she survive her mother and should my said daughter Georgia Anna Wood die childless, then in that case the whole shall revert to my estate and be equally divided between my other children or their descendants of the same, the children of such as may be dead taking the interest that the parent would be entitled to if living.

Third Item: I give jointly and equally to wife May Jane Wood and our daughter Georgia Anna Wood five head of the work mules on the place to be a full average of the whole with a sufficient quantity of harness, tools and farming instruments to cultivate the place successfully to be selected from the stock on hand. My buggy horse, Rockaway and harness. Three head of milk cows and calves; two sows and pigs; two hundred and fifty bushels of corn, three thousand pounds of pork, one-half to be in clear bulk sides; three hundred dollars in United States currency, the whole of the household and kitchen furnitures, all of the queensware on hand, one-half of the knives and

forks, silver spoons, ladles, goblets and other silverware on hand. The above bequests contained in items two and three are made to my wife and daughter believing that it is their full share of my entire estate, ample for a comfortable support and in consideration of my wife relinquishing dower in the same.

Fourth Item: The whole of the residue of my estate both real and personal I give and bequeath to my five children namely: John Rice Wood, Lucy Caroline Thompson, Mary Francis Macklin, James Edward Wood and Thomas Wood. and after adjusting the accounts of advancements heretofore made by me to them as shown by my Book of Advancements to which a reference is made, the remainder shall be equally divided between them, each taking one-fifth share of the same, as it is my intention to do equal and exact justice to all and that all shall share and share alike.

Fifth Item: It is my desire that my library shall be equally divided between my wife and six children each taking in 1-7 value.

Sixth Item: In the event of the collection of a just * * * against the United States Government for property taken from my brother, W. H. Wood and myself, I direct my Administrator to hand to each of the older children of my son John Rice Wood, namely George Guy Wood, Lucy Wood, P. Wood and Fanny Wood the sum of one hundred dollars and divide the remainder equally between my wife and six children, each taking one-seventh part.

Seventh Item: I give my gold watch to my grandson, Samuel William Wood.

Eighth Item: I constitute and appoint my brother, W. H. Wood, Administrator and Trustee to execute and carry out the purposes and intentions of this will, having full confidence in his integrity. I request of him no bond but his own for the faithful performance of the trust.

In testimony whereof I have hereunto set my hand and * * * this 9th day of November, 1873.

GEORGE WOOD (SEAL)."

The chancellor found in favor of appellee, Cooper, and entered a decree dismissing the complaint of appellants and ordering the mortgage to be foreclosed, and rendered a judgment in favor of Cooper against Mrs. Georgia Anna Harrington for the amount of his mortgage debt. To reverse that decree appellants prosecute this appeal.

D. S. Plummer and *Daggett & Daggett* for appellants.

Under Kirby's Digest, § 735, the appellants, under the will, became the owners of the lands subject to a life estate in the mother. The will created "an estate tail by implication" and under our statute a fee simple estate in appellants, on the death of the life-tenant, their mother. Tiedeman (3 Ed.) § 39, note 10 and § 40; 40 Cyc. 1600-2; 8 Am. Dec. 330; 71 N. E. 703; 17 Sup. R. 488; 83 S. W. 453; 12 East, 253; 15 Pick. 104; Bar. & Ald. 713; 1 Sumn. 359; 18 Am. Rep. 589; 15 Ga. 122; 3 *Id.* 551; 34 Atl. 191; *Ib.* 501; 5 Pa. St. 264; 27 Am. Dec. 746; 10 R. C. L. 652; 91 N. E. 91; 54 N. E. 304; 32 *Id.* 114, 768; 10 Haw. 547; 80 Ark. 252; 90 *Id.* 520; 17 U. S. Sup. 488; 3 Ark. 147; 23 *Id.* 179; *Ib.* 357; 49 *Id.* 357; 95 *Id.* 333; 7 L. R. A. 1094; 40 Cyc. 1427-9 (C), (2) (11) 1431, 1433-8; 186 Fed. 770; 173 S. W. 831; 40 Cyc. 1396; 74 Ark. 422; 51 *Id.* 61, 62.

Smith & McCulloch, Mann, Bussey & Mann and *Edgar H. McCulloch* for appellee.

1. The following estates were created under the will.

1. Mary Jane Wood, the wife, and Georgia Anna Wood, the daughter, as joint-tenants for the life of the former. 2. Contingent remainder in Georgia Anna Wood, if she survives her mother, subject to an executory devise in favor of the other children, if she should die childless. 1 Vent. 231; Jarman on Wills (6 Ed.), 1919; 11 H. of L. Cases, 143; 16 Ga. 545; 20 Dec. Dig. § 545 (3) (4); 3 Ark. 147.

2. A definite failure of issue was intended. 90 Ark. 152; 104 *Id.* 439; 2 Mass. 56; 34 Barb. (N. Y.) 594; 17 Hun. (N. Y.) 215; 59 Vt. 557; 32 N. E. 687; 70 Ga. 572; 95 Ark. 333; 23 *Id.* 179, 357; 49 *Id.* 125; 74 *Id.* 545; 75 *Id.* 20 and many others.

3. Parol evidence was not admissible. 36 Am. & Eng. Am. Cas. 1 and note; 40 Cyc. 1429-30 (11); *Ib.* 1433-35; (Ed. 1); 4 A. & E. Am. Cas. 1136.

4. The complaint is demurrable. 79 Ark. 185; 98 *Id.* 595. The test for the right to remove cloud on title is set out in 37 Ark. 516.

HART, J. (after stating the facts). (1) In construing the provision of a will, the intention of the maker is first to be ascertained, and, when not at variance with recognized rules of law, must govern. The intention of the testator must be gathered from all parts of the will, and such construction be given as will, if possible, give force and meaning to every clause of the will. *Parker* v. *Wilson*, 98 Ark. 553; *Archer* v. *Palmer*, 112 Ark. 527.

The particular clause of the will whose construction is involved by this appeal reads as follows:

"I give to my beloved wife, Mary Jane Wood, during natural life and to our daughter, Georgia Anna Wood, that portion of the tract of land on which we reside, lying north and east of Jacks Creek containing about five hundred acres, including the dwelling and gin house and other improvements as a joint support for my wife and at the death of my wife I desire and intend that my daughter, Georgia Anna Wood, shall take in her own right the entire interest should she survive her mother and should my said daughter, Georgia Anna Wood, die childless then in that case the whole shall revert to my estate and be equally divided between my other children or their descendants of the same, the children of such as may be dead taking the interest that the parent would be entitled to if living."

It is the contention of counsel for appellants that under section 735 of Kirby's Digest they became, under the will, the owners in fee of the lands in controversy subject to a life estate therein in their mother. We do not agree with their contention.

(2-5) Bearing in mind the settled rules of construction of wills just referred to and that the law favors the vesting of estates as early as possible, it will be seen that the first part of the clause just quoted gives to the wife of the testator a life estate in the property and that that part which reads "and at the death of my wife I desire and intend that my daughter, Georgia Anna Wood, shall take in her own right the entire interest should she survive her mother," devised to the daughter a fee simple estate to take effect on the death of her mother. It will be noted that this clause is followed by a defeasance clause which reads as follows: "And should my said daughter, Georgia Anna Wood, die childless and in that case the whole shall revert to my estate and be equally divided between my other children and their descendants of the same, the children of such as may be dead taking the interest that the parent would be entitled to if living."

It seems clear that the defeasance relates to the time of the death of the mother of appellants. That is the time fixed for her remainder interest to take effect. The words "die childless" mean without having had or without leaving a child. In this way and in no other can every clause of the will be harmonized and have force and effect. It is perfectly clear that the testator intended that his daughter, Georgia Anna, should take a fee simple when he used the words, "shall take in her own right the entire interest," and it is also clear that he intended the estate to vest when her mother died by using the words, "should she survive her mother." The last clause already quoted by using the words "die childless," etc., means that if Georgia Anna should die without having a child or leaving a child before her mother's death, that the whole shall revert to the testator's estate and be

equally divided among the testator's other children. In short it meant that the remainder in fee should be vested in Georgia Anna at her mother's death and in case Georgia Anna should die without leaving a child before her mother's death the estate should revert to the testator's estate and be divided among his other children. This is in application of a rule that where an estate is devised to one for life, with remainder to another, with the further provision that, if the remainderman should die without having a child, then to a third person, the words "die without having a child" are restricted to the death of the remainderman before the termination of the particular estate. *Birney* v. *Richardson*, 5 Dana (Ky.) 432; *Daniel* v. *Thomson*, 14 B. Mon. (Ky.) 662; *Thackston* v. *Watson*, (Ky.) 1 S. W. 398; *Pruitt* v. *Holland*, (Ky). 18 S. W. 852; *Ferguson*, etc., v. *Thomasson, et al.* (Ky.) 9 S. W. 714; *Harvey*, etc., v. *Bell* (Ky.), 81 S. W. 671; *Bradshaw* v. *Butler* (Ky.), 110 S. W. 420.

This conclusion is borne out by the context of the will. The testator in one case refers to having made advancements to certain of his children and says that it is his intention to do equal and exact justice to all of his children and that all may share and share alike. Other language used in the will also shows that it was the intention of the testator that all his children should share equally in his property taking into consideration certain advancements made to his older children.

It follows that the decree will be affirmed.

BENNETT v. THOMPSON.

Opinion delivered November 6, 1916.

1. REAL ESTATE BROKERS—SALE PRICE—DUTY TO MAKE DISCLOSURE.—The duty rests upon a broker, the same as upon any other agent, to make disclosures to his principal of the terms of the negotiation so that the principal may act advisedly in determining whether or not the proposal is satisfactory. A broker may make a contract whereby he will be entitled to the difference between the price the seller agrees to accept and the amount the purchaser agrees to pay, regardless of what that amount is, but such a contract must be plainly expressed in order to relieve the broker of the duty he owes to his principal to make full disclosure concerning the terms of the negotiation.
2. REAL ESTATE BROKERS—SALE PRICE—FAILURE TO MAKE DISCLOSURES. A broker, A., undertook to procure a sale of land belonging to B. A. found a purchaser who agreed to purchase for $750. A. wrote B. that he could procure for her the net price of $500 for the land and B. wired an acceptance. When B. discovered the facts she refused to consummate the sale, and A. sued her for $250 commissions. *Held*, B. had the right to disregard the trade on account of A.'s unfaithfulness, and was not liable to A. in any amount.

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

J. W. & J. W. House, Jr., and *A. F. House*, for appellant.

1. Whether one acts as a broker or agent, his duty to the principal is the same, and the compensation, when not expressed, is the same. 42 N. E. 298; 47 N. E. 717.

Plaintiff, in order to recover, must show that he was defendant's agent, and, as a condition precedent to such recovery, he must show a faithful discharge of his duties. He cannot advance his own interests at the expense of the principal. Bad faith on the part of an agent or broker is a perfect defense to any action for commissions. 4 R. C. L., Brokers, No. 43; 82 Ark. 381; 76 Ark. 396; 94 N. E. 260. The case should be reversed and dismissed.

2. It is also a prerequisite to the recovery of commissions that the agent show that he has produced a purchaser who was ready, willing and able to take the

property upon the terms proposed by the seller. 97 Ark. 22; 88 N. W. 15. The burden was on the appellee to show this state of facts, and therein he has wholly failed. There were two "offers" here. The first from a man who was to pay $500.00 net, immediately, and who failed to consummate his offer as appellee admits and second, this offer of $750.00 provided appellee was allowed $250.00. Appellant was at liberty to decline the second offer, or any other offer, since she was to pass upon any offer submitted. 179 Mass. 480; 4 R. C. L., Brokers, No. 52; 20 How. 224. The first offer of $500.00 net can not be construed to mean anything except an agreement to take that sum for the land, and pay the broker a reasonable compensation, provided there was no express agreement fixing his compensation. 70 Ark. 58; 51 Ill. App. 448; 27 Ill. App. 244; Gross on Real Estate Brokers, Par. 216; 130 Ga. 713.

Hutton & Harkey, for appellee.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover the amount of broker's profit on a sale of real estate. Appellant owned a tract of land at Magazine, Arkansas, and authorized appellee to find a purchaser for her, which he did and reported the sale to her, but appellant refused to consummate the deal on the ground that appellee had deceived her by withholding information concerning the true amount of the agreed price, and appellee sues to recover the difference between the amount of the price which appellant agreed to accept for the land and the amount he was to receive from the purchaser. The case was tried before a jury in the circuit court and each side asked a peremptory instruction. The court gave the appellee's requested instruction, so the question presented to us on this appeal is whether or not the testimony, viewing it in its strongest light in appellee's favor, is sufficient to sustain the verdict. *St. Louis Sw. Ry. Co.* v. *Mulkey*, 100 Ark. 71. The testimony

will, therefore, be stated in its strongest light favorable to appellee's right of recovery.

The two parties to the controversy met in Little Rock, where appellee resided, and appellant informed appellee that she owned land at Magazine and asked him to find a purchaser for her. Nothing was said at that time about the price nor about the payment of any commission. Appellant then returned to her home in Muskogee, Oklahoma, and later appellee found a prospective purchaser who agreed to take the land at the price of $750. He wrote to appellant, informing her that he had found a purchaser and that he could sell the land so as to get her the net price of $500, but said nothing about the price he was to get from the purchaser. She replied by telegram, accepting the offered price, and appellee then wrote to her instructing her to make the deed to the purchaser, reciting a consideration of $750, and forward the deed to one of the banks in Little Rock with instructions to pay him (appellee) $250 out of the consideration to be paid. Appellant refused to consummate the sale when she ascertained the true price for which the land was sold.

Appellee testified that he was not acting as agent for Miss Bennett, the appellant, and was not buying the property for himself, but was acting as a broker and expected to earn as a profit the difference between the price Miss Bennett agreed to accept and the price to be paid by the purchaser. He testified that the customary commission of a real estate agent was 5% on the amount of the sale, but that it was customary for a broker to earn a greater profit on a deal negotiated by him. Under this state of facts, we are of the opinion that appellee's conduct in withholding from appellant the information as to the amount of the purchase was a wrongful act which prevents him from recovering the amount claimed, or any amount. The case is ruled by several decisions of this court.

In *Boysen* v. *Robertson*, 70 Ark. 56, the facts were that Robertson, a real estate broker, agreed to seek

a purchaser for Mrs. Jones, the owner of certain lands, at the price of $3.00 per acre net to her. Boysen's agent, Thweatt, was authorized to purchase the land at $4.00 an acre, and the two agents, Robertson and Thweatt, got together and negotiated a sale and purchase between their principals for $4.00 an acre. One half of the difference between the net price which the owner had agreed to accept and which the prospective purchaser had agreed to pay was to be allowed to Robertson for his commission. The two principals subsequently disregarded this agreement and negotiated a sale direct between themselves at the price of $4.00 per acre.

Robertson sued Boysen for the commission he was to receive, and in denying the relief sought this court said: "The contract meant that the land must bring to Mrs. Jones three dollars per acre over and above all expenses and deductions. * * * This was only a limitation upon his power to sell. It was still his duty to sell the land for the highest price obtainable, and to account to Mrs. Jones for the proceeds, less a compensation not greater than the excess of the purchase money over three dollars per acre net, and at the same time not exceeding a reasonable compensation. The whole amount for which he sold the land was due to and recoverable by Mrs. Jones. If he had collected it, he might have reserved out of it what his principal was owing him on account of the sale. But the contract made by him was never completed.

In *Taylor* v. *Godbold*, 76 Ark. 395, the facts were similar except that the subject matter of the contract was personal property. The court delivering the opinion quoted the following statement of the law from Mechem on Agency, Sec. 952: "Like other agents in whom trust and confidence are reposed, the broker owes to his principal the utmost good faith and loyalty to his interests. * * * It is his duty, therefore, to fully and freely disclose to his principal at all times the fact of any interest of his own or of another client which may be antagonistic to the interests of his prin-

cipal, and he will not be permitted to take advantage of the situation to make gain for himself by forestalling or undermining his principal." It was held that the broker was not entitled to recover any commission.

The same doctrine is announced in *Featherston* v. *Trone*, 82 Ark. 381.

It is contended by counsel for the appellee that the principle announced by this court does not control for the reason that he was acting, not as an agent, but as a broker. This argument overlooks the fact that a brokerage transaction is governed by the doctrine of agency.

"A broker is a peculiar kind of an agent," says the Indiana court, "and brokerage is a peculiar kind of agency. It is the business of a broker to negotiate contracts between others in matters of trade and commerce. He usually deals with the contracting parties, and not with the things which may be the subject of the contract. He has neither interest in nor possession of the property which it is his business to buy or sell for others, and ordinarily he has no implied power to buy or sell in his own name. It is in these respects that a broker differs from a factor and from an ordinary agent." *Haas* v. *Ruston*, 14 Ind. App. 8, 42 N. E. 298.

The rule is again stated as follows: "A broker acting strictly as middleman to effect a purchase and sale of property is the common agent of both buyer and seller; otherwise he is the agent of the party originally employing him." 19 Cyc. 191. To the same effect see Rapalje on Real Estate Brokers, Sec. 2, and Gross on Real Estate Brokers, Sec. 141.

The Supreme Court of the United States, in *Hooper* v. *California*, 155 U. S. 648, quoted with approval a text-writer's definition of broker and principal as follows: "The engagement of a broker is like to that of a proxy, a factor, or other agent; but, with this difference, that the broker, being employed by persons who having opposite interests to manage, he is, as it were, agent both for the one and the other to nego-

tiate the commerce and affair in which he concerns himself. Thus, his engagement is twofold, and consists in being faithful to all the parties in the execution of what every one of them entrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner as to put those who employ him in a condition to treat together personally."

(1) The duty therefore rests upon the broker the same as any other agent to make disclosure to his principal of the terms of the negotiation so that the principal may act advisedly in determining whether or not the proposal is satisfactory. A broker can undoubtedly make a contract whereby he will be entitled to the difference between the amount of the price the seller agrees to accept and the amount the purchaser agrees to pay, regardless of what the amount is. But such a contract must be plainly expressed in order to relieve the broker of the duty he owes to his principal to make full disclosure concerning the terms of the negotiation.

This rule is very aptly stated by the Georgia court as follows: "We do not mean to hold that if the real estate brokers who are plaintiffs in this case had alleged an express contract that if they should procure a purchaser for the property listed with them they might have as compensation for their services all that they might sell the property for, above a fixed sum, they would not be entitled to such excess as compensation for their services, in case they procured a purchaser. But where the owner agrees with brokers for them to sell property for a named amount "net to him" such language will not be held to import by implication a contract to allow the brokers, as a fee or profit, all of the purchase price in excess of the sum so named." *Matheney, etc.* v. *Godin*, 130 Ga. 713.

(2) It follows, therefore, that appellee is not entitled to recover the profit which he claims to have earned by the sale. If appellant, after receiving knowledge of the terms of the sale, had accepted the price

offered and consummated the sale, she would have been liable to appellee for a reasonable compensation. *Boysen* v. *Robertson*, *supra*. But appellant refused to consummate the sale after she ascertained the true conditions, and appellee did not ask for a consummation on any other terms. Appellant had the right to disregard the trade on account of appellee's unfaithfulness, and is therefore not liable to him for any amount. *Featherston* v. *Trone*, *supra; Little* v. *Phipps*, (Mass.) 94 N. E. 260.

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

BELOATE v. BAKER & CO.

Opinion delivered November 6, 1916.

1. CONTRACTS—AGREEMENT TO DO WORK AND TO FURNISH MATERIALS.—A. sued B., alleging that he "did install in the residence of this defendant a bath and closet, for which he charged this defendant the sum of $64.00, which charge the defendant has never objected to." B. demurred to the complaint, on the ground that it did not state a cause of action. *Held*, under a fair interpretation of the language there was a contract between the two parties under which the work was done.
2. MECHANIC'S LIENS—ENFORCEMENT—FILING EXHIBITS WITH COMPLAINT—PRACTICE.—In an action at law to recover for materials furnished and work done, and to charge certain real estate with a lien therefor, the failure of the plaintiff to exhibit with his complaint copies of the account and affidavit filed with the circuit clerk is a defect which should be reached by a motion for a rule on plaintiff to require an exhibition with the complaint, on account and affidavit; and the defect is not one which can be reached by a general demurrer.
3. MECHANICS' LIENS—RIGHT OF PRINCIPAL CONTRACTOR.—Act No. 446 of 1911, p. 462, *held* to amend or repeal nothing except Kirby's Digest, § 4975, and such other provisions as are in conflict with the new statute, and it does not operate to deprive a principal contractor of his lien.

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

W. E. Beloate, pro se.

1. In order to entitle appellee to a default judgment it was essential either that the account and affidavit filed in the circuit clerk's office be exhibited with the complaint, or introduced in evidence upon the hearing. Neither was done. 21 Ark. 186.

2. The complaint does not allege that appellant contracted with appellee in person for installing the bath and closet, but that it was done with the request and consent of appellant. If the contract was made by a third party as a contractor, there is a defect of parties defendant, and the complaint does not state a cause of action. 114 Ark. 464.

3. Liens of mechanics and materialmen are based upon the Act amendatory of the general lien laws, Acts 1911, p. 462, which provides that the principal contractor may give bond, and also provides: "That if such bond is not filed, all laborers, mechanics and material furnishers, *except the principal contractor*, shall have a lien, etc." Section 7 of the Act repeals conflicting laws.

Any prior statute giving the principal contractor a lien is repealed by this act.

W. K. Ruddell, for appellee.

1. Act 446, Acts 1911, is only cumulative of Chap. 101, sub-div. II, of Kirby's Digest, and not intended to repeal it. Had the Legislature intended to repeal the chapter, why did they in section 6 of the Act, specifically repeal section 4975 only, of the chapter?

Where two statutes can be construed together so that both may stand, the later act will not be construed to repeal the former. 27 Ark. 419, 421; 23 Ark. 304, 307.

2. There was no default judgment. Appellant was present in person at the time of judgment and the amount was fixed by agreement. Since none of the evidence produced in the lower court has been brought into this Court, it will be presumed that there was sufficient legal evidence to sustain the judgment. 37 Ark. 528; 33 Ark. 97.

3. The allegation in the complaint that the work was done "at the request and with the consent" of the appellant, was sufficient.

McCULLOCH, C. J. This is an action instituted in the circuit court of Independence county by appellee against appellant to recover the sum of $64.00 and to charge certain real estate with a lien for the amount to be recovered under the statute allowing liens for the benefit of mechanics. It is alleged in the complaint that the plaintiff installed a bath and closet in the residence of defendant for the agreed sum of $64.00, the real estate on which the residence is situated being described, and that the plaintiff had complied with the statute by filing with the clerk of the circuit court a verified account of the demand showing the labor performed and material furnished. The court overruled appellant's demurrer to the complaint, appellant stood upon the demurrer without pleading further, and the court rendered judgment in appellee's favor for the amount of the claim found to be due.

(1) The demurrer was a general one on the ground that the complaint failed to state facts sufficient to constitute a cause of action. It is said that the complaint is insufficient because it does not contain an allegation that appellant contracted with appellee in person for installing the bath and closet in the building, but we think that the language of the complaint is sufficient to be treated as a specific allegation to the effect that the work was done and material furnished under a contract with the appellant. The allegation is that the plaintiff "did install in the residence of this defendant a bath and closet, for which he charged this defendant the sum of $64.00, which charge the defendant has never objected to." A fair interpretation of the language is that there was a contract between the two parties under which the work was done.

(2) It is next contended that the complaint was defective because copies of the account and affidavit filed with the clerk of the circuit court were not exhib-

ited with the complaint. That was a defect which should have been raised by a motion for a rule on plaintiff to require an exhibition with the complaint of the account and affidavit. The defect is not one which can be reached by a general demurrer. *Henry* v. *Blackburn*, 32 Ark. 445.

(3) The final contention of appellant is that the statute now in force does not give a principal contractor a lien. The argument is based upon the peculiar language of the Act of June 2, No. 446, 1911 (Acts 1911, p. 462), which in part reads as follows:

"That chapter 101, subdivision 11 of Kirby's Digest of the Statutes of Arkansas be amended as follows:

"Section 1. The principal contractor mentioned in chapter 101, subdivision II, may execute a bond to the State of Arkansas, for the use of all persons in whose favor liens might accrue, by virtue of chapter 101, subdivision II of Kirby's Digest of the statutes of Arkansas, conditional for the payment of all claims which might be the basis of liens; which bond shall be in a sum of not less than double the amount of the contract price, with good and sufficient sureties, whose qualifications shall be verified, and such sureties shall be approved by the clerk of the circuit court, in the county in which the property is situated, and may file such bond in the office of said clerk; provided, that if such bond is not filed all laborers, mechanics, and material furnishers, except the principal contractor, shall have a lien for the unpaid amount of their claims, against the building erected and improved and against the lot of ground upon which the same is situated, and provided in this chapter. *Provided*, that if the owner shall require the contractor to execute bond, and the same shall be executed, approved and filed, as herein provided, he shall not be liable, nor shall the building, erection or improvements, nor shall the lot or ground upon which the same is situated, be liable for any sum or sums of money due sub-contractor, laborers or material men because of any work done,

labor performed, or material furnished in the erection of said building erected, or improvements under contract with said principal contractor or sub-contractor. Suit may be brought on said bond by any person interested."

The position appellant takes is that the Act of 1911 operates as a repeal of the chapter of the digest conferring liens in favor of mechanics and materialmen, and that as the last statute is substituted for and takes the place of the former, it alone can be looked to for authority to declare a lien in favor of a principal contractor. It is contended that the language of the statute "except the principal contractor," excludes a lien in favor of the principal contractor. We do not think that the statute was intended to repeal that part of the chapter of the digest referred to, which gives a lien to a principal contractor. The other sections of the Act of 1911 relate to public buildings and to public officers and buildings erected by churches and charitable institutions. It contains a section expressly repealing section 4975 of Kirby's Digest, which declares that contractors, sub-contractors, laborers and material furnishers shall not be given a lien for a greater amount than the aggregate contract price with the owner, but that the owner shall not pay any money until all laborers and mechanics employed on the same, and all material furnishers, shall be paid. Another section provides that all laws in conflict with the act are repealed.

Section 1, as quoted above, was only intended to give the owner the privilege of requiring a bond so as to obviate liens of laborers and mechanics and material furnishers and to give a lien on a building or other improvement in favor of sub-contractors, laborers or material men for the full amount of their respective claims in the event the bond be not given. It has nothing whatever to do with liens of the principal contractors, and leaves the old statute in full force so far as relates to such liens. The statute does not purport to substitute the new act for the old one, and does not

specify any particular section which is amended. It does not follow the usual form of amending the old statute "so as to read as follows." It seems clear, therefore, that nothing is amended or repealed except Kirby's Digest, § 4975, and such other provisions as are in conflict with the new statute. The exception in the first section as to principal contractors is therefore without any force and could have been altogether omitted without affecting the force of the statute.

The complaint stated a cause of action, and the court did not err in overruling the demurrer. Affirmed.

HUGHES MANUFACTURING & LUMBER CO. v. CULVER.

Opinion delivered November 6, 1916.

1. CORPORATIONS—FRAUDULENT ACTS OF DIRECTORS—SUIT TO UNCOVER FRAUD—BY WHOM MAINTAINABLE.—Where the managing directors of a corporation are guilty of fraud in its management, the conduct of a suit to uncover their fraud will not be left under their control.
2. CORPORATIONS—FRAUDULENT ACTS OF DIRECTORS—ACTION BY MAJORITY STOCKHOLDERS.—One A. owned 990 shares of the capital stock of a corporation which had only 1000 shares of capital stock; the directors of the corporation disposed of its assets, consisting solely of a certain tract of land, without accounting to either the corporation or to A. therefor. *Held*, A. might maintain an action in her own name to have the conveyance set aside, where she joined as defendants, the corporation, the directors and the purchaser of the tract of land.
3. CORPORATIONS—ACTS OF OFFICERS—PRESUMPTION OF VALIDITY—BONA FIDE PURCHASER.—Where land belonging to a corporation was fraudulently conveyed to a purchaser, the principle that the acts of the officers of the corporation will be conclusively presumed to be valid, will apply only in cases where the purchaser is bona fide and for value, without notice of the defective act of the corporation.
4. CORPORATIONS—EXECUTION OF DEED—AUTHORITY OF OFFICERS. The officers of a corporation have authority to execute a deed to its land only when authorized to do so by proper resolution of the board of directors.
5. CORPORATIONS—SURRENDER OF CHARTER—RIGHT OF MAJORITY STOCKHOLDER.—The resolution of the board of directors authorizing

the president and secretary of a corporation to wind up its affairs and surrender its charter, will be invalid where the action was taken without the knowledge or consent of a stockholder who held 990 shares of its 1000 shares of capital stock.

6. FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—LACHES.—An action by the majority stockholder of a corporation to set aside a fraudulent conveyance of its lands, will not be barred by laches, where there was no intervention of equities in favor of the defendant, and the delay worked no injury to him.

7. APPEAL AND ERROR—ABSENCE OF INTEREST IN ISSUE IN APPELLANTS. Where, in an action to set aside a conveyance, as fraudulent, the chancellor decreed a cancellation of the deed, the appellant cannot complain of the action of the chancellor in allowing appellee's counsel a lien on the land for his fees.

Appeal from Greene Chancery Court; *C. D. Frierson*, Chancellor; affirmed.

STATEMENT BY THE COURT.

On February 10, 1914, Mary C. Culver instituted this action in the chancery court against the Hughes Manufacturing & Lumber Company, a corporation, the Culver Company, a corporation, H. A. Culver, D. R. Roberts and C. L. Flack, to cancel on the ground of fraud a deed executed by the Culver Company to the Hughes Manufacturing & Lumber Company. The material facts are as follows:

The Hughes Manufacturing & Lumber Company is a California corporation and the Culver Company is an Arkansas corporation. Mary C. Culver has owned nine hundred and ninety (990) out of the thousand shares of the capital stock of the Culver Company since its organization, but has never held any official position in it. The shares were of the par value of $100.00 each. H. A. Culver was president, D. R. Roberts was Secretary, and these two with Louella Culver, the wife of H. A. Culver, constituted the directors of the corporation.

In 1907, Mary C. Culver went to California and has been a resident of that State since that time. During the whole year of 1911, Louella Culver was not in the State of Arkansas. In 1911, the Culver Company

had seven hundred and sixty (760) acres of land in Greene County, Arkansas. On the 24th day of April, 1911, the Culver Company, by warranty deed, conveyed the seven hundred and sixty acres of land to the Hughes Manufacturing & Lumber Company for a consideration of $11,400.00 as recited in the deed. H. A. Culver as president and D. R. Roberts as secretary acted for the Culver Company in the execution of the deed. The deed contained the following recital, "That the Culver Company, a corporation organized under and by virtue of the laws of the State of Arkansas, by its president and secretary, duly authorized by proper resolutions of its board of directors," etc. At the time of the execution of the deed Grant Hughes, C. L. Flack and Thos. Hughes were stock holders and officers of the Hughes Manufacturing Company. On December 18, 1912, the last mentioned Company executed a deed to the land to C. L. Flack. On July 22, 1913, it executed another deed to Flack to correct a defective acknowledgment in the first deed. On the 28th day of February, 1914, after the institution of this suit, and after notice of *lis pendens* had been filed, Flack conveyed a one-half interest in the land to Thos. Hughes.

Under the charter of the Culver Company, the general nature of the business proposed to be transacted was to buy and sell real estate and to buy and sell all wood products, timber and minerals. The by-laws among other things provided that the president, when duly authorized by the board of directors, shall sign all contracts, orders, deeds, liens, licenses and other instruments of a special nature. The by-laws also provide that the Secretary shall sign with the president all contracts, deeds, liens, licenses and other instruments when so ordered.

Mary C. Culver testified substantially as follows: I have owned nine hundred and ninety (990) shares of the stock of the Culver Company since its organization. I am seventy-two years old and moved to California in 1907. I left the business affairs in the hands of my son, H. A. Culver, and the other officers of the

corporation. The corporation owned seven hundred and sixty (760) acres of real estate in Green County, Arkansas, and that was all its assets. I never authorized the sale of the lands involved in this suit, and never knew that they had been sold until after the death of my husband, E. W. Culver, which occurred in April, 1912. I obtained my information about the transaction by insisting upon knowing from my son, H. A. Culver, about the business affairs of the corporation. I never at any time authorized the deed to be made nor did I ratify the same in any way after it was made. Neither the Culver Company nor myself ever received any consideration whatever for the execution of the deed. Neither H. A. Culver nor D. R. Roberts had any power of attorney or any other authority from me or from the Culver Company to make such a deed and the records do not show (and as far as my knowledge goes) there was no resolution of the board of directors or of the stockholders authorizing such a deed. Proper resolutions were always passed by the board of directors before deeds conveying the lands of the Company were ever executed. In addition thereto, my written consent was always obtained when such sales were made.

H. A. Culver testified substantially as follows: I am forty-seven years of age and now reside in Seattle, Washington. I was president of the Culver Company from its organization and D. R. Roberts was its secretary. My father and I entered into a contract with the Hughes Manufacturing & Lumber Company of which C. L. Flack was Vice President and director for the purchase of the lands of the Culver Company and the consideration therefor was the purchase of the Redwood Lumber Company stock and plant by us. D. R. Roberts as secretary and myself as president executed the deed to the lands to the Hughes Manufacturing & Lumber Company. No resolution was passed by the board of directors authorizing us to make the deed. My wife, Louella Culver, was the remaining director of the Culver Company and she was not in Arkansas during

the year 1911 at all. My mother, Mary C. Culver, never had any knowledge of the conveyance of these lands. Neither she nor the Culver Company ever received any part of the consideration. The sole consideration was the sale of the stock and plant of the Redwood Lumber Company to my father and myself. After the sale I moved to California and my father and I took charge of the stock and plant of the Redwood Lumber Company there. I thought when I made the trade that I could make enough money to pay back my mother or the Culver Manufacturing & Lumber Company and this is the reason I did not tell her anything about the transaction. I was deceived in the transaction. The amount of the indebtedness of the Redwood Lumber Company was misrepresented to us and the condition of the plant was not nearly so good as was represented. The company was practically insolvent. Neither Mary C. Culver nor the Culver Company were known in the contract but the same was the individual transaction of my father and myself. Mary C. Culver never knew that the deed had been executed until I gave her the facts in Seattle in July, 1913. Thos. Hughes was president, C. L. Flack, Vice President, and Grant Hughes manager of the Hughes Company when the deed was executed. At the time I was in Portland, Arkansas, and my father was in Los Angeles, California. D. R. Roberts was in Walnut Ridge, Arkansas.

Grant Hughes testified substantially as follows: E. W. and H. A. Culver had a thorough knowledge of both the physical and financial condition of the Redwood Lumber Company at the time the deed in question was executed. I told them all that I knew of the condition of the Company. I think Mary C. Culver was present with her husband at one time when the subject of this deal came up and was discussed but I do not remember what was said. On cross-examination the witness stated that Mary C. Culver had nothing to do with the closing up of this deal in his presence. He further states that he thinks E. W. Culver exhibited

a copy of the resolution authorizing the transfer of the Greene county land.

E. E. Norton testified substantially as follows: On and after November 21, 1911, I had conversations with Mary C. Culver relating to the procuring of a loan of $1,500.00 for the benefit of the Redwood Lumber Company which she secured on her own personal financial statements. She said nothing about any transfer of land by the Culver Company to the Hughes Company and did not mention any deal between the Hughes Company and E. W. Culver and H. A. Culver. She produced a telegram purporting to come from E. W. Culver or J. E. Culver, requesting that she get a loan of $1,500.00 for the Redwood Manufacturing Company.

In rebuttal, Mary C. Culver denied that she had ever accompanied her husband to the office of Grant Hughes or had any conversation with him whatever at any time in which the purchase of the Redwood Lumber Company was discussed. She said that she borrowed $1,500.00 on her own credit for the Redwood Lumber Company because she had received a telegram from her son Joe saying that he needed that amount of money at once. That if the money was placed to the credit of the Redwood Lumber Company it was at her son's, J. E. Culver's, request.

Other facts will be referred to in the opinion. The court found that the deed of the Culver Lumber Company of the date of April 24, 1911, was executed without any authority from the Culver Company and was a fraud upon it and a decree was entered cancelling the deed. The court also cancelled the deed from the Hughes Manufacturing & Lumber Company to Flack and from Flack to Hughes.

It appears that Mary C. Culver and the other stockholders of the Culver Company executed a deed to C. L. Flack, to a part of these lands, dated November 5, 1914. The court also cancelled the deed from Mary C. Culver and the other stockholders to Flack.

The attorneys for the plaintiff filed a petition to enforce an attorney's lien on these lands. Upon the final hearing upon this branch of the case the decision of the chancellor was against Flack and the decree also provided that the attorneys were entitled to enforce their lien against the lands for their fees.

Partlow & Shane and *Block & Kirsch,* for appellants.

1. The suit should have been brought in the name of the corporation. 104 U. S. 450; 96 Ark. 282.

2. The deed was signed by the proper officers, the seal attached and recited that it was authorized by resolution of the board of directors. The presumption is that it was executed according to law and the burden is on those who dispute the existence of the authority. 23 Am. Dec. 728 and note; 2 Thompson on Corp., § 1928; 12 Cent. Dig., §§ 1728-9; 5 Dec. Dig., § 432. The authority may be shown otherwise than by the official records. 62 Ark. 7; 79 *Id.* 745; 89 *Id.* 435; 104 U. S. 192; 2 Col. 226.

3. The deed was ratified by acquiescence and affirmative action. 2 Morawetz on Pr. Corp. (2d Ed.), § 623; 89 Ark. 435; 103 *Id.* 283; 104 W. S. 192; 13 C. C. A. 420; 7 *Id.* 253.

4. It was error to sustain the demurrer as to the attorney's lien.

Geo. G. Dent and *R. E. L. Johnson,* for appellee.

1. The act of making the deed was primarily beyond the corporate power—*ultra vires.* 131 Mass. 258; L. R. 7, H. L. 653; 8 S. W. 396; 26 U. S. (Law Ed.) 950; 71 Fed. 787; 10 C. C. A. 415.

2. The president and secretary were not authorized to execute the deed as required by the by-laws. 103 Ark. 283; 62 *Id.* 7; 2 Morawetz on Pr. Corp., § 628; 71 Fed. 799; 152 U. S. 346; 62 Ark. 33; 7 Wall. 636; 84 Ark. 444.

3. The deal was that of H. A. and E. W. Culver and no consideration passed to the corporation.

The suit was properly brought as a stockholders' bill. 3 Pom. Eq., § 1095 note; 2 Cook Stockholders, § 741; 18 How. 341; 104 U. S. 450; 27 N. E. 487; 10 Cyc. 978; 15 S. W. 448.

4. No acquiescence or ratification is shown. There were no laches. 2 Cook on Corp., § 731; 4 Thompson on Corp., § 4572; 121 Ala. 131; 81 Ark. 296; 76 *Id.* 53; 91 U. S. 587.

5. The deed to Flack was void for fraud, and failure to perform conditions.

6. The lien was fixed by contract. 179 S. W. 577; 21 Atl. 712.

HART, J. (after stating the facts).

(1-2) It is first insisted that the suit should have been brought in the name of the Culver Company and not in the name of Mary C. Culver. It will be remembered that Mary C. Culver owned practically all the stock in the corporation and that the fraudulent conduct complained of was that of the managing officers of the corporation. The directors were the guilty parties in the sale of which complaint is made. The directors who were charged with wrongdoing and the corporation itself were made parties defendant and under the circumstances we think the plaintiff was entitled to maintain the action in her own name. Where the managing directors of the corporation are the guilty parties, it cannot be said that the management of a suit to uncover their fraud should be left under their control. *Red Bud Realty Co.* v. *South*, 96 Ark. 281; Pomeroy's Equity Jurisprudence, 3rd ed., Vol. 3, § 1095; 10 Cyc. 978-980.

(3) It is contended by counsel for the defendants that there is a conclusive presumption that the officers who executed the deed were authorized to do so. The by-laws authorized the president and the secretary of the Culver Company to execute deeds when authorized to do so by the board of directors. In the case of *Sibly* v. *England*, 90 Ark. 420, the court held that because a certified copy of the record of a deed is admis-

sible as evidence, under the statutes of this State, to prove the execution of the deed and that the seal was attached, the presumption arises that the officer who executed the deed was authorized to do so. There is a class of cases which hold that where the act in question is that of one representing the corporation as a general agent whose authority depends on compliance by himself with the preliminary regulations, the presumption of regularity against the corporation is conclusive. The rule is said to be founded on the very limited opportunities of the public to know with certainty the circumstances of the internal management of the corporation. The rule, however, is only applied in those cases where one in good faith has advanced value on the faith of the presumption. *Louisville Trust Co.* v. *Louisville, N. A. & C. Ry. Co.*, 22 C. C. A. 378, and cases cited. The principle of the right of the public to conclusively presume that the corporate acts are valid as above stated and to proceed on that presumption apply only in cases of a *bona fide* purchaser for value, without notice of the defective act of the corporation. Hence, it is not necessary for us to decide this question; for the Hughes Company was not a *bona fide* purchaser for value.

(4) In the instant case the record shows that neither the Culver Company nor Mary C. Culver, who owned nearly all its stock, ever received any part of the consideration for the deed or reaped any benefit from it. The whole consideration of the deed went to E. W. Culver and H. A. Culver and the officers of the Hughes Company knew this fact. They had notice of the illegal appropriation of the consideration for the deed and knew that the consideration passed to the benefit of H. A. Culver and E. W. Culver. Therefore this does not belong to that class of cases where one in good faith has advanced value on the faith of the presumption of the regularity of the acts of the officers of the corporation and the corporation is not permitted to prove to the contrary. Under the rule above announced in *Sibly* v. *England* it was incumbent upon

Mary C. Culver to satisfy the court that the president and secretary acted beyond their authority. On this point it is quite clear that the president and secretary were not authorized by the board of directors to execute in the name and in behalf of the corporation the deed in question. The records of the corporation were produced and did not show that the board of directors ever authorized the execution of the deed. The president and secretary had no authority to execute the deed by virtue of their offices. They could only do so under the direction or approbation of the board of directors.

H. A. Culver testified in positive terms that no such resolution was passed by the board of directors and Mary C. Culver testified that she did not know that the deed had been executed and gave no such authority. The records of the corporation do not show that any such resolution was passed by the board of directors.

It is next contended that a corporation may approve the unauthorized acts of its agents and make them their own and that this may be done directly or indirectly. We do not think, however, the facts and circumstances disclosed by the record show any ratification on the part of the corporation or by Mary C. Culver.

(5) Counsel for the defendants insists there was a ratification because the records of the corporation show that at a call meeting on December 16, 1912, the board of directors passed a resolution reciting that there being no further assets of the corporation, nor indebtedness, the president and secretary are authorized to wind up all the affairs of the corporation and to surrender to the State of Arkansas its charter. Mrs. Culver did not know that this action had been had by the board of directors and there is nothing to show that she in any way was participating in the meeting. Section 957 of Kirby's Digest provides that a corporation may surrender its charter by resolution adopted by the majority in value of the holders of the stock. Hence

we are of the opinion that there was no ratification of the execution of the deed in question.

(6) It is also insisted that Mary C. Culver is barred of relief by laches. Her testimony shows (and no attempt is made to contradict it) that as soon as she discovered the fraud, she submitted the facts to an attorney in Arkansas and filed the present suit as soon as he had completed his investigation and advised her to do so. Under these circumstances she was not guilty of laches. Besides, there were no intervention of equities in favor of the defendants, and the delay, if any, did not work any injury to the defendants. Hence, she was not barred by laches. *Tatum* v. *Arkansas Lumber Co.*, 103 Ark. 251.

In November, 1914, Mary C. Culver and the remaining stockholders and officers of the Culver Company executed a quitclaim deed to C. L. Flack to a one-half interest to all the lands involved in this suit. C. L. Flack was permitted to intervene and set up his rights under the deed. A demurrer to his intervention was sustained by the court, and in this, it is insisted that the court erred. We need give this point but little consideration. The record shows that a reply was filed to this intervention.

Mary C. Culver testified that the deed in question was executed and only to be delivered to Flack under certain conditions which were never performed by him, and for that reason the deed was not delivered. She is the only witness who testifies on this point. Neither Thos. Hughes nor Flack, President and Vice President of the Hughes corporation, have seen fit to testify in the case. The testimony of Mary C. Culver on this point was sufficient to entitle her to a decision on the merits of the case and it becomes immaterial that the chancellor sustained a demurrer to the intervention of Flack.

(7) Finally it is insisted that the court erred in permitting the attorneys of Mary C. Culver to file an attorney's lien. This is a matter that could only concern Mary C. Culver. Having decided that the

defendants have no interest in the lands, they have no cause of complaint and are not entitled to have that question heard on appeal.

The decree will be affirmed.

LEIGHTON v. LEWIS.

Opinion delivered November 6, 1916.

CONTRACTS—AGREEMENT FOR "PLOWING AND LEVEE FIXING."—Appellee rented certain rice land to appellant, which appellant was to cultivate. Appellee agreed to furnish water, but if he failed to do so he agreed to pay to appellant "the reasonable value of the plowing and levee fixing" done on the land up to the time notice was given of appellee's inability to furnish water. *Held*, the parties used the word "plowing" in its restricted sense only, that is turning up the soil to prepare it for bearing crops.

Appeal from Arkansas Chancery Court; *Jno. M. Elliott*, Chancellor; affirmed.

Eugene Lankford, for appellant.

The question for this court is simply the proper construction of the clause in the contract that should appellee be unable to put down a well, etc., suitable for raising rice, he shall pay the reasonable value of the *plowing and levee fixing*.

1. Construing the contract under the rule in 74 Ark. 241, plowing includes double discing, harrowing, drilling, etc., as charged for by appellant, and levee fixing includes plowing down old levees and building new ones. Plowing should not be restricted to simply using a turning plow or furrowing the land with a *plow*.

2. Appellant was also liable for the hauling done.

John L. Ingram, for appellee.

All appellant was entitled to was for "plowing, $165.00, and making new levees, $50.00." This was allowed him. He agreed to do the hauling. Appellant was not liable for harrowing, discing, drilling, rolling, etc.—they are not *plowing*. The decree is right but

on cross-appeal appellee should recover for coal $44.00 and $165.00 for plowing.

HART, J. Geo. C. Lewis instituted this action in the chancery court against A. C. Leighton to enforce a landlord's lien for rent and supplies.

Lewis and Leighton entered into a written contract whereby the former rented to the latter his farm to be cultivated in rice. The contract provided that the tenant should prepare the land, plant it, distribute the water, gather and haul the rice to the mill. It further provided that the landlord should pay the expenses of operating the pumping plant, including the salaries of the engineers, fuel, oil, etc., and also pay for the necessary seed rice to sow the farm.

The lease contract also contained the following: "It is understood that the first party is to put down a well and pumping plant, suitable for raising rice on the said place at once. However, should the first party for any reason fail to get a well suitable to irrigate the said place for rice as aforesaid he shall not be liable in damages in any amount to the second party for such failure. But he shall pay to the second party the reasonable value of the plowing and levee fixing done on the said place by the said second party up to the time when the second party be notified of such failure." The material facts are as follows:

The plaintiff attempted to dig a well as required by the contract but was unable to get water to irrigate the one hundred and ten (110) acres of land embraced in the lease contract. He only got water sufficient to irrigate about thirty acres of the land. The plaintiff furnished the defendant feed to the amount of $181.30.

The defendant filed a counterclaim to the action and was allowed by the court, $165.00 for plowing 110 acres of land. The court also allowed him $50.00 for making new levees. The defendant charged for other items which were not allowed him by the court. Among them were the following:

Double discing 110 acres at $2.00 per acre...	$220.00
Plowing down old levees.....	18.00
Dragging ground to level it.....	55.00
Drilling 110 acres at $.50 per acre.....	55.00
Harrowing 110 acres at $.30 per acre.....	33.00
Rolling 40 acres at $.50 cents per acre.....	20.00

The chancellor was of the opinion that none of these last mentioned items came within the terms of the contract. He only allowed the defendant $215.00 comprising the items above stated. A decree was entered in accordance with the opinion of the chancellor and the defendant has appealed.

The correctness of the decision of the chancellor depends upon the construction to be given the words, "plowing and levee fixing" as used in the contract. Webster defines a plow as an implement, drawn by horses or other power, for making a furrow in and turning up the earth to prepare it for sowing or planting. The Century Dictionary defines a plow as an agricultural implement drawn by animals or moved by steam power, used to cut the ground and turn it up so as to prepare it for the reception of seeds. To plow is defined by Funk & Wagnalls as to break up or turn up the surface of the land with a plow.

The chancellor considered the word "plow" as used in the contract in its more restricted and literal sense and in this we think he was correct. Double discing is defined by one of the defendant's witnesses as leveling and preparing the ground for a seed bed with a disc after it had been broken up. He defined drilling the 110 acres as planting the rice and said that part of the harrowing was done before the rice was planted and part of it afterwards.

Under the terms of the contract each of the parties to it was to have one half of the rice which was raised. The parties evidently realized that there was a risk to be run in digging the well and provided what expense or burden was to be borne by each one in case the well failed. The landlord was to bear the expense of digging the well and if he failed to get a well suitable to irrigate

the place for rice, he was to pay the tenant the value of the plowing and levee fixing. He failed to get the well and it seems to us that the parties used the word "plowing" in its more limited or more restricted sense in the contract. That is to say they used it in the sense of turning up the soil to prepare it for bearing crops. If the word "plow" is to be considered in its most enlarged sense, the landlord would have had to have borne the whole expense and the tenant would have been out nothing. If that had been the case the parties would likely have used the word putting in the rice, instead of "plowing and levee fixing;" for the words putting in rice would have included everything that was to be done by the tenant.

It follows that the decree will be affirmed.

JONES v. TEMPLE.

Opinion delivered November 6, 1916.

1. PROBATE SALES—NECESSITY FOR CONFIRMATION.—A sale of land under order of the probate court, is not completed until confirmed by the court, and the mere recital in a deed that the same was sold pursuant to the orders of the court, is not evidence that the court approved the sale.
2. PROBATE SALES.—CONFIRMATION.—No formal order of confirmation is necessary, but in order for the sale to be valid there must be something which expresses unqualifiedly the approbation of the court.
3. TAX TITLES—CONTINUOUS POSSESSION.—Where a purchaser of land has been in actual possession of the land under a tax deed for more than two years, he acquires title, regardless of the validity of the tax sale.
4. EVIDENCE—ADVERSE POSSESSION—BURDEN OF PROOF.—On the issue of adverse possession the burden of proof is always on the party who asserts it.
5. ADVERSE POSSESSION—SUFFICIENCY OF THE PROOF.—Where defendant lived away from the land in issue most of the time, and where the house on it was unfit for human habitation, it will be held that he was not in the actual occupancy thereof.
6. LACHES—DEFINITION—ACTION TO CLEAR TITLE.—Laches is not mere delay, but is delay that works disadvantage to another; so long as the parties are in the same condition, one of them claiming title to certain land, may assert it at any time within the limits of the law.

7. TITLE—ABSENCE OF CLAIMANTS—PRESUMPTION OF DEATH.—Where certain persons left the neighborhood in 1878, and were not heard of again, and where an action affecting title to land, in which they might have had an interest, was brought in 1914, their death will be presumed.

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

B. L. Herring and *Will G. Akers*, for appellant.

1. Appellee can prevail only on the strength of her own title, not on the weakness of the appellants. 89 Ark. 289; 90 Ark. 420; 97 Ark. 368; 8 Michie's Enc. Dig., Ark. Rep., 403, § 6.

Where it can be gathered from the whole record that a sale of land of an estate pursuant to an order of the probate court had the approbation of the court, no formal order of approval was necessary. 72 Ark. 339, 342; 76 Ark. 146, 149.

2. Appellee's claim is stale. Even if the proceedings of the probate court evidencing the sale of the lands of the W. K. Duncan estate, were such that they could have been disregarded had a timely suit been brought, they should not now be open to such attacks, after the lapse of forty-five years.

While bare lapse of time is not of itself laches, yet acquiescence in the decrees and orders of courts of record for a great length of time is laches. 55 Ark. 86, 92; 210 Ill. 471, 102 Am. St. Rep. 180; 16 Cyc. 156, Sec. VIII; 44 Ark. 267, 270.

Appellant has title by adverse possession for two years, the statutory period.

D. A. Bradham, for appellee.

1. A judicial sale passes no title until it is confirmed, and confirmation will *not be presumed*, but must be shown. 47 Ark. 419; 45 Ark. 41; 54 Ark. 481; 111 Ark. 174-75; 62 Ark. 213. In this record there is no hint at a confirmation, but to the contrary the record shows affirmatively that there was no confirmation,

hence, *Ousler* v. *Robinson*, 72 Ark. 339-342, relied on by appellant, does not apply.

2. No laches is shown. The lands involved here were forfeited to the State under void sales and so remained until part of the lands were conveyed to Ed. Jones in 1916, and part to appellant in 1909. They have paid taxes only for one or two years since then, whereas appellee and her grantors have paid most of the taxes thereon since the date of these sales. The only improvement placed upon the lands was a partly built log house, not completed for habitation until after this suit was brought. No enhancement in value of the lands is shown. The facts stated in *Gibson* v. *Herriott*, 55 Ark. 93, are not helpful to appellant's contention. See also 103 Ark. 251.

3. Appellant's claim of title under the two years' statute of limitation is contrary to the facts shown in evidence. The burden was on him to prove such adverse possession for the statutory period. 1 Cyc. 1143-A; 61 Ark. 464; 65 Ark. 422. See also 23 Ark. 735; 92 Ark. 323.

4. For all legal purposes a presumption of death arises from the continued and unexplained absence of a person from his home or place of residence without any intelligence from or concerning him for a period of seven years. 104 Am. St. Rep. 198, *et seq.*, and note; 22 Ark. 90.

HART, J. Effie Temple instituted this action in the chancery court against J. F. Jones to cancel the tax titles to certain tracts of land held by him. The chancellor granted the relief as to three of the tracts and entered a decree cancelling the title of the defendant to these three tracts. Two of these tracts comprised forty acres each and the other one eighty acres. The defendant has appealed. No appeal was taken by the plaintiff and for that reason we need only consider the three tracts of land as to which relief was granted her. The material facts are as follows:

The lands involved in this appeal were conveyed by the United States to the State of Arkansas as swamp and overflowed lands and in 1859 the State conveyed one hundred and twenty (120) acres of the lands to W. K. Duncan and the remaining forty to Geo. J. Duncan, a brother of William K. Duncan. In 1911, G. W. Duncan and Florence F. Robertson, the sole heirs at law of William K. Duncan, who had died, conveyed the land to Effie Temple. William K. Duncan died intestate about the year 1861. Administration was had upon his estate and the record shows that the administrator of his estate was ordered to sell his lands. There are no records of the probate court confirming any sale made by the administrator; nor is there any order referring to any such sale. There was introduced, however, a recorded deed from the administrator to Robert S. Parker conveying to him all the lands remaining unsold of said estate, including by a specific description, one of the forty acre tracts involved in this suit. All three of the tracts involved in the suit were forfeited to the State of Arkansas for the taxes due for the years 1870, 1871, 1872 and 1873. They remained upon the books in the State Land Office as State lands under the above forfeitures until July 9, 1906, when they were sold by the State to Ed. Jones. They were conveyed by Ed Jones to J. F. Jones on June 7, 1911. The chancellor found that the forfeiture of the lands to the State for the non-payment of taxes was void and it is not claimed upon this appeal that the chancellor erred in so finding. Therefore it is not necessary to further consider this feature of the case. It is well settled that the plaintiff must recover, if at all, upon the strength of her own title. The defendant seeks to reverse the decree as to the one hundred and twenty (120) acres to which plaintiff deraigns title from William K. Duncan by adverse possession under his tax deed. Defendant claims that plaintiff had no title to the forty (40) acres owned by Geo. J. Duncan because it is not shown that he is dead, and that G. W.

Duncan and Mrs. Florence F. Robertson were his heirs at law and had a right to convey the lands.

We will first consider the one hundred twenty (120) acres owned by William K. Duncan in his lifetime.

It is first contended by counsel for the defendant that the plaintiff acquired no title in these lands because the heirs at law of William K. Duncan had no interest therein. They insist that the title to these lands became invested in Robert S. Parker by the probate sale after the death of William K. Duncan. As we have already seen, the record shows that the probate court made an order for the administrator to sell the lands but there is nothing in the record or any order of the court confirming this sale. There was introduced, however, a deed from the administrator to Robert S. Parker, reciting that he had sold the lands pursuant to the order of the court and that Robert S. Parker was the highest bidder and the lands were knocked off to him.

(1-2) It is insisted by counsel for the defendant that this amounted to a confirmation of the sale and they cite to sustain their contention the following cases: *Ousler* v. *Robinson*, 72 Ark. 339; *Cowling* v. *Nelson*, 76 Ark. 146; *Jacks* v. *Kelley Trust Co.*, 90 Ark. 548. We do not think either one of those cases sustains the contention of counsel. In the first mentioned case there was an order of the court showing that the Commissioner who made the sale appeared in court and acknowledged the deed set up by the defendant and that the court ordered a copy of the order of acknowledgment to be endorsed on the deed. The order further recites that a writ of possession should be issued on demand of the purchaser. Thus there was an affirmative showing by the record itself that the court approved the sale. So too in the second mentioned case there was an order of record reciting that the Commissioners produced to the court their deed to the purchaser for the land, described it and the order concluded, "which is in all things approved and confirmed by the court."

The court said that while this related to the deed, it identified the prior transaction wherein the sale was ordered and must be treated as a confirmation of the sale. In the last mentioned case the deed to the purchaser had endorsed on it the words, "approved: M. T. Sanders, Judge of Phillips Circuit Court." The circuit court at that time exercised chancery jurisdiction and the court held that the endorsement was in effect an approval by the court. So it will be seen that in each of these cases there was an order of record or a formal notation on the deed itself signed by the judge showing that the sale had been made and the approval thereof. No such showing is attempted to be made in the present case. The recitals made in the deed that the land was sold pursuant to the orders of the court is no evidence whatever that the court approved the sale. The sale was not completed until confirmed by the court. The reason is that the court is the vendor and will confirm or reject the reported sale, or suspend its completion as the law and justice of the case may require. *Miller* v. *Henry*, 105 Ark. 261, and cases cited. This case is also authority that the state of record in the present case does not fairly admit of a construction that the court made an order confirming the sale. It is true that no formal order of confirmation is necessary, but as stated in the last-mentioned case, there must be something which expresses unqualifiedly the approbation of the court.

(3-4) Where a purchaser of land has been in actual possession of the land under a tax deed for more than two years, he acquires title, regardless of the validity of the tax sale. *Walker* v. *Helms*, 84 Ark. 614. The defendant claims title to the one hundred and twenty (120) acres formerly owned by W. K. Duncan on the ground of adverse possession for two years under his tax deed. On the issue of adverse possession the burden of proof is always on the party who asserts it. *Newman* v. *Peay*, 117 Ark. 579. The defendant obtained title to this land on June 7, 1911, from Ed

Jones, who purchased from the State, after the land had been forfeited to it for the non-payment of taxes.

The defendant testified that in July, 1911, he built a house on the land, cleared some of the land about it and that he has had the actual adverse possession of the same from that date until the filing of this suit on the 29th day of June, 1914; that he lived in the house himself except when the overflow prevented him; that he taught school in Little Rock during eight months of the year and that he taught there in 1911; that he taught there again during the years 1912, 1913, 1914 and 1915; that during the time he was away his father had charge of the house and in 1914 rented it to a man named Clint Sherard.

(5) Another witness for him testified that his sister lived in the house a part of the time. Other witnesses were introduced whose testimony tended to corroborate the defendant. We do not deem it necessary, however, to set out all this testimony and discuss it in detail; for we think the chancellor was correct in holding that a preponderance of the evidence did not show that the defendant had held the land for two years adversely under his tax deed. The testimony on the part of the plaintiff tended to show that no building was placed on the land until sometime in 1912, less than two years before the institution of the present action. Again the evidence shows that the building was a one-room shack, that it was never completely floored or covered until 1914. That it had no chimney and was not fit for habitation and that the door to it swung open most of the time; that there were no outhouses or stables; that no clearing was made around the house and that there was no path leading to it; that there was a path some little distance away which passed along the bank of the lake but this was made by stock traveling along there. Several witnesses stated that they frequently passed there hunting for stock and that there was no evidence of any one living there. When we consider that the defendant lived in Little Rock for most of the year and that the house was not

fit for human habitation in connection with all the other facts and circumstances adduced in the evidence we are of the opinion that there was no actual occupancy of the land by adverse possession by the defendant for two years under his tax title. *Files* v. *Jackson*, 84 Ark. 587; *McComb* v. *Saxe*, 92 Ark. 321.

(6) Again it is contended by counsel for the defendant that the plaintiff is barred of her right to recover by laches, but we cannot agree with counsel in this contention. It is true the forfeitures to the State for the non-payment of taxes occurred in 1872 or 1873 and that the plaintiff and her grantors did not commence the present suit until in 1914, but there is nothing in the record tending to show that the defendant was injured by the delay of the plaintiff and her grantors in seeking the relief prayed for in the present action. There was no loss of evidence or intervention of equities in behalf of the defendant. There is nothing whatever to show that the defendant was injured by the delay in bringing suit. It is well settled that aches is not mere delay, but is delay that works disadvantage to another. So long as parties are in the same condition, the party claiming the right to the land may press his right at any time within the limits of the law. It is only when he takes no steps to enforce his right until the condition of the other party has in good faith become so changed that he cannot be restored to his former state, if the right be then enforced, that delay becomes inequitable and operates as estoppel against the assertion of the right. *Tatum* v. *Arkansas Lumber Co.*, 103 Ark. 251, and cases cited.

As to the forty acres of land which Geo. J. Duncan formerly had, it is claimed by the defendant that there is nothing to show that he is dead and that G. W. Duncan and Mrs. Robertson were his heirs at law. Therefore they insist that Mrs. Robertson and G. W. Duncan did not have any title in said lands to convey and that plaintiff did not acquire any title thereto by the execution of the deed to G. W. Duncan and Mrs. Robertson.

(7) William K. Duncan had two children, viz.: G. W. Duncan, and Mrs. Robertson. He also had two brothers, Geo. J. Duncan, and John Duncan. The last named brother died soon after the death of William K. Duncan, without leaving a widow or children. Geo. J. Duncan had a son named James. The evidence shows that Geo. J. Duncan and his son left the neighborhood in which they resided sometime prior to 1878 and have been gone ever since. During which time none of their relatives or acquaintances have ever heard from them or have any knowledge as to their whereabouts. Under these circumstances there was a presumption of their death and the record shows that Geo. W. Duncan and Mrs. Robertson were their sole heirs at law. The execution of the deed in question by them, therefore, conveys title to the plaintiff to the land in question. *Carrier* v. *Comstock*, 108 Ark. 515. See also case note to 104 A. St. Rep. p. 198.

The decree will be affirmed.

CURTSINGER v. BURKEEN.

Opinion delivered November 6, 1916.

TAX SALES—CONFIRMATION—INADEQUATE PRICE—AMBIGUOUS DISCRIPTION.—Where lands are advertised and sold for the non-payment of an improvement assessment, under an ambiguous description, and are sold for a grossly inadequate consideration, the court has a discretion to refuse to confirm the sale.

Appeal from Greene Chancery Court; *C. D. Frierson*, Chancellor; affirmed.

R. P. Taylor, for appellant.

It was the duty of the court, in the absence of fraud, irregularity or mistake affecting the validity of the sale, to confirm the same and to approve the deed made to the appellant. 111 Ark. 165; 108 Ark. 366; 77 Ark. 216; 66 Ark. 490; 86 Ark. 255.

Wm. F. Kirsch and *Partlow & Shane*, for appellee.

It is the settled law of this State that a tax sale of lands *en masse* is void. 83 Ark. 174; 87 Ark. 428; 88 Ark. 395; 94 Ark. 221; 61 Ark. 414.

In judicial sales the sale of several parcels of land *en masse* constitutes an irregularity such as makes the sale voidable and justifies the court in setting the sale aside on proper application made in apt time. 27 Am. & Eng. Ann. Cases 616 and note.

R. P. Taylor, for appellant in reply.

Appellee's contention as to the sale *en masse* is fully met by this court's decision in *Nix* v. *Draughon*, 56 Ark. 240, where it is said: Where defendant made no objection to decree condemning his land to be sold as one tract, he cannot, after sale, for the first time, object that it was not sold in sub-divisions. See also 24 Cyc.36.

SMITH, J. This cause grows out of a hearing of exceptions to the confirmation of the commissioner's report of sale in the matter of a foreclosure proceeding brought by the collector of Greene county, Arkansas, on behalf of Eight-Mile Drainage District No. 2 against certain lands, including the lands in suit, for the non-payment of certain assessments due the drainage district. In the course of the foreclosure proceedings the lands involved in this suit were sold to appellant's assignor. Sometime after the one year period of redemption appellee filed exceptions to the confirmation of the report of sale, in which she deraigned title in herself by mesne conveyances from a forfeiture to the State of Arkansas for non-payment of taxes.

The exceptions were heard upon an agreed statement in which the following facts were recited: That on December 16, 1907, in the course of the organization of Drainage District No. 2 and the levying of assessments upon lands embraced in said district an assessment was duly made by the county court upon the following described lands: "North half of Lots 27, 28 and 29 of Crawford's Addition to Paragould." That the assess-

ments for the years 1911, 1912 and 1913 being delinquent a decree of foreclosure was obtained, under which the lands were condemned to be sold under the above description, and they were thereafter sold under that description by the commissioner appointed to make the sale. That the land was described in the sale under which it forfeited to the State as "North half of Lots 27, 28 and 29 of Crawford's Addition to Paragould," and was so described in the deed under which appellee acquired her title. That said land was advertised and sold *en masse* for the drainage taxes pursuant to said decree for the amount for which a lien had been decreed against said lots.

It is not denied that the lots are valuable and the price for which they were sold is grossly inadequate as compared with their actual value as the taxes were only a nominal sum, being a portion only of the betterment, or enhanced value of the lots resulting from the proposed improvement.

It is also shown "that said lots run east and west with a frontage of 50 feet at the east end of each, said Lot 28 being immediately south of said Lot 27 and said Lot 29 being immediately south of said Lot 28."

Five exceptions to the report of sale are discussed in the brief; but we shall not consider them all.

It is urged that the sale was void because the lots were sold *en masse*, but a majority of the court do not think this exception is well taken.

It is insisted by appellee that the description to be valid must be definite and certain so that the lands may be located, and the correctness of this contention is conceded; but appellant says the description employed meets this requirement, and the majority of the court agree with him, although the writer and the Chief Justice are of the contrary opinion. Appellant contends that the description set out above describes the north half of the parcel of land which has been divided into three lots and numbered for convenience as Lots 27, 28 and 29; while appellee contends that the description means the north half of each lot, leaving an alternating

south half of a lot between them; and this was evidently the view of the court below in passing upon the exceptions.

In the recent case of *Wells* v. *Lenox*, 108 Ark. 366, there is a review of the cases which deal with the subject of confirmation of judicial sales made in substantial conformity to the decree of sale, and it was there said, as it had been several times previously said, that when property is sold at a judicial sale, in the absence of fraud and unfairness, mere inadequacy of price, however gross, does not invalidate the sale. But the doctrine of that case is that, while courts may generally be expected to confirm sales which have been conducted according to the direction and upon the terms prescribed by the court in ordering the sale, unless intervening circumstances should make it unwise or unjust to do so, yet the courts are not compelled to confirm them because they have been so made, and the purchaser does not, under all circumstances, have the absolute right to rely upon his expectation of securing his deed. So we think that there was not here any absolute duty resting upon the court to confirm the sale of these lots merely because the sale conformed to the directions of the court ordering it. The matter was called to the attention of the court that a description had been employed which was, at least, ambiguous, if it was not entirely void, a question about which there might be, as there is, indeed, here, a difference of opinion as to its sufficiency. And in this connection it was pointed out to the court below that valuable property had been sold for the nominal amount of the drainage tax due thereon, and that upon the confirmation of this sale the owner's title is gone, and if the lots bring nothing in excess of the tax due thereon, then the owner has lost his land and will get nothing for it. While the Legislature has seen fit to adopt a drastic and somewhat summary method of enforcing the payment of these assessments, it is certainly the policy of the law that the lands thus sold should bring the largest sum obtainable, especially as the law requires the lands to be sold to the highest bidder, and the owner of lands who thus loses them gets

only the excess over the taxes, penalty, interest and costs. Who can know that these lots might not have been sold at a price bearing some fair proportion to their value if they had been more accurately described and there had been no doubt of the sufficiency of the description to pass the title in the event of confirmation?

In view of the circumstances of this case we think the court had the discretion to refuse a confirmation of this sale, and its action in so doing is affirmed.

BROOKS v. STATE.

Opinion delivered November 13, 1916.

1. SEDUCTION—CORROBORATION OF PROSECUTRIX.—Where defendant is prosecuted for the crime of seduction it is necessary for the testimony of the prosecutrix to be corroborated, both as to the promise of marriage and the sexual intercourse.
2. SEDUCTION—CORROBORATION OF PROSECUTRIX.—In a prosecution for seduction, the testimony of the prosecutrix held to be corroborated by that of other witnesses, who had held conversations with the defendant relative to the crime.

Appeal from Sevier Circuit Court; *Jefferson T. Cowling*, Judge; affirmed.

Steel & Lake and *James D. Head*, for appellant.

1. There is no corroboration of the prosecuting witness either as to the promise of marriage or the intercourse. 77 Ark. 16, 23, 468; 95 *Id.* 555; 92 *Id.* 421.

2. Prejudicial evidence as to other acts was admitted.

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

1. The evidence is clearly corroborative of the testimony of the prosecutrix. 77 Ark. 472; 40 *Id.* 482; 92 *Id.* 421.

2. No prejudicial evidence was admitted. The evidence complained of was excluded.

HART, J. Clayton Brooks was convicted of the crime of seduction and prosecutes this appeal from the judgment of conviction.

(1) It is conceded that the testimony of the prosecuting witness established the crime, but it is insisted that there is not sufficient evidence to sustain the verdict of the jury for the reason that there is no corroboration of the prosecuting witness. In such cases before a conviction can be had it is necessary for the testimony of the prosecutrix to be corroborated, both as to the promise of marriage and the sexual intercourse. *Nichols* v. *State*, 92 Ark. 421, and *Cook* v. *State*, 102 Ark. 363.

According to the testimony of the prosecutrix the first act of intercourse occurred in February, 1915, and the illicit relation continued until the defendant left the neighborhood in July of that year. On November 12, 1915, a child was born to the prosecutrix and a short time thereafter she made an affidavit before a justice of the peace charging the defendant with seduction. Before the warrant was issued the justice of the peace was requested to interview the defendant about the charge and did so. He said that he went to the home of defendant's parents and found the defendant hiding in a closet with a gun; that defendant seemed to be excited; that he told the defendant he had come over to see if he would do the right thing and marry the girl; that the defendant said that he was willing to marry the girl but that his father did not want him to; that the defendant ran off before the warrant could be served on him and remained away from the State until after an indictment was returned against him and then came back and gave himself into custody; that after the defendant was indicted the witness again met him and in talking about the crime the defendant said he had come to the conclusion he would be convicted but that he would get a pardon before he went to the penitentiary.

Doctor Clingham stated that he was called to the home of the prosecutrix and after ascertaining that she was pregnant he went to see the defendant; that he

told the defendant that if he wronged the girl, he knew it and that if he did do it, he ought to go ahead and marry her and the defendant answered that if he wanted to marry, that he had just as soon have her as any girl but that he did not want to marry anyone until he talked to his father about it.

The mother of the girl testified that the defendant had been going with the prosecutrix for the past two years; that she went out frequently with him and that the defendant visited her regularly at her home. She also stated that her daughter during this period rarely ever kept company with any other boy.

(2) The testimony we have just recited was sufficient to corroborate the prosecuting witness and warranted the jury in returning a verdict of guilty against the defendant. *Nichols* v. *State*, 92 Ark. 421; *Lasater* v. *State*, 77 Ark. 472.

It is true the defendant denied his guilt and introduced witnesses to corroborate his testimony but the credibility of the witnesses was submitted to the jury under proper instructions and for the reasons already given the testimony was sufficient to warrant the conviction.

A reversal of the judgment of conviction is also asked on the ground that the court erroneously permitted two witnesses to testify that the defendant had told them that he had had sexual intercourse with other girls. On this assignment of error we need only say that a careful examination of the record shows that the court did not permit this testimony to go to the jury but specifically excluded it from them.

The judgment will be affirmed.

McDOUGALD v. CHILDS.

Opinion delivered November 13, 1916.

PUBLIC LANDS—FRAUD IN PROCURING PATENT—RIGHTS OF GRANTEES OF PATENTEE.—Appellee and one M. procured a deed to certain land, but finding that no title was acquired thereby it was agreed that M.'s son should homestead the land and after securing a patent that a deed should be given to appellee for the land, appellee advancing the money necessary to procure the patent. The agreement was carried out, and appellee occupied portions of the land for over twenty years. The patentee of the land thereafter conveyed to appellant, who sought to recover the land on the theory that the agreement between appellee and M. and his son was invalid as being in violation of §§ 2289-90, Revised Statutes of the United States. *Held*, the law relating to the issuance of patents having been complied with, and the government not having objected, that a grantee of the patentee was in no position to complain of the transaction upon the grounds of fraud.

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

B. L. Herring, for appellant.

1. The possession of appellee was only permissive. It was never adverse and the burden was on him to prove adverse possession for the required length of time and the quantity of land so held. 79 Ark. 109; 82 *Id.* 51.

2. The land was the homestead of Moman. His wife has never joined in any deed to appellee. Kirby's Dig., § 3901; 57 Ark. 242.

3. One cannot homestead land from the government for another. Rev. St. U. S., § 2289; 19 Wall. 646; 86 S. C. Rep. 219.

J. R. Wilson, for appellee.

1. The testimony shows adverse possession for the requisite time. 74 Ark. 486; 96 *Id.* 612; 82 *Id.* 33; 50 *Id.* 340; 65 *Id.* 427; 43 *Id.* 486; 48 *Id.* 316; 101 *Id.* 163; 80 *Id.* 444; *Ib.* 575; 83 *Id.* 303; 87 *Id.* 625; 90 *Id.* 149; 108 *Id.* 276.

2. Morris Moman, Jr., took his title from the U. S. in trust for appellee. No one except the U. S. can complain. 60 Fed. 34; 32 Cyc. 1060-1; 23 Ill. 91;

47 Kans. 676; 29 Pac. 607; 7 Minn. 286; 20 How. (U. S.) 558; 7 Ind. 277.

3. A wife is not entitled to homestead in lands held in trust for another. 32 Kans. 53; 11 Tex. 346; 8 Minn. 309; 21 Cyc. 508.

4. A patent may be obtained by one in trust for another. 29 Mich. 146; 14 Kans. 259; 19 *Id.* 397; 7 Mo. 610; 61 Am. Dec. 593; 137 Mo. 482; 96 Ark. 612, 613.

Smith, J. This action was brought by appellant as the vendee of the patentee of the eighty acres of land in controversy to recover that land, and the issues in the case grow out of the allegations of the answer. It was alleged in the answer that the quarter section of which the eighty acres in controversy was a part was patented by the United States to Maurice Moman, March 25, 1890, and immediately thereafter, for a valuable consideration, Moman agreed to convey the disputed land to appellee, who was the defendant below, and put him in the actual possession of the land, and that appellee has since been in the open, continuous and adverse possession of said lands, and has paid all taxes due thereon from 1895 to date, and that Moman executed his deed to McDougald without consideration and with the intention of defrauding appellee by conveying to a third party.

There was a motion that Moman be made a party, and this action was taken, and there was a prayer that Moman be required to make appellee a deed, and for general relief, and the cause was transferred to the chancery court where, upon final hearing, the court cancelled the deed from Moman to McDougald and quieted and confirmed the title of appellee as against any claim of either Moman or McDougald.

The evidence is sharply conflicting; but we think the finding in appellee's favor upon the controlling questions of fact cannot be said to be clearly against the preponderance of the evidence.

Appellee and Moman's father procured a deed to this land from a Mr. Belin, but ascertained that no title was thus acquired, whereupon it was agreed that Moman, Jr., should homestead the land and that after the patent had been secured appellee should be given a deed to the land in controversy. Pursuant to this agreement appellee advanced the money to cover the expenses incurred in securing the patent.

Appellee had extended his fence from time to time, and while he had possession of a large part of the land for more than seven years, there was a small part which he had never enclosed, and a somewhat larger portion which had not been enclosed for the full period of seven years; but the parties agreed upon a lane as constituting the dividing line between the portions of the land respectively claimed by them.

It was shown that during all this time appellee paid the taxes on the land in his own name and cleared and improved it; but it is said that this was done in consideration of the permissive possession under which it was held. But, as we have said, we think the evidence sustains the finding that this possession was not permissive, but was adverse.

The real question in the case is whether such an agreement is binding and enforceable if it was made. Appellant points out that the homestead entryman, among other things, must swear that "This application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person, persons, or corporation. * * * That I am not acting as agent of any person, corporation or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly, made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever,

by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself." Sec. 2290, Revised Statutes of the United States.

And upon the authority of the case of *Warren* v. *Van Brunt*, 19 Wallace 646, it is said that Moman could not have made a valid entry of the land except for his own use, and any agreement whereby another person should have an interest in the land is void and cannot be enforced in a court of equity.

Appellee, however, is not seeking affirmative relief. He says he has the possession and the right to the possession under his agreement with Moman. It does not appear that any intention existed upon the part of either appellee or Moman to practice a fraud upon the Government in procuring the patent. The law concerning the issuance of the patent was complied with, and although more than twenty-six years have expired since its issuance, the Government has not complained that any fraud was practiced in its procurement. If there was a fraud Moman was a party to it and a beneficiary of it and he cannot in this proceeding be permitted to defeat his own contract where a recovery must be had by him, or his vendee, upon the strength of their title by showing that this title was acquired by a fraud practiced upon the Government in obtaining the patent. *Scott* v. *Lockey Investment Co.*, 60 Fed. 34; *Johnson* v. *Towsley*, 13 Wallace 72; 32 Cyc. 1060; *Boyd* v. *Mammoth Spring Improvement Co.*, 137 Mo. 482; *Barlow* v. *Barlow*, 47 Kansas 689.

We think the equity of the case is with appellee, and as the finding of the chancellor is not clearly against the preponderance of the evidence the decree will be affirmed.

MANILLA SUPPLY CO. v. TIGER BROS.

Opinion delivered November 20, 1916.

1. CONTRACTS—LIEN FOR SUPPLIES FURNISHED—ENFORCEMENT.—Where appellant rented land to one B. and B. sold the crop to appellee, appellant having at most, only a lien for supplies furnished B. his remedy is in equity to enforce the lien against the proceeds of the crop, in the hands of the purchaser.
2. ACTIONS—JOINDER WHERE THE REMEDIES ARE AT LAW AND AT EQUITY.—Where two causes of action, one properly cognizable at law, and the other in equity, are joined in an action at law, the cause will not be split, and a portion thereof transferred to equity, but the whole will be tried at law, and the equitable remedy will not be enforced.
3. CONTRACTS—RENT AND SUPPLIES TO TENANT OF LAND—IMPROPER JOINDER IN ONE ACTION.—A rented land to B. for a certain rent, and also furnished B. with supplies. B. gathered and sold his crop to C. whom A. sued at law on both causes of action. *Held*, A.'s cause of action for supplies was cognizable in equity, and that the trial court was correct in refusing to grant equitable relief in the action at law.

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

E. L. Westbrooke, for appellant.

1. The wagon bought by Ballard was properly chargeable as supplies furnished, and appellant had a landlord's lien. Kirby's Digest, § 5033; 79 Ark. 427; 80 *Id.* 218.

2. The purchase price of the horse was secured by a lien on the crop. The mortgage did not extinguish the lien; it was merely cumulative. 36 Ark. 96; 56 *Id.* 499.

3. It was error to instruct the jury to find for the defendant at all. Kirby's Digest, § 5984-5, provides for equitable proceedings but all other proceedings must be at law. *Ib.* §§ 5991-4; 36 Ark. 564; 31 *Id.* 411; 39 *Id.* 248; 47 *Id.* 208; 494 *Id.* 20; 51 *Id.* 259. The court should have transferred the cause to equity. 51 Ark. 259; 74 *Id.* 87; 46 *Id.* 272; 74 *Id.* 122; 105 *Id.* 671; 107 *Id.* 73; 60 *Id.* 74.

Little & Lasley, for appellees.

1. The appellant was not the landlord, but only the principal tenant. It had no lien. Kiryb's Digest, § 5037. The instructions were too favorable to appellant. 88 Ark. 189; 89 *Id.* 111.

2. The only remedy was in equity. 36 Ark. 575. Appellant could only sue at law for conversion, but to enforce a lien he must resort to equity. 56 Ark. 499; 77 *Id.* 132; 95 *Id.* 32; 37 *Id.* 164. No motion to transfer was made and the court properly dismissed the case as to the lien for supplies.

McCULLOCH, C. J. Appellant rented land in Mississippi county to one Ballard, the latter agreeing to pay as rent one-fourth of the cotton raised on the premises, and appellant also furnished stock and other supplies to Ballard. Ballard gathered the crop and sold it to appellees, to whom he had previously mortgaged it, and this is an action instituted by appellant against appellees in the circuit court to recover the value of one-fourth of the cotton and to enforce a lien for supplies furnished Ballard.

On the trial of the cause the court submitted to the jury the question of appellant's right to recover the value of its interest in the cotton, but refused to permit a recovery on the account for supplies. The jury found in favor of appellant for the value of the cotton, and an appeal has been prosecuted from that part of the judgment refusing to permit a recovery for the amount of supplies and dismissing the complaint on that branch of the case. The correctness of the judgment in appellant's favor for the value of its interest in the cotton is not questioned, as appellees have not appealed from the judgment. Therefore we need not enter upon any discussion of the question of appellant's right to recover on that branch of the case.

Appellant sues on the theory that the purchase of the cotton by appellees from Ballard constituted a conversion, for which appellant has a right to sue to the extent of its interest in the property. If it be conceded that appellant had such title to the property as would

justify the adoption of that remedy so far as the value of the rent cotton is concerned, it is true beyond question that appellant has only a lien for the amount of the account for supplies, and has no title to the property which would sustain an action for conversion. The remedy on that branch of the case is by suit in chancery to enforce the lien against the proceeds of the property in the hands of the purchasers. *Reavis* v. *Barnes*, 36 Ark. 575.

The statute provides that where there is an error as to the kind of proceedings adopted, the action shall not be dismissed but that the cause shall be transferred to the proper docket. Kirby's Digest, § 5991. This, the court should ordinarily do on its own motion. *Newman* v. *Mountain Park Land Co.*, 85 Ark. 208. But appellant elected to join the causes of action, and the statute does not authorize a splitting of a cause of action so as to transfer a part from the court where the action has been erroneously instituted. The statute contemplates the transfer of the action as a whole and not in parts. There was, therefore, no error committed by the trial court in refusing to enforce the equitable remedy in appellant's favor for the recovery of the amount due on the account for supplies.

Affirmed. HUMPHREYS, J., not participating.

STATE v. ARKANSAS LUMBER COMPANY.

Opinion delivered November 20, 1916.

CRIMINAL LAW—LEGAL HOURS FOR LABOR IN SAW AND PLANING MILLS—NIGHT WATCHMAN.—Act 49, p. 139 Acts of 1905, providing a penalty when laborers in saw and planing mills are required to work more than ten hours in a day, is not violated where the night watchman was required to work twelve hours a day.

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

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

1. The act is not unconstitutional because it prohibits the working of employees more than ten hours per day, without providing for cases of emergency. Many of these "hours of labor" acts have been sustained which did not provide for cases of emergency. 138 Pac. 695; 51 L. R. A. (N. S.) 361; 65 Cal. 34; 113 S. W. 29; *Ib.* 707; 106 Pac. 235; 157 Cal. 61; 26 L. R. A. (N. S.) 242; 100 N. E. 194; 256 Ill. 558; 244 *Id.* 509; 91 N. E. 695; 27 L. R. A. (N. S.) 994; 254 Ill. 579; 98 N. E. 982.

2. The act is not discriminatory in its operation or effect. Cases *supra.* See, also, 78 S. W. 569; 170 Mo. 245; 129 S. W. 124; 98 N. E. 982; 254 Ill. 579.

3. The act applies to a night watchman. Acts 1905, 139; 15 N. W. 45; 185 Ill. 216; 14 Idaho 95; 93 Pac. 369.

B. L. Herring and *Fred L. Purcell,* for appellee.

1. The act is unconstitutional. It is absolute and unconditional in its terms without any provision for emergencies. 59 So. 923; 45 L. R. A. (N. S.) 851, and cases cited.

2. The demurrers were properly sustained. Night watchmen are not "in a department relating to the running and management" of mills.

WOOD, J. Act 49 of the Acts of 1905 provides as follows:

"Section 1. That on and after the passage of this act, ten hours shall constitute a legal day's work for all classes of working men and laborers designated in section two of this act.

"Section 2. This act shall apply to associations of persons, companies, or corporations, engaged in the business of operating or constructing saw and planing mills in this State, and to all working men and laborers now, or hereafter to be employed by any such association, company or corporation, in any department relating to the running and management of said mills."

The third section provides a penalty for violation of the act.

The appellee was indicted for a violation of the above act. The indictment, omitting formal portions, charged that appellee "then and there did exact twelve hours of labor per day of one Tom B. Reddin, the said Tom B. Reddin being then and there employed as night watchman by the said Arkansas Lumber Company, and the said Arkansas Lumber Company did then and there fail to comply with and did violate the provisions of Act No. 49," etc.

The appellee interposed a special demurrer to the indictment, one of the grounds being that, "the indictment charges the defendant with violation of Act No. 49 of the 1905 Acts of the General Assembly of the State of Arkansas in receiving more than ten hours of work from its night watchman at its mill plant on the first day of November, 1915, which is not a public offense, and not prohibited by said act."

The court reserved its ruling on the demurrer until it heard the evidence, which is brought into the record by an agreed statement of facts, as follows: "That on the 2d day of March, 1915, Tom B. Reddin was in the employ of the Southern Lumber Company, a corporation engaged in the manufacture of lumber at Warren, Bradley County, Arkansas; that the duties of the said Tom B. Reddin, as such employee, were the duties of night watchman, and that said duties required him to serve twelve consecutive hours in the discharge of his employ; that as night watchman it was his duty to guard the mill plant and lumber against trespassers, thieves and incendiaries and to extinguish fires, if any occurred, and if in his power, otherwise, if he could not control the fire, to give the alarm; that he was also required at the end of each hour to punch a clock; that part of the time he could take short naps if he desired; that the duties herein enumerated were the only duties he was required to perform at any time during the twelve hours of service."

After hearing the evidence, the court sustained the demurrer, holding that "the night watchman is not shown by the evidence to be one of those employees who come within the scope of the act."

The gravamen of the offense, under the act, is the requiring of working and laboring men, engaged in "any department relating to the running and management of said mills" to work more than ten hours per day. The indictment does not charge that Reddin was employed and was required to work "in any department relating to the running and management of said mill." The facts show that Reddin was employed as night watchman, and that his duties as such required him to make his rounds every hour, and after an interval of twenty minutes to begin the next round; that he would begin at 6 o'clock in the evening and continue until 6 o'clock in the morning. His duties required him to guard the mill plant and lumber against trespassers, thieves and incendiaries, and to extinguish fires, if in his power, and, if not, to give the alarm. He was required to punch clocks, distributed at different points over the mill, in order to show that he had made the rounds each hour. While he was on duty, none of the machinery was being operated.

The ruling of the court was correct. The undisputed facts show that Reddin was not employed by the appellee "in any department relating to the running and management of its mill." The purpose of the law was to protect working men and laborers while employed in work connected with "any department relating to the running and management of the mills." The duties of the night watchman, as set forth, have no relation to the operating and managing departments of such companies. There are many employees about mill plants that have duties to perform, such as bookkeepers, night watchman, auditors, etc., that have no relation to the operating and managing departments.

The purpose of the law was to protect those doing dangerous and laborious work connected with the operating department, and also arduous and perhaps in

some cases dangerous duties connected with the management of the plants.

The court also ruled that the act was unconstitutional, but, having reached the conclusion that the proof fails to show any violation of the act, it is unnecessary, in this case, to determine whether or not the act is unconstitutional, and therefore we do not decide that question.

The judgment is affirmed.

HUMPHREYS, J., not participating.

SHOOP v. BAKER.

Opinion delivered November 20, 1916.

1. BILLS AND NOTES—LIABILITY OF INDORSER—DEBT OF MAKER.—Where A. loaned money to B., and C. endorsed the same, C. will be liable only on the note, and A. cannot bring an action against him until the note is due.
2. BILLS AND NOTES—FRAUD—JURY QUESTION.—Whether defendant was induced by fraud to sign a note, is a question for the jury.

Appeal from Crawford Circuit Court; *Jas. Cochran*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee brought this action against the appellants, C. D. Shoop and W. S. Shoop.

Appellee testified that the defendants below were indebted to him in the sum of $75 and interest, for money loaned; that Simon Shoop wanted to borrow the money, but appellee would not loan to Simon unless C. D. would sign with him. C. D. Shoop said to go ahead and let Simon have the money, and he (C. D.) would mortgage his mules for it. Appellee let Simon have the money upon the faith of C. D. Shoop's promise. C. D. Shoop afterward refused to sign the mortgage, but did sign a note for the money. The note was also signed by one W. N. Shoop and Frank Jack. The note was not due when the suit was commenced, and appellee sued upon the debt, and not upon the note.

C. D. Shoop testified as follows: "I did not borrow any money from the plaintiff. The plaintiff and my brother wanted me to give a mortgage upon my team as a security for money that he was about to loan my brother. I never did agree to sign myself, but did tell them that he could go ahead and give a mortgage on my mules if Simon would also mortgage his wife's cow for the amount. They came back and wanted me to sign the mortgage after Mr. Baker had loaned my brother the money. I refused to do so unless his wife would put her cow in the mortgage. She refused and I did not sign the mortgage. Then they got my father and Frank Jack to sign a note, and with all of them on the note, I signed it. It was not my debt. I signed the note in good faith.

W. N. Shoop testified that appellee came to him and wanted him to sign a note for seventy-five dollars, saying that he would not hold witness responsible, but only wanted witness to sign so that he could get C. D. Shoop on the note. Witness signed it under a written agreement between himself and the appellee that witness was not to be responsible on the note. The written agreement was read in evidence.

The appellee being recalled, testified that he knew that Simon Shoop was not responsible; that he let Simon have the money solely upon C. D. Shoop's credit.

Among others, the court instructed the jury as follows: "Baker does not sue upon the note, but does sue upon the account. If Mr. Baker had a valid note and there was no fraud with certain parties, then of course if the note was not due at the time suit was brought, he could not recover the cost in the case. Since that time the note has become due; he could recover upon the note if he was suing upon the note, but he is suing upon the original account that he says Dan Shoop stood for, and he let Simon Shoop have the money upon Dan Shoop's credit. If that is true, you ought to give judgment for Mr. Baker against Dan Shoop; if it is not true, you ought not to give judgment against Dan Shoop.

The appellant excepted to the giving of the instruction. The verdict and judgment were in favor of the appellee.

C. A. Starbird, for appellant.

1. The appellant was not liable and the court erred in giving instructions 2 and 4. 12 Ark. 174; 81 *Id.* 127. The undertaking was void and the note was not in suit and not due.

WOOD, J. (after stating the facts). The undisputed testimony shows that the contract between the appellee and the appellant for the loan of the $75 was evidenced by a promissory note, which was not due at the time the suit was instituted. There is no account between appellee and appellant for this note. The account was merged into the note, and the note must stand as the sole and only evidence of the contract between the parties.

The undisputed proof shows that at the time of the institution of this suit the note was not due. Hence, the suit was premature, and this action can not be maintained. It will be a question of fact for the jury in a suit upon the note to determine whether or not appellant was induced by fraud perpetrated upon him to sign the note. That might be grounds for cancellation of the note in a suit in equity for that purpose, or in a suit at law upon the note appellant might set up such fraud as a defense, but such fraud would not justify appellee, the payee of the note, in setting up his own fraud as a reason why he should repudiate the note and sue the appellant upon open account.

If appellant is liable at all, he is liable upon the note, which, as we have seen, is the only written evidence of the contract between appellant and appellee for the loan of the money. The instruction was erroneous and presented the case to the jury upon an erroneous theory. The judgment is therefore reversed and the cause dismissed.

HUMPHREYS, J., not participating.

BENNETT v. STATE.

Opinion delivered November 20, 1916.

LIQUOR—ILLEGAL MANUFACTURE—SUFFICIENCY OF THE EVIDENCE.—The evidence held sufficient to sustain a conviction of defendant for being interested in the manufacture of intoxicating liquors, contrary to Act 30, p. 98, Acts of 1915.

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

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

HART, J. Gus Bennett was indicted for being interested in the manufacture of intoxicating liquors contrary to the provisions of Act No. 30, of Acts of 1915, see Acts 1915, p. 98.

From the judgment of conviction, he has duly prosecuted an appeal to this court.

The only ground relied upon for a reversal of the judgment is that the evidence is not legally sufficient to warrant the verdict.

Two witnesses for the State testified that at different times they went to a still in the woods where whiskey was being made, and that the defendant was present. That they did not know whether or not defendant was helping to make the whiskey. One of the witnesses admitted that he had testified before the grand jury that the defendant was assisting in making the whiskey. He stated on the trial, however, that he did not remember seeing the defendant doing anything in connection with running the still.

Another witness admitted that he testified before the grand jury that he saw the defendant and others making whiskey in Howard county while court was in session; and that he saw them at other times. He stated at the trial that this testimony was true. The indictment was returned on August 25, 1916, and the time referred to by the witnesses was during the year 1916 prior to the return into court of the indictment.

The defendant took the stand and admitted that the witnesses saw him at the place where the whiskey was being manufactured but denied that he assisted in making it.

The evidence adduced in behalf of the State was sufficient to warrant the verdict.

The judgment will be affirmed.

HUMPHREYS, J., not participating.

BIRCHFIELD v. DIEHL.

Opinion delivered November 20, 1916.

1. MUNICIPAL CORPORATIONS—CONSTRUCTION OF SIDEWALK—LIABILITY FOR PERSONAL INJURIES.—A municipal corporation will not be liable in damages for an injury to a pedestrian who fell from a sidewalk, which was constructed at a level higher than the adjacent property.
2. TORTS—PERSONAL INJURY—FALLING FROM SIDEWALK—NEGLIGENCE. Defendant constructed a concrete sidewalk in accordance with the directions of the city, said construction having the walk somewhat higher than his adjoining property. Plaintiff fell from the sidewalk onto defendant's property and was injured. *Held*, the defendant was not liable in damages for the injury.

Appeal from Carroll Circuit Court, Western District; *J. S. Maples*, Judge; affirmed.

Charles D. James, for appellant.

1. The city is not liable. 27 Ark. 572; 34 *Id.* 105; 49 *Id.* 139; 52 *Id.* 84. But the appellee is liable. 51 Ark. 491; 63 *Id.* 65, 76-7; 46 *Id.* 209; Wood on Nuisances, vol. 1 (3 ed.), § 271, p. 343; Elliott on Roads and Streets (2 ed.), § 711, p. 771-773, § 713; 29 Cyc. 467, note 47; 106 A. S. R. 361; 16 Pa. St. 463; 68 N. Y. 283; 120 N. Y. S. 768; 65 S. E. 1051; 107 Pac. 863; 134 *Id.* 869; 36 N. W. 561; 115 Am. St. 993; 178 Mass. 566; 60 N. E. 382; 182 Pa. St. 82; 37 Atl. 995; 25 N. Y. Supp. 246. It was error to sustain the demurrer.

Festus O. Butt, for appellee.

Neither the city nor appellee was liable. There was no breach of any legal duty owing to appellant. 19

Johns. 385; 3 Hill, 38; 10 Exch., 3 C. L. Rep. 417; 2 Best & S. 770; 31 L. J. Q. B. 212; 8 Jur. (N. S.) 221; 6 L. T. (N. S.) 711; 9 C. B. 392; 49 Ark. 209; 73 Ark. 448; 59 *Id.* 494; 87 *Id.* 85; 149 Pa. 40; 189 *Id.* 253; 106 Mass. 278; 96 Misc. 546; 99 *Id.* 361; 119 Mich. 680; 81 *Id.* 536; 209 Pa. 240; 28 Cyc. 1438.

SMITH, J. Appellant was the plaintiff in the court below, and in his complaint alleged that on or about January 15, 1915, appellee was the owner and in the possession of certain lots situated at the corner of Owen and Spring streets in the city of Eureka Springs. That prior to said date the city of Eureka Springs had ordered sidewalks to be placed along and in front of the said lots, and that said sidewalks were required to be placed on the grade as established by said city in front of said lots.

The complaint further alleged that appellee had constructed the sidewalk to conform to the grade established by the city, in doing which the walk was necessarily placed from three to five and one-half feet higher than the lots it fronted, and appellee thereafter failed to fill in said lots to the level of the sidewalk, and had also failed to put a guard railing or balustrade on the inside of the walk so as to protect pedestrians from falling from said walk onto said lots, and because of this failure it was alleged that appellant had slipped on said walk, and, before he could recover his balance, had fallen from the walk over on appellee's lots, and thereby sustained the injuries to compensate which this suit was brought; and that the dangerous condition of the walk was known to appellee, or could have been known to him had he exercised the care and caution a reasonably prudent man should have exercised under similar circumstances; and that appellant was himself free from any negligence causing or contributing to his injury.

A demurrer to this complaint was sustained, and this appeal questions the correctness of that action.

The essence of the complaint is that the injury was caused by the failure and negligence of appellee in failing to fill in said lots up to the level of said sidewalk,

and because appellee had carelessly and negligently failed to place a guard along and on the inside of said sidewalk next to said lots so as to protect pedestrians from the danger incident to falling from the walk. Was appellee under this legal duty? If he was not, then no liability can be predicated upon his failure to do the things which it was alleged he had failed to do.

The statute confers upon the city the power to compel the owner of property to construct sidewalks, and to establish a grade line in their construction, to which the owner must conform. There is no allegation here of defective construction of the walk, nor that appellee had done anything to his lots which made the premises dangerous. The allegation is that the premises became dangerous by the construction of the walk, and the failure to erect balustrades. But the walk was constructed in obedience to the ordinance of the city and in accordance with its plans, and appellee not only had no option in yielding obedience to this ordinance, but his non-compliance therewith would have subjected him to the payment of a fine. Sections 5648 and 5542, Kirby's Digest.

(1) Had the city itself constructed this walk, it would not have been liable to appellant for his injury, because the cities of this State are not liable for such damages. *Arkadelphia* v. *Windham*, 49 Ark. 139; *Granger* v. *Pulaski County*, 26 Ark. 37; *Collier* v. *Fort Smith*, 73 Ark. 447; *Gray* v. *Batesville*, 74 Ark. 519; *Fort Smith* v. *York*, 52 Ark. 84.

(2) Nor can one be held liable who obeys the city's mandate and does an act which the city may require and for which it would not be liable had the act been done by itself.

Here the owner did nothing to his lot to change its condition, and it was in obedience to a valid exercise of the police power of the city that he constructed the walk. The primary duty to construct sidewalks rests upon the city, but, in the exercise of its authority, it shifted that burden to the property owner, and this added burden was discharged when the property owner

complied with the ordinance. *Brizzolara* v. *Fort Smith*, 87 Ark. 92; *Little Rock* v. *Fitzgerald*, 59 Ark. 494.

To constitute actionable negligence, there must be a breach of some legal duty which results in injury to the person to whom that duty is owing, and as the complaint does not charge appellee with such negligence, the demurrer to the complaint was properly sustained, and the judgment is affirmed.

HUMPHREYS, J., not participating.

ASHBY v. MILLIGAN.

Opinion delivered November 27, 1916.

1. APPEAL AND ERROR—ABSENCE OF MOTION FOR NEW TRIAL AND BILL OF EXCEPTIONS.—Where no motion for new trial or bill of exceptions appear on the record, on appeal, only errors apparent on the face of the record will be reviewed.
2. JUSTICES OF THE PEACE—EXTENT OF JURISDICTION.—A justice of the peace has jurisdiction only coextensive with his county, and cannot issue process to be served upon a defendant in another county.
3. APPEAL FROM JUSTICE COURT—LACK OF JURISDICTION—HOW SHOWN.—A defendant may, on appeal to the circuit court, show by extrinsic evidence that the justice court had no jurisdiction over him.
4. INFANTS—APPEARANCE—HOW ENTERED—SERVICE.—A minor cannot enter his appearance to an action, nor can it be entered for him; he must be properly served with process before the court can acquire jurisdiction over his person.

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

Earl C. Casey and *McCaleb & Reeder*, for appellant.

1. The court, in sustaining the motion to quash could only act on the record of the justice, and the authority must appear from the face of the transcript. The court erred in sustaining the motion. 21 Ark. 457.

2. Appellee waived his right by failing to file motion to quash, or other plea. 3 Ark. 436; 7 *Id.* 100; 48 *Id.* 100; 56 *Id.* 45.

3. By appealing, Milligan made himself a party. 1 Ark. 55; 45 *Id.* 295; 25 *Id.* 99; 87 *Id.* 230; 101 *Id.* 124;

85 *Id.* 431; 46 *Id.* 251. He also moved for a continuance. By filing said motion and a demurrer, and demanding a jury trial, and going into the merits, he waived any want of process or service. 62 Ark. 144; 38 *Id.* 102; 43 *Id.* 545; 4 *Id.* 70; 39 *Id.* 95; 14 *Id.* 234; 35 *Id.* 276; 56 *Id.* 45; 2 R. C. L. 329.

4. If the circuit court had no jurisdiction, it erred in rendering judgment for costs. 10 Ark. 265; 102 *Id.* 511.

S. M. Bone and *I. J. Matheny*, for appellee.

1. There being no motion for new trial on bill of exceptions, there is nothing for this court to review. 93 Ark. 382; 122 Ark. 148; Kirby's Digest, § 6215.

2. Appellee is a minor and the justice had no power to render judgment against him until a defense was made for him by his guardian. Kirby's Digest, § 6023, and notes cited.

3. Going to trial on the merits does not constitute a waiver of objections to venue or service. 77 Ark. 413.

HART, J. John Ashby sued Elmer Milligan before a justice of the peace in Independence county to recover the balance of the purchase money for certain corn which he alleges he sold to Milligan. Ashby recovered judgment against Milligan for $10, and the latter appealed to the circuit court.

The transcript of the justice of the peace shows that Milligan made a motion to dismiss the cause of action on the ground that he was a minor and that his motion was overruled. It is also shown that he demurred to the jurisdiction of the court on the ground that he was not a resident of the county. He then filed a set-off in the action and after judgment took an appeal to the circuit court. In the circuit court, Milligan moved the court to quash the service of summons, and to dismiss the action. The court sustained his motion and rendered a judgment quashing the service of summons upon him and setting aside the judgment of the justice of the peace as void. The plaintiff Ashby has appealed to this court.

(1-3) No motion for a new trial was filed, and no bill of exceptions taken. Hence, under the long and well settled procedure of this court, we can only review for errors which appear from the face of the record. It is contended by counsel for the plaintiff that the circuit court, in sustaining the defendant's motion to quash the service on him and dismiss the plaintiff's cause of action, could act only on the record of the justice of the peace, and the circuit court's authority for so doing must appear from the face of the transcript filed by the justice of the peace. We do not agree with counsel in this contention. The justice of the peace had only jurisdiction co-extensive with his county and could not have issued process to be served upon the defendant in another county. Kirby's Digest, sections 4553 and 4558. The defendant might have shown by extrinsic evidence even in the face of a recital in the judgment of a justice of the peace, that he was served with process in another county, and that the court had no jurisdiction over him. *Townsly-Myrick Dry Goods Co.* v. *Fuller*, 58 Ark. 181; *Jones* v. *Terry*, 43 Ark. 230; *Levy* v. *Ferguson Lumber Company*, 51 Ark. 317.

(4) But it is contended by counsel for the plaintiff that the defendant entered his appearance to the action by taking an appeal from the judgment rendered against him in the justice of the peace court. The defendant may have shown in support of his motion that he was a minor, and that he was a non-resident of the county in which he was sued, and this is precisely what his counsel said he did do. There being no bill of exceptions and no motion for a new trial, every presumption in favor of the judgment must be indulged in. A minor can not enter his appearance to an action; nor can it be entered for him. He must have been properly served with process before the court can acquire jurisdiction over his person. *Johnson* v. *Johnson*, 84 Ark. 307; *Gannon* v. *Moore*, 83 Ark. 196; *Nunn* v. *Robertson*, 80 Ark. 350.

It follows that the judgment must be affirmed.

MAY & ELLIS COMPANY v. FARMERS UNION MERCANTILE COMPANY.

Opinion delivered November 27, 1916.

EVIDENCE—CONTRACT FOR SHIPMENT OF FREIGHT—PROOF—INVOICE.—Appellee, having contracted to purchase certain goods from appellant, refused to pay for same on account of certain alleged shortages in the shipment. Complaint of the shortage was not made until thirty days after receipt of the goods. *Held*, testimony showing that the invoice recited that complaint must be made within ten days, was inadmissible in an action to recover on the contract, since the invoice was not evidence of the terms of the contract between the parties.

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

D. L. King, for appellant.

1. The court erred in refusing to permit appellant to read the deposition of S. R. Wood. Kirby's Digest, § 3190; 75 Ark. 422.

2. No objection to the bill was made until after ten days. 80 Ark. 438; 1 Rul. C. L. 213.

HART, J. Appellant sold to appellee a bill of merchandise and sued appellee to recover the balance alleged to be due. Appellee admitted that it bought the bill of goods from appellant, but alleged that appellant had not shipped certain articles of the value of $130.34, and refused to pay for the items which it claims were not shipped.

The testimony on the part of appellee tended to show that on account of a change in its business, the goods were not taken out of the box in which they were shipped until about a month after their receipt, and that for this reason the shortage was not discovered. As soon as the shortage was discovered, appellee gave to appellant notice thereof. This was substantially the same testimony as that introduced on the former trial of the case, when the court directed a verdict in favor of appellee. The judgment was reversed on that account. See *May & Ellis Co.* v. *Farmers Union Mercantile Co.*, 120 Ark. 316, 179 S. W. 490. Upon a retrial of

the case under proper instructions from the court, the jury returned a verdict in favor of appellee, and the case is here on appeal.

The only grounds of reversal relied upon by appellant is that the court erred in excluding certain testimony from the jury. Appellant offered to prove by one of its officers that it sent an invoice of the shipment to appellee, and that there was printed on it the following, "All claims or any objections to this bill must be made within ten days." Appellee's own testimony showed that the alleged shortage was not discovered until about a month after the goods were received, and that no objection to the bill was made until that time. The court did not err in excluding the testimony. The invoice was not the contract of sale between the parties. The contract of sale had been made before that time. The invoice was only a list of the goods shipped with the prices set opposite each item. Therefore, the judgment will be affirmed.

TAYLOR v. DEXTER.

Opinion delivered November 27, 1916.

CORPORATION—FAILURE OF OFFICERS TO FILE REPORT—LIABILITY FOR JUDGMENT ON ACTION SOUNDING IN TORT.—Officers of a corporation, who have failed to file the annual report, are not personally responsible where a judgment has been obtained against the corporation, in tort. The personal liability of the officers is limited to debts *ex contractu*.

Appeal from Cross Circuit Court, First Division; *W. J. Driver*, Judge; reversed.

Killough & Lines, for appellant.

1. The language of § 859, Kirby's Digest, is restricted to debts incurred *ex contractu*, and does not include obligations incurred *ex delicto* on torts. 180 Fed. 543; 113 U. S. 452; 14 Wend. 58; 137 Mass. 516; 9 L. R. A. 187; 68 Ark. 433; 36 L. Ed. U. S. 1123; 28 *Id.* 1038. The judgment should be reversed and the cause dismissed.

Mardis & Mardis, *H. P. Maddox* and *S. W. Ogan*, for appellee.

1. A judgment merges the original obligation and becomes a debt by contract, and appellant is liable under § 859 of Kirby's Digest. Harr. Cont., 295; 67 N. W. 1015; 89 Hun. 54; 119 N. Y. 117; 2 Ia. 535; 4 Keyes, 335; 38 Ind. 429; 2 Blacks. Com. (Lewis ed.) 465; 1 Bouvier Law Dict., 426; 43 Atl. 233.

HUMPHREYS, J. On the 29th day of October, 1915, appellee instituted this proceeding to fix personal liability on appellant, president of "The York Lumber Company," for failure to comply with section 848, Kirby's Digest, in reference to filing required reports. Said appellee had obtained a judgment against the York Lumber Company on account of personal injury for $800 on the 23d day of April, 1913. Execution was issued on the judgment, but no levy was made because no property could be found by the officer. Only two issues were presented by the pleadings and evidence.

First: Was William Taylor president of said corporation when the injury occurred and judgment was obtained, and did the officers of the corporation fail to file the report required by law. These questions were properly submitted to the jury and there was sufficient evidence to sustain the verdict of the jury on these points:

Second: Are officers of a corporation personally responsible for actions sounding in tort for failure to file reports required by law?

Section 859, Kirby's Digest, 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."

The court is of opinion that the personal liability of officers under this statute is limited to debts *ex contractu.* The statute is not broad enough to include obligations *ex delicto*, even when reduced to judgment.

In construing these statutes, the court used the following language in the case of *Nebraska National Bank* v. *Walsh:* "We conclude from this consideration, that the statute is not penal, but highly remedial, even when construed independent of the statute of limitations." 68 Ark. 437. See, also, *McDonald* v. *Mueller* 123 Ark. 226.

In the case of *Proctor-Gamble Co.* v. *Warren Cotton Oil Co.*, 180 Fed. Reporter, 543 these statutes were construed by Judge Trieber. In that case it was held that the construction given by the Arkansas court was binding on the Federal courts. The following language was used in that opinion: "It will be noted that in each of the acts the words used are 'all debts,' thus indicating that the intention of the law-making body was to include every liability arising upon contracts as distinguished from those arising from torts."

In support of the opinion rendered by the court the case of *Chase* v. *Curtis*, 113 U. S. 452 was cited. This was a New York case and involved a construction of the statute of the State of New York very much like the statute of the State of Arkansas.

The court, in *Proctor-Gamble Co.* v. *Warren Cotton Oil Co.*, used the following language: "There it was sought to hold officers of a corporation liable * * * on a judgment rendered against the corporation for a tort committed by its agents; but the court held that such an action could not be maintained for a tort, even after it had been reduced to a judgment and thus liquidated and made certain."

We think the reasoning of the learned judge on the construction of these statutes in *Proctor-Gamble Co.* v. *Warren Cotton Oil Co.*, is sound and adopt same in arriving at our conclusion herein.

Under this view of the law, it is unnecessary to remand this cause, and therefore the judgment is reversed and cause dismissed.

HALL v. BLEDSOE.

Opinion delivered November 6, 1916.

1. STATE—SUIT AGAINST—CHARITABLE BOARD OF CONTROL.—An action brought by the Board of Control of State Charitable Institutions, created by Act 108, p. 403, Acts of 1915, against the superintendent of the State Hospital for Nervous diseases, to oust him from office on account of misconduct, is not a suit against the State.
2. CERTIORARI—REVIEW OF DECISION OF CHARITABLE BOARD OF CONTROL.—Where the Board of Control of State Charitable Institutions sought to remove an officer of the State Hospital, under the provisions of Act 108, p. 403, Acts of 1915, the writ of *certiorari* is available for the purpose of giving the circuit court the opportunity to review the decision of the Board of Control, the Board having acted in a *quasi*-judicial capacity.
3. CERTIORARI—WRIT WILL BE GRANTED, WHEN.—The writ of *certiorari* will be granted where it is shown that the inferior tribunal has exceeded its jurisdiction, and where it appears that it has proceeded illegally and no appeal will lie, or that the right has been unavoidably lost.
4. CERTIORARI—SCOPE OF WRIT—WHAT MAY BE CONSIDERED.—The scope of the writ of *certiorari* at common law, is not enlarged by the Statutes of the State, but under Kirby's Digest § 1316 the court may hear evidence *de hors*, the record for the purpose of possessing itself fully of the matter presented to the inferior tribunal.
5. CERTIORARI—PRACTICE ON HEARING WRIT.—The office of the writ of *certiorari* is merely to secure a review for errors of law, one of which may be the legal insufficiency of the evidence, and for the purpose of testing out that question in the circuit court, and the circuit court may hear evidence *de hors* the record in order to ascertain what evidence was heard by the inferior tribunal, and to determine whether or not the evidence was legally sufficient to sustain the judgment of that tribunal.
6. CERTIORARI—REVIEW OF DECISION OF STATE BOARD OF CONTROL.—In a proceeding to remove the superintendent of the State Hospital for Nervous Diseases, from office, the decision of the Board of Control being against him, the superintendent applied to a circuit judge for a writ of *certiorari* to bring the proceedings of the Board of Control before the court for review. *Held*, the record made at the hearing before the Board should have included all testimony that was offered, whether accepted by the Board or not, and on hearing the writ the circuit court had the right to inquire into all the evidence that was adduced or offered, and had the right to hear other evidence to determine what matters were offered before the Board.
7. CERTIORARI—PRACTICE—AUTHORITY OF COURT.—Where the writ of *certiorari* is limited as at common law, the court is confined in its

review of the evidence to the determination of whether there was substantial evidence to sustain the conviction of the charge.

8. STATE HOSPITAL—REMOVAL OF SUPERINTENDENT—ACTION OF BOARD OF CONTROL.—The action of the State Board of Control of Charitable Institutions in removing from office the superintendent of the State Hospital for Nervous Diseases, held to be supported by evidence of the superintendent's inattention, and neglect of duty, sufficient to warrant that action, and was a fair exercise of the Board's discretion.

9. STATE BOARD OF CONTROL—ACTION TO REMOVE SUPERINTENDENT OF STATE HOSPITAL—COMPROMISE AGREEMENT.—The State Board of Control of Charitable Institutions is not bound by an agreement to retain the superintendent of the State Hospital in office, where it appeared that the superintendent was guilty of a neglect of his duties.

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

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

1. The demurrer should have been sustained. The circuit court was without jurisdiction, because:

A. The action of the board was administrative and not *quasi* judicial, and therefore not reviewable. 19 Am. St. 88, 94; 62 Ark. 186; 70 *Id.* 589; 61 *Id.* 605; 73 *Id.* 606; 109 *Id.* 100.

B. The board is created the tribunal to decide as to the necessity of removal of the Superintendent and its finding is not reviewable. 109 Ark. 250; 96 *Id.* 424; 61 *Id.* 497.

C. This is, in effect, a suit against the State. 70 Ark. 568; 114 U. S. 270; 117 *Id.* 52; 123 *Id.* 443; 172 U. S. 516; 105 Fed. 459; 107 U. S. 711; 91 Ark. 535; 98 *Id.* 528; 102 *Id.* 471-492; 106 *Id.* 177; 108 *Id.* 60.

2. The motion to require appellee to strike portions of the petition should have been sustained. 59 Ark. 629; 182 S. W. 820.

3. The court had no power to try the case *de novo*. 5 Rul. C. L., §§ 5, 11, 14. *Certiorari* does not lie to correct errors or irregularities, and cannot be used as a substitute for appeal; it only lies to correct the lower tribunal when it proceeds illegally or exceeds its jurisdiction. 73 Ark. 606 ; 69 *Id.* 587; 61 *Id.* 605;

62 *Id.* 196; 39 Am. St. 595; 69 N. Y. 408; 10 Mich. 9; 35 Ark. 99; 85 *Id.* 85. It does not lie to review questions of fact to be determined by the evidence outside the record. 11 L. R. A. (N. S.) 940; 20 *Id.* 1175; 24 *Id.* 447.

4. The forms of law were complied with; due notice was given; a fair hearing had, and the testimony sustains the findings of the Board. 84 Ark. 540, 551.

John M. Moore, Walter H. Pemberton and *Cockrill & Armistead,* for appellee.

1. There is an entire failure of any substantial testimony to sustain any charge. No official misconduct, inattention, ne lect or inefficiency was shown, nor other adequate cause for removal. 23 A. and E. Ency. 442; 106 Ark. 253; 67 *Id.* 156; 90 *Id.* 1; 72 N. Y. 445; 79 *Id.* 582; 55 N. W. 118; 79 N. W. 369.

2. The findings of facts by the board are reviewable and must be supported by the proof to stand. *Certiorari* is the proper remedy. Act March 18, 1899; Kirby's Digest, §§ 1315-1316; 35 Ark. 99; 43 *Id.* 341; 14 Ark. 337; 52 *Id.* 213. Here there was no appeal as in judicial proceedings. 21 Ark. 264; 44 *Id.* 267; 61 Ark. 605. The common law scope of the writ has been enlarged by our statutes. 6 Cyc. 738; 103 Wisc. 460; 6 Cyc. 826-7; 30 Ark. 148; 33 *Id.* 117; 56 *Id.* 85; 14 N. Y. S. 345; 23 N. E. 1061; 9 S. E. 863; 40 Pac. 264. The finding of the board is not conclusive and the court had power to quash the order of removal upon a finding that it was not sustained by the evidence; second, that evidence *de hors* the record was admissible and that the evidence did not sustain the finding.

3. The action of the board was *quasi* judicial. 84 Ark. 540; 62 *Id.* 186; 70 *Id.* 588; 109 *Id.* 100-105. Hence reviewable on *certiorari.*

4. This is not a suit against the State. 70 Ark. 588; 133 N. W. 857; 109 Ark. 100; 91 *Id.* 538; 36 Cyc. 916; 203 U. S. 335.

5. The compromise agreement was a condonation and estopped the board from renewing the charges. 14 Cyc. 430.

6. The notice was insufficient. 142 N. W. 632; 176 U. S. 398.

McCULLOCH, C. J. The appellants in this case constitute the Board of Control for the Charitable Institutions of the State, and Dr. E. P. Bledsoe, the appellee, is the superintendent of the institution known as the State Hospital for Nervous Diseases. The Board of Control, pursuant to statutory authority, preferred charges against Dr. Bledsoe, and after notice given and a hearing, an order was made removing him from said office. Dr. Bledsoe then applied to one of the judges of the Pulaski Circuit Court for a writ of *certiorari* to bring the proceedings of the Board of Control before that court for review, and on the hearing before the circuit court a judgment was rendered quashing the order of the board, and an appeal has been duly prosecuted to this court. On the hearing of the cause before the circuit court, the record as made before the Board of Control, including all of the oral testimony adduced, was considered, and also appellee was permitted to introduce additional testimony, oral and documentary.

The statutes of the State originally provided that the charitable institutions should be under the supervision of a board of trustees appointed biennially by the governor. The office of superintending physician was created and the duties of the office prescribed in part as follows:

"The superintending physician shall have the power to appoint and remove all subordinate officers and persons allowed by the board of trustees. He shall, at the time of the reception of each patient, enter in a book kept for that purpose the name, age, sex, residence, office and occupation of the person, by whom and by whose authority each insane person is brought to the asylum, and have all the orders, warrants, requests,

certificates, and other papers accompanying such insane person, carefully filed and forthwith copied in said book; he shall also have general superintendence of the buildings, grounds and farms, with their furniture, fixtures and stock, and the direction and control of all persons therein, subject to the by-laws and regulations of the trustees; he shall daily ascertain the condition of the patients, and prescribe their treatment, in the manner prescribed in the said by-laws; and he shall also be required to see that all the rules and regulations for the discipline and good government of the institution are properly obeyed and enforced." Kirby's Digest, Sec. 4186.

The General Assembly of 1915 created the Board of Control to consist of three members to be appointed by the governor, instead of the board of trustees as originally provided. Acts 1915, p. 403, No. 108. The new statute referred to does not enlarge nor otherwise change the duties and powers of the superintendent, but merely changes the management from that of the old board of trustees to the new Board of Control. Section 7 of the new statute reads as follows: "The Board of Control shall have full authority to adopt such rules and regulations for the conduct of its business, and of the affairs of the institutions under its control, as it may deem proper; it may meet at such times and places for the conduct of its business as may seem fit, but must meet at least once each month." Section 8 of that statute contains the following provision: "The board may at any time remove the Secretary, or the superintendent, or steward of any of the institutions, for inattention, neglect, misconduct or inefficiency in the discharge of his duties, or for other adequate cause; but in case of such removal, it shall state specifically and distinctly the ground therefor.

The substance of the charges against Dr. Bledsoe, which we deem it worth while in the discussion to mention, is that he was guilty of inattention and neglect and inefficiency in failing to devote his entire time to the discharge of the duties of the office, and in absent-

ing himself frequently from the institution at times when his presence was required; that he failed to visit and inspect the wards in the institution and to personally familiarize himself with the conditions existing there; and that he failed to hold staff meetings for the purpose of consulting concerning the treatment of patients. There were other charges embraced in the specifications which we do not deem it important to mention. The fact that some of the charges are unsustained does not affect the merits of the controversy with respect to the other charges.

The discussion of counsel in their respective briefs has taken a very wide range, and many questions which we think are well settled are debated with great zeal.

(1) In the first place, it appears clear to us that this is not, as contended by counsel for appellants, a suit against the State. It is merely a review of the proceedings of a tribunal created by the State to perform certain functions, the one exercised in this instance being *quasi* judicial. The rights of the State are in no wise drawn into the controversy, for the proceeding merely raises the question of regularity and correctness of the action of the Board in removing Dr. Bledsoe from the office which he held. The State is not sued, either directly or indirectly. That feature of the discussion may therefore be dismissed without further comment.

(2) Again, it is very plainly settled, we think, that the writ of *certiorari* is available for the purpose of giving the circuit court, a court of general original jurisdiction, the opportunity to review the decision of the Board in removing an officer pursuant to the terms of the statute. *Pine Bluff Water & Light Co.* v. *City of Pine Bluff*, 62 Ark. 196; *State, ex rel.* v. *Railroad Commission*, 109 Ark. 100. "The test, therefore, is," we said in the case last cited, "whether the act sought to be reviewed is done in a judicial or *quasi* judicial capacity, and not merely in a legislative, executive or administrative capacity." It being seen that the Board, in hearing the charges against the superintend-

ent of the hospital, and in removing him, acted in a *quasi* judicial capacity, it follows that a writ of *certiorari* may run for the purpose of bringing up the proceedings for review.

(3) In *Burgett* v. *Apperson*, 52 Ark. 213, this court said: "The writ is granted in two classes of cases, first: where it is shown that the inferior tribunal has exceeded its jurisdiction; and, second, where it appears that it has proceeded illegally and no appeal will lie, or that the right has been unavoidably lost."

More serious questions arise concerning the scope of the inquiry of the court in reviewing the proceedings of the Board. At common law the scope of the remedy was merely to review for errors of law, and the inquiry on the hearing was confined to the record made before the tribunal whose proceedings were sought to be reviewed. Harris on Certiorari, Sec. 59; *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206; *Morrill* v. *Morrill*, 20 Ore. 96; *Stevens* v. *County Commissioners*, 97 Me. 121; note to the case of *Wulzen* v. *Board of Supervisors*, 40 Am. St. Rep. 35.

The rule is stated in the note referred to above as follows: "No questions can be presented for review upon *certiorari* other than those which arise on the record, save and except that the court may sometimes hear evidence in support of the record for the purpose of showing that substantial justice has been done, or that for some reason the discretion which the court has to deny relief by this writ ought to be exercised and the petitioner left to such other means of redress as he may have, but it is clear in the absence of statutory authority, that the record cannot be contradicted by extrinsic evidence, and that the petitioner's cause must be determined on the record alone. * * * If the evidence received has not been preserved in such a manner as to constitute a part of the record in the lower court, it must be excluded from consideration in the superior court, though the judge or some other officer has certified to it, and thus attempted to make it a part of the return to the writ. In the great majority

of cases in which redress is sought by this writ it is directed to inferior courts or tribunals exercising a limited or summary jurisdiction having no record. In such cases perhaps the most usual practice is to require such court or tribunal, by its clerk or otherwise, to certify the proceedings taken before it and its action thereon, as well as to furnish copies of such petitions and other papers as have been presented to it and made a basis of its right to act, together with a statement of its rulings upon any point in which it is claimed to have acted erroneously to the prejudice of the applicant."

In Ruling Case Law (Vol. 5, p. 260), we find this statement: "In many jurisdictions the doctrine is asserted that the office of a *certiorari*, at common law, is only to bring up for review questions of jurisdiction, power and authority on the part of the inferior tribunal; and that the superior court is confined to the simple consideration whether the inferior tribunal had jurisdiction, and whether the proceeding and order was within that jurisdiction, and that, if the superior court finds that the inferior tribunal has not exceeded its jurisdiction, it must not go further and inquire whether the order or judgment complained of was right upon the merits. This statement of the law is, doubtless, sufficiently accurate when considered in connection with the cases in which it is generally made. But the rule is not strictly adhered to. Courts do frequently consider upon a common-law *certiorari*, defects and errors in the proceedings of the inferior tribunal which are not strictly of a jurisdictional nature, and it cannot be gainsaid that questions relating to the regularity of the proceedings, or questions of law which arise on the face of the record, or of the proceedings and orders which are in the nature of records, may be reviewed."

In the same volume, p. 263, we find the following statement with respect to the particular matter now under consideration: "In some jurisdictions the courts, restricting the writ to its original common-law office, hold that it brings up for review only the record,

and not the evidence, and hence that they will not look into the evidence at all, but merely inspect the record to see whether the inferior tribunal had jurisdiction, or exceeded it, or proceeded according to law, or, as sometimes expressed, whether the tribunal kept within its jurisdiction, or whether the cause assigned was a cause for removal under the statute. In other jurisdictions it is held that the evidence may be brought up, not for the purpose of weighing it, to ascertain the preponderance, but merely to ascertain whether there was any evidence at all to sustain the decision of the inferior tribunal—whether it furnished any legal and substantial basis for the decision. While in the exercise of this power of removal for cause the proceedings of these bodies are *quasi* judicial and so reviewable by the court, still they are not courts, but essentially legislative and administrative bodies, whose action should be considered in view of their nature and the purposes for which they were organized, and not be tested by the strict legal rules which prevail in trials in courts of law. Therefore, if such a body has kept within its jurisdiction, and the evidence furnished any legal and substantial basis for its action, it ought not to be disturbed for any mere informalities or irregularities which might have amounted to reversible error in the proceedings of a court. To apply any other rule would be impracticable, and disastrous in the extreme to public interests."

Our statute regulating the remedy on *certiorari* reads as follows:

"They shall have power to issue writs of *certiorari* to any officer or board of officers, city or town council, or any inferior tribunal of their respective counties, to correct any erroneous or void proceeding or ordinance, and to hear and determine the same; application for such writ may be made to the court or to the judge thereof in vacation on reasonable notice; and a temporary restraining order may be granted thereupon on bond and good security being given, in a sum to be fixed by the court or the judge in vacation,

conditioned that the applicant will perform the judgment of the court." Kirby's Digest, Sec. 1315.

"Affidavits may be read on such applications, and evidence *de hors* the record may be introduced by either party on the hearing. The record of any such inferior judicial tribunal shall be conclusive as far as the same may extend, but the acts of any executive officer or board of such shall only be *prima facie* evidence of their regularity and legality. The court shall have power in such cases to enforce its judgments by *mandamus*, *prohibition* and other appropriate writs." Kirby's Digest, Section 1316.

It has been expressly held by this court that the scope of the writ of *certiorari* at common law is not enlarged by the statutes of this State on that subject. *St. L., I. M. & S. Ry. Co.* v. *Barnes*, 35 Ark. 95; *Merchants & Planters Bank* v. *Fitzgerald*, 61 Ark. 605; *Pine Bluff Water & Light Co.* v. *City of Pine Bluff*, 62 Ark. 196.

In the case of *Merchants & Planters Bank* v. *Fitzgerald*, *supra*, Judge Battle, speaking for the court, said: "According to the well-settled practice in this State the writ of *certiorari* can be used by the circuit court in the exercise of its appellate power and superintending control over inferior courts in the following classes of cases: (1) Where the tribunal to which it is issued has exceeded its jurisdiction; (2) where the party applying for it had the right to appeal, but lost it through no fault of his own; and (3) in cases where the superintending control over a tribunal which has proceeded illegally, and no other mode has been provided for directly reviewing its proceedings. But it cannot be used as a substitute for an appeal or writ of error, for the mere correction of errors or irregularities in the proceedings of inferior courts."

(4) Now, while it is true that our statute has not enlarged the scope of the remedy it has enlarged the power of the court with respect to the method of bringing a case before the court for review. At common law a court was bound by the record made in the inferior

court, but the statute which has just been quoted provides in express terms that "evidence *de hors* the record may be introduced by either party on the hearing." It was the manifest purpose of the Legislature to set aside the common law rule to that extent and to permit the court to hear evidence *de hors* the record for the purpose of possessing itself fully of the matter presented to the inferior tribunal. To give any less effect to this language would be to nullify it altogether.

(5) But it does not follow that the court, on hearing the writ, proceeds *de novo* and tries the case as if it had never been heard in the inferior court. This is true, because as we have already seen, the office of the writ, which has not been enlarged by statute, is merely to review for errors of law, one of which may be the legal insufficiency of the evidence, and for the purpose of testing out that question the circuit court is, by the statute, empowered to hear evidence *de hors* the record in order to ascertain what evidence was heard by the inferior tribunal, and to determine whether or not the evidence was legally sufficient to sustain the judgment of that tribunal. That question is one of law, which is subject to review like all other errors of law. *Callett* v. *Railway Co.*, 57 Ark. 461.

(6-7) The record made at the hearing before the Board of Control should have included, of course, all testimony that was offered, whether accepted by the Board or not, and the circuit court on the hearing of the writ therefore had the right to inquire into all evidence that was adduced or offered, and had the right to hear other evidence to determine what matters were offered before the Board. Learned counsel for appellee concede the correct rule to be that "Where the writ is limited as at common law, then the court is confined in its review of the evidence to the determination of whether there was any substantial evidence to sustain the conviction of the charge" and we are of the opinion that that is the rule applicable to this proceeding under our present statute.

The testimony introduced before the Board was accurately preserved and a transcript furnished. There is no question made about its accuracy. It may be said, too, that the additional evidence heard by the circuit court, even if considered, adds nothing to the solution of the question really presented, whether or not the Board acted arbitrarily and without legally sufficient evidence. That is the real question presented, since we find the law to be that the court cannot in this proceeding review merely for errors of judgment upon legally sufficient evidence, and we proceed to an analysis of the testimony for the purpose of determining whether or not there was evidence of a substantial nature which justified the action of the Board of Control, or whether the removal of Dr. Bledsoe was arbitrarily done and without any justification in fact.

Dr. Bledsoe became superintendent of the hospital on January 1, 1916, and these charges were preferred on June 9, 1916, the hearing being begun the next day. The testimony was undisputed that there were no morning staff meetings held for about thirty days prior to the time the charges against him of inattention and inefficiency were made. It appears that it had long been the custom, and was thought necessary, to hold two meetings of the staff of physicians daily for the purposes of consultation. One of those meetings was held early in the morning, and are referred to as the morning staff meetings, and the other was held about 11:30 a. m., and are referred to in the testimony as the noon meeting. There is testimony to the effect that the morning meetings were the more important ones. At the examination of patients by members of the staff, a stenographer is usually present who takes down everything that is said at the examination, and a transcript of that is furnished so that it may be submitted to the staff at the meetings. Every case is taken up in consultation and the opinion of each physician expressed in the order of seniority, beginning with the superintendent. The reason given by Dr. Bledsoe for not holding these staff meetings for the period

named was that he had insufficient stenographic help. It seems that there were ordinarily three stenographers employed for that work, and two of the places were vacant, one of the stenographers having been discharged by Dr. Bledsoe and the other having resigned. Dr. Bledsoe states that the reason he had not filled those vacancies was that there was so much strife and controversy between him and the Board over the management of the institution that he could not make employments. He admits, however, that there were a number of applicants for the places and that the members of the Board had sent persons out there to apply for the places, but that he considered the applicants inefficient and did not employ them.

The testimony tends to show that Dr. Bledsoe was frequently absent from the noon staff meetings. The physician next in rank to Dr. Bledsoe, who appears not to be unfriendly to him and who was introduced by him as a witness, testified that Dr. Bledsoe was absent from the noon consultations on an average of two days in each week. Dr. Bledsoe denies that statement and says that while he was absent from the consultation room a good many times, he was generally busy in another room at the hospital.

Quite a number of witnesses were introduced—nurses and attendants in charge of the wards—and the testimony tended to show that Dr. Bledsoe very seldom visited certain wards. The testimony shows that during the six months he was in charge he did not visit certain wards more than once or twice, and had no opportunity to ascertain the condition of the wards except through the reports of his subordinates. The testimony shows that he did not interrogate the attendants actually in charge. Many of them testified that he never spoke to them at all. Much of the testimony is to the effect that Dr. Bledsoe's conduct towards the attendants, if not actually uncivil or discourteous, manifested indifference or unwillingness to get acquainted with his subordinates.

Again, there was testimony tending to show that Dr. Bledsoe was absent from the institution a great deal of the time and spent considerable time in the city of Little Rock. One witness, who was an employee at the institution for the purpose of carrying the mail back and forth from the city to the hospital, testified that frequently on his return from the city about ten or eleven o'clock in the morning, and about four o'clock in the afternoon, he met Dr. Bledsoe going towards the city. Another witness testified that frequently he was unable to find Dr. Bledsoe about the premises on important occasions when his presence was desired.

There is a farm connected with the institution, which is in charge of a practical farmer selected by the superintendent. This farm has about 45 acres in cultivation and is operated for the purpose of furnishing vegetables to the institution. The man in charge of the farm testified that Dr. Bledsoe, during the whole six months of his incumbency up to the time of the trial, had never visited the farm and had never given him any directions, except upon one occasion in the office he had spoken about planting some potatoes at a certain place. The witness stated that he had never received any other directions from Dr. Bledsoe and had never seen the latter visit the farm.

The laundry at the institution is quite extensive, and 18 men are employed there, and besides about 40 inmates of the institution are worked. The evidence shows that thirty or forty thousand garments are laundered there per week. The testimony of the man in charge of that department is that Dr. Bledsoe never visited the laundry nor gave any directions concerning its management. The testimony of the engineer in charge of the mechanical part of the institution was that Dr. Bledsoe paid very little attention to that department.

Dr. Bledsoe, in his testimony, gives an account of his management of the institution which is very satisfactory, if his version of the matter is accepted as true, and he is corroborated in all important details by other

testimony, but it cannot, we think, be said that the undisputed evidence shows that there is no foundation for the charges made against him. There was testimony introduced tending to show that Dr. Bledsoe visited the wards more frequently than is claimed by many of the witnesses who testified, and he says that it was unnecessary for him to visit the wards oftener for the reason that he received frequent reports from his assistants. But we are unable to say that the Board was not justified in reaching the conclusion that a failure on the part of the superintendent to make frequent visits himself and possess himself with personal knowledge of the management of the wards was not a species of inattention which seriously affected his efficiency. The same may be said with respect to his conduct in ignoring the presence of those in charge of the wards when he met them and in failing to get acquainted with them so that he would be informed as to their capacity for caring for the inmates of the institution.

Dr. Bledsoe gives what may be deemed a satisfactory reason for his failure to attend staff meetings, but it cannot be said that his reason is one which necessarily must be accepted by the Board charged with the duty of superintending the institution where the helpless wards of the State are kept and treated. The superintendent was not expected to be a farmer or a laundryman, but the statute makes it his duty to exercise a superintending control over all those departments of the institution, and it was not unreasonable upon the part of the Board to find that he was derelict in discharging his duty by wholly failing to visit those departments.

(8) We are not called on to decide primarily whether or not the decision of the Board was correct. The lawmakers have placed that authority in the Board of Control, and it would be clearly an encroachment by the courts upon the authority of another department of government to undertake to substitute the judgment of the judges for that of the members of the tribunal vested with authority to manage the insti-

tutions of the State and to appoint and remove those who are placed there in charge. When all the testimony in the case is considered and viewed in the strongest light to which it is susceptible in support of the Board's findings, it cannot be said that there is an entire absence of evidence of a substantial nature tending to establish the charge of inattention and neglect of duty on the part of the superintendent. This being true, it becomes the duty of the courts, upon well-settled principles of law, to leave undisturbed the action of the tribunal especially created by the lawmakers to pass upon those questions. Any other view would make the Board of Control a mere conduit through which a decision on the removal of an unfaithful or inefficient superintendent would be passed up to the courts instead of leaving the matter where the lawmakers have placed it, in the hands of the Board.

(9) There is one other question discussed which we ought to mention briefly, and it is this: It is contended that a few days before these charges were preferred a compromise agreement was entered into between Dr. Bledsoe and the Board whereby he was permitted to continue as superintendent on certain terms specified in the written agreement, and that this operated as a condonation of the offenses involved in the charge. We think it is a sufficient answer to this to say that if the charges were true the Board had no power to bind itself not to proceed towards the removal of the superintendent. We cannot concern ourselves about the motives of the members of the Board further than to look to the testimony to see whether or not the judgment of removal was a fair exercise of discretion based upon legally sufficient evidence.

Having reached the conclusion that there was sufficient evidence to justify the action of the Board, it follows that the circuit court erred in quashing the order. The judgment is therefore reversed and the writ of *certiorari* dismissed.

HUMPHREYS, J., concurs.

HART, J., dissenting. It is with regret that I do not agree with my brother judges in a case of such public importance. As a rule dissenting opinions are of but little value, and need not be written and recorded. Inasmuch as my grounds of dissent would not fully appear from the opinion of the majority, I deem it appropriate to write a dissenting opinion.

It is the settled law of this State that a public officer who has under the law a fixed term of office and who is removable only for definite and specified causes, cannot be removed without notice and an opportunity to make defense to the charges against him. *Lucas* v. *Futrall*, 84 Ark. 540. Many decisions to the same effect are cited in a case note to 12 A. & E. Ann. Cas. 996-7.

In *Miles* v. *Stevenson*, 80 Md. 358, 30 Atl. 646, one of the cases cited, the court said: "It is the utmost stretch of arbitrary power and a despotic denial of justice to strip an incumbent of his public office and deprive him of his emoluments and income before its prescribed term has elapsed, except for legal cause, alleged and proved upon an impartial investigation after due notice."

Mechem on Public Officers, at Sec. 454, in discussing the general question here under consideration, says: "In those cases in which the office is held at the pleasure of the appointing power, and where the power of removal is exercisable at its mere discretion, it is well settled that the officer may be removed without notice or hearing. But, on the other hand, when the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing, but that the existence of the cause for which the power is to be exercised must first be determined after notice has been given to the officer of charges made against him, and he has been given an opportunity to be heard in his defense." See also num-

reous cases cited by the Supreme Court of the State of Wisconsin in *Ekern* v. *McGovern*, 46 L. R. A. (N. S.) at pages 828 and 829; Throop on Public Officers, sec. 364.

So it has been uniformly held that when the statute provides that an officer may be removed for specified causes, or upon doing or failing to do some specific act, the board as the body making the removal and declaring the vacancy must first find the existence of the facts which entitles them to make such removal.

For the reason that the power conferred upon the board to remove the superintendent contemplates a hearing and determination of the truth or falsity of the charges, the action of the board is judicial in its nature, and as there is no appeal or writ of error provided in the statute, certiorari is the only remedy which the superintendent had to review the action of the board. In discussing the office of the writ of certiorari in *Pine Bluff Water and Light Co.* v. *City of Pine Bluff*, 62 Ark. 196, Mr. Justice Battle said: "At common law, the writ lies only to review the judicial action of inferior courts, or of public officers or bodies. When the action of the officers or public bodies is purely legislative, executive, and administrative, although it involves the exercise of discretion, it is not reviewable on certiorari. But it is not essential that the officers or bodies to whom it lies shall constitute a court, or that their proceedings, to be reviewable by the writ, should be strictly and technically "judicial," in the sense that word is used when applied to courts. It is sufficient if they are what is termed "*quasi* judicial." It has been held that it lies to review the proceedings of officers and bodies, because they are *quasi* judicial, in the following cases, of supervisors, commissioners, and city councils in opening, widening, altering, or discontinuing public streets and highways," etc. The court further said that our statute (now sec. 1315 of Kirby's Digest) "was not intended to amend the common law by enlarging the office of the writ, but, presumably knowing its office at common law, the legislature adopted it, and made it a part of the code,

as it was of the common law pleading and practice, and thereby intended to authorize the circuit courts by means of it, to review judicial and *quasi* judicial proceedings of officers, boards of officers, and inferior tribunals, and no other." Hence the court held the ordinance under consideration in that case was purely legislative and was not reviewable on *certiorari*. The reason of course, being that to do so would be an enlargement of the writ.

Section 1316 of Kirby's Digest was passed to enable the circuit court to properly exercise the power conferred upon it of reviewing the *quasi* judicial proceedings of officers and boards of officers. It meant to give either party the right to introduce evidence that might be competent to enable the circuit court to properly review the action of the board. This is borne out by the concluding part of the section which provides that the acts of any board shall be only *prima facie* evidence of its regularity. If the lawmakers had intended only to supply the evidence taken or offered before the board, it would likely have provided for a record of the proceedings below by bill of exceptions or other appropriate method. It would not likely have left it to so much a matter of conjecture as the introduction of affidavits and other evidence by the respective parties on the hearing. I am not aware that such an unusual method of supplying the record of what occurred before the board, as the opinion of the majority contemplates, was ever provided for in any other proceeding. The board was given the power under the statute to remove the superintendent for certain specified causes, and could only act after notice to the superintendent and a hearing of the facts. If the board should act without any evidence or contrary to any reasonable view of the evidence, its action is subject to review by the circuit court, and section 1316 was passed to enable the officer on the one hand to introduce evidence tending to show that the action of the board was not characterized by good faith, that it exceeded its jurisdiction, or that its finding was con-

trary to any reasonable view of the facts as they existed; and on the other, to enable the board to show it acted in good faith and that the facts reasonably supported the charges preferred against the officer. Such construction of the statute would not amount to a trial *de novo*, in the circuit court, but would only be an appropriate method of reviewing the action of the board which was not required to make a complete record of its proceedings. It seems to me a strained construction of the statute to say that section 1316 was enacted simply as a means of supplying the record made before the board. It was rather passed to provide a full and comprehensive method of enabling the circuit court to arrive at the facts and properly review the action of the board, and such construction does not in any sense enlarge the scope of the writ of *certiorari*. In short my construction of section 1316 does not tend in any sense to enlarge the writ, but under it, the evident purpose of the act is to provide a method of conducting the inquiry before the circuit court and to enable it to take testimony in order that it may correctly and intelligently review the action of the board.

The opinion of the majority seems to give the finding of the board the same effect and binding force as the verdict of a jury in this court. That is to say, if any witness should testify to a substantial fact and the board should find according to his testimony, its finding must be upheld in the circuit court although his testimony was unreasonable and inconsistent, or that he might be contradicted by numerous credible witnesses. Appellants' counsel have cited the cases of *St. L., I. M. & S. R. Co.* v. *Bellamy*, 113 Ark. 384, to sustain their contention that the finding of the board must be upheld by the circuit court if there is any evidence to support it. I do not regard that case or our earlier cases on the subject reviewed in it as having any bearing whatever on the principle at issue in this case. In that case the court properly held that the legislature has primarily the right to determine whether the public necessity and convenience require the establishment of

a railway depot at a given point, and that having it, could delegate the powers to the railroad commission. There the court held that in cases where the Legislative determination of a question is committed to a board, council, commission or the like, the action of the board or commission is conclusive unless it is arbitrary. The principle was recognized in *Shibley* v. *Ft. Smith & Van Buren Dist.*, 96 Ark. 410, where the court declared that it was a settled principle of law that where the Legislature has created a tribunal for the purpose of ascertaining and declaring the result of an election upon any subject, the decision of such tribunal is conclusive. Again in *Little Rock* v. *Katzenstein*, 52 Ark. 107, the court held that the action of a city council in including property in an improvement district, is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake. This is in application of the rule that the Legislature having delegated to the council the power to fix the boundaries of the district, the finding of the council on the subject committed to it is conclusive. In the case before us, the Legislature could not pass an act making the finding of the board conclusive. The reason as we have already pointed out is that due process of law requires that, in an office having the incidents of a fixed term but subject to be terminated for due cause, or some particular cause, required to be established by proof, the officer shall be notified of the charges against him and have an opportunity to defend before he can be removed. As we have already pointed out, the action of the board in cases like this is judicial in its nature and for this reason is subject to review by the courts, by *certiorari* because no other method of review is provided by the statute. This distinction is clearly pointed out by Judge Battle in *Pine Bluff Water & Light Company* v. *Pine Bluff*, from which I have so liberally quoted above. It will be remembered that in that case the court held that the ordinance under consideration was purely legislative and for that reason was not reviewable on *certiorari*.

Of course I do not think the circuit court should weigh the evidence to decide where the preponderance lies, but I think the finding of the board is subject to review if there is no evidence to reasonably support the charges from any fair viewpoint.

The opinion of the majority says that any other rule than the one adopted by it would make the board a conduit through which a decision on the removal of an unfaithful or inefficient officer would be passed up to the courts. I do not think so. The board had no inherent power of removal. It had only such power as it derived from the statute, and can only exercise that power in conformity with the statute. The superintendent is an officer of the State, and his removal is a matter of serious importance. It would be unfortunate, indeed, if the board had no power to remove an unfaithful or inefficient superintendent. But it would be equally unfortunate to give the finding of the board such binding effect as to enable it to exercise its power of removal in an oppressive and unreasonable manner. As we have already seen the action of the board is judicial in its nature and because it exercises judicial functions its action is subject to the supervision of the courts; and it is thus deprived of exercising its power of removal in an unreasonable manner.

I quote from the opinion of Mr. Justice Mitchell in the case of *State* v. *City of Duluth*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595, as follows: "The sufficiency and the reasonableness of the cause of removal are questions for the courts. Dillon on Municipal Corporations, sec. 252, and cases cited. This has been the settled law ever since Bagg's case, *supra*, and we are not aware of any respectable authority to the contrary. Of course, cases (many of which are cited by respondents) where an officer or body was vested with an absolute power of removal at discretion are not in point.

Upon examination of the charges in this case we are clearly of the opinion that they are not sufficient in law. Considering them as a whole they show on

their face that they were not formulated in a very judicial frame of mind. They read more like a hostile declamation than a calm and deliberate statement of charges with a view to a fair investigation."

What the learned Justice said is peculiarly appropriate to the facts of this case as will be hereinafter seen.

The statute provides that the board may remove the superintendent for inattention, neglect, misconduct or inefficiency in the discharge of his duties, or for other adequate cause. I think the causes for which the statute provides his removal must be found in his officials acts and conduct and affect the proper administration of the office. The charges and evidence must relate to something of a substantial nature directly affecting the administration of the office and affecting the rights and interests of the public.

Having reached this conclusion as to the law of the case, it becomes necessary for me to restate the facts. The majority opinion has omitted certain evidence which I think is essential to a proper determination of the issues. Then, too, the opinion rather contains the conclusion of the judges as to the effect of the evidence than an abridgement of it. Section 4186 of Kirby's Digest prescribes the duties of the superintendent, and evidently contemplates that he shall devote his whole time to the discharge of the duties of the office. His duties are manifold and a certain degree of discretion must necessarily be vested in him to enable him to properly discharge them.

Appellee was elected superintendent by the Board of Control about the first of January, 1916. During the spring the members of the board told another physician, who was a mutual friend of all parties that appellee was a good superintendent and his services were perfectly satisfactory.

Another witness testified that he had a conversation with one of the members of the Board about the efficiency of appellee, and the member said he regarded appellee as the best man in the State for the position.

Early in May, 1916, the Board called appellee in and handed him a paper demanding that he remove certain members of his staff and appoint other persons, named by them, in their places, and also that he discharge certain other employees. Appellee asked the members of the Board if they had any charges to make against him personally and was told they had not. The members of the Board and appellee went to the Governor's office and discussed the matter, and the latter insisted upon the changes suggested by the Board being made. No charge of misconduct was made against any of the persons whose removal was demanded. Appellee refused to make the changes suggested by the Board and by the Governor. After several conferences the Board asked appellee to resign, and upon his refusal preferred charges against him, which were served on him at 11:30 of the night of May 25, 1916, to be heard the next morning at 10:00 o'clock. The charges were substantially as follows:

1. Absenting himself from the Institution.
2. Failing to visit and inspect wards.
3. Permitting autopsies.
4. Failure to consult with Board with reference to the employment and discharge of employees.

Through the efforts of mutual friends of the Governor, the members of the Board and of appellee, a compromise was effected on May 29, 1916. No record was made by the Board of these charges or their dismissal. It appears that the dissension between the Board and Dr. Bledsoe created a spirit of unrest among the employees and caused some confusion in the management and conduct of the institution. Dr. Bledsoe testified that to allay this, he made the compromise, believing that by so doing he was acting for the best interests of the institution. The members of the Board told mutual friends both before and after the compromise that they had no complaints against appellee personally, and were satisfied with his administration of the office, but that he must make the changes in his staff and other subordinates suggested by them.

Subsequently there was another quarrel between appellee and the Board because appellee refused to discharge certain members of his staff and certain other employees. Appellee refused to make the changes in his staff and other employees as demanded by the Board. At six o'clock in the afternoon on June 6, 1916, charges were again preferred against appellee and he was notified to appear and answer them the next morning at 10 o'clock. The charges are in substance as follows:

1. Failing to devote his whole time to the duties of the office.

2. That he had absented himself from the institution when it was his duty to be there.

3. That he had failed to visit and inspect the wards as often as his duty required.

4. That he had failed to hold meetings of his staff as his duty required.

5. That he had illegally permitted autopsies to be held.

6. That during the past few weeks he has used his position to prejudice the people of the State against the Board and the Governor.

7. Charged with official misconduct in giving to the press his correspondence with the Board concerning the first disagreement between the Board and appellee.

Counsel in their brief for the Board do not argue that there is any testimony to support charges numbered 1, 2, 6 and 7; but inasmuch as reference has been made in regard to one of them in the majority opinion it has been deemed proper by me to also refer to them as being explanatory of the motives that actuated the Board in making the charges. In regard to charges numbers 6 and 7, it may be said that during the month of May when the first quarrel was had, certain letters passed between appellee and the Board which were published in the newspapers. In regard to charge No. 1, the evidence shows that appellee on one occasion, by permission of the Board went to Batesville, Ark., on Saturday night and was back at his post on Monday

morning. That on another occasion, he went to Pine Bluff, leaving at 3 P. M., and returning next day. He was, also absent for one week in New Orleans. His absence at New Orleans was by permission of the Board, and was to attend a convention where it was thought he would gather some new and useful ideas in regard to running institutions of this kind. This was all the evidence on these charges and of course counsel abandoned them.

In regard to charge No. 2, one of the inmates of the hospital testified that he carried the mail to and from the city and worked at the telephone during the noon hour. That he usually got back from the post-office about 10:30 or 11 o'clock A. M., and 4 o'clock, P. M. That he had been doing this for three months. That he quite frequently met Dr. Bledsoe going away from the hospital as he returned. That he would frequently have telephone calls for him at the noon hour when he was not there. That sometimes he would meet him going away about 4 o'clock in the afternoon. Dr. Bledsoe, himself, gave a reasonable explanation of his absence. He said that it was frequently necessary for him to go to the State Capitol to consult the Board about obtaining supplies or to be down town on the same business. He also stated he has on a few occasions been absent on personal business or to go to a picture show with his family. This is all the testimony on this charge contained in the record and it furnished no ground whatever for dismissal. The undisputed evidence shows that no autopsies were made except in cases where no one claimed the body and an autopsy was necessary to determine the cause of the death of the deceased. The body was then interred in the same manner as other unclaimed bodies where no autopsies were held. The majority opinion does not even mention this charge and I only mention it as tending to show the Board was seeking any charge that might afford it a legal cause for removing appellee. It was not shown that the Board even objected to autopsies being held, or asked appellee not to hold

them. This leaves for our consideration the only two charges that were pressed by the counsel for the Board to sustain its action in removing appellee, to-wit: Failing to attend staff meetings and to visit the wards. These are the charges relied upon by counsel to sustain the action of the Board in removing Dr. Bledsoe. In regard to the first, it may be said that the evidence shows that Dr. Bledsoe did not attend certain meetings of his staff during the month preceding his removal by the Board. It will be remembered that a quarrel commenced between Dr. Bledsoe and the Board about the first of May because he would not discharge his staff and other employees at the request of the Board. The hospital was divided into wards for the purpose of receiving patients, and certain members of the medical staff were designated for each ward. The incoming patient was mentally and bodily examined by the physician whose duty it was to receive him. A stenographer was assigned to the physician whose duty it was to examine the patient and his duty was to take down the result of the examination. A certain number of stenographers were employed for that purpose. After the quarrel between the Board and appellee, beginning May 1, 1916, the stenographers quit or were discharged. So during the month of May while the dissension was hot between the Board and Dr. Bledsoe satisfactory stenographers could not be employed. The matters taken down by the stenographers were the basis for the staff meetings which were held for the purpose of determining the particular mental disease of the patient and to better enable them to be treated. Dr. Bledsoe testified that during this time it was impossible to employ satisfactory stenographers and that it would take about a month to train to the work steno raphers who could be employed. His testimony on this point is not contradicted. It is reasonable and consistent and there was no reason to disregard it unless testimony tending to disprove it was introduced. Dr. Bledsoe's private office adjoined the room in which the staff meetings

were held, and on several occasions he did not go into the room where the staff meetings were held because he was engaged in other duties pertaining to the institution, having arranged with his chief assistant to call him in at any time that his presence was required. The only remaining question is whether or not he visited the wards as often as necessary. The testimony on this question is as follows:

There are over two thousand patients in the Hospital and thirty-seven wards. The testimony of nine nurses shows that Dr. Bledsoe seldom visited their wards. Their testimony is contradicted by the records which are required to be kept on this matter, and also by Dr. Bledsoe who testified that he visited the wards where his presence seemed to be most required, and that he spent his whole time in the discharge of his official duties. That the only time he was absent was when he went to see the members of the Board about supplies or occasionally to take his family to see a moving picture show. There are 37 wards in the institution. Dr. Bledsoe is only charged with having failed personally to visit seven of them. He has eight assistants. It is admitted in the record that they faithfully performed their duties. It was their duty to visit the wards to which they were assigned and this it is conceded was done by them. It is also conceded that their duties were performed in an efficient and faithful manner. Every ward was visited one or more times each day by some member of his staff. On account of the number of wards and the number of patients in each ward, Dr. Bledsoe could not visit every ward each day and attend to his many other official duties. Hence he visited more frequently the wards where his presence seemed to be more needed. As to the 30 other wards it is not pretended that he did not visit them as often as necessary. Hence Dr. Bledsoe could not be discharged for failing to visit these wards. As a makeshift it is shown that he did not visit the laundry. It was the duty of Dr. Bledsoe to see that this department was conducted as the law

requires. The man in charge of the laundry testified that Dr. Bledsoe never visited his department. He does testify, however, that he conducted it as it ought to be and reported to Dr. Bledsoe. It will be remembered that there was a quarrel for nearly a month before charges were preferred. It seems from the record that the only complaint against Dr. Bledsoe was that he had not visited the laundry. It seems that the laundry was conducted as it should have been done and Dr. Bledsoe should of course not be discharged on that account. Dr. Bledsoe himself testified that he kept a general supervision over the farm and laundry.

There is an amount of ground around the institution which is planted in vegetables. It is shown that Dr. Bledsoe did not personally superintend the growing of the vegetables therein. The farmer designated to manage this branch of the institution testified that the farm was conducted as it ought to be and his only complaint was that Dr. Bledsoe did not personally superintend it. I do not understand the record to show that many of the attendants testified that Dr. Bledsoe never spoke to them at all or that much of the testimony is to the effect that Dr. Bledsoe's conduct towards the attendants was uncivil or discourteous. There is some testimony to the effect that Dr. Bledsoe was rude to some of his employees. He says that he is near-sighted and did not intend so to be. His rudeness unless it extended to illegality of conduct or to oppression under color of office is not ground for removal. This is so because the temperament of people is different. An apparent incivility may be due to poor eyes, to a preoccupied mind, or to a variety of other unintentional causes on the part of the person charged with being rude or discourteous, or it may be the result of prejudice, imagination or a variety of other causes on the part of the person alleging incivility. It must be remembered that the quarrel between the Board and Dr. Bledsoe commenced about the 1st of May. That it arose on account of his refusal to discharge certain members of his medical staff and other

subordinates on the demand of the Board. That this quarrel continued until the compromise was affected during the latter part of the month, and that it was revived again in a week or so, when Dr. Bledsoe refused to make all the removals demanded by the Board. I think that a careful consideration of the whole record and a judicial review of it leads to the conclusion that whatever inefficiency resulted from not holding staff meetings or the lack of doing other things which had been regularly done before resulted from the unwarranted demands of the Board of Dr. Bledsoe and that the causes of removal designated in the statute could not result from a situation or condition caused by the Board itself making unwarranted demands on Dr. Bledsoe. Each time charges were preferred against Dr. Bledsoe, he was given only a few hours' notice to appear and defend against the charges. It may be seriously doubted if sufficient notice was given him to meet the charges but I make no point on that. I only mention this in connection with the other facts to show that the Board did not act in a very judicial frame of mind; and that the charges did not eminate from minds desirous of exercising calm and deliberate judgment in investigating them. I think the whole matter resulted from the quarrel in regard to the removal of certain members of the medical staff and other subordinates and that the evidence as disclosed by the whole record did not afford any reasonable ground for the action of the Board in removing Dr. Bledsoe.

I am authorized to state by Mr. Justice WOOD that he concurs in this dissent.

SUMPTER v. HOT SPRINGS SAVINGS, TRUST & GUARANTY COMPANY.

Opinion delivered October 30, 1916.

1. USURY—LOAN—BELIEF OF BORROWER.—The intention of the borrower, and his belief that he has contracted a usurious loan, will not alone render the loan usurious.

2. USURY—BONUS TO BORROWER'S AGENT.—A bonus given to the borrower's agent who procured the loan for him cannot render the loan usurious.

3. USURY—BONUS TO LENDER'S AGENT.—If the agent of the lender receive from the borrower a bonus in excess of the highest lawful interest, either with the lender's knowledge, or under circumstances from which the law will presume knowledge, the transaction is usurious; while if the agent received the excessive bonus without the lender's knowledge, and under circumstances from which his knowledge cannot reasonably be presumed, the transaction will not be usurious.

Appeal from Garland Chancery Court; *Jethro P. Henderson*, Chancellor; affirmed.

Geo. P. Whittington and *O. H. Sumpter*, for appellants.

The loan was usurious and void.

1. Tombler was the agent of the bank, an officer and member of the discount board.

2. A bonus or commission was paid him as agent of the bank.

3. Plaintiff had knowledge of the payment of the bonus to Tombler, or under the circumstances knowledge will be presumed.

4. The bonus paid Tombler when added to the interest to be paid constitutes a clear case of usury.

C. T. Cotham and *Chas. C. Sparks*, for appellee.

1. The burden to prove usury by clear and satisfactory evidence was on appellant. 83 Ark. 31; 105 *Id.* 653; 91 *Id.* 458; 68 *Id.* 162; 63 *Id.* 358.

2. Tombler was the agent of the bank in the transaction. 45 Am. Rep. 365; 39 *Id.* 761; 52 *Id.* 710; 3 R. C. L., § 107, p. 478; 5 Cyc. 461.

3. No bonus or commission was paid to Tombler by appellant as agent of the appellee. 21 Ark. 69; 25 L. R. A. (N. S.) 275.

4. Plaintiff had no knowledge of the payment of any bonus to Tombler, nor under the circumstances will any be presumed. The loan was not usurious. 2 Parsons Cont. 391. There is no testimony that the bank shared in or profited by the alleged bonus.

SMITH, J. This suit was brought to foreclose a deed of trust executed by appellant to appellee (hereinafter referred to as the bank) to secure a note payable to its order in the sum of $14,000.00, and the suit was defended upon the ground that the note was usurious and void. In support of this plea the following testimony was offered: An application had been made to the bank for a loan of $13,000.00, and the application was rejected. Later O. H. Sumpter, son of, and attorney for appellant, employed C. C. Sparks to secure the loan, and an application therefor was made to one M. C. Tombler, who had incurred certain liabilities by becoming surety for a Mrs. Shannahan, a daughter of appellant, and this daughter's husband, and had, in this manner, become involved in the litigation against the Shannahans. Later Tombler sued Mrs. Shannahan and recovered a judgment against her in the sum of $2,832.16, and in this litigation Tombler had unsuccessfully attempted to assert a claim against the Shannahans for $800.00, which sum he alleged had been expended by him in defense of the litigation against himself and the Shannahans.

O. H. Sumpter applied also to Tombler for this loan after his attorney had talked to Tombler, and Tombler agreed to procure the desired loan but imposed as a condition that the Shannahans should not only pay this $800.00 so claimed by him, but should also pay $200.00 as attorney's fees and costs in the litigation in which he had attempted to assert that demand. The property on which the loan was desired had belonged to Mrs. Sumpter's three children, but

they had conveyed their interests to her in order that she might procure the loan which was desired for the purpose of discharging certain outstanding liens against the building on which this loan was made. Tombler was a stockholder, director and a member of the discount board of the bank. It was testified to by both Sumpter and his attorney that the president of the bank refused to make the desired loan of $13,000.00, but that after conference and negotiation between themselves and Tombler and between Tombler and the bank the bank later made a loan of $14,000.00 upon the same property upon which a loan of $13,000.00 had been declined, and they testified that Tombler said he would not negotiate the loan unless his demand of a thousand dollars was paid, and Sumpter testified that this demand was unjust and was known so to be by Tombler, and that the thousand dollars which was paid for the nominal purpose of satisfying this demand was in fact paid as a bonus for procuring this loan, and it is insisted that in this transaction Tombler was acting for and as the agent of the bank, and that the bonus when so paid to Tombler rendered the loan usurious and void.

Under the by-laws of the bank no loan exceeding $200.00 could be made without the approval of the discount board, and this loan was submitted to and approved by the said board. Sumpter testified that he told the president of the bank that Tombler was being paid a thousand dollars to negotiate this loan; but this was denied by the president of the bank. The proof is that both Sumpter and the bank's president were hard of hearing.

Tombler testified that his claim was a just one, although he had not succeeded in establishing it in court, and that his efforts in assisting in procuring the loan were prompted solely by a desire to collect what he regarded as a just demand, and that he was acting for himself and not for the bank. The bank's president testified that he knew Tombler was interested in trying to collect some demand from the Shannahans and

Sumpters, but that he did not know the nature of the demand except that it had been in dispute between the parties, and that the bank did not receive any part of this thousand dollars. It was also shown that before the bank would agree to make the loan it required Tombler to endorse this note and, in addition, required him to obligate himself to carry a minimum deposit with the bank of $7,000.00 during the time the loan was carried by the bank, and that Tombler had complied with both these conditions.

The court found that the loan was not usurious and decreed a foreclosure of the deed of trust, and this appeal has been duly prosecuted from that decree.

(1) Notwithstanding the fact that Sumpter considered that he was paying a bonus of a thousand dollars for the negotiation of this loan and was not satisfying the disputed claim, we think this would not render the loan usurious. His intention to contract for a usurious loan and his opinion that he had done so would not make the loan usurious unless Tombler was acting for the bank in its negotiation. 3 R. C. L., page 479, Section 107.

In the recent case of *VanDeventer* v. *Smith*, 123 Ark. 612, 186 S. W. 59, we had occasion to review the decisions of this court upon this subject, and it was there said:

(2-3). "The parties cite and rely upon the cases of *Thompson* v. *Ingram*, 51 Ark. 546, 11 S. W. 881, and *Vahlberg* v. *Keaton*, 51 Ark. 534, 11 S. W. 878, 4 L. R. A. 462,14 Am. St. Rep. 73. 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 knowledge, 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.'"

We think the proof shows that Tombler acted for himself and for appellant, and not for the bank. This is shown by the conditions imposed by the bank before making the loan that Tombler become jointly liable for this loan and that he carry as a deposit a sum equal to one-half of the loan. Under this proof the chancellor's finding cannot be said to be against the preponderance of the evidence, and his decree is accordingly affirmed.

POLK v. STEPHENS.

Opinion delivered October 30, 1916.

1. HOMESTEAD—CONVEYANCE TO WIFE.—A conveyance of the homestead property to the grantor's wife and children, without the wife's joining in the deed is valid where the conveyance was approved and accepted by the wife.
2. HOMESTEAD—CONVEYANCE—ERRONEOUS HOLDING OF CHANCELLOR—BONA FIDE PURCHASER.—A grantor conveyed his homestead to his wife and children, the wife not joining in the deed. The chancellor held the deed invalid; but on appeal the cause was reversed, and the decree ordered to be vacated. In the meantime the grantor had conveyed to another party. *Held*, the latter conveyance was invalid, the original conveyance standing.

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

STATEMENT BY THE COURT.

Appellees brought suit in ejectment, claiming to be the owners of certain lands in Clay county, of which it was alleged appellant was in the wrongful possession.

They deraigned title from a deed from their father, Wm. Stephens, executed on the 21st day of July, 1898, and alleged that defendant claimed through and under a deed of later date from the same grantor.

Appellant answered denying the allegations of the complaint that the lands were conveyed to appellees by Wm. Stephens on the 21st day of July, 1898, or at any other time and that he was in the wrongful possession thereof. Admitted claiming title under a deed from Wm. Stephens and his wife, executed October 14, 1905, and alleged that the deed under which appellees claimed title was void, the lands conveyed being the homestead of the grantor, and his wife not having joined in the deed thereto as required by law. He then set up the fact that the attempted conveyance by Wm. Stephens of the lands to his wife and children by the said deed was thereunder cancelled as a cloud upon his title by the chancery court of Clay county, after which cancellation he became the purchaser, paying therefor the sum of $3,600 and was a *bona fide* purchaser for value, and entitled to protection as such and that he had paid the taxes regularly thereon since his purchase, etc.

It appears from the testimony that the lands were conveyed by said Stephens to his wife and children by a warranty deed on the 21st day of July, 1898, in which his said wife, Jennie Stephens, did not join as a grantor. That afterwards, in a suit for that purpose against his wife and said children, said deed was cancelled as never having been delivered. The lands were then sold and conveyed by Wm. Stephens and his wife by a deed under which appellant claims title, executed on the 14th day of October, 1905.

Maggie Stephens, as guardian of James and Grace Stephens, appealed from said decision of the chancery

court, cancelling the deed executed by Wm. Stephens, his said wife and children, and the Supreme Court reversed said decision and held the deed valid. *Stephens* v. *Stephens*, 108 Ark. 53.

The cause was remanded with directions to vacate said decree, which was done and the complaint dismissed for want of equity, which decree was excepted to by W. D. Polk and L. H. Colley, who had filed motions asking to be made party plaintiffs in the cause, which were overruled. Appellant then petitioned for a writ of mandamus against the chancellor to compel him to allow petitioner to be made a party plaintiff in said suit, setting out that at the time of the conveyance from said Wm. Stephens to his wife and children, that the property was a homestead and that his wife had not joined in the conveyance thereof and that petitioner was an innocent purchaser for value. The petition for the writ was denied, and finally disposed of in *Polk* v. *Frierson*, 113 Ark. 582.

It appears also that the lands in controversy were the homestead of Wm. Stephens, at the time he conveyed them to his wife and children in 1898 upon his departure for Oregon; that after his return he lived thereon with his wife and children as his homestead until he sold the lands in 1905 to appellee and moved to town. There was also some testimony tending to show that 80 acres of the lands was worth $3,000.00.

The court instructed the jury that the conveyance of the lands under which appellees claimed the deed of 1898 was valid, having been made so by a curative act of 1907, notwithstanding the wife failed to join in the conveyance and directed a verdict for an undivided one-half interest in the lands and half the rents and profits for three years, less the cost of taxes and improvements. It also instructed the jury that the question had been determined against Stephens, the record of which case was offered in evidence, that the land in controversy was not the homestead of Stephens at the time of the conveyance, which bound Polk his grantor, thereafter, and excluded all evidence of the

value of the improvement thereon. From the judgment on the directed verdict, this appeal is prosecuted.

J. N. Moore and *G. B. Oliver*, for appellant.

1. The conveyance to the wife and children in 1898 was absolutely void as to the children because the wife did not join in its execution. Kirby's Digest, § 3901; 57 Ark. 242; 108 *Id.* 53. And a subsequent abandonment does not cure the invalidity. 57 Ark. 242.

2. Argue that the court erred in its instructions to the jury, but they are not passed upon by the court.

W. E. Beloate and *F. G. Taylor*, for appellees.

1. There is no proof that the land was a homestead. The burden was on appellant. 67 Ark. 232; 67 *Id.* 1; 34 *Id.* 55; Thompson on Homest. and Ex., § 701. But if a homestead, it was a personal privilege which could be waived and Stephens waived it by failure to claim it. 28 Ark. 485; 47 *Id.* 485; 55 *Id.* 139. The wife accepted the deed and it was not necessary for her to join—she acquiesced in it.

2. Appellant was charged with notice of the decree in *Stephens* v. *Stephens*, and acquired no vested rights by his purchase after said decree. 70 Ark. 415; 81 *Id.* 440. The decree is conclusive on appellant. 96 Ark. 540; 117 *Id.* 492; 94 U. S. 351. He is estopped. 23 Cyc. 1253 and notes; 69 and 70; 94 Ark. 45; 19 Ark. 420; 36 Barb. 88. The question is now *res adjudicata*. Pomeroy on Rem. and Rem. Rights, § 460; 12 N. Y. 336; 24 *Id.* 4; 56 *Id.* 1221.

KIRBY, J. (after stating the facts). Appellant contends that the deed under which appellees claimed title was absolutely void, having been made to convey the grantor's homestead to his wife and children without the wife joining therein.

The statute provides, section 3901, Kirby's Digest: "No conveyance or other instrument affecting the homestead of any married man, shall be of any validity except for taxes, laborers' and mechanics' liens, and

the purchase money, unless his wife joins in the execution of such instrument, and acknowledges the same."

In *Kindley* v. *Spraker*, 72 Ark. 228, the court held that a conveyance from a husband directly to his wife was valid, notwithstanding the statute and that the wife did not join therein. It was held that a conveyance to the wife, which meets her approval and shows her consent thereto, conforms to the intent of the law to the same extent as a conveyance by the husband to a third person in which the wife joins.

The court quoted from Thompson on Homestead and Exemptions, sec. 473, as follows: "The policy of these statutes, which restrain the alienation of the homestead without the wife joining in the deed, is to protect the wife and enable her to protect the family in the possession and enjoyment of a homestead, after one has been acquired by the husband. They are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever may be the form of such conveyance," and continuing said, the weight of authority sustains this view.

The policy of the homestead law is to protect the family, the wife and children in the enjoyment of a home and it was not the purpose of this statute to make void a conveyance thereof by the husband directly to his wife and children, under which they would necessarily be as much protected as they could be if no conveyance of the homestead was made or the attempted conveyance was invalid, because of the failure of the wife to join therein. The conveyance met the approval of the wife and was accepted by her, and the family continued to reside thereon certainly until she later joined in the conveyance to appellant.

The deed was effectual to convey the lands and notwithstanding its wrongful cancellation by the decree of the chancery court, the title was not divested from the grantees, who appealed therefrom and caused said decree to be vacated. The purchase of the lands

for a valuable consideration thereafter from the original grantor and a conveyance of same to appellee before the reversal and vacation of said decree, would not have effect to constitute appellee a *bona fide* purchaser of the lands as against the claim of appellees under the original deed nor furnish any defense against their action for the possession of the lands. It can make no difference that a different reason was assigned by the trial court for its decision and upon which the verdict was directed, since no error was committed in the result reached.

The judgment is accordingly affirmed.

ALLEN v. ALLEN.

Opinion delivered November 13, 1916.

1. WARNING ORDER—PUBLICATION—PRESUMPTION.—Where the record is incomplete, on appeal it will be presumed that the omitted testimony was sufficient to establish the finding of the court that the warning order had been duly published.
2. WARNING ORDER—PROOF OF PUBLICATION.—The affidavit of the editor, etc., of a paper in which a warning order has been published, is not the sole evidence of its publications, but the court may hear other evidence establishing that fact.
3. DIVORCE—APPOINTMENT OF ATTORNEY AD LITEM.—In an action for divorce, the appointment of an attorney *ad litem* for the non-resident defendant, held to have been properly done.
4. DIVORCE—JURISDICTION OVER DEFENDANT'S PROPERTY.—The Statute authorizes the court to set apart to the plaintiff in a divorce case, one-third of all the husband's real estate, and the filing of a complaint describing the property gives the court jurisdiction over it for the purposes of making an award in accordance with the terms of the Statute; no attachment or other method of sequestration is necessary in order for the court to acquire jurisdiction.
5. DIVORCE—SALE OF HUSBAND'S LANDS—NECESSITY FOR BOND—CONSTRUCTIVE SERVICE.—Where the husband is defendant in a divorce suit, and being a non-resident was constructively served, Kirby's Digest § 6254, Sub-division 2 applies, and the wife will be required to give bond, in the event the husband's property is sold under decree of the court.
6. DIVORCE—SALE OF DEFENDANT'S LANDS—ABSENCE OF BOND.—Where lands belonging to defendant, a non-resident, were sold under decree

in divorce proceedings, where the bond of plaintiff appears nowhere in the record, and there is no evidence of its having been given, the presumption that the same was given will not be indulged.

7. DIVORCE—DISPOSITION OF HUSBAND'S PROPERTY.—In an action for divorce, when defendant was constructively served, it is the duty of the court, in dealing with his property to obey the Statute, Kirby's Digest, § 6256, which provides that where a bond is not given the court may enter a judgment ascertaining the rights of the parties, but shall retain control over and preserve the property, or proceeds thereof which may have been attached on the action, until the expiration of the period allowed to the defendent to appear and make defense.

8. DIVORCE—PROCEEDS OF SALE OF SALE OF HUSBAND'S LANDS.—Where the lands of a non-resident defendant are sold in a divorce proceeding, brought by the wife, the fact that the wife is allowed a life estate in the lands set apart to her, precludes the idea that she is to have the total amount of the proceeds arising from the sale of that interest, and it is the duty of the court, in cases of sale, to ascertain the present value of the interest and order it to be paid over to her, or otherwise protect her in the enjoyment of her interests.

Appeal from Prairie Chancery Court, Southern District; *Jno. M. Elliott*, Chancellor; reversed.

C. B. & Cooper Thweatt, for appellant.

1. The decree was rendered on constructive service and every fact necessary to jurisdiction must affirmatively appear. 48 Ark 246. The publication of the warning order did not comply with the statutes. The last three insertions were after the proof was filed and two of them after the decree. Kirby's Digest, § 6188 as amended by Act 290, Acts 1915. The presumption is that the decree was based on the proof of publication and there is no presumption that other evidence was heard. 94 Ark. 338; 89 *Id.* 573; 72 *Id.* 108. This is a direct attack on the judgment. 92 Ark. 148.

2. The attorney *ad litem* was not appointed 30 days before the decree. Kirby's Digest, § 6254; 50 Ark. 439.

3. No indemnifying bond was given. Kirby's Digest, § 6263; 2 Black on Judg., Art. 925.

4. It was error to award dower. 59 Ark. 448; Kirby's Digest, § 6259; 2 Encl. Pl. and Pr., 103.

5. A judgment by default will be set aside if service is not shown. 68 Ark. 561.

J. M. McClintock and *W. A. Leach,* for appellee.

1. The appellant was properly served with process. Other evidence than the proof of publication was heard and the presumption is that service was shown. 89 Ark. 64; 72 *Id.* 101; 66 *Id.* 1; 21 *Id.* 364. The record recites that defendant was duly served by warning order and that is *prima facie* evidence of service, unless otherwise shown. 72 Ark. 266; 66 *Id.* 1; 63 *Id.* 513; 57 *Id.* 49; 25 *Id.* 40 and cases *supra;* Kirby's Digest, § 4425.

2. The attorney *ad litem* was duly appointed and in time. Kirby's Digest, § 6254. The presumption is that the clerk performed his duty. 8 Ark. 30.

3. Under Kirby's Digest, § 2684, the wife was entitled to one-third of the personal property absolutely and one-third of the lands for life, or a dower interest. 64 Ark. 518. This is in addition to alimony. Kirby's Digest, §§ 2861-2-3.

4. No attachment was necessary and the lands, as they could not be divided were properly ordered sold. *Ib.* § 2684.

5. No bond was necessary before judgment. The record is silent on this question; the presumption is that the bond was given. It is only in attachments for debt that the bond is required.

McCULLOCH, C. J. Appellee filed her complaint in the chancery court of Prairie county, Southern District, on September 29, 1915, against appellant, her husband, in which she set forth desertion as grounds for divorce, and also set forth a description of certain real estate owned by appellant, and prayed that on final decree an interest in the lands be awarded her in accordance with the terms of the statute. The omission of a prayer for divorce was an obvious error which

was corrected by an amendment to the complaint filed on the next day.

An affidavit was filed with the complaint showing that defendant was a non-resident of the State, and a warning order was made by the clerk and indorsed on the complaint, summoning the defendant to appear. There appears also an indorsement on the complaint showing the appointment of an attorney *ad litem* for the defendant. The affidavit of the proprietor of a certain newspaper was filed on November 1, 1915, in proof of the publication of the warning order, and in said affidavit it was stated that a warning order had been published four times, viz.: on October 30th, November 7th, November 14th, and November 21, 1915. A written report of the attorney *ad litem* for the non-resident defendant was filed in open court on November 1, 1915, and on November 12, 1915, the court rendered a final decree in favor of appellee, granting a divorce from the bonds of matrimony and awarding her one-third of the lands of appellant in that county, pursuant to the terms of the statute which provides that in every final judgment for divorce granted to the wife against the husband she "shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form, and every such final order or judgment shall designate the specific property both real and personal, to which such wife is entitled." Kirby's Digest, Sec. 2684.

The court further found that the said interest of appellee could not be allotted to her in kind, and an order of sale was made directing the clerk of the court, as commissioner, to sell the land at public outcry and to pay over to appellee one-third of the gross proceeds of said sale. The decree recited that appellant had been duly served by publication of warning order, but had made default, and that the cause was heard upon the complaint, "the proof of

warning order," the depositions of appellee and another witness, "and other evidence adduced at the hearing." It does not appear in the record what the other evidence consisted of. Within six months from the date of said decree, appellant, through his attorney, appeared before the clerk of this court and prayed an appeal, which was granted.

(1-2) The first point made is that the proof of publication of the warning order shows an insufficient publication, in that the last three insertions in the newspaper occurred after the proof was filed and two of them after the date of the decree. This was obviously a clerical error in the preparation of the affidavit attached to the warning order, for the affidavit was filed on November 1st, and the language is contradictory in stating that it had been published four times, the last three dates being subsequent to the date of the affidavit and two of them being subsequent to the date of the decree of the court. The statute (Kirby's Digest, Sec. 4924) does not make the affidavit of the editor, proprietor, etc., the sole evidence of publication, and the court may have heard other evidence establishing the fact that the warning order had been duly published. The record being incomplete, we must indulge the presumption that the omitted testimony was sufficient to establish the finding of the court that the warning order had been duly published. *Cannon* v. *Lunsford*, 89 Ark. 64.

(3) It is contended that the record fails to show that the attorney *ad litem* was appointed thirty days prior to the date of judgment, as required by statute, but we think that this contention is unsound, and that the record fairly reflects the fact that the appointment was made by the clerk on the date of the filing of the complaint, which was more than thirty days before the decree. The appointment was indorsed on the back of the complaint and appears between the warning order and the filing marks of the clerk, which show the date of filing and the issuance of the warning order. We are of the opinion that this is sufficient,

in the absence of other evidence showing affirmatively that the appointment was not made thirty days prior to the rendition of the decree.

(4) It is next contended that as there was no attachment issued and levied seizing the property of appellant, and that there was nothing to give the court jurisdiction of the *res* so as to justify a decree awarding a portion of the property to appellee. In support of this contention counsel quote from Black on Judgments (Vol. II, Sec. 925), where the rule is stated that a decree for a divorce is one in *rem* but that the decree for alimony is one in *personam* and that the property must be seized under process of the court before jurisdiction is acquired. It is a mistake to assume that a suit for a division of property in a divorce proceeding is not a proceeding in *rem*. The statute authorizes the court to set apart to the plaintiff in a divorce case one-third of all the real estate, and the filing of a complaint, describing the property gives the court jurisdiction over it for the purposes of making an award in accordance with the terms of the statute. No attachment or other method of sequestration is necessary in order for the court to acquire jurisdiction.

It is next urged that the court committed error in rendering final judgment without requiring appellee to give bond as required by statute in cases of judgments against defendants who have been constructively summoned. The statute provides that before a judgment is rendered against a defendant constructively summoned, and who has not appeared, a bond must be executed "to the effect that if the defendant, within the period prescribed by law, shall appear, make defense and set aside the judgment, the plaintiff shall restore to him the property taken under any attachment in the action, or under the judgment therein, the restoration of which may be adjudged, and pay to the defendant such sums of money as the court may award to him." Kirby's Digest, Sec. 6254, subdivision 2.

(5) Counsel for appellee say in response to this contention that the general statute quoted above with reference to giving bond in cases of constructive service does not apply to a suit of this kind. Of course, it does not apply to an ordinary divorce case, where no property rights are involved, inasmuch as the bond is only to afford security for the restoration of property which may be taken by attachment or under the judgment, but we perceive no reason why the statute, though of a general nature applicable to all proceedings, should not apply to that portion of a divorce suit which authorizes a division of the property. No attachment is required in the case, as we have already said, but the statute provides that the bond is to compel the restoration of property taken under the judgment, and it seems to us that the effect of a decree under this statute is to take the property away from the defendant by the decree of the court. We are of the opinion, therefore, that the statute applies and it was error for the court to render judgment completely depriving the appellant of his right to restoration of the property or proceeds in the event that he should appear and show cause sufficient to set aside the decree.

(6-8) The transcript, which bears the clerk's certificate showing that it contains a complete record, does not include the bond, and there is no reference anywhere in the decree to the giving of a bond. Therefore we cannot indulge the presumption that the bond was given. Now, the statute further provides that if the bond be not given "the court may enter a judgment ascertaining the rights of the parties, but shall retain control over and preserve any property, or the proceeds thereof, which may have been attached in the action, until the expiration of the period allowed to the defendant to appear and make defense." Kirby's Digest, Sec. 6256. Instead of making an order preserving the property, the court ordered it sold and one-third of the gross amount of the proceeds paid over to appellee. This action of the court was clearly in conflict with

the plain letter of the statute and was erroneous. Moreover, the court erred in decreeing to appellee one-third of the gross amount of the proceeds of sale. The statute, it will be noted, only gives the wife who is granted a divorce one-third of the real estate for life, and the effect of the court's decree was to give her an absolute interest in the property by turning over to her one-third of the gross amount of the proceeds. It is true the statute further provides that if the real estate cannot be divided without prejudice to the parties, the court shall order a sale thereof by a commissioner and that "the proceeds of every such sale after deducting the cost and expenses of the same, including the fee allowed said commissioner by said court for his services, shall be paid into said court and by the court divided among the parties in proportion to their respective rights in the premises." Kirby's Digest, Sec. 2684. The fact that the wife is only allowed an estate for life in the lands set apart to her precludes the idea that she is to have the total amount of the proceeds arising from the sale of that interest, but it is the duty of the court in cases of sale to ascertain the present value of the interest and order it to be paid over to her, or otherwise protect her in the enjoyment of her interests.

The decree of the chancellor is affirmed insofar as it grants a divorce to appellee and awards to her an undivided third of the lands for life, but that part of the decree which directs a sale of the land and distribution of the proceeds is reversed and the cause is remanded for further proceedings in accordance with the law.

FREEZE v. IMPROVEMENT DISTRICT NO. 16.

Opinion delivered November 13, 1916.

1. LOCAL IMPROVEMENT—ORGANIZATION OF DISTRICT—DESCRIPTION—"CENTER."—The description of a district began with a point in the "center" of a certain quarter section. *Held*, the description was not invalid, although the quarter section, the center of which was referred to, was not a square.
2. LOCAL IMPROVEMENT—SUFFICIENCY OF DESCRIPTION.—The description of a local improvement is sufficient which describes one boundary as along the right-of-way of a certain railroad: that will be treated as certain which can be made certain.
3. LOCAL IMPROVEMENT—STREETS—DESCRIPTION.—The description of certain streets to be paved, held sufficient.
4. LOCAL IMPROVEMENT—STREET IMPROVEMENT—ADJOINING STREETS.—In the formation of a paving district, property may be included between which there is no actual physical connection, and in this case, *held*, that there was no fraud or mistake on the part of the city council in designating the streets to be included in the district.

Appeal from Craighead Chancery Court, Western District; *J. D. Block*, Special Chancellor; affirmed.

H. M. Mayes, for appellants.

1. The petition was for the improvement of certain streets while the ordinance limits the improvement to a portion or part of such streets. This is inconsistent and not uniform. 115 Ark. 594; 86 Ark. 21; 59 *Id.* 354; 108 *Id.* 141; 115 Ark. 88; 105 Ark. 65.

2. The boundary line is indefinite and not "easily distinguished." Kirby's Digest, § 5665. The point of beginning is indefinite and the north boundary line of the railroad is uncertain. 105 Ark. 65.

3. Property is included that is not "adjoining" or "near" the improvements, but at a great distance therefrom. 84 Ark. 257.

4. Improvement districts cannot be merged where no benefits result. 109 Ark. 90; 125 Ark. 57.

5. The specifications of the improvements are not definite. 115 Ark. 88.

Lamb, Turney & Sloan, for appellees.

1. There was no variance or inconsistency in the petitions or ordinances in the description of the streets

to be improved. 30 Cyc. 1119; 90 Ark. 29; 1 Ga. 171; 1 Pick. (Mass.) 248; 151 Mo. 210.

2. The boundary lines were designated so as to be easily distinguished. 60 N. W. 538; 60 S. E. 76.

3. All property included within the district adjoins the locality to be affected by the improvement. 52 Ark. 112; 70 *Id.* 466; 84 *Id.* 267.

4. The fact that this district includes property which has heretofore been included in other districts does not invalidate its organization. 109 Ark. 97; 90 *Id.* 29; 103 *Id.* 452.

5. The designation of the improvements was sufficient. 90 Ark. 29; 97 *Id.* 339; 106 *Id.* 66.

McCULLOCH, C. J. An improvement district has been formed in the City of Jonesboro for the purpose of paving parts of certain streets near the center of that city, and this is an action instituted by appellant in the chancery court of Craighead county to restrain the Board of Improvement of the district from carrying out the purposes of the organization. It is alleged that the organization is void upon several grounds set forth in the complaint.

(1) The first attack is made on the ground that the boundary lines of the district are insufficiently set forth to constitute a definite description so that property owners may know the precise territorial limits of the district. The description begins with a point in the center of a certain quarter section, and it is claimed that the subdivision mentioned is not an exact square according to the government surveys, in other words that it is a fractional quarter section, and that the use of the word "center" in the description does not designate a specific point of beginning. It might be a question of construction to determine whether the word "center" referred to the exact geographical center of the quarter section or to the common corners of the four smaller subdivisions constituting the quarter section, but whenever necessary to construe the word thus used it can be done and that

will make certain the use in which the word is meant. It is not contended that the difference makes any substantial change in the line of the district, but even if it does we are of the opinion that the use of the word does not make the description so uncertain as would invalidate the organization of the district.

(2) It is also contended that the description is indefinite for the reason that it designates one of the lines as running along the north boundary of the right of way of a certain railroad, and it is argued that it is an insufficient description without designating the line more particularly by metes and bounds or otherwise. That should be treated as certain which can be made certain, and it is a matter susceptible of proof as to what constitutes the north boundary line of the right of way of the railroad, and therefore it is a sufficient description.

(3) The next point of attack is that there is a variance between the improvement described in the petition and that described in the ordinance creating the district. It is said that in the petition for the organization of the district the improvement is described as paving certain streets, whereas the ordinance creating the district specifies the improvement as the paving of parts of certain streets. When the language of the petition is compared with that of the ordinance, it is found that they correspond in substance, and that the purpose of the organization is described as that of paving certain portions of the street named, the precise extent of the improvement being described alike in each instance. The attack on that score is entirely unfounded.

(4) It is shown that the boundaries of the district include property several blocks distant from the nearest portion of the contemplated improvement—conceded to be about one-fourth mile distant, and that the distant property so included does not adjoin the improvement within the meaning of the constitutional provision authorizing the assessment of real property for local improvements in cities and towns "based upon

the consent of a majority in value of the property holders owning property adjoining the locality to be affected." Art. XIX, Sec. 27, Const. 1874.

That provision of the constitution has received an interpretation by this court in the case of *Little Rock* v. *Katzenstein*, 52 Ark. 107, which we think is controlling in the present case. In that case the court laid down two rules as follows: "First. That property adjoining the locality to be affected is any property adjoining or near the improvement which is physically affected, or the value of which is commercially affected, directly by the improvement, to a degree in excess of the effect upon the property in the city generally. Second. That the action of the city council, in including property in an improvement district, is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake." In that case the court was dealing with the question of the validity of a district which embraced property in a block abutting on the street to be improved, but the particular lots owned by the recalcitrant property owner did not abut on the street.

This principle was followed in the case of *Matthews* v. *Kimball*, 70 Ark. 451, in which it was held that the organization of a district composed of the whole of the city of Little Rock for the purpose of establishing and maintaining a public park was valid. In the opinion the court said: "In the case at bar there is no break in the continuity of the assessable lots or parcels of ground from the park grounds to the outermost boundaries of the district, which is the city. Therefore, according to *Katzenstein* v. *Little Rock*, *supra*, all is adjoining the locality to be affected."

Again, in the case of *Board of Improvement* v. *Offenhauser*, 84 Ark. 257, the court expressly approved the doctrine of the Katzenstein case and held that the inclusion in a sewer district of property three hundred feet from any of the sewers was not necessarily invalid.

It being established by these decisions that there need not be any physical connection between the included property and the improvement, and that the action of the city council is conclusive except for fraud or demonstrable mistake, the only question is whether or not it can be said to be either fraudulent to include property distant from the improvement to the extent shown in the present case, or that it constitutes a demonstrable mistake to include such property. Our conclusion is that the facts of this case are not sufficient to establish either fraud or a demonstrable mistake, and that the conclusive effect of the action of the city council in embracing the property within the limits of the district is not overturned. Property may be so remote from the improvement that it will not receive special benefit in proportion to the property actually abutting on the improvement, yet it may be affected by the improvement in excess of the effect upon the property of the city generally. That was emphasized in the *Katzenstein* case, *supra.* Applying this rule to the case at bar, we cannot say that it is a demonstrable mistake to include property distant from the improvement.

We are not dealing now with the question of the extent to which the property is affected, further than to ascertain whether or not it is a demonstrable mistake to say that it is affected in excess of the effect upon other property generally. The statute provides a method of direct attack upon the action of the assessors in determining the extent to which the property is affected and the benefits which are likely to accrue from the construction of the improvement. The actual benefit in excess of the general benefit to property in the community may be very slight, and yet the inclusion of the property in the district be justified. In determining whether or not the action of the city council shall be set aside, we are therefore confined to the consideration of questions of fraud or demonstrable mistake, and we are of the opinion, as before stated, that it cannot be said in the present instance

that the action of the city council was demonstrably erroneous.

The territory described included two other districts organized for the purpose of paving portions of certain streets, and it is contended that this renders the district invalid. On that point the case is ruled by *Boles* v. *Kelley*, 90 Ark. 29, and *Board of Improvement* v. *Offenhauser, supra.*

Other points of attack are not of sufficient importance to call for discussion. The conclusion of the majority is that all of the attacks upon the validity of the district are unfounded, and that the chancery court was correct in so declaring and in dismissing the complaint of appellant for want of equity. Affirmed.

WOOD and HART, JJ., dissent.

GRAVES *v.* FIRST NATIONAL BANK OF BENTONVILLE.

Opinion delivered November 13, 1916.

1. VENDOR'S LIEN—RIGHTS OF ASSIGNEE OF NEGOTIABLE NOTE.—The assignee of a negotiable note has the right to rely upon the reservation of a lien recited in the face of a deed which passes with the note, and in the absence of notice, or information as to facts sufficient to put him upon notice, he is protected against equities existing in favor of the vendee against the vendor.
2. VENDOR'S LIEN—PURCHASER OF NOTES.—A subsequent purchaser of land from the original vendee is chargeable with notice of a lien appearing on the face of the deed in the line of his title, and cannot, as against an innocent purchaser of the note, set up equities which his vendor could not have taken advantage of.
3. JUDICIAL SALES—CONFIRMATION—VENDOR'S LIEN.—One T transferred certain land to J, taking notes therefor, and reciting a vendor's lien in the deed. T assigned the notes to appellee. J then transferred the land to appellant, who forclosed the vendor's lien. *Held,* T had a right to purchase at the sale and was entitled to a confirmation of his deed.

Appeal from Benton Chancery Court; *W. A. Falconer*, Chancellor; affirmed.

E. P. Watson, for appellant.

1. Appellant had the right to prove that the $350.00 note was executed for a separate consideration for the Springtown lots, and that the $475.00 note was not a lien on the 40-acre tract, and that the bank had notice. A vendor's lien does not arise from an exchange of lands. The-40 acre tract was not subject to the lien. Pom. Eq. Jur. (3d ed.), §§ 1251, 1255; 36 Barb. 195; 13 Ark. 112; 99 *Id.* 218, 350; 54 *Id.* 195; 75 *Id.* 89. Parol evidence was admissible. 27 Ark. 510; Jones on Ev., § 499; 121 Ill. 366; 93 Ark. 191; 69 *Id.* 313; 53 *Id.* 4; 29 A. and E. Enc. (2 ed.) 896.

2. A vendor's lien can only exist for the purchase money of the land. 36 Ark. 166; 39 Cyc. 1806; 27 S. W. 167; 60 Ark. 90; 37 *Id.* 384; Jones on Mortg., §§ 193, 271; 4 Fed. 577.

3. Tate had no lien on the 40-acre tract and the bank has none as assignee. 19 A. and E. 10; 40 Am. Dec. 33; 95 *Id.* 572; 39 Cyc. 1812; 24 Ala. 37; 8 Ky. L. Rep. 422; Kirby's Digest, § 510; 60 Ark. 90; 1 Jones on Mortgages, 147.

4. Tate was primarily liable and could not purchase the land.

McGill & Lindsey, for appellee.

1. The bank was an innocent purchaser for value without notice, and the lien was reserved on the lots and the tract on the face of the notes. There is no error. 60 Ark. 90; 60 *Id.* 90; 115 *Id.* 366.

2. Parol proof was not admissible. Peel had no notice.

Mauck & Seamster, for appellee Tate.

Parol testimony was not admissible. 29 Ark. 544; 106 *Id.* 461-3. Tate was entitled to purchase. He owed no debt to Jones nor appellant.

McCULLOCH, C. J. This is an action instituted by appellee, First National Bank of Bentonville, Arkansas, as assignee of two negotiable promissory notes, alleged to be secured by a vendor's lien on real estate, to

recover the amount of said notes and to enforce the lien on the land. The notes were executed by Alvin Jones to Thomas Tate, and by the latter sold and assigned before maturity to said appellee. Appellant, J. I. Graves, purchased the land from Jones, and was made a party defendant in the action. Jones and Tate were also made defendants, the former as maker of the note and the latter as assignor.

Jones owned a farm in Washington county, Arkansas, and exchanged it with Tate for certain lands in Benton county, consisting of a certain tract of farm land containing forty acres, two lots in Springtown, Benton county, and another lot containing one acre not involved in this controversy. It appears from the evidence that Jones was to pay the sum of $350.00 as a part of the consideration for the exchange, and that that amount was to be treated as part of the price of the two lots in Springtown. A deed was executed by Tate to Jones and was placed in the bank to be held until the parties were ready to consummate the trade. Later it was discovered that there was an unsatisfied mortgage lien on the Washington county land for the sum of $475.00, and Jones made an unsuccessful effort to borrow the money to pay off the debt. The parties met again for the purpose of consummating the trade, and the negotiations then had between them resulted in the execution of a new deed from Tate to Jones conveying the forty-acre tract and the lots in Springtown, with recital therein of a vendor's lien on all the property conveyed to secure two purchase-money notes, one for $350.00 and the other for $475.00. Jones accepted this deed and executed the two notes to Tate who subsequently assigned the same to appellee bank.

Jones testified that he did not know at the time he accepted the deed that there was a recital therein to the effect that a vendor's lien was reserved on all the property conveyed. There was a separate conveyance from Tate to Jones of the other lot not involved in this controversy. Jones afterwards, by separate

deeds executed to appellant, conveyed the forty-acre tract and the two lots in Springtown. Appellant insisted in the trial below upon the right to prove that the $350.00 note was executed by Jones as a separate consideration for the price of the Springtown lots, and that the $475.00 note was not executed as a part of the purchase price but for money borrowed by Jones from Tate, and he contends that the lien for the $350.00 should be confined to the Springtown lots and that the $475.00 should not be declared to be a lien on the property. The court decreed in favor of the bank and declared a lien on both pieces of property, which were sold by the commissioner of the court, and the forty-acre tract was purchased by Tate. After confirmation of the sale, appellant objected to the approval of the commissioner's deed to Tate on the ground that Tate's purchase constituted a redemption from the lien.

It is unnecessary to determine whether, as between appellant and Tate, the original assignor, it was competent to prove by parol evidence the fact that one of the notes was executed as a separate consideration for one of the lots, and that the note for $475.00 was not a part of the purchase money for the land but was for money borrowed by Jones from Tate, for we are of the opinion that even if the testimony was competent, appellee is entitled to protection as an innocent purchaser.

"Under the statutes of this State," said Judge Battle in delivering the opinion of this court in *Pullen* v. *Ward*, 60 Ark 90, "the lien retained in the face of the deed became a security for the payment of the notes, and passed to the assignee of the same * * * The assignee thereby acquired the right to enforce the lien, and cause the land to be sold to satisfy it. In this respect, it is analogous to a mortgage executed to secure the payment of a note, and is controlled by the same rules of law. When a negotiable note is executed, and a mortgage is given at the same time to secure its payment, and the note is transferred for value before maturity, without notice of any defenses against it,

the assignee, when he seeks to foreclose the mortgage for the purpose of collecting the debt, is not affected by any equities existing between the mortgagor and mortgagee of which he had no notice at the time he became the owner of the note. * * * The two are inseparable—the note as the principal and essential thing; the mortgage as an accessory and an incident. The latter can have no existence independent of the former. When the note is assigned the mortgage follows it as an incident, and when the former is paid the latter expires."

Our statute on the subject provides as follows: "The lien or equity held or possessed by the vendor of real estate, when the same is expressed upon or appears from the face of the deed or conveyance shall inure to the benefit of the assignee of the note or obligation given for the purchase money of such real estate, and may be enforced by such assignee." Kirby's Digest, Sec. 510.

(1-2) It follows, therefore, that the assignee of a negotiable note has the right to rely upon the reservation of a lien recited in the face of the deed, and in the absence of notice, or information as to facts sufficient to put him upon notice, he is protected against equities existing in favor of the vendee against the vendor. A subsequent purchaser of the land from the original vendee is also charged with notice of the lien appearing on the face of the deed in the line of his title, and cannot, as against an innocent purchaser of the note, set up equities which his vendor could not have taken advantage of.

The evidence was sufficient to warrant the finding of the chancellor that the bank was an innocent purchaser of the notes for value and without notice. The only evidence tending to prove notice to the bank is the testimony of Jones to the effect that at the time the trade was consummated and the notes executed Tate called the cashier of appellee bank over the telephone, and in the conversation stated that the forty-acre tract of land was gilt edge security for $475.00.

Even if this should be deemed sufficient proof to show that the cashier was informed of the existence of the facts as claimed by appellant, that testimony is contradicted by the testimony of the cashier, who says he had no information at all of any facts other than that the two notes were recited as a lien on all of the lands conveyed. The cashier testified that he was called to the telephone and informed by Tate that he had some land notes to sell and was asked to purchase them, and that he told him to bring them in; that subsequently the notes were brought to him and he purchased them on the faith that they constituted a lien on the lands conveyed by the deed. It cannot be said that the finding of the chancellor is against the preponderance of the testimony.

(3) It is argued in behalf of appellant that the court erred in approving the commissioner's deed to Tate, and that because Tate was liable to the bank as indorser, his purchase of the land constituted a redemption from the lien. Tate was merely liable to the bank as indorser of the notes. He was under no obligation either to Jones, his vendee, or to appellant, as subsequent purchaser, to protect the lands from the lien recited in the deed, and therefore had the right to purchase at the sale.

There was no error committed by the court in the original decree or in the subsequent order approving the deed.

Affirmed.

DUDLEY v. DUDLEY.

Opinion delivered November 20, 1916.

1. INFANTS—SUIT AGAINST.—It is error to render a judgment against an infant defendant without the appointment of a guardian and defense made, and the appointment must be made before the proof is taken in the case so that the guardian may have an opportunity of attending when the proof is taken.

2. GUARDIANS—PRESUMPTION AS TO TIME OF APPOINTMENT.—The mere silence of the record as to the time of the appointment of a guardian does not affirmatively show an error of the court in its proceedings.

3. DEEDS—DELIVERY TO PERSON FOR "SAFE-KEEPING."—A deed delivered to a third person for "safe-keeping," the third person having no knowledge of the nature of the instrument, will not be construed as a delivery to the grantee.

Appeal from Jackson Chancery Court; *G. T. Humphries*, Chancellor; affirmed.

Hillhouse & Boyce, for appellants.

1. No defense for the minor defendants was made as required by law. The record does not show that a guardian *ad litem* was appointed before the proof was taken. Kirby's Digest, § 6058; Act 290, Acts 1915; Kirby's Digest, §§ 6023-4; 22 Cyc. 636; 107 Ark. 1; 42 *Id.* 227; 97 *Id.* 589-613; 69 *Id.* 350; 43 *Id.* 521.

2. The complaint does state a cause of action. The deed was delivered and accepted. 90 N. E. 1108; 243 Ill. 626; 121 Ark. 328; 181 S. W. 139; 8 R. C. L. 1009-10-11-12; 84 N. E. 194; 127 S. W. 86. The acceptance by an infant grantee is presumed. 3 Ohio St. 377-388. Any disposal of a deed, accompanied by acts, words or circumstances which clearly indicate the grantor intends that it shall take effect as a conveyance is a sufficient delivery. 77 Ark. 89; 100 Ark. 427.

3. A court of equity will decree specific performance where a decided preponderance of the testimony shows a contract and its precise terms. 103 Ark. 550; 78 *Id.* 158; 44 *Id.* 334. The evidence does not support the decree.

M. M. Stuckey, for appellees.

1. Defense was made for the minors as prescribed by law. The record shows due service, warning order and appointment of guardian *ad litem*. While the record is silent as to the time of appointment of the guardian, yet it recites he was *duly appointed* and answered for them. The presumptions are all in favor the decree.

2. The complaint states a cause of action. The deed to the Dudley children was never delivered nor accepted, and was recorded without direction of the grantor.

3. The evidence is legally sufficient to support the decree. 100 Ark. 427; 120 *Id.* 43. The deed was always under the control of Geo. W. Bandy and it is plain that he did not intend, after the execution of the quitclaim, that it should ever have effect as a deed. 93 Ark. 324; 98 *Id.* 466; 110 *Id.* 431.

McCULLOCH, C. J. The appellees, George C. Dudley, Guildford M. Dudley, Houston Dudley and Lula Moon, who were the plaintiffs below, claim title in fee simple to certain lands in Jackson county, Arkansas, and instituted this action in the chancery court of that county to cancel a deed which is alleged to constitute a cloud on their title. They claim title to part of the land by inheritance from their grandfather, George W. Bandy, and to the other part under devise from their grandmother, D. S. M. Bandy, and by a partition between them and the other heirs and devisees of the lands.

George W. Bandy and D. S. M. Bandy were husband and wife, and the latter died in the year 1906, seized and possessed in fee simple of certain tracts of land which included a portion of the lands in controversy. The remainder of the lands in controversy were owned by George W. Bandy, who died intestate in the year 1914. Appellees are grandchildren of George W. Bandy and D. S. M. Bandy. Mrs. Bandy left a will whereby she devised her lands to her husband for life and provided that at his death the estate should be divided between her children and grandchildren. George W. Bandy seems to have had the idea that he possessed the power of disposing of all the lands, and on May 8, 1912, he executed a deed purporting to convey the lands in controversy to appellees, "and to the heirs of the respective body of each, provided, either of them leave no heirs of the body surviving, then the interest of such grantee in the lands herein conveyed shall revert to my heirs surviving me." This deed was not delivered or placed of record during the lifetime of George W. Bandy, but after his death

it was recorded by one of his children who did so pursuant to instructions which her father had given her.

On March 14, 1913, all of the children and grandchildren of George W. Bandy and D. S. M. Bandy, upon the suggestion of the former, executed to him a quitclaim deed conveying their interests in all of the lands, those owned by D. S. M. Bandy as well as those owned by George W. Bandy, for the purpose of placing the title in George W. Bandy so that he could divide all the land between those parties and reconvey to them their several shares. George W. Bandy died intestate without having reconveyed the lands to any of his children or grandchildren, but subsequently they got together and by mutual agreement divided the lands. Appellees attempted to sell their land, and, for the first time they claim, made discovery on the record of the deed which their grandfather, George W. Bandy, had executed and which had been placed of record after his death. Their contention is that they did not accept the deed, knew nothing of its existence, and that the apparent restriction upon the estate conveyed by the deed constitutes a cloud upon their title and they ask that the same be removed by cancellation of the deed.

Appellants are the children of appellees, and are made parties on the theory that if the deed created an estate tail it would, under the statutes of this State, vest a life estate with remainder over "in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law." (Kirby's Digest, Sec. 735) which would be the heirs of the body of the first taker. Appellants are infants residing with their parents, and some of them are non-residents who were brought in by publication of warning orders. A guardian *ad litem* was appointed for the infants, who appeared and filed an answer raising an issue upon every material allegation of the complaint. The cause was heard upon the pleadings and upon the depositions of witnesses, and the court entered

a decree in favor of appellees cancelling said deed as a cloud upon their title.

(1) It is contended in the first place that the decree was erroneous for the reason that the record fails to show that the guardian was appointed before the proof was taken in the case. It is true that the record fails to show when the guardian was appointed, but there is a recital in the decree to the effect that the guardian had been duly appointed and had appeared and filed an answer, which is brought up in the record. It is error to render a judgment against an infant defendant without the appointment of a guardian and defense made (*Woodall* v. *Delatour*, 43 Ark. 521), and the appointment must be made before the proof is taken in the case so that the guardian may have an opportunity of attending when the proof is taken. *Blanton* v. *Davis*, 107 Ark. 1.

(2) It is urged on behalf of appellants that this case is ruled by the one last cited, and that the decree should be reversed for the reason that the record does not affirmatively show the date of the appointment of the guardian. All that was decided in that case was that the guardian must be appointed before the proof is taken, and in the state of the record before us in the present case we think the presumption should be indulged that the guardian was appointed in apt time. The statute provides that the appointment may be made by the court, or judge thereof, or by the clerk in vacation, and that the name of the guardian and the date of the appointment shall be indorsed on the complaint by the clerk. Kirby's Digest, Sec. 6024. With the recital in the decree, however, to the effect that the guardian had been duly appointed, and that the cause was heard upon the depositions taken, it is fair to assume that the court found that the guardian had been appointed in apt time, notwithstanding the fact that the indorsement is not found upon the complaint as it appears in the record before us. In other words, the mere silence of the record as to the time of the appointment of the guardian does not affirmatively

show an error of the court in its proceedings. Our conclusion on that branch of the case is, therefore, that no error is shown which would call for reversal.

(3) It is next contended that the evidence shows a complete delivery of the deed by George W. Bandy to a third person to hold until after his death, and then to place of record for the benefit of appellees, and that the acceptance of appellees will be presumed. The fallacy of the contention is in attempting to apply the presumption of acceptance. Counsel for appellants rely upon the decisions of this court holding that where a deed is executed and delivered to a third person to hold as a depositary for the benefit of the grantee, the acceptance of the deed by the grantee is presumed because of the fact that the latter is the beneficiary in the transaction. *Russell* v. *May*, 77 Ark. 89; *Rhea* v. *Bagley*, 63 Ark. 374; *Staggers* v. *White*, 121 Ark. 328.

In those cases the deeds were delivered to a third person to hold for the benefit of the grantees, and the circumstances warranted the inference that a delivery was intended and the acceptance was presumed, the deeds being entirely for the benefit of the grantees. In the present case, the facts are that Mr. Graham, the person to whom the grantor delivered the deed, together with other papers, never knew what the contents of the papers were but took them and kept them merely as custodian for the grantor himself. No direction was ever given by the grantor to Mr. Graham to hold the deed for any particular person, or to make any disposition of them. On the contrary, the testimony shows affirmatively that he delivered the deed to Mr. Graham "for safe keeping." He told his daughter later that he wanted her to get the papers from the safe of Graham Brothers, after his death, and record them, which she did, but she did not know the contents of the papers. In this state of the proof the chancellor was warranted in finding that no delivery was intended, that the grantor kept the deed under his own control and dominion, that the custodian did not receive the

deed as agent or trustee of appellees and no acceptance can be presumed.

Appellees have a clear and unrestricted title to the property in controversy under the partition deeds from the other heirs of George W. Bandy and D. S. M. Bandy, and this deed constitutes a cloud on their title in that it appears to convey a life estate only to them. They were entitled, therefore, to have that cloud removed, and the chancery court was correct in granting the relief prayed for.

Affirmed.

HART, JJ. and HUMPHREYS, not participating.

SOUTHWICK v. STATE.

Opinion delivered November 20, 1916.

1. PANDERING—NATURE OF CRIME.—The crime of pandering as denounced in Act 105, Acts of 1913, is but one offense, which may be committed in the different ways enumerated in the Statute.
2. PANDERING—"INTIMIDATION"—"THREATS."—The words "intimidation" and "threats" are used synomously in Act 105, Acts of 1913.
3. PANDERING—SUFFICIENCY OF INDICTMENT.—The indictment, charging defendant with the crime of pandering, held sufficient to charge the offense under Sec. 2 of Act 105, Acts of 1913.
4. PANDERING—INSUFFICIENCY OF THE EVIDENCE.—Defendant was charged with the crime of pandering, and that he by force, fraud and intimidation caused his wife to lead a life of prostitution. *Held*, the evidence was insufficient to sustain the charge.

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

E. H. Vance, Jr., for appellant.

1. The indictment is bad and the demurrer should have been sustained. 110 Ark. 318; 111 *Id.* 214; 114 *Id.* 310.

2. The testimony is insufficient to sustain a case of pandering.

3. The instructions for the State were erroneous.

Wallace Davis, Attorney General, and *Hamilton Moses*, Assistant, for appellee; *D. D. Glover*, of counsel.

1. While the time and place of some crimes must be alleged and proved the general rule is that neither need be done, provided only, that the felony must be alleged. 34 Ark. 321; 102 *Id.* 393; 92 *Id.* 413; 99 *Id.* 126. It is sufficient to follow the language used in the statute and the indictment only states one offense. 111 Ark. 214-217; 64 *Id.* 231; 70 *Id.* 290.

2. The demurrer was properly overruled. The indictment is sufficient. Kirby's Digest, §§ 2227-9; 111 Ark. 214-218. The instructions were correct.

WOOD, J. Appellant was convicted under Act 105 of the Acts of 1913, page 407, of the crime of pandering. The charging part of the indictment is as follows: "Said C. E. Southwick, in the county and State aforesaid, on the 13th day of April, A. D. 1916, did unlawfully and feloniously, by force, fraud, intimidation or threats, and by the use of his position of confidence and authority, cause his wife, Leetta Southwick, to lead a life of prostitution, and procured other persons to induce his wife to lead a life of prostitution, and to have intercourse with her, he being then and there her husband, and she being then and there his wife, against the peace and dignity of the State of Arkansas."

The section of the act under which appellant was indicted reads: "Any person who, by force, fraud, intimidation or threats, places or leaves, or procures any other person or persons to place or leave, his wife in a house of prostitution or to lead a life of prostitution, shall be guilty of a felony and upon conviction thereof shall be sentenced to the penitentiary for not less than two nor more than ten years."

(1) Pandering is but one offense, under the statute, and may be committed in the different modes therein enumerated. The indictment charges the offense as having been committed in the mode mentioned in section 2 of the act.

(2) "Intimidation," in law, is "the use of violence or threats to influence the conduct or compel the consent of another." To intimidate is "to restrain by

threats." Webster's Dictionary, "Intimidation," "Intimidate." The words "intimidation," "threats" were used in the statute synonymously.

The use of the disjunctive "or" between the words "intimidation" and "threats" in the statute was not in the sense of indicating that they are two different things, but was only used as an alias to designate the same thing by different words. The use of the words "intimidation" and "threats" thus connected by the use of the word "or" only means one and the same thing. If the word "or" had been used in the sense of disconnecting the words "force," "fraud," and "intimidation," so as to indicate that the pandering was done in either one of these ways, then the indictment would have been uncertain, and hence defective. *Thompson* v. *State*, 37 Ark. 408.

"In an offense created by the statute, it is generally sufficient to describe the offense in the words of the statute." See cases cited in 5 Encyclopedic Dig. of Ark. Reps., p. 645.

In *Blais* v. *State*, 94 Ark. 327, the indictment charged that the defendant "did forge a writing or paper." We held that the use of the word "or" in that connection did not describe the instrument alleged to have been forged in the alternative, since the words "writing" and "paper" clearly amounted to the same thing.

(3) The indictment uses the words, "and by the use of his position of confidence and authority." These words are found in the first section of the act, and are intended to describe the offense when a person occupying a position of confidence or authority uses such relation to take, place, harbor, inveigle," etc., any female to any place in the State in which prostitution is practiced. These words, "and by the use of his position of confidence and authority," are clearly out of place in an indictment where the charge of pandering is other than that of placing a female in some house or prostitution. It is clear that the indictment was not intended to charge pandering by

placing the female in a house of prostitution, or in any place where prostitution is practiced, the only charge being that he caused his wife, by the methods indicated, to lead a life of prostitution. But these words may be stricken from the indictment as surplusage. They are not a necessary part of the description of the offense. We conclude therefore that the indictment, though artlessly drawn, is nevertheless sufficient to charge the offense under the second section of the act.

The testimony on behalf of the State tended to prove that the appellant asked certain men on the streets of Malvern, to go upstairs to a certain room, giving the number, at a certain hotel, stating to them that there was a woman there who wished to see them. He told one of the men to knock on her door. The witness knocked at the door, and the woman said, "Come in." When he entered she told witness that he ought to get out to work; asked the witness if there were any men that he could send in to see her, stating that she would pay him for his work; that both the husband of the woman and the woman herself stated to the witness that they would pay him fifty cents each for the men whom witness might send to her. Witness went out on the streets and spoke to one man, who didn't care to go up. Another man said he would go up. Witness accompanied this man to the door of the woman's room between 10 and 11 o'clock at night. The woman and appellant were in bed. Appellant told witness to take the man in another room and wait until appellant put his clothes on.

Another witness, who was night marshal of the town, stated that he met appellant on the street and appellant told him there was a woman upstairs, and asked the witness if he did not want to go up to her room. Witness went up to the room at night, with a negro whom he had arrested, and, on knocking at the door, appellant opened the door and said, "take them in the other room." Appellant was in bed with a woman who he said was his wife. Witness got the marriage license out of appellant's pocket. When witness ar-

rested appellant his wife never opened her mouth. She acted like she was scared to death. Witness stated that appellant seemed to control her in the justice court. When she was in his presence she seemed to be afraid of him, but when in his absence she would talk freely about the way he was doing her. Witness went back the next morning and arrested the woman about 10 o'clock.

Other witnesses testified to the effect that appellant asked them to meet the woman designated as appellant's wife at another place down in a certain pasture, and that they did so. One of them said that he took a stroll with the woman and had sexual intercourse with her. One of these witnesses stated that he was present at the examining trial, and after he was bound over the woman said to be his wife visited the jail in which he was confined; that when she was in appellant's presence, she was not natural—seemed to be intimidated. When she was out of his presence, she seemed natural. Appellant told witness that the woman was his wife.

On cross-examination, this witness stated that the woman was not forced to come to the jail to see appellant; that appellant was in jail handcuffed, and witness supposed that made his wife unnatural.

The town marshal testified that he was present at the examining trial and noticed the appearance of the woman. She would talk about the case when she was away from him, but would not talk much when she was near him. She seemed afraid of him when in his presence; she seemed intimidated by him and was afraid to talk.

Another witness testified that "she hesitated to give testimony against him; seemed like she was intimidated;" that appellant's expressions were pretty scornful.

The testimony of the woman was to the effect that she was the wife of the appellant; that she was in bed with her husband at the time the man knocked on the door. She stated that she had been keeping up the practice of having sexual intercourse with men for the last five

months; that she charged from three to five dollars each; that her husband, for a while, did not know that she was receiving men, but that he had known it for the last three months. Stated that she was to pay the negro porter for bringing the men to her the sum of fifty cents.

The appellant himself testified that the woman that was with him in the hotel at Malvern was his wife; that he knew that his wife was crooked before he married her, but thought that she had reformed. He knew her about nine months before they were married; that he never induced his wife to lead a life of prostitution, but told her that if he ever heard of her doing anything like that he would leave her; that he never induced others to induce her to lead a life of prostitution.

(4) Giving the testimony its strongest probative force in favor of the State, it is wholly insufficient to sustain the charge in the indictment. The testimony of appellant and of the woman herself shows that the woman was a prostitute before appellant married her, and there is no testimony tending to prove that appellant, "by force, fraud and intimidation," caused his wife to lead a life of prostitution. There is some proof tending to show that appellant sought to induce others to have intercourse with his wife, but this is not sufficient to show that by force, fraud, intimidation and threats he procured other persons to place or leave his wife in a house of prostitution or to lead a life of prostitution. There is an utter absence of evidence tending to show that the life of prostitution which the woman was leading was any other than voluntary upon her part. The proof as to the force, fraud and intimidation breaks down, and the instructions of the court, under this evidence, were abstract and erroneous. The court should have granted appellant's prayer for an instruction, telling the jury "to find the defendant not guilty."

The judgment is therefore reversed and the cause is remanded for a new trial.

HUMPHREYS, J., not participating.

BETHEA v. JEFFRES.

Opinion delivered November 20, 1916.

CROPS—RIGHT OF TRESPASSER WHO RAISES AND SEVERS CROP.—Where one who raises a crop upon land which he holds adversely, the crop being the result wholly of his own labor or that of his tenant, and where he has severed and removed the crop from the premises while still in possession, the title to the crop is in him, and the only remedy of the owner of the land is his action for mesne profits.

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

STATEMENT BY THE COURT.

This is an action of replevin instituted in the circuit court by Noah L. Bethea against W. H. Jeffres to recover two bales of cotton, 1,500 pounds of the cotton in the seed, 2,000 pounds of cottonseed and 60 bushels of corn.

The case was tried before the court sitting as a jury. The court found the facts as follows:

On September 21, 1915, Noah L. Bethea entered a certain 40-acre tract of land at the United States land office as an adjoining homestead, and obtained a certificate of entry, but has not yet received his patent. The land had been claimed by various parties for 30 years prior to the date of plaintiff's entry, and thirty acres of it had been in cultivation during this time. The land was cultivated by the various parties claiming to own it or by their tenants.

W. B. Bethea conveyed the land to Arthur O. Plair; Arthur O. Plair and Lillie Plair, his wife, conveyed it to Orie Plair. In November, 1914, after the land had been conveyed to him, Orie Plair leased it to W. H. Jeffres for the year 1915. Jeffres entered into possession of the land under his lease, and prior to the institution of this suit, October 19, 1915, he had planted, cultivated and gathered the crop which is the subject-matter of this suit. Noah L. Bethea knew when Jeffres rented the land, and also knew that he raised a crop on it in 1915.

Arthur O. Plair was killed on February 14, 1915, and left surviving him Lillie Plair, his widow. After his death, W. B. Bethea purchased from Lillie Plair, all of her claim to said land, and made application to enter it at the United States land office. Later W. B. Bethea withdrew his application to enter said land in favor of Noah L. Bethea, who entered it on the date above stated.

The record warranted the court in finding the facts as stated. The court rendered judgment dismissing the complaint of the plaintiff, and the latter has appealed.

E. E. Williams, for appellant.

1. Appellee was not in possession, as an actual occupant of the land, as is meant by the law giving to actual occupants rights in public lands. 121 Fed. 1. Demand before suit is of no importance when defendant is claiming the crop as his own and has appropriated it to his own use. 94 Ark. 1.

2. Appellee did not reside on the land. The land office issued to appellant the receipt and whether it did it rightfully was a question for it to decide under the rules of the office, and the State courts have no jurisdiction. 36 Ark. 471; 41 *Id.* 465.

3. The court erred in its declaration of law. This case is ruled by 14 Ark. 286; 23 *Id.* 19; 32 Am. Dec. 324.

B. L. Herring, for appellee.

1. 14 Ark. 286 is not in point.

2. Where a disseizin or trespasser enters upon land of another and plants, cultivates and harvests a crop while he is in possession, it is his crop, and the owner of the land can not recover in replevin. 8 R. C. L., p. 366, § 11; 12 Cyc. 977; 110 Pac. 911; 128 N. W. 691; 99 Pac. 578.

3. There is no error in the court's finding or declaration of law.

HART, J., (after stating the facts). There are authorities which hold that where a crop is sown by a trespasser, and is by him cultivated and severed, it

becomes the personal property of the severer as against the owner of the land. 8 R. C. L., p. 366, and cases cited. But it is not necessary for us to pass upon this proposition; for it is not involved in this case.

Jeffres leased the land from Orie Plair, who claimed to be the owner of it. He planted, cultivated and harvested the crop while he was in possession of the land. The rule in such cases is that, with respect to crops which are the result wholly of the labor of the person holding adversely or his tenant, and which he has severed and removed from the premises while still in possession, the title is in him, and that the sole remedy of the owner of the land is his action for mesne profits. It has been said that it would be an oppressive rule to require every one who may be found to have a bad title to pay the gross value of all the crops he has raised; and it would be an inconvenience to the public if the bad title of the farmer to his land attached to the crops he offered for sale, and rendered it necessary to have an abstract of his title to make it safe to purchase his produce. *Page* v. *Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Phillips* v. *Keysaw* (Okla.), 56 Pac. 695; *Brothers* v. *Hurdle*, 32 N. C. 490; *Faulcon* v. *Johnston*, 102 N. C. 264, 11 Am. St. Rep. 737; *Waltenbarger* v. *Hall* (Okla.), 110 Pac. 911; *Lynch et al.* v. *Sprague Roller Mills* (Wash), 99 Pac. 578. See 12 Cyc. 977.

Counsel for plaintiff seeks to reverse the judgment upon the authority of *Floyd* v. *Ricks*, 14 Ark. 286; but we do not think the case sustains the contention of counsel. The facts in that case show that the purchaser of the land had entered into possession of it, and had taken charge of the crop and applied it to his own use. Suit was brought by the maker of the crop, who was a trespasser, against the purchaser in possession for conversion. The settler had nothing beyond a mere naked possession, and the court held that he could not recover.

The judgment will be affirmed.

HUMPHREYS, J., not participating.

HOWELL v. WALKER.

Opinion delivered November 27, 1916.

PLEADING AND PRACTICE—REMAND OF CAUSE—AMENDMENT TO PLEADINGS.—Where a cause was reversed and remanded, *held*, the mandate of this court was sufficiently broad to permit an amendment to the pleadings and the introduction of proof in support thereof.

Appeal from St. Francis Chancery Court; *E. D. Robertson*, Chancellor; affirmed.

Walter Gorman, for appellants.

This is the second appeal in this cause. 111 Ark. 362.

1. Under the recognized rule for application of payments upon running accounts, all credits subsequent, as well as prior to February 2, 1910, should be applied to the oldest items of the account, which if done would overpay the account of 1909. In running accounts, the debtor only has the election to apply payments. If he makes none, the law applies them to the earliest items on the account. The creditor has no election. 38 Ark. 285; 57 *Id.* 595; 70 *Id.* 517. The account of 1909 was paid.

2. The reversal and directions in the former case are conclusive of all issues presented, or that could have been presented. 111 Ark. 362; 76 *Id.* 423; 82 *Id.* 1; 94 *Id.* 332; 118 *Id.* 558. It was error to reopen the case and allow new pleadings and new proof. 94 Ark. 329, 332.

H. G. Gatling, *R. J. Williams* and *J. W. Morrow*, for appellees.

1. No new cause of action was set up. The amendment was allowed and testimony heard simply to determine the account of 1909. 111 Ark. 362. The court acted in pursuance of and within the scope of the mandate. 3 Cyc. 497; 30 *Id.* 1248 (8).

2. A payment made from the proceeds of mortgaged property must be applied in payment of the mortgage debt. 30 Cyc. 1248 (8); 30 Ark. 396; 76 *Id.* 534; 84 Ala. 444; 82 *Id.* 412.

HUMPHREYS, J. This is the second appeal to the Supreme Court in this case. The facts are fully set out in the former opinion, so it is unnecessary to restate them. See *Howell* v. *Walker*, 111 Ark. 362.

The cause was reversed in part and remanded with directions and so much of the mandate of the Supreme Court as is material to the issues herein is as follows: "This cause came on to be heard upon the transcript of the record of the chancery court of St. Francis county, and was argued by solicitors, on consideration whereof, it is the opinion of the court that there is error in the proceedings and decree of said chancery court in this cause, in this: Said court erred in holding that the account for supplies furnished by the Beck Company subsequent to the year 1909 constituted a lien upon the property in controversy.

"It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered, be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside, with costs, and that this cause be remanded to said chancery court, with directions to proceed with the foreclosure of the Grobmyer mortgage. And also foreclosing so much of the original Beck Company mortgage as includes the account of 1909."

After the case was remanded, the learned chancellor permitted the appellees to amend the original complaint in the following manner: "Come the plaintiffs and ask leave of the court to amend their complaint in the following particulars: They state that this cause by the mandate of the Supreme Court of Arkansas was remanded with directions to this court to foreclose the mortgage given by J. O. Howell to the J. W. Beck Company for the payment of the account of 1909, and that the account of 1909 can not by this court be ascertained from the pleadings and evidence now before the court for the reason that it does not affirmatively appear that the credits given to the account of J. O. Howell in 1910 were pledged to the payment of the account made in 1910, when in truth and in fact the said

J. O. Howell and W. H. Howell were tenants and the J. W. Beck Company was landlord during the said year 1910, and the account for that year accruing was for supplies furnished by the said Beck Company to the said Howells to make a crop upon the rented land, and that the said account of 1910 was secured by a landlord's lien, and that the credits appearing on said account in 1910 are the crops so pledged and on which said lien existed, that the said credits were not sufficient to discharge said lien, and that the said credits were not and could not lawfully be applied to the payment of the said account of 1909 until the account of 1910 was fully paid, and that this was not done.

"These plaintiffs further alleged that the said J. O. and W. H. Howell mortgaged the crop of 1910, raised by them, to the said J. W. Beck Company for the payment of the account of 1910 as exhibited, and that the said credits appearing on the exhibited account were the mortgaged crop and the proceeds of the said mortgaged crop, and by law went to the satisfaction and payment of the 1910 account, and could not, lawfully, be and were not applied to the discharge and payment of the 1909 account. A copy of said mortgage is filed herewith and marked exhibit "A," and the original is held subject to the order of this court.

"Therefore, these plaintiffs pray the court to allow them to so amend their complaint and to introduce testimony to support the amendment, and for all other general and proper relief."

A copy of the chattel mortgage for 1910 was attached as exhibit "A."

Appellants filed the following motion to strike out the amendment to appellees' complaint, which motion is as follows: "First: Because this cause was finally tried and a final decree entered therein at the June term of this honorable court, 1913, in favor of the plaintiffs from which the defendants appealed to the Supreme Court of the State of Arkansas, in which Supreme Court the decree of this court was in part reversed and the cause sent down to this court for a decree in pursuance

of the decree of the Supreme Court; that the mandate of the Supreme Court in this cause was filed herein on the first day of June, 1914; that the said amendment to said complaint sets up a new cause of action not heretofore mentioned in the pleadings or in the evidence; that to permit the plaintiffs to amend their complaint as set out in said amendment would render it necessary for additional proof to be taken by both sides and would work further delay.

"Second. Because the amendment proposed to the complaint is inconsistent with the allegations in the original complaint and is inconsistent with the evidence taken in this cause and filed herein and used upon the hearing of the cause both in this court and in the Supreme Court on the part of the plaintiff.

"Third. Because the matters and things and issues now set up in the said amendment are now *res adjudicata*, and can not be again litigated in this or in any other cause.

"Defendants submit that this court should now enter such decree as the mandate and decree of the Supreme Court directs, upon the original papers and records in this cause."

The court overruled the motion to strike and appellants filed an answer denying the allegations in said amendment. Evidence was heard in support of the amendment.

The chancellor stated the account for 1909 as follows:

1909 to December 28, 1909	$1,441.27
Deducted amount of credits to February 12, 1910	673.89
Leaving balance	$ 767.38

and foreclosed the 1909 mortgage for said amount.

The only way to ascertain the debits and credits for the year 1909 and to make the proper application of payments was to permit the amendment and hear additional proof. As a rule this can not be done unless

the mandate of the Supreme Court so directs or permits.

We think that by necessary inference, the mandate is broad enough to permit the amendment and proof. In fact, we can not see how the account of 1909 could be stated correctly on the original record.

The account was correctly stated by the chancellor, this cause is accordingly affirmed. It is so ordered.

PINKERTON v. STATE.

Opinion delivered December 4, 1916.

1. EVIDENCE—DEFENDANT AS WITNESS—IMPEACHMENT—CRIMINAL CASE.—When an accused person undertakes to testify in his own behalf, he goes upon the witness stand subject to the same rules of evidence as any other witness, and may be impeached in the same way that any other witness may be impeached. He may be impeached by contradictory statements wherever made, and there is no exception concerning a statement made before the grand jury, when he has testified there as a witness.
2. EVIDENCE—DEFENDANT AS WITNESS—IMPEACHMENT—CRIMINAL CASE.—Where the accused has taken the stand as a witness, and his testimony has been impeached by evidence of contradictory statements, it is the duty of the trial court to admonish the jury that the alleged conflicting statements are not to be considered as substantive proof of the accused's guilt.

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

W. P. Feazel, for appellant.

1. The defendant was forced to give testimony against himself. His testimony before the grand jury could not be used against him. Const., Art. 2, § 8; 115 Ark. 391; Kirby's Digest, § 3087; 84 *Id.* 88; 66 *Id.* 33, 53.

2. The fourth instruction was improperly refused. It is the law.

Wallace Davis, Attorney General, and *Hamilton Moses*, Assistant, for appellee; *Abe Collins*, Prosecuting Attorney, of counsel.

1. The testimony of the foreman of the grand jury was admissible by way of impeachment and as affecting the credibility of the witness. When a defendant takes the stand, he is subject to the same liabilities on cross-examination as other witnesses. 46 Ark. 141,151; 60 *Id.* 450; 75 *Id.* 574; 100 *Id.* 321; 104 *Id.* 162; 56 *Id.* 4; 58 *Id.* 473. The court specifically instructed the jury that his evidence could not be considered as evidence of his guilt, but only as affecting his credibility as a witness. See 13 Ark. 307.

2. Appellant's fourth instruction was a comment upon the weight to be given certain testimony and properly refused. There is no error.

McCULLOCH, C. J. Appellant was indicted by the grand jury of Howard county on the charge of being engaged in manufacturing whiskey in that county, and on the trial before a jury he was convicted and sentenced to the State penitentiary. It is undisputed that whiskey was being manufactured at a small distillery in the woods near appellant's premises, and that appellant was aware of its presence there, and, in fact, visited the place on more than one occasion and drank whiskey there. The only issue in the case is whether or not he participated in the operation of the still.

The State introduced a witness who testified that he saw appellant at the place on several occasions, and that he was engaged in working there, performing various services required to manufacture the whiskey. Appellant admitted that he visited the place several times, but stated that his visits there were purely accidental and that he had nothing to do with the operation of the still. Appellant was asked on cross-examination if he had not stated before the grand jury that he worked at the still. He denied that he made any such statement, and later the foreman of the grand jury was called and permitted, over appellant's objection, to testify that appellant stated to the grand jury that he did some work at the still. An exception was duly saved and this ruling of the court is about the only

thing that is seriously urged here as grounds for reversal.

It is argued that the effect of the court's ruling in the admission of this testimony was to do violence to the constitutional guaranty that a person shall not "be compelled in any criminal case to be a witness against himself." Art. II, section 8, Const. 1874. The purpose of this guaranty is the protection against an accused as such, and not as a witness. When an accused person takes advantage of the right conferred upon him by statute to testify in his own behalf, he goes upon the witness stand subject to the same rules of evidence as any other witness, and may be impeached in the same way that any other witness may be impeached. He can be impeached by contradictory statements wherever made, and there is no exception concerning a statement made before the grand jury when he has testified there as a witness.

The fact that the testimony might be considered by the jury as an admission of guilt, notwithstanding the admonition of the court to the contrary, is no reason for excluding it. An accused person takes that chance when he voluntarily goes upon the witness stand and subjects himself to the ordinary test of credibility as a witness. It is the duty of the court, of course, to admonish the jury that the alleged conflicting statements are not to be considered as substantive proof of guilt of the offense charged, and this the trial court did in very appropriate and forceful terms. We are of the opinion, therefore, that no error was committed.

There is another assignment of error with respect to the refusal of the court to give an instruction concerning the inference to be drawn from the presence of the accused at the still, but we find that the substance of this instruction was covered by one which the court gave of its own motion.

There is no error and the judgment is affirmed.

WHITE SEWING MACHINE COMPANY v. ATKINSON & SON.

Opinion delivered December 4, 1916.

EVIDENCE—WRITTEN CONTRACT—PROOF OF TERMS.—An agent of appellant entered into a written contract with appellee, whereby appellee agreed to purchase a certain number of sewing machines. The contract stated that all its terms were contained in the one document. *Held*, evidence was admissible to show that appellee and appellant's agent agreed to certain other terms which were reduced to writing and attached to the written contract, and that the admission of such testimony does not violate the prohibition against varying written instruments by parol testimony.

Appeal from Carroll Circuit Court, Eastern District; *J. S. Maple*, Judge; affirmed.

Andrew J. Russell and *Chas. D. James*, for appellant.

1. The oral testimony as to the contemporaneous agreement was inadmissible to contradict, vary or affect the terms of a written contract. 75 Ark. 55, 58; 75 *Id.* 206, 210. A solicitor is a special agent whose authority is limited, and if McNutt exceeded his authority appellant was not bound. 81 Ark. 202, 204; 84 *Id.* 224-227. One who deals with a special agent is bound to ascertain the nature and extent of his authority. 74 Ark. 557. Appellant was not bound by any special or additional contract made by McNutt.

2. The company never ratified McNutt's action. 75 Ark. 206, 210. The verdict is palpably against the weight of the evidence. 70 Ark. 385; 34 *Id.* 632; 10 *Id.* 492.

3. The verdict is clearly against the law given in instructions Nos. 3 and 4, and the verdict is too small. Kirby's Digest, § 6215, par. 5.

Festus O. Butt, for appellee.

1. The testimony as to the additional part of the order was competent. 88 Ark. 383; 94 *Id.* 575. By acceptance of the order, appellant ratified McNutt's acts. The jury so found.

2. There is no error in the court's instructions. The verdict is for the correct amount. The trial was fair, and there is no error.

McCULLOCH, C. J. This is an action instituted by appellant against appellees before a justice of the peace to recover the price of ten sewing machines sold to appellees pursuant to the terms of a written contract. Appellant introduced in evidence the contract, signed by appellees, constituting an unconditional agreement to purchase ten sewing machines at the price of $26 each, payable on the terms specified in the contract.

Appellant is doing business at Cleveland, Ohio, and the order received from appellees was solicited by one McNutt, a traveling solicitor of appellant with authority to solicit, receive and forward orders for machines. The written order contained a stipulation that it was "given subject to approval of the White Sewing Machine Company, and if accepted or filled in full or in part to be settled for at the price and terms above set forth." Also that "there is no understanding or agreement of any nature whatsoever between this company and the undersigned as to these machines, except such as is embraced in this written order, which contains all the terms and conditions which the same is given upon." The order also specified that there was to be one machine of the same kind sent free as a premium. The order was signed by appellees at their place of business at Berryville, Arkansas, and delivered to McNutt, who forwarded the same to appellant at Cleveland, Ohio, and the machines were shipped from the last named place. Appellees sold five of the machines and shipped the other five back to appellant at Cleveland. Appellees offered to pay for the five machines sold, but appellant refused to accept the amount offered because it claimed that the price of all the machines was due.

Appellees introduced proof to the effect that in giving the order to McNutt, there was attached to it a typewritten slip expressly stipulating that appellees

should have the right to return all unsold machines at any time they saw fit to quit the business before the machines were sold. One of the appellees testified to that effect, and also testified that he kept a copy of the typewritten stipulation, and that he saw McNutt inclose the order, with the stipulation attached to it, in an envelope addressed to appellant at its place of business at Cleveland, and that he (witness) mailed the letter. This testimony was objected to on the ground that it was an attempt to vary the terms of the written contract. We do not think that such was the effect of the testimony, but it was introduced for the purpose of proving what the written contract was. *Barton-Parker Mfg. Co.* v. *Taylor*, 78 Ark. 586.

The jury could have found from this testimony, and doubtless did find, that appellant received the order with the additional stipulation attached, and accepted it in that form and shipped the machines accordingly. If so, it constituted a ratification of the act of the soliciting agent in attaching the additional stipulation. In addition to that, the evidence is that McNutt, while only a soliciting agent, had authority to solicit orders in writing and to forward the same to appellant for approval; and if McNutt in fact received the written order with the slip attached, and failed to send it in that form, appellant is responsible for it, for that was within the scope of his authority. The proof is undisputed that McNutt had no authority to approve a sale, but he did have authority to receive and forward orders, and in doing that, he was acting as the agent of appellant, who would be responsible for any act of his in failing to properly send in the order in the form in which it was received from the appellees. We are of the opinion, therefore, that the evidence did not offend against the rule which forbids the introduction of oral testimony varying or contradicting the terms of a written contract, and that the court was not in error in admitting it.

The case was submitted to the jury upon instructions as favorable to appellant as it was entitled to, and

the jury have settled the issues of fact against appellant's contention. There was sufficient evidence to support the verdict.

The verdict was in appellant's favor for the recovery of $130, and it is urged that this is erroneous for the reason that appellees, it is said, admitted liability in the sum of $150. It is true that appellees offered at one time to pay $150, but their testimony is that that was really more than they owed. They proved at the trial that they had only sold five of the machines, and that they had shipped back the other five, and that the additional $20 was to go on the price of a new "free" machine. The explanation of this may not appear altogether satisfactory, but the jury accepted it and credited the testimony of appellees to the effect that they only owed $130, and we can not, therefore, say that the verdict is unsupported by the evidence.

Affirmed.

HOLLIS v. HOGAN.

Opinion delivered December 4, 1916.

1. CERTIORARI—PURPOSE OF WRIT—WHEN DENIED.—The aid of the writ should never be granted except to do substantial justice, and a petition for a writ of *certiorari* to review a judgment rendered on a note and account should be denied when it alleged no valid defense thereto.
2. CERTIORARI—REVIEW OF JUDGMENT ON ACCOUNT AND NOTE—STATEMENT OF DEFENSE.—In a petition for a writ of *certiorari* to review a judgment rendered on a note and account it is necessary for the petitioner to set out the valid defense which he claims to the action, and a mere general statement that he has such a defense will be insufficient.

Appeal from Baxter Circuit Court; *J. B. Baker*, Judge; affirmed.

Allyn Smith, for appellant.

1. A judgment without notice is void. Kirby's Digest, § 4224; 3 Ark. 532; 5 *Id.* 424; 2 *Id.* 149; 20 *Id.* 12; 34 *Id.* 529. Want of service, or notice may be shown by parol evidence. 33 Ark. 778; 50 *Id.* 458.

A personal judgment can not be rendered on constructive service. 54 Ark. 137; 42 *Id.* 268. A meritorious defense is not necessary when an attack is made to quash by certiorari. 50 Ark. 458; 52 *Id.* 80.

2. The judgment here is absolutely void. 66 Ark. 282-5; 25 *Id.* 60; 40 *Id.* 124; 50 *Id.* 433. The suit was brought in a township other than defendant's residence. The warning order was insufficient and no attorney *ad litem* was appointed. 39 Ark. 348.

3. Certiorari was the proper remedy. 28 Ark. 87; 44 *Id.* 509; 39 *Id.* 347; 29 *Id.* 173; 80 *Id.* 200; 52 *Id.* 213; 57 *Id.* 287; 50 *Id.* 34, etc.

4. The motion to vacate was not an appearance nor waiver of service. 39 Ark. 348.

Z. M. Horton, for appellee.

Dyer & Alley, of counsel.

1. Certiorari does not lie when there is any other remedy. Defendant should have appealed. 69 Ark. 518; 73 *Id.* 606, etc. No meritorious defense was shown. 69 Ark. 518; 35 *Id.* 104; 37 *Id.* 602.

2. It is only where judgments are without notice either *actual* or *constructive*, that they are void. Kirby's Digest, § 4424. Here he appeared in court and had notice. He is precluded by the judgment on his motion. 57 Ark. 500-3; 75 *Id.* 507; 77 *Id.* 382.

3. He acquiesced and failed to appeal. The judgment is *res judicata*. 33 Ark. 485; 44 *Id.* 483; 45 *Id.* 373.

HART, J. Ben Hollis filed a petition in the circuit court for a writ of certiorari to quash a judgment obtained against him by W. M. Hogan before a justice of the peace in Union Township in Baxter County, Arkansas. The circuit court dismissed his petition and Hollis has appealed.

The case, as stated in his petition is substantially as follows:

On the 15th day of May, 1915, W. M. Hogan filed an account against B. W. Hollis before a justice of the peace in Union Township in Baxter County, Arkansas.

The account was for merchandise sold by Hogan to Hillis, and was duly verified. The account contained a list of the goods and the prices thereof and the days on which they were sold, together with the credits allowed and the balance due. The affidavit stated that the account was correct and that after all just credits had been placed thereon the sum of $32.49 was due Hogan. A warning order was thereupon issued by the justice of the peace and published in a newspaper of the county, warning the defendant to appear on the 22d day of June, 1915. On that day the justice of the peace rendered a personal judgment against Hollis in favor of Hogan for the sum of $32.39. No writ of attachment was asked or issued by the justice. On the 31st day of July, 1915, an execution was issued and certain personal property belonging to Hollis was seized under it and sold in satisfaction of the debt. The execution was then returned satisfied. Hollis filed his petition for a writ of certiorari on August 23, 1915. In his petition he says that he is now, and has been for more than five years past, a resident and citizen of Baxter County, Arkansas; that the judgment above recited was obtained against him while he was temporarily absent from home; that he had been absent from home about sixty days and that while he was absent, the judgment in question was rendered against him and that he did not know of that fact until the first day of August, 1915, when it was too late to appeal. His petition also contains the following: "And this plaintiff has a just and meritorious defense to said unjust, trumped up and fraudulent claim of said W. M. Hogan, on which said judgment was rendered, in that he was not indebted to said W. M. Hogan as set forth in the account filed by said W. M. Hogan in said case."

The circuit court was right in quashing the writ of certiorari and dismissing the petition of Hollis.

This case is ruled by *Gates* v. *Hayes*, 69 Ark. 518, where the court said that the aid of the writ should never be granted except to do substantial justice, and that a petition for a writ of certiorari to review a judg-

ment rendered on a note and account should be denied when it alleged no valid defense thereto. It will be noted that the defense of Hollis to the action against him before the justice of the peace is stated in language as follows: "And this plaintiff has a just and meritorious defense to said unjust, trumped up and fraudulent claim of said W. M. Hogan on which said judgment was rendered, in that he was not indebted to said W. M. Hogan as set forth in the account filed by said W. M. Hogan in said case."

This general statement does not state any defense to the action. The object of the Code is that the pleadings shall state facts and not mere conclusions of law. The petition of Hollis neither denies any allegation of fact contained in the account filed before the justice of the peace, nor does it state any new matter constituting a defense. The account sued on by Hogan was for goods sold to Hollis, and the items are set out in it and the account is sworn to. The account imports that Hogan sold go Hollis certain articles of merchandise set out in it at the times and for the prices therein stated.

The petition does not controvert the sale or the value of the goods, but simply alleges that Hollis was not indebted to Hogan as set forth in the account filed before the justice of the peace. Every item in the account might be correct except a single one of inconsiderable value, and yet the petition in its present form, would be literally true. If this practice was tolerated, the plaintiff might in all similar cases be put to the trouble and expense of proving that which the defendant would not and could not upon oath deny. Such generalities and vagueness of pleading is opposed to the requirements of our Code. *Gates* v. *Hayes*, *supra; Lawrence* v. *Meyer*, 35 Ark. 104; *Francis* v. *Francis*, 18 B. Monroe (Ky.) 57.

It follows that the judgment must be affirmed.

MISSISSIPPI COUNTY *v.* MOORE.

Opinion delivered December 4, 1916.

1. APPEALS FROM COUNTY COURT—MUST BE GRANTED HOW.—A claim against the county was refused by the county court. An affidavit for appeal to the circuit court was filed, but the record did not contain any order of the county court, or of the circuit court granting an appeal. *Held,* the circuit court was without jurisdiction to hear the appeal.
2. APPEALS FROM COUNTY COURT—HOW GRANTED.—Under Kirby's Digest, § 1487, appeals are granted as a matter of right from all final orders of the county court, by the court rendering the judgment, or by the circuit clerk.

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

Lamb & Rhodes, for appellant.

1. No appeal was granted to the circuit court. Kirby's Digest, § 1487.

2. There was no authority for any one to incur this expense in behalf of the county. Kirby's Digest, § 1458; 102 Ark. 144.

HART, J. In July, 1915, the sheriff of Mississippi county was killed in an effort to capture certain persons engaged in gambling and the illegal sale of intoxicating liquors on an island in the Mississippi River. Tony Hill, one of the persons captured, was badly wounded. W. H. Moore, a deputy sheriff who was in the raid, took Hill to his house and guarded him and filed a claim against the county for $120 for boarding and guarding him. The county refused to allow his claim and Moore filed an affidavit for appeal to the circuit court, but the record does not contain any order of the county court or of the circuit clerk granting the appeal. The circuit court allowed the claim and Mississippi county has appealed.

Section 1487 of Kirby's Digest provides that appeals shall be granted as a matter of right from all final orders of the county court by the court rendering a judgment, as in *Drainage District No. 1* v. *Rolfe*, 110

Ark. 374, and *Chicago Mill and Lumber Co.* v. *Drainage District*, 117 Ark. 292, or by the circuit clerk as in *Jones* v. *Coffin*, 96 Ark. 332.

Section 1348 of Kirby's Digest provides that appeals to the circuit court from the probate court shall be granted by the probate court. In construing this statute in the case of *Speed* v. *Fry*, 95 Ark. 148, the court held that the order of the probate court granting the appeal is a prerequisite to the right of the circuit court to exercise jurisdiction, and for that reason can not be waived. This rule was reaffirmed in the case of *Williams* v. *Bowen, Executor*, 116 Ark. 266. In that case no motion was made in the circuit court to dismiss the appeal on account of there being no order of the probate court granting it, and the court held that it was the duty of the circuit court to dismiss the appeal for want of jurisdiction. We quote from the opinion as follows:

"In the later case of *Drainage District No. 1* v. *Rolfe*, 110 Ark. 374, we held, under a statute prescribing methods for appeals from county courts in the matter of formation of drainage districts, that where there was no order of the county court granting the appeal, appearance in the circuit court without objection to the jurisdiction would not operate as a waiver, and that a judgment of the circuit court under those circumstances would be reversed, even though the question of jurisdiction was raised here for the first time." For like reason the circuit court should have dismissed the appeal in the present case for want of jurisdiction, and for the error in not doing so, the judgment must be reversed and the cause of action will be dismissed. It is so ordered.

SWEAT v. STATE.

Opinion delivered December 4, 1916.

1. LARCENY—SUFFICIENCY OF INDICTMENT.—An indictment charging the unlawful and felonious taking of a certain sum of money from one R, a woman engaged in prostitution, *held*, sufficient. (See § 3, Act No. 105, p. 407, Acts of 1913.)
2. EVIDENCE—LARCENY—PANDERING.—Where defendant was charged with the unlawful and felonious taking of money from one R, under Act 105, Acts of 1913, evidence that he received things other than money, is admissible in evidence, to show that defendant was engaged in the business of receiving money and profit out of the prostitution of his wife.

Appeal from Pike Circuit Court; *Jefferson T. Cowling*, Judge; affirmed.

W. S. Coblentz, for appellant.

1. The indictment is bad. It does not allege the facts with sufficient certainty. 133 Fed. 337; 126 S. W. 797; 12 Enc. of Proc. 327; 98 Ark. 575; 93 *Id.* 81; 10 Am. St. 169; 10 Ind. 404; 90 S. W. 852; 126 S. W. 797; 43 Ark. 93; 95 *Id.* 48; 114 *Id.* 310.

2. The proof must conform to the charge. Proof of receiving money is not proof of receiving gold, silver and paper money. 60 Ark. 141; 105 S. W. 361.

3. It was error to admit evidence of other crimes. Jones on Ev., §§ 143, 145; 39 Ark. 278; 73 *Id.* 262; 91 *Id.* 555.

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

1. The indictment is sufficient. Act 105, Acts 1915, § 3. It is sufficient to follow the language of the statute. 97 Ark. 5; 100 *Id.* 499; 43 *Id.* 7; 113 Me. 41; 35 Wash. 249; 77 Pac. 191.

2. There was no variance. 120 Ga. 142; 105 Ark. 174; 18 *Id.* 363.

3. There was no error in admitting evidence of different acts of the receipt of prostitute's earnings.

SMITH, J. Appellant was convicted under an indictment which charged that he "unlawfully, feloni-

ously and knowingly did accept, receive, levy and appropriate four and 50/100 dollars in gold, silver and paper money of the value of four and 50/100 dollars, without consideration, from the proceeds of the earnings of Rettie Sweat, who was then and there a woman engaged in prostitution, against the peace and dignity of the State of Arkansas."

To this indictment a demurrer was filed on the ground that it did not describe the offense with sufficient certainty to apprise him what charge he would have to meet. The indictment, however, employs substantially the language used in section 3 of Act No. 105, Acts 1913, page 407, in relation to the crime of pandering, and recites the facts alleged to constitute that offense with sufficient certainty to describe it and to enable him to plead an acquittal or a conviction under this indictment in bar of a subsequent prosecution for the same offense. This meets the requirements of the law.

The indictment alleges that appellant received from the earnings of the woman named in the indictment the sum of four and 50/100 dollars in money, and it is argued that the court erred in permitting proof of payments not made in money. A witness named Albert Hatch testified that he had twice had sexual intercourse with the woman, and that on one occasion he paid appellant $1.50 in money, and on the other occasion gave him an order for $2 in merchandise. A witness named Jesse Hatch testified that, for the same purpose, he gave appellant three yards of red serge, for which he had himself paid $1.50. A witness named Huddleston testified that he paid appellant $1.50 for this purpose, but did not have intercourse with the woman because of her uncleanliness.

It is said that the proof of the receipt of other considerations than that of money constitutes a variance from the allegations of the indictment. It is unnecessary here to decide that question, for the court gave the following instruction:

"The indictment alleges property, gold, silver and paper money. It would be necessary to prove the receipt of money. It doesn't have to be any certain amount. The evidence of the receipt of other things may be considered by the jury along with the other evidence in determining whether the defendant did, in fact, receive money for the purposes mentioned in the indictment. The evidence with reference to the serge and order is competent only for the purpose of determining whether the defendant was engaged in that sort of business of receiving money and profit out of the prostitution of his wife. That is a circumstance along with all the other evidence in the case as to whether or not he received money for that."

Appellant had denied all the material statements of the witnesses against him, and this evidence was competent as tending to show that he was receiving the earnings of a woman engaged in prostitution.

It is said that the evidence of Huddleston should have been excluded because he testified that, although he had paid the price charged, he did not have intercourse with the woman. This and other evidence objected to tended to show the woman's business and appellant's knowledge of and participation in it, and it was therefore competent.

The jury has passed upon the conflicting questions of fact, and the evidence is legally sufficient to support the verdict, and as no error of law appears, the judgment must be affirmed. It is so ordered.

THURMAN v. SYMONDS.

Opinion delivered December 4, 1916.

WILLS—LIFE ESTATE WITH POWER OF DISPOSITION.—A testator devised his lands by one clause in his will to his widow and to her children begotten by the testator, and in another clause gave the widow full authority to sell and convey the property; *held*, a conveyance of the fee by the widow would be valid. (Archer *v.* Palmer, 112 Ark. 527.)

Appeal from Crawford Circuit Court; *James Cochran*, Judge; affirmed.

Covington & Grant, for appellant.

1. The widow only took a life estate with remainder in fee to the heirs. 95 Ark. 18; 72 *Id.* 336; 67 *Id.* 517; Kirby's Digest, § 735; 111 Ark. 58; 112 *Id.* 527; 51 Ark. 61; 105 *Id.* 571.

2. The sale was not made as executrix as required. Kirby's Digest, § 173; 34 Ark. 151; 109 S. W. 890; 77 *Id.* 182.

Starbird & Starbird, for appellees.

1. Power to sell absolutely was given by the will. 112 Ark. 527.

2. She properly exercised the power. 31 Cyc. 1150; 108 Pa. St. 129; 27 Atl. 1082; 86 Ark. 399; 53 *Id.* 185.

SMITH, J. Appellants brought suit to recover possession of certain lands described in their complaint. They claimed title to the lands through the will of one A. J. Meadors, which is set out and forms a part of the complaint. They alleged that at the death of the said Meadors, he left a widow, Lucinda K. Meadors, who qualified as executrix, and later conveyed certain lands which had belonged to the testator, but these conveyances were made in her individual capacity, and not as executrix, she claiming the authority so to convey under the will. The relevant portions of this will are as follows:

"II. I bequeath to my beloved wife, Lucinda K. Meadors, in the event she survives my death, and unto

her children by my body begotten all my property by me owned at the time of my death, both real and personal, and I further will that my said beloved wife be my executrix, and that she administer upon any and all my said property of both real and personal of any kind, including the rights in action to use, sell or dispose of the same or any part thereof without bonds of any kind, and without any process in any court or functionary.

"III. I also bequeath to my beloved wife the right and power to sell and make warranty deed to any real estate that I may be possessed of at the time of my death and to use the proceeds for her own personal use and benefit without bond or process of court or accountability to any person or persons. Now, in the event that I survive my said beloved wife then in that event this will and testament shall be null, void and remain my property as heretofore."

The complaint questions the authority of the widow so to convey. The court sustained a demurrer and dismissed the complaint, and this appeal questions that action.

Counsel for appellant argue that the case is similar to and is controlled by the case of *Patty* v. *Goolsby*, 51 Ark. 61; while counsel for appellee say the case of *Archer* v. *Palmer*, 112 Ark. 527, announces the doctrine which controls here; and we are of this latter opinion. A comparison of the will set out in the opinion in that case with the one now under consideration shows a striking similarity. A clause of the will in the Archer case gave the widow a life estate with remainder over to a son and a niece. Another clause gave full power to sell and dispose of any and all the property. Here one clause contains a devise to the widow and to her children begotten by the testator; and another clause gave her the full authority to sell and convey the property. It was argued there, as here, that to so construe the will as to give the widow the authority to convey the fee in the land would operate to defeat the estate in remainder, and it was said there, as here, that the case of *Patty* v. *Goolsby* forbade that construction. It

was pointed out, however, in the case of *Archer* v. *Palmer*, *supra*, that in the case of *Patty v. Goolsby*, the power of disposition was given in the same clause as that which devised to the widow the property for her natural life and in immediate connection with the devise of the life estate, thereby indicating that the power of disposal was to be limited to the life estate, and that as by the terms of the will the widow took only a life estate, and that since the power of disposition was annexed to the devise of this life estate, its presence did not give the widow an unlimited power of disposition, but was restricted to the life estate. In the case of *Archer* v. *Palmer*, it was also said:

"The language is very broad and comprehensive. When the will is read and considered as a whole, we think it is manifest that the power of disposal was not limited to such disposition as a tenant for life can make. To so hold would give no effect whatever to the fourth clause of the will; for the tenant for life had the power of disposition without being granted that power under the will. The fourth clause of the will, in express terms, gives her the power of disposal of the whole of his property. It does not purport to give her any absolute right to the property, but only the bare authority to dispose of it. The existence of such a power does not imply ownership, but it does in express terms, give to the life tenant authority to dispose of the property absolutely. By the exercise of the power of the life tenant, she could convey the fee to her grantee. According to the current of authority, the rule is that where a testator gives an estate for life only, with the added power to the life tenant to convey the estate absolutely, the life tenant may defeat the estate of a remainderman under the will by the exercise of the power of disposal during his lifetime."

What was said there is applicable to the construction of this will, and in so far as this case differs from the instant case this is a stronger one for the application of this principle, for in the *Archer* v. *Palmer* case the power was granted to one who had only a life estate,

whereas here the will vests the fee in the widow and her heirs by the testator begotten.

Nor do we think the conveyances executed by Mrs. Meadors are void because they were executed by her in her individual capacity rather than as executrix of the estate of her husband. Under the second clause of the will she might have conveyed as executrix for purposes of administration upon this estate, but however that may be, the grant of the power to convey contained in the third clause of the will was to her as wife, and not as executrix, and the conveyances in question were made pursuant to this power, and for the reasons stated will be upheld.

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

MISSISSIPPI COUNTY v. GRIDER.

Opinion delivered December 4, 1916.

COUNTIES—CONSTRUCTION OF COUNTY COURT HOUSE—EMPLOYMENT OF ARCHITECT.—Where a county undertakes the erection of a county court house, it is proper for the county court to employ an architect, in addition to the commissioner, and to pay him a reasonable compensation.

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

Lamb & Rhodes, for appellant.

The law of this case is Kirby's Digest, Ch. 35, §§ 1009-12-14-17 to 1024. While only one commissioner is authorized, the fact that three were appointed is not material, except that no additional compensation can be paid. 68 Ark. 340. Instead of performing the duties, they employed others to do so, and they were paid. To pay the commissioners would be double compensation. Gladish is not entitled to any pay for his services. Kirby's Digest, § 1486. The act of April 5, 1913, made no provision for paying the three commissioners.

Waddell did nothing, Grider but little and Gladish was not entitled to pay.

J. T. Coston, for appellees.

1. Gladish was entitled to compensation after his term as county judge expired. The court allowed a lump sum, and this court is not concerned about how it is to be divided. 122 Ark. 596.

2. The services were rendered and the court, in the exercise of its best judgment allowed a lump sum. It is immaterial whether one or three commissioners get the amount. The commissioners superintended and directed the work, hired an architect and let the contract, etc. Kirby's Digest, § 1021; 74 N. W. 432; 28 N. E. 400; 1 So. 521; 96 U. S. 341; 72 Mich. 295; 107 Fed. 369; 7 Ill. 256; 2 N. E. 544; 66 N. W. 866; 19 Minn. 295.

2. The allowance was reasonable and the court had jurisdiction. 98 Ark. 529.

SMITH, J. This appeal is prosecuted to reverse a judgment in favor of appellees in which they were allowed the sum of one thousand dollars for services as courthouse commissioners. Their appointment related originally to an order of the county court of Mississippi County made in 1911 in which S. L. Gladish, as county judge, appointed himself and the other appellees as commissioners. They employed an architect to prepare plans for the building, and paid him $1,500 for that service. In addition, they employed one Parlow as superintendent to supervise the construction of the building at a salary of $200 per month, and paid him for his services in this connection $3,400. The commissioners advertised for bids for the construction of the building and let a contract for that purpose for $87,820. The testimony shows that the county received full value for this money, but it is somewhat conflicting as to the nature, character and extent of the services rendered by the commissioners themselves. There is testimony, however, to sustain the finding that they exercised that

general supervision of the building in its construction, and in making various contracts relating thereto which commissioners acting as such are required under the statute to perform, and that they continued in the performance of these duties from the time of their original appointment until the final completion and acceptance of the building.

It is conceded that the appointment of Gladish by himself as a commissioner is void; but his term of office as judge expired on October 31, 1912, and he, with the other commissioners appointed by himself, were named as commissioners in Act No. 327, Acts 1913, page 1498, and there charged with the duty of constructing the courthouse at Osceola. The statutes of this State in regard to the building of courthouses contemplate the appointment of only one commissioner, and authority exists only for allowing compensation to one commissioner. The act of 1913 above mentioned amended this statute so far as it related to Mississippi County and provision was made for three commissioners in that county. It is true this special act made no provision for their compensation, but the general statute affords authority for that allowance. In the case of *Izard County* v. *Williamson*, 122 Ark. 596, it was said that, while more than one commissioner might have been appointed, the compensation allowed can be a reasonable one for only one person. And it was there also said that if the county court had allowed the two commissioners there appointed compensation in one order, and they had accepted it, the court could not be concerned about how they divided it, provided only a reasonable compensation for one person had been allowed. Here a single compensation was allowed in the sum of a thousand dollars to the three commissioners as such, and the order contains no direction as to the apportionment of the allowance among themselves.

The court was not, therefore, without jurisdiction to make the order of allowance, and it remains only to consider whether that allowance was excessive.

It is argued that a competent architect could have been secured to supervise the entire construction of the building, in addition to the preparation of the plans, for a less sum than that paid the architect for his plans and to Parlow for his supervision. This fact, if true, is not controlling here. The statute does not contain any express authority for the employment of an architect, but the commissioner is required under section 1017 of Kirby's Digest to prepare and submit to the county court a plan of the building to be erected, and there abides with that court a discretion in regard to the employment of an architect to assist in the preparation of these plans. The commissioner is not required to be an architect, yet the desirability, if not, indeed, the necessity, of the assistance of one is apparent when we consider the character of work involved in the construction of a courthouse.

Counsel, in effect, concede this, and also concede the right of the commissioners to employ Parlow; but it is said that the architect and Parlow did the work which the statute contemplates the commissioners should do, and that the present allowance results in double compensation for that service. This, however, is a question of fact which has been passed upon by the court below. There are certain duties which are non-delegable by the commissioners under the statute, and these, they say, they performed, and that such services were worth the allowance made. The court below so found, and as the evidence is legally sufficient to support that finding we must affirm the judgment to that effect.

HOLT v. STATE.

Opinion delivered December 4, 1916.

LIQUOR—ILLEGAL SALE.—The evidence held sufficient to warrant a conviction for the crime of selling whiskey illegally.

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

J. G. Sain, for appellant.

1. There is nothing in the record to show *when* or *where* defendant sold the whiskey.

2. It was error to refuse instructions 2 and 4.

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

1. The date of the sale and place was sufficiently established. 125 Ark. 47.

2. There was no error in the court's refusal of instructions. 34 Ark. 649; 52 *Id.* 180; 58 *Id.* 472; 84 *Id.* 607.

HUMPHREYS, J. Will Holt was indicted on the 22d day of August, 1916, by the grand jury of Howard county, Arkansas, for selling intoxicating liquors in Howard county and State of Arkansas, on the 1st day of June, 1916.

On the trial of the cause, the jury returned a verdict of guilty against the defendant and assessed his punishment in the penitentiary at one year.

Appellant insists on a reversal of the judgment for the reason, he says, there is nothing in the record to show *when* or *where* he sold the whiskey in question, and because the court refused to give instructions 2 and 4 asked by him.

The court told the jury that if they believed "from the evidence beyond a reasonable doubt, that the defendant, in Howard county, Arkansas, since the first day of January, 1916, sold intoxicating liquors in any quantity, you will find him guilty and assess his punishment at imprisonment for one year in the State

penitentiary. If you have a reasonable doubt of his guilt, you would find him not guilty."

Will Gamble testified on the trial that he took some whiskey from the M., D. & G. depot, over to Will Holt's house, just before he was accused of making the sale. Being asked, "When?" he answered, "I believe it was Thursday evening." "Q. Before the sale on Saturday night?" "A. Yes, sir."

Monroe Jones, the prosecuting witness, stated that he bought one pint of whiskey from Will Holt at his house in Howard county and paid him one dollar for it.

There was other evidence tending to show the time and place.

We can not say the verdict was unsupported by the evidence.

Instruction No. 2, asked by defendant, is as follows: "The defendant is charged with the sale of whiskey to Monroe Jones, and you are instructed that you must find beyond a reasonable doubt that the sale was made; that Jones bought of the defendant the pint of whiskey and that he paid defendant one dollar for same, before you can convict him on the indictment in this case."

The questions of sale and reasonable doubt were fully covered by the court's instructions. It was not error to refuse this instruction. *Larimore* v. *State*, 84 Ark. 606.

Instruction No. 4, asked by defendant, is as follows: "You are further instructed that it is not against the laws of the State of Arkansas for a person in ordering whiskey to use the name of another person in making the order, and the fact that the whiskey out of which it is alleged that this pint of whiskey was sold was ordered in the name of John Gamble, is not a crime under the laws of the State of Arkansas."

The fact that appellant was ordering whiskey in Gamble's name as often as the record shows he did, was a circumstance tending to prove he was in the liquor business. The issue was, did he sell it, not in whose

name he ordered it. The instruction in the form asked could only serve the purpose of diverting the minds of the jury from the real issue in the case.

The case was presented to the jury under proper instructions. There is evidence of a substantial character to support the verdict. The judgment is affirmed.

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

Opinion delivered December 4, 1916.

1. MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT—INJURY TO SERVANT—RAILROADS.—Under the employers' liability act, Act 88, p. 56, Acts 1911, if an employee of a railroad company is injured by the negligence of another employee of such company, the injured employee may recover damages from the company for such negligence, provided that he is engaged at the time of the injury in the running of trains or in work that is incident thereto, or immediately connected therewith.
2. MASTER AND SERVANT—INJURY TO SERVANT—VICE-PRINCIPAL.—Under Act 88, p. 56, Acts 1911, where an employee of a railway company is injured, the liability of the company is not as though the injured employee stands in the relation of vice-principal to the employee injuring him, provided the injury is caused through the negligence of such employee.
3. NEGLIGENCE—PROOF—ASSUMPTION IN INSTRUCTION.—In a personal injury action where negligence is shown by the undisputed evidence, an instruction will not be held bad because it assumes defendant's negligence.
4. APPEAL AND ERROR—DEFECTIVE INSTRUCTION—CURE.—A defect in an instruction, in a personal injury action, in the omission of the issue of contributory comparative negligence, will be cured when the next instruction given by the court adequately covered that issue.
5. DAMAGES—PERSONAL INJURIES.—Where plaintiff, an employee of defendant railway company, was fifty-eight years of age, was earning $55 per month, and was severely injured by defendant's negligence, greatly diminishing his earning power, and causing him to suffer great pain, a verdict awarding $1,000 damages will not be held to be excessive.

Appeal from Monroe Circuit Court; *Thomas C. Trimble*, Judge; affirmed.

STATEMENT BY THE COURT.

On or about the 2nd of February, 1915, appellee, a section foreman of appellant, was instructed by the roadmaster to repair some bad track on appellant's line between Marvell and Poplar Grove. On the 4th of February, appellee was notified that a freight train would bring out a car of cinders from Helena which was to be used by appellee in the repair work. Appellee resided at Marvell, in the section house of appellant. Appellee wanted to commence unloading cinders about half or three-quarters of a mile west of Poplar Grove. He went with his section crew on a handcar, and put four of the crew to draining the track, and went on with the cinder car to meet the local freight at Poplar Grove. He got upon the car of cinders and rode back to the place where the bad track was, in order that he might have the car of cinders stopped at the proper place for unloading. Upon reaching the piece of bad track, the freight car was stopped and appellee directed his crew as follows: "Ed Holland, you open the doors, and the balance of you get on top and go to cutting off cinders. Holland opened the first door on the north side. Ed Richardson, when he got to the third door, was a little long about opening it, and Cobb walked up along the side of the car to see what the trouble was, and just as he did so, Holland knocked the door open and Cobb backed back to get out of the way of it, when Simon Derrick, who was on the south side, opened the door without Cobb's knowledge, causing him to fall against the side of the car, severely injuring him.

Cobb instituted this suit against appellant, alleging substantially the above facts, and charging that his injury was caused through the negligence of one of appellant's employees.

The appellant answered, denying the allegations as to negligence and setting up the defenses of assumed risk and contributory negligence.

There was testimony on behalf of appellant tending to prove that the members of the crew were obey-

ing his orders in the manner in which they were doing the work at the time that Cobb was injured.

The verdict and judgment were in favor of the appellee for the sum of $1,000. The appellant seeks to reverse this judgment. Other facts stated in the opinion.

Troy Pace and *W. R. Satterfield*, for appellant.

1. Cobb was a vice-principal and if his injury was caused by the sole negligence of one of his section men, appellant was not liable. 65 Ark. 138; 85 *Id.* 503; 20 L. R. A. (N. S.) 442, and note; 90 Ark. 210; 105 Ky. 479; 144 Mo. 397; 118 Ark. 377; 116 *Id.* 461; 104 *Id.* 506, 510.

2. Appellee's instruction No. 1 was error. It intimated to the jury the court's opinion of the weight of evidence. 45 Ark. 492; 72 *Id.* 559; 82 *Id.* 424; 87 *Id.* 321; 89 *Id.* 538; 99 *Id.* 385. The second instruction did not cure the error. 99 Ark. 385; 76 *Id.* 224; 84 *Id.* 233. The instructions are conflicting. 94 Ark. 506; 99 *Id.* 377; 104 *Id.* 67; 110 *Id.* 197.

3. Instruction No. 3 on the measure of damages was error. 105 Ark. 205; 109 *Id.* 4; 93 *Id.* 209.

4. Cobb was guilty of contributory negligence. 93 Ark. 484. This defense is not abolished under the Fellow Servant act. 93 Ark. 484; 105 *Id.* 364; 98 *Id.* 462.

5. Cobb assumed the risk. 95 Ark. 560; 100 *Id.* 462.

6. The verdict is excessive.

Lee & Moore, for appellee.

1. This suit was brought under Acts 1911, p. 85. Cobb was an employee under section 1. 118 Ark. 377; 157 U. S. 209; 147 Mass. 101; 16 N. E. 690; 103 S. W. 437; 92 *Id.* 48; 119 Ark. 398.

2. The question of assumed risk is denied the master, as is that of contributory negligence. 116 Ark. 461; 118 Ark. 377. The contributory negligence of Cobb was for the jury. 173 S. W. 221, 421; 122 Ark. 297.

3. There is no error in the court's instructions, and the verdict is not excessive. 122 Ark. 297; 116 Ark. 461; 109 Ark. 239. The issues were all fairly presented to the jury.

WOOD, J. (after stating the facts). Appellant contends that the court erred in giving appellee's prayer for instruction No. 1, as follows: "1. You are instructed that a common carrier by railroad in this State is liable for all damages to an employee suffering injury while such employee is employed by such carrier, which injury is the result in whole or in part from the negligence of any of the officers, agents or employees of such carrier. So, if you believe from the evidence in this case that the plaintiff was an employee of the St. Louis, Iron Mountain & Southern Railway Company at the time of the injury which the plaintiff received and that the defendant is a common carrier by railroad in this State, and that the injury which the plaintiff received resulted in whole or in part from the negligence of the defendant, its officers, agents or employees, the defendant would be liable."

Appellant insists that, inasmuch as the allegations of the complaint and the undisputed evidence show that appellee was a vice-principal at the time of his injury, and was injured by one of his subordinates, appellee assumed the risk, citing *McGrory* v. *Ultima Thule A. & M. Railway Company*, 90 Ark. 210, where we held that the master was not responsible to a vice-principal on account of the negligence of a servant who was his subordinate, such negligence being one of the ordinary risks which the vice-principal assumed when he took control over his subordinates. But that doctrine was announced before the passage of the Employers' Liability Act of March 8, 1911. Act 88, page 56, Acts of 1911. The present suit was instituted under that act, the first section of which provides, in part, as follows: "That every common carrier by railroad in this State shall be liable for all damages to any person suffering injury while he is employed by such carrier

* * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

In *Kansas City & M. Ry. Co.* v. *Huff*, 116 Ark. 461, 466, we said: "Where there is a right of action under section 1, that action can not be defeated by the defense of assumption of risk, and is not necessarily defeated because the servant may have been guilty of contributory negligence."

(1) Under the above statute, if an employee of a railroad company is injured by the negligence of another employee of such company the injured employee may recover damages of the company for such negligence, provided he is engaged at the time of the injury in the running of trains or in work that is incident thereto or immediately connected therewith. The statute was designed for the protection of those whose work exposed them to those "characteristic dangers peculiarly connected with the operation of railroads known as railroad hazards," *i. e.*, "those peculiar dangers to which employees are exposed in work connected with and necessary to the operation and running of trains over a line of railroad." *St. Louis, I. M. & S. Ry. Co.* v. *Ingram*, 118 Ark. 377; *St. Louis, I. M. & S. Ry. Co.* v. *Wiseman*, 119 Ark. 477.

(2) The language of the statute is very broad and makes the railroad company liable "for the negligence of any of the officers, agents or employees of such carrier," causing injury to another employee. Under the statute it matters not whether the injured employee stands in the relation of vice-principal to the employee injuring him, provided the injury is caused through the negligence of such employee. But if the relation of vice-principal and subordinate exists between the two servants at the time of the injury, and the injury is caused while the subordinate is acting without negligence under the orders and directions of his superior, then there would be no negligence for which the company would be liable, because, in such case, the negligence would be that of the vice-principal himself.

(3) It is urged that the instruction was erroneous because it assumes that appellee was injured. The undisputed evidence showed that appellee was injured, therefore there was no prejudicial error in assuming that such fact was established.

(4) It is also insisted that the instruction ignored the issue of contributory comparative negligence. The instruction was open to this objection, but the very next instruction fully and correctly submitted that issue to the jury, and taking the instructions as a whole, and the order thereof—the juxtaposition of the first and second—they were not contradictory. The jury could not have been misled, and the instruction was not prejudicial error under the rule announced in *St. Louis, I. M. & S. Ry. Co.* v. *Rogers*, 93 Ark. 564.

The issues of negligence and contributory comparative negligence were issues of fact for the jury. The appellee testified that he directed Ed Holland to open the doors and the balance of the crew to get on top and go to cutting off cinders. Instead of obeying these directions, Simon Derrick opened the door on the south side without the knowledge of appellee, causing his injury. Appellee is corroborated by at least one member of the crew, Ed Holland. The others testify to the contrary, but this raised questions of fact as to negligence and contributory comparative negligence. There was evidence to warrant the verdict on these issues.

(5) The verdict was not excessive. According to appellee's testimony, and the testimony of the physician who attended him, he was severely injured in his back and knee. He was 58 years of age, was getting $55 per month, and his earning capacity in the work for which he was fitted had been greatly diminished by the injury. He had suffered intense pain for months and was still suffering at the time of the trial. A verdict for one thousand dollars under such circumstances is not excessive.

There was no prejudicial error in the instruction on the measure of damages. While not in the most approved form, it conformed substantially to the instruc-

tion given in *Railway Co.* v. *Cantrell*, 37 Ark. 522, and *St. Louis, I. M. & S. Ry. Co.* v. *Hydrick*, 109 Ark. 239, on the measure of damages. The giving of an instruction in this form has not been expressly condemned as prejudicial error by any previous decision of this court. The record presents no reversible error and the judgment is therefore affirmed.

EUREKA FIRE HOSE COMPANY *v.* FURRY.

Opinion delivered December 4, 1916.

1. MUNICIPAL CORPORATIONS—RIGHT TO CALL IN WARRANTS.—Under Kirby's Digest, § 5508, all municipal corporations have power to call in outstanding warrants for cancellation, re-issuance or classification, or for any lawful purpose whatever.
2. MUNICIPAL CORPORATIONS—ATTEMPTED CHANGE OF CLASSIFICATION—ACTS OF DE FACTO OFFICERS.—The acts of *de facto* officers of a city of the second class, which the legislature ineffectually attempted to raise to a city of the first class, and who had been elected under the belief that the said statute was valid, will be held to be valid, where they undertook to call in certain outstanding warrants.

Appeal from Crawford Circuit Court; *James Cochran*, Judge; affirmed.

STATEMENT BY THE COURT.

This cause was heard below on an agreed statement of facts. The agreed statement of facts is as follows:

"It is agreed by counsel for the above named parties that this cause be tried before this court, upon the pleadings, exhibits and the following agreed statement of facts:

"1. That the facts as alleged in the complaint and answer, with all exhibits thereto and proofs of publication attached, are true.

"2. That the city of Van Buren, Ark., was a duly organized city of the second class prior to the passage of Act No. 112 of the General Assembly of Arkansas entitled, 'An Act Declaring the City of Van Buren, Crawford County, Ark., a city of the first class,' approved

March 1, 1913, and that said city prior thereto and still, consists of three city wards.

"3. That the following officers were elected as officers of Van Buren as a city of the second class, the first Tuesday in April, 1912, duly qualified and entered upon their respective offices, towit: Mayor, J. D. Hawkins; Recorder, F. H. Fennessy; Marshal, H. G. Miller; Aldermen, C. E. Norman, Carl Shibley, Edgar Covey, John Kohne, S. A. Pernot, and L. H. Johnson; Treasurer, David Furry.

"That in June, 1913, the following officers were elected at a special election for a city of the first class, duly qualified, and the former officers, not re-elected, abandoned their offices, and said officers entered upon their respective offices, towit: Mayor, J. D. Hawkins; City Clerk, F. H. Fennessy; Police Judge, Park Crutcher; Aldermen, C. E. Norman, P. H. Morris, W. J. Martin, Joe Jones, L. H. Johnson and W. H. Hayman; Treasurer, said P. W. Furry.

"That J. D. Hawkins has been holding the office of Mayor since April, 1912, said Fennessy was elected as city recorder in April, 1912, and has been elected successively to the office of city clerk under the elections held since said special act, and the office as styled in the proclamation of said elections was "City Clerk." That he has been in constant possession of the records of ordinances, by-laws and proceedings of the city council since 1912, and acting as clerk to said city council. That Aldermen C. E. Norman and L. H. Johnson have been re-elected to office aforesaid continuously since April, 1912.

"At the time set forth in defendant's answer, the said F. H. Fennessy was acting as city clerk under the government as organized by the elections held since the passage of said special act of the Legislature. That no ordinance was passed prescribing his duties since the passage of the said act, and he performed the same clerical duties as he did when acting as recorder in 1912. He signed and attested the minutes and records of the

proceedings of the council as 'F. H. Fennessy, City Clerk.' "

Covington & Grant, for appellant.

1. The proceedings to call in the warrants were without authority of law and void. The act was void. 44 Law Rep. 196; 171 S. W. 231.

2. The proof of publication is not in due form of law and there was no proof of publication of the notices required. Kirby's Digest, § 5509; 65 Ark. 142; 48 *Id.* 238; 65 *Id.* 353; 87 *Id.* 406; 48 *Id.* 238.

L. H. Southmayd, Jr., for appellee.

1. Van Buren had the right to call in its warrants. Kirby's Digest, § 5508. It lost none of its rights by the act March 1, 1913. In 117 Ark. 190, the city attempted to do an act which it had no power to do.

2. The officers were at least *de facto* officers. 38 Conn. 499; 9 Am. Rep. 409-427; 49 Ark. 439; 38 *Id.* 150, 158. Their acts are valid. 4 Ark. 582; 49 *Id.* 439; 55 *Id.* 81; 52 *Id.* 356; 65 *Id.* 343, 351; 74 N. J. L. 455.

3. The notices were given and posted as required by law and the proof of publication legally sufficient. Kirby's Digest, §§ 5508-9, 5471-3, 4923-4; 83 Ark. 229, 231; 117 *Id.* 254, 259; 34 Cyc. 1825; 122 Ark. 326; 65 Ark. 142; 48 *Id.* 238; 65 *Id.* 353; 87 *Id.* 406-9.

HUMPHREYS, J. (after stating the facts). (1) There can be no question as to the power of all municipalities to call in outstanding warrants for cancellation, reissuance or classification, or for any lawful purpose whatever. Under section 5508, Kirby's Digest, this authority is given to any city or incorporated town in this State.

After purchasing the hose from the appellant herein and issuing a warrant therefor, the city of Van Buren called in its warrants. The call was made by the officers elected at a special election held in 1913, under a special law enacted by the Legislature of Arkansas, raising the city of Van Buren from a city of the second class to a city of the first class.

It is contended by learned counsel for appellant that the special act attempting to raise the city of Van Buren from a city of the second class to a city of the first class is void and that all proceedings by the officers of Van Buren as a city of the first class are void, including the call of the city's warrants for cancellation and reissuance. It is true that acts of this character were held void in the case of *Cotten* v. *Benton*, 117 Ark. 190, because it enlarged the powers of a municipality. The right to call in the outstanding warrants of the city was not enlarged by the special act in question.

In the special election the same mayor was re-elected, the recorder was elected city clerk and two of the old aldermen were elected new aldermen; four of the old aldermen abandoned their offices and the four newly elected aldermen served in their places on the city council as a city of the first class.

(2) After looking into the authorities carefully, we are of the opinion that all the officers participating in the affairs of the city as a city of the first class, were at least *de facto* officers in so far as they were exercising corporate powers of a city of the second class. They were acting under the color of an election and at a time when the special act had not been declared unconstitutional. *State* v. *Carroll*, 38 Conn. 449; *Keith* v. *State*, 49 Ark. 439; *Pierce* v. *Edington*, 38 Ark. 158.

The other questions presented are whether the notices were properly posted and the proofs thereof legally sufficient. The order, notices, proof of publications of notices for calling in the warrants appear in the record as exhibits to the answer and are quite lengthy. We have examined them carefully in connection with the statutes. Both the notice and the proofs thereof are sufficient in form and substance.

The decree refusing the mandamus and declaring the warrants sued on barred, was correct and should be affirmed. It is so ordered.

PILLOW v. HODGE.

Opinion delivered December 11, 1916.

APPEALS—VERDICT FOR ONE OR TWO DEFENDANTS—LIABILITY OF SURETIES ON APPEAL BOND.—Appellant sued H and C on an account, in justice court, and recovered judgment against both defendants. Both H. and C. appealed and gave an appeal bond in statutory form with B. and S. as sureties. In the circuit court there was a verdict and judgment against H. but for C. *Held,* the appeal bond was a joint and several obligation and constituted an undertaking on the part of all the parties thereon to perform the judgment of the court, and the exoneration of C. by the verdict of the jury did not release the sureties from their undertaking to perform any judgment rendered against H. on the appeal.

Appeal from Poinsett Circuit Court; *S. T. Mays,* Special Judge; reversed.

Mardis & Mardis, for appellant.

1. Plaintiff was entitled to judgment on the supersedeas bond against the sureties, when the judgment was affirmed. Kirby's Digest, §§ 4420, 4684; 28 Ark. 483-4; 2 R. C. L., § 269; 31 Ark. 194. Judgment should be entered here against said sureties.

McCULLOCH, C. J. Appellant sued the appellee, John Hodge, and one Cross, asserting against them a claim of joint liability on an account for merchandise alleged to have been sold to them. The case was originally instituted before a justice of the peace, and appellant recovered judgment against both of the defendants. Both of the defendants took an appeal to the circuit court, and gave an appeal bond in statutory form, with R. Bailey and J. R. Stafford, as sureties. The case was tried in the circuit court on appeal, and the jury returned a verdict in appellant's favor against Hodge, but in favor of the defendant Cross as to his liability for the debt.

There was a garnishment in the case, and after the judgment was rendered by the justice of the peace, the money was paid into court by the garnishee, but it appeared that the money belonged to defendant Cross, and the circuit court ordered it refunded to him.

Appellant moved for a judgment against the sureties on the supersedeas bond, which motion the court overruled, and an appeal has been prosecuted to this court.

The appeal bond executed by appellee Hodge and his co-defendant, with sureties, was a joint and several obligation and constituted an undertaking on the part of each of them to perform the judgment of the court. Hence the exoneration of Cross by the verdict of the jury did not release the sureties from their undertaking to perform any judgment rendered against Hodge on the appeal. *Porter* v. *Singleton*, 28 Ark. 483. The court erred, therefore, in refusing to give appellant judgment against the sureties.

The judgment is therefore reversed and the cause remanded with directions to enter judgment in appellant's favor on the verdict against appellee Hodge and the two sureties on the appeal bond.

MEMPHIS, DALLAS & GULF RAILROAD COMPANY v. RICHARDSON.

Opinion delivered December 11, 1916.

1. CARRIERS—BURNING COTTON NEAR RIGHT OF WAY—ENGINES OF TWO DEFENDANTS.—Appellant railway company, under contract, used the tracks of the I. M. Ry. Co. at Amity, Ark. Shortly after engines belonging to both companies had been near certain cotton, the same was discovered to be on fire. The owner of the cotton sued both railway companies. *Held*, if the fire was set out by appellant company, then both companies would be liable, but that if the I. M. Co. set out the fire, it alone would be responsible.
2. CARRIERS—BURNING COTTON NEAR RIGHT OF WAY—LIABILITY OF TWO RAILWAY COMPANIES.—Under the facts set out above, *held*, a finding of the jury that the fire was set out by both companies would not be disturbed on appeal.

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

J. W. Bishop, for appellant.

The jury did not return a verdict responsive to the issues tried. The trial was nothing less than a mistrial,

as the jury should have disposed of the whole case. The verdict is against the weight of the evidence. 209 Pa. 425; 231 *Id.* 332; 8 Ark. 154. The judgment is final as to the St. Louis, I. M. & So. Ry. Co., but should be reversed as to appellant.

McMillan & McMillan, for appellee.

The cotton was discovered on fire shortly after a train passed, and the proof does not establish any other origin of the fire; the inference is that the fire originated from sparks from the engine. 112 Ark. 300; 121 *Id.* 590; 83 *Id.* 94, etc. The judgment should be affirmed as to both companies. 112 Ark. 300.

E. B. Kinsworthy and *R. E. Wiley*, for B. F. Bush, Receiver, and the Iron Mountain Railway Company.

The proof shows that the Iron Mountain locomotives did not set the fire, but that the last southbound local passenger did set it.

McCULLOCH, C. J. Appellant, the Memphis, Dallas & Gulf Railway Company, uses the tracks of the St. Louis, Iron Mountain & Southern Railway Company on a branch line of that company, on which the town of Amity is a station. Appellee had a lot of cotton stored on a platform near the track at Amity, and on October 25, 1914, the cotton was destroyed by fire.

It is alleged that the fire was communicated to the cotton by sparks from an engine. Appellee instituted this joint action against both of the companies, alleging that the fire was set out from engines operated by each of the companies. Each of the defendants answered, denying liability, and specifically denying the allegation that the fire was communicated from engines which its servants operated. The St. Louis, Iron Mountain & Southern Railway Company also set forth in its answer a cross-complaint against the appellant, Memphis, Dallas & Gulf Railway Company, in which it alleged that the last named company had executed a contract to hold the Iron Mountain Company harmless from liability for damage done by reason of the oper-

ation of its trains over the tracks of the latter, and a judgment over was asked against the appellant company in the event that it was found that the fire was communicated from the latter's engine.

On the trial of the case before a jury, the plaintiff introduced testimony from which the jury might have inferred that the fire was communicated from engines operated by either one of the defendant companies. A local freight train operated by the Iron Mountain Company came to Amity shortly after 11 o'clock in the forenoon of the day named and remained there doing switching for thirty-five or forty minutes. A passenger train of the Iron Mountain had come in a short time before that and left on its journey. A short time after the Iron Mountain local freight left Amity—about twenty minutes, according to the testimony of the witnesses—the local freight train operated by appellant came into the station and stopped for a short while, and about five or ten minutes after this train left the cotton was discovered to be on fire. The testimony was to the effect that the Iron Mountain engine stopped within two feet of the cotton stored on the platform, and that when it pulled out from the station the engine worked steam heavily and emitted sparks. There is proof to the same effect concerning the engine of appellant company, that is to say, that the engine stopped within a few feet of the cotton, and emitted sparks as it began to move away. There was no witness in the case who testified that he saw sparks from either of the engines fall upon the cotton, but there was enough to warrant the jury in drawing the inference that either of the engines emitted the sparks which communicated the fire to the cotton. *Cairo, etc., Ry. Co.* v. *Brooks*, 112 Ark. 298.

(1) Now the court submitted the case to the jury upon correct instructions, to the effect that if the fire was set out by appellant company, then both companies would be responsible to appellee for the damage, but that if the fire was set out by the Iron Mountain engine that company alone would be responsible for

the damage. At the request of one of the defendants the court submitted to the jury special interrogatories separately inquiring as to which of the engines emitted the sparks which communicated the fire to the cotton. In question No. 2 the jury were asked to state whether or not the fire was set out by a locomotive operated by the St. Louis, Iron Mountain & Southern Railway Company, and to their interrogatory the jury made answer in the affirmative. In question No. 3, the jury were required to state whether or not the fire was set out by a locomotive operated by appellant, and the jury also answered this interrogatory in the affirmative. The court rendered judgment in favor of appellee against both of the defendants, and the appellant has alone prosecuted the appeal.

The only contention made by counsel for appellant is that the verdict is not supported by sufficient evidence, so far as relates to the liability of this appellant, and that the verdict is inconsistent in that it constitutes a finding that the fire was set out by both of the locomotives. We are of the opinion, as before stated, that there is sufficient evidence to warrant the inference that the fire was set out by the locomotive operated by appellant. Witnesses who were near the cotton stated that they saw no smoke arising from the cotton until about five or ten minutes after appellant's train left the station, and that they then saw the blaze, a number of the bales of cotton being on fire then. The inference was also justified that the fire was set out from the engine of the Iron Mountain train, for it was emitting sparks when it left its position near the cotton platform about thirty minutes before the fire was discovered.

(2) We can not say as a matter of law that there is any inconsistency in the verdict, or that the verdict against the appellant is necessarily wrong, because there was also a finding that the fire was set out by the locomotive of the Iron Mountain. The jury might have concluded that the fire was communicated from both of the engines, and we can not say that there is not

testimony sufficient to warrant that inference. If that be true, neither of them can escape liability on the ground that fire was also set out by the locomotive operated by the other, for if that be a sufficient excuse, then both could escape liability on that ground.

We are of the opinion, therefore, that the judgment against appellant ought to be affirmed, and it is so ordered.

CASE v. CADDO RIVER LUMBER COMPANY.

Opinion delivered December 11, 1916.

DEEDS—INNOCENT PURCHASER—QUITCLAIM.—A purchaser of land will be held to be an innocent purchaser, where inquiry would have shown a perfect record title in his grantor, although he took from his grantor by quitclaim deed.

Appeal from Pike Chancery Court; *Jas. D. Shaver*, Chancellor; affirmed.

Martin, Wootton & Martin, for appellants.

1. The levy of the attachment was a substantial compliance with the statute and created a lien. Kirby's Digest, § 355; 11 Cal. 238; 70 Am. Dec. 775; 72 Cal. 494; 42 Kans. 177.

2. The decree is valid on collateral attack. Kirby's Digest, §§ 412-15-19; 90 Ark. 454.

3. The rights of third persons acquired in good faith under a judgment in full force are not affected by a subsequent reversal or change in such judgment. 17 Ark. 608, 682; 17 Am. & Enc. Law, 810 (2 ed.); 4 Dana (Ky.), 99; 60 Tex. 555; 16 Ill. 225; 3 Ohio, 550; 25 Cyc. 1472; 96 Mich. 525; 72 *Id.* 966; 106 U. S. 579.

McRae & Tompkins, *J. C. Pinnix* and *W. P. Feazell*, for appellees.

1. There was no valid levy of the attachment. Kirby's Digest, §§ 5365, 355; Drake on Attachment, § 236. The court obtained no jurisdiction and its judgment is void. 105 Ark. 5. It may be attacked collaterally. 89 *Id.* 160; 64 *Id.* 111. The attachment

was no lien. 69 Ark. 271. It gave the court no jurisdiction. 81 Oh. St. 280; 135 Am. St. 784; 20 *Id.* 803; 63 *Id.* 424; 97 *Id.* 250; 102 *Id.* 561; 8 L. R. A. 727; 4 Cyc. 582, 583 (III), 606, 3, 613 (V).

2. The title to the land was not in W. F. Davis, the attachment defendant.

3. The Caddo Company bought the land, believing at the time that the title had been adjudicated, and was an innocent purchaser. Appellant is estopped by delay and negligence. 95 Ark. 178; 87 *Id.* 238; 86 *Id.* 591; 60 *Id.* 453; 110 *Id.* 24; 140 Am. St. 741; 133 *Id.* 219.

WOOD, J. The appellants instituted this suit against the appellees to remove clouds from their title. Appellants alleged in substance that they were the owners of certain lands in Pike county by having purchased same at a sale under a judgment rendered by the United States District Court of Arkansas in certain attachment proceedings therein pending in which the lands were levied upon and sold as the property of W. F. Davis and wife. They alleged that notice *lis pendens* was duly given of the attachment proceedings. They also alleged that the appellees were claiming title under deeds which were clouds upon appellants' title, and prayed that these deeds be canceled. The appellees set up that the writ of attachment was irregularly levied upon the lands and that such levy was therefore void. They further set up that the Graysonia-Nashville Lumber Company purchased the lands from the Grayson-McLeod Lumber Company in good faith and for value, and without any knowledge of the attachment and lien; that it conveyed the land to the Caddo River Lumber Company, which was also an innocent purchaser for value. The conclusion we have reached on the issue as to whether or not the Caddo River Lumber Company was an innocent purchaser for value makes it unnecessary to consider the other issues in the case. The facts concerning the issue as to whether or not the appellee, Caddo River Lumber Company, was an inno-

cent purchaser for value are substantially as follows: On the 5th day of May, 1909, one Will Lawrence (who at that time was the owner of the land in controversy) conveyed the land by warranty deed to one H. H. Coffman; this deed was recorded on May 6, 1909. Lawrence testified that this deed was given to secure an indebtedness to Coffman of $750, which he afterwards paid and that Coffman deeded the land back to him. It appears that this deed was never placed on record. On the 16th day of July, 1909, Lawrence conveyed the land to W. F. Davis, and on the next day the land was attached by appellants, and on July 21, 1909, *lis pendens* notice of the attachment was filed with the clerk of Pike county. On August 30, 1909, W. F. Davis conveyed the land to W. B. Davis. On February 7, 1910, Coffman (who at that time held the record deed) conveyed the land by quitclaim deed to W. B. Davis. On February 8, 1910, W. B. Davis conveyed the land to the Fort Smith & Gurdon Land & Timber Company, from whom by mesne conveyances it passed to the Caddo River Lumber Company.

The Caddo River Lumber Company at the time of its purchase of the lands in controversy had no notice by the *lis pendens* that affected its title because it did not claim under any title derived from W. F. Davis. His title was not in the chain of title of the Caddo River Lumber Company. The record title under which the Caddo Company claimed was in one Coffman and not in W. F. Davis. The quitclaim deed was sufficient to put the lumber company upon inquiry as to the title of W. B. Davis, under whom the lumber company claimed; but inquiry as to this title would have disclosed to the lumber company that W. B. Davis had a perfect record title to the lands by virtue of his quitclaim deed from Coffman. Since inquiry would have discovered that W. B. Davis had a perfect record title and would not have disclosed any defects whatever in the title of its vendor, W. B. Davis, the defense of innocent purchaser set up by the lumber company was complete and must be sustained. Al-

though holding under quitclaim deed, this was sufficient to entitle the lumber company to protection as an innocent purchaser. *The Henry Wrape Co.* v. *Cox*, 122 Ark. 445; *Miller* v. *Fraley, Greenwood & Co.*, 23 Ark. 735.

The decree appealed from herein dismissed the appellants' complaint and quieted the title in the appellees, which decree, for the reasons stated, is correct, and is, therefore, affirmed.

LUND v. DICKINSON, STATE AUDITOR.

Opinion delivered December 11, 1916.

PUBLIC FUNDS—LACK OF APPROPRIATION—ISSUANCE OF WARRANT.—Where no appropriation has been made, the Auditor is not required to issue a warrant to pay for services rendered a department of the State government. (Dickinson *v.* Clibourn, 125 Ark. 101.)

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

The appellant, *pro se*.

Act 302 has appropriated the amount appellant claims, and it imposes on the Auditor the duty of issuing the warrant. 42 Ark. 233.

Article 5, § 29, has no application to this fund. 94 Atl. 746; 61 *Id.* 253.

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

1. Act 302, §§ 7-9, etc., do not constitute an appropriation. Const., art. 5, § 29, article 16, § 12; Kirby's Digest, §§ 3415, 3441, 3409. A specific appropriation must be made. 85 Ark. 171; 120 *Id.* 80.

2. An appropriation must be made every two years. 27 Ark. 129; 50 Neb. 88; 45 Cal. 149; *Dickinson* v. *Clibourn*, 125 Ark. 101.

HART, J. On May 12, 1916, A. M. Lund filed his petition in the circuit court, for mandamus against M. F. Dickinson, Auditor of State, to compel him to

issue a warrant in his favor for services performed as assistant engineer in the Department of State Lands, Highways and Improvements. His petition alleges that on the 20th day of April, 1916, he was appointed as such assistant engineer and directed to make a survey of a proposed road in Pike county; that he made the survey in accordance with his instructions, and submitted a statement of his expenses to the Commissioner of State Lands, Highways and Improvements; that the Commissioner approved his expense account and issued him a voucher therefor in the sum of $34.70; that he presented this voucher to M. F. Dickinson, Auditor of State, and requested him to issue a warrant for said amount on the State Treasurer for the payment of his claim out of the Highway Improvement fund, and that the Auditor refused to issue him a warrant therefor, and filed a demurrer to the petition, which was sustained by the circuit court. The case is here on appeal.

Act 302 of the Acts of 1913, created the State Highway Commission and provided that the Commissioner of State Lands should have charge of the department, and should hereafter be designated as the Commissioner of State Lands, Highways and Improvements. Acts of 1913, page 1179.

The act provides for the appointment of a State Highway Engineer and his assistants, and provides that their expenses shall be paid out of a special fund collected by the State under the terms of the act. The act further provides that the State Treasurer shall pay out the money in the Highway Improvement Fund on warrants of the State, which shall be issued only on voucher of the Commissioner of State Lands, Highways and Improvements. Hence it is urged by counsel for appellant that the act itself provides a method of payment and is a continuing or permanent appropriation which does away with the necessity of further legislative action. The doctrine of fixed or continuing appropriations has never been recognized or approved by this court.

Section 29, article 5, of the Constitution of 1874, provides: "No money shall be drawn from the treasury except in pursuance of specific appropriations made by law, the purpose of which shall be distinctly stated in the bill; and the maximum amount which may be drawn shall be specified in dollars and cents; and no appropriation shall be for a longer period than two years."

Under this section all money must be specifically appropriated and specifically applied. It contains the further limitation that no appropriation shall extend beyond two years. The purpose to be accomplished was to give to the Legislature, alone, the right, and to impose upon it, the duty of designating, periodically, the particular demands against the State, or other objects to which the moneys in the treasury shall be, from time to time, applied, and the amount to each. This construction has already been placed upon this section of the Constitution by the court in the case of *Dickinson, State Auditor*, v. *Clibourn*, 125 Ark. 101, 187 S. W. 909. Therefore, it is unnecessary for us to review the cases cited by counsel for appellant to the contrary. It is only necessary to state that the warrant in question was issued more than two years after the passage of the act creating the State Highway Commission, and that no specific appropriation has been made to pay the expenses for which the warrant in question was asked to be drawn. The case falls squarely within the rule announced in *Dickinson* v. *Clibourn*, *supra*, and it is not necessary to repeat here the reasons given there for the rule.

The judgment will be affirmed.

ADAIR v. ARENDT.

Opinion delivered December 11, 1916.

MARRIED WOMEN—PURCHASE OF GROCERIES ON CREDIT FOR HOUSEHOLD CONSUMPTION.—Defendant, a married woman, purchased groceries on credit, and the same were used by her household. *Held*, she was liable therefor in an action against her by the seller, for the purchase price.

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

John B. Gulley, for appellant.

1. The account was the husband's. The appellant was a married woman, and not responsible for necessaries furnished the family. The contract was not for her personal benefit nor for the benefit of her separate estate. 66 Ark. 437; 33 *Id.* 265; 48 *Id.* 220; 52 *Id.* 234; 108 *Id.* 153; 47 *Id.* 485; 27 S. C. 500; 54 Ind. 106; 69 Mich. 272; 62 Ark. 146; 66 Ky. (3 Bush.) 210; 4 S. E. 345; 37 N. E. 213; 69 Mich. 227; 1 Macky D. C. 350; Art. 9, § 7, Const.; 66 Ark. 437; 47 *Id.* 220; 52 *Id.* 234; 18 Conn. 417; 28 Mo. App. 150; 34 N. H. 420; 6 Ala. 651; 35 Fla. 187; 17 So. 363; 28 Minn. 208; 9 N. W. 759; 41 Am. Rep. 279; 147 Mo. 504; 39 Ark. 238.

2. The court erred in its charge to the jury. 79 Ark. 12; 82 *Id.* 424; 95 *Id.* 506, and many others.

E. B. Buchanan, for appellee.

1. The wife bought the groceries. The credit was extended to her and she is personally liable whether the goods were necessaries or not. 176 N. Y. 75; 62 Ark. 146; 15 Mich. 456; 78 Ark. 275; 62 *Id.* 150; 29 *Id.* 346; *Ib.* 444; 33 *Id.* 265; 48 *Id.* 220; 85 N. Y. S. 516, 493; 89 *Id.* 1031; 83 *Id.* 90; 69 Mich. 227; 51 N. H. 314; 13 Idaho 651; 28 Minn. 208; 26 App. D. C. 157; 3 Camp. 22; 70 Ala. 528; 55 W. Va. 429; 54 Miss. 368; 37 Conn. 491; 22 Md. 71; 11 Ind. App. 453; 6 Ga. 17; 47 Mo. 504; 51 N. H. 314.

2. There is no error in the court's charge. Acts 1915. The credit was extended to the wife. 83 Ark.

61; 93 *Id.* 548; 21 *Id.* 357; 88 *Id.* 524; *Ib.* 433; 97 *Id.* 358; 66 *Id.* 588.

SMITH, J. Appellant, who is a married woman living with her husband, was sued for a bill of groceries which were used by the family of herself and her husband. She interposed two defenses; first, that the account was that of her husband and not of her own making, by express contract or otherwise; second, that at the time the groceries were furnished, that she was a married woman living with her husband and family, and for this reason she could not be responsible for necessaries furnished the family, or for her husband's debt.

A verdict was returned by the jury against her for the full amount of the account, and by this appeal she questions both the sufficiency of the evidence to support the verdict and the correctness of the instruction under which it was returned.

Upon the first question it may be said that the evidence is sharply conflicting; but appellee testified that he sold the goods to appellant and upon her promise to pay, and this evidence, which was accepted by the jury, is legally sufficient to support the verdict upon the first proposition.

The second defense presents the real question in the case, and in its solution counsel for the respective parties have evinced much industry in their research, as evidenced by the number of cases they cite bearing upon the question.

We shall attempt no review of these cases, as we think the question involved presents no difficulty since the passage of our Married Woman's Act. The effect of this legislation was reviewed by Mr. Justice Riddick with his usual clearness, in the case of *Sidway* v. *Nichol*, 62 Ark. 146. In that case it was said:

"Our conclusion is that a married woman has, under our law, the right to purchase personal property, or borrow money for her separate use, and that the property purchased or money borrowed becomes her

separate property. Her contract to pay for the same is a contract in reference to her separate property, and creates a personal obligation, valid in law and in equity, and this without regard to whether she owned any additional property or not (citing cases.) To hold otherwise would be to say that, although the statute gives a married woman the right to acquire and hold property, yet, if she undertakes to acquire it by contract, the law will treat such contract as of no validity. Under that view of the statute, a married woman who had no separate estate could make no valid contract for the acquisition of property, however desirable and beneficial the ownership of it might be to her. If she was a seamstress and needed a sewing machine, or a music teacher and needed a piano, she could make no contract for a purchase upon credit. If she borrowed money with which to purchase property, her note given for the money would be void. This was her condition before the passage of the enabling acts. Such a construction, it seems to us, would, to a large extent, nullify the statutes which were intended to emancipate married women from many of the trammels of the common law, and permit them to contract for, acquire, and hold property."

A portion of this language was quoted with approval in the case of *Arnold* v. *McBride*, 78 Ark. 275, and the quotation was followed by the statement that: "It is unimportant what use she made of the money after she received it, as the lender was not bound to see that she actually used it for her own purposes and benefit. All that is necessary is that the money shall have passed to her as her own property to do with it as she pleased. The evidence shows that this was done in this case."

These quotations make it appear that authority was given the wife to buy what she pleased for herself, and, after it had been acquired, to dispose of it as she pleased, and she might buy on credit as well as for cash. But the right to buy on credit would avail noth-

ing if it was not accompanied with the obligation to pay, for without this obligation credit is impossible.

A great many cases on this subject are cited in the article on Husband and Wife in 13 Ruling Case Law, and we quote from section 209, of that article as follows:

"209. Credit Extended to Wife. If purchases, though of ordinary household supplies, are made by the wife on her sole credit, and not as agent for or on the credit of her husband, the husband is not as a general rule held liable therefor; in such a case the question of the agency of the wife is not involved; still, if a wife purchases ordinary household supplies without indicating that she does so on her personal credit, the presumption is that the purchase was on the credit of the husband, and the mere fact that a tradesman charges the articles to the wife does not show that the purchase was on the sole credit of the wife, and will not necessarily relieve the husband from liability therefor on the ground of the implied agency of the wife to bind her husband. It has been held that the fact that a wife gave her own note for the price of supplies bought by her for her husband's farm is not conclusive evidence that the indebtedness was incurred by her individually; that the questions of her agency and her husband's liability are for the jury. Under the statutes enlarging the powers of married women to make contracts and transact business, it is competent for a wife to bind herself personally on contracts in relation to household matters and necessaries. These statutes, however, do not alter the common law rule that she is presumed to have authority to act for her husband in such matters, and that she is presumed to act in pursuance of such authority and not on her own account. * * *"

After having given certain written instructions, the court gave an oral charge which it is now earnestly insisted was erroneous, and that the giving of this oral charge was a prejudicial error which calls for the reversal of the case. This oral charge was as follows:

"Gentlemen of the jury, the old common law is that a husband is absolutely liable for all necessaries

for both his wife and family, but the law has been changed, and where a wife makes a contract to purchase goods on her own credit, then she is liable for those goods, and not her husband. The last Legislature went so far as to put that into the form of an act, giving a married woman power to sue and be sued the same as if she were a single woman; that was only in furtherance of a decision of the Supreme Court which had been previously rendered."

It may be said that this charge was unhappily phrased, in that it is somewhat argumentative in form; but we think it contained no erroneous statement of the law as it existed even prior to the passage of the act of 1915 referred to, which greatly enlarged the rights of married women. The bill of goods sued for was purchased before this act went into effect.

We think no prejudicial error could have resulted from this charge because the court had narrowed the issues in one of the written instructions by the following statement of the law:

"3. You are instructed that if you find from the evidence that the plaintiff sold these groceries in reliance upon the credit of defendant's husband, then you will find for defendant, if, however, you find the fact to be that the credit was extended to the defendant herself and at her request, then you will find for the plaintiff."

Under this instruction the jury had only to pass upon the disputed question of fact, and as we have said the testimony was sufficient to support the verdict, we think no prejudicial error could have resulted. The judgment is affirmed.

JAMES, HOLCOMBE & RAINWATER *v.* FURR.

Opinion delivered December 11, 1916.

REFORMATION OF DEEDS—REQUISITES.—Where one party seeks the reformation of a deed, so that it include certain lands claimed to have been omitted, and the other party denies that it was agreed that those lands be included, a mere preponderance of the evidence in favor of plaintiff's contention is not sufficient, and while it is not required that the proof be undisputed, it is required that it be clear, convincing and satisfying.

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

X. O. Pindall, for appellant.

On appeals, chancery causes are tried *de novo*, and this court considers only competent testimony. 124 Ark. 74. Two witnesses testified that the "landing field" was the subject of trade, and one, Furr, stated that it was not.

The great preponderance of the testimony sustains the plaintiffs. The evidence is clear and unequivocal and convincing. 45 Atl. 612; 110 N. W. 840. At any rate, the evidence of plaintiffs preponderated. 4 Atl. 781; 52 S. W. 1007.

J. Bernhardt and *T. D. Crawford*, for appellees.

There is no allegation of fraud, and the proof is not clear, unequivocal and decisive that the trade was made, and that there was a mutual mistake. 71 Ark. 614; 91 *Id.* 162. See also, 104 Ark. 475.

SMITH, J. This suit was brought to enforce the specific performance of a contract to convey land, but is, in effect, and, in fact, a suit to reform a description contained in a deed, and the suit is so treated by the parties. The tract of land in controversy is known by the parties as the "Medford Landing Field," and contains 18½ acres, and is further described as that part of the northwest quarter, northeast quarter section 1, township 9 south, range 3 west, east of the bayou. Each of the parties to this litigation owned other lands be-

sides those conveyed in the deed here sought to be reformed, and in the negotiations which led to the trade evidenced by the deed various propositions and counter propositions were made.

It is reasonably certain that appellants understood that these negotiations were terminated by an agreement to sell the land in controversy for the consideration of $1,400, and various circumstances are testified to which corroborate them in this contention. Principally among such circumstances is the location of this land with reference to their other lands and to the river, and it is said by them that the acquisition of this land was the chief object in making the trade. A memorandum of the trade was prepared by appellee, and to this an addition was made by appellant Holcombe which is indicated by the italics. This memorandum is as follows:

"$1,400.00.

"One-half Henry James, J. N. Holcombe ¼, Loid Rainwater, ¼.

"N. E. N. E. sec. 1-9-3-40 A. All of that part of the E½ sec. 36-8-3, lying E. of bayou leading from Davis Lake and emptying into Arkansas river west of Medford Ldg., *containing 75 acres, more or less.*

"*$1,400.00 & James H. & R. to receive rent notes for 1914.*

"*J. N. Holcombe.*"

Appellants insist that appellee assured them the description employed embraced the land in controversy, and that they relied upon this representation.

Appellee testified, however, that no mistake was made in the description employed in the memorandum. He says he proposed to sell the disputed tract, but only on condition that appellants buy certain other lands not included in the trade finally made. He testified that he could not get to Medford Landing or to the county road without going over this disputed tract of land, and that he would not have sold that land at the price paid

him. He also says that if the land had been described as lying east of a creek or bayou, as appellants contend, that such description would have included 30 additional acres, instead of 18½. A deed was drawn to conform to the descriptions in the memorandum and thereafter a survey of the lands there described was made, which disclosed the fact that the land in controversy was not included in the description employed. It is undisputed that when appellants called attention to the alleged mistake, appellee offered to rescind the contract, but appellants refused and demanded a deed conforming to their version of the trade.

Counsel do not disagree about the rule governing in cases of this character, but it is very earnestly insisted for appellants that the testimony meets this requirement. But we do not think so. It may be conceded that appellants intended to buy, and supposed they had bought, this land, but it is not so certain that appellee intended to sell it. A mere preponderance of the evidence is not sufficient, and while it is not required that the proof be undisputed, it is required that the proof be clear, convincing and satisfying, so that, in ordering a reformation made, a reasonable certainty may be entertained that the real intention of both parties is being executed. *McGuigan* v. *Gaines*, 71 Ark. 614.

The decree of the chancellor is, therefore, affirmed.

NEELY v. LEE WILSON & CO.

Opinion delivered December 11, 1916.

1. SERVICE OF SUMMONS—SUFFICIENCY OF PROOF.—The officer's return of service is *prima facie* true, and under the facts, although service was denied, *held*, that the finding of the chancellor that the defendant had been served would not be disturbed.
2. APPEAL AND ERROR—MATTERS IN DEFENSE MUST BE SET UP, WHEN.—Appellant's lands were sold under foreclosure at the suit of a drainage district. In an action to set aside the sale, *held*, appellant cannot set up defects which should have been pleaded in the original foreclosure suit.

3. JUDICIAL SALES—DEFECTS—CONFIRMATION.—All irregularities in a judicial sale, which are not jurisdictional, will be cured by a confirmation thereof.

4. JUDICIAL SALES—DECREE—FAILURE TO SET OUT TERMS OF SALE.—The failure to set out the terms of a judicial sale, in the decree, is not jurisdictional.

Appeal from Mississippi Chancery Court; *Chas. D. Frierson*, Chancellor; affirmed.

STATEMENT BY THE COURT.

On September 17, 1915, appellant brought this suit to set aside a decree of foreclosure, and a sale and deed made thereunder, alleging that appellant was not summoned in said cause; that the assessment, the basis of the suit, was void; that the county court did not sufficiently define the district and that the decree was illegal on its face.

The decree of foreclosure failed to specifically order the land to be sold on a credit of three months and it did not recite that service was had in accordance with law. It in substance found that the levy of the assessments was made in accordance with law, the amount of the assessment, and declared it a lien on the land described as "Northeast quarter, Sec. 18, Township 12 North, Range 10 East;" appointed a commissioner and ordered him to sell the land after advertising the same for the length of time prescribed by law, to satisfy said lien. This decree was rendered on October 8, 1906. The commissioner of the court sold said land on December 4, 1908, and the appellee purchased it. The sale was reported and confirmed by the court on October 6, 1909.

The deed recited that the original decree ordered the land sold to the highest bidder for cash. The report of the sale showed that it was sold on a credit of three months. The sheriff's return in the foreclosure suit showed that appellant was served.

On August 24, 1911, Lee Wilson & Co., the purchaser at the sale, filed application for a writ of assistance to obtain possession of said real estate. Notice of the application was given to Baltimore Neely

on August 25, 1911, and on September 20, 1911, the court ordered the writ issued. The writ was issued July 24, 1915, and on that date Baltimore Neely was dispossessed of the land by the sheriff.

The drainage district was established under Secs. 1414, 1450, Kirby's Digest. The description of the land in the original proceedings for the establishment of the district failed to set out that it was in Mississippi county and failed to show that it was North Township and East Range and the assessment was indicated by the figures "187.20," under the heading "amount assessed." In the original assessment "160" appears, under the heading "affected ben. assessed."

The chancellor at the February term, 1916, of the chancery court of the Osceola District of Mississippi county, Arkansas, found against appellant, and dismissed his bill seeking to cancel said judgment, and the appellant excepted and appealed the cause to this court.

Such other facts as may be necessary in passing upon the questions involved will be set out in the opinion.

H. N. Moon, of Memphis, Tenn., for appellant.

1. No service was had in the foreclosure suit. The return of the officer is *prima facie* evidence of what it recites, and may be set aside by sufficient proof that it is not true. 102 Ark. 252; 62 *Id.* 323.

2. The assessment was void for uncertainty.

3. The district is not sufficiently defined. 105 Ark. 392.

4. The decree is illegal on its face as it does not provide the terms of sale. Kirby's Digest, § 6236; 37 Ark. 43; 43 Fla. 461; 31 Cal. 619; 12 Mont. 510. Confirmation did not cure. 12 Mont. 510; 104 Ark. 567.

5. Appellant was not guilty of laches. 5 Words & Phr. 3969; 106 Ala. 535; 13 Gantt (Va.) 354, 362; 9 Eq. L. R. 44, 50; 96 Tenn. 285-7; 103 Ark. 254.

Coleman, Lewis & Cunningham, for appellees.

1. This is a collateral attack on a decree. Appellant was duly served. 105 Ark. 5; 101 *Id.* 390; 79 *Id.* 16; 50 *Id.* 338; 102 *Id.* 252.

2. The assessment is not void on collateral attack. 94 Ark. 519; 101 *Id.* 390.

3. The boundaries of the district are sufficiently described. The decree is not void on its face. The land was sold on three months' credit, was reported and confirmed. This cured all irregularities and the sale cannot be attacked collaterally. 37 Ark. 43; 90 *Id.* 166; 83 *Id.* 154; 64 *Id.* 126; 84 *Id.* 277.

4. Appellant was barred by laches.

HUMPHREYS, J. (after stating the facts). It is strenuously insisted that the foreclosure decree should be cancelled and appellant restored to the possession of his property, for the reason that no service was had upon him in the foreclosure suit.

(1). Appellant is confronted with a return by the sheriff, through his deputy, that he was served in this case. In addition, Mr. S. L. Gladish testified that Neely employed him in the case and that he did represent him for a time. The decree itself recites that appellant at the time of its rendition, excepted to the ruling of the court and prayed an appeal to the Supreme Court, which was granted. There are other circumstances tending to show that appellant had been served. The sheriff and his deputy are now dead and cannot testify. Neely himself denies service and is corroborated in his statement to some extent by Jennie Neely, who was his constant companion. In the case of *Holman* v. *Lowrance*, 102 Ark. 255, the court said: "The officer's return of service is *prima facie* true, and the chancellor found, upon conflicting evidence, that appellant was duly notified of the pendency of the suit * * *." We think on the question of service, the instant case a stronger one than *Holman* v. *Lowrance*. The finding of the chancellor that service was had upon him in the original foreclosure suit is sustained by the weight of the evidence.

(2). The insufficient description of the lands complained of by appellant relates to the original proceedings establishing the drainage district. It was appel-

lant's duty when made a party to the foreclosure suit, to set up all his defenses against the organization of said drainage district. The errors and irregularities in the original organization of the district are not matters for consideration in this bill of review.

We do not understand that any contention is made that the description of the land in the foreclosure decree is insufficient. The description of said real estate in said foreclosure decree is definite and certain.

The statute of Arkansas provides that judicial sales must be on terms of credit, "not less than three months." Kirby's Digest, Sec. 6236. The foreclosure decree failed to specify the terms upon which the land should sell. Counsel for appellant claims that *Fry* v. *Street*, 37 Ark. 39, is a case on all fours with the case at bar. That is a direct appeal from the decree of foreclosure before the sale was made, reported and confirmed. In the case at bar, the land was sold on three months' credit and the sale was reported and confirmed. The appellant appealed from the foreclosure decree, but failed to prosecute his appeal. The cases are quite different.

(3-4). Jurisdictional errors in a decree ordering the sale of land, cannot be cured by confirmation of the sale. The failure to set out the terms of sale in a decree is in no sense jurisdictional. All irregularities not jurisdictional will be cured by confirmation of the sale. The confirmation of sale in the case at bar cured this defect. There being no error in the findings and decree of the chancellor, the decree is in all things affirmed.

BAILEY & CO. v. SOUTHWESTERN VENEER CO.

Opinion delivered December 11, 1916.

BILLS AND NOTES—BILL OF EXCHANGE—DESTRUCTION BY DRAWEE.—The drawee of a bill of exchange agreed orally to accept the same, and then destroyed it by throwing it into a waste basket and permitting it to be burned, and thereafter refused to pay it. *Held*, it was a question for the jury whether the drawee had acted in a reckless and negligent manner, and that if he acted wilfully, that he would be liable on the bill.

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

STATEMENT BY THE COURT.

I. W. Saxon was indebted to appellant in the sum of $84.96, and on the 22d day of March, 1915, gave an order drawn on appellees for said sum in payment of said indebtedness. This order was immediately presented to appellees for acceptance. They did not accept it in writing, but stated to the appellant that the order was all right. Subsequently thereto and within a few days, they confirmed the oral acceptance of the order over telephone. Later, they refused to pay the order. On the 12th day of April thereafter appellant demanded a return of the order. Appellees stated that the order had been thrown in the waste basket and burned up. The return of the order was refused.

The record fails to disclose why the order was thrown into the waste basket and burned. No explanation appears in the record as to why appellees refused to pay it. The order was never paid by either I. W. Saxon or appellees.

This cause was tried in the circuit court on appeal and after the evidence was closed, the court gave the following peremptory instruction to the jury:

"Gentlemen of the jury, under the law and testimony in this case, you are instructed to return a verdict for the defendant."

Thereupon the jury returned in open court the following verdict: "We, the jury, find for the defendants. V. O. Richey, Foreman."

Appellant filed his motion for a new trial, which was overruled. Judgment was rendered on the verdict, and this cause was brought here on appeal.

The appellant, *pro se*.

1. The court erred in directing a verdict. The order was an inland bill of exchange. Kirby's Digest, § 507, Act 81, Acts of 1913. There was a question of

fact for a jury. 112 Ark. 305. There was a verbal acceptance. Kirby's Digest, § 500, Act 81, 1913; 78 Ark. 490; 17 L. R. A. (N. S.) 1266.

Roy D. Campbell, for appellees.

1. The order was not a bill of exchange and its retention was not an implied acceptance. Neg. Inst. Law, §§ 126, 132; 17 L. R. A. (N. S.) 1266; 78 Ark. 490; Brannan Anno. Neg. Inst. Law (2 Ed.) 135-6. A mere failure to return is not an implied acceptance. 1 Barn. & Ald. 653; 118 Mass. 537; 151 *Id.* 383; 5 Colo. 190; 117 Wis. 589; Moore Cases on Bills & Notes, 95; Neg. Inst. Law, §§ 132, 133, 137.

HUMPHREYS, J. (after stating the facts). Section 126 of Act 81 of the Acts of Arkansas, 1913, known as the Law of Negotiable Instruments, defines a bill of exchange as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed, to pay on demand or at a fixed or determinable future time a sum certain in money to order or bearer."

So far as disclosed in this record, the order in question in form and substance conforms to this definition and is an inland bill of exchange. By another section of the same act, a written acceptance is necessary to bind the drawee. By still another section, if the drawee destroys the bill he will be deemed to have accepted the same. Section 137, Act 81, Acts of Arkansas, 1913.

The evidence in this case is undisputed that appellees destroyed this bill and are silent as to why they did so. No excuse is rendered by them for not paying the order. Certainly it is not the privilege of a drawee to put the holder to sleep by an oral acceptance, then afterward to destroy the order or bill of exchange and refuse to pay same without rendering any kind or character of explanation or excuse, for destroying it.

An accidental destruction of the bill could not amount to an acceptance, but a wilful destruction of the

bill would. Under all the circumstances in this case, we are of the opinion that the question of fact as to why the order was destroyed should have been submitted to the jury under proper instructions. Throwing the order in the waste basket and permitting it to burn and refusing to pay it without explanation, after having orally accepted same, indicates a negligent and reckless manner of handling bills of exchange. If wilful, then appellee herein became responsible. For this error, this case must be reversed and remanded for a new trial. It is so ordered.

DAVIS v. STATE.

Opinion delivered November 13, 1916.

1. CONSTITUTIONAL LAW—CATTLE TICK ERADICATION.—Act 86, Acts 1915, providing for cattle tick eradication, held valid except that portion of Section Six providing that the Board of Control of State Agricultural Institutions should prescribe penalties for violations of regulations made by it.
2. CATTLE TICK ERADICATION—VIOLATION OF RULES.—The penalties provided by Act 409, Acts 1907, § 5, cannot be applied to Act 86, Acts of 1915.
3. CATTLE TICK ERADICATION—PENALTIES.—The imposition of fines, for the violation of its rules, by the Board of Control of Agricultural Institutions, with reference to cattle tick eradication, is proper under Kirby's Digest, § 2448.

Appeal from Logan Circuit Court; *Jas. Cochran*, Judge; affirmed.

H. N. Smith and *Roberts & Roberts*, for appellant.

Section 6 of the Act is unconstitutional for the reason that the act is incomplete, and attempts to delegate legislative powers to the Board. Sec. 7 of the Rules of the Board is void for the reason that Sec. 6 of the Act is void and vests them with no power to declare a crime, fix a penalty and prescribe a punishment. 8 Cyc. 830; Cooley Const. Lim. (4 Ed.) 151-2; 35 Ark. 69. The power to legislate cannot be delegated to individuals. 8 Cyc. 831. An act conferring power to declare what acts shall constitute a misdemeanor is

unconstitutional. 63 Cal. 21; 135 *Id.* 466; 56 L. R. A. 733; 24 L. R. A. 744; 140 Mich. 258; 65 N. W. 738; 187 Ill. 587; 1 Baxt. 435; 134 Ala. 392.

2. No penalty whatever is prescribed by the act, and none can be fixed. Cases *supra.*

Wallace Davis, Attorney General, and *Hamilton Moses*, Assistant, for appellee. *Troy Pace*, of counsel.

The act is not unconstitutional. It only gave the Board power to make rules and regulations, the violations of which were a misdemeanor. The purpose of the act was: (1) to create a tick eradication district; (2) to provide funds for the work, and (3) to designate the agency to have charge of such work. The act did not cover the whole subject nor repeal prior laws. 76 Ark. 443; 45 *Id.* 387; 47 *Id.* 388. All the acts in *pari materia* must be taken and construed together and made to stand if capable of being reconciled. 4 Ark. 410, 416; 6 *Id.* 9; 40 *Id.* 448, 452. A statute is presumed to be constitutional and every doubt is indulged in its favor. It is the duty of the courts to uphold it when not clearly unconstitutional. Cooley Const. Lim. (6 Ed.) p. 218; 58 Ark. 414; 63 *Id.* 576; 65 *Id.* 532; 66 *Id.* 466; 69 *Id.* 612; 75 *Id.* 120; 102 *Id.* 168.

If part of an act is unconstitutional, that part will be stricken out, leaving the balance of the act to stand. Endlich Int. of Stat. §§ 301, 302; Cooley Const. Lim. (6 Ed.) 210-11, 177; 32 Ark. 144; 37 *Id.* 356, 361; 46 *Id.* 312; 48 *Id.* 370, 383; 53 *Id.* 490; 58 *Id.* 407; 13 *Id.* 752; 24 *Id.* 161; 55 *Id.* 200; 75 *Id.* 328; 76 *Id.* 303; 98 *Id.* 466; 92 *Id.* 93; 111 *Id.* 109, 119. The act is divisible. The clause proving penalties should be stricken out. The defendant then could be punished under our misdemeanor statutes. Kirby's Digest, §§ 2447-8.

SMITH, J. This appeal questions the constitutionality of Act 86, of the Acts of 1915, p. 338, and the ground of the attack is that the Act is incomplete in that it provides no penalty for a violation of its provisions,

but attempts a delegation of the legislative function of prescribing the penalty to the Board of Control of the Agricultural Experiment Station. The section complained of is Section 6, which reads as follows:

"Section 6. That the enforcement of the laws of this State in relation to cattle tick eradication and protecting the counties placed entirely or provisionally above the Federal quarantine line in this district is hereby vested in the Board of Control of the Agricultural Experiment Station, with full power and authority to promulgate the necessary rules and regulations for that purpose and to provide penalties for the infraction or disobedience of any such rule or regulation, or order made by such board, and to enforce obedience to such rules and regulations."

Acting under the authority of this section the Board of Control prescribed rules for the enforcement of the provisions of the Act, and among others, enacted a rule numbered 7, which reads as follows:

"Cattle in area where systematic tick eradication is being conducted shall be disinfected under supervision of a duly authorized inspector when so ordered by said inspector. It shall be the duty of all persons owning or having in charge cattle that are exposed or infested with ticks to have all of their cattle at a regular disinfecting station for the purpose of having them properly dipped when so ordered by the inspector. Any person failing to comply with the provisions of this regulation shall be prosecuted as provided for in Section 5 of Act 409, Acts of 1907."

It is not contended in support of the judgment of the court below that the Legislature had the authority to delegate to the Board of Control the power of prescribing penalties for a violation of its rules; but it is said that the provision to that effect should be treated as a nullity, inasmuch as it is void, and when this has been done a complete and harmonious act remains.

The rule of construction in such cases is stated in Cooley's Constitutional Limitations (7th Ed.), p. 246, as follows:

"Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."

This rule has been frequently applied by this court. See *Cotham* v. *Coffman*, 111 Ark. 109, and cases there cited.

(1). We think under this rule that we may treat as void the provision that the Board of Control should prescribe penalties.

Counsel for the State contend that if this is done, Section 5, of Act 409, of the Acts of 1907, p. 1043, applies and affords full authority for the imposition of the fine of $25.00 which was assessed by the jury against appellant.

(2). We do not agree with counsel, however, in this contention. While the Act of 1907 was enacted "to prevent the introduction and spread of contagious and infectious diseases of animals in Arkansas," we think there is in this Act no legislative thought of tick eradication or provision for punishment for the failure to dip cattle for that purpose and, therefore, the penalties prescribed by the Act of 1907 cannot be applied to the Act of 1915.

(3). It is conceded by learned counsel for appellant that the Legislature had the right to delegate to this Board the duty of promulgating rules in regard to dipping cattle, and that the Legislature could have prescribed penalties for the violation of such rules when made; but it is argued that inasmuch as the Legislature has prescribed no penalty, none can be imposed.

But we do not agree with counsel in this contention. The valid portion of the sections quoted imposes upon the Board the duty of making necessary rules and regulations, and obedience to these rules is necessarily enjoined upon all persons coming within their scope. We have, therefore, the case of the State enjoining a duty without prescribing a penalty for its violation.

Sections 2447 and 2448, of Kirby's Digest, were enacted to cover such cases. These sections read as follows:

"Section 2447. Where the performance of any act is prohibited, or the performance of any act is required by any statute, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition or requiring such act or duty, or in any other section or statute, the doing of such prohibited act or the neglect of such required act or duty, shall be deemed a misdemeanor.

"Section 2448. Every person who shall be convicted of any misdemeanor, the punishment of which is not defined in this or some other statute, shall be punished by imprisonment not exceeding one year, or by fine not exceeding two hundred and fifty dollars, or by fine and imprisonment both."

The fine imposed upon appellant was, therefore, warranted under Section 2448. *State* v. *Greenlees*, 41 Ark. 353.

We think what is here said does not contravene the doctrine of *Rowe* v. *State*, 92 Ark. 155. There an act of the General Assembly provided that upon a fence law being adopted at an election it should thereafter be unlawful for certain animals to run at large. The act provided for the impounding of stock, and for the

payment of damages done by them by their owners, and for their summary sale in satisfaction of these damages if not otherwise paid. The syllabus of that case is as follows:

"Under the rule that when an act creates a new offense and makes that unlawful which was lawful before, and prescribes a particular penalty, that penalty alone can be enforced, *held* that the penalty prescribed by the special stock law of May 23, 1901, applicable to certain counties, is the only punishment which can be administered for a violation of its provisions."

Here there is no penalty. We have seen that a proper construction of the act requires us to strike out what is therein said about the penalty, and the result of that action is that no penalty is prescribed except such as exists under Section 2448 of Kirby's Digest.

It is insisted that the court erred in excluding proof on the part of appellant to the effect that his cattle were not infected with ticks, and that no ticks had been found in his neighborhood. But this testimony was properly excluded. The purpose of this regulation was to rid the area in which it was effective of the tick, and it had been determined that the proper way to accomplish this result was to dip all cattle in that area, and appellant should have complied with this regulation, his opinion to the contrary notwithstanding. If the actual presence of the ticks on an animal is to be established before the orders of the Board are effective against that animal, then the resolutions are largely nugatory and the eradication work would be greatly hampered. The legislature no doubt thought, and properly so, that it were better to dip some cattle which did not have ticks on them than to fail to dip others which were infected, and to thus afford the opportunity for further propagation of the ticks, and that certainty and safety required that all cattle in the prescribed area be dipped.

Other exceptions were saved at the trial, and are discussed in the brief, but we do not regard them as of sufficient importance to call for a discussion here.

Finding no prejudicial error the judgment of the court below is affirmed.

McCULLOCH, C. J., dissenting. The Legislature undertook to delegate to the Board of Control the power to prescribe penalties for violation of its regulations, and this court (properly, I think) holds that such attempted delegation of power is ineffectual and void, but it at least excludes the idea that the lawmakers intended to impose any other penalty. The effect of the court's decision is, therefore, to impose a penalty pursuant to the terms of another statute, which the lawmakers manifestly did not intend should apply. The court, in other words, disregards the expressed will of the lawmakers and substitutes something else instead. It seems to the writer that this violates all of the settled rules of construction and constitutes legislation on the part of the court. *Ex parte Deeds*, 75 Ark. 542.

I dissent from the conclusion of the majority. Mr. Justice KIRBY concurs in the dissent.

CITIZENS BANK & TRUST CO. v. HINKLE, ADMINISTRATOR.

Opinion delivered November 13, 1916.

1. ACCOUNT STATED—ACCOUNT WITH BANK—NOTICE OF DISPUTE.—Deceased had certain funds on deposit in appellant bank, and after his death it was suspected that the cashier was misappropriating some of the funds belonging to deceased's widow. The bank was requested to furnish a statement of the account, which it did in February, 1915; an action was brought against the bank in September, 1915, in which the peculations of the cashier were set out. In the meantime the bank's attorney was notified that the widow disputed the correctness of the statement furnished by the bank. *Held*, the account was not an account stated, and that the action against the bank could be maintained.
2. BANKS AND BANKING—RELATION TO DEPOSITOR—DUTY OF DEPOSITOR TO EXAMINE PASS BOOK.—The relation between a bank and its depositor is that of debtor and creditor, and the pass book of a depositor, where balanced and returned, may become an account stated, and binding upon both the bank and the depositor as such.
3. BANKS AND BANKING—ACCOUNT WITH DEPOSITOR—ACCOUNT STATED.—Where the cashier of a bank appropriated the funds deposited by a

depositor, and credited the same to his account, the bank will be liable therefor, unless the depositor, with knowledge of such improper charges, by silence ratified and adopted the same, or having received a statement from the bank, with vouchers representing such charges, the depositor did not in a reasonable time notify the bank that they were improper, and the bank was injured by such failure.

4. BANKS AND BANKING—RELATION TO DEPOSITOR—IMPROPER CHARGES—FAILURE TO RENDER STATEMENTS.—A depositor cannot be held to have ratified improper charges against his account, in the absence of any knowledge of such facts or in the absence of a statement furnished to him by the bank, showing such improper charges; and no duty rests upon him to take any action until some notice of such improper charges is brought to his attention.

5. BANKS AND BANKING—DEPOSIT OF PRESIDENT—DUTY OF BANK.—A bank owes to its president, where he is a depositor, the same duty with respect to his individual deposit that it owes to any other depositor.

Appeal from Independence Circuit Court; *T. D. Crawford*, Special Judge; affirmed.

Brundidge & Neelly and *J. W. & J. W. House, Jr.*, for appellant.

1. The bank books were balanced from time to time and delivered to appellees with all checks and vouchers, and it was the duty of appellees to examine them, thus discovering any shortage, and notify the bank, so it could protect itself; but the failure to so examine and notify the bank relieved it from liability, as upon an account stated.

2. Paxton was appellee's agent and was authorized to sign checks and acted within the scope of his authority and under the circumstances the bank was not liable. These are the bank's defenses and the instructions were based upon these theories. It was error to give instruction No. 5 for plaintiffs. The vice is the use of the words, "With knowledge of the improper charges." 117 U. S. 96; 56 S. E. 152; 71 S. W. 612; 74 Am. St. 672-4; 97 N. W. 380; 87 N. E. 740-4; 63 *Id.* 969, 973; 27 Am. St. 82; 101 N. E. 872; 109 Va. 530; 57 Ark. 142; 58 Atl. 305; 92 Cal. 14; 14 L. R. A. 320; 69 Atl. 609; 87 N. E. 740; 77 S. W. 1002. All these and others show that it is the duty of the depositor to make reason-

able examination of pass books and statements and notify the bank, and if he neglects and the bank suffers it is not liable.

3. Other instructions also are objectionable and conflicting. The knowledge of Thomas cannot be imputed to the bank. 154 S. W. 512; 65 Ark. 543; 100 Fed. 705; 122 Mo. 339; 134 S. W. 165; 180 Fed. 686; 59 Am. St. 650.

4. Where a principal by entrusting his money to the agent enables him to do the wrong the principal, rather than the bank, should suffer. Michie on Banks & Banking, 964; 2 N. Y. Sup. (2 Hall) 589; 57 Ga. 283; 191 Fed. 566; 86 Pa. 84; 97 N. W. 380. Thomas was appellee's agent.

Hal. L. Norwood, Ernest Neill and *Moore, Smith, Moore & Trieber*, for appellees.

1. The bank became debtor to appellees by virtue of the relation to bank as depositors, and the bank being accountable for the money deposited therein must show that the charges made against the accounts were made with their authority. The burden was on it. 3 Ruling Case Law, § 149; 56 Ark. 508; 187 S. W. 674. The charges against appellee's accounts were unauthorized and unknown.

2. The bank benefited by these charges and is liable. 127 N. W. 522; 95 Fed. 87; 82 Conn. 8; 104 U. S. 54; 72 N. Y. 286; 147 Mass. 268; 68 Ark. 299; 69 *Id.* 48; 68 *Id.* 71; Morse on Banks, etc. (3 Ed.), § 317; Michie on Banks & Banking, 966; 14 L. R. A. 234; 104 Tex. 379; 127 N. W. 522; 2 L. R. A. (N. S.) 993.

3. The unlawful charges by Thomas were the acts of an officer of the bank and not of the customer. The bank is charged with notice of the acts of its cashier and cannot escape liability except by showing authority from the depositor. 95 Fed. 87; 72 Atl. 150.

4. Knowledge of the unauthorized acts is imputed to the bank. 2 L. R. A. (N. S.) 993; 60 Fed. 79; 177 S. W. 72; 118 Ill. 625; 127 N. W. 522; 72 Atl. 150; 72 N. Y. 286; 80 N. Y. 162; 74 Fed. 1000; 46 L. R. A.

734; 15 S. E. 888; 17 N. E. 496; 26 Mo. App. 129; 72 N. Y. 286; 107 Ark. 232; 170 U. S. 133.

5. Instruction No. 5 for appellee was correct and properly given. Ratification of unauthorized acts of an agent must be with full knowledge. 11 Ark. 189; 76 *Id.* 563; 64 *Id.* 217; 97 *Id.* 43; 90 *Id.* 104; 82 *Id.* 367; 15 *Id.* 55; 117 U. S. 96.

6. There was no ratification and no account stated. There is no error in the other instructions. 141 Fed. 538; 57 Hun. (N. Y.) 72; 38 N. Y. S. 580; 58 Ark. 129; 120 *Id.* 178.

SMITH, J. This appeal is prosecuted from a judgment of the court rendered in a cause wherein two cases were consolidated and tried together. Both suits were against the appellant, Citizens Bank & Trust Company, hereinafter referred to as the bank. Mrs. Ida L. Erwin was the plaintiff in one of these suits and the administrator of her husband's estate was the plaintiff in the other. It was alleged by Mrs. Erwin that on January 10, 1913, she deposited with the bank to her credit the sum of $30,779.18, and thereafter, up to and including November 11, 1914, made sundry deposits aggregating $45,821.93, so that her total deposits between those dates amounted to $76,601.11, which deposits were made subject to the rules controlling general deposits, and that the sum of $61,061.55 had been paid her, leaving a balance of $15,539.56, for which she had made demand but the bank had refused to pay.

In the complaint filed by the administrator of W. J. Erwin's estate it was alleged that plaintiff's intestate carried an account with the bank as a general depositor and subject to the rules controlling general deposits. That at the close of business on January 9, 1913, there was on deposit to the credit of his account the sum of $33,879.18, and the bank was indebted to Erwin in that sum, and on the next day Erwin drew a check for $30,779.18 in favor of his wife, and at the time there was another outstanding check, which was subsequently cashed by the bank, in the sum of $600, and no other

checks had been drawn against said account and there was, therefore, to the credit of this account the sum of $2,500, for which a demand had been made and payment refused.

In defense of Mrs. Erwin's suit the bank denied that only the sum of $61,061.55 had been withdrawn, alleging the fact to be that the entire deposit had been withdrawn by her and by her duly authorized agents and attorneys. Further answering, the bank alleged that at stated intervals between the dates mentioned in her complaint, statements of the account had been rendered with balances and pass books, at which times the cancelled checks and vouchers were returned and the pass books showed at such times the true and correct balances to her credit, and no objection was made thereto for nearly a year after the rendition of the last of such statements. Whereby the bank says Mrs. Erwin is now estopped to dispute such statements.

In answer to the complaint filed by the administrator, the bank alleged that Major Erwin's account was closed on January 10, 1913, at which time he and his duly authorized agent withdrew all of said funds from the bank, and said account was closed, and thereafter statements were rendered to him showing that it had been closed, and no objections to such statements were made from that date until the date of his death on October 22, 1914. It was further alleged that on January 10, 1913, Major Erwin was president of the bank, and continued as such until the date of his death. That as president he was charged with the duty to investigate his account and to determine the correctness thereof, and to report any irregularity to the board of directors. Wherefore, it is said that, because of the failure to perform his duty as president, and because of his failure to complain of the erroneous statement of his account as a depositor, his administrator is now estopped from the prosecution of a suit to recover an alleged balance.

Major Erwin was a man of large wealth and had extensive interests, but he had grown old and feeble, and on January 6, 1913, being then in his 81st year, he

had a stroke of paralysis, from which he never recovered. This event marked the close of his business career, and such attention as he thereafter gave to his business was in the collecting together of the odds and ends of his holdings. He had numerous loans but thereafter made no new ones, and as the old loans matured and were collected the proceeds were deposited to the credit of his wife's account with the bank.

In a conference with Paxton Thomas, who was the cashier of the bank, Major Erwin determined to transfer to his wife the balance to his credit in the bank, and, to accomplish this end signed a check drawn in blank as to the amount, payable to the order of his wife. This check was delivered to Thomas with directions to fill in the amount of the balance on hand, less certain checks known to be outstanding, but Thomas filled in this check for $2,500.00 less than this balance, and credited this difference to his individual account. This transaction closed the account of Major Erwin at the bank, and thereafter no checks were drawn in his name, and no subsequent deposits were made to his credit.

Notwithstanding the allegation of the answer to that effect, there is no proof that Major Erwin's pass book was ever balanced after he drew the check to his wife, nor is there any showing that this check was ever returned to him; but, upon the contrary, other checks drawn by Major Erwin were found in the compartment of the bank's vault where cancelled checks were kept until the pass books of the drawers of the checks were balanced, and the checks so found were ones which would have been included in a final balancing of this account.

There was no showing that Major Erwin had any duties to perform as president except such as are ordinarily performed by a bank president. On the contrary, it affirmatively appears there was an auditing committee whose business it was to exercise a general supervision of the bank's books, and to make regular examination of them every two or three months, and to examine generally into the accounts and condition of the bank; but

this committee was not required to go into a personal investigation of any individual accounts.

It is also undisputed that after his stroke Major Erwin did not undertake to discharge any of the duties of president, and on only a very few occasions did he ever visit the bank, and the duties of president were discharged by other persons. Thomas, the bank's cashier, was a trusted friend and agent of the Erwins, and their confidence in him appears to have been unlimited. It is shown that he signed the name of Major Erwin to many checks against that account before it was closed, and that he continued this practice in the name of Mrs. Erwin after the account had been opened in her name. Indeed, Mrs. Erwin admitted that all the checks and charges against her account which represented many transactions had by Thomas were either authorized by her or were for her benefit, except items amounting to $15,000.00. This sum was covered by five transactions, two of which were checks signed in her name by Thomas, dated May 7, 1913, and September 18, 1913, and for $2,500 and $1,500, respectively. Two other items were charge tickets dated August 14, 1914, and August 25, 1914, for the sums of $2,000.00 and $5,500.00, respectively. These charge tickets purported to be loans made Thomas, and charge tickets for those amounts were found in the vaults of the bank. But neither check nor charge ticket was found to cover an item of $3,500.00 dated January 6, 1914. Appellees contend that all of these items were credited by Thomas to his individual account and there was proof tending to support that contention.

The evidence is undisputed that Thomas did not have the authority to credit his account with the $2,500 taken from the account of Major Erwin; nor did he have any authority from Mrs. Erwin to sign her name to the checks to his order involved in this litigation, and the evidence shows that she did not make him any loan. The extent of his authority was to draw checks for Mrs. Erwin's benefit, and none of the items making up the $15,000.00 in dispute were for her benefit.

Mrs. Erwin's pass book was twice balanced, and the first balancing covered the first half of the year 1913, and she testified that the cancelled checks during that period corresponded with her pass book. And she testified that there was no entry of the item of $2,500.00 charged on the books of the bank under date of May 7, 1913, in her pass book, nor any voucher of any kind showing that item, as they were not making any new loans and she would have been very much startled to have found any such charge. She had preserved her cancelled checks during this period, including one for $133.80, covering fencing district taxes under date of May 7, but there was not found any other check of that date nor any check for $2,500.00 of any date.

Later she again left her book to be balanced, and after waiting some time she called on Thomas for the book, but was told by him that the book had been misplaced and it was never returned to her. Thomas then furnished Mrs. Erwin with a second book which contained a statement of her account from January 7, 1914, to June 5, 1914, thus leaving a period of several months of which she had no statement of the account. Within this period for which no statement was furnished were the items dated September 18, 1913, for $1,500.00, and the one for $3,500.00 dated January 6, 1914. She testified that when Thomas gave her this second book he said, "I made up your book from the first of the year," and while she had never heard of an occurrence just like this it did not occur to her that there was anything wrong about the transaction, and that her suspicions were not aroused, as the checks which were delivered to her corresponded with the charges against her in her pass book, and that there was no balancing of her book during the period which would have covered the alleged loans of $2,000 and $5,500 under date of August 4, 1914, and August 25, 1914, respectively.

Kennerly, who was an employee of the bank during the time Thomas was its cashier and succeeded Thomas in that capacity, testified that he balanced Mrs. Erwin's pass book on June 5, 1914, and that it was balanced

again on January 5, 1915, at which time a check was drawn by Mrs. Erwin for the amount then on deposit to her credit and the account was converted into a time deposit and a certificate of deposit was issued for the amount shown by the bank's books to be then on hand.

(1) After the death of Major Erwin his estate became involved in litigation over its distribution, and inquiry was made into the state of these accounts. Officers of the bank began to suspect Thomas' peculations, and when Thomas was called upon for a statement of these accounts he went to work, ostensibly, to comply with this demand, and some time during the night, while he was supposed to be thus employed, he committed suicide in the vault of the bank. It is suggested that he spent the time in the bank destroying evidences of his wrongdoing and that much of the uncertainty about the facts of this case grow out of the destruction by him of this evidence. After Thomas' death and after Mrs. Erwin's attorney had received from her her new pass book with the cancelled checks for the period from January 7, 1914, to June 5, 1914, these attorneys had the bank make a complete statement of this account, and that statement showed all the items involved in this controversy. This statement was furnished in the latter part of February, and these suits were begun on September 25, 1915. Thomas' death occurred on January 20, 1915, and letters of administration were taken out on his estate on February 1, 1915, and there is proof on the part of the bank to the effect that it was not advised that it would be held responsible for the full amount of Thomas' peculations until two days before the expiration of six months after the grant of letters of administration on Thomas' estate. Mrs. Erwin removed to Tennessee after the death of her husband and has since continued her residence there, and there is no proof of any acquiescence on her part in the correctness of the statement of her account as furnished her attorneys nor by the attorneys themselves after a conference between them and their client had revealed the improper charges which had been made

against the account. While these suits were not brought against the bank until September 25, 1915, the undisputed proof is that a conference of Mrs. Erwin's attorneys was held in the latter part of February, 1915, at which Charles F. Cole, who was a director and the general attorney for the bank and a member of its auditing committee, was present, at which time these discrepancies were discussed, and while there is some difference as to what was said in regard to the extent of the bank's liability, there is no dispute that the correctness of the account was then challenged; and we think it should be said as a matter of law that no such time had elapsed between the date when the full statement of Mrs. Erwin's account was furnished her attorneys and the date when the bank's attorney was notified that this account was not correct as made the statement so furnished an account stated.

In 1 Ruling Case Law, p. 211 it is said: "An account stated presupposes an absolute acknowledgment or admission of a certain sum due, or an adjustment of accounts between the parties, the striking of a balance, or an assent express or implied, to the correctness of the balance. If the acknowledgment or admission is qualified and not absolute, or if there is but an admission that something is due, without specifying how much, there is no account stated, nor does an account stated exist if there is but a partial settlement of accounts, without arriving at a balance, or if there is a dissent from the balance as struck." The essentials of an account stated are lacking here. The bank officers themselves had become suspicious of Thomas, and the verification of these suspicions caused the suicide, and so far as the Erwin account is concerned his suicide was not only his expiation but it was his confession.

The demand of the attorneys for a statement of the account was made after the suicide, and the demand was not merely that a pass book be balanced from the exact date on which it had been previously balanced, but that a statement of the entire account be furnished and the significance and purpose of this demand could

not have been unknown to the bank under the circumstances. Moreover the proof is undisputed that, before the expiration of the month in which the demand was made, actual notice was given to the attorney for the bank that the account was not correct.

Proper instructions submitted to the jury the question of Thomas' agency and authority, and that question may be said to be concluded by the verdict of the jury.

The pivotal instruction in the case so far as the suit of Mrs. Erwin is concerned was instruction No. 5, given at the instance of the plaintiff, and this instruction reads as follows:

"You are instructed that if you find Paxton Thomas, as cashier of the bank, transferred amounts from the account of Ida L. Erwin without her authority to his individual account, and caused entries to be made on the books of the bank by virtue of authority of charge tickets made by himself, which operated to transfer the amounts to his credit, and that charge tickets as used by said Paxton Thomas in said transactions could only be made by an officer or agent of the bank, and that by this system the said Paxton Thomas appropriated amounts to his own use, then you are instructed that as between the bank and Ida L. Erwin, the bank would be liable for such charges made to her account, unless with knowledge of said improper charges she has, by silence, ratified and adopted the same as proper charges, or having received a statement from the bank with vouchers representing such charges, and she upon receiving them did not in a reasonable time notify the bank that they were improper, and the bank was injured by her failure to so notify it."

The objection made to this instruction is the employment of the phrase, "with knowledge of said improper charges."

The theory of the bank was, and is, that, even though Thomas had no authority to divert the deposits of the Erwins, yet statements of the accounts showing

that this had been done were furnished, and that these statements became accounts stated.

Discussing this question the Supreme Court of the United States, in the case of *Leather Manufacturer's Bank* v. *Morgan et al.*, 117 U. S. 96, said: "While it is true that the relation of a bank and its depositor is one simply of debtor and creditor (*Phoenix Bank* v. *Risley*, 111 U. S. 125, 127), and that the depositor is not chargeable with any payments except such as are made in conformity with his orders, it is within common knowledge that the object of a pass book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his pass book to be written up and returned with the vouchers is, therefore, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book, with the vouchers, is the answer to that demand, and in effect imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it."

And further in the same opinion it was said:

"It seems to us that if the case had been submitted to the jury, and they had found such negligence upon the part of the depositor as precluded him from disputing the correctness of the account rendered by the bank, the verdict could not have been set aside as wholly unsupported by the evidence. In their relations with depositors, banks are held, as they ought to be, to rigid responsibility. But the principles governing these relations ought not to be so extended as to invite or encourage such negligence by depositors in the examination of their bank accounts as is inconsistent with the relations of the parties or with those established rules and usages sanctioned by business men of ordinary

prudence and sagacity, which are or ought to be known to depositors. * * *

"While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business."

(2-4) We think this is the true rule to apply between a bank and its depositor, as we have held that relation to be one of debtor and creditor. *State Nat. Bank* v. *First Nat. Bank*, 124 Ark. 531; 187 S. W. 674. Notwithstanding the fact, however, that we now hold that the pass book of a depositor, when balanced and returned, may become an account stated and binding upon both the bank and the depositor as such, yet we think the instruction given was a correct declaration of the law as applied to the facts of this case. This instruction dealt both with the questions of ratification or estoppel and also with the duty of a depositor to examine statements of his account and to report any improper charges within a reasonable time. Having shown that there was no evidence that Mrs. Erwin had been furnished a statement of the account showing these charges there could be no objection to saying that she must have had knowledge of them to have ratified them. Certainly she could not ratify the unauthorized act until she had knowledge of that act, or was furnished the means of obtaining that knowledge.

Mrs. Erwin had the right to suppose that her accounts were being correctly kept; and while it was her duty to examine her pass book and to make complaint to the bank, if her pass book furnished her with the notice that improper charges had been made against her account, yet she was under no duty to take any action until she had this information.

(5) We think no different rule is to be applied to Major Erwin's account. It is true that he had been the acting president of the bank prior to his stroke of

paralysis and remained as the nominal president until the time of his death on October 22, 1914, and it was known to every one connected with the bank in any capacity that he was not undertaking to discharge any of the functions of that office. This record does not present the question of the bank's liability to one who dealt with it on the faith of the fact that Erwin was being held out as president. In such event the president might incur a liability from the fact that he was the nominal president, although he discharged none of the duties of that office. This case presents the question of the bank's liability to one of its depositors who was its president. There is nothing in this record to show that Major Erwin was under any duty to make any examination as president of the bank of his own or any other account, and in the absence of such duty he is entitled to the same rights and protection in his individual deposit as the law accords to other depositors.

3 R. C. L., p. 440, Sec. 66, in the article on the subject of Banks, defines the duty of president as follows:

" * * * The president is but the executive agent of the board of directors, to perform such duties as may be devolved upon him; he is not the corporation, and cannot take the place of the governing board, and make contracts or incur liabilities outside of the ordinary business of the bank, without special authority. Ordinarily the cashier of a bank is its managing officer, and the powers of the president as such are very limited, save as conferred on him by the board of directors. Special powers may, of course, be conferred upon the president; and where he acts with the knowledge and consent of the bank in a particular matter his authority to do so cannot be denied. * * * The president usually presides at the meetings of the board of directors, and being a member of the board of directors he is, in the absence of that body, entrusted with the general supervision of the concerns of the bank. * * *

In Section 71 of the same text, page 444, the duties of the cashier are defined as follows:

"* * * The cashier's ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly or through subordinate officers, all moneys and notes of the bank, delivers up all discounted notes and securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and as the executive officer of the bank transacts most of its business."

The proof here does not show that any charge ticket or pass book was ever returned to Major Erwin, and he was not, therefore, ever advised or furnished the means of knowing that the item of $2,500.00 had been subtracted from his balance.

The court gave at appellant's request an instruction to the effect that a delivery of cancelled checks and vouchers of a depositor to an attorney of such depositor was equivalent to a delivery to the depositor, and that when so delivered it became the duty of the depositor or her attorney to inspect the same within a reasonable time and to make complaint of any error; but it is said that other instructions on the same subject were in conflict with it. Even though this were true, such error would not call for the reversal of the case. Having held as a matter of law that the account did not become an account stated through the statement furnished the attorneys for Mrs. Erwin, no prejudice could result if the instructions did not correctly declare the law upon a subject which did not constitute a defense.

Exceptions were saved to the action of the court in giving and refusing other instructions; but we think the views we have here expressed render it unnecessary to discuss these instructions.

Finding no prejudicial error the judgments are affirmed.

IMPERIAL VALLEY SAVINGS BANK *v.* HUFF.

Opinion delivered November 20, 1916.

CHATTEL MORTGAGES—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEE.—One P. mortgaged certain cattle to appellant, and thereafter sold the cattle, converting the proceeds to his own use. He was arrested, and after sueing out a writ of habeas corpus, deposited the said money in court in lieu of bail. Appellant intervened, claiming the money, which, *held*, it could do. P. having sold the property upon which appellant had a lien, appellant had the right either to sue the purchaser for a conversion of the property, or to ratify the sale and sue P. for the proceeds.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; reversed.

Frank Birkhauser and *Rector & Sawyer*, for appellants.

1. The court erred in its declarations of law. Under the laws of California the title to the cattle passed to the mortgagee. 5 R. C. L., § 22, pp. 927-8; Civil Code of Cal., §§ 2965-6-7, 2955 to 2972; 127 Cal. 648-652; 84 *Id.* 554-6; 63 *Id.* 4, 550; 152 *Id.* 488, 493; 121 *Id.* 8; 117 *Id.* 412; 36 *Id.* 414; 61 Pac. 84.

2. The lien attaches to the proceeds of sale. 131 Cal. 11-14; 144 *Id.* 468-470; 138 *Id.* 334; 37 Pac. 914.

3. The lien of appellant is superior to the claim of appellees who took with notice. 127 Cal. 290; 4 Cal. Unreported Cases, 813, 817; Civil Code Cal., § 2897.

A valid lien on personal property is enforceable against it, or its proceeds, in the hands of any one except an innocent purchaser without notice. 25 Cyc. 680; 72 Ark. 494; 37 *Id.* 511; Jones on Chat. Mortg., 464; 112 Cal. 12; 73 N. W. 667; 47 Am. St. 705; 33 Pac. 31.

4. If the proceedings were irregular they were not prejudicial. 91 Ark. 25.

C. Floyd Huff and *B. H. Randolph*, for appellees.

1. Appellants have failed to establish that the fund is the proceeds of the sale of the mortgaged property.

2. The appellants had not the title to the property. Civil Code of Cal., § 2888; 6 Cal. App. 455; 92 Pac. 393; 128 Cal. 489; 61 Pac. 84; 112 Cal. 215; 44 Pac. 487; 53 Am. St. 207; 84 Cal. 154; 23 Pac. 1086; 32 Cal. 55, 199; 162 Cal. 181; 121 Pac. 726; 106 Cal. 673; 39 Pac. 1071. Appellants consented to the removal and sale. 112 Cal. 8; 44 Pac. 357; 53 Am. St. 151. Appellants had no lien on the proceeds.

3. The lien of a chattel mortgage remains valid thirty days after removal from the county where the mortgage was given. Code of Cal., § 2965; 151 Cal. 522; 91 Pac. 327. The only remedy was against the purchaser of the property. 89 Cal. 178; 26 Pac. 626; 70 Cal. 190; 11 Pac. 608. There can be only one remedy. Code of Cal., § 726; 15 Cal. App. 347; 115 Pac. 59.

4. But if the fund was the proceeds of the sale of the mortgaged property and Phillips had no right to sell same, appellants only had an equitable lien not enforceable at law.

5. Appellees had no notice.

HART, J. E. J. Phillips was arrested in Hot Springs, Garland County, Arkansas, as a fugitive from justice, charged with having unlawfully disposed of mortgaged property in the State of California. He sued out a writ of habeas corpus in the circuit court and was permitted to deposit with the clerk of the court $1,100.00 in lieu of bail. Appellants filed an intervention in which they set up that the money deposited as bail with the clerk of the court was derived from the proceeds of personal property which Phillips had mortgaged to appellants and which he had sold without their consent.

The prayer was that the money should be delivered to appellants. Subsequently appellees filed a petition in which they stated that Phillips had assigned the money to them for professional services rendered by them in the habeas corpus proceeding and other proceedings concerning the disposition of the mortgaged property. Phillips was discharged from custody and issue was joined between appellants and appellees as to

which of them was entitled to the money deposited with the clerk as above stated.

The case was tried before the court sitting without a jury. The material facts are as follows:

Appellants were banking corporations doing business in the State of California, and had a mortgage executed by E. J. Phillips, a resident of the State of California, on fifty head of cattle, which belonged to him and which were in his possession, to secure a debt owed by Phillips to the banks. The mortgage was duly recorded as required by the laws of the State. Phillips removed the cattle from the county where the mortgage was given and recorded, to another county in the State of California and sold them, together with other cattle owned by him, to a packing house without the consent of the mortgagees. He collected the proceeds of the sale and soon afterward went to Hot Springs in the State of Arkansas. After he arrived there, he was arrested as a fugitive from justice, charged with selling mortgaged property in the State of California in violation of the statutes of that State. After he was arrested, he filed a petition in the circuit court for a writ of habeas corpus, and the court allowed him to deposit $1,100.00 in cash in lieu of a bond for his appearance as required by law. The money was immediately deposited in court, and it was a part of the money which Phillips had received from the sale of the mortgaged cattle and other cattle owned by him which he had mingled with them. Appellants then filed an intervention in the circuit court claiming the money as the proceeds of the sale of the cattle mortgaged to them as above set forth. After the petition was filed by appellants, appellees filed an answer claiming the money under a written assignment made to them by Phillips for legal services rendered by them in the habeas corpus proceeding as above set forth. Other facts tend to show that appellees had notice that the money was derived from the sale of the mortgaged property before they received the assignment of the money from Phillips.

The court found that appellees' right to the money deposited with the clerk was superior to that of appellants and rendered judgment accordingly. To reverse that judgment appellants prosecute this appeal.

The circuit court was of the opinion that under the facts the laws of the State of California must govern and that in that State the title does not pass to the mortgagee to personal property under a chattel mortgage, but that the mortgagee merely has a lien on the property. He was further of the opinion that even though appellee had notice that the money in the hands of the court was a part of the proceeds of the cattle upon which appellants had a mortgage that this would not deprive them of the right to an assignment of the money and that their rights are superior to those of appellants. We think the circuit court erred in its conclusions of law. We deem it immaterial to decide whether or not under the laws of the State of California a mortgage of chattels conveys the title in the mortgaged property to the mortgagee or that he has merely a lien on the property. The mortgage in question contained a clause providing that the mortgagor should not sell the property without the written consent of the mortgagee or remove it from the county. It is insisted by appellees that appellants waived this provision of the mortgage. They relied on the testimony of the cashier of the bank to sustain their contention. The cashier denied that appellants had given Phillips the right to remove the property from the county in which it was situated or to sell or dispose of it. On cross-examination the cashier admitted that there had been one or two mortgges executed by Phillips in favor of appellants before this time and that they had permitted him to sell the cattle and apply the proceeds to the mortgage. The fact that they had done this on two previous occasions does not show that they gave Phillips the right to sell the cattle embraced in the mortgage under consideration and apply the proceeds to the payment of the mortgage debt. The testimony of the cashier of the bank shows that the mortgage debt was more than the amount deposited with the clerk of

the circuit court and it was shown that Phillips admitted that this money was the proceeds of the sale of cattle mortgaged to appellants. As we have already seen, the testimony shows that the property was sold without the consent of the mortgagee. Under these circumstances it is immaterial whether the legal title to the mortgaged property passed to the mortgagee by execution of the mortgage or whether it merely had a lien on the cattle. Phillips having sold the property upon which appellants had a lien, appellants might sue the purchaser for conversion of the property or they might elect to ratify the sale and sue Phillips for the proceeds. *Burke* v. *First National Bank*, 61 Neb. 20, 84 N. W. 408, 87 Am. St. Rep. 447; *Jones* v. *Hoar*, 5 Pick. (Mass.) 285. See also *Mathew* v. *Mathew*, 138 Cal. 334, and cases cited.

We do not think what we have said in anywise conflicts with the rule laid down in *Reavis* v. *Barnes*, 36 Ark. 575 and *Judge* v. *Curtis*, 72 Ark. 132. In each of these cases a landlord was proceeding against the purchaser from his tenant of property upon which he had a landlord's lien. Here the mortgagees are not proceeding against the purchaser from the mortgagor to fix their lien on the property sold by the mortgagor or the proceeds thereof, but they are proceeding directly against the mortgagor. The mortgagor had sold the mortgaged property without permission of the mortgagees and had deposited the proceeds of sale with the clerk of the circuit court in lieu of a bail bond. The mortgagees filed their petition in the court which had custody of the fund. They asked the court that had the custody of the money to turn it over to them and their petition was filed before the mortgagor assigned his right to the money to appellees. The mortgagees properly filed their petition in the court which had the custody of the money and they were entitled to it. The circuit court erred in not directing that it be turned over to them. For this error the judgment will be reversed and the cause remanded for a new trial.

HUMPHREYS, J., not participating.

TRICE, ADMINSTRATOR, v. SCHOOL DISTRICT NO. 40.

Opinion delivered November 20, 1916.

MONEY PAID—MISTAKE—RECOVERY.—One B. owed a school district some money; one M. suffering under an hallucination, conceived the idea that he owed the district money, and gave to B. a $1,000 bill, which B. delivered to the district to be applied on his debt. *Held,* M.'s administrator could not maintain an action to recover the money.

Appeal from Mississippi Chancery Court, Chickasawba District; *E. E. Alexander*, Special Chancellor; affirmed.

N. F. Lamb and *Archer Wheatley*, for appellant.

1. Decedent was insane when he paid the money. 87 Ark. 243, 277; 70 *Id.* 166; 48 S. E. 603; 76 N. E. 755; 97 Ark. 450, 457; 105 *Id.* 44-47; 73 *Id.* 170; 22 Cyc. 1170; 48 Ga. 313; 6 Humph. (Tenn.) 503. There was no consideration for the payment. 22 Cyc. 1173-4; 18 Pac. 687; 39 So. 12. See also 29 N. H. 106; 20 Mich. 278; 95 N. Y. 503. The personal representative may avoid the gift. 22 Cyc. 1174; 45 Ark. 392.

2. The testimony was uncontradicted and should not have been disregarded. 75 Ark. 406; 89 *Id.* 29; 113 *Id.* 190. It was competent. 79 Ark. 414; 43 *Id.* 307; 46 *Id.* 306. Mrs. Mathes was a competent witness. 40 Cyc. 2355; 42 Atl. 1024.

3. Appellant's family are not estopped.

R. A. Nelson and *G. E. Keck*, for appellee.

1. The money paid did not belong to E. H. Mathes, but was the property of his wife.

2. Plaintiff is estopped from coming in and setting up a claim adverse to that of the school district. The money was Mrs. Mathes'. 66 Ark. 299; 79 *Id.* 69. She acquiesced in and furnished the money. The payment was September 20, 1913, and Mathes died in May, 1914. This suit was filed August 7, 1913. The parties are estopped by their conduct. 99 Ark. 260.

3. Mathes was not insane. 87 Ark. 276; 219 Mo. 494; 118 S. W. 12; 62 Mo. 401; 16 Am. Rep. 473; 27 L. R. A. (N. S.) 68.

SMITH, J. The Sixteenth Section lying within Common School District No. 40, Mississippi county, was sold in the year 1900 to E. F. Brown. His purchase was for the joint benefit of himself and E. H. Mathes and W. J. Driver, although the last named gentlemen never appeared of record as having any title, but they transferred their interest to Brown, who took the deed in his individual name.

Mathes was a lawyer of reputation and a man of high character, but in the spring of 1913 his strength and health began to fail, and there was an attendant loss of mentality, and this physical and mental weakness grew until May, 1914, when he died. Mathes conceived the idea, which the proof shows to have been an hallucination, that he had done the school district a wrong, and the thought of making atonement preyed on his mind until he was desirous of giving all his property to the district. He had repeated conversations with Brown on the subject, and went to Brown's office with a letter which he had written to the treasurer of Mississsippi county and a thousand-dollar bill. With this bill Brown, at Mathes' request, purchased exchange and made a remittance to the treasurer in his own name, signing the letter which Mathes had prepared. This relieved Mathes' mind for a time, but he soon wanted additional payments made to the school district. Finally a supposititious receipt was presented to him which recited that three thousand dollars had been paid by himself, Brown and Driver. This receipt was signed by the county treasurer, but at the same time there had been prepared a complete written memorandum of the entire transaction and circumstances, in which the mental condition of Mathes was recited, and this writing was signed by Mathes' wife and son, Brown and Driver, and by the treasurer of the county. The exhibition of this receipt pacified Mathes for an additional time, but he soon demanded that other payments be made.

The proof shows that in the early summer of 1913 Mathes and his wife sold a lot in Jonesboro for $1,500, of which $1,000 was put in a certificate of deposit and de-

livered to Mrs. Mathes. This certificate was later endorsed by Mrs. Mathes, cashed by her husband, and for it he received the thousand dollar bill above mentioned.

This suit was filed by the executor of Mathes' estate to recover the thousand dollars so paid, on the ground that Mathes was of unsound mind at the time the payment was made.

In defense of this action it was shown that no one acting for the school district ever knew prior to the institution of this suit that any one was interested with Brown in this purchase, but a suit had been brought in the name of the school district to cancel the deed to Brown upon the ground that the sale to him was fraudulently made. This suit was on the docket of the chancery court for three terms, during all of which time Brown was demanding that the case be prepared for trial.

About that time this court announced its decision in the case of *Reeves* v. *Conger*, 103 Ark. 446, which the school district regarded as adverse to certain of its contions and a nonsuit was taken, but attorneys for the district later announced their intention of renewing the suit, but did not do so in consideration of Brown's promise to pay the district a thousand dollars and the subsequent payment of that amount, and the suit was not brought because of this promise, and the year within which the suit could have been again brought expired without an intimation that the payment would not be made pursuant to the agreement that it should be made.

Brown testified that Mathes wanted the money remitted in his (Brown's) name, and that he took the thousand dollars which Mathes gave him and bought the exchange which was sent to the treasurer. The letter which accompanied this remittance reads as follows:

"September 20, 1913.

"Hon. C. B. Hall, County Treasurer, Osceola, Ark.:

"Dear Mr. Hall: I enclose herewith express money order for one thousand dollars, which I desire you to place to the credit of the building fund for the school district in which the town of Leachville is situated. I believe the district No. is 32, but you will know about that.

"I promised these people when I was railroading that I would give them a substantial contribution towards the erection of new school building, but one thing and another deferred action till now.

"If it be possible and lawful for you to do so, I want this to remain in the treasury subject to the order of the directors of the district when it appears they have as much money on hand for building purposes. That will give them a good substantial building. If this can not be done, then I wish this fund to go on the books of their credit for building purposes at their pleasure.

"Please send me your official receipt for this money and greatly oblige me.

"Yours truly,

"E. F. Brown."

It may be said that the proof here indicates that the school district could not have successfully maintained its suit to cancel Brown's deed; but it also shows that a suit had been instituted for that purpose and that that litigation was finally disposed of by the payment of the money now sought to be recovered.

The court dismissed the complaint for want of equity, and this appeal is prosecuted to reverse that decree.

We think the decree must be affirmed, because appellant's evidence, when accepted as true, does not establish a cause of action. The title to a bill of exchange ordinarily passes by endorsement, and the title to money ordinarily passes by delivery. Here Mathes delivered money to Brown, who bought exchange with it, and endorsed the exchange to the county treasurer,

who accepted it for and to the credit of the school district and without knowledge that the transaction was not what it purported to be. Under the circumstances of this case we must hold that this suit can not be maintained. See note to *Schmidt* v. *Shaver*, 89 Am. St. Rep. 250; *Hunter* v. *Lawrence's Admr.*, 62 Am. Dec. 640; *Carpenter* v. *McBride*, 52 Am. Dec. 379.

The decree dismissing the suit is accordingly affirmed.

HUMPHREYS, J., not participating.

TEMPLE v. STATE.

Opinion delivered November 27, 1916.

1. FORGERY—AVERMENTS IN INDICTMENT.—It is not necessary to show upon the face of an indictment how or in what manner the party is to be defrauded; that is a matter of evidence; it is enough, if by possibility he may be defrauded, upon the face of the indictment. It is not necessary to show upon the face of the indictment any apparent connection between the transaction and the party to be defrauded.
2. FORGERY—INDICTMENT AND PROOF—VARIANCE—DEED TO LAND.—There is no variance between an indictment charging forgery and the proof where defendant was charged with uttering a forged deed covering certain lands, and proof which showed that the party, who it was alleged was the owner of the said lands, owned only a portion thereof.
3. FORGERY—FORGED DEED—GIVING TO PERSON TO PLACE UPON RECORD.—An indictment which alleged that defendant "did utter and publish as true to B. L. B., a helper and employee in the office of C. K. W., who is the clerk of Bradley County Court and the Recorder of Deeds for Bradley County, * * * with the felonious intent then and there to file and have recorded a forged and fraudulent deed * * * ," *held*, valid.
4. EVIDENCE—PROOF OF DEED BY RECORD.—In a prosecution for forgery, it was not improper to permit the introduction of the record of certain deeds, in the claim of title to the land, concerning which it was alleged that forged deeds had been uttered by the defendant, without proof that the original deeds were either lost or destroyed.
5. CRIMINAL PROCEDURE—PEREMPTORY CHALLENGE BY STATE OF JURORS ACCEPTED BY BOTH SIDES.—It is an abuse of the discretion of the trial court, to permit the State, in a criminal trial, to challenge peremptorily a juror who has been accepted by both sides, after the defense has exhausted all of its peremptory challenges.

Appeal from Bradley Circuit Court; *Turner Butler*, Judge; reversed.

J. R. Wilson, for appellant.

1. The special venire should have been discharged and set aside.

2. After the defendant's peremptory challenges were exhausted, it was error to allow the State to challenge two jurors.

3. The record of deeds is not admissible unless the originals are shown to have been lost or mislaid. No foundation was laid and the record does not show that the deed contained all the lands included in alleged forged deed.

4. Incompetent evidence was admitted.

5. The burden was upon the State to prove title. Material allegations must be proved as laid in the indictment. 30 Ark. 131; 9 *Id.* 193,196; 22 *Id.* 251; 62 *Id*, 542; 34 *Id.* 160; 61 *Id.* 16; 55 *Id.* 244; 55 *Id.* 246; 42 *Id.* 74; 13 *Id.* 688; 62 *Id.* 459; 77 *Id.* 538; 66 *Id.* 121; 97 *Id.* 179; 102 *Id.* 629; 73 *Id.* 34, 169; 70 *Id.* 144; 63 *Id.* 488; 19 Cyc. 1412; 22 *Id.* 370. The record of the forged deed was incompetent. 129 S. W. 886; 124 *Id.* 946.

6. The court erred in its charge to the jury and in admitting testimony. *Malony* v. *State*, 91 Ark. 485.

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

1. Temple knew that he was uttering a forged instrument when he placed the deed on the record. He made no attempt to show that he ever had any title to the lands.

2. The objections to the special venire were properly overruled.

3. A proper foundation was laid for the introduction of the record of the deeds.

4. The indictment was good.

5. The instructions contain no error and the evidence sustains the verdict.

6. It is unnecessary to state whether the company is a corporation or a partnership. Kirby's Digest, § 2233. See also *Ib.*, §§ 2229, etc. No prejudice has been shown.

SMITH, J. Appellant was convicted under an indictment which charged him with uttering a forged instrument. The material allegations of the indictment are that he "did utter and publish as true to B. L. Beasley, a helper and employee in the office of G. K. Watkins, who is clerk of Bradley County Circuit Court and the recorder of deeds for Bradley County, * * * with the felonious intent then and there to file and have recorded a forged and fraudulent deed in the deed records for Bradley county, with the felonious intent then and there unlawfully, fraudulently, and feloniously to defraud the said lumber company, a corporation organized and doing business under the laws of the State of Arkansas, out of the said lands described in the said forged and fraudulent deed * * *."

(1) A number of objections were made to this indictment, and as respecting its sufficiency these questions are similar to those raised in the case of *Snow* v. *State*, 85 Ark. 203. In that case the court quoted with approval from the case of *West* v. *State*, 22 N. J. L. 212, the following language:

"But the cases all agree that it is not necessary to show upon the face of the indictment *how* or *in what manner* the party is to be defrauded. That is matter of evidence upon the trial. It is enough if by possibility he may be defrauded, upon the face of the indictment. That it is not necessary to show upon the face of the indictment any apparent connection between the transaction and the party to be defrauded, is apparent from the precedents. * * * It was suggested, upon the argument, that a different form of indictment was necessary where the instrument alleged to be forged respected real estate. But why so? No such rules exist at common law. * * * The statute draws no distinction between the two classes of instruments. * * *

This count being in the terms of the statute, including all the essential ingredients of the offense, and being in accordance with approved precedents under similar statutes, we are of opinion that this error can not be sustained."

And the same opinion also quoted from 9 Enc. Plead. & Prac. 588, the following statement of the law:

"It is not necessary that the indictment should contain averments, showing how the false instrument would, if true, create, increase, diminish, discharge or defeat any pecuniary obligation; or would transfer or affect any property whatever. These are deductions of law, not necessary to be averred."

(2) According to the State's theory of the case, the forged instrument was placed of record to give color of title to the land there described for cutting timber on part of which appellant had been indicted for trespassing. That case was pending and undisposed of at the time this deed was filed for record. This deed might have been of importance in measuring the amount of damages recoverable by the lumber company in a suit for trespassing under section 7976 of Kirby's Digest. And, as was said in the case of *Snow* v. *State*, *supra*, this deed would constitute color of title to the land there described so that possession of a part of it would have given title to all of it.

It is urged that inasmuch as the proof does not show that the lumber company owns all of the land described in the alleged forged deed there is a variance between the allegation and the proof. But we are unable to agree with counsel in this respect. The proof would be sufficient and the conviction could be sustained if the proof showed ownership in the lumber company of *any* of the lands described in the deed set out in the indictment. There can no more be said to be a variance here than would exist where the indictment charged one with the larceny of a cow and a horse, when the proof showed the ownership only of the horse.

(3) Objection is also made to the allegation and proof that the deed was uttered and published as true

"to B. L. Beasley, a helper and employee in the office of G. K. Watkins, who is the recorder of deeds." This is upon the ground that no such officer as helper is known to the law, and that the deed could have been uttered and published as true only by delivering it to some one who had authority to place it of record. But the indictment does allege that the deed was delivered to the helper for the purpose of having it filed and recorded. One may do an act by his own hand or by the hand of another, and giving this deed to a helper in the recorder's office to deliver to his employer is as much an utterance of the deed as delivering it directly to the recorder would have been. And the proof shows this helper gave the deed to the deputy recorder, who placed it of record. In the case of *Elsey* v. *State*, 47 Ark. 576, it was said:

"The putting of a forged deed upon record as genuine has been held to be an uttering of it; and so has the bringing of a suit upon a forged paper."

(4) It is very earnestly urged that error was committed in the introduction of the deed records to prove certain deeds appearing in the chain of title of the lumber company without proof of the loss of the original deeds. For instance, it was insisted that the original patent from the State to the Mississippi, Ouachita & Red River Railway Company should have been offered in evidence, as it was shown to be in existence, and it is argued that if these originals had been produced it might have been shown that they were not properly recorded, or, even, indeed, that they were never, in fact, executed by the person who purported to have executed them. This is mere surmise, however, and no attempt was made to offer such proof. The proof showed that this document was very old and very much worn, and that it purported to convey between one hundred and two hundred thousand acres of land, and was in possession of a resident of Danbury, Connecticut, who had no interest in this prosecution or the lands involved therein. We think this proof sufficiently accounted for the non-production of this patent; and that the same

thing may be said in regard to the record of other deeds offered in evidence. These deeds appeared to have been properly acknowledged and had been recorded, and were properly admitted in evidence. Section 756 of Kirby's Digest.

(5) After appellant had exhausted all his peremptory challenges, the court, over his objection permitted the State to challenge two jurors who had previously been examined and accepted, and this action is assigned as error.

In the case of *Williams* v. *State*, 63 Ark. 527, it was held an abuse of discretion to permit the State to interpose peremptory challenges to jurors who had been accepted by both parties after the defendant had exhausted his peremptory challenges in the absence of any showing that the defendant was not prejudiced thereby. Other cases on this subject are as follows: *Glenn* v. *State*, 71 Ark. 87; *Bevis* v. *State*, 90 Ark. 589; *Dewein* v. *State*, 114 Ark. 484; *McGough* v. *State*, 113 Ark. 301; *Carr* v. *State*, 81 Ark. 589; *Allen* v. *State*, 70 Ark. 337.

It was held in some of these cases that the court, in its discretion, might permit the State to use a peremptory challenge on a juror who had been accepted by both sides where the defendant had not exhausted all his peremptory challenges; but in all the cases in which it was held not to have been error to permit this action, the defendant had not exhausted his peremptory challenges. The test seems to be whether the defendant has remaining as many challenges as the State is permitted to exercise, and upon the authority of these cases, the judgment of the court must be reversed.

Numerous other assignments of error are pressed upon our attention; but they relate to matters which are not of sufficient importance to require discussion; or to occurrences at the former trial which are not likely to recur upon a trial anew.

The judgment is reversed and the cause remanded.

LOYAL PROTECTIVE INSURANCE COMPANY v. WALKER.

Opinion delivered November 27, 1916.

INSURANCE—PREMIUM DATES—NOTICE WHEN DUE.—Although premiums are due at a certain fixed time, and the policy provides for a lapse thereof when premiums are not paid as required, the insurance company or society will be bound by a custom of notifying the policyholder before the due dates, and cannot forfeit a policy where it failed to give such notice.

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

F. G. Bridges and *W. T. Wooldridge*, for appellant.

1. Appellee failed to pay the premium and his policy lapsed. He had notice. He was reinstated subject to all the conditions contained in the new contract. His sickness existed within thirty days from the reinstatement of the policy, and it was error to refuse instruction No. 1, asked by appellant. 122 Ark. 219; 64 S. E. 180; 112 Pac. 1106; 166 S. W. 17; 98 Ark. 421; 74 *Id.* 507; 75 *Id.* 25.

2. The court erred in giving instruction No. 1 asked by appellee. There was no evidence to justify the court in submitting the question of waiver of the forfeiture of the policy to the jury.

Geo. H. Holmes, for appellee.

1. The policy had not lapsed, but if so, it had been reinstated. The company agreed to give thirty days' notice and failed. The doctrine of waiver and estoppel applies to insurance contracts. 122 Ark. 219; 67 Ark. 584; 72 *Id.* 365. After a company has once waived its right to declare a forfeiture, it can not subsequently avoid the effect of such waiver. 53 Ark. 494; 19 Cyc. 872.

2. The uniform custom of an insurance company to give notice relieves the policy holders from paying dues till notice is given. 48 S. W. 968; 98 Ark. 421; 67 Wisc. 422.

3. The contract does not provide that it shall not be liable for sickness commencing within thirty days after reinstatement. The provision as to sickness

within thirty days after reinstatement is unreasonable. 92 N. Y. 846; 78 *Id.* 85; 3 Daly 20.

4. Appellant is liable for damages and attorneys' fee provided by Act 115, Acts 1905. 94 Ark. 578; 88 *Id.* 556; 103 *Id.* 1.

3. There is no error in the instructions. 15 Wash. 627; 141 U. S. 213.

SMITH, J. This suit was brought by appellee to recover certain sick benefits under a policy of insurance issued to him by the appellant company.

In defense of this suit it is said that the policy had lapsed by reason of the nonpayment of the quarterly dues, and that while the policy had been reinstated, the period of illness here sought to be compensated existed within thirty days of the reinstatement, a condition against any liability for which the policy had provided.

Appellee insists that he had the right to recover as a reinstated policy holder; but he also says that his policy had never lapsed. Of course, if he is right in his last contention, we need not consider whether he is also right in his first.

The policy or certificate of membership recited that the premium of $7 was payable quarterly on the first business days of March, June, September and December in each year, and the payment of which appellee is said to have made default was one due December 1, 1913.

It is not shown whether the by-laws of the order contained any provision for giving notice of assessments to the members; but the policy provided that the premiums should be paid on the first business days of March, June, September and December, and also provided that failure to pay any premuim upon the appointed day should terminate the contract except as to any claim which had accrued; but that the policy might be reinstated by the secretary in his discretion, subject to all the provisions thereof.

In connection with his application for membership, appellee was given a receipt for his initial payment,

which contained the following recitals: "If accepted, your next payment will be due December, 1913. Premiums are payable quarterly in advance on or before March 1, June 1, September 1 and December 1, 30 days' notice being given."

In the letter to appellee notifying him of his acceptance as a member, written by the secretary of the insurance company for that purpose, the following statement appears: "Your quarterly premiums will be due on the first business day of March, June, September and December in each year and notices for same will be sent you thirty days in advance."

Appellant not only admitted its custom to send this written notice, but offered proof to show that the notice had, in fact, been sent appellee of this particular payment. However, that question was submitted to the jury under an instruction which told the jury to find for the company if they found such notice had been sent.

The court gave, over appellant's objection, the following instruction:

"The jury are instructed further that the stipulation requiring payment of premiums on the dates mentioned in the policy is a valid one, and binding upon the plaintiff, unless the defendant by its conduct has waived its right to insist upon a forfeiture of the policy by reason thereof.

"You are, therefore, instructed that if the defendant company by its acts or conduct lead the plaintiff to believe that he would have notice before the maturity of his installments of the date upon which they they would fall due, and plaintiff relied upon it to give said notice, and the defendant failed to notify plaintiff before the installment falling due on December 1 became due and that as soon as he was notified that said installment was due, he immediately remitted therefor and defendant received and accepted said remittance in payment of the 'call' or installment due December 1, 1913, then it is liable and your verdict should be for the plaintiff."

The correctness of this instruction presents the controlling question in the case.

In the case of *Haynes* v. *Masonic Benefit Assn.*, 98 Ark. 421, it was said:

"But in the absence of a statute or any law of the society requiring notice as a condition precedent to the payment of dues, and where the dues are unvarying and permanent charges to be paid at fixed and regular intervals, then a member failing to pay such dues at the time prescribed therefor becomes delinquent and loses his standing and the right to insurance benefits."

We adhere to the doctrine of that case. But it is also settled that an insurance company, in declaring a forfeiture, must not mislead its members, and, although it may not be required to give notice of payments, yet, if it adopts the practice of doing so, and leads its members to believe this notice will be given, it can not declare a forfeiture without giving notice of the assessment, or without previously advising its members who have relied upon receiving notice that that custom will be discontinued. *N. Y. Life Ins. Co.* v. *Eggleston*, 96 U. S. 572; *District Grand Lodge* v. *Pratt*, 96 Ark. 614; Joyce on Insurance, section 1332; May on Insurance, section 356; Bacon on Ben. Societies, sections 360, 362, 432; *Hartford Life Ins. Co.* v. *Hyde*, 48 S. W. 968, and cases there cited.

In the last cited case the authorities on this subject are reviewed in an opinion by Mr. Justice McAlister of the Supreme Court of Tennessee in which he quoted from Cook on Life Insurance, page 160, a statement of the law to the effect that, if the time and amount of dues are due and payable at stated times, the mere usage of giving notice can not operate as a waiver of the company's right to demand prompt payment and to enforce a forfeiture where there was default of such notice, it being said by that writer that such usage in no way contemplates, as a time of payment, a time later than that fixed by the contract, but, on the contrary, rather indicates, by way of reaffirmance, the original agreement that the time shall be exactly as fixed,

and that the practice of giving notice, even when it has grown into a fixed custom, is nothing more than a mere reminder of the obligation of the insured. This statement of the law is disapproved by the learned justice who wrote that opinion, and is stated to be against the weight of authority as shown by the cases and the authorities there cited, and the court there approved an instruction substantially similar to the one set out in this opinion.

The evidence here is legally sufficient to support the jury's verdict under the instruction. Appellee testified that he did not receive any notice prior to December 1, but that the first and only notice which he did receive in regard to this payment was one advising him that his policy had lapsed and stating the conditions upon which he could be reinstated. Appellee immediately responded to this notice by signing the required certificate as to the condition of his health and remitting the premium which he should have paid by or before December 1. The letter enclosing the remittance was received at the home office of the company on December 18, 1913. The custom of giving the notice is undisputed, and the promise to continue to do so is contained in the notification of appellee's acceptance as a member, and his reliance upon this promise was established by his own evidence.

Finding no error, the judgment is affirmed.

JONES v. HUNTER.

Opinion delivered November 27, 1916.

1. APPEAL AND ERROR—ERRONEOUS RULING OF LAW—DUTY TO EXCEPT.—Where the appellant is dissatisfied with a ruling of the circuit judge in a matter of law, that ruling should be brought before the court by an appropriate exception, and where appellant failed to except to the ruling of the circuit judge in refusing to grant a requested instruction, the objection to the judge's ruling, if made, will be treated on appeal as abandoned, and cannot be reviewed by this court.
2. APPEAL AND ERROR—PRESERVING EXCEPTIONS TO RULINGS OF CIRCUIT JUDGE.—Matters constituting alleged errors of the circuit court must

appear in the bill of exceptions, and a mere recital of them in the motion for a new trial is insufficient, if they do not appear in the bill of exceptions.

3. BOUNDARIES—LANDS FORMED IN A NAVIGABLE STREAM—OWNERSHIP.—Under Kirby's Digest § 4918, all land which is formed in the navigable waters of this State and within the original boundaries of a former owner of land upon such stream, shall belong to such former owner and his grantees.

4. APPEAL AND ERROR—VERDICT OF JURY—FINALITY.—Where there is testimony of a substantial character to support the verdict of the jury, it will not be disturbed on appeal, although the verdict appears to be against the weight of the evidence.

5. EVIDENCE—BOUNDARIES—CIVIL ENGINEERS.—The testimony of civil engineers who surveyed the land in controversy, is competent in an action to determine the ownership of an island formed in a navigable stream.

Appeal from Crawford Circuit Court; *James Cochran*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellants instituted this action in the circuit court against appellees to recover possession of an island in the Arkansas River opposite the river front just below Riverside Addition to the city of Van Buren, in Crawford County, Arkansas. Appellants claim that they are the owners of the fractional west half of section 31, township 9 north, range 31 west, in Crawford County, Arkansas, and that the island is a part of the lands embraced in their deeds.

At the time of the original government survey in 1829, the Arkansas River was the west boundary line of said section 31. The channel of the river shifted west from where it was when the original survey was made. Much of the land in the west fractional half of section 31 has caved into the river and a long narrow irregular shaped island has formed in the river opposite the lands remaining in the fractional half of section 31. The island has been in process of formation for thirty-five years. It first appeared as a sand-bar in the river, and was gradually built up so that vegetation and timber began to grow on it, and it has steep bluff

banks on the west side. Appellees went into possession of the island and have cleared about 200 acres of it. The main channel of the river is on the west side of the island, but according to the testimony of appellees, there is a well defined channel between the island and the main land in said section 31, and the water varies in depth from one to ten feet the year around. All the witnesses admit that in high water the channel between the island and the mainland on the east side of the island is navigable. Witnesses for appellees say the channel between the island and the mainland in said section 31 is several hundred feet wide in low water. On the other hand witnesses for appellant say that it becomes so narrow in places that a person with a pole might jump over it.

Appellees went into possession of the island in 1908 and 1909, and have put in cultivation about 200 acres of it. According to the testimony of appellants, the island was formed within the boundaries of the fractional west half of section 31 as it was originally surveyed. or at least that part of the island was within such limits.

On the other hand the testimony of appellees shows that the island is not within the boundaries of the fractional west half of section 31 as it was originally surveyed. Other facts will be stated or referred to in the opinion.

The jury returned a verdict in favor of appellees, and from the judgment rendered, appellants prosecute this appeal.

W. H. Neal and *E. L. Matlock* for appellants.

1. This suit is based upon Kirby's Digest, § 4918. Appellees acquired no title prior to the passage of the act of April 26, 1901. This court takes judicial notice that the Arkansas River is a navigable stream, and that land measurements terminate at the river at the limit of riparian ownership. 88 Ark. 308. Kerr was in possession of the island when the act was passed. The writer of this act had in mind the decision in 61 Ark. 92.

Appellants are not barred by the seven years' statute. The deeds to appellants conveyed the river front all the way across section 31, and had the legal effect of conveying all the land susceptible of ownerhsip to the main channel of the river, including all accretions and the island. 61 Ark. 429; 71 *Id.* 390; 73 *Id.* 199; 55 Conn. 292. All the land which formed back within the original boundaries belonged to the owner of the abutting shore. 61 Ark. 429.

2. The undisputed evidence shows that appellants have title to all the land between the levee and the river; that the river runs on the west side of the island, and that the island is land susceptible of ownership within the meaning of the law; that on the west side of the island next to the main channel is a well-defined river bank high and precipitous; that the slough has filled in from the river; that appellants hold title to the abutting west one-half of section 31, and have been in continuous possession since 1901. The appellees fail to show title by adverse possession. The burden was on them, and they have failed. 57 Ark. 97; 65 *Id.* 422; 79 *Id.* 109; 110 *Id.* 571.

3. It was error to permit Bell to testify. He only stated conclusions. The same objection is made to Burn's testimony and Hunter's.

4. The court erred in refusing instructions 2, 3 and 7, asked by plaintiffs; also in refusing No. 9 and in giving No. 2 for defendants. Ejectment is a possessory action, and may be maintained in all cases where there is a legal right of possession against one wrongfully in possession. 41 Ark. 465.

5. Under the decision in 61 Ark. 429, appellants take to the main channel of the river, including all land within the original boundaries and the accretions thereto.

Sam R. Chew for appellees; *J. E. London* of Counsel.

1. Appellants claim under section 4918, Kirby's Digest. This statute says nothing about accretions or

the rights of riparian owners. It only vests in the owner of the land bordering on the river all lands which have formed within the original boundaries of the owner. The proof fails to show this. The doctrine of accretion has no place in this cause and further the land formed was not an accretion, because the river between appellants' land and the island was navigable in ordinary stages of water.

2. The lands were not within the original boundaries of appellants' lands. This burden of proof was on appellants and they failed. Under the proof the verdict was rightfully for appellees, and there was no error in the instructions nor in the admission of evidence.

HART, J., (after stating the facts). This suit is based upon section 4918 of Kirby's Digest, which reads as follows:

"All land which has formed or may hereafter form, in the navigable waters of this State and within the original boundaries of a former owner of land upon such stream, shall belong to and the title thereto shall vest in such former owner, his heirs or assigns, or in whoever may have lawfully succeeded to the right of such former owner therein. Provided, that nothing herein shall be construed to affect the rights or interest of third parties in any such land acquired before the passage of this act."

(1) The act in question was approved April 26, 1901, and appellees do not contend that they had acquired any rights in the island prior to the passage of the act. The Arkansas River is a navigable stream. According to the original survey, the west boundary line of the fractional west half of section 31, referred to in the statement of facts, was the Arkansas River. A large quantity of the land in the fractional west half of section 31 caved into the river and an island formed in the river opposite the mainland at this point. According to the testimony of Bell, a civil engineer, a part of the island is within the limits of the fractional west

half of section 31, but the greater part of it extends westward beyond the limits of that section as originally surveyed. Appellees asked the court to instruct the jury that if any of the land in the fractional west half of section 31, as it was originally surveyed, has caved into the river and that even a part of the land in controversy formed in the river within the original boundaries, the verdict of the jury should be for the appellants even though the jury might also find that the land so formed now extends beyond the original boundaries. They asked this instruction on the theory that if a part of the land formed within the original boundaries of the former owner, the title thereto vested in appellants under section 4918 of Kirby's Digest, and that they would acquire title to that part of the island which extends beyond the boundaries of the former owners by accretion. Under the state of the record presented to us, we can not consider this supposed assignment of error. The bill of exceptions does not show that any objection was made to the ruling of the court in refusing this instruction or that any exceptions were saved to its ruling in that regard. If a party is dissatisfied with the ruling of the circuit judge in a matter of law, that ruling should be brought before this court by an appropriate exception, and as there were no exceptions to the action of the court in refusing the instructions, the objection to the ruling of the court, if made, must be treated as abandoned, and there is nothing for review here. *Dunnington* v. *Frick Co.*, 60 Ark. 250; *Bluff City Lumber Co.* v. *Floyd*, 70 Ark. 418; *Ward* v. *Fort Smith Light & Traction Co.*, 123 Ark. 548.

(2-3) It is true the supposed assignment of error appears in the motion for a new trial, but that is not the place to set out the matter constituting an alleged error. The motion for a new trial constitutes an assignment of error, but not the matter upon which the assignment is based. The bill of exceptions must contain a history of the trial, including the matter which was assigned as error. Merely reciting the matter in a motion for a new trial is not sufficient. *Harrelson* v.

Eureka Springs Electric Co. 121 Ark. 269. Appellants in their motion for a new trial also assigned as error the action of the court in giving certain instructions, but for the reason just given, we can not consider these alleged assignments of error. The court told the jury that the Arkansas River is a navigable stream and that the statute quoted above relating to the ownership of lands formed in navigable rivers is applicable to the Arkansas River. It further told the jury that all land which is formed in the navigable waters of this State and within the original boundaries of a former owner of land upon such stream shall belong to such former owner and his grantees. It also specifically told the jury that if it should find from a preponderance of the evidence that after the land described in the complaint was patented by the United States on the 13th day of April, 1836, any of the land within the limits of the original boundary of the ownership of the patentee's was swept away by the waters of the Arkansas River, and that the land in controversy has since formed in the river within the original boundaries of the patentee's, then its verdict should be for the plaintiffs who are the appellants here. The court also instructed the jury that appellants must recover upon the strength of their own title.

(4) According to the testimony of appellees themselves, and that of a civil engineer, none of the island formed in the river within the original boundaries of a former owner of the land, within the meaning of section 4918 of Kirby's Digest. Hence there was testimony of a substantial character to support the verdict of the jury, and under the settled rules of this court we can not disturb it even though we might think it was against the weight of the evidence.

(5) Again appellants ask that the judgment be reversed because the court erred in permitting witnesses, Bell and Burn and appellees, Hunter and Bradley, to testify that the land described in the deeds to appellants did not extend onto the island or embrace any part of it. Their objection to the testimony is that

it was a conclusion of law and as such was not admissible in evidence. We do not agree with counsel for appellants in this contention. Bell and Burn were civil engineers and Bell made a survey showing the location of the island with reference to the mainland and also a map thereof. He also examined a map showing the original survey. Burn also examined these maps and both of them testified as to the particular facts showing the location of the island with reference to the mainland, and then stated that the island was not included within the limit of the grant to appellants, and we think their testimony was competent. Hunter and Bradley were appellees and helped to make the survey. They had lived on the island since 1908. They testified that they were familiar with the boundary lines of the grantor of appellants. They had also lived in that community for many years and were familiar with the lands in question, and their location. All these facts were stated in detail by them to the jury, and we think their testimony was competent.

The judgment will be affirmed.

FLUHART v. W. T. RAWLEIGH COMPANY.

Opinion delivered November 20, 1916.

SURETYSHIP—ACTION AGAINST PRINCIPAL AND SURETY JOINTLY.—One W purchased certain goods from appellee, and appellants, in writing, agreed to pay whatever balance was shown to be due to appellee by W. *Held*, in an action to recover the balance due, that appellee could sue both W and the appellee in one action.

Appeal from Lonoke Circuit Court; *Thomas C. Trimble*, Judge; reversed.

STATEMENT BY THE COURT.

The appellee instituted this suit against C. C. Whedbee, principal, and I. T. Fluhart, G. W. Persefull and J. V. Crutcher, as guarantors of a certain contract which was made an exhibit to the complaint. The complaint alleged that on or about October 24, 1913, an

agreement was made between the appellee (plaintiff) and the defendant C. C. Whedbee, as principal, and the said parties, guarantors (naming them), for the said C. C. Whedbee, which contract was accepted June 4, 1914; that by the terms of the contract, appellee agreed to sell to Whedbee certain goods, wares and merchandise; that the guarantors jointly and severally guaranteed that Whedbee would pay the balance due from him to the appellee at the time the contract was entered into, and would pay all indebtedness incurred under the contract. That Whedbee purchased goods under the contract amounting to the sum of $1,567.07, and that he owed the appellee $350.73 at the time the contract was entered into, making a total indebtedness of $1,915.80; that the sum of $1,191.10 had been paid thereon, leaving a balance of $724.70; that such balance had not been paid, "although reasonable time therefor had elapsed," and although lawful demand therefor had been made; that the guarantors, under the terms of their contract, had agreed that a written acknowledgment of the account by C. C. Whedbee, or any judgment against Whedbee in favor of the appellee, should in every respect bind and be conclusive against them, and that any extension of time granted by the appellee to Whedbee should not release them from liability under their guarantee. Plaintiff prayed judgment against C. C. Whedbee and the other appellants in the sum of $724.70, with interest.

The contract set up as an exhibit to the complaint was one by which the appellee agreed to sell and Whedbee agreed to buy certain medical supplies and other equipments.

The contract contained mutual agreements for things to be done by the respective parties, and provided that unless previously terminated by either party upon written notice that it should expire December 31, 1914; that at the expiration of the contract the company agreed to make a new contract, if signed by acceptable guarantors, without requiring Whedbee to pay any balance of account. The contract was duly

signed by the parties and was accepted by the appellee June 4, 1914.

The contract of guaranty provided in part as follows: "For and in consideration of the extension of further time in which to pay his account for goods previously sold to the above party (Whedbee) of the second part, and in further consideration of the W. T. Rawleigh Medical Company extending further credit to him, we, the undersigned, do hereby jointly and severally guarantee unto the said W. T. Rawleigh Medical Company, unconditionally, first, the payment in full of the balance due said company on account as shown by its books, at the date of the acceptance of this contract; and, second, the full and completed payment to said company of any indebtedness incurred under the terms of the within instrument by the party of the second part, named as such herein, to which terms we fully assent, waiving acceptance of this guaranty and all notice, and agree that the written acknowledgment of his account or any judgment against said party of the second part shall, in every respect, bind and be conclusive against the undersigned, and that any extension of time shall not release us from liability under this guaranty."

Also exhibited with the complaint, was a statement of account, showing balance due the appellee of $724.70.

The appellant Whedbee answered the complaint, denying that he owed appellee anything, and by way of cross-complaint alleged that appellee was indebted to him in the sum of $1,230, for which he asked judgment.

The appellant Whedbee, and the other appellants, the guarantors, demurred to the complaint, and also moved to dismiss the same as to guarantors. The court, upon consideration of the motion, overruled the same, to which the appellants duly excepted. The appellants, the guarantors, declined to plead further. The appellee, plaintiff, thereupon asked that judgment be entered against the guarantors for the amount sued for, which the court granted, and entered judgment in

favor of the appellee against the guarantors for the amount sued for in the complaint.

Oscar E. Williams, for appellants.

1. The court erred in holding that the guarantors could be sued jointly with the principal. Am. & Eng. Enc. of Law (2 ed.), p. 1130; 20 Cyc. 1482; 59 So. 512; 95 Ala. 362; 36 Am. St. 210; 10 So. 539; 60 *Id.* 1001; 65 *Id.* 52; 4 Ark. 76; 22 *Id.* 540; 8 *Id.* 167; 24 *Id.* 517; 59 *Id.* 86; 68 *Id.* 426; 111 *Id.* 227; 163 S. W. 785; 5 Cyc. 822, 1484.

2. The court erred in rendering a judgment against the guarantor's without a judgment against the principal. 16 Enc. of Pl. & Pr., 939; 14 Cyc. 411, and Arkansas cases cited.

Trimble & Williams, for appellee.

1. The principal debtor and the guarantors can be sued jointly. Kirby's Digest, § 6009; 20 Cyc. 1484; 7 Peters, 125; 68 Ark. 424-5; 111 Ark. 419; 71 *Id.* 585; 87 U. S. 268; 74 S. W. 746; 38 S. W. 1056; 66 S. W. 1027; 31 Minn. 314; 1 Nev. 326; 4 Utah 348; 11 Iowa, 373; 8 Hun (N. Y.) 110; 23 N. Y. 286; 79 Ill. 62; 80 *Id.* 244; 64 Ind. 356; 7 Me. 186, 29 S. W. 80; 47 How (N. Y.) 180; 175 S. W. 81.

2. It was not necessary to first procure a judgment against the principal. 80 Ill. 244; 64 Ind. 356; 7 Me. 186; 70 Mich. 566; 2 Thomps. & C. (N. Y.) 342; 46 Pa. (10 Wright) 243; 94 Tenn. (10 Pickle) 34; 2 Pa. Law, J. 346; 47 How. (N. Y.) 180; 29 S. W. 80; 175 S. W. 81.

Oscar E. Williams, for appellant in reply.

The guaranty was not absolute. 20 Cyc. 1398. The guaranty is conditional and limited and it is necessary to fix the liability of the principal before suing the guarantors. Kirby's Digest, § 6009 does not apply. 16 Iowa 226; 9 Nebr. 445; 16 Enc. Pl. & Pr. 942-3, etc.

WOOD, J., (after stating the facts). Two questions are presented.

I. Did the court err in holding that the guarantors could be sued jointly with the principal? The contract between the appellee and Whedbee, the principal debtor, it appears from the recitals therein, was executed on the 24th day of October, 1913. The contract of guaranty bears no date, but the allegations of the complaint, in effect, show that the instruments were executed on the same day and that they were parts of but one and the same transaction. Indeed the recitals of the contract of guaranty referred to the contract between appellee and Whedbee as if it were but a part of the same contract. For instance, the recital "for and in consideration of the extension of further time in which to pay his accounts for goods previously sold to the above party of the second part." Whedbee is not mentioned *eo nomine* in the contract of guaranty, but is only referred to as "the above party of the second part," clearly referring to the contract in which Whedbee is mentioned as "party of the second part." It occurs to us therefore that the two contracts appear on their face to be parts of the same instrument. There is no way to identify Whedbee as being the "above party of the second part," except by reading this in connection with the original contract, and the two contracts therefore should be regarded as evidenced by one and the same instrument.

The contract of guaranty under review was an unconditional undertaking on the part of the guarantors to pay appellee the balance shown to be due it by their principal, Whedbee. There was no condition that they would pay in the event that appellee could not collect its debt with reasonable diligence from Whedbee. In other words, the liability of the guarantors was fixed by the failure of Whedbee, the principal debtor, to pay the indebtedness incurred by him at maturity. See 12 R. C. L., section 13, page 1064; *Yager* v. *Kentucky Title Co.*, 66 S. W. 1027; *White Sewing Machine Co.* v. *Powell*, 74 S. W. 746; *Memphis* v. *Brown*, 87 U. S. 289.

There is no limitation in the contract upon the obligation to pay. The guarantors, however, did not bind themselves to pay any amount claimed by the appellee to be due it from Whedbee unless he gave appellee a written acknowledgment of his account or unless there was a judgment in appellee's favor against him.

As we construe the contracts, the guarantors and Whedbee bound themselves jointly and severally for the payment of the latter's debt to the appellee when the same matured. Section 6009 of Kirby's Digest provides: "Persons severally liable upon the same contract, including parties to bills of exchange, promissory notes, common orders and checks, and sureties on the same or separate instruments, may all, or any of them * * * be included in the same action, at plaintiff's option."

And section 6010 provides: "Where two or more persons are jointly bound by a contract, the action may be brought against all or any of them, at the plaintiff's option."

The Supreme Court of Minnesota, in passing upon a statute precisely similar to section 6009 of Kirby's Digest, *supra*, said:

"There is no principle of reason which requires two separate suits against parties when one would effect the same object, and every reason which can be given for uniting the maker and endorser in one action will apply with equal force to the maker and guarantor. If an endorser is liable on the same instrument with the maker, so is an absolute guarantor of payment, if his undertaking is in the nature of a surety, which is primary, and that of the guarantor properly so called, which is collateral and secondary. And when he guarantees the payment of the debt is in every respect essentially a surety. Moreover, in view of the manifest policy and purpose of the statute, the word 'surety' must be understood as including any one who is bound on the same instrument, for its payment with another, who, as between themselves, is the principal debtor.

whatever may be the particular form of the undertaking. If not, the italicized clause (and sureties on the same or separate instruments) in the statute would be without meaning and effect." *Henry Hammel* v. *Beardsley*, 31 Minn. 314.

We approve the above doctrine as applicable to the facts of this record. See also, *Marvin* v. *Adamson*, 11 Iowa 373, and other cases cited on this point in appellee's brief.

The ruling of the court therefore was correct in overruling appellants' motion to dismiss the complaint against them.

II. The court erred, however, in rendering judgment in favor of the appellee for the amount claimed. No judgment had been rendered against the principal debtor. He denied that he was indebted to the appellee, and there had been no judicial determination and final judgment as to the issue thus raised.

The judgment therefore in favor of the appellee was premature, and for the error in rendering judgment against the appellants, the same is reversed and the cause will be remanded for further proceedings according to law.

HUMPHREYS, J., not participating.

BOTHE v. GLEASON.

Opinion delivered December 4, 1916.

1. REDEMPTION—SALE—FORECLOSURE OF VENDOR'S LIEN.—There is no statutory right of redemption under a sale to foreclose a vendor's lien.
2. VENDOR'S LIEN—FORECLOSURE—WIFE CANNOT REDEEM.—Where there is a foreclosure of a vendor's lien against the contract purchaser, the purchaser's wife is bound by it so far as her right to claim dower, and she has no right of redemption after the husband's right is cut off by the foreclosure.

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

Appellant *pro se*.

1. The wife was not a necessary party to the suit. She had no dower right nor right to redeem. 14 N. E. 901-3; 13 *Id.* 245; 106 Ark. 79, 83; 66 *Id.* 49a; 107 *Id.* 40; 25 *Id.* 52-59; 29 *Id.* 591-6; 39 Cyc. 1859-60; 17 So. 45; 82 N. W. 892; 2 Am. Rep. 303; 76 N. E. 350-2; 2 Ohio C. C. 70; 50 N. E. 933-5; 69 *Id.* 523-6; 81 Am. Dec. 242; 15 Pet. 21; 22 Oh. St. 435; 66 N. E. 245, 547; 185 S. W. 1000; 60 Ark. 180.

O. M. Young and *Geo. C. Lewis*, for appellee.

1. The wife had the right to redeem—she was a necessary party. Wiltsie on Mortg. Forecl., § 155; *Ib.* 156; 4 L. R. A. 606; 20 N. Y. 412; Jones on Mortg., § 1067; Tiffany Mod. Law of Real Prop., 436 and note to § 184; 66 Am. St. 467; 27 Cyc. 1807; 54 Ark. 275.

McCULLOCH, C. J. Appellant was the purchaser of the lands in controversy at a judicial sale, and appeals from the decree of the court permitting the wife of one of the defendants in the suit in which the original decree was rendered to redeem. The original suit was instituted by C. F. Prang against certain parties, including John C. Gleason, the husband of appellee, Edith O. Gleason, to foreclose a vendor's lien on the lands in controversy. The chancery court granted the relief and entered a decree ascertaining the amount of the indebtednness due as purchase price of the land and ordered the land sold by a commissioner. The sale was duly made by the commissioner and appellant, H. Bothe, became the purchaser, and the sale was reported to the court, and when it came up for confirmation, appellee, Edith O. Gleason, intervened for the purpose of redeeming from the sale and the court permitted her to redeem.

(1) There is a question presented in the case as to the amount required in redemption, if redemption be allowed at all, but we need not go into that if we reach the conclusion that appellee had no right to redeem. There is no statutory right of redemption under a sale to foreclose a vendor's lien. *Priddy & Chambers* v. *Smith*, 106 Ark. 79.

The decision turns on the question whether or not the wife of a purchaser of land is a necessary party to a suit to foreclose the vendor's lien for purchase money, for if the wife is not a necessary party to the suit, she has no right to redeem after the husband's right of redemption is foreclosed by the sale.

In the Cyclopedia of Law and Procedure (Vol. 39, page 1859), the rule is broadly stated that "the wife of the purchaser is neither a necessary, nor a proper, party to a suit to foreclose a purchase money lien upon land purchased by her husband unless the title to the land is in her, since no homestead right can exist as against the purchase money." The same may be said with respect to the dower right, for no such right can exist as against the debt for the purchase money. Kirby's Digest, § 2691; *Birnie* v. *Main*, 29 Ark. 591. The rule stated in the encyclopedia is sustained by numerous authorities. *Amphlett* v. *Hibbard*, 29 Mich. 298; *Fowler* v. *Bracy*, 124 Mich. 250; *Sarver* v. *Clarkson*, 156 Ind. 316; *Porter* v. *Teate*, 17 Fla. 813; *Mutual Building Association* v. *Wyeth*, 105 Ala. 639; *Kuhnert* v. *Conrad*, 6 N. Dak. 215; *Waldon* v. *Davis* (Texas), 185 S. W. 1000.

In *Fowler* v. *Bracy*, *supra*, the Michigan court, in disposing of the question, said: "The sole question, therefore, is whether in a suit in equity to foreclose the lien of a land contract the wife of the contract purchaser is a necessary party, when, as in this case, a portion of the land which is the subject of the contract is a homestead. This question must be answered in the negative. Stating the rights of the contract, purchaser most broadly, they can not be greater than a purchaser under a deed of conveyance who gives back the purchase money mortgage. Indeed this is the relation which equity accords to the parties; that is to say, equity treats the purchaser as the holder of the title, subject to the lien of the vendor for the purchase price."

The authorities do not appear to be entirely in accord, at least so far as concerns the necessity for joining the wife as a party in a suit to foreclose a mortgage. In the last edition of Wiltsie on Mortgage Foreclosure (section 155), the rule is stated to be that the wife is a necessary party to a suit to foreclose a mortgage, and that her rights will not be affected unless she is made a party. Cases are cited which support the text. Notwithstanding the fact that in equity the parties to a vendor's lien and to a mortgage are treated as the same, a distinction may be found in a foreclosure proceeding so far as relates to the necessity for making the wife a party. The distinction is this: The wife in the mortgage foreclosure may have a defense separate and apart from her husband, for instance, that she did not sign the mortgage or that she was coerced into signing it; whereas the wife has no separate defense against the vendor's lien, for if the husband is bound she is bound, too. In other words, the wife has no dower right as against a vendor's lien under any circumstances, and any defense to a suit is necessarily a common one between the husband and wife. This distinction, however, does not seem to be observed in the line of cases cited holding that the wife is not a necessary party. At any rate, the decisions of this court place it in accord with those cases which hold that the wife is not a necessary party.

In *McWhirter* v. *Roberts*, 40 Ark. 283, and *Fourche River Lumber Co.* v. *Walker*, 96 Ark. 540, the court decided that the widow of a deceased mortgagor is not barred of dower by decree of foreclosure, though she was a party to the suit, unless her right to dower was directly put in issue. In the McWhirter case, Chief Justice English, speaking for the court, said: "The purpose of the foreclosure suit was to bar the equity of redemption of the administrator and heirs of the mortgagor. The widow had no equity of redemption in the lands. She had a dower right in them which was paramount to the title of the mortgagees and the mortgagor, or persons claiming under him. There was

no allegation of the bill calling in question or tendering an issue as to her right of dower, if it could have been litigated in a foreclosure suit. She admitted, it seems, the allegations of the bill to be true, and consented to a decree of foreclosure, which it is not probable she would have done had it been alleged that she had no right to dower in the lands, or had it been understood by her that the effect of the decree would be to bar her right of dower."

In line with those cases, we said in *Brignardello* v. *Cooper*, 116 Ark. 103, that "the wife is not a necessary party to a suit to foreclose a mortgage executed by her husband, save for the purpose of barring her *inchoate* right of dower." Now, if we had held that the wife was a necessary party to the foreclosure suit, the conclusion therefrom would have been that if she was in fact made a party she would be necessarily barred by the decree, for she could not have been made a party for any other purpose. And since we held that she was not bound by the decree unless her right to dower was made an issue, it follows from those decisions that she is not a necessary party. If the wife's *inchoate* right of dower exists, then it can not be barred except by an express adjudication, but if it does not in fact exist as against the vendor's lien, the failure to make her a party does not give her the right to redeem, as her *inchoate* dower right subject to the vendor's lien, falls with the foreclossure against her husband.

We decided in *Brignardello* v. *Cooper*, *supra*, that in a mortgage foreclosure suit against a husband, the wife, though not a party, was bound by the adjudication that the property did not constitute the homestead, and it necessarily follows that where there is a foreclosure of the vendor's lien against the husband, the wife is bound by it so far as her right to claim dower, and that she has no right of redemption after the husband's right is cut off by the foreclosure.

The chancery court erred in allowing the appellee to redeem, and the decree is reversed and the cause re-

manded with directions to dismiss the intervention of Edith O. Gleason and to confirm the commissioner's sale to appellant.

JONES v. ROAD IMPROVEMENT NO. 1 OF SEVIER COUNTY, ARKANSAS.

Opinion delivered December 18, 1916.

1. ROADS—ORGANIZATION OF DISTRICT—PLANS AND SURVEYS.—Act 338, Acts of 1915, provides that upon the application to the county judge of ten or more property owners within a proposed district, that the Highway Commissioner shall have prepared a preliminary survey of the proposed road; *held*, the provision about the method of obtaining the survey and plans was directory merely, and that a recital in the record as to how the survey was procured, was not necessary to the validity of the organization of the district.
2. ROADS—FORMATION OF DISTRICT—NAMES TO PETITION.—Names sufficient to make the necessary majority of property owners under the statute, may be added to the petition, up to its final presentation to the county court.
3. ROADS—FORMATION OF DISTRICT—ROUTE—AUTHORITY OF COUNTY COURT.—Under § 36 of Act 338, Acts of 1915, the authority of the county court was continued over the creation of public roads, and the court was given special authority to change the route of any public road to conform to the route of the proposed improvement district.

Appeal from Sevier Circuit Court; *Jefferson T. Cowling*, Judge; affirmed.

B. E. Isbell, for appellant.

1. The act provides for the construction of a new road and violates the Constitution. 92 Ark. 93, 621; 118 *Id.* 669; 115 *Id.* 88; *Ib.* 594; 116 *Id.* 167. This point and these authorities were cited in 123 Ark. 205; Act 338, 1915. The road was not laid out and dedicated as provided by law. All facts essential to jurisdiction must appear upon the face of the record. 123 Ark. 195; *Ib.* 211; *Ib.* 283; 103 Ark. 446; 54 *Ib.* 627; 51 *Id.* 34.

2. There was not a majority when the petitions were filed. 123 Ark. 305; *Ib.* 298.

3. The organization of the district was not to the best interest of the land owners. The uncertainty

should be resolved in favor of the land owner. 106 Ark. 304; 116 *Id.* 30.

Lake & Steel and *James D. Head*, for appellees.

1. The road was properly established. 50 Ark. 53; 102 *Id.* 533; 89 *Id.* 513; Act 422, 1911. The change was properly made by formal order. 102 Ark. 553.

2. All conditions precedent to jurisdictions must be shown and were shown here. This was a road by dedication and use. 50 Ark. 53; 102 *Id.* 533; 89 *Id.* 513; 123 Ark. 298; *Ib.* 305; 124 Ark. 234.

3. The change was properly made. All jurisdictional facts were shown and the act was fully complied with. The petitions were consolidated and treated as one. 72 Ark. 187; 73 *Id.* 270.

4. The testimony does support the judgment. 40 Ark. 290; 123 *Id.* 298.

McCULLOCH, C. J. The county court of Sevier County, on the petition of what was found to be a majority of the owners of real estate in the locality affected, made an order forming a road improvement district pursuant to the terms of 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." Appellants, who are the owners of real property in the district, appeared in apt time and filed a remonstrance against the organization of the district, and they appealed to the circuit court from said order. On the trial in the circuit court, there was a finding in favor of the petitioners, and the court rendered a judgment affirming the judgment of the county court, and an appeal has been duly prosecuted to this court.

The first point made against the validity of the proceedings is that there is no legal evidence in the record as to a request, either by the county judge or by ten property owners, to the State Highway Commission for the survey of the line of the road as required by the terms of the statute. The statute provides that upon

the application of the county judge or ten or more land owners within a proposed district to the State Highway Commission, it shall be the duty of the Commissioners to 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," and file the same in the county court for the purpose of determining the feasibility of the project and the costs thereof, and that said surveys, plans, specifications, etc., shall be filed in the county court before the petitions are circulated among the property owners.

(1) It is contended that the request to the State Highway Commission is a jurisdictional step in the proceedings, and that the evidence thereof must affirmatively appear in the record. We held in *Lamberson* v. *Collins*, 123 Ark. 205, that the requirement for the making of the surveys, plans, maps, estimates, etc., by the State Highway Engineer, and filing same in the county court before the circulation of the petition, was jurisdictional, and that the failure to comply with that provision was fatal to the validity of the organization. It is quite another question, however, whether the request by the county judge or the number of land owners mentioned, to the State Highway Commission is jurisdictional. The important thing that was evidently in the mind of the lawmakers was to provide some means whereby the property owners could know in advance what steps they were called on to express an opinion about in signing or refusing to sign the petitions circulated. It is not so much a matter why the surveys, plans and estimates were prepared, but the fact that they were prepared and filed with the county court is the jurisdictional requirement set forth in the statute. The request may be made either by the county judge or by ten property owners, and this is directed to the State Highway Commission and not to the county court, so it is evident that the Legislature did not intend to make the jurisdiction of the court depend upon the request to the State Highway Commis-

sion, and evidence of that request is not essential to the validity of the proceeding. The provision about the method of obtaining the surveys and plans is only directory.

(2) It is next contended that the proceeding is void because some of the petitions were filed after the publication of the notice. It appears from the record that the four petitions, containing more than three hundred names of the owners of real property in the district, were filed on May 9, 1916, and on that day the county court made an order fixing the first day of June, 1916, as the date for hearing the petitions, and the notice was then published as provided by statute, but that on May 31, other petitions were filed containing names necessary to make up a majority. There is a controversy as to whether or not the names on the first four petitions constituted a majority in "value, acreage or number of land owners," but we deem that immaterial for we are of the opinion that the statute gives the right to add names sufficient to make a majority up to the time of the final presentation of the petitions in the county court.

Subdivision A of section 1 of the statute referred to reads as follows: "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." The language of the concluding paragraph of subdivision B of the section is not altogether clear, and might appear to be in conflict with the language just quoted above, but we are of the opinion that the two expressions can be harmonized by construing them together to mean that the petition or petitions must be filed before the county court has authority to cause notice to be published, but that the petitions may be added to or additional petitions filed up to the hearing, and that all the petitions so filed are considered by

the court in determining whether or not there is a majority of owners signing the petitions.

The evidence adduced by appellants establishes the fact that a small portion of the line of the road to be improved is not a public highway, though the evidence is conclusive that the greater portion of it is in fact a public highway. The entire route of the road stretches clear across the county, but the evidence shows about a mile, or perhaps less, had not been created a public road. It is contended that to grant the petition will conflict with the rulings of this court in certain cases where it was held that it is beyond the power of the Legislature to invade the jurisdiction of the county court by providing for the creation of public roads through the agency of improvement districts instead of by an order of the county court. *Parkview Land Co.* v. *Road Improvement Dist. No. 1*, 92 Ark. 93.

(3) Section 36 of the act provides that the commissioners and the county court in changing the route of any road may enter upon and lay out said road over any lands in any road improvement district, and that "nothing in this act shall be construed to divest the county court of its exclusive jurisdiction to determine any matter relating to county roads over which the said county court has such exclusive jurisdiction." Now, it is clear that the Legislature intended by this section to preserve the constitutional jurisdiction of the county court and to continue that court's authority over the creation of public roads, and to give it special authority to change the route of any public road to conform to the route of the proposed improvement district. This is not an encroachment upon the jurisdiction of the county court, but preserves its complete authority over the establishment of public highways, for the Commissioners have no power to change the route unless the county court orders the change.

Considerable testimony was adduced on each side of the controversy concerning the feasibility of the plan, and we think the testimony was sufficient to sustain the finding of the court that the establishment of

the district was for the best interests of the owners of property, and that a majority of them favored it and signed the petitions. The finding of the trial court is binding upon us when supported by legally sufficient evidence. We are of the opinion, therefore, that all of the jurisdictional requirements have been complied with, and that there was no error in the proceedings which calls for a reversal of the judgment.

Affirmed.

PEAY v. KINSWORTHY.

Opinion delivered December 18, 1916.

1. SEWERS—RIGHTS OF COMMISSIONERS OF DISTRICT BEFORE RELINQUISHING CONTROL—ATTEMPT OF THIRD PARTY TO CONNECT.—The commissioners of a sewer district may maintain an action to restrain a private individual from connecting a sewer system which he has constructed under the authority of the city council, with the system still under their control.
2. SEWERS—PRIVATE SYSTEM—CONNECTION WITH CITY SEWERS.—A system of sewers constructed by private enterprise, cannot connect with the sewer of a sewer improvement district, until the former has complied with the terms of Kirby's Digest § 5726.

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

Comer & Clayton, for appellant.

1. The appellees are not authorized under the powers granted them to maintain this proceeding. 55 Ark. 148, Kirby's Digest, § 5726; 56 Ark. 205; 53 *Id.* 300; Kirby's Digest, § 5456; 97 Ark. 321; 119 *Id.* 166. The district has been completed and the commissioners have lost their control of the district. The city of Little Rock has succeeded to all their rights.

Rose, Hemingway, Cantrell, Loughborough & Miles, for appellee.

1. The commissioners have charge of the improvement until it is completed and accepted. 56 Ark. 205; 97 *Id.* 321. It was the duty of the commissioners to

permit Peay to connect upon making fair compensation. 95 Ark. 264; 56 Ark. 148.

SMITH, J. This suit was brought by appellees, as Commissioners of Sewer Improvement District No. 78 of the City of Little Rock, to enjoin appellant from making connection with the sewers of that District until he shall have made compensation for the value of that use. It was alleged in the complaint that appellant, as a private individual and for the purpose of profit, constructed a system of sewers in a territory adjacent to appellees' district, in consideration of the abutting property owners paying him certain sums of money as compensation for connecting with his sewer, and that appellant, without permission from appellees and without their knowledge, connected his sewer with appellees' sewer and proposed to use the same without compensation; that appellees' sewer has not been completed, accepted, or turned over to the city of Little Rock, and there was a prayer for an order restraining appellant from making this connection until after he had made reasonable compensation for the value of its use.

Appellant filed a general demurrer and an answer denying the allegations of the complaint, and alleging the facts to be that the City Council, by an ordinance, No. 2015, granted to him authority to construct a system of sewers at his own expense within a defined territory and, as compensation for said service and money so expended, the city was to permit him to recover $50.00 per lot for each lot connected with said sewer until such time as the amount collected should equal the investment, plus 10 per cent. interest thereon, at which time said sewer should become the property of and be thereafter controlled by the city. The validity of this contract is not questioned by appellees and we, therefore, express no opinion upon that question.

It was further alleged that appellees' sewer district was organized subsequent to the passage of said ordinance No. 2015 and embraced a portion of the territory described in said ordinance and that appellees' district

was completed and had thereafter become the property of the city and the commissioners were without authority over said sewer, and that appellant had connected his sewer with the city's sewer more than twelve inches from the termination or manhole of the appellees' sewer pipe.

Appellant's franchise required him to connect with the city sewer at Fourth and Byrd streets, and the proof shows that to have laid a pipe this distance would have involved a cost of over $1,300.00, but by making the connection here sought to be enjoined appellant secured an outlet without cost except that of making the connection.

The chancellor made no special finding of fact, but the testimony, while somewhat conflicting, warrants our finding that the commissioners had not made final settlement with the contractors and had not accepted the sewer from them, nor had they turned the sewer over to the city, but were still in charge of it, and that portions of the work remained to be done. Applications for sewerage connections had been made by the property owners in appellees' district, but the record does not show that such permission had been granted. The City Superintendent of Public Works had issued to appellant a permit to connect with Sewer District No. 78 and had designated the point of connection, but as stated this was done while the Commissioners were still in control. The commissioners insisted that appellant be required to pay the amount which the connections saved him; but the court found the value of this connection to be $400.00 and enjoined appellant from making or using the connection until this sum was paid, and this appeal is brought to reverse that decree.

Appellant says the only question in this case is whether or not appellees were authorized under the powers granted by the statute to maintain this proceeding, and as appellees join issue on this question, we shall consider that question only.

In the case of *Martin* v. *Hill*, 53 Ark. 300, the court held that the property owner, under the then existing

statute, had the right to connect with the sewer which had been turned over to the city without bearing any part of the burden of its construction; but the opinion called attention to the Act approved February 19, 1889, (Acts 1889, p. 17) which is now Section 5726 of Kirby's Digest, and which was evidently enacted subsequent to the time of the trial of that cause in the court below. This section is as follows:

"Sec. 5726. The city council shall regulate by ordinance the terms, time and manner, and the compensation which shall be paid by the private parties not building sewers under the orders of the board of health, upon compliance with which said parties may tap the sewers of said city; but no person shall be allowed to tap any such sewer without paying in proportion to the value of his property to be benefited thereby, as compared with the value of the property taxed in the district and the actual cost of said sewers."

It will be observed that this section deals only with sewers which have been turned over to the city; but it is contemplated that this sewer will be turned over to the city immediately upon its completion, and the Act manifests the legislative will that he shall bear proportionately the cost of the sewer who shares in its benefits; and we perceive no reason why this principle should not be applied to the facts of this case. Here a sewer system has been constructed for private profit by one who proposes to use as an outlet for his system the sewers of another district. It is not said that the amount charged for this connection is excessive; it is only insisted that the commissioners have no right to enforce the payment of any sum.

There appears to be no statute controlling the case of a connection with a sewer before it has been taken charge of by the city; but there is no reason why the commissioners of the sewer district should not, until that time, take the necessary action to protect the interests of their district. It is not contended that this connection will in any manner impair the utility and serviceability of District No. 78; nor is it contended

that appellant would not be entitled to make this connection after the district was turned over to the city. But he could do so then only upon complying with the conditions of the statute set out above. Here appellees did not sue to recover a money judgment, but to restrain appellant from connecting with their district, while it was still under their control, and the decree rendered is not primarily a money judgment. Appellees were not granted the relief they prayed but appellant cannot complain of that fact, even though this relief should have been granted.

The court below held that appellant should not make this connection without paying a sum which is apparently a very reasonable one, and we think the commissioners acted within the authority conferred upon them in the institution of this suit to protect the interests of their district. The decree of the court below is affirmed.

MOSAIC TEMPLARS OF AMERICA v. AUSTIN, GUARDIAN.

Opinion delivered December 18, 1916.

1. ACCORD AND SATISFACTION—PAYMENT AND ACCEPTANCE OF PART OF AMOUNT DUE—POLICY OF LIFE INSURANCE.—A life insurance society owed the beneficiary under a policy the sum of $100.00, there being no dispute as to the amount due. The beneficiary accepted in payment a voucher ambiguously drawn, covering a payment of $50.00 and reciting that it was in full payment of the beneficiaries' claim. The beneficiary testified that he did not intend to accept $50.00 in settlement of the claim. *Held*, under the evidence that the account was not an account stated, and that the beneficiary could recover the balance due on the policy.
2. ACCORD AND SATISFACTION—RULE.—In order to constitute an accord and satisfaction, it is necessary that offer of the payment should be made by one party in full satisfaction of the demand, and should be accepted by the other as such.
3. ACTIONS—ACTION BROUGHT IN EQUITY COGNIZABLE AT LAW—PRACTICE.—Where in an action to recover on a policy of life insurance, in equity, the defendant merely asked that the complaint be dismissed, and did not ask for a transfer to law, there being no ground for dismissing the complaint, defendant cannot complain on appeal because the cause was not transferred.

Appeal from Hot Spring Chancery Court; *J. P. Henderson*, Chancellor; affirmed.

E. H. Vance, Jr., *Scipio A. Jones* and *Thomas J. Price*, for appellant.

1. The check received was *in full payment.* By retaining the check stating that it was payment in full, the creditor rendered it an accord and satisfaction of the debt. 98 Ark. 271. He is now estopped. 94 Ark. 159; 1 Corp. Jur. par. 81; 100 Ark. 251.

R. S. Bowers, for appellee.

1. There was no accord and satisfaction. 56 Ark. 43; 100 *Id.* 252; 49 Mo. 556. There was no compromise 93 Ark. 353; 121 S. W. 774.

2. A minor cannot be deprived of his money through fraud. 69 Ark. 431; 76 *Id.* 400.

3. The findings of the Chancellor are supported by the evidence. 67 Ark. 287; 68 *Id.* 314.

SMITH, J. This suit was brought against appellant by the guardian of the beneficiary of a policy of insurance issued by the appellant company. It was alleged that the policy or certificate was issued for the sum of $100.00, but that only $50.00 had been paid thereon. A demurrer to this complaint was overruled, whereupon appellant answered and alleged that the policy showed upon its face that it had been surrendered and satisfied by the acceptance of a check for $50.00, and there was an allegation that the chancery court in which the suit had been brought had no jurisdiction and a prayer for the dismissal of the complaint on that account. The guardian of the beneficiary, who was the husband of the insured, testified that he endorsed a certain voucher check which contained the following recitals:

"Voucher check. Notice. If any part of this check is detached it is void and must not be paid. If any parties' names hereon are minors the bank must require

guardianship papers and require the guardian to sign on behalf of the minors.

"J. E. Bush, National Grand Scribe.

"Mosaic Templars of America, August 17, '15, No. 5474.

"Upon the payee executing in ink the receipt on the back of this voucher check, on demand, pay to the order of James Austin, Guardian for Lucile Austin, Fifty Dollars, $50.00.

"Signed, J. E. Bush,
"National Grand Scribe, M. T. A.

"To the England National Bank,
"Little Rock, Ark.

"If not correct return without alteration and state difference. Make all endorsements below. Received the amount stated in this voucher check in full payment of the within account.

Signed, James Austin, Guardian,
"for Lucile Austin, Payee.

"Date 8-17-15. Description. Amount.
"Claim No. 926, Beneficiary of Jane Austin, deceased, check mailed to M. M. Anthony, W. S., Malvern, Arkansas.

"Endorsed: Paid Aug. 20, 1915.
"England National Bank,
"Little Rock, Arkansas."

He also testified that there was no controversy as to the amount due and that he supposed the recital in the voucher that the sum received was "in full payment of the within account" referred to the voucher itself and was a mere part payment of the amount due on the policy. That the writing signed by him did not state it was in satisfaction and payment of the policy and he did not know it was so intended. He further testified that the check was delivered to him by the secretary of the local chamber of which his wife had been a member; that it was the business of the secretary to collect the dues of the members and make remittances thereof, and when the attention of this officer was called to the

amount of the check she stated that this was probably a mere mistake or was intended as a partial payment and that the balance would no doubt be paid later. The secretary testified that it was her business to deliver policies to those who became members of the chamber of which she was secretary and to collect and remit all dues to the grand lodge, and that all dues on this policy had been paid and remitted, and that no one had ever written to her as secretary that the claim would not be paid in full, and that the letter to her accompanying the check contained no intimation of the company's intention to pay only $50.00. She testified that she understood the check to be a mere partial payment of the policy and so advised appellee when she delivered the check. She also testified that some one had given her the policy, but appellee had not done so and that it was not in his possession at the time of the death of the insured and that her assistant sent the policy to J. E. Bush, the National Grand Scribe of the Order, at his request, and that appellee made no endorsement of any kind on the policy, nor was he asked to do so. The policy was endorsed "Paid in full for $50.00. Policy surrendered and cancelled this August 17, 1915," but this endorsement was signed by J. E. Bush, and not by the beneficiary, nor by any one professing to act for her.

A decree was entered for the balance due, and this appeal has been duly prosecuted.

(1-2.) Counsel for appellant cite us to our own and other cases which hold that a check tendered in payment of a disputed claim, which recites that it is tendered as payment in full, becomes an accord and satisfaction of the debt when the check is retained and collected, and that this is true even though the creditor immediately writes that it will not be so accepted. A recent case involving the principle here sought to be applied is that of *Pekin Cooperage Co.* v. *Gibbs*, 114 Ark. 559, in which case we quoted from the case of *Barham* v. *Bank of Delight*, 94 Ark. 158, the following statement of the law:

"It is true that, in order to constitute an accord and satisfaction, it is necessary that the offer of the payment should be made by one party in full satisfaction of the demand, and should be accepted as such by the other. But when the claim is disputed and unliquidated, and a less amount than is demanded is offered in full payment, the question as to whether the creditor in such case does so agree to accept the amount offered in full satisfaction of his demand is a mixed question of law and fact. If the offer or tender is accompanied by declarations and acts so as to amount to a condition that if the creditor accepts the amount offered it must be in satisfaction of his demand, and the creditor understands therefrom that if he takes it subject to that condition, then an acceptance by the creditor will estop him from denying that he has agreed to accept the amount in full payment of his demand. His action in accepting the tender under such conditions will speak, and his words of protest only will not avail him."

We reaffirm the doctrine of that case; but we think the principle there announced is not controlling here. There was no dispute as to the amount due, and it is not now contended that appellee was entitled to receive only $50.00. The language of the voucher is somewhat ambiguous, especially in view of the fact that no surrender or cancellation of the policy was required by the local secretary as a condition for the delivery of the check. Under these circumstances we think the court correctly held that there was no accord and satisfaction of this demand.

(3.) This case should have been brought at law, but that was not ground for dismissing the complaint. Appellant did not ask that the cause be transferred to the law court. His prayer was that the complaint be dismissed, and as he was not entitled to the relief asked he is in no condition to complain that the cause was not transferred to the law court because he did not ask that this be done.

Finding no error the decree is affirmed.

HOLLAND v. STATE.

Opinion delivered December 4, 1916.

1. HOMICIDE—SECOND DEGREE MURDER—SUFFICIENT PROOF.—A verdict pronouncing defendant guilty of second degree murder, *held* to be warranted by the evidence.
2. EVIDENCE—DYING DECLARATIONS—DECLARATIONS OF THIRD PARTY.—A. was indicted and tried for the murder of his brother B. A.'s son, D., was present at the time of the shooting, and was himself shot. *Held*, statements of D. were not admissible as dying declarations, at the trial of A.
3. EVIDENCE—DECLARATIONS OF THIRD PARTY—RES GESTAE.—Under the facts in the above syllabus, D. had been asked who had begun the shooting, and he replied that B. had. *Held*, such a statement was not admissible as a part of the *res gestae*.
4. HOMICIDE—SELF-DEFENSE.—In a prosecution for murder, the instruction of the court, on the issue of self-defense, held proper.

Appeal from Columbia Circuit Court; *C. W. Smith*, Judge; affirmed.

C. W. McKay, for appellant.

1. It was error to exclude the testimony of C. C. Hammock. 93 Ark. 414; 21 Cyc. 826-7. It was part of the *res gestae*. 98 Ark. 435; 69 *Id.* 537; 43 *Id.* 99; 66 *Id.* 494; 116 Ark. 17.

2. Instruction No. 2 for defendant should have been given. The court erred in amending No. 9.

3. The evidence is not sufficient to sustain the verdict.

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

1. There was no error in excluding the alleged dying declaration of Dud Holland. 104 Ark. 162; 68 *Id.* 355; 81 *Id.* 417; 88 *Id.* 579; 99 *Id.* 208; 120 Ga. 857; Underhill, Cr. Ev., § 1440; 104 Ark. 175.

2. There is no error in the refusal of instruction No. 2. This was fully covered in the court's charge. 52 Ark. 180; 58 *Id.* 472; 72 *Id.* 384; 74 *Id.* 33; 80 *Id.* 201.

3. The court did not err in amending defendant's instruction No. 9. 29 Ark. 248; 55 *Id.* 593; 37 *Id.* 257; 77 *Id.* 97; 164 U. S. 492; 80 Ark. 88, 92. The

instructions for the State follow the rule approved in 29 Ark. 248; 32 *Id.* 585; 37 *Id.* 257; 109 *Id.* 515; 116 *Id.* 24; 110 *Id.* 415.

4. The evidence fully sustains the verdict. 109 Ark. 449; 104 *Id.* 142; 101 *Id.* 570; 109 *Id.* 130, 138; 92 *Id.* 120; 50 *Id.* 511.

HART, J. The defendant J. J. Holland was indicted for the crime of murder in the first degree charged to have been committed by killing his brother, Bruce Holland. He was tried before a jury and convicted of murder in the second degree, his punishment being fixed at ten years in the State penitentiary. From the judgment of conviction he has duly prosecuted an appeal to this court. The material facts proved by the State are as follows:

J. J. Holland, called Rome Holland, and Bruce Holland were brothers and lived near to each other in Columbia county, Arkansas. Rome Holland has a grown son called Dud Holland. An enmity existed between them and Bruce Holland. On one occasion Rome Holland came over in the field where his brother Bruce, was at work and threatened to kill him. On other occasions he would sit on top of the fence at the home of his brother Bruce with his rifle in his hand and at one time fired off his rifle while Bruce was out in the yard.

On the day of the killing, Bruce Holland went to a commissary near his house to purchase some supplies. His nephew, Dud Holland, was there and they with others remained there for some time. Finally Rome Holland came up with a raincoat in his hand. He gave it to his son Dud and asked him to take it home with him. About that time Bruce Holland started toward home, and after he had gone ten or fifteen steps, Rome Holland started after him. After Bruce Holland had walked about 113 steps, he set down on a stump and motioned to his brother Rome to go on. Rome Holland passed on about 25 steps and then came back and put his hand on his breast and was talking to his brother

Bruce. The witnesses at the commissary could not hear what the brothers were saying to each other. Dud Holland said to the other parties at the commissary, "Come on, some of you, and let's go up there and keep them from killing each other." One of the parties started to go with him but his brother stopped him. Dud Holland, however, proceeded on to where his father and uncle were talking. As soon as he got there, the shooting commenced. The witnesses for the State say they could not tell which one shot first, but one of them, a nephew of Rome and Bruce Holland, said that he thought that his uncle Bruce fell first.

Bose McMahon testified that he happened to look at the brothers just before the shooting began, that he could not tell who fired the first shot; that they were almost at the same time; that when the smoke cleared away, one of them was on the ground; that when he got there Bruce Holland was down and Rome and Dud Holland were up and that one or both of them were still shooting at him and that Bruce was lying right where he saw some one fall. That after Bruce fell, Rome and Dud Holland went towards him and that he saw the smoke from their pistols; that he examined Bruce Holland's pistol just after the shooting and that it was an old style Smith & Wesson single action pistol; that one cartridge had been fired from it and the other four were still in the pistol; that the shooting took place about 5 o'clock on a cloudy afternoon in November. The evidence shows that the killing occurred in Columbia county, Arkansas, in 1915; that Dud Holland was armed with a 38 caliber pistol; that Rome Holland was armed with a 32 caliber pistol; that Bruce Holland had a large bullet in his head over his right eye and a small bullet also entered his head; that he was also shot in the body twice; that there were two sizes of bullet wounds caused by pistols of different caliber and that he died in a very short time as the result of these pistol wounds. At the time he was killed, Bruce Holland had sold his place and was preparing to move out of the neighborhood.

Another witness testified that some time after the killing the defendant told him that he heard that he was living where Nettie Holland (his brother's widow) was staying; that witness answered in the affirmative and the defendant then said, "If you help her out in any way, I will put your light out just like I did Bruce's." The defendant further said, "I wish God would raise Bruce from the dead, so that I could kill him again, and he could kill me, and we could both kill each other."

According to the testimony adduced by the defendant, Bruce Holland had threatened him and his son, had purchased a rifle to kill them with, and was in the habit of carrying his rifle around with him. On the day of the killing the defendant said that he walked off from the commissary behind his brother; that they walked about a hundred steps close together, and that all at once Bruce sat down on a stump by the side of the road and told him to go on; that he did not make any reply to Bruce, but walked on a few steps, and that Bruce then said that Dud (referring to defendant's son) had been lying to him and that he was going to kill him; that he turned around and thought that he would try to reason with Bruce and show him that he had no right to kill anybody; that he walked back a few steps and told Bruce that Dud did not mean him any harm, and that for him not to kill him, and that after talking a little bit, he saw that Bruce was determined to kill Dud, and that he pulled his coat to one side, struck himself on the breast and told Bruce that if he was bound to kill one of them, to kill him and let the boy go home to his mother; that he told Bruce there was no use of having trouble; that about this time he heard a pistol hammer click, and looked around and saw Dud; that he saw that Dud was hit with a bullet, and that he went up to Dud and put his left arm around him and held him up while he emptied his pistol; that he then jerked out his own pistol and emptied it; that he heard Bruce tell the boy he was going to kill him, and at the same time jerk out his pistol and shoot; that Dud then fell back against him and pulled

his own pistol and shot at Bruce; that he held the boy up while he fired several shots, and that he himself shot several times at Bruce.

(1) Other witnesses for the defendant testified that Bruce fired the first shot. If the jury believed the witnesses for the State, it was warranted in finding the defendant guilty of murder in the second degree. It is true the witnesses for the State testified that the first two shots were fired nearly together, and that they could not tell which one fired first, but one of the witnesses testified that as soon as the first shot was fired, he saw a man fall, and that when he got up there he found that the man who had fallen was Bruce Holland. Bruce died in a very short time after the difficulty was over, and as there was only one shot fired from his pistol, the jury might have inferred that his nephew shot first. In any event Bruce Holland did not fire but one shot, and the evidence shows that the defendant and his son continued to shoot at him after he fell down on the ground. They both emptied their pistols at him, and several shots took effect in his head and body. When we consider this testimony together with the enmity which was shown to have existed between the parties and the previous threats made against the life of Bruce Holland, the jury was warranted in finding that it was a wilful and malicious killing, and that the defendant was guilty of at least murder in the second degree.

C. C. Hammock, the owner of the commissary and mill near which the shooting occurred, testified that he was at the mill the day of the killing, but did not see any of the shooting. He stated that he went to the scene of the shooting immediately after it occurred, and saw Bruce Holland lying up against a log dying, and Dud Holland was over by the side of the road a short distance away, and that Dud said he was dying. That they were both shot. He was then asked the following: "Did Dud Holland say anything further?" He answered, "I asked Dud who began the shooting, and he said his uncle Bruce shot him first."

On cross-examination he was asked: "Did Dud Holland tell you he was dying?" He answered, "Yes, I believe he did, and I told him he wasn't dying." The prosecuting attorney objected to the evidence of Dud Holland's dying declaration and asked that it be excluded from the jury. The court held that the admission of dying declarations in evidence is confined to cases of homicide, where the death of deceased is the subject of the charge, and excluded the testimony from the jury.

(2) The ruling of the court was excepted to and it is now insisted that the judgment should be reversed because the court excluded the testimony from the jury. It will be remembered that the defendant was on trial charged with killing his brother Bruce, and although Dud Holland was shot in the same fight, his dying declarations were not, as such, admissible in evidence on the trial of Rome Holland for the murder of Bruce Holland. *Taylor* v. *State*, 120 Ga. 857; *State* v. *Westfall*, 49 Ia. 328; *State* v. *Bohan*, 15 Kan. 407; *Johnson* v. *State* (Fla.), 40 L. R. A. (N. S.) 1195; *State* v. *Nist*, 66 Wash. 55, 118 Pac. 920, Ann. Cas. 1913 C, 409.

On this subject, Mr. Underhill says: "The declaration of a deceased person which is offered in evidence as a dying declaration is only admissible, as such, in case his death is the subject of an inquiry because of an accusation of homicide. * * * The mere circumstance that a person's death occurred in a disturbance, in which the person for whose homicide the prisoner is indicted, was killed, is insufficient to admit the declaration." Underhill on Criminal Evidence, section 106; 2 Wigmore on Evidence, section 1440; *Montgomery* v. *State*, 80 Ind. 338; *State* v. *Jefferson*, 77 Mo. 136; *State* v. *Dickinson*, 41 Wisc. 299. See, also, *Rhea* v. *State*, 104 Ark. 175.

(3) The contention is also made by the defendant that if the dying declaration of Dud Holland can not be admitted in evidence as such a declaration, yet it was proper as a part of the *res gestae*. They cite in support of their contention *Childs* v. *State*, 98 Ark. 435,

and *Stevens* v. *State*, 117 Ark. 64, and *Carr* v. *State*, 43 Ark. 99. The witness stated that, when he went up to the place where the shooting occurred, that Dud Holland said he was dying, that the witness asked Dud who began the shooting, and that Dud said his uncle Bruce shot him first. This was the narration of a past event in response to a question asked him, and was not a part of the transaction itself. Under the authorities above referred to, *res gestae* are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting. As we have already seen, the answer was made by Dud Holland in response to a question asked him, and it was made after he had said that he was dying, thus showing that his mind had been turned to other things, and the answer that his uncle Bruce shot him first was made in response to a question, and was not a spontaneous emanation from the transaction itself.

(4) It is also contended by counsel for the defendant that the judgment should be reversed because the court erred in giving in its amended form instruction No. 9, which reads as follows:

"You are instructed that to justify a killing in self-defense, it is not essential that it should appear to the jury to have been necessary, it is sufficient if the defendant (acting as a reasonable person) honestly believed without fault or carelessness on his part that the danger was so urgent and pressing that the killing was necessary to save his own life or prevent his receiving great bodily injury, or to save the life of his son; and the reasonableness of defendant's apprehension is to be judged from the standpoint of the defendant, situated as he was at the time, and not from that of the jury." The amendment consisted in adding the words included in parenthesis, towit: "acting as a reasonable person." In *Hoard* v. *State*, 80 Ark. 87, the court held that "it was not error to instruct the jury that any one who killed another was justified in defending himself, if it appeared to him, acting as a reasonable person, without fault on his part, that he was in danger of losing

his life or receiving great bodily harm, as the law presumes, where nothing to the contrary is shown, that the accused is of ordinary reason and holds him accountable accordingly." The court in that case, while not approving the form of the instruction gives at length its reasons for holding that such an instruction does not constitute reversible error and the reasoning of the court need not be repeated here. See, also, *Scoggin* v. *State*, 109 Ark. 510. There is nothing in the record in the present case that tends to show that the defendant is weak-minded or is a person of less than ordinary intelligence. Therefore, the judgment will not be reversed for this alleged error.

The defendant asked an instruction on reasonable doubt which the court refused to give. We need not set out this instruction, however; for the court in its instructions given to the jury fully covered the question of reasonable doubt, and it is well settled that the court is not required to repeat instructions on the same point. We have carefully examined the record and there is nothing in it which constitutes reversible error.

The judgment will be affirmed.

WILKINS v. EANES.

Opinion delivered December 4, 1916.

1. SPECIFIC PERFORMANCE—ACTION BY VENDOR OF REAL ESTATE.—The relief of specific performance may be granted to a vendor of real estate.
2. WILLS—DEVISE OF LAND—DEVISE IN FEE WITH DEVISE OVER.—A testator by a paragraph in her will, devised certain property to one E., the same to be controlled and managed by one C. until E. became of age, when the same should vest in the said E. in fee simple. Another paragraph in the same will provided that in the event of the death of E. without issue of his body surviving, that the title to the property devised as above, should vest in fee simple in one M. *Held*, the time at which the devise over would take effect would be the death of E. before attaining his majority, but M. having died before the testator, and E. having attained his majority, E. will be

held to have a fee simple title to the land, and that he could by deed pass a fee simple title to the same.

3. WILLS—CONSTRUCTION—EARLY VESTING OF ESTATES.—In the construction of wills, the law favors an early vesting of estates devised.

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

Moore, Smith, Moore & Trieber, for appellant.

1. Under the will, appellee took only a qualified fee in the lots, with a limitation over by way of executory devise. 82 Ark. 209; 55 Wisc. 96; 100 N. Y. 288; 11 R. C. L. 470; 2 Jarman on Wills, 44, 485, 495; 13 N. Y. 273; 19 *Id.* 344; 4 Kent Com. 279; 26 Atl. 770; 3 Term. (Pa.) 143; 74 Ark. 545; 105 N. W. 161; 81 Ark. 480; 2 Redfield Wills (3 ed.) 278; Page on Wills, § 684; 11 R. C. L. 476-7. See, also, 3 Ark. 148; 13 *Id.* 91, and 23 *Id.* 356; 19 *Id.* 66-9.

2. The limitation over to Mary A. Eanes and heirs is a valid executory devise, and upon her death before the testator it did not lapse. The words "heirs and assigns" are not to be taken as words of limitation, but as words of purchase. 105 Ark. 565. The word "heir" is often construed to mean "children." 68 Ark. 369; 72 *Id.* 539, 565-7. See, also, 68 Ark. 376; 50 Atl. 1001; 25 N. E. 1013; 18 Atl. 857; 50 *Id.* 750; 10 L. R. A. 161; 95 Ark. 18.

Rose, Hemingway, Cantrell, Loughborough & Miles, for appellee.

1. The intention of the testator is the thing to be sought. The intention was that Eanes should have the whole estate in fee. 4 Kent Com., 4, *p. 5 and 8*p. 9, etc.; 1 Washb. Real Prop., *p. 51-52; Kirby's Digest, §§ 731-3; 50 Hun, 324-8; 71 N. E. 137; 35 *Id.* 9; 58 *Id.* 191; 58 Atl. 472; 23 *Id.* 349; 26 S. E. 722; 187 Mass. 562; 73 N. E. 672; 36 Atl. 318; 108 Pac. 87; 3 Ark. 148; 23 *Id.* 356, 378; 81 *Id.* 480.

2. Item 8 refers to an indefinite failure of issue. 3 Ark. 148, 191-4-5; 4 Kent. Com. 283; 23 Ark. 356; *Ib.* 378, etc.

3. Looking at all the provisions of the will, it was clearly the intention to give Eanes an estate in fee. 137 Ky. 167; 117 S. W. 264; 104 Ark. 448; 126 Fed. 701; 39 S. W. 12; 39 N. E. 388; 67 N. W. 605; 69 Hun. 469; 87 *Id.* 110; 155 N. Y. 677; 145 *Id.* 351-9; 81 *Id.* 356.

4. If there was a valid executory devise, it lapsed. 105 Ark. 565; 80 Me. 290; 67 Conn. 249; 34 Atl. 1106; 108 Mass. 382; 159 *Id.* 280; 162 *Id.* 448; 28 N. J. Eq. 59; 3 Dem. (N. Y.) 43; 113 N. Y. 369; 38 Pa. 34; 60 Tex. 426; 2 W. & S. (Pa.) 450; 1 Jarman on Wills, 617-621.

5. Mrs. Eanes died before the testator and appellee had a quitclaim deed from D. F. S. Galloway, which perfected his title.

Moore, Smith, Moore & Trieber, in reply.

1. The intention must be gathered from the whole instrument. Only a qualified fee was intended. 71 N. E. 137; 35 *Id.* 9; 53 *Id.* 191; 58 Atl. 472; 26 S. E. 722; 187 Mass. 562; 11 R. C. L. 470; 23 Atl. 349; 36 *Id.* 218; 180 Pac. 87.

2. The limitation over to Mary Eanes, her heirs and assigns can not be confined to the occurrence of the death of David Eanes in the lifetime of the testatrix. 112 U. S. 526; 20 S. W. 306; 118 Ky. 512; 5 S. E. 430; 20 Ohio C. C. 409; 14 Atl. 850; 157 *Id.* 79.

3. As to failure of issue, see 4 Kent. Com. 299; 26 Atl. 770; 3 Tenn. (Pa.) 143; 44 Ark. 545, 550.

McCULLOCH, C. J. This is an action instituted by appellee in the chancery court of Pulaski county to compel specific performance of a written contract entered into between him and appellant, whereby he agreed to sell, and appellant agreed to purchase, certain real estate situated in the city of Little Rock. The contract set forth in the complaint is unambiguous in its terms, and constitutes an undertaking on the part of appellee to sell, and on the part of appellant to purchase, the two lots for the stipulated price. Appellant paid the sum of $100 on the purchase price, which is recited in the contract, and undertook to pay the bal-

ance "upon presentation of a good and valid warranty deed, after allowing ten days from delivery of abstracts of title and taxes for examination of title only." It is further stipulated in the contract that appellee was to furnish "a fee simple absolute title." Appellant refused to perform the contract on the alleged ground that appellee was unable to furnish a perfect title to the property which was the subject of the contract. The case was tried upon an agreed statement of the facts, and the chancellor decided in favor of appellee and rendered a decree for the specific performance of the contract. The only question, therefore, presented for our decision is whether or not appellee's title was such that appellant was bound to accept, or whether appellee failed to present a "fee simple absolute title" within the meaning of the contract.

(1) There is no question raised about the jurisdiction of the chancery court to decree specific performance of such a contract at the request of the vendor. That question has never been expressly passed on by this court, though it seems to be conceded in one of our decisions that the court may grant that relief to a vendor, the same as to the vendee, under a contract for the conveyance of real estate. *Hodges, ex parte*, 24 Ark. 197. It seems to be settled, however, by the great weight of authority that the relief of specific performance may be granted to a vendor of real estate, and we need not enter into any discussion of that question here or refer to the reasons upon which the relief is granted. 36 Cyc. 552-565.

Appellee derived title to the property under the last will and testament of his great-aunt, Elizabeth S. Shall. The clause under which the property in question was devised to appellee reads as follows: "Item 5. I will, devise and bequeath to my grand nephew, David F. Shall Eanes, lots 7, 8 and 9, in block 93, in the city of Little Rock, Pulaski county, Arkansas, the same to be controlled and managed for him by my grand nephew, David F. Shall Galloway, as trustee, until he is twenty-one years of age, or until he is relieved of

his disabilities of minority when the same shall vest in fee simple in the said David F. Shall Eanes. But until that time, the same shall be controlled as above set out, and the income thereof shall be used for the support and education of the said David F. Shall Eanes." Under the preceding clause of the will, certain other property was devised to appellee's mother for and during her natural life, with remainder over at her death to appellee. A subsequent clause of the will, under which the present controversy arises, reads as follows: "The property herein devised and bequeathed in items 4 and 5 to my grand nephew, David F. Shall Eanes, shall in the event of his death without issue of his body surviving, vest in fee simple in his mother, my niece, Mary A. Eanes, her heirs and assigns." The residuary clause of the will devised to D. F. S. Galloway all the rest of the estate of the testatrix not specifically devised.

Mary A. Eanes died during the lifetime of the testatrix, and at the time this contract was entered into appellee was 25 years of age and was in full enjoyment of the use of the property devised to him. Appellee also had procured a quitclaim deed from D. F. S. Galloway, the residuary devisee under the will.

The contention of appellant is (stating it substantially in the language found in the brief) that under the terms of the will, appellee took only a qualified fee in the lots in question, with a limitation over by way of executory devise to his mother upon the death of appellee without issue of his body surviving; that the devise over should be construed to be upon a definite failure of issue, and was therefore valid, and that it did not lapse upon the death of Mrs. Eanes during the lifetime of the testatrix or fall into the residuary clause of the will.

The language of the devise undoubtedly refers to a definite failure of issue, and the only question is as to the point of time to which it refers. The contention of counsel for appellant is, of course, that it refers to the time of the death of appellee, and that the title he took was not absolute.

We are of the opinion that this case is ruled by the principles announced in the recent case of *Harrington* v. *Cooper*, 126 Ark. 53, where we said: "This is an application of a rule that where an estate is devised to one for life with remainder to another, with the further provision that 'if the remainderman shall die without having a child, then to a third person,' the words 'die without having a child,' are restricted to the death of the remainderman before the determination of the particular estate." In that case there was a devise for life, and we held that the language used with reference to the devise over referred to the death of the first taker. The application of the principle announced in that case is slightly varied in the present one so as to construe the language to refer to the period at which the appellee was to come into full enjoyment of the property—in other words, when the trusteeship for his benefit ceased and the legal title vested in him. The principle announced, and its application to the facts of the present case, are sustained by the authorities there cited and others. It will be noted that the devise of this property was to appellee, that the same should be "controlled and managed for him," by D. F. S. Galloway, as trustee, until appellee should become twenty-one years of age or be relieved of his disabilities of minority, and that then the title "shall vest in fee simple in the said David F. Shall Eanes." This language is very emphatic and it manifests unmistakably the intention of the testatrix to give to appellee at some time the title in fee.

One of the leading cases in this country on the question of construction of apparently conflicting devises is that of *Washbon* v. *Cope*, 144 N. Y. 287, where Mr. Justice Peckham, in delivering the opinion of the court, said: "We are confronted in the first place by the well settled rule that courts refuse to cut down an estate already granted in fee or absolutely when the supposed terms of limitation are to be found in some subsequent portion of the will, and are not in themselves clear, unmistakable and certain so that there can

be no doubt of the meaning and intention of the testator. * * * There is another rule which is also well settled, that where the devise or bequest over to third persons is not dependent upon the event of death simply, but upon death without issue or without children, the death referred to is death in the lifetime of the testator. It is true that in some cases courts have stated that they would lay hold of slight circumstances to vary this construction and give effect to the language according to its natural import as referring to a death, under the circumstances mentioned, happening either before or after the death of the testator. But those circumstances must be such that a court can reasonably say there is good and fair ground upon which to base an alteration of the rule outside of and beyond the language which courts have heretofore held compelled them to enforce the rule as stated. When the language of a devise or bequest is such that the courts, without looking at any other provisions of a will, would say that such language meant, within the well-settled decisions, that the death spoken of was death before that of the testator, then the language in other portions of the will which is to alter that rule must be such as at least to give fair, clear and reasonable ground for saying that its proper effect is to change the rule in question."

(2) Applying this rule in the construction of the language of the will, it is entirely clear that, even without indulging the presumptions generally recognized in favor of the early vesting of estates, the testatrix intended to vest the estate absolutely in appellee at some time during his life; and since she fixed a definite period for that to occur, namely, when he became twenty-one years of age, or was otherwise relieved of his disabilities of minority, we are driven to the conclusion that his death before that occurred was the period at which the devise over was to take effect, if at all. It being shown that appellee has attained the age of majority, and that the contingency upon which the devise over should take effect did not happen within the time

specified, it follows that appellee's title under the will became absolute, and that he was in position to tender to appellant, and did so tender, a conveyance which conveyed the title in fee simple.

(3) This conclusion is not affected by the peculiar result to which attention is called by counsel for appellant, which might have arisen with respect to the application of the devise over in the fourth clause of the will which leaves certain property to appellee's mother with remainder over to him in fee at her death. It is argued that the executory devise contained in item 8 of the will could have no application, as the period fixed for the failure of issue should be held to refer to the time of the death of the testatrix or to the period fixed for full enjoyment by appellee under the will. We need not concern ourselves now about the effect of this upon the property embraced in the other clause of the will, for we are clearly of the opinion that the conclusion we have reached gives a natural interpretation to the language used and reaches a result which the law always favored, namely, the early vesting of estates in land. It is not, however, very difficult to apply the same rule to the devise in item 4 and to hold that the contingency upon which the executory devise over is to vest related to the time when appellee was to begin the enjoyment of the estate. This conclusion brings that feature of the case squarely within the rule laid down in *Harrington* v. *Cooper*, *supra*.

We are of the opinion, therefore, that the chancellor reached the correct conclusion in the interpretation of the will, and that appellant should be compelled to specifically perform the contract. The decree is therefore affirmed.

SECOND DIVISION OF THE LACONIA LEVEE DISTRICT v. LACONIA LEVEE DISTRICT.

Opinion delivered December 11, 1916.

1. LEVEE DISTRICTS—SUBDIVISION—EXISTING DEBTS.—Under Act 141, p. 579, Acts of 1913, dividing the territory of a levee district, *held*, the act intended to *pro rate* the funds in the hands of the original levee district at the time of the passage of the act, after deducting the indebtedness of the original district at that time, and requiring the second district to pay its *pro rata* part of any then existing indebtedness after deducting the funds on hand.
2. LEVEE DISTRICTS—SUBDIVISION. While the Legislature may divide one district into two, and adjust their liabilities, such adjustment must not be arbitrary.
3. LEVEE DISTRICT—SEVERANCE—LIABILITY ON CONTRACTS. Where the Legislature has organized a new levee district out of a district already organized, the Legislature can not make the original district liable on a contract for the benefit of the new district, made after the passage of the act, severing the districts.

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

STATEMENT BY THE COURT.

Prior to the 7th of March, 1913, certain territory in Phillips and Desha counties had been incorporated into the Laconia Levee District. See Acts of 1891, p. 169, and Acts of 1893, p. 253.

On March 7, 1913, an act was passed creating an independent levee district, carved out of the Laconia Levee District, and designated as "Second Division of Laconia Levee District." The Second Division of the Laconia Levee District thus created comprised the levees that were located in Phillips County. This left in the original Laconia Levee District the levees situated in Desha County.

At the time of the passage of the act of March 7, 1913, No. 141, p. 579, Acts 1913, the original Laconia Levee District was under a contract with one Harry Adams for the placement of 100,000 yards of dirt as a banquette of the levee located in Phillips county, which contract was dated September 3, 1912. Up to the time of the passage of the act of March 7. 1913, Adams

had done work under this contract, and continued to do work under such contract after the passage of the above act until the two districts refused to further pay him. After the passage of the act, the secretary of the original district issued to Adams warrants drawn on the treasurer of the district in payment of levee work done by him in Phillips county. Warrants had been issued for the work done before the passage of the act and the secretary continued to issue warrants under the orders of the board of directors of the original levee district, and the treasurer of that district continued to pay those warrants until as late as July 7, 1913. The warrants that were thus issued and paid after the passage of the act of March 7, 1913, amounted in the aggregate to $4,579.65. At the time of the passage of the act there was in the treasury of the original Laconia Levee District the sum of $6,166.35.

Upon the refusal of both districts to further pay Adams he brought suit against them for breach of contract and recovered judgment against them in the sum of $897.67. A controversy arose between the two districts as to their respective liabilities to each other under the act, and as to their respective liabilities for the amount that had accrued under the Adams contract. This suit was instituted by the appellant against the appellee to determine that controversy.

The chancery court, upon substantially the above facts, found among other things:

"1. That on the 7th day of March, 1913, there was in the treasury of the defendant the sum of $6,-166.35."

"2. That under the terms of the act of March 7, 1913, the plaintiff was entitled to twenty and one-half forty-fifths of said fund, amounting to the sum of $2,-778.16."

"3. That from and after the date of the passage of said act of March 7, 1913, defendant paid to Harry Adams the sum of $4,579.65 for work done on the contract of September, 1912, in Phillips county, and is entitle to be reimbursed in that sum by the plaintiff; and

that defendant is not liable, as between it and plaintiff for any part of the judgment rendered in the Desha Circuit Court in favor of Harry Adams and against both plaintiff and defendant."

The court further found that defendant was liable to the plaintiff for its pro rata of the value of certain lands taken for levee purposes prior to the passage of the act, amounting to $318.75, and that after crediting the plaintiff with such sum there was a balance due the defendant amounting, in principal and interest, to the sum of $1,697.63, and entered judgment in favor of the appellee for such sum, and the appellant brings this appeal.

Such other facts as may be necessary will be stated in the opinion.

Moore, Vineyard & Satterfield and *J. G. Burke*, for appellant.

The Harry Adams debt was an outstanding legitimate and existing indebtedness against the district at the time of the passage of the act and was properly pro rated as provided by the act. The Legislature has the right to adjust such matters and has done so. 16 Am. & E. Enc. L., 162; 18 S. W. 438; 2 Words & Phr. (2d series), 1027. No abuse of discretion or power is shown. 107 Ark. 291; 98 *Id.* 113, 117. The act of the Legislature is final. The statute is plain and unambiguous. 110 Ark. 99; 52 *Id.* 430; 73 *Id.* 387; 33 *Id.* 497; 92 U. S. 307; 100 *Id.* 514; Act 141, Acts 1913. The court erred in holding that defendant was not liable.

F. M. Rogers, for appellee.

The court properly construed the act in accordance with the legislative will. The decree is correct and should be affirmed. No error is shown.

WOOD, J. (after stating the facts). A correct solution of the issue presented by this appeal involves a construction of Act No. 141 of the Acts of 1913, approved March 7, 1913. The first section of that act creates the appellant levee district. Other sections

provide for the maintenance, construction, repair and control of the levees already situated in the appellant district, and those thereafter to be constructed, and the levying and collecting of all taxes in such district, including those assessed in the year 1912 and collected in 1913, and the expenditure thereof, and place these matters under the exclusive control, supervision and management of the board of directors of the appellant.

The fifth section of the act is as follows: "Should there be any funds in the hands of the treasurer of the Laconia Levee District at the time of the passage of this act in excess of any legitimate indebtedness of said district, then such a part of said fund shall be paid over to the treasurer of the division herein created in the ratio as the mileage in said division bears to the total mileage of the levee in said Laconia Levee District. In the event the said Laconia Levee District, at the time of the passage of this act is indebted in any amount whatever in excess of the funds on hand, then the division hereby created shall pay its proportional part of such indebtedness in the ratio as the number of miles of levee in said division bears to the total miles of levee in said Laconia Levee District. For the purpose of ascertaining such surplus or indebtedness, as the case may be, the directors of said division shall have access to the books and records of the Laconia Levee District."

Appellant contends that the court erred in holding that the appellee was not liable as between it and appellant for any part of the judgment rendered by the Desha Circuit Court against both appellant and appellee. But the appellant does not bring into its abstract any evidence to sustain this contention. The only reference to this judgment that is contained in the abstract is that recited in the answer, as follows: "That the said Harry Adams filed suit in the Desha Circuit Court against the plaintiff and defendant districts, alleging therein that he had been prevented by defendant districts from completing said contract, and prayed judgment for damages; that said suit resulted in a

judgment against defendant districts in the sum of $897.67."

It appears affirmatively from these recitals that the judgment rendered against the districts was not for any indebtedness due from the Laconia Levee District to Harry Adams at the time of the passage of the act, but, on the contrary, that the judgment was for damages caused by the conduct of the districts in perventing him from completing his contract. Since it appears from the testimony that Adams was still performing work under his contract after the passage of the act of March 7, 1913, the damages for which he recovered judgment accrued after the passage of the act, and therefore were not an indebtedness existing at the time of the passage of the act. The amount of the judgment therefore was not an indebtedness to be pro rated under the act, and the court did not err in so holding.

It was the manifest purpose of the act, as shown by section 5, to pro rate the funds in the hands of the original levee district at the time of the passage of the act, after deducting the indebtedness of the original district at that time, and to require the second division to pay its *pro rata* part of any then existing indebtedness after deducting the funds on hand.

Now the proof shows that at the time and after the passage of the act, the performance of the work contemplated by the contract was not complete, and the contract itself in express terms shows that the work which was being done was banquette work, comprising 100,000 yards, more or less. Although the work was done under a contract executed prior to the passage of the act, yet no indebtedness against the original levee district would accrue under the contract until the work was actually done, and if this work was done subsequent to the passage of the act of March 7,1913, then the indebtedness therefor did not exist at the time of the passage of the act, but was an indebtedness accruing thereafter.

Since the act created the second division and gave its governing board exclusive control, supervision and

management of the work of constructing, repairing and maintaining the levees of the second division, it is clear that the appellee, the original Laconia Levee District, after the passage of the act had no longer any duty to perform with reference to the levees situated in the appellant district. While the appellee was still liable under its contract with Adams for any indebtedness that accrued either before or after the passage of the act under said contract, yet, as between the appellee and the appellant, by the terms of the act, appellee was relieved of any indebtedness that accrued under that contract after the passage of the act, and appellant could not hold appellee even for a proportional part of such indebtedness.

The court found that the appellee paid Adams from and after the passage of the act, $4,579.65 for work done under the contract, and that appellee was entitled to be reimbursed in that sum by the appellant.

While there is no express finding that the work for which this sum was paid was done subsequent to the passage of the act of March 7, 1913, yet the finding of the court was tantamount to that, and such was the effect of the judgment. It can not be said that such a finding is clearly against the preponderance of the evidence.

The testimony of the secretary of the Laconia Levee District shows that at the end of the month the engineer estimated the work done during the preceding month and gave orders to the contractor on the secretary to cover those estimates, and that the secretary, upon such orders, would issue his warrant in favor of the contractor on the treasurer of the district for the payment of the money. The testimony shows that warrants covering the sum of $4,579.65 were issued March 28, May 31, and July 1, 1913, and that these checks were paid by the treasurer respectively March 29, June 2 and July 7, 1913. True, the secretary of the appellee, when asked why these warrants were issued after March 7, 1913, if the work was done in Phillips county, answered: "Because they had been issued before this

time by the old members of the original district to honor Mr. Jordan's orders for work done, and I continued to give orders until I was instructed otherwise." He also testified that the warrants he paid out to Mr. Adams were ordered by the board of the original Laconia Levee District.

Now, it must be remembered that, so far as this record shows, the board of the original Laconia Levee District was not changed by the act of March 7, 1913, creating the appellant district, and it was therefore literally true that the warrants issued by the secretary after the passage of the act were ordered by the board of the original Laconia Levee District. Taking the testimony of the secretary of the board as a whole, it shows that after the passage of the act creating the appellant district, he continued to give warrants on the orders of the board of the Laconia Levee District in the same manner that he had done before the passage of the act, towit, upon estimates made by the engineer at the end of the month for work done during that month.

The burden was upon the appellant to show by a preponderance of the evidence that these warrants were issued and paid upon an indebtedness existing at the time of the passage of the act. It has not met that burden.

The proof shows that there were forty-five and a half miles of levee in the original levee district, and that twenty and one-half miles of this levee were in Phillips county, and that all the work that had been done under the Adams contract was done on the levee situated in Phillips county.

Appellant contends that it was within the exclusive province of the Legislature to define the boundaries of the two districts and to adjust the liabilities of said districts after their separation. While this is true, such adjustment must not be arbitrary, that is, without any just and reasonable basis for the legislative determination. *Moore* v. *Board of Levee Dist.*, 98 Ark. 113, 117.

It was not within the power of the Legislature to make the property owners of the appellee liable for levee work done under the contract with Adams after the passage of the act of March 7, 1913, on the levee situated in Phillips county. To relieve the property owners of appellant of the cost of the levee work done under the Adams contract after the passage of the act, and to lay the burden of the cost of such work upon the property owners of the appellee without a hearing and without corresponding benefit to them, would be taking their property without due process and without compensation. If the act had to be so construed it would be unconstitutional and void.

The chancery court correctly construed the act. Its findings of facts are in accord with the preponderance of the evidence and its decree must therefore be affirmed.

WILSON v. STATE.

Opinion delivered December 11, 1916.

1. HOMICIDE—POISONING—PROOF OF CIRCUMSTANCES IN MITIGATION.—An instruction in a homicide case, in the language of the statute, that "the killing being proved, the burden of proving circumstances of mitigation * * * shall devolve on the plaintiff * * *," while abstract is not prejudicial where the court gave proper instructions on the issue of defendant's guilt, and where the verdict of the jury pronounced the defendant guilty of the killing.
2. TRIAL—IMPROPER ARGUMENT—FAILURE TO MAKE A RULING.—Appellant can not predicate error upon the failure of the trial court to make a ruling, directing the jury not to consider certain improper argument made by appellee's counsel, when the appellant did not ask for a ruling, although he objected to the argument, unless the remarks were so flagrant and so highly prejudicial in character as to make it the duty of the court, on its own motion, to have instructed the jury not to consider the same.
3. TRIAL—IMPROPER ARGUMENT—DUTY OF COURT.—In a criminal trial the prosecuting attorney stated in his opening argument that the defense threatened and attempted to prevent a certain witness from testifying. *Held*, the remarks, while improper, were not so intensely prejudicial in their nature as to call for a ruling of the court on its own motion.

Appeal from Columbia Circuit Court; *Chas. W. Smith*, Judge; affirmed.

C. W. McKay and *Walker Smith*, for appellant.

1. The court erred in giving instruction No. 5 for the State. It was misleading. 71 Ark. 459; 21 Cyc. 633; 67 Ark. 605.

2. The remarks of the prosecuting attorney were prejudicial and should have been excluded. 110 Ark. 528.

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

1. There was no prejudicial error in the State's instruction No. 5. 71 Ark. 459; 71 *Id.* 459; 95 *Id.* 106; 96 *Id.* 629; 76 *Id.* 493; *Ib.* 517, 110, 489; 85 *Id.* 358; 98 *Id.* 436; 100 *Id.* 183; 109 *Id.* 514; 120 *Id.* 200.

2. There was no error in the remarks of the prosecuting attorney. 110 Ark. 543; 74 *Id.* 259; 74 *Id.* 256; 95 *Id.* 326; 94 *Id.* 518; 69 Wisc. 32; 100 Minn. 396; Thompson on Trials, § 964.

WOOD, J. At the August term, 1916, of the Columbia circuit court, appellant was convicted of the crime of murder in the second degree and sentenced to imprisonment in the State penitentiary for a period of ten years.

The indictment charged him with having committed the crime of murder by killing his wife, Maud Wilson, by giving her strychnine. It was a question for the jury, under the evidence, as to whether or not Maud Wilson died as the result of strychnine administered by the appellant for the purpose of killing her, or whether she died from Bright's Disease, with which she had been afflicted for some two years.

The evidence tending to prove that appellant poisoned his wife was circumstantial, but sufficient to sustain a verdict of guilty.

Among other instructions, the court gave the following: "The killing being proved, the burden of proving circumstances of mitigation that justify or

excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense amounted only to manslaughter, or that the accused was justified or excused in committing the homicide provided the burden of the whole case is on the State, to show the defendant guilty beyond a reasonable doubt."

Appellant specifically objected to the giving of the instruction on the ground among others, that the instruction was abstract, and that it assumed that the killing by the defendant was proved, and that it cast the burden of proving circumstances of mitigation upon the defendant, and thus placed the burden upon him to show circumstances that justified or excused him in administering the poison.

The instruction is wholly abstract in a case where the killing is done by poison, or in any other case of wilful, deliberate, malicious and premeditated killing, such as to constitute only murder in the first degree. The case of *Easter* v. *State*, 96 Ark. 629-633, was such a case. There, as here, the court gave the instruction in connection with other instructions on the law of homicide, and of reasonable doubt, and the burden of proof in such cases. In that case, in commenting upon the ruling of the court in giving the instruction as set out above, we said: "It is contended that this instruction is not applicable where there was a conflict as to whether or not the defendant did the killing. It is true that this statute is applicable only where the killing is claimed to have been done in self-defense, and is not applicable in cases of killing by lying in wait. There is no prejudicial error, however, in giving it in any case, for no harm could result in giving it as an abstract proposition of law. The danger of giving it in the exact language of the statute is that it might be construed as an assumption by the court that the killing had been done by the accused. The instruction was not, however, objected to on that ground, and that construction seems not to have been placed upon it by court or counsel."

Here the instruction was specifically objected to on the ground that it assumed that appellant did the killing, and the very next instruction, given at the instance of the State, submitted the issue as to whether or not appellant did the killing, and told the jury that unless they found that he did kill Maud Wilson beyond a reasonable doubt by unlawfully, wilfully and feloniously, after premeditation and deliberation, with malice aforethought, administering strychnine, that they should find him not guilty. And in the first instruction given at the instance of the appellant, the court told the jury, in substance, the same thing.

The instruction is in the exact language of the statute and when given in this form it could not be construed as an assumption by the court that the killing was proved, but is only tantamount to telling the jury that if they found that the killing by the defendant was proved, then the burden of proof was upon the accused, where self-defense was set up, to establish such defense, unless the proof introduced by the State showed it. This, as we have often held, does not shift the burden to defendant of establishing his innocence, but the burden of proof to show guilt in the whole case still rests on the State. *Cogburn* v. *State*, 76 Ark. 110, 113; *Tignor* v. *State*, 76 Ark. 489, 493; *Thomas* v. *State*, 85 Ark. 357, 358; *Childs* v. *State*, 98 Ark. 430, 437; *Walker* v. *State*, 100 Ark. 180, 183; *Brock* v. *State*, 101 Ark. 147, 154; *Scoggin* v. *State*, 109 Ark. 510, 514; *Johnson* v. *State*, 120 Ark. 193, 200.

While an instruction given in this form was criticised in the case of *Easter* v. *State*, *supra*, it was not expressly condemned as prejudicial error in this form in any case, and we now hold that the instruction, even when given in the language of the statute, does not assume that the killing has been proved, but, when so worded, the effect of it is to submit that issue to the jury.

The contention that inasmuch as the instruction was abstract it was prejudicial is unsound, for the reason that the jury found a state of facts to exist which

would make the instruction favorable rather than prejudicial to the interests of appellant. The jury, in other words, by their verdict of guilty, must have found that the appellant killed his wife, and they must also have found that he killed her by administering strychnine, for that is the only means which he employed to kill her if he committed the offense at all. Under the law, upon such a state of facts, the only correct verdict would have been murder in the first degree. Instead, the jury went beyond its province and extended clemency to the accused by returning a verdict for murder in the second degree. Since the jury found the appellant guilty, he is in no attitude to complain, and was in no manner prejudiced, by the giving of an instruction the only effect of which, if it had any effect at all, was to cause the jury to mitigate his punishment, which, under their finding of guilty, might have been death or imprisonment for life instead of imprisonment in the State penitentiary for a shorter term. The instruction could not have misled the jury on the issue as to the guilt or innocence of the appellant.

2. Counsel for the State, in his opening argument, stated to the jury that Charles Beeson, a witness for the State, was there and had testified in this case in behalf of the State, although he had been threatened and intimidated for the purpose of preventing him from so testifying, to which argument the defendant objected and asked the court to rule upon his objection, but counsel for the State immediately stated that he withdrew the statement. The court did not rule upon the same, and counsel excepted.

Counsel for appellant state that the court's refusal to rule on appellant's objection and to instruct the jury not to consider the statement could have caused the jury to believe that the prosecuting attorney was justified in making the statement.

The remarks were improper, because they were calculated to cause the jury to believe that appellant had threatened and intimidated a witness for the State, who gave damaging testimony against appellant, in

order to prevent, if possible, his attendance at the trial. But, upon objection being made to the remarks, the counsel immediately withdrew the statement and the appellant did not thereupon ask the court to admonish the jury not to consider the improper remarks. Counsel for appellant thus, in effect, treated the withdrawal of the statement as sufficient to remove the prejudice; at least, he did not ask the court to instruct the jury not to consider the remarks or to take any other affirmative steps to remove any possible prejudice that might have been created against appellant in the minds of the jury. Appellant can not predicate error upon failure of the court to make a ruling that he did not at the time ask the court to make, unless the remarks were so flagrant and so highly prejudicial in character as to make it the duty of the court on its own motion to have instructed the jury not to consider the same. See *Kansas City So. Ry. Co.* v. *Murphy*, 74 Ark. 259; *Harding* v. *State*, 94 Ark. 65. The remarks were not so intensely prejudicial in their nature as to call for such ruling of the court *sua motu.*

The trial courts have broad discretion in the matter of controlling the arguments of counsel, and except in cases of a manifest abuse of discretion, this court will defer largely to the conclusions of the trial court as to whether or not prejudice in any given case results from improper remarks, and as to whether or not the court has taken such affirmative action in the premises as might be necessary to remove any possible prejudice. See Thompson on Trials, 964; *Railway Co.* v. *Murphy, supra; Cravens* v. *State*, 95 Ark. 321, 326.

The prosecuting attorney, in his closing argument, also, in effect, stated that witness O'Dell had testified that the appellant stated to him "that he had never cared anything for the damned bitch, and that he was going to get rid of her."

When this statement was made by the prosecuting attorney and objected to by counsel for appellant, the court told the jury that he did not know whether counsel was misstating the evidence or not, but that they

were the judges of the evidence, and as to whether or not the prosecuting attorney had misstated same.

While the witness O'Dell did not testify in the exact language as stated by the prosecuting attorney, he did testify that the appellant had said to him that he (appellant) "did not care a G— d— about that woman." And witness Chas. Beeson testified that appellant stated to him on the day he procured his license to marry that he was not going to live with her, and that if he did, "By G—, you will hear what I am going to do with her."

While the prosecuting attorney failed to designate the witness who testified to the statement contained in his remarks, yet it appears from the record that substantially these remarks were testified to by a witness. Therefore, the remarks of counsel were warranted by the evidence, and the court ruled correctly in holding that the jury were the sole judges of the evidence, and as to whether or not the prosecuting attorney had misstated the same.

There is no reversible error in the record, and the judgment is therefore affirmed.

HUTCHINS v. GLOBE LIFE INSURANCE COMPANY.

Opinion delivered December 11, 1916.

1. LIFE INSURANCE—WARRANTIES AS TO HEALTH—KNOWLEDGE OF COMPANY PHYSICIAN.—Where the physician representing an insurance company had knowledge that the applicant for insurance whom he was examining, was subject to epilepsy, his knowledge will be imputed to the company, and it can not complain that the applicant was guilty of a breach of warranty.
2. LIFE INSURANCE—NONPAYMENT OF PREMIUM NOTE—EXTENSION OF TIME BY AGENT.—Where the assured gave his note to an agent in payment of a premium on a policy of life insurance, where the agent had authority to take such notes in his own name, and where the policy provided for a forfeiture for failure to pay premiums promptly, it is a question for the jury whether the agent extended the time of payment, and whether he had authority to do so, and it is error to withdraw those questions from the jury.

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

Dunaway & Chamberlin, for appellant.

1. The first annual premium was paid. If not, the time was extended and the time was waived. Having elected to waive, the company is estopped afterward to claim a forfeiture. 49 Ark. 215; 37 *Id.* 47; 112 *Id.* 178; 67 *Id.* 588; 53 *Id.* 500; 150 S. W. 978; 129 Pac. 865.

No notice of cancellation of policy was given. 72 Ark. 47.

2. Hutchins could neither read nor write. The examining physician wrote the answers, and he knew the facts. The knowledge of the agent was the knowledge of the principal and the company is estopped to claim a forfeiture. 71 Ark. 295.

3. The limitation is void by § 4380, Kirby's Digest.

4. It was error to direct a verdict.

Hawthorne & Hawthorne and *D. K. Hawthorne*, for appellees.

1. The first premium was not paid and the policy was forfeited. 112 Ark. 171; 92 *Id.* 385; 85 *Id.* 337; 75 *Id.* 25; 74 *Id.* 507; 104 *Id.* 288.

2. The applicant's answers were warranties, and they were false. They avoided the policy. 58 Ark. 528; 71 *Id.* 295. A verdict was properly directed. 72 Ark. 620; 82 *Id.* 400.

3. The policy was automatically cancelled when the note was not paid. Notice was mailed. 72 Ark. 27.

SMITH, J. This is a suit to collect a policy of insurance on the life of Charles H. Hutchins, who died February 4, 1914. The issuance and delivery of the policy by the company is admitted; but it denies any liability thereunder, for the reason, first, that the insured had failed to state that he was afflicted with epilepsy at the time of his examination for his insurance, and for the reason, second, that the insured failed to pay

his note given in payment of the first annual premium. At the conclusion of the evidence, the court directed a verdict in favor of the insurance company, and this appeal has been prosecuted from that judgment.

(1) It is admitted that the answers contained in the application for the insurance did not disclose the fact that the applicant had epilepsy and that these answers were made warranties. The insured was an illiterate man who could neither read nor write, and there was proof to the effect that the examining physician for the insurance company had attended and treated him for epilepsy, and knew of his condition. While this testimony was not undisputed, there was testimony sufficient to support a finding to that effect, and the jury might have so found had the determination of that question been submitted. If, in fact, the doctor had this knowledge when he wrote down a false answer, his knowledge is imputed to the company, and it can not now be heard to say there was a breach of the warranty. *Franklin Life Ins. Co.* v. *Galligan*, 71 Ark. 295; *Gray* v. *Stone*, 102 Ark. 146; *Woodmen of the World* v. *Hall*, 104 Ark. 538; *Peebles* v. *Eminent Household of Columbian Woodmen*, 111 Ark. 435; *Peoples Fire Ins. Assn.* v. *Goyne*, 79 Ark. 315.

It is admitted that the note given for the premium was past due and unpaid at the time of the death of the insured, and that the policy provided that the contract of insurance should be void in this event. It is said, however, that this failure to pay the note, which would ordinarily have avoided the policy, did not have that effect here for the reason that the company's agent had agreed to an extension of the time of payment to a date beyond that on which the insured died. It is said for appellee that upon the maturity of the note its collection was attempted but, failing to collect it, a letter was written to the insured that the policy was cancelled and the policy was entered upon the record of the cancelled policies. It is further insisted that the agent had no authority to extend the time of payment of a past due note, and that he had not, in fact, done so.

The secretary of the insurance company testified that he entered the cancellation of the policy upon the company's record provided for that purpose and on January 20, 1914, wrote the insured advising him of that fact. There was no proof, however, that the letter was mailed, and there is affirmative proof by a brother of the insured that he read for his brother all letters received by him, but this brother had never seen the letter in question, and no such letter was found among the insured's effects.

Appellant offered in evidence a contract between the insurance company and the Globe Agency Company a corporation organized for the purpose of writing insurance for appellee, whereby the agency company was given an exclusive contract to write insurance for the company, and in consideration therefor agreed to write a stated amount of insurance and to receive as compensation a fixed per cent. of the first annual premium, all of which it was to collect, and, after deducting its own per cent. to pay the balance to the insurance company. The secretary of the appellee insurance company testified that the agency company received the moneys and credits and required the agents of the agency company to pay the net amount to carry their actuary insurance at Little Rock for the year. This amount the agent was required to pay into the life insurance company, and "the balance of the premium could be handled in a way that would be satisfactory to all concerned. That we were anxious for the agents to do well and if an agent got short, the agency company would finance him, but we invariably required the agent to pay the net insurance." He further stated that he also knew that one Riddle, a soliciting agent, had taken this premium note in his own name, and this was done in accordance with the rule of the insurance company, and that as Riddle had authority to take the note in his own name, he was liable to the company for its part of the premium when he had done so. He also testified that this note showed on its face that it was given for insurance, but did not state the particular insurance; while

another agent of the appellee who had the note for collection testified that the note did not recite the consideration for which it was given; but both agree it was payable to Riddle's order. The note was last accounted for as being in the hands of an agent of the insurance company for collection, but it was not produced at the trial. Riddle was agent for both the insurance company and the agency company, and had taken the application upon which the policy in suit was issued and the note given in payment thereof.

Appellants offered to prove by four witnesses that Riddle, in soliciting their applications for insurance, and by way of inducement to witnesses to become policy holders, had assured them that he had extended the time for the payment of the note given him by Hutchins until the fall of 1914; but the court excluded this evidence.

An agent of the Globe Agency Company named Morgan testified that the insurance company sent him the note for collection, and that he advised Hutchins of that fact, whereupon Hutchins brought the policy and offered to surrender it for his note, and made the statement at the time that he was not able to pay the note. Witness advised the insurance company of this offer and asked instructions, and received a letter from the insurance company directing him to refuse to accept the policy and press collection of the note, and that the company would send Riddle down to adjust this matter, and that Riddle called upon him and secured the note and upbraided him for writing the company about it, telling him that he owned the note and had paid the company its portion thereof, and Riddle took the note to a Mr. Gardner, who was also an agent of the agency company, and left it with him for collection, making the statement at the time that he had extended time for payment until the fall of 1914 when the insured would pay with his cotton. These conversations occurred after the maturity of the note, and while they were not all admitted in evidence by the court, appellant offered to make this proof, and in view of the fact

that there was a directed verdict in favor of the insurance company, we must give this evidence its highest probative value.

(2) We think the evidence recited entitled appellant to go to the jury upon the question of the extension of the time by Riddle for the payment of this note and his authority so to do. Cooley's Briefs on Insurance, vol. 1, page 345; *Queen of Ark. Ins. Co.* v. *Cooper*, 81 Ark. 160; *Shawnee Mutual Fire Ins. Co.* v. *Cannedy*, 129 Pac. 865; *American Employers' Liability Ins. Co.* v. *Fordyce*, 62 Ark. 562.

This testimony presents a state of facts similar to those in the case of *Mutual Life Ins. Co.* v. *Abbey*, 76 Ark. 328, in which case it was said:

"Mr. Remmel, the general agent, was clothed with authority to transact generally the company's business in this State, and to collect the premiums, and was permitted by the company to accept notes to himself in lieu of cash to the company, the company looking to him instead of the policy holder for the cash in such cases. This general power gave him authority to bind the company by accepting notes in lieu of cash; and, whether he paid the company or not, when he accepted a note and waived cash payments, the company was bound by his act, for it was within the apparent scope of his agency. See *Miller* v. *Life Ins. Co.*, 12 Wall. (U. S.) 285, and long line of decisions following and approving it collected in 7 Rose's Notes on U. S. Reports, pp. 546-549."

We conclude, therefore, that the court should not have directed a verdict for the insurance company upon either of the theories upon which that action is defended by learned counsel for appellee, and the judgment of the court below will, therefore, be reversed and the cause remanded for a new trial.

PRESCOTT & NORTHWESTERN RAILWAY COMPANY v. DAVIS.

Opinion delivered October 30, 1916.

1. BILLS OF LADING—TITLE TO SHIPMENT OF FREIGHT.—The purchaser of the bills of lading who has accepted a delivery thereof and paid for the same, becomes the owner of the shipment of freight.
2. BILLS OF LADING—CONSTRUCTION.—Bills of lading, insofar as they are receipts, may be explained or contradicted, but as contracts for the carriage of property, they are to be construed according to their terms.
3. CARRIERS—RIGHTS OF PURCHASER OF BILL OF LADING.—The purchaser of a bill of lading may rely upon the representations of the carrier made therein, and the carrier will be liable to him for damages resulting from a violation of its terms.
4. CARRIERS—TERMS OF SHIPMENT—BILL OF LADING.—It will be presumed that any oral negotiations respecting the terms or conditions upon which goods are received for carriage, the route and rate at which they are to be forwarded, are merged in the bill of lading.
5. CARRIERS—DAMAGE TO FREIGHT.—A carrier will be liable for damages to freight, in an action by the *bona fide* purchaser of the bill of lading, where the goods were not routed as specified in the bill of lading, and the damage was the result of such mis-routing.

Appeal from Nevada Circuit Court; *George R. Haynie*, Judge; affirmed.

STATEMENT BY THE COURT.

S. P. Davis brought suit for damages, for the total loss of two carloads of strawberries, alleged to have been caused by delay in transportation and delivery.

The complaint alleges that the railroad company issued two negotiable bills of lading, one for each carload of strawberries, on about the 8th of May, 1913, agreeing therein to ship from Prescott, Arkansas, via East St. Louis over the Mo. Pac. R. R. to Buffalo, N. Y., in which bills it appeared that the berries were originally consigned to G. L. Mays, Kansas City, but had been diverted from Kansas City; that at the time of the issuance of the bills the shipments had not in fact been diverted from Kansas City, but had been deviated from the route specified in the bill of lading and trans-

ported to Kansas City, 500 miles out of the way from said route. That on the 9th day of May he purchased the bills of lading, in good faith, which were assigned and sent to him in the usual course of business and in reliance upon the representations made therein, that the cars had been diverted from Kansas City and were in transit by the usual route from Prescott, Ark., to Buffalo, N. Y., as specified, and thereby he became the owner of the carloads of berries. That by reason of their shipment out of the way by Kansas City, they were delayed 48 hours and reached the market in Buffalo in a damaged and decayed condition, or absolutely worthless, and that because of the negligence and misconduct, he was damaged in the sum of $1,800.

The answer admitted that the shipment orignated on its line; arrived at Prescott on the afternoon of the 8th of May, when the shipper, G. L. Mays ordered the cars consigned to G. L. Mays, Kansas City, Mo., and they were so waybilled, no bills of lading being issued on that day, according to its custom. On the 9th, instructions were given to divert the cars and ship to Geo. DeLong & Co., Buffalo, N. Y., and upon receiving said instructions, appellant ascertained that the cars had passed through Little Rock, Ark., on their way to Kansas City, advised the shipper of that fact and issued the bills of lading at the shippers request, noting on each, "Originally consigned to G. L. Mays, Kansas City, Mo. Diverted from Kansas City;" meaning thereby that said cars would upon arrival at Kansas City be diverted to Buffalo, N. Y. Alleged that the shipper received the bills of lading, knew that the cars had already passed Little Rock, and that they were ordered diverted from Kansas City and would first go to that place before being diverted.

The answer denies the bills of lading were negotiable; that the berries were deviated from the route mentioned therein and sent 500 miles out of the way; that the plaintiff purchased the bills of lading on the 9th of May in good faith, paying value therefor and that he purchased same in reliance upon the represen-

tations of the bills; denied that the bills represented that the cars had been diverted from Kansas City, and were in transit by the usual course and customary route from Prescott via East St. Louis, to Buffalo, N. Y. Alleged that the company complied with the request and instructions of the shipper and that the bills of lading gave appellee notice that the cars would be diverted from Kansas City. Denied any damage to the shipment, that the berries were originally worth $1,800, and alleged that if any damage resulted, it was caused by reason of the berries being unfit for shipment and the negligent manner in which they were packed.

It appears from the testimony that appellee, a broker, purchased the two cars of berries on the 9th of May between 9 and 11 o'clock, through his clerk in the office, over the 'phone from Mays at Morrilton. Mays said he had two cars of berries at Prescott that were billed to Kansas City, but he could have them diverted, and was told that if he could have them diverted and shipped on the direct route from Prescott over the Mo. Pac. through East St. Louis to Buffalo, that he would purchase same and the trade was made upon Mays stating that this would be done. The next day, the 10th, the bills of lading were delivered to appellant, showing the notations set out in the complaint and "date of May 8, 1913, 449 crates of strawberries consigned to the order of G. L. Mays, Buffalo, N. Y. Notify Geo. DeLong & Co., Buffalo, N. Y. Route Prescott, Mo. Pac. East St. Louis, Lake Shore delivery." They are signed by the shipper. On the back among other provisions, the following: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper, etc."

A check was given in payment and drafts were forwarded to Buffalo with the bills of lading attached.

Appellant went to Buffalo and inspected the berries which had been sold for $2 per crate and found them decayed and worthless, the purchaser refusing to receive them at all. They arrived two days late, having been shipped around by Kansas City, 500 miles from the direct route designated in the bills. He stated also that if the berries had been marketable, he would have received $855.80 net for each car.

He had no notice when he paid for the berries that the cars were going via Kansas City. The bills were endorsed to him by Mays, the shipper.

The agent for the railroad testified that he made out the bills of lading, about noon on May 9. That the order to divert the cars was given at the hotel at noon by an agent of Mr. Mays, on the receipt of which he called the Iron Mountain at Little Rock after first telling Mays' agent he expected the cars had already passed that point, and found that they had passed Little Rock about 11 o'clock. The cars were shipped on a way bill issued on the 8th; the bills of lading were issued about 3 o'clock on the afternoon of the 9th, and Stone, the agent who signed the bills for the shipper Mays, had learned that the cars had already passed Little Rock. Witness said after he learned they had passed Little Rock, he issued the bills of lading with the endorsement already set out, "To show that the cars were moving by indirect route and by way of Kansas City." Stated the direct route was as shown by the bills of lading through East St. Louis, and not by Kansas City. He stated his said notation on the bill of lading meant that they were to be diverted from Kansas City after reaching there. He had never issued any bills of lading through to Kansas City before. Said he told the shipper after trying to give him the benefit of the direct route, that they had already moved to Kansas City and were afterward to be diverted from that point as they could not catch them after they left Little Rock.

The chief clerk of the traffic department of the Iron Mountain railroad, stated that the shipment of berries originating in Prescott routed via East St. Louis, Big

Four, Lake Shore delivery would take a through rate, and that there was no traffic agreement between appellant railroad and the roads in Kansas City, by which a car could be billed from Prescott via Kansas City via East St. Louis to Buffalo on the through rate. The diversion point of the shipment originating at Prescott going to Kansas City is Little Rock and if it had passed that point, it would be reconsigned out of Kansas City. Stated he would not understand from the notation on the bill as to the shipments being diverted from Kansas City, that they were ever to go there, but had been diverted or would be and take the regular route.

The court directed the jury to find a verdict for the plaintiff and assess the damages from the testimony, allowing 6 per cent interest thereon from the 14th of May, over the objections of appellant.

The jury returned and stated they had not reached a verdict and the court told them they were to find for the plaintiff the sum of $1,711.60. A member of the jury stated this would not be satisfactory to all the members and thereupon the court directed the jury to return a verdict for that amount, which was done, and from the judgment thereon this appeal is prosecuted.

McRae & Tompkins, for appellant.

1. The Arkansas statute on bills of lading does not change the common law. The statute making bills of lading negotiable does not clothe them with the attributes of notes or bills of exchange in the sense that they pass title by endorsement without inquiry, as in the case of a note negotiated before maturity, but the purchaser takes title by endorsement of such bill of lading subject to any defense which can be made against the shipper. Kirby's Digest, §§ 524, 528, 529; 101 U. S. 565; 80 Ark. 601-8; Hutchinson on Carriers, § 176; Daniel on Negotiable Instruments (4 ed.), § 1748; 130 U. S. 423; 55 Ark. 525; 6 L. R. A. (N. S.) 302.

2. State statutes affecting interstate bills of lading are superseded or suspended by the Carmack Amendment to the Interstate Commerce Law. 77

Ark. 482, 490; 227 U. S. 657; 233 U. S. 97; 108 Ark. 115; 115 Ark. 20; 4 R. C. L., § 267; 6 L. R. A. (N. S.) 302.

3. The endorsement on the bills of lading put the purchaser on notice that the cars were not taking the direct route. 101 U. S. 557; 4 Elliott on Railroads, § 1429; 99 Ala. 416; 78 Am. Dec., § 334; 19 Fed 123. It was a jury question as to whether the appellee was a *bona fide* purchaser under all the evidence. The endorsement on the bill of lading was ambiguous—railroad men themselves, as appears in the testimony, differed as to its construction. 81 Ark. 337; 4 R. C. L., § 26.

4. The court erred in its instruction on the measure of damages. This being an interstate shipment, the rules of law announced by the Federal courts must control. Clause 6 in the bill of lading (quoted in the opinion) is binding. 112 U. S. 331; 4 R. C. L., § 248; 40 L. R. A. 350; 70 U. S. 107; 194 U. S. 427; 139 Fed. 127; 204 U. S. 505. If the stipulations on the bill of lading referring to the value of the property was valid, the court erred in deciding that the price at Buffalo was the measure of damages, and there was no evidence by which the court or jury could determine the damages because appellee failed to prove what the price at the point of shipment was.

5. The appellant was not estopped from showing the actual agreement with the shipper. 177 U. S. 665; 105 U. S. 7; 6 L. R. A. (N. S.) 302; 130 U. S. 416.

Mehaffy, Reid & Mehaffy, for appellee.

1. We do not insist that bills of lading are strictly negotiable in the ordinary sense, as bills of exchange or promissory notes, but they are under many restrictions growing out of the nature of the contract and the long usage and demands of commerce from which ordinary contracts are free. One of their common uses of which the courts take notice is that they may be used through banks to obtain advances and credits. 33 S. E. 821, 823.

Bills of lading insofar as they are receipts, may be explained or contradicted; but as contracts they must be construed according to their terms. 32 Ark. 669; 41 N. E. 480; 36 N. E. 624; 68 S. E. 617; 4 Elliott on Railroads, § 1423; 93 Ark. 545.

There is no uncertainty nor ambiguity in the terms as to the route the shipment was to take. The notation on the bill of lading purports to deal only with the *route*, and not with the destination. The carrier writes the bill, and its terms can not be varied or modified by parol testimony. 61 S. E. 298; 25 N. W. 761; 21 N. E. 341; 14 Wall. 579.

Previous contracts between the shipper and the carrier relating to the shipment of freight will be deemed to be merged in the bill of lading. 93 Ark. 537; 215 Fed. 88.

Bills of lading are to be construed more strictly against the carrier. 4 Elliott, § 1424; 142 Fed. 669.

2. There was no error in the court's holding as to the measure of damages. The bill of lading provided that the measure should be based upon the *bona fide* invoice price of berries at the point of shipment. The testimony shows that the berries *were sold f. o. b. Prescott*, point of shipment, and that this was the market price at Buffalo.

The stipulation referred to in the bill of lading is valid only when fair and reasonable and based upon a consideration. 94 Ark. 105; 115 Ark. 20.

Appellant did not, by requested instruction or otherwise, indicate to the court any particular reason why the amount of the verdict was not correctly calculated or based upon the evidence. 33 Ark. 707; 39 Ark. 17; 39 Ark. 337; 93 Ark. 589; 126 S. W. 99; 98 S. W. 366; 80 Ark. 587; 153 S. W. 1111; 106 Ark. 315.

KIRBY, J., (after stating the facts). The facts of this case are virtually undisputed. The cars of berries were started from Prescott on the night of the 8th of May, no bills of lading being issued therefor until the afternoon of the 9th, when it was known to appellant

and the shipper that the cars had already passed Little Rock, the diversion point, and the shipper signed the bills of lading as written.

Appellee knew the cars had been billed from Prescott to Kansas City on the 8th; did not see the bill of lading until the 10th when he paid for the berries, and when he received the bills and inquired of the shipper as to the location of the cars he was advised they had gone straight on through Little Rock.

(1) The bills of lading were negotiable and were transferred and delivered to appellee upon his payment of value therefor and he thereby became the owner of the shipment. *Martin* v. *Railway Company*, 55 Ark. 525.

(2) Such bills insofar as they are receipts may be explained or contradicted but as contracts for carriage of property, they are to be construed according to their terms. *Western A. & R. Co.* v. *Ohio Valley Bkg. & Tr. Co.* (Ga.), 33 S. E. 821; *Little Rock & etc. Rd. Co.* v. *Hall*, 32 Ark. 669; *Cleveland, C. C. & St. Louis L. R. Ry.* v. *Moline Plow Co.*, 41 N. E. 480; *Merchants Dispatch Transp. Co.* v. *Furthmann*, 36 N. E. 624.

(3) The carrier knew when the bills of lading were issued that they were negotiable and could be used to obtain advances on the shipment by attaching drafts thereto and discounting them with some bank, which would forward for delivery upon payment of such draft. These bills contain nothing that would put the purchaser on notice that the shipment would not take the usual route as designated therein, the notation made thereon by the carrier's agent indicating that notwithstanding the shipment had been originally made to Kansas City, it had been diverted therefrom, and the purchaser understood that such was the case and had the right to rely upon the terms of the written contract of carriage or bill of lading, in making his purchase. *Western & A. R. Co.* v. *Ohio Valley Bkg. & Tr. Co.*, *supra.*

(4) It will be presumed that any oral negotiations respecting the terms or conditions upon which the goods are to be received, the route and rate at which they are

to be forwarded, are merged in the bill of lading. 4 Elliott on Railroads, § 1423; *St. L., I. M. & S. Ry. Co.* v. *Jones*, 93 Ark. 545.

The evidence is undisputed as to the damage and no clause of the bill of lading providing for a different rule of computation was set up at the trial, nor urged as an objection to the measure of damages as assessed. There was no testimony showing the rate charged for the transportation of the shipment nor that the shipper had any other option than to ship under the terms of the contract as made, and at the rate charged.

We do not therefore see that any question can now be made that the damages were erroneously assessed upon a different basis than provided for in the contract of carriage of an interstate shipment. *St. L., I. M. & Sou. Ry. Co.* v. *Cumbie*, 101 Ark. 179; *K. C. P. & G. Rd. Co.* v. *Pace*, 69 Ark. 256.

The judgment is accordingly affirmed.

HART, J. (On rehearing.) Counsel for appellant ask for a rehearing upon the authority of *Atchison, Topeka & Santa Fe Ry. Co.* v. *Harold*, 241 U. S. 371.

(5) In that case the Supreme Court of Kansas held that the bill of lading was an intrastate bill, and that under the State laws an innocent holder of a bill of lading was invested with certain rights not available to the shipper. The court there held that the bill of lading in question was an intrastate bill of lading, and its decision was therefore based wholly on the State statute in regard to innocent purchasers of bills of lading, and entirely ignored the general commercial law on the subject as laid down by the Supreme Court of the United States. The latter court held that the shipment was an interstate one, and therefore governed by decisions of the Supreme Court of the United States. This court, in the case of *Kansas City & Memphis Railway Company* v. *Oakley*, 115 Ark. 20, and other decisions recognized that we are controlled by decisions of the Supreme Court of the United States in regard to

interstate commerce bills of lading. The negotiable character of an interstate bill of lading is discussed in *Pollard* v. *Vinton*, 105 U. S. page 7, and the rule there stated has since been followed by the Supreme Court of the United States. In that case the court said:

"A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense. It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."

This court also recognized this rule in the case of *Martin* v. *Railway Company*, 55 Ark. 510, and other cases. In that case following the decisions of the Supreme Court of the United States, the court, in effect, held that where a transportation company shows that merchandise was not actually received by it and that a bill of lading has been issued by its agent, either through fraud or mistake that, as the receipt of the goods lies at the foundation of the contract to carry and deliver, there can be no such contract unless the goods have actually been received; and that an agent

of the carrier has no authority to issue a bill of lading without actual receipt of the goods, and can not bind the carrier, even as to an innocent holder of the bill of lading. A careful reading of the decision in the case of *Railway Company* v. *Harold*, *supra*, will show that the Supreme Court of the United States has not in any way departed from the rule announced in its earlier cases. We have not set out the facts in that case because they have no application whatever to the facts of the case at bar. In the instant case the undisputed evidence shows that the strawberries were received by the carrier from the shipper, and that they were in good condition when delivered to the carrier. The uncontradicted evidence shows that the station agent had the authority to issue the bill of lading changing the destination of the strawberries. The berries were originally consigned to the shipper at Kansas City, but he had the right to have them diverted. The agent of the railroad company issued a bill of lading consigning them to Buffalo, New York, by the direct route through East St. Louis. The agent had authority to issue this bill of lading changing the route and destination of the berries, and it is not even claimed by the railroad company that he did not have such authority. Therefore, the railroad company is bound by the terms of the bill of lading issued by it. Because the undisputed evidence shows that the agent had authority to issue the bill of lading in question the court did not err in directing a verdict against the railroad company. It is true that railroad companies are not dealers in bills of lading and are carriers only; but they are held to rigid responsibility as carriers. As we have just stated, the agent had authority to issue the bill of lading in question, and the railroad company is bound by its terms.

It follows that the motion for a rehearing must be denied.

FORT SMITH LIGHT & TRACTION COMPANY *v.* HENDRICKSON.

Opinion delivered November 13, 1916.

1. NEGLIGENCE—PERSONAL INJURY—OPPORTUNITY TO AVOID INJURY.—Plaintiff, while riding on a fire wagon, in the course of his duty, was struck by a street car at a street crossing and injured. *Held*, an instruction that the motorman was under a duty to stop his car, if in the exercise of ordinary care he could have heard the approach of the fire wagon, was proper.
2. EVIDENCE—PERSONAL INJURY ACTION—TESTIMONY AS TO SIMILAR CONDITIONS.—In an action for damages for personal injuries, sustained by a fireman, who, while riding on a fire wagon, was struck at a blind street crossing and injured by a street car, testimony by witness, that while riding on a street car upon another occasion, that he could hear the approach of a fire wagon while nearing the said crossing, is competent.
3. TRIAL—IMPROPER REMARKS OF COUNSEL—ADMONITION BY COURT—PERSONAL INJURY ACTION.—In an action for damages for personal injuries, counsel for plaintiff, during argument, made some improper remarks; the defenant objected, and "thereupon counsel for plaintiff attempted to withdraw said remarks and the court admonished the jury to disregard them." *Held*, what the court actually said was not in the record, but that it will be presumed, in the absence of a showing to the contrary, that the language of the court was sufficient to remove from the minds of the jury any prejudice created by the remarks of plaintiff's counsel.
4. DAMAGES—PERSONAL INJURIES—ELEMENTS OF DAMAGE—EARNINGS AS BOXING TEACHER.—In an action for damages for personal injuries, the plaintiff may show, in proof of his damages, a loss of earnings, by his inability to act, after the injury, in the capacity of a teacher of boxing, at which business he was earning about $75 per month.
5. DAMAGES—AMOUNT—PERSONAL INJURY ACTION.—Plaintiff was injured by defendant's negligence, suffered great pain, and his ankle was permanently injured; he was earning $75 per month as a fireman, and $75 per month as a boxing instructor. *Held*, a verdict awarding $8,500 damages was not excessive.
6. NEGLIGENCE—PERSONAL INJURIES—INJURY TO CITY FIREMAN.—Plaintiff, an employee in a city fire department, was injured while driving on a fire wagon to a fire, by being struck by a street car; plaintiff had nothing to do with driving the fire wagon. *Held*, no negligence of the driver of the fire wagon affected plaintiff's right to recover unless the negligence of the driver of the fire wagon was the sole cause of the accident.

Appeal from Sebastian Circuit Court, Fort Smith District; *Geo. W. Dodd*, Special Judge; affirmed.

STATEMENT BY THE COURT.

Appellee sued appellant to recover damages which he alleges were sustained by one of appellant's street cars negligently colliding with a fire wagon in which he was riding. The material facts are as follows:

Appellee, Leo Hendrickson, was a fireman employed by the city of Fort Smith and appellant was a corporation operating a street car line in that city. On the afternoon of August 11, 1915, appellee was injured by one of appellant's street cars colliding with a fire wagon in which appellee was riding on his way to a fire. The accident occurred at the intersection of A and Fifth streets. Fifth and Sixth streets run north and south, and are parallel to each other. A and B streets run east and west and are parallel to each other. These streets are 300 feet apart and are 50 feet wide, including sidewalks. Garrison avenue is 100 feet wide. A fire station is situated on Sixth street, one hundred feet north of the corner of A street, and the distance from the fire station down A street to Fifth Street, where the accident occurred, is a little over 400 feet. Garrison Avenue is one block south of where the accident occurred. A fire alarm was turned in from a point between Fourth and Fifth streets on Garrison Avenue. Four fire wagons left the station, above referred to, and appellee was on the first wagon that left the station, riding on the seat with the driver. All the fire wagons were equipped with rotary bells, but the front wagon, upon which appellee was riding was equipped with a triple stroke rotary bell which could be heard above the rest. The gong upon each fire wagon was rung continuously from the time they left the fire station until the accident occurred, and the wagons themselves made considerable noise, each having steel tires and being drawn by horses over brick paved streets. According to the testimony of the plaintiff, the fire wagon on which he was riding was going at a speed of ten or twelve miles an hour, and according to the testimony of the motorman of the street car, it was traveling

at a speed of fifteen miles an hour. The fire wagon was driven down Sixth street to A street, and was then turned down A street. The driver said that he intended to turn into Fifth street and began to pull up when he was within 35 feet of the street car and before he saw it. After he saw the car, thinking he would not have time to make the turn, he attempted to drive straight across the track. The street car struck the right hind wheel of the fire wagon and knocked it over so that the fire wagon struck the curb on the southwest corner of Fifth and A streets. The collision occurred in the center of A street. Appellee was on a seat with the driver, but had no control over the team or wagon. The collision pinned him under the fire wagon and he was severely injured. The street car was traveling south toward Garrison Avenue at the time of the accident. The crossing at which the accident occurred is what is commonly called a blind corner. That is to say, it is a corner where a building is on the property line and cuts off the view from the street.

The motorman testified that on this account he began to cut off the power at B Street and reduced the speed of the car to eight or ten miles an hour and began sounding the bell continuously until the accident. That as he approached A Street, about a hundred feet away from it the car was travelling at six or seven miles an hour, and when fifty feet away from A Street the car was traveling at the rate of five of six miles an hour; that at the time of the accident the car was going at a rate of speed at which it could be stopped in thirty or forty feet. The motorman also testified that he tried to stop the car as soon as he saw the fire wagon. According to the testimony of appellee the motorman did not try to stop the car until he got within four or five feet of the fire wagon and the street car at that time was going at the rate of ten miles an hour. There was a city ordinance providing that all fire engines or fire apparatus shall have the right of way upon any street in the city of Fort Smith. Another ordinance provided that when a fire alarm is given by the gongs attached to the fire wagons, all street cars shall be re-

quired to stop running until the fire wagons have passed or until the driver ascertains that the fire wagons are not moving in such a direction as to interfere with his car.

Without stating the testimony with more particularity it is sufficient to say that the evidence introduced in behalf of appellee showed that the accident occurred by reason of the negligence of the motorman in charge of the street car and evidence adduced in favor of appellant tended to show that there was no negligence on his part. The jury returned a verdict for appellee in the sum of $8,500 and from the judgment rendered appellant prosecutes this appeal.

Hill, Fitzhugh & Brizzolara, for appellant.

1. There was clearly prejudicial error in instructions 7 and 8 given for plaintiff. They clearly predicated a liability upon the violation of the city ordinance. 116 Ark. 125. Another vice in these instructions is that they made it the motorman's duty absolutely to stop when it was a question for the jury as to whether the motorman was negligent in not stopping. 109 N.W. 619.

2. The lower court confused the doctrine of imputed negligence with that of direct personal negligence. 8 L. R. A. (N. S.) 643, 671 and note; 7 So. Rep. 666; 76 S. W. 973; 28 So. Rep. 87.

3. The evidence of witnesses Clayton, Euper, Cleaver and Gardner as to occurrences on Fifth Street cars at various subsequent times was inadmissible. Black Law & Practice in Accident Cases, § 223; 138 N. W. 320; 35 S. W. 297; 50 Ark. Law Rep. 450; 1 Greenleaf on Ev., § 14a; 1 Elliott on Ev., § 157.

4. Miss Parke's testimony was admissible as relevant and material. It stated a fact. 89 Ill. App. 1; 15 So. 508; 39 Atl. 859, par. 7.

5. The remarks of Ben Cravens, attorney for plaintiff, were highly prejudicial. 116 Ark. 514, 520.

6. The verdict is excessive and the court erred in

refusing the instructions asked by defendant. 39 Atl. 110; 76 Ark. 356; 77 *Id.* 401; 81 *Id.* 368; 28 So. 87.

7. The testimony of plaintiff as to his earnings as a prize-fighter was inadmissible. Kirby's Digest, § 1983; 75 Ark. 184; 118 Am. Dec. 35, 37; 115 N. Y. 507; 2 Sh. & Redf. on Negl., § 745; 41 Conn. 66; 87 Mass. 213, 216; 2 S. W. 878; 2 Bish. New Cr. Law, § 35; 1 Cox C. C. 177; Hughes Cr. Law & Pr., § 176; 119 Mass. 350; 1 Hawks (N. C.) 420; 3 Jones (N. C.) 131; 1 Car. & M. 314; 10 Cox 371; 180 Fed. 779.

Oglesby, Cravens & Oglesby, for appellee.

1. There is no error in instructions 7 and 8. If the evidence established the facts set out, the motorman was guilty of negligence. Specific objections should have been made. 104 Ark. 409; 87 *Id.* 396. Taken in connection with all the instructions given, they were not prejudicial. 117 Ark. 504; 108 *Id.* 292; 105 *Id.* 533; 111 *Id.* 272; 121 N. W. 12; 108 *Id.* 95.

2. In this case gross negligence was clearly established. 95 N. W. 100; 113 S. W. 239; 121 N. W. 12; 54 S. W. 470.

3. The testimony of Euper *et al* was clearly competent. 113 S. W. 239; 95 N. W. 100; 54 S. W. 470; 112 Ark. 457; 115 *Id.* 101.

4. The verdict is not excessive.

5. There was no testimony that plaintiff earned anything as a prize-fighter. Athletics, including instruction in boxing, is legitimate. The motion to exclude was only a general objection. 112 Ark. 394. His wages were not connected with anything unlawful. 85 Ark. 9; 94 *Id.* 96; 103 *Id.* 114.

HART, J. (after stating the facts). It is insisted by counsel for appellant that the court erred in giving instructions numbered 7 and 8 at the request of appellee. The instructions read as follows:

"7. If the evidence shows that defendant's motorman did not hear the approach of the fire wagon upon which plaintiff was riding, in time to stop his car,

before the wagon was struck, if it was struck, yet if the jury believes from the evidence that he could in the exercise of ordinary care have heard the approach of said fire wagon in time to stop his car before the collision and that his failure to hear the approach of the fire wagon was not due to the fact that it could not be heard, but to the fact that on account of his failure to listen, he did not hear same, and that he could have heard same in time to stop the car if he had listened, with ordinary care and attention, then the motorman was guilty of negligence in the operation of the car."

"8. If the jury believe from the evidence that a fire alarm was given by the ringing of fire bells or by gongs attached to the hose cart or fire wagons, and that the motorman, operating the street car at the time of such alarm, heard such alarm before colliding with the fire wagon, provided he might reasonably apprehend that fire wagon was moving toward such car track, then it was his duty to stop the car until said fire apparatus passed, or until he ascertained that same was not moving in such direction as to interfere with the car. If the jury believe from the evidence, he could have heard same in time to stop the car before a collision if he had been listening with ordinary care and attention, the defendant is held to the same duty as if the motorman did in fact hear the alarm."

(1) It will be remembered that there was a city ordinance which provides that when a fire gong is sounded all street cars shall be required to stop running until fire wagons shall have passed. It is insisted that the instructions, in effect, told the jury that it was the duty of the motorman to stop the car upon hearing the approach of the fire wagon, or if in the exercise of ordinary care he could have heard the same and that a violation of this duty as provided by the ordinance was negligence. In other words it is insisted that the instructions are open to the same objection as those condemned in the case of *Bain* v. *Fort Smith Light & Traction Company*, 116 Ark. 125. We do not agree with counsel in this contention. The instructions set out

above were not designed to cover the same field as those criticised in the Bain case. In the Bain case the court said that in a common law action against the street railway company for an injury alleged to have been caused by the company's negligence, if at the time of the injury the street car producing it is being operated in a manner that violated an ordinance of the city, such fact may be shown as tending to establish the allegations of negligence. The court held, however, that it would be erroneous to tell the jury that the operation of street cars in violation of a city ordinance was negligence as a matter of law. In the present case, at the request of appellant, the court expressly told the jury that the failure of appellant to comply with the city ordinance in question did not create a liability against appellant, but that it could be considered in measuring the care required of the respective operatives of the street car and fire apparatus. Moreover, in the instructions given at the request of appellee, the jury was specifically told that the ordinance in question did not create a liability against appellant and that if in the exercise of ordinary care the motorman should have known of the approach of the fire wagon and that such failure caused the accident, then such failure to obey such ordinance was a circumstance which the jury might consider in determining whether the company was or was not guilty of negligence. The instructions complained of were not directed against the violation of the ordinance in question; they had no reference to that phase of the case.

This was a common law action for negligence and the instructions complained of were directed toward what the jury might find constituted negligence on the part of appellant. They made no reference whatever to the ordinance in question and their correctness must be tested as if no such ordinance existed. It is well settled that it is not practicable that the court should state all the propositions of law involved in a case in one instruction. Where the whole law can not be embodied in one proposition, it is better that the instruction

should not conclude in "find for the plaintiff" or "find for the defendant," as the case may be. These instructions were not open to that objection. Instruction No. 7 simply told the jury that if they found certain facts to exist, then the motorman was guilty of negligence in the operation of the car. Instruction No. 8 was on the duty of the appellant. Both the instructions would have been just as appropriate if the fire wagon had been any other sort of a wagon.

It is true that street cars from necessity must travel on their tracks but persons crossing the tracks at a street crossing are not trespassers. Street car companies must anticipate that persons and vehicles will cross their tracks at street crossings, and their motorman must use ordinary care to discover them. What would be ordinary care would depend upon the circumstances of the particular case. Where there was nothing to obstruct the view the motorman might see persons about to cross the street, and it would not be necessary for him to listen. In the present case it was the contention of appellant that there was a building right up to the property line, and that this prevented the motorman from seeing the fire wagon. In other words, the only way the motorman could know of the approach of the fire wagon was by listening. Hence the instructions are not faulty because they only deal with the failure of the motorman to hear the approaching fire wagon. In short, it was not necessary to submit to the jury the question of whether he could have seen the fire wagon, for it was the contention of appellant that he could not have seen it and the testimony on this point is undisputed.

(2) It is next insisted that the court erred in permitting certain witnesses to testify that on subsequent days they were on one of appellant's street cars at the same point at which the accident occurred and heard the ringing of gongs and the sounding of the fire wagons on the pavement as they left the fire station in question in this case. Counsel based their right to exclude this evidence on the ruling of the court in the case

of *Ward* v. *Fort Smith Light & Traction Co.*, 123 Ark. 548. We do not think that case sustains the contention of counsel. There the plaintiff offered to prove that the witness had had a race with a street car 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. The testimony was rejected because it was not shown that the cars were geared in the same way as the car under consideration in that case, or that they were so constructed that they would naturally have the same speed. For that reason we held that the excluded evidence related to collateral transactions and would tend to confuse the issues. Here the position of the car was practically the same as that testified to by the witnesses on the occasion of the accident and the witnesses had the same opportunity to hear the fire gongs. Therefore, the testimony was competent under the principles decided in *St. L., I. M. & S. R. Co.* v. *Kimbrell*, 111 Ark. 134, and *St. L., I. M. & S. R. Co.* v. *McMichael*, 115 Ark. 101.

Appellant was permitted to prove by one witness that she was familiar with the corner where the accident occurred and saw the accident. The witness was permitted to state that a brick building was right up to the property line and state the physical surrroundings as they existed, but was not permitted to state whether or not the motorman could have seen up A Street before he began to wind the brake. Error is assigned by counsel for appellant because the witness was not permitted to state whether or not this was a fact. If it be assumed that this was error no prejudice resulted to appellant from its exclusion. Appellant made a diagram of the locality and of the point where the car was when the motorman says he first saw the fire wagon and began to apply the brakes. The jury by consent were carried to the scene and permitted to view it. Therefore they could have ascertained for themselves whether or not the motorman could have seen the fire wagon from the point where he first began to wind the brake.

(3) One of the appellee's counsel, in his closing argument to the jury made the following statement: "I know that it is generally said that no one can get a verdict against the Fort Smith Light & Traction Company from a jury in Fort Smith regardless of the justice of the case." The record continues as follows: "Whereupon, the defendant objected to said remarks and at the time saved its exceptions. Thereupon, counsel for plaintiff attempted to withdraw said remarks and the court admonished the jury to disregard them." The remarks should not have been made by counsel, but we think their prejudicial effect was removed by the court. The record shows simply that the court admonished the jury to disregard them. What the court actually said to the jury is not in the record, but we must assume that the language was sufficient to remove the prejudice caused by the remarks. Webster says that the word admonish means to counsel against wrong practices; to caution or advise; to warn against danger of an offense. In the absence of a showing to the contrary, we will presume that the language of the court was sufficient to remove from the minds of the jury any prejudice created by remarks of the attorney. As soon as an objection was made to the remarks by opposing counsel, the counsel who made the remarks attempted to withdraw them from the jury. This was followed by an admonition from the presiding judge to the jury to disregard the prejudicial statements, and this we think was sufficient to cure the prejudice.

(4) It is insisted by counsel for appellant that the judgment should be reversed because appellee was allowed to testify as to his earnings from prize-fighting and training prize fighters. They insist that this evidence is not a proper element in the determination of the amount of recovery appellee would be entitled to by reason of his impaired earning capacity, because section 1983 of Kirby's Digest makes it unlawful for any person to fight prize fights or in any wise participate in them in the State of Arkansas. The record shows that appellee stated that in addition to being a fireman he

earned about $75 a month as boxing instructor or trainer. It is true that in response to a question on cross-examination he stated that he was a prize fighter, but when his whole testimony is read it is perfectly apparent that he said that he earned $75 a month as a boxing instructor. It is not apparent from his testimony that he engaged in prize fighting or earned any money from training other people to fight a prize fight. His testimony plainly shows that his additional earnings were made by being a boxing instructor or a trainer of people who desire to practice boxing. This is not prohibited by the statutes of the State, and the testimony was properly admitted to go to the jury.

Finally it is insisted that the verdict is excessive, The jury returned a verdict for appellee for $8,500. The attending physician stated that on examination of appellee shortly after the accident he found that the large bone of the leg had been torn away from its attachments, pushed through the ligaments and flesh for between two and three inches outside the skin. He also described another fracture and the treatment that was necessary to be given while appellee was in the hospital. He said that appellee was confined to the hospital for about six weeks and suffered excruciating pain nearly all the time he was there. We quote from the record the physician's description of appellee's injuries as follows:

"Q. Can you describe that injury if he will take off his shoe and show to the jury how he was hurt?

A. Yes, sir.

Plaintiff removed his shoe and the doctor showed the jury how and where the leg was injured.

A. We found that this bone here was broken and the ligaments were badly torn and lacerated, and it was sticking out through the skin here, pushed through here two or three inches.

Q. That is the big bone?

A. Yes, sir; that is the hinge bone here was projecting the internal malleolus and this bone here is a hinge joint and was projecting here, and the tibia which

is down on the leg there had an attachment to both bones, and these ligaments on top here are necessary for the small bone in the foot and they come down here over the foot and this place here was mangled and torn from its ligaments and these bones on this joint here were just pressed up like that. It was necessary in order to put this bone back to use a great deal of force, even more than we were able to exert to replace it so it was necessary to make a little incision here and then we sutured it over, and with very slight infections it healed very nicely.

Q. And he was able to leave the hospital in how long?

A. About six weeks."

(5) He further stated that there was no doubt that appellee would have a permanently weak ankle, and that it would always give him trouble; that appellee would never be able to have the same use of his leg as he did before the injury. It is true he stated in one place that it would be one or two years before appellee's leg would be anything like normal again, but when all his testimony is read, it is evident that the physician meant that it would be about two years before the stiffness would get out of appellee's leg and it approached anything like a normal state. The witness states positively that the ankle was permanently injured, and that it would be weaker than appellee's other ankle for the remainder of his life, and it could never stand much pressure. From his testimony the jury might readily infer that appellee could never again follow the avocations in life for which he had fitted himself, viz., fireman and boxing instructor. He was only twenty-five years of age at the time he received his injuries and from his physical appearance and mental condition as disclosed by the evidence, the jury might have found that his earning capacity in his chosen vocations in life would be increased in the near future. He was earning $75 a month as fireman and an additional $75 as boxing instructor. He had not fitted himself to earn money by a sedentary occupation and under all

the circumstances, taking into consideration the excruciating pain he suffered and his decreased earning capacity we do not think it can be said that the verdict is excessive.

(6) Other assignments of error in regard to giving and refusing instructions are pressed upon us for a reversal of the judgment. We do not deem it necessary to set them out or to discuss them in detail. The court in instructions correctly told the jury that no negligence of the driver of the fire wagon affected appellee's right to recover unless the negligence of the driver of the fire wagon was the sole cause of the accident. The records show that appellee had no control whatever over the driver of the fire wagon, that it was his duty to ride beside the driver in the absence of his chief and that it was against the rules for him to direct the driver in regard to his duties. In other words, under the rules and regulations of the fire department he had no control whatever over the driver. It can be readily understood how this regulation would operate to the safety of both. It was necessary that the wagon should be driven at a rapid rate of speed through the streets and the driver's attention would be wholly engrossed in managing his team, and it would be dangerous for him to be distracted by any one attempting to direct him how to discharge his duties.

The judgment will be affirmed.

PAUL, ADMINISTRATRIX, *v.* STUCKEY.

Opinion delivered November 20, 1916.

ACTIONS—SERVICE OF SUMMONS UPON NON-RESIDENT ATTORNEY DURING TRIAL.—An attorney, while attending court in his professional capacity in a county other than that of his residence, is not exempt from the service of summons in a civil action brought against him in that county.

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

Carmichael, Brooks, Powers & Rector, for appellant.

1. There is no State statute exempting either local or nonresident attorneys from any legal process. Kirby's Digest, §§ 3129, 444; 61 Ark. 504; 54 Am. St. 276.

2. The common law does not allow counsel the privilege of immunity from service of civil process. Weeks on Attorneys, § 107, p. 203; 3 Blackst. Com., § 289.

3. The great weight of authority is against the immunity. 35 Ark. 331; 12 L. R. A. (N. S.) 942, and note; 32 *Id.* 931; 198 U. S. 144; 134 Am. St. 886; 7 Words & Phrases, 6787; 89 M. W. 1124; 17 Tenn. (9 Yerg.) 7, 9; 18 Am. 660; 27 Fed. 342, 343; 76 Ark. 161; 1 Phil. 217; 18 Johns. 52; 12 Fed. 590; 11 L. R. A. 101; 67 Am. St. 458; 37 Fed. 342; 110 N. E. 601; 63 L. R. A. 503; 122 N. C. 963; 131 *Id.* 54.

4. Granting such a privilege would be contrary to reason and public policy. 133 N. C. 292; 45 S. E. 638; 63 L. R. A. 503.

Campbell & Suits, for appellee.

1. In view of the decisions of this court exempting *parties* from service of process, the rule exempting attorneys rests upon the bedrock of the Constitution and public policy. Art. 2, § 10, Const.; Kirby's Digest, §§ 2273, 444; 31 Ark. 266; 101 *Id.* 216; 3 Blackst. Com. 24, 26; 60 Ark. 207; 207 Fed. 890.

2. The privilege of attorneys is ascertained by the common law and the great weight of authority. 61 Ark. 504; 76 *Id.* 161; 7 Fed. 17; 15 *Id.* 1130; 54 Am. St. Powers' case; 207 Fed. 890; 4 Call. 97; 15 Johns. 242; 18 *Id.* 52; 15 Fed. Cas. 1126; 18 *Id.* 1138; 1 Phila. 217; 7 Fed. 17; 87 N. Y. 568; 74 Fed. 442; 67 Am. St. 458; 20 Ohio Ct. Ct. 1; 3 Boyce 1; 95 S. C. 49; 207 Fed. 890; 83 S. C. 225.

3. The privilege is not contrary to reason and public policy. 40 Ark. 263; 60 *Id.* 425 31 *Id.* 767.

WOOD, J. The appellant filed her complaint against the appellee in the Pulaski Circuit Court, alleging that appellee was indebted to the estate of John P. Paul in the sum of $700, and asking that she, as his administratrix, have judgment for that amount. She had summons issued. Appellee is an attorney. He was engaged in defending one Atkinson, who was on trial charged with a felony in the Pulaski Circuit Court. Appellee, while thus engaged, was called to the door of the court room and the summons issued in the civil suit was served upon him. Appellee at that time resided in Jackson county. He moved to quash the service of summons. The court sustained the motion, dismissed appellant's complaint, and she appeals.

Was the service valid? The action instituted against the appellee belongs to that class that may be brought in any county in which the defendant is summoned. Section 6072, of Kirby's Digest. We have a statute expressly exempting witnesses from being sued in counties where they do not reside, while going, returning or attending in obedience to a subpoena. Kirby's Digest, section 3129. But there is no such statute concerning attorneys at law. They fall, so far as statutory enactment is concerned, within the general class against whom suits may be brought in any county in which the defendant is summoned. Kirby's Digest, section 6072, *supra.*

The appellee contends that attorneys, while attending court in their professional capacity in counties other than their residence, should be exempt from the service of summons in civil actions against them in those counties under the doctrine announced by this court in *Powers* v. *Arkadelphia Lumber Co.*, 61 Ark. 504, and *Martin* v. *Bacon*, 76 Ark. 158, to the effect that suitors, while in attendance upon judicial proceedings in courts other than that of their residence, are privileged from the service of summons in other adverse proceedings instituted against them in those counties.

In *Powers* v. *Arkadelphia Lumber Co.*, *supra*, we said: "One line of authorities rests the privilege solely

on the familiar constitutional ground of freedom from arrest on civil process, but we prefer to rest it also on the ground of a sound public policy, so aptly expressed by the Supreme Court of Ohio in the case of *Andrews* v. *Lembeck*, 46 Ohio St. 40, thus: 'The question is one which profoundly concerns the free and unhampered administration of justice in the courts. That suitors should feel free and safe at all times to attend, within any jurisdiction outside of their own, upon judicial proceedings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer to some other adverse judicial proceeding against them, is so far a rule of public policy that it has received almost universal recognition wherever the common law is known and administered.' " And, again, quoting from *Lamkin* v. *Starkey*, 7 Hun. 479, we said: "The court has power, independently of the statute, to protect its suitors, officers and witnesses."

In *Martin* v. *Bacon*, *supra*, we quoted the lanquage of Judge Elliott in *Wilson* v. *Donaldson*, 117 Ind. 356, as follows: "High considerations of public policy require that the law should encourage him (the non-resident suitor) to freely enter our forums by granting immunity from process in other civil actions, and not discourage him by burdening him with the obligation to submit to the writs of our courts if he comes within our borders."

Public policy is defined as, "That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good; the principles under which freedom of contract or private dealing is restricted by law for the good of the community, the public good." 32 Cyc. 1251. In *Woodruff* v. *Berry*, 40 Ark. 251, this court approved Lord Brougham's definition of public policy as follows: "Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good,

which may be termed the policy of the law, or public policy, in relation to the administration of the law." Says the Supreme Court of Rhode Island: "The reasons assigned for the exemption of non-resident suitors are, that courts of justice ought to be open and accessible to suitors; that they ought to be permitted to approach and attend the courts in the prosecution of their claims and the making of their defenses without molestation or hindrance; that they ought not to be distracted from prosecuting their just rights, or making their just defenses to suits by reason of their liability to suit in a foreign jurisdiction." *Baldwin* v. *Emerson*, 16 R. I. 304, 307.

It is shown by numerous authorities collated in the note to *Mullen* v. *Sanborn et al.*, 25 L. R. A. 721, that the rule arose and exists as one of the necessities of judicial administration, because without it, it would be impossible for the courts to fully and freely administer justice. It is there succinctly stated that, "the rule exists in order that causes may be fully heard and justice administered in an orderly manner. The privilege is to subserve public interests."

Now the service of summons in a civil action upon an attorney while engaged in the trial of a cause pending in a county other than that in which he resides does not contravene any doctrine of public policy as above defined, and as announced in our decisions, *supra*. The service of summons is had by delivering to the defendant a copy thereof, or, if he refuses to receive it, by offering him a copy thereof. Section 6042, Kirby's Digest.

We cannot see that the mere service of summons upon an attorney while in attendance upon a court in his professional capacity would in any way infringe upon the dignity or invade the prerogatives of the court. It could not interrupt the orderly progress of trials nor tend in the least to hamper and embarrass the courts in the administration of justice. Therefore, as we view it, the public good would not be adversely affected by

such procedure, and the rule of public policy applicable to suitors does not obtain.

In *Netograph Mfg. Co.* v. *Scrugham*, 197 N. Y. 377, 90 N. E. 962, 134 Am. St. Rep. 886, it is held that (quoting syllabus): "The exemption of a suitor or witness from process is not a natural right, but a privilege having its origin in the necessity for protecting courts from interruption and delay and witnesses or parties from the temptation to disobey process." It "is in derogation of the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him, and therefore the privilege should not be extended beyond the reason of the rule upon which it is founded."

Our statute giving a right of action "in any county in which the defendant is summoned" is but declarative of and in conformity with this natural right.

The appellee contends that the rule of public policy declared by this court in *Powers* v. *Arkadelphia Lumber Co.*, and *Martin* v. *Bacon*, *supra*, exempting non-resident suitors from the operation of the statute should also be extended, by analogy, to attorneys at law while attending in their professional capacity upon judicial proceedings in counties other than that of their residence. This contention is unsound.

The reason upon which the rule is founded, as we have shown, is that it is to the public interest and for the public good that courts should be untramelled in their efforts to administer justice between parties to causes pending before them. Parties litigant are entitled to be heard in court by themselves and counsel. In criminal prosecutions the accused is guaranteed this right by express constitutional and statutory law. Art. 2, section 10, Const. 1874; Kirby's Digest, section 2273. So far as the interest of the public is concerned, the ends of justice are fully satisfied when suitors are protected in the right to be heard by themselves and counsel. The selection of counsel by suitors is a matter purely of private concern, and not of public interest.

It is not essential to the administration of justice, and no rule of public policy therefore requires that courts should extend the privilege, which was intended for the protection of its own authority and dignity and to enable it to do justice between the parties, so as to grant immunities to attorneys from their individual liabilities. The attorney is only the *alter ego* of his client, in the limited sense that he may plead in matters pertaining to his client's cause. The attorney is not subject, like the suitor, to the process of the court issued to enable it to carry out its orders in pending causes. He can not stand in his client's shoes as to the consequences of the judicial proceedings. Therefore, it is not necessary for courts, in order to deal out justice between parties litigant, to shield a non-resident attorney from the service of process in a matter that concerns him only, and which in no manner affects his client's cause.

The effect of the service of summons upon a non-resident attorney does not operate, like an arrest, to deprive the client of the services of his attorney, nor does it tend to interfere with the dignity and authority of the court, and thus to delay and obstruct its orderly procedure in the administration of justice. Nor can it be said that the mere service of a summons upon an attorney, while in attendance upon the court could have the effect to so embarrass the attorney and distract his attention from the cause of his client as to virtually deprive the latter of the benefit of counsel and thus deny him his legal right.

When an attorney goes into a jurisdiction other than that of his residence to represent a client before a court in a cause there pending he does so by virtue of private contract and of his own motion. His case is not like that of one who has to attend upon the court as a suitor, a juror, or a witness. He is not under the protection of the court because he is in attendance thereon in obedience to its process or because he has entered its portals as a suitor. While he takes an oath to support the Constitution and laws, and is an officer

of the court in the broad sense that he is licensed to practice before it and is amenable to rules adopted for the dispatch of the business of the court and subject to its orders in conducting any business he may have before the court; yet his employment is private, and while pursuing his practice before the court, he is engaged in his own private business. He does not occupy the relation to the court of one of the officers chosen by the public for the discharge of the public duty of assisting the court in the conduct of its business in the administration of justice. But if he did, there is no rule of public policy requiring the court to shield even its officers from the service of process in civil actions, unless the service of such process would tend to impair the authority and dignity of the court and to obstruct the administration of justice.

We can not see that the mere service of a summons in a civil action upon any of the officers of the court while in the discharge of their duties would in any manner reflect upon the dignity of the court, or lessen its authority, or impede the administration of justice.

Our attention is directed by learned counsel for appellee to quite a number of cases in support of their contention that the privilege extends to attorneys as well as to witnesses and parties. We have examined these cases carefully, and it would too greatly extend this opinion to review them *seriatim.*

Mr. Blackstone says that, "attorneys and all other persons attending the courts of justice (for attorneys being officers of the court, are always supposed to be there attending) are not liable to be arrested by the ordinary processes of the court, but must be sued by a bill, called usually a bill of privilege, as being personally present in court." 3 Blackstone's Commentaries, star page 289.

In 8 Bacon's Abridgment, "Privilege," B. page 171, it is said: "And it hath lately been laid down by the court of C. P. as a general rule, that all persons who have relation to a suit which calls for their attendance, whether they are compelled to attend by process

or not, are entitled to privilege from arrest *eundo et redeundo*, provided they come *bona fide*. And in this description bail and barristers upon the circuit are included."

In 1 Tidd's Practice, it is said: "The parties to a suit and their attorneys and witnesses are, for the sake of public justice, protected from arrest in coming to, attending upon and returning from the courts."

"It was an ancient privilege of attorneys," says Mr. Weeks, "to be exempt from arrest on *mesne* process, or being held to bail, because attorneys, being obliged to attend officially, and, as the law presumes, continuously, upon courts, they were always amenable to their own courts, and could not be drawn away to attend others. *** These privileges arose from the supposition that the business of their clients would suffer by their being drawn elsewhere." Weeks on Attorneys, sections 107-108, and cases cited in note.

"An arrest," says Mr. Blackstone, "must be by corporal seizing or touching the defendant's body." 3 Blackstone's Commentaries, star page 288. See, also, *Huntington* v. *Schultz* (S. C.), Harp. 452-3, 18 Am. Dec. 660.

Perhaps the strongest case cited by counsel for appellee is that of *Brooks* v. *State, ex. rel. Richards*, 3 Boyce (Del.) 1, 79 Atl. 790, 35 Am. & Eng. Ann. Cas. 1133, where it is said: "The privilege of parties to judicial proceedings, as well as witnesses, attorneys, judges, jurors and certain other officers of the court, of going to the place where they are held, and remaining as long as necessary and returning wholly free from the restraint of process in other civil proceedings, has been long settled and liberally enforced. The rule is of ancient origin and is mentioned in the Year Books as early as Henry VI. It came to us out of the common law with only such modifications as were required to make its principle harmonize with American institutions and to be in accord with American jurisprudence. * * * The privilege arises out of the authority and dignity of the court, it is founded on the necessities

of judicial administration, it has for its principal object the protection of the court, and not the immunity of the person, and is extended or withheld only as judicial necessities require."

There was a time in England when men, however honest they may have been, if unable to pay their debts, were subject to arrest and imprisonment in the tower. This barbarous practice prevailed from the enactment of the "Statute of Merchants," in 1288, until it was finally abolished in the reign of Victoria, in 1868. Statutes 32 and 33, Vict., p. 571.

There was also a long period in England when, under the influence and domination of a rampant ecclesiasticism, kings and popes alike granted numerous scandalous immunities and privileges to a favored few of special classes. World's History and its Makers, vol. 1, p. 362; 1 Green's History of England, p. 164, *et seq.*

It is not surprising, therefore, that this doctrine of privilege from arrest should have taken root and flourished in the soil of England at a time when it was rich in the production of special privileges, and when poor, but honest, men had to live in mortal dread of being arrested and imprisoned for debt. It is easy to see that in such times witnesses, jurors, suitors and attorneys might be intimidated from attendance upon the courts, and that the courts would therefore be hampered in the administration of justice, and hence the necessity for extending the privilege from arrest to these persons while going to, attending upon and returning from the courts.

Thus arose the above doctrine of the common law which some American courts attempt, by analogy, to apply in this country. But there is no analogy. For here the whole fabric of government rests upon the principles of equality and liberty, and the doctrine of equal rights to all and special privileges to none finds expression not only in the Constitution of the United States, but in the organic law of every State in the Union.

We can readily understand how the arrest of an attorney during the progress of a trial, in the presence of the court, which would necessitate his giving bail, or else being removed from the court, would seriously encroach upon the dignity of the court and disturb its orderly procedure, and deprive the suitor of his right to be represented by the counsel of his choice, and also deprive the court of the aid of such counsel. But the service of a copy of a summons upon counsel, which is merely a notice to him that proceedings have been instituted against him in another jurisdiction, could have no such effect. There is no analogy whatever between the service of process of summons and the service of capias. All the reasons therefore for the common law doctrine of privilege from arrest wholly break down in this country when they are attempted to be applied to the mere service of summons. Every reason for the rule having failed, the rule itself should fail.

To hold that non-resident attorneys are immune from the service of summons, or other process, not in arrest, while they are voluntarily in attendance upon the court upon their private business would be to confer upon them a special privilege not enjoyed by resident attorneys. *Kutner* v. *Hodnett*, 109 N. Y. Supp. 1068. "The reason upon which those decisions are based" that so hold, as stated by the Supreme Court of North Carolina, "is not satisfactory to us." *Greenleaf* v. *People's Bank of Buffalo et al.*, 133 N. C. 292, 63 L. R. A. 499. We agree to the conclusions reached by Ch. J. Clarke in his concurring opinion in that case. It occurs to us that those decisions follow rather loosely the doctrine of the common law without a proper analysis and consideration of the reasons upon which such doctrine was founded.

The framers of our code, who were presumably familiar with the doctrines of the common law, only exempted witnesses from being sued in counties other than that of their residence. Our court has exempted suitors, on the ground of public policy, and by this

appeal we are asked to exempt non-resident attorneys. To do so would be approving a doctrine which is contrary to the genius of our institutions, and which should have no place in the jurisprudence of this country.

If we are correct in our conclusion that no rule of public policy in the administration of justice is infringed by denying the privilege to attorneys, then there is no more reason why the privilege from service of summons should be granted to them than to those of any other profession or business calling. To do so would put the courts in the attitude of establishing a highly discriminatory class privilege in favor of the legal profession.

In the case of *Elam* v. *Lewis*, 19 Ga. 602, a lawyer claimed the benefit of privilege from arrest because of the fact that he was a practicing attorney in that State. Judge Lumpkin, rendering the opinion of the court, among other things, said: "Any decision which separates the bar from the people in sympathy or identity of privilege would prove one of the greatest curses which could befall the profession. From the day when it is made the bar itself will receive an impulse downward in the eyes of the community. * * So extensive a question should be determined upon the broad foundation that the general justice of the country should alike pervade all walks and professions." So we say.

The judgment is therefore reversed and the cause remanded with directions to overrule the motion to quash.

HUMPHREYS, J., not participating.

HICKS v. HELM, RECEIVER.

Opinion delivered November 27, 1916.

CORPORATIONS—AGREEMENT TO PURCHASE STOCK—NOTE—DEFENSES.—Appellant agreed to purchase stock in a certain corporation, and gave his note in payment therefor. *Held*, the note could be collected, although the agent of the corporation who solicited the subscription, agreed orally that the corporation would set aside a certain sinking fund for the protection of the capital stock, which was not done.

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

Moore, Smith, Moore & Trieber and *Jno. T. Hicks*, for appellant.

1. The note is void because of a total failure of consideration. Langdale on Contracts, § 45; 2 Black. Com. 443; 38 Ark. 127; Leake on Contracts, 547; 9 Cyc. 369; 19 L. T. Rep. (New Series) 74; 10 Cyc. 429 e.

T. N. Robertson, for appellee.

1. The charter of the company was appellant's contract of subscription and purchase. The oral representations of the agents were not made by authority of the company and were not the consideration, and failure to comply with same is no defense. 20 Ark. 452; 92 *Id.* 504-507; 111 *Id.* 239, 245-6.

WOOD, J. This action was begun by the appellee as receiver of the Arkansas Life Insurance Company, an Arkansas corporation, against the appellant John T. Hicks, on a promissory note executed by him to the insurance company in the sum of $2,000.00, due six months after date with 6 per cent. interest, and also to recover on a due bill for $60.00 payable May 1, 1912.

The complaint alleged that the note and due bill were past due and unpaid; that the appellant deposited certain corporate stock as collateral with the insurance company and judgment was asked for the principal and interest of both instruments and for foreclosure of the company's lien on the collateral. The appellant filed his answer and cross-complaint and in his answer he admitted the execution of the instruments and the deposit by him of collateral stock with the insurance company, but denied that he was indebted to the company and to the plaintiff, appellee, its receiver, and prayed that the stocks be surrendered and that he be discharged with costs.

The appellee demurred to the cross-complaint, which demurrer the court sustained and the appellant

refusing to plead further the court entered a decree in favor of the appellee in the sum of $2,447.95, the amount of the appellee's debt and interest, from which decree this appeal has been duly prosecuted.

The appellant's cross-complaint alleges in substance and he contends that he was induced to purchase shares of the capital stock of the insurance company and to execute the note and due bill in suit therefor upon the representations of its agents and the agreement upon the part of the corporation that the amount of money that might be received by the corporation in excess of the face value of its capital stock then being sold, should be placed by the corporation in a surplus fund to the end that its capital stock might not be impaired and that the company might thereby be enabled to prosecute its business with profit; that without such representations and agreement the capital stock purchased by appellant would have been worthless and the company would not have been permitted to transact business in the State; that appellant purchased the stock relying upon the representations and agreement of the corporation to create the surplus fund above mentioned, and executed his note and due bill with the *bona fide* intention of paying same, but that the insurance company wholly failed to carry out its agreement to create and maintain the surplus fund, thereby rendering the stock purchased by the appellant absolutely worthless; that instead of using the surplus to pay the legitimate indebtedness of the company, it squandered the same in exorbitant salaries to its officers and agents and in *ultra vires* enterprises; that by reason of the failure of the company to perform its agreement to create and use the surplus fund to prevent the impairment of its capital stock as represented to the appellant, the stock purchased by him was worthless and the note and due bill upon which the suit is based were wholly without consideration and void.

The contention of appellant is contrary to former decisions of this court, and therefore cannot be sustained. In the case of *Mississippi, Ouachita and Red River Ry.*

Co. v. *Cross*, 20 Ark. 452, this court said: "If when a subscriber for stock is sued for calls made upon it he may defeat the transaction by showing that the directors of the company have violated the charter by departing from the route or points fixed by it for the location of the road, there is no good reason why he may not defeat the suit by making it appear that they are appropriating the funds of the company to unauthorized purposes; or that the directors and officers of the company are consuming the funds for their own purposes, and utterly neglecting to progress its enterprise; or wholly incompetent to prosecute it to a successful termination; or any other abuse of the charter. If the door were once opened for such defenses in every suit brought by a corporation the conduct of its directors would be canvassed and collateral issues would become interminable. As above remarked, the charter is the law of the subscriber's contract. If directors undertake to make an unwarranted departure from the provisions of the charter, in the location or construction of the road or in the appropriation of the funds of the company, the stockholder has his remedy by injunction. Not to enjoin the collection of calls due upon his stock, but to restrain the corporation from the particular violation or abuse of its charter complained of."

In *Collins* v. *Southern Brick Co.*, 92 Ark. 504-507, we said: "The contention of the defendant that he was not bound by his stock subscription notes which was based on the alleged unperformed condition that he was to be made manager of the business when organized cannot be sustained, for the well recognized reason that a condition resting in parol cannot be engrafted on a written stock subscription. The written agreement signed by the subscribers constituted the contract between them, the mutuality of the agreement being the consideration; and it cannot be varied nor contradicted by parol testimony, nor can any oral agreement or condition be engrafted upon it. * * * Parol evidence is not admissible to vary the terms of a subscription to the capital stock of a corporation, or to show a discharge

therefrom in any manner other than that required by the terms of subscription, charter and by-law. All separate agreements and conditions made at the time of subscribing which are inconsistent with the written contract are void, whether they be verbal or contained in a separate written contract." See also *Warner* v. *Bonds*, 111 Ark. 239, 245, 246. The allegations of appellant's cross-complaint show that fifty shares of the capital stock of the insurance company were issued to appellant, for which he executed the note in suit by which he agreed in writing to pay appellee the sum of $2,000.00 for value received. The appellant does not aver that the articles of association or by-laws or that the charter of the insurance company required that the company should create and maintain a surplus fund to meet its current liabilities and prevent the impairment of its capital stock, and that these were conditions precedent to the payment of his note, or the performance of the contract on his part. The allegations of the appellant's cross-complaint show that he got the capital stock, the thing that he purchased, and that this contract of purchase on his part was evidenced by the note in suit. The allegations of appellant's cross-complaint show that the representations and agreement of the company to create and maintain a surplus fund were but oral representations and agreements upon the part of the agents of the company that it would do certain things in the future. Nowhere is it alleged that the articles of association or by-laws, or the certificate showing the purposes for which the corporation was formed, or the charter, which according to the above cases constitutes the law of appellant's contract, sets forth that the corporation was to create and maintain the alleged surplus fund. Appellant does not allege, and it is not specified in his note as a condition precedent, that same was to be paid only upon condition that the company should create and maintain a surplus fund out of the excess over the face value paid into the treasury of the corporation by the subscribers and purchasers of its capital stock. Conceding that the

allegations of appellant's cross-complaint are true, they only show that the selling agents of the company made appellant certain oral representations which the company had not performed, but, as pointed out in the above cases, such testimony could not be admitted to vary the written contract upon which the appellee predicates his suit. If the insurance company could be bound by these alleged representations of its selling agents, appellant as a stockholder could not set up the failure upon the part of the company to comply with these representations in defense to a suit against him for the purchase money of his stock. That is not his remedy, as shown by the opinion in *Mississippi, Ouachita & Red River Ry. Co.* v. *Cross, supra.*

The decree is therefore correct and it is affirmed.

DALY v. ARKADELPHIA MILLING CO.

Opinion delivered November 27, 1916.

1. MECHANICS' LIENS—LIABILITY OF OWNER FOR CONTRACTS OF AGENT.—Where the contract is made with an agent to have work done and materials furnished, in order to bind the principal, under the statute, (Kirby's Digest, § 4970), it is essential that the agent have authority to make such a contract; the burden of proof is upon the parties attempting to assert the lien to show that the person with whom they contracted was the agent of the owner, and that as such agent, that he acted within the scope of his authority when he authorized the work to be done.
2. PRINCIPAL AND AGENT—PROOF OF RELATIONSHIP.—The authority of an agent can not be established by the mere fact that the person claiming such authority has exercised it. Agency must be shown by positive proof, or by circumstances that will justify the inference that the principal has assented to the acts of his agent.
3. PRINCIPAL AND AGENT—PROOF OF RELATIONSHIP.—While the relation of principal and agent can not be proved by the declarations of the agent, it may be established by the agent's testimony.
4. PRINCIPAL AND AGENT—KNOWLEDGE OF ACTS OF ALLEGED AGENT—REPAIRS ON HOUSE.—One D. agreed to sell certain property to R., and delivered a deed thereto in escrow to a bank; R. went into possession. *Held,* knowledge and consent by D. that R. was in possession of the property and making improvements, alone, did not establish that D.

authorized the improvements to be made for his benefit, nor will it justify a finding that D. placed R. in possession, authorizing him to repair and rebuild, so as to render D. and the property (which was never conveyed to R.) liable to laborers and materialmen for services rendered.

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

STATEMENT BY THE COURT.

On September 21, 1914, the appellant, T. J. Daly, and his sister executed a deed conveying a certain lot upon which a dwelling house was situated in the town of Arkadelphia, Arkansas. The consideration named in the deed was $820.00, to be paid on or before June 15, 1915. The deed was placed in escrow in a local bank at Arkadelphia, and the grantee, R. A. Roberson, was given possession with the understanding that he was to pay an amount equal to eight per cent. interest on the $820.00. When Roberson's note for $820.00 became due in June, 1915, he did not pay the purchase price or any part thereof, and asked Daly to extend the time for such payment until September, 1915, which request Daly granted.

Between June and September, 1915, Roberson bought lumber from the Arkadelphia Milling Company, and hardware from the Graves Hardware Company, and employed C. D. Gregory, a carpenter, and had certain repair work done on the house. Roberson did not pay these parties for the material and labor and they instituted this suit against Roberson and Daly for the amounts claimed by them and asked that the same be declared a lien upon the house.

Daly answered, setting up that the deed from himself and his sister to Roberson had never been delivered to Roberson, but was placed in the Citizens National Bank in escrow, to be held until June 1, 1915, when the deed was to be delivered to Roberson upon his paying to the bank the sum of $820.00; that Roberson was given immediate possession of the property, and upon his request permission was granted him to make

certain repairs thereon upon his own responsibility, but that no authority was given him by the owners to make the repairs on their account, and that he did not act for them as agent in buying the material and having the work done; that the owners extended the time for Roberson to make the payment from June 1 to September, and that Roberson having failed to pay for the property in September, the deed was withdrawn from escrow.

Roberson answered admitting the purchase of the materials and the performance of the labor under contracts made with him, and averring that he went into possession for the purpose of improving the property so that he could get a loan on the property with which to pay Daly, and alleged that Daly knew that he was making the improvements in order to apply for a loan with which to pay Daly; that the improvements were placed on the property with the consent and knowledge of Daly. He further alleged that when he entered into the contract with Daly for the purchase of the property it was understood that Daly would furnish him an abstract showing perfect title; that Daly failed to comply with his contract in this respect, and for that reason he was not able to obtain the loan.

Roberson testified in substance as follows: That he entered into the contract for the purchase of the property with one J. D. Townsend, whom he understood to be the agent of Daly. Townsend was also representing Roberson in endeavoring to secure a loan on the property, and at Townsend's request, partly, Roberson had the work done. The reason the trade between himself and Daly was not closed was on account of some dispute with reference to a part of the lot, being a strip of ground on the north side of the lot 10 feet wide and 110 feet long, that was claimed by a Mr. Cleveland. Roberson did not know about this claim until he had let the contract for the repair work and it was nearly completed. When he noticed the abstract showed this defect he wrote to Daly about it and finally Daly came to Arkadelphia and they tried to settle it, but could not. The

deed was not to be delivered to Roberson until the note was taken up. Roberson regarded Townsend as Dr. Daly's agent in effecting the sale of the property and felt that in speaking to Townsend he was speaking to Daly, because Townsend represented to witness that he was Daly's agent. The improvements were put upon the property with the approval and consent of Daly and Townsend. Witness would not have put the improvements there without their consent. Witness supposed that Daly and his sister had a perfect title or they would not be selling the lot. He cautioned Daly about the abstract in every letter that he wrote, and also informed him that witness would have to borrow the money to pay the note, and that it would require an absolute title. He exhibited a letter written to Dr. Daly, at Palmer, Texas, in which he informed Daly that it would be satisfactory for him to execute deed and deposit the same with the Citizens National Bank of Arkadelphia, together with a *bona fide* abstract, conveying perfect title, and note of witness payable June 15, 1915. In this letter he informed Daly that he would be compelled to borrow at least part of the money with which to handle the note when it matured, saying, "Therefore, we cannot be too particular in the matter of making sure of a perfect title." He concludes the letter by saying: "If we are to deal at all it will have to be done at once as I contemplate considerable improvement of this property so that it will prove an attractive rental proposition." Daly replied to this, "I am perfectly willing to have my wife, sister and her husband to sign the deed with me so as to make you a clear title to the house and lot, and if you wish you can begin your improvements at once, as it will take some time to make you a deed as you request."

In answer to Daly's letter, Roberson, among other things, said: "I am perfectly willing that you shall have the time necessary for the deed to be forwarded to California for Mrs. Slade's signature after you and your wife have signed the same. In the meantime, acting

upon the suggestion as per your letter, I shall take possession of the place and begin my improvements."

Townsend testified that he was Dr. Daly's agent "in looking after this property at Arkadelphia and closing the deal." As such agent he authorized Roberson to go into possession of the property and make the improvements. Daly knew that Roberson was in possession and making the improvements, and approved of it. As a part of the contract, Daly was to give Roberson a perfect title to the lot and an abstract showing that fact. Witness, as agent of Daly, knew, and Daly also knew, that Roberson expected to get the money, or part of the money, on the property by borrowing it from a loan company. Roberson was not able to get the money because of a defect in the title. Witness took that matter up with Dr. Daly. Daly did not have the alleged defect in the title removed, and that stopped the trade and prevented Roberson from carrying out his part of the contract.

Witness exhibited with his deposition a letter that he received from Daly, which witness construed as giving witness more authority than simply closing the deal. The letter was received by witness while the deal was pending for the sale of the property to Roberson. It reads as follows: "I will be glad if you would look into the title of this lot which he is to put up as security, as you are my agent, I don't think it necessary for me to have my attorney there to look after the papers, as I am sure you will look to my interest in the premises. It will be all right for Mr. Roberson to improve the place, as we are dealing in good faith, and I am sure he is."

Other letters which passed between Daly and Townsend after the deed was executed and deposited in escrow were read in evidence. In one of these letters Townsend informs Daly that he could loan Roberson $2,500.00 on his home place and the one he was getting from Daly, which would enable Roberson to pay his note in the bank to Daly. In one of Townsend's letters to Daly while the negotiations were pending he states:

"Mr. Roberson let the contract yesterday to one of our local carpenters to have about $500.00 or $600.00 worth of improvements done on the little house he got from you. He came to see me before closing the contract and wanted to know if there were reasonable possibilities of the loaning company placing on it a loan of $1,000.00 when completed, and I told him that I felt sure there were. The contract calls for the work to be completed within fifteen days, and I suppose note will be paid soon after the completion."

In one of the letters written by Townsend to Daly after the deed and abstract had been deposited in the bank Townsend informed Daly that Roberson was complaining "about Mr. Cleveland claiming the right to use 10 feet across the property;" and in this letter Townsend states that, "the abstract shows that this alley is on the property just north" of Daly's lot. And Townsend further states that he (Townsend) does not believe that Cleveland can hold the alley, but that Roberson will not close the deal until the matter is settled, and Townsend asks what he must do.

In answer to this letter Daly wrote Townsend as follows: "Please see Mr. Roberson and if he will not close the deal as per contract instruct the bank to send me my deed. If the bank refuses to send my deeds wire me at once."

In answer to this letter Townsend wrote Daly that he had seen Roberson, and that Roberson advised that there had been no settlement for materials and labor on the house, and that the laborers and materialmen would immediately file liens against the property unless there was a satisfactory settlement, and urging Daly, before having the deed in escrow returned to him, to take time and adjust his differences with Roberson as to the abstract of title in order to avoid legal proceedings.

Daly testified that Mrs. Laura Butler was his agent at Arkadelphia, and that she turned over the place to J. D. Townsend to sell upon the terms already stated; that Townsend had no authority to act as his

agent except in the sale of the property. He gave no one any authority to improve the property whatever as his agent. He received a letter from Townsend stating that Roberson had found a flaw in the title and would not take the land until it was straightened up. Witness wrote Townsend to tell Roberson that he bought the land with the record before him, and that if he would not take up his note to instruct the bank to send witness' deed. Witness stated that he did not dream that any man would place his property in jeopardy of liens without his knowledge or consent.

The court found that T. J. Daly placed R. A. Roberson in possession of the property and authorized the said R. A. Roberson to repair or rebuild the house on the lot in controversy, and also found the value of the materials and labor, and rendered a decree in favor of the appellees for the respective amounts claimed by them, declared same a lien on the lot in controversy and ordered same sold to satisfy the decree. Daly prosecutes this appeal.

Callaway & Huie, for appellant.

1. Roberson was not the *owner* of the property nor the *proprietor*, nor the owner's agent, or trustee, and there was no lien. 5 Ark. 217, 220-1-2-3; 56 *Id.* 217-19, 220-1; 57 *Id.* 481; 167 (Tex.) S. W. 275; 80 Tex. 62; 106 N. E. 466; 203 Ill. 198; 114 Ark. 7.

McMillan & McMillan, for appellees.

1. The doctrine of agency rules this case. Roberson was the agent of Daly and in possession under contract of purchase. Kirby's Digest, §§ 4970, 4914; 51 Ark. 302; 30 *Id.* 568; 122 Ark. 464; 90 Ark. 469; 9 Am. St. 435; 124 *Id.* 880; 41 *Id.* 767; 47 Ark. 481.

2. Daly is estopped from setting up his title as against the lien. 56 Ark. 217; 61 Am. Dec. 696, and note.

3. Daly failed to furnish perfect or marketable title as he agreed. 57 Ark. 481; 66 *Id.* 33, 548.

WOOD, J., (after stating the facts). I. Our statute provides that, any person who shall perform any work upon or furnish any material for any building upon land, or for repairing the same, "under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or sub-contractor, upon complying with the provisions of this act shall have for his work" a lien upon such building and upon the land belonging to such owner or proprietor. Kirby's Digest, § 4970.

There is no pretense that the material furnished and the work done for which claim is made in this suit were under or by virtue of any contract with the owner or proprietor in person. The contention is that Townsend had the work done as the agent of the owner. There is no testimony in the record to warrant a finding that Townsend was the agent of Daly in the matter of having the repairs done on the building.

(1) Where the contract is made with an agent to have work done and material furnished in order to bind the principal, under the statute, it is essential that the agent have authority to make such a contract. The burden of proof was upon the appellees to show that Townsend was the agent of the owners, Daly and his sister, and that as such agent he acted within the scope of his authority when he authorized Roberson to make the improvement on the lot in controversy.

While Townsend testified that he was the agent of Daly in looking after the property and in closing the deal, and that as such agent he authorized Roberson to go into possession and make the improvements, this testimony falls far short of proving that Daly constituted Townsend his agent for the purpose of having improvements made. This testimony of Townsend does not show that he was authorized by Daly to make the improvements.

Giving Townsend's testimony its strongest probative value in favor of the finding of the chancellor, it only tends to show that Daly consented that Roberson should make the improvements and approved of his

act in doing so. Undoubtedly, the testimony of Townsend shows that he was the agent of Daly to look after the property at Arkadelphia and to make sale of the property for Daly; and it also shows that Townsend assumed that he had authority as such agent to authorize Roberson to make the improvements for Daly. Now, the fact that Townsend was the agent of Daly to "look after the property and close the deal" did not authorize him to make the improvements to the extent shown in this record. It can not be said that improvements to the extent and cost of these were within the real or apparent scope of the authority of the agent, Townsend. Nor would the authority to make such improvement be implied from the express authority to look after and sell the property.

(2-3) No principle of law is better settled than that the authority of an agent can not be established by the mere fact that the person claiming such authority has exercised it. It must also be shown by positive proof, or by circumstances that would justify the inference that the principal had assented to the acts of his agent. *St. L., I. M. & S. Ry. Co.* v. *Bennett*, 53 Ark. 208, 210; *Wales-Riggs Plantations* v. *Dye*, 105 Ark. 446. While the relation of principal and agent can not be proved by the declarations of the agent, it may be established by the agent's testimony. *Ayer-Lord Tie Co.* v. *Young*, 90 Ark. 104; *Dierks Lumber & Coal Co.* v. *Coffman*, 96 Ark. 505.

Therefore, if Townsend had testified that by virtue of his agency to look after the property and to make sale of the same to Roberson, he was authorized by his principal, Daly, to have the improvements made, or to authorize Roberson to make the improvements for Daly, the case would have been entirely different. But a careful analysis of the testimony of both Townsend and Roberson will not show that either of these parties had the authority to make the improvements or to authorize the same to be made for Daly.

The testimony of Roberson shows that Daly had written him that he might make the improvements at

any time he wanted to, and that he went ahead with the work partly at the request of Townsend, Daly's agent. But the utmost extent of this testimony is to show that Daly consented that Roberson might make the improvements, and that Daly's agent, by his acts, assumed that he had authority to authorize Roberson to make the improvements. Therefore, Roberson's testimony also falls short of showing the essential fact, that Daly authorized any one to make the improvements for him or for his benefit.

(4) Knowledge on the part of Daly that Roberson was in possession of the property and making the improvements and consent on his part that the improvements should be made, and his approval of such improvements, did not establish the fact that Daly authorized improvements to be made for his benefit, and therefore justify the finding of the chancellor that T. J. Daly placed R. A. Roberson in possession of the property and authorized the said Roberson to repair or rebuild the house on said lot.

It seems to us that this is the correct conclusion, even from a consideration alone of the testimony of the witnesses for appellees, and the letters of Daly in the record, upon which they rely as tending to establish the authority upon the part of Roberson and Townsend to have the improvements made. But when all this testimony is considered in connection with the testimony of Daly to the effect that he gave no one authority to improve the property whatever as his agent, it is clear to us that the above finding of the court is against the preponderance of the evidence.

Liens of mechanics and materialmen "are creatures of the statute and must be perfected and enforced according to its provisions." In *Hoffman* v. *McFadden*, 56 Ark. 202, 205, we said: "Under the statute of this State creating lien for work done or materials furnished in making improvements on real property, the lien exists only where the labor is performed, or materials are supplied, under a contract, expressed or implied, with the owner of the land. * * * The terms of the

act import no intention to create a lien in the absence of such contract, and there is no decision of this court giving the statute by construction a wider meaning than its language implies." See, also, *Doke, Admr.*, v. *Benton County Lumber Co.*, 114 Ark. 1, 7.

The cases upon which appellees rely are differentiated from the instant case by the facts of those cases. Moreover, any decision contrary to that which we have reached, if based upon statutes similar to our own, would be unsound, and we could not follow them.

II. There is no testimony in this record to warrant a finding that the appellees furnished the material and did the work, for which they sue, upon any knowledge upon their part that Daly owned the property and had authorized the improvements to be made. Daly lived at Palmer, Texas, and was several hundred miles away at the time the appellees furnished the material and did the work under contracts entered into by them with Roberson. So far as the proof shows to the contrary, they did not know that Daly and his sister were the owners of the lot.

As we have already shown, Roberson was not the agent of Daly to make improvements and had no authority whatever to enter into contracts for the same that would bind Daly. The case therefore is not like that of the owner who stands by and expressly consents to or silently acquiesces in contracts for improvements entered into by mechanics or materialmen with one who claims to be his agent or one who represents himself to be the owner without repudiating the agency or revealing his own identity as the owner and disclosing the condition of his title. Of course, in such cases the owner would be estopped from denying the agency or setting up his legal title to the injury of those who had been thus misled by his conduct in the premises. But such is not this case, and the doctrine of estoppel cannot be invoked against the appellant.

III. We cannot see that the issue of title as between appellant and Roberson, and as to whether appellant complied with his contract to furnish a war-

ranty deed and an abstract of title, is germane to this controversy. Such issue is not involved in this appeal.

The judgment is therefore reversed and the complaints will be dismissed for want of equity.

MARKLE v. HART.

Opinion delivered November 27, 1916.

1. IMPROVEMENT DISTRICTS—ORGANIZATION—VOID ACT—ENFORCEMENT OF LIEN.—Act 457, Special Acts of 1911, attempting to organize a drainage district, being void *ab initio*, no indebedtness could be incurred, and no lien to protect said indebtedness could exist, and an attempted foreclosure of an alleged lien is void.
2. IMPROVEMENT DISTRICTS—VOID STATUTE.—Where the statute attempting to organize an improvement district is void *ab initio*, there can exist not even a *de facto* district.

Appeal from Craighead Chancery Court, Western District; *Chas. D. Frierson*, Chancellor; affirmed in part and reversed in part.

Basil Baker and *Horace Sloan*, for appellant.

1. This is a collateral attack. 72 Ark. 101; 113 Ark. 449; 89 Kans. 751; 133 S. W. 470, 67 S. E. 569; 152 N. C. 748; 25 Fla. 730; 6 So. 77; 61 Neb. 339; 165 (Mo.) S. W. 1050.

2. None of the objections that no affidavit for warning order was filed; that no warning order was indorsed on the complaint and that no attorney *ad litem* was appointed are available on collateral attack. 1 Black on Judgments (2 Ed.), § 281; 77 U. S. (10 Wall.) 308; 84 Tex. 562; 55 S. W. 411; 143 Ind. 467; 16 Wash. 491; 152 S. W. 936; 95 U. S. 714; 33 Cal. 505; 76 Ark. 465; 72 *Id.* 101, 109; 78 *Id.* 353; 82 *Id.* 334; 63 Ky. 369; 72 *Id.* 111; 105 Ark. 11; 72 Ark. 101, 107.

3. Appellees wholly failed to show want of jurisdiction, or any fraud and the decree stands unimpeached. The special act was not void. 184 S. W. 57. Nor was the Act repealing the Act creating the district void. 97 Ark. 322; 71 *Id.* 22. None of the objections are available on collateral attack. 55 Ark. 398; *Ib.*

37, 43; 91 *Id.* 95; 50 *Id.* 188; 49 *Id.* 336; 100 *Id.* 63, 69. The decree should be reversed and judgment entered here.

Hawthorne & Hawthorne, for appellees.

1. The special act was declared void. There was no statute upon which the action could be based. The decree is void. 122 Ark. 491; 18 Wall. 350.

2. The want of affidavit for warning order and failure to warn or appoint an attorney *ad litem* is jurisdictional. 40 Ark. 124; 47 *Id.* 131; 50 *Id.* 430; 186 S. W. 604; 97 U. S. 444; 18 Wall. 457; 173 U. S. 560.

3. There was no debt and no lien. 4 Peters, 466; 164 Fed. 963; 55 Ark. 30. The judgment was a nullity. 14 Fed. 603; 175 *Id.* 667; 82 *Id.* 241; 196 *Id.* 56; 197 *Id.* 769. The decree should be affirmed except as to payment of taxes and costs.

SMITH, J. (1) In this cause it was alleged that by Act 457 of the Special Acts of 1911, p. 1245, the General Assembly created the Cache River Drainage District; but that, at the following session of the General Assembly, this Act had been repealed by Act 119 of the Acts of 1913, p. 512. That the repealing Act made provision for ascertaining the indebtedness which had been incurred by the district, and for its payment, and that pursuant to these provisions an indebtedness had been found due Alex Berger, as treasurer of this district, and this indebtedness was declared a lien upon the lands of the district, which was prorated against the lands pursuant to the directions of the repealing Act.

The amount apportioned against appellees' lands was not paid, and there was a decree of foreclosure of this supposed lien, and at the sale thereunder appellant bought the lands here involved.

This sale was attacked by appellees upon the ground that various irregularities existed in the rendition of this decree, and the court so found, and decreed that appellees had the right of redemption and awarded

them this right, and assessed the costs of the court below against them.

Since the rendition of the decree so appealed from, this court has rendered its opinion in the case of *Morgan Engineering Co.* v. *Cache River Drainage District*, 122 Ark. 491. As will appear from an inspection of that opinion, that was a proceeding to enforce a demand against the same drainage district which undertook to enforce the lien above stated. In that case, in a discussion of the above mentioned Acts, we said:

"Counsel for appellant contends that, although all the prior proceedings were invalid, yet the General Assembly had power to pass the Act of 1913, abolishing the district and directing a levy upon the lands intended to be benefited for the preliminary expenses incurred under the alleged contract with the appellant, and that the Act levying the assessment for this purpose adopted the description of the lands as assessed, and that therefore this latter Act was not void for uncertainty. Citing *Board of Dir. Crawford Co., Levee Dist.* v. *Dunbar*, 107 Ark. 285; *Fellows* v. *McHaney*, 113 Ark. 363-371; *Thibault* v. *McHaney*, 119 Ark. 188, 177 S. W. 877. We cannot agree with this contention of counsel, for the Act of 1911, purporting to create the Cache River Drainage District, as we have seen, was void *ab initio* because of the uncertainty in the description of the boundaries of such district. In the cases cited by appellant to support its contention the Acts creating the district were valid Acts, and the districts were therefore legally brought into existence, and there was authority or incurring the preliminary expenses in forwarding and promoting the improvement contemplated. But such was not the case here.

"The Act of 1913 did not purport to and could not cure the defects of description in the Act of 1911 that rendered the so-called Cache River Drainage District void for uncertainty; and it was not within the power of the Legislature of 1913 to validate contracts made with those acting in the capacity of directors of a district that never had in fact any existence and to make

the preliminary expenses incurred under these void contracts liabilities against the land included in the proposed district. To do this would be taking property of the appellees and other land owners without due process of law and without compensation."

That case is decisive of this. Having held that there was never any district and, consequently, no indebtedness against it, we must hold the proceeding under which the sale took place to be *coram non judice.* If there was no district, and therefore no indebtedness, it must follow that there could be no lien covering an indebtedness to foreclose.

The court below directed appellees to pay appellant the taxes, penalty, interest and costs paid by him when he purchased the lands, and assessed against appellees the costs of the court below. The judgment of the court cancelling this sale will be affirmed, but the direction requiring appellees to pay the taxes and costs will be set aside, and all the costs of this suit will be assessed against appellant.

The decree will be reversed and the cause remanded with directions to enter a decree accordingly.

SMITH, J. (on rehearing). (2) We have not overlooked the case of *Whipple* v. *Tuxworth*, 81 Ark. 391, where it was held that a decree enforcing a lien on property within a *de facto* improvement district could not be shown to be void in a collateral attack because the district was not legally organized. This case is distinguishable from that. There the decree of sale was rendered in the suit of a *de facto* corporation where the requisites for the existence of such a corporation appeared. These were said to be (1) a charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; (3) actual user of the corporate franchise. The first of these essentials is absent here. There was no law under which this corporation could have had an existence.

There can be no *de facto* officer unless there is a *de jure* office, and there can be no *de facto* corporation

unless there is a charter or general law under which such a corporation as this drainage district purported to be might have been lawfully organized, and we have held that the Act under which the Cache River Drainage District sought to proceed was abortive because the district was not properly described in the Act purporting to create it. There could have been no *de jure* district under this Act of the General Assembly, and there could be, therefore, no *de facto* district.

It appears, however, that appellant paid certain taxes on the lands in question since his purchase, and to secure these be is entitled to a lien on the land, and the judgment is modified to the extent of declaring a lien in appellant's favor for all taxes on the lands paid subsequent to his purchase at the commissioner's sale.

BEARD v. BANK OF OSCEOLA.

Opinion delivered December 18, 1916.

1. VENDOR'S LIENS—RESERVATIONS OF LIEN—RIGHTS OF INNOCENT PURCHASER OF LIEN RETAINING NOTES.—Where land is conveyed, with a recital in the deed that notes were given for the purchase price, and a lien retained to secure the same, all subsequent purchasers of the land take the same subject to the lien, which exists in favor of any innocent holder of the notes, who has taken them for value, before maturity.
2. VENDOR'S LIENS—RIGHTS OF HOLDER OF NOTES—ANTECEDENT INDEBTEDNESS.—The rule as stated above is the same, although the holder of the notes took the same to secure an antecedent indebtedness.

Appeal from Mississippi Chancery Court; *Chas. D. Frierson*, Chancellor; affirmed.

A. G. Little and *Churchill M. Buck*, for appellant.

1. There was no vendor's lien retained in the deed; nothing to put appellants upon notice. But if a lien was retained the deed of release was sufficient to cancel and release same. Beard was an innocent purchaser for value without notice and had a right to rely upon the records showing satisfaction. Appellant has the greater equity. A vendor's lien does not pass unless expressly

reserved in the deed, except where the note is transferred as collateral security; and then if the lien is not reserved or does not appear on the face of the deed it is not good against innocent purchasers, for value without actual notice. 37 Ark. 571; 41 *Id.* 292. Beard had no notice of any lien and had a right to rely upon the records showing satisfaction. 18 Ark. 162; 23 *Id.* 257; 28 *Id.* 401.

2. The two notes of Barron and Lilly were assigned without recourse and by Lilly endorsed to the bank in blank. This did not transfer the lien. 23 Ark. 258. A quitclaim deed, if unexplained, is a circumstance to show notice. 23 Ark. 735; 50 *Id.* 322. The notes were endorsed in blank and in the absence of testimony as to the date of assignment they must be treated as having been assigned on that date most favorable to defendant. Kirby's Digest, § 520; 31 Ark. 20; 90 *Id.* 334; 31 *Id.* 128.

3. One who takes a note as collateral security for a pre-existing debt is not an innocent purchaser. 13 Ark. 163; 94 *Id.* 387.

4. Beard purchased, relying upon the records, and should be protected as against appellee who took an assignment as collateral security for a pre-existing debt after the record had been satisfied. 26 Law Ed. U. S. 245; 27 *Id.* 529; 199 U. S. 251; 73 N. E. 404; 106 N. W. 846; 54 S. E. 901; 56 *Id.* 163; 84 N. W. 353; 46 Am. St. 70; 15 L. R. A. (N. S.) 1025; 131 Am. St. 996; 129 *Id.* 927; 110 *Id.* 924; 120 *Id.* 1030; 59 Am. Rep. 49; 51 Am. Dec. 147; 64 *Id.* 197; 63 Am. St. 460; 138 Wisc. 82; 131 Am. St. 997; 28 Kans. 497; 42 Am. St. 173.

5. In answer to the contention that Beard should have inquired as to the location of the notes at the time he purchased, see 107 U. S. 478-484; 4 S. W. Rep. 834. Appellant is an innocent purchaser and had a right to rely upon the records showing the title clear and unincumbered.

J. W. Rhodes, Jr., and *W. J. Lamb*, for appellee.

1. This case is almost identical with *Driver* v. *Lacer*, May 22, 1916. The law fixes a lien when the purchase money is not paid. 94 Ark. 301; 105 *Id.* 201; 93 *Id.* 371; 99 *Id.* 438. A lien appears upon the face of the deed. Kirby's Digest, § 510; 180 S. W. 216; 176 *Id.* 316. Beard was necessarily affected with notice of the lien. Kirby's Digest, § 5403; *Ib.* 511, 510-12; 27 Cyc. 1296, 1314 N. 2; *Ib.* 1315, Note B; 51 N. W. 520.

2. The law fixes the lien when the purchase money is not paid. It is not the recital of the lien. 94 Ark. 301; 105 *Id.* 201; 93 *Id.* 371; 99 *Id.* 438. It appears on the face of the deed that there is a note which is a lien. Kirby's Digest, § 510; 120 Ark. 616; 118 Ark. 316.

3. The appellee has the greater equity. Beard was not an innocent purchaser as the records were not satisfied. To protect himself he should have inquired at least. 115 Ark. 366; 105 Ark. *Koen* v. *Miller; Driver* v. *Lacey*, 124 Ark. 150; 186 S. W. 824; 27 Cyc. 1315, Note B; 68 A. S. R. 685; 46 *Id.* 70; 94 Ark. 387; 25 Kans. 625; 51 *Id.* 580; 63 N. W. 37; 66 *Id.* 57; 51 *Id.* 520; 129 Am. St. Rep. 927-931; 110 *Id.* 924; 106 *Id.* 472; 63 Am. St. R. 460.

McCULLOCH, C. J. This is an action instituted by the plaintiff, Bank of Osceola, in the chancery court of Mississippi county, Chickasawba District, to foreclose certain liens on three 40-acre tracts of land in that county described as the west half of the northwest quarter, and the southeast quarter of the northwest quarter, of section 25, township 16 north, range 11 East.

There is no dispute about the material facts of the case, which are as follows: On September 2, 1909, J. W. Barron and O. R. Lilly sold and, by warranty deed, conveyed to Ben Bunch one of said 40-acre tracts, the southeast quarter of the northwest quarter of section 25, for the sum and price of $1,300.00, evidenced by a negotiable promissory note of that date executed by

said Bunch to Barron and Lilly, bearing 10 per cent. interest per annum, due and payable ten years after date; Barron assigned his interest in the note before maturity to Lilly, and Lilly assigned the note before maturity to plaintiff; on December 1, 1909, J. P Meador executed to Barron and Lilly two deeds of trust on the west half of the northwest quarter of section 25, one to secure a negotiable promissory note in the sum of a thousand dollars and the other to secure a negotiable promissory note in the sum of two thousand dollars, both of which notes were assigned before maturity to plaintiff by Barron and Lilly; on March 4, 1910, Meador sold and by warranty deed conveyed to Bunch the southwest quarter of the northwest quarter of section 25, for the price of one thousand dollars, as evidenced by a negotiable promissory note executed by Bunch to Meador, due and payable ten years after date, with interest at the rate of 10 per cent. per annum, and this note was by Meador assigned before maturity to Lilly, and by Lilly assigned before maturity to plaintiff. The assignments of the various notes set forth above to the plaintiff were for the purpose of securing the payment of certain indebtedness of Barron and Lilly to the plaintiff, which has not been paid.

On the 7th of May, 1910, Meador conveyed the northwest quarter of the northwest quarter of section 25 to M. A. Rudder and J. A. Hopkins, who subsequently conveyed to one Fisher, and on November 14, 1910, Bunch conveyed to Fisher the south half of the northwest quarter of section 25, which said conveyances put the legal title in Fisher subject to the lien for the purchase money and mortgage notes referred to above. On April 12, 1912, Barron and Lilly executed to Fisher a quitclaim deed conveying all their interest in the aforedescribed tracts, said deed reciting a consideration of $1.00, and also reciting that the deed was made for the purpose of releasing the deeds of trust and vendors' liens arising under the deeds already described. On April 15, 1912, Fisher conveyed all of said lands to W. A. Beard, one of the defendants herein, who subse-

quently mortgaged the land to John G. Powell, who is also made defendant. All of the deeds hereinbefore referred to were promptly placed of record in Mississippi county. It is not definitely shown whether said notes were assigned to the plaintiff before or after the execution of the release deed by Barron and Lilly to Fisher on April 12, 1912, and for the purposes of this decision we assume that they were assigned after the execution of that deed, but before the maturity of the notes and for an antecedent indebtedness.

The chancellor decreed in favor of the plaintiff for a foreclosure of the liens, and defendants Beard and Powell have prosecuted an appeal to this court.

Counsel for appellants have brought to our attention in the brief various authorities from other courts bearing on the points at issue, but we are of the opinion that every point raised in the case has been heretofore decided by this court against the contention of appellants' counsel. The principal contention is that as between the two innocent parties—that is, the appellants, as innocent purchasers of the property subsequent to the execution of the release deed from Barron and Lilly to Fisher, and the plaintiff bank as the holder of the lien notes—the former is entitled to the first consideration, and that the lien of the notes in the hands of the bank should not be held to be superior to the rights of appellants as subsequent purchasers of the land. This contention has been expressly decided against appellants in the recent case of *Driver* v. *Lacer*, 124 Ark. 150, 186 S. W. 824, and cases cited therein. The facts of the case just cited are very similar in all essential respects to the facts of the case at bar. The notes in that case were, as in the present case, assigned after the execution of the deed by the original grantor, which would otherwise have operated as a release, and we held that the release was ineffectual against the rights of an innocent holder of the negotiable promissory note. We said that the subsequent deed of the original purchaser was not in the line of the title of the purchaser of the notes, and he was not, therefore, bound to take constructive notice

of that deed on the record, and that the subsequent purchaser of the land, in order to protect himself, must have demanded a surrender of the notes. "In no other way," we said, "could he protect himself against a *bona fide* holder of the notes before their maturity."

It is true that there is this difference between the two cases: In *Driver* v. *Lacer* the deed recited an express reservation of the vendor's lien, whilst in the present case the deeds, or at least one of them, merely recites the execution of the notes but do not in express terms reserve a lien. That, however, is an unimportant distinction between the two cases. Our statute, Kirby's Digest, section 510, provides that the lien possessed by the vendor of real estate, "when the same is expressed upon or appears from the face of the deed or conveyance shall inure to the benefit of the assignee of the note or obligation given for the purchase money of such real estate." It is not essential, therefore, that the lien be expressly reserved, as it is only necessary that the lien shall "appear from the face of the deed." *Stephens* v. *Anthony*, 37 Ark. 571. The lien is not a creature of contract, but is a creature of equity and arises by operation of law out of the contract for the payment of the purchase price, and the effect of the statute is merely to preserve that lien to the purchaser of the note when the same is "expressed upon or appears from the face of the deed or conveyance." The notes and the lien are inseparable, and the lien passes by the assignment of the notes. *Pullen* v. *Ward*, 60 Ark. 90; *Driver* v. *Lacer*, *supra*.

It is insisted that this case is different from *Driver* v. *Lacer* in another respect, namely, that the negotiability of the notes does not appear from the face of the deed so as to constitute notice to subsequent purchasers of the land. The answer to this contention is that the statute itself, which we have already quoted, makes the lien inure to the benefit of an assignee of the note, and the subsequent purchaser of the land must take notice of the recital of the deed, for that is in the line of his title. The recital that the purchase money is unpaid is

sufficient to put all parties upon notice, and they must protect themselves by evidence of the fact that the purchase money has been paid and that negotiable promissory notes are not outstanding in the hands of innocent purchasers. Any other construction would defeat the manifest purpose of the law-makers in enacting this statute. The fact that the notes were assigned to plaintiff to secure antecedent indebtedness does not impair the right to assert claims of an innocent holder of the notes. *Exchange National Bank* v. *Coe*, 94 Ark. 387.

It is urged with considerable zeal that as between the holders of the note and a subsequent purchaser of the land, the latter should be protected for the reason, it is said, that the holder of the note had better opportunity to protect himself. We think, however, that the reverse is true, and that the subsequent purchaser has the best opportunity to protect himself by requiring an exhibition or surrender of the evidences of the indebtedness on the purchase money of the land. This is the basis of our decision in *Driver* v. *Lacer*, *supra*, which is conclusive of that question.

Finally it is contended that the lien for the note given as consideration by Bunch to Meador could not be declared a lien against appellants for the reason that the deed itself fails to show that any note was executed, and also that it negatives the fact that the lien was reserved. The deed from Meador to Bunch recites the consideration as follows: "$1,500.00 to be paid as follows: one note for $250.00, due and payable November 1, 1912, and one note for $250.00, due and payable November 1, 1913, and balance due and payable ten years from date. Said notes bearing interest at the rate of 10 per cent. per annum from date until paid. A lien is retained on said land to secure the payment of said notes." This recital is sufficient to show that there is unpaid purchase money due to the extent of $1,500.00, and it is fairly inferable from the language used that a note was executed for the thousand dollars due and payable in ten years, as well as for the other two pay-

ments of $250.00 each. It is not a fair construction of the language to say that it was only intended to recite that there were two notes for $250.00 each, and that there was a reservation of a lien only to secure those two notes.

It is unnecessary to say anything further with respect to the lien of the notes secured by the mortgage executed by Meador to Barron and Lilly, for what we have said about the assignment of the notes secured by the vendor's lien applies with equal force to the lien of the notes secured by the mortgage. *Pullen* v. *Ward, supra.*

The principles here announced having been recognized and decided in repeated opinions of this court, and having become rules of property in this State, we deem it unnecessary at this time to determine whether or not those decisions are in line with the weight of authority in other jurisdictions. Our conclusion being that the decision of the chancellor was correct, the decree is, therefore, affirmed,

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TWIST v. MULLINIX.

Opinion delivered December 18, 1916.

1. MALICIOUS PROSECUTION—ACTION MAINTAINABLE WHEN —TERMINATION OF ORIGINAL PROCEEDINGS.—Before a party may maintain an action for malicious prosecution, it is necessary for him to show that the original proceeding instituted against him has been legally terminated; and it is a sufficient termination of the original proceeding to serve as a basis for an action for malicious prosecution that plaintiff was discharged, or that the original proceeding was dismissed at a preliminary hearing, or before trial, as upon an abandonment of the proceedings.
2. MALICIOUS PROSECUTION—PROOF OF ABANDONMENT OF ORIGINAL PROCEEDING.—Oral proof is admissible to show that the defendant, in a suit for malicious prosecution, abandoned the criminal prosecution against the plaintiff.
3. MALICIOUS PROSECUTION—ABANDONMENT OF ORIGINAL PROCEEDING. One T. filed information against one M., charging embezzlement, and also brought a civil action against him. Both actions were returnable before the same justice of the peace. Upon trial, the justice rendered judgment in the civil action for M., and upon the motion of M.'s attorney, dismissed the criminal prosecution. T. and his attorney

were present and raised no objection to the court's action. *Held*, the prosecution will be treated as abandoned by T., and this although the same facts were afterward presented to the grand jury, and an indictment returned upon them.

4. JUDGMENTS—PROOF OF—PROOF OF DISMISSAL OF ACTION.—The fact that a criminal proceeding before a justice had been dismissed must be shown by the judgment of dismissal entered in the justices' docket or the minutes of his proceedings; oral proof of such judgment is not competent until a sufficient foundation has been laid for such proof by a showing that the justice kept no docket, or that the same had been lost.

5. APPEAL AND ERROR—FAILURE TO OBJECT BELOW—INCOMPETENT TESTIMONY.—Appellant can not complain of the admission of incompetent testimony, for the first time, on appeal.

6. TRIAL—REVIEW OF VERDICT BY TRIAL JUDGE—PREPONDERANCE OF THE EVIDENCE.—After the jury has returned its verdict, if there has been filed a motion for a new trial setting up that the verdict is not sustained by sufficient evidence, or that it is contrary to law, or both, it is then the province of the trial court to review the verdict and to determine whether or not the jury has correctly applied the law as contained in the court's instructions, and whether or not the verdict is responsive to the preponderance of the evidence.

7. TRIAL—DUTY OF COURT TO SET ASIDE VERDICT, WHEN.—When the trial court is convinced that a verdict is not sustained by a preponderance of the evidence, then it is his duty to set aside the verdict; and if the trial court finds and announces that a verdict of the jury is against the preponderance of the evidence on a material issue of fact, then he must set the verdict aside.

8. APPEAL AND ERROR—REVERSAL WHERE VERDICT IS NOT SUPPORTED BY WEIGHT OF EVIDENCE.—A cause will not be reversed on appeal to this court, where the trial court has overruled a motion for a new trial made on the ground that the verdict is against the weight of the evidence, upon the ground that the verdict was not supported by a preponderance of the evidence, unless it is manifest that the trial court abused its discretion and acted imprudently, arbitrarily or capriciously.

9. TRIAL—CONFLICTING EVIDENCE—SETTING ASIDE A VERDICT.—It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence, and, conversely, he must not set aside a verdict if the evidence is so evenly balanced that he cannot see clearly that the verdict is against the preponderance of the evidence.

10. APPEAL AND ERROR—TRIAL—PREPONDERANCE OF THE EVIDENCE—FINDING OF TRIAL JUDGE—DUTY TO SET ASIDE A VERDICT.—Where the trial court finds positively and unequivocally that the verdict of the jury is against the preponderance of the evidence, it is reversible error for him thereafter to fail to set aside the verdict.

Appeal from Crittenden Circuit Court; *J. F. Gautney*, Judge; reversed.

STATEMENT BY THE COURT.

J. W. Mullinix, who, at that time lived in Mississippi, was employed by Ira F. Twist to manage his plantation in Arkansas. After a few months Twist became dissatisfied with Mullinix as manager, claiming that he was incompetent, and discharged him.

Mullinix, after his discharge, returned to Mississippi, leaving his family and household effects temporarily in a house that he occupied at Earle, Arkansas. Twist claimed that upon investigation he ascertained that Mullinix had misappropriated and converted to his own use funds in his hands belonging to Twist amounting to something more than $200.00, and after consultation with an attorney, and upon his advice, he made an affidavit before a justice of the peace charging Mullinix with the embezzlement of $200, and also at the same time instituted a civil suit for that sum and had an attachment issued and levied upon Mullinix's household goods.

Mullinix returned to Arkansas to defend the attachment suit and was arrested on the warrant charging him with embezzlement. He was allowed to go at liberty until the next day, when the attachment suit was tried before the justice.

The civil suit resulted in a judgment for Mullinix. After the civil suit was disposed of, and while Twist and his attorney were present, the attorney for Mullinix called the justice's attention to the criminal case and told the court that the facts were the same in the two cases, and moved the court that the criminal case be dismissed and Mullinix discharged. The court sustained the motion, no objection being made to same by Twist or his attorney.

Mullinix afterwards instituted this suit against Twist for malicious prosecution. There was a verdict in favor of Mullinix in the sum of $20,000.00. Twist moved for a new trial.

The court had a remittitur entered for the sum of $15,000.00, to which Mullinix agreed. The motion for new trial was overruled and final judgment was rendered in Mullinix's favor in the sum of $5,000.00, from which this appeal comes. Other facts will be stated in the opinion.

Hughes & Hughes, Allen, Humphrey & Converse, for appellant.

Berry & Wheeler and *H. H. Barker*, of counsel.

1. The criminal prosecution was not abandoned. 1 Corpus Juris, 5-7; 1 Cyc. 4; 24 Cal. 339; 70 Ark. 538; 12 Cyc. 379; 73 Hun. 547; 34 S. E. 531; 38 Kans. 570.

2. There is no legal evidence in the record that the criminal prosecution before the justice was dismissed. Freeman on Judg., § 38; Wigmore on Ev., §§ 2425-2450; 23 Cyc. 1534; 10 Wend. 325; 4 Ark. 236; 7 Ill. App. 369; 33 Ark. 485; 40 *Id.* 166; 87 *Id.* 441; 51 *Id.* 317; Kirby's Digest, §§ 4562, 4604, 2149, 4616-17.

3. But if the evidence proves the dismissal the order of the justice was illegal and void. 23 Cyc. 1059; 30 S. E. 558; Kirby's Digest, §§ 2130, 2137; 104 Pac. 468.

4. If the proof shows a termination of the criminal case it was brought about by plaintiff and such termination will not support a malicious prosecution suit. 36 S. E. 470; 10 Cush. 281; 144 Mass. 431; 73 N. H. 384; 123 Cal. 35; 2 L. R. A. (N. S.) 945; 43 N. J. L. 57.

5. There was probable cause for instituting the criminal case. The burden was on plaintiff to prove malice and want of probable cause. 32 Ark. 166, 765; 63 *Id.* 439; 33 *Id.* 316; 107 *Id.* 74; 96 *Id.* 325; 71 *Id.* 351; 42 Minn. 49.

6. Where defendant makes a full, fair and honest statement to counsel and acts thereon, he is not liable. 107 Ark. 74; 122 Ark. 382; 100 Ark. 316; 71 *Id.* 351. The finding of an indictment by the grand jury is

prima facie evidence of probable cause. 26 Cyc. 40. See also notes to 26 Am. St. Rep. 158.

7. The damages were so excessive as to show passion and prejudice. 19 Cyc. 372.

8. Defendant was taken by surprise and new evidence was discovered. 66 Ark. 612.

9. The verdict is clearly against the weight of the evidence and was disapproved by the court below. It should be set aside. 47 Ark. 567; 94 *Id.* 566; 98 *Id.* 334; 100 *Id.* 599; 112 Tenn. 463; 85 *Id.* 387; 102 *Id.* 702; 113 Ga. 453; 16 Wash. 288; 17 Kans. 172.

Caruthers Ewing, *H. C. Williamson*, *Jr.*, and *A. B. Shafer*, for appellee.

1. The granting or refusing a new trial on the ground of surprise, newly discovered evidence, etc., is a matter addressing itself to the sound discretion of the trial court. 18 Ark. 570; 26 *Id.* 496; 85 *Id.* 33; 103 *Id.* 589; 118 *Id.* 277; 29 Cyc. 1009-10. The so-called newly discovered evidence only was valuable, if at all, to impeach by contradiction the testimony of Mullinix as to 100 bushels of seed. Such testimony is not ground for new trial. 90 Ark. 435; 97 *Id.* 92; 99 *Id.* 407; 114 *Id.* 472.

2. The original prosecution was finally determined and ended. It was dismissed by defendant's consent. 4 Mackey's Rep. 65; 2 Johnson 204.

3. It is an invasion of the province of the jury to set aside a verdict that is not clearly or decidedly against the evidence, or the weight thereof. 10 Ark. 138; 13 *Id.* 339; 17 *Id.* 385; 20 *Id.* 443; 47 *Id.* 562; 94 *Id.* 556; 98 *Id.* 334; 94 *Id.* 566. The Tennessee rule is not a sound one. 14 Pl. and Pr. 770, note; 29 Cyc. 824; 58 Kans. 447; 48 Pac. 579; 1 Sumner, 451; 73 Ga. 630; 108 *Id.* 792; 137 Mass. 315; 24 S. C. 593; 69 *Id.* 160; 3 Ore. 178; 108 Mich. 446; 102 Va. 622; 134 N. C. 53; 107 N. Y. App. Div. 254.

4. When the criminal prosecution was dismissed finally, the termination thereof justified the bringing of

the suit for malicious prosecution. 4 Mackey Rep. 65; 129 Tenn. 614.

5. The finding of an indictment affords *prima facie* proof of probable cause. 71 Ark. 351; 94 *Id.* 433; 100 *Id.* 316.

6. Suing out an attachment without good reason and honest belief is ground for an action. 63 Ark. 387; 73 *Id.* 437.

7. Probable cause exists only when a reasonably prudent, dispassionate man would believe on the facts that the accused was guilty. 32 Ark. 166, 177; 69 *Id.* 439; 71 *Id.* 351; 82 *Id.* 252.

8. Malice may be inferred from want of probable cause. 32 Ark. 166; 37 *Id.* 160; 63 *Id.* 387; 94 *Id.* 433; 100 *Id.* 316.

9. Advice of counsel is a defense only when a full and fair statement of facts is made and advice sought in good faith. 71 Ark. 351; 73 *Id.* 437; 100 *Id.* 316; 107 *Id.* 74; 18 L. R. A. (N. S.) 65 and note.

10. If untruthful statements are made to counsel, the advice is no protection. 66 Neb. 782; 92 N. W. 1014; 68 N. E. 179; 37 *Id.* 593; 84 N. W. 574. See also 73 Ark. 437; 76 *Id.* 41; Newell on Mal. Pros., p. 325, 22.

11. The verdict is not excessive. 66 Ill. App. 173; 97 N. Y. App. Div. 416; 50 Fed. 515; 203 Mo. 295; 18 W. Va. 1; 73 Tex. 12; 139 Ala. 217; 131 Ind. 223; 67 Wisc. 350; 74 Hun. 284.

WOOD, J. (after stating the facts). (1) Before appellee could maintain his action for malicious prosecution it was necessary for him to show that the original proceeding instituted against him had been legally terminated. "It is a sufficient termination of the original proceeding to serve as a basis for an action for malicious prosecution that plaintiff was discharged, or the original proceeding was dismissed at a preliminary hearing, or before trial, as upon an abandonment of the proceedings." 26 Cyc. 55 et seq. 59.

(2-3) Appellant, while conceding that an abandonment of the original proceedings by Twist would be a sufficient termination of the original proceedings, nevertheless contends that the criminal prosecution was not abandoned. But, giving the testimony its strongest probative value in favor of the appellee, it was sufficient to warrant a finding that Twist had abandoned the criminal prosecution instituted by him against the appellee before the justice of the peace. Oral proof of what took place before the justice was competent to show an abandonment. The testimony shows that after the verdict had been returned in the civil action an attorney for the appellee stated that the facts were about the same in the two cases and moved the court to dismiss the criminal charge, and that the court dismissed that charge and released the appellee. Appellant Twist and his counsel were present and offered no objection to this proceeding. When such affirmative action was being taken by the court in the presence of Twist and his counsel with reference to the prosecution that had been instituted by him it was incumbent upon him at least to object to the dismissal. He was called upon to speak then, and having failed to do so he cannot set up that the prosecution was not abandoned because the same facts were afterward presented by him to the grand jury upon which an indictment was returned.

The proceedings before the grand jury were entirely independent of the proceedings before the justice of the peace. If the justice had held appellee to answer to the grand jury on the charges instituted against him by Twist then the proceedings before the grand jury might be regarded as a continuation of the original prosecution. But when the justice dismissed the prosecution and discharged the appellee without objection or protest from appellant, that was an abandonment of the proceedings before the justice. See *Costello* v. *Knight*, 4 Mackey Rep. 65.

This is not like a case where a criminal prosecution is dismissed by mutual consent. Here the testimony tended to show that the facts upon which the prosecu-

tion was based had been developed in a civil action, and the appellee, in asking the justice to dismiss the prosecution and to discharge him, was but contending that the cause had been heard and that he was entitled, as a matter of legal right, to a judgment dismissing the prosecution.

There was no mutual consent between the appellee and the appellant that the prosecution should be dismissed, but a positive demand for dismissal upon the part of the appellee, and a failure to object thereto on the part of appellant. The facts of this case are entirely different from those cases cited in appellant's brief, in which a *nolle prosequi* of the criminal case is procured at the instance of the defendant therein, or where there has been a compromise and the case is dismissed by mutual consent of the prosecutor and the defendant.

There was testimony from which the jury might have found that appellant Twist abandoned the criminal prosecution instituted by him against appellee before the justice of the peace. Such abandonment, as we have seen, constituted a legal termination of that prosecution.

(4) There is no competent evidence in the record showing that the criminal prosecution against appellee pending before the justice had been dismissed. Such fact could only be established by the best evidence thereof, which would be the judgment of dismissal entered on the justice's docket or minutes of his proceedings. Oral proof of such judgment would not be competent until a sufficient foundation had been laid for such proof by showing that the justice had kept no docket or that the justice's docket had been lost or destroyed. See *Scott* v. *State*, 49 Ark. 156. Our statute provides that every justice of the peace shall keep a docket in which he shall enter his proceedings in each case. See Kirby's Digest, sections 4562, 2149.

(5) The appellant, however, is not in an attitude to complain of the ruling of the court in permitting the justice of the peace to testify that the criminal case against the appellee was dismissed. Appellant made no objection to such testimony at the time, saved no

exceptions to the rulings of the court, and did not make such ruling a ground of his motion for a new trial. We would not reverse the case therefore for the ruling in admitting this incompetent testimony, and only mention it here in view of a new trial.

Appellant urges that there was probable cause for instituting the criminal prosecution against appellee before the justice, and that no malice upon the part of Twist was shown. Also that the verdict was excessive, and actuated by passion and prejudice.

The testimony bearing upon these questions is quite voluminous. No useful purpose could be subserved by discussing it in detail. These were issues of fact upon which the court properly instructed the jury, and there was evidence to sustain the verdict. We find no reversible error in the rulings of the court on any of these grounds.

In overruling the motion for a new trial the court said: "While the jury determined by their finding that Twist did not make a full and complete statement of all of the facts within his knowledge when consulting said attorney, in my judgment the finding upon that question was against the preponderance of the evidence. However, the verdict will not be disturbed merely because it is against the preponderance of the evidence."

Under our judicial system it is the peculiar province of the jury to determine issues of fact, being guided in their deliberations by instructions or declarations of law announced by the trial court applicable to the facts which the testimony adduced in the cause tends to prove. It is the duty of the jury to apply the law, as declared by the court, to the facts which they find established by the evidence and decide the issues of fact in accordance with the preponderance of the evidence.

(6) In order to determine which of the parties litigant has the preponderance of the evidence in his favor the jury are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. Under our Constitution the trial court can-

not invade the province of the jury to tell them what weight they should give to the testimony as a whole, or to that of any witness. They cannot charge juries with regard to matters of fact. Const. of Ark. article 7, section 23. But after the jury has concluded its deliberations and returned its verdict, if there is a motion for a new trial setting up that the verdict is not sustained by sufficient evidence, or that it is contrary to law, or both, it is then the province of the trial court to review the verdict and to determine whether or not the jury has correctly applied the law as contained in the court's instructions, and whether or not the verdict is responsive to the preponderance of the evidence.

(7-8) Under the law the verdict of a jury should be in favor of that party who has established the issues of fact for which he contends by a preponderance of the evidence. If the jury has not so decided, then its verdict is not correct, and it is the peculiar and exclusive province of the trial court to correct such error by granting a new trial. When the trial court becomes convinced that the verdict is not sustained by a preponderance of the evidence, then it is his duty to set aside that verdict. And if the trial court finds and announces that the verdict of the jury is against the preponderance of the evidence on a material issue of fact then he must set aside such verdict. The trial court presides over the trial. He observes and hears the witnesses, and has the same opportunity as the jury in this respect, and that is the reason why it is made his peculiar and exclusive function to determine the issue on a review of the verdict as to whether it is responsive to the preponderance of the evidence in the cause. This court cannot do that for the reason that it has no such opportunity. Hence the rule is firmly established by the authority of our own decisions, as well as courts of last resort in many other jurisdictions, that a ruling of the trial court overruling a motion for a new trial and sustaining the verdict of a jury, as in accord with the preponderance of the evidence, will not be reversed and the verdict set aside by the appellate court even though

such court may be convinced that the verdict of the jury is clearly against the weight of the evidence. This court will not pass upon the issue as to whether or not a verdict is responsive to the preponderance of the evidence, but will leave that issue where it belongs, under our judicial system, to the trial court. But when the trial court has passed upon that issue and announced its finding this court must see as a matter of law that the party entitled thereto gets the benefit of such finding.

The rule setting forth the respective functions of the jury and the trial court and this court is well expressed in *Richardson* v. *State*, 47 Ark. 562, 567, where we said: "But the weight of evidence and the credibility of witnesses are to be determined by the jury. It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence. But when the case reaches us, the question is no longer whether the evidence preponderates on one side or the other, or whether due credit has been given to the statements of a witness who has testified fully and fairly. But the question is, whether there is a failure of proof on a material point. To order a new trial because we differ in opinion from the circuit judge as to the weight of the testimony, or the truth or falsity of a witness, is to substitute our discretion for his discretion. And in this matter he is supposed to enjoy some advantages over us."

And again in *Blackwood* v. *Eads*, 98 Ark. 304-310, where we quoted from *Taylor* v. *Grant Lumber Co.*, 94 Ark. 566, as follows: "The trial judge still has control of the verdict of the jury after and during the term it was rendered. Because of his training and experience in the weighing of testimony, and of the application of legal rules to the same, and of his equal opportunities with the jury to weigh the evidence and judge of the credibility of witnesses, he is vested with the power to set aside their verdicts on account of errors committed by them, whereby they have failed in their verdict to do justice and enforce the right of the case under the testimony and instructions of the court. This is a

necessary counterbalance to protect litigants against the failure of the administration of the law and justice on account of the inexperience of jurors."

In *Blackwood* v. *Eads*, *supra*, we said further: "Where there is a decided conflict in the evidence this court will leave the question of determining the preponderance with the trial court, and will not disturb his ruling in either sustaining a motion for a new trial or overruling same." * * *

"The witnesses give their testimony under the eye and within the hearing of the trial judge. His opportunities for passing upon the weight of the evidence are far superior to those of this court. Therefore his judgment in ordering a new trial will not be interfered with unless his discretion has been manifestly abused." See also *McDonald* v. *St. L. S. W. Ry. Co.*, 98 Ark. 334; *McIlroy* v. *Arkansas Valley Trust Co.*, 100 Ark. 596-599.

The only tribunal, under our judicial system, vested with the power to determine whether or not a verdict is against the preponderance of the evidence is the trial court. Where there is a conflict in the evidence and the trial court finds that the verdict, upon a material issue of fact, is against the preponderance of the evidence, the logical and necessary result of such finding as matter of law is that the verdict must be set aside; otherwise, it would be impossible to correct the error.

We are aware that a different rule prevails in some jurisdictions, but the rule which obtains in our own jurisdiction is the only logical and sound one, and it is supported by excellent authority elsewhere. Precisely the same rule prevails in Tennessee. *Cumberland, etc. Telephone Co.* v. *Smithwick*, 112 Tenn. 463; *Railroad* v. *Neely*, 102 Tenn. 702; *Turner* v. *Turner*, 85 Tenn. 387; and see, also, *K. P. Railway Co.* v. *Kunkel*, 17 Kan. 172; *Central of Georgia Ry. Co.* v. *Harden*, 113 Ga. 453; *Tacoma* v. *Light Co.*, 16 Wash. 288. We cannot approve the doctrine that it is an invasion of province of the jury for the trial court to set aside a verdict which he finds to be against the preponderance of the evidence. On the contrary if

he fails to do so, he surrenders his own province, ignores his duty, and by so doing destroys the integrity of the best system that thus far has been devised in this country for the administration of justice.

Perhaps in the majority of courts of last resort in this country the rule obtains that where the trial court has sustained the verdict of a jury, the court of review will not reverse the ruling of the trial court in refusing to set aside such verdict where there is sufficient evidence to sustain it, even though in the opinion of the appellate court such verdict may be clearly against the weight of the evidence.

Learned counsel for the appellee cite us to several cases of our own court where the above rule is announced. *Drennen* v. *Brown*, 10 Ark. 138; *Allen* v. *Nordheimer*, 13 Ark. 339; *Lindsay* v. *Wayland*, 17 Ark. 385; *Miss. etc. R. R. Co.* v. *Cross*, 20 Ark. 443.

But the rule announced in these cases has no application whatever to, and should not govern trial courts in passing upon motions for a new trial. Having presided at the trial, and having seen and heard the witnesses testify, they have had the same opportunities as the jury, and hence are vested with the authority to ascertain whether or not the jury's verdict is in accordance with the preponderance of the evidence, and when they have found upon conflicting evidence that such verdict is, or is not, against the weight of the evidence, such finding will not be set aside unless it is manifest that the court abused its discretion, that is, acted improvidently, arbitrarily, or capriciously in making such finding. Such finding must avail the party entitled to the benefit thereof.

Now, if the court had simply overruled the motion for a new trial, without the statement quoted, this ruling would have been tantamount to a finding that the verdict was not against a preponderance of the evidence. But such deduction cannot be drawn here for there was an affirmative finding of the court in the following language: "While the jury determined by their finding that the defendant Twist did not make a full

and complete statement of all of the facts within his knowledge when consulting said attorney, in my judgment the finding upon that question was against the preponderance of the evidence."

(9) This court has said in several cases that, "It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence," which means conversely that the trial judge should not set aside a verdict if the evidence is so evenly balanced that the court cannot see clearly that the verdict is against the preponderance. In other words the trial court should let the verdict stand if he is in doubt as to whether or not it is against the preponderance. Where he finds positively that it was we must assume that he was convinced that such was the fact. When the language used by the court in ruling on the motion for new trial is closely analyzed, there does not appear to be any doubt or uncertainty in the mind of the court that the jury's finding was against the preponderance of the evidence. To be sure, where the language used by the court is such as to make it doubtful or uncertain as to whether the court actually found the fact to be that the verdict was against the preponderance of the evidence, then the ruling of the court in refusing to set the verdict aside should not be disturbed. But the language of the court was not such as to indicate that the testimony was so nearly at equipoise in the thought of the presiding judge as to leave him in doubt as to whether the verdict was against the preponderance of the evidence on the particular question mentioned. The word "merely" in the language quoted does not qualify the finding of the court on that issue. On the conclusion of fact as to the verdict being against the preponderance of the evidence, the language of the court is positive and unequivocal.

The language "but, of course, the verdict will not be disturbed by me merely because it is against the preponderance," states the court's reason for the conclusion it had reached not to set aside the verdict. This language certainly does not indicate that there was any doubt or uncertainty in the mind of the court that the

verdict was against the preponderance of the evidence. It rather emphasizes and strengthens the idea that the court had reached that conclusion. The language, however, does show that the court wholly misapprehended the rule of law that should be applied to such a finding. The language shows that the court was of the opinion that he could not disturb the verdict merely because it was against the preponderance, whereas that was the very reason why he should have set it aside.

The word "merely" means "purely," "only," "solely." "Merely" is often misused for "simply." Funk and Wagnall's New Standard Dictionary. As used in the sentence it qualifies the word *because*. So, giving the word any one of its natural and accepted meanings, and treating it in its grammatical relation to the other parts of the sentence, it does not show that the court was in any doubt whatever about the verdict of the jury being against the preponderance of the evidence. If the language of the court had been "the verdict will not be disturbed by me solely (or simply, or purely, or only) because it is against the preponderance of the evidence," it would have had precisely the same meaning as the language actually used.

(10) Therefore, we conclude that the finding of the court was positive that the verdict was against the weight of the evidence on the essential point mentioned, and that the court erred, after thus finding, in not setting aside the verdict. For this error the judgment must be reversed and the cause remanded for a new trial.

HART, J. (dissenting). It is true that according to the uniform current of authority in this State, it is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence. But this statement of the law was not intended to authorize the trial court to weigh the evidence and substitute its judgment for that of the jury; for under our constitution, this is clearly the peculiar province of the jury.

The inquiry in such cases is not whether the judge acting as a juror would or would not have come to the conclusion returned by the jury in their verdict, but whether reasonable men charged with the duty of finding facts from the evidence, under the court's instructions as to the law applicable to the case, would come to that result. *Doody* v. *Boston & Maine Rd.*, 77 N. H. 161, Ann Cas. 1914 C, 846; *Reeve* v. *Dennett*, 137 Mass. 315; *Atchison, etc. Railroad Co.* v. *Matthews*, 58 Kan. 447. See also *State* v. *Tarrant*, 24 S. C. 593; *Beaudrot* v. *Southern Ry. Co.*, 69 S. C., 160 and *Oregon Cas. R. R. Co.* v. *Oregon Steam Nav. Co.* 3 Ore. 178.

The fair inference to be deduced from the remarks of the trial judge is that while upon the evidence adduced at the trial, he would have found the other way, yet, after a full consideration of the matter, he was not so clearly of the opinion that the verdict of the jury was against the preponderance of the evidence, that, as a matter of law, he was required to set it aside. This construction of his remarks is borne out by the fact that the court approved the verdict, and entered judgment thereon.

Our Constitution provides that judges shall not charge juries with regard to matters of fact, but shall declare the law. If the jury abuses this power, it is the duty of the trial judge to grant a new trial; but he should do this only when he is clearly of the opinion that the verdict of the jury is against the preponderance of the evidence; and not merely because he differs with the jury as to the preponderance of evidence.

I am authorized to state that Judge HUMPHREYS concurs in this dissent.

HARPER, ADMR., *v.* WISNER.

Opinion delivered December 18, 1916.

ADMINISTRATION—SALE OF LAND FOR DEBTS—NOTICE.—The probate court is without authority to authorize an administrator to sell the lands of an estate, unless, prior to his making application for such authority, he has given the notice required by Kirby's Digest, § 195.

Appeal from Randolph Circuit Court; *J. B. Baker*, Judge; affirmed.

S. A. D. Eaton, for appellant.

1. The order of sale should not have been granted. No notice was given as prescribed by law. Kirby's Digest, § 195. Mere informalities do not vitiate so long as they do not mislead. 20 Cyc. 1117.

2. No inventory of the personal estate was ever filed. 64 Kans. 254.

3. No debts had been probated against the estate. It is not necessary, Kirby's Digest, § 187; 77 Am. Dec. 340. There was a valid lien on the land—it was due. 78 N. E. 71; 40 Cyc. 1710. Appellees must pay this indebtedness. 40 Cyc. 1683.

4. There was sufficient personal property to pay the debt. The jurisdiction of the probate court rested upon the allegations of the petition. 76 Am. Dig. 551; 18 Cyc. 751. The judgment was *in rem.* 44 Ark. 267. The order confirming the sale is final. 31 Ark. 75; 47 *Id.* 413; 18 Cyc. 733. The judgment was a final order and no appeal was taken. 20 Ark. 652; 23 *Id.* 39 47 *Id.* 413; 53 *Id.* 113; 38 *Id.* 78; 99 *Id.* 327. The sale could only be set aside by appeal. 53 Ark. 113; 38 *Id.* 78.

5. Richardson's rights, the purchaser, must be respected. 86 Ark. 255; 108 *Id.* 370. The confirmation relates back to the date of the sale and the purchaser was the owner from that date. 99 Ark. 327. The judgment should be reversed and the action dismissed.

J. W. Meeks, *T. W. Campbell* and *W. L. Pope*, for appellee.

1. The trial was before the circuit court *de novo.* 38 Ark. 392; 26 *Id.* 533.

2. The land was not described. The law was not complied with. The petition was properly denied. Kirby's Digest, §§ 187, 195. A claim must be presented for allowance. Croswell Ex. & Adm., p. 337; 18 Cyc. 451; Kirby's Digest, §§ 113, 114. The statutes must be substantially complied with. 65 Ark. 1; 66 *Id.* 327; 69 *Id.* 62; 97 *Id.* 546.

3. The will created a condition subsequent not precedent. 4 Kent Com., 122-133; 40 Cyc. 1695. When the takers fail or refuse to perform the condition, the land goes to the heirs. 78 N. E. 972; 9 L. R. A. 167, notes; 12 A. & E. Am. Cas. 224; 4 Kent. 122-133.

4. This is an appeal and not a collateral attack. All irregularities can be taken advantage of. 31 Ark. 75; 47 *Id.* 413.

5. The probate court had only such jurisdiction as is conferred by statute and the law must be complied with. No notice was given as prescribed by law.

HART, J. Joe A. Harper as administrator with the will annexed of the estate of Nannie W. Harper, deceased, prosecutes this appeal to reverse a judgment of the circuit court setting aside a judgment of the probate court ordering the sale of decedent's lands to pay debts. The material facts are as follows:

On March 2, 1915, Joe A. Harper was appointed administrator with the will annexed of the estate of Nannie W. Harper, deceased. On April 15, 1915, he filed his application for an order to sell a certain forty acres of land belonging to the estate of Nannie W. Harper, deceased, for the purpose of paying off a mortgage which she in her lifetime had executed on said lands and which indebtedness was unpaid at the time of her death. In his petition the land was definitely described in the application for the sale of it. The application bears the following endorsement: "Filed in open court this 15th of April, 1915. The within petition examined and the first day of July term is set for further

hearing on this petition. April 17, 1915. C. E. Pringle, Probate Judge."

Prior to this time the administrator had given no notice whatever of his intended application for the sale of the land. After this time a notice was published in a newspaper published in the county on April 30, 1915, May 7, 1915, May 14, 1915, May 21, 1915, May 28, 1915, stating that a petition had already been filed in the probate court praying an order for the sale for a certain described tract of land. This notice described a different tract of land from that described in the application. At the July, 1915, term of the probate court an order was made by said court granting the petition and ordering the sale of the land described in it. At that time no claims whatever had been probated against the estate. The land was sold pursuant to the order of the probate court and a report of sale was made and approved by the court at its October term, 1915. The administrator was directed in the order to collect the amount of sale and settle for the same at the January, 1916, term of the probate court. An appeal from the judgment of the probate court ordering the land sold was prayed by the heirs and legatees of decedent and granted by the probate court within the time allowed by law.

The circuit court held that the probate court cannot lawfully make an order authorizing administrators to sell the lands of an estate unless prior to his making application therefor he has given the notice required by section 195 of Kirby's Digest, and unless the debts for which the order of sale is made have been duly probated against the estate as above stated. The circuit court rendered a judgment denying the application of the administrator to sell the lands and setting aside the judgment of the probate court. The administrator has appealed from the judgment of the circuit court.

It may be noted at the outset that this is a direct and not a collateral attack on the judgment of the probate court ordering the lands to be sold. Section 195 of Kirby's Digest reads as follows:

"No order for the sale of lands and tenements for the payment of debts shall be made by the court, unless it shall appear to the satisfaction of the court that notice of the intended application for the sale of such lands and tenements has been given, at least four weeks before making such application, in some newspaper printed in the county where the lands lie, if there be any printed in such county, and, if none, by advertisements set up in at least six of the most public places in such county."

The probate court is authorized by statute to make orders for the sale of lands of the estates of deceased persons, but the order of the sale can only be made in the manner and for the purposes prescribed by the statute. *Planters Mutual Insurance Association* v. *Harris*, 96 Ark. 222.

In the case of *Rogers* v. *Wilson*, 13 Ark. 507, the administrator applied for and obtained an order of the probate court empowering him to sell certain lands belonging to his decedent's estate without giving the notice required by statute. In that case relief was denied because no appeal was taken from the judgment of the probate court ordering the land sold and the action was a collateral attack on the judgment. In that case, however, the court said that it was clearly erroneous to have granted the order for the sale of the real estate without first having given the notice required by the statute, but the court said that the order was not void, because it was made in a proceeding *in rem*, for the sale of real estate, which, by our statute, is made assets in the hands of the administrator, and over which, by petition, the probate court had jurisdiction.

In the case of *Montgomery and Wife* v. *Johnson et al*, 31 Ark. 74, which was also a collateral attack on the judgment of the probate court ordering the sale of decedent's lands, the court said, "As a Superior Court, with general jurisdiction and plenary power over the matters committed to its peculiar cognizance, its judgment or order, when acting within the sphere of its jurisdiction, however erroneous it may be, is conclusive

as to all persons, until reversed upon review by a higher tribunal, or set aside in a direct proceeding for that purpose; for it is well settled that the judicial sentence of a Superior Court of competent jurisdiction over the subject-matter to which it relates, cannot be attacked or impeached in a collateral proceeding, upon the ground that the court erroneously exercised its powers. (Citing authorities.)"

Again in the case of *Livingston, Administrator*, v. *Cochran, et al*, 33 Ark. 294, a bill was filed in the chancery court to set aside an order of the probate court for the sale of land belonging to the estate of a deceased person as being null and void. One of the grounds relied upon was that the administrator had not given public notice of the intended application for the order of sale as required by the statute. The relief prayed for was denied because the court held that the action was a collateral attack upon the judgment of the probate court.

The court said, however, "It was certainly the duty of the executor to give notice as required by the statute, and it was the duty of the probate court to see that the notice had been given before making the order of sale, and the granting of an order of sale without such notice would be an error and ground for reversal of the order on appeal. But when the order comes in question collaterally, as in this case, and not in a direct proceeding to review it, it cannot be treated as null and void because such notice is not shown to have been given, as repeatedly held by this court. (Citing authorities.)"

In the application of these principles to the case at bar we think the judgment of the probate court ordering the sale of the land was erroneous because the notice required by section 195, of Kirby's Digest, was not given. As we have already seen probate courts acting through the agency of administrators and executors have jurisdiction *in rem* of the property of deceased persons but that jurisdiction can only be exercised in the manner and for the purpose prescribed by the statute. A notice is required by the statute in order that persons interested may have an opportunity to come in

before the application is heard and show that the order of sale should not be granted. In the present case, the notice of the intended application required by the statute undertook to describe the land which it stated the petition asked to be sold and the notice described a wholly different tract of land from that described in the application in the order of sale and subsequent proceedings. As we have already seen the present case is a direct and not a collateral attack on the judgment of the probate court. The judgment of the probate court was erroneous for the reasons already given and the circuit court properly set it aside. The purchaser at the sale became a party to the proceedings at the time he bid in the lands and is bound by the subsequent proceedings in the case. It appears from the record that he has not yet paid the purchase money and it necessarily follows that from there having been an appeal and reversal of the judgment of the probate court, the purchaser is not bound by his obligation for the purchase money.

Another reason given by the circuit court for setting aside the judgment was that at the time of its rendition, no claims had been probated against the estate. The record does show, however, that there was an unprobated debt secured by a mortgage on the lands which were ordered sold and the question of whether the probate court had jurisdiction to order for the protection of the estate, a sale of land for the purpose of paying off an unprobated debt secured by a mortgage on land of the estate has never been passed upon by this court. See *Long* v. *Hoffman*, 103 Ark. 574. Inasmuch as the circuit court was right in setting aside the sale for want of notice as required by the statute, it becomes unnecessary for us to pass upon the last mentioned question in this case.

The judgment of the circuit court will be affirmed.

CADDO RIVER LUMBER CO. *v.* GROVER.

Opinion delivered December 18, 1916.

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT.—In an action against a foreign corporation for personal injuries, resulting from the negligence of a fellow-servant, Act 69, Acts 1907, giving a right of action against an employer for the negligence of other employees, is applicable.
2. TRIAL—IMPROPER ARGUMENT—PROVOCATION.—Improper argument by appellee's counsel will not be held to be prejudicial when made in answer to a personal attack upon him by appellant's counsel, in argument.

Appeal from Pike Circuit Court, *Jefferson T. Cowling*, Judge; affirmed.

J. C. Pinnix and *McRae & Tompkins*, for appellant.

1. Ashcraft was not negligent. 99 Ark. 537; 104 *Id.* 67; 116 *Id.* 196.

2. The risk was an ordinary one and was assumed by appellee. 90 Ark. 543-5-6, etc.

3. The court erred in giving instruction No. 1 for appellee. It told the jury that it was the duty of appellant to *protect* the appellee from danger. 86 Pac. 1005; Labatt on Mast. & S., § 1165. Grover was not ignorant of the risk. It is also erroneous because it contradicts the instruction on the measure of damages. 99 Ark. 377.

4. The court erred in refusing to reprove counsel for making improper remarks to the jury in his closing argument. 82 Ark. 432-440; 75 *Id.* 430-434.

5. The court erred in refusing to give instruction No. 1 asked by appellant. The evidence failed to show any negligence. Appellant is a foreign corporation and the Act of 1907 abolishing the common law fellow-servant doctrine violates the 14th amendment to the Constitution of the U. S. 87 Ark. 587; 89 *Id.* 522; 222 U. S. 251-5-6; 127 *Id.* 205; 173 *Id.* 404; 169 *Id.* 393; 183 *Id.* 79; 113 *Id.* 709; 58 Ark. 435; 81 Miss. 507; 62 Am. St. Rep. 181; 178 Fed. 619; 47 L. R. A. (N. S.) 97, 84.

Pace, Seawel & Davis, for appellee.

1. The evidence is sufficient to sustain the verdict. 90 Ark. 131; 74 *Id.* 16; 87 *Id.* 614; 100 *Id.* 629. Ashcraft was guilty of negligence and the jury so found. Attention is called to 229 Fed. 956, a case where the facts are peculiarly like this case. As to the effect of a special verdict the general rule is to permit both verdicts to stand, if not inconsistent. 84 Ark. 359; 50 *Id.* 314; 16 U. S. Sup. Ct. Adv. Op. 686.

2. The instructions were correct and have been repeatedly approved by this court. The fellow-servant doctrine has been abolished. 89 Ark. 522; 85 Ark. 503; 111 *Id.* 501. The question of contributory negligence and assumption of risk was clearly submitted by instructions Nos. 6 and 1 given by the court. 229 U. S. 114; 7 U. S. Sup. Ct. Adv. Op. 249.

3. The fellow-servant statute is constitutional. 87 Ark. 587; 89 *Id.* 522. The charter of a foreign corporation can be amended by legislation. 54 Ark 101; 69 *Id.* 521; 82 *Id.* 309; 95 *Id.* 588. Judge Sanborn's decision is not in harmony with the decisions of the Supreme Court of U. S. 218 U. S. 36.

4. The court did not commit an error in refusing to reprove counsel for alleged improper remarks. The remarks were legitimate and made in reply to an impassioned effort on the part of counsel for appellant. 112 Ark. 464; 104 *Id.* 528; 93 *Id.* 66.

SMITH, J. Appellee recovered judgment for a large sum of money to compensate a personal injury sustained by him while employed by appellant. No serious complaint, however, is made against the size of the judgment, but it is insisted that no judgment should have been permitted for the reasons which are herein discussed.

Only appellee and a man named Ashcraft were present at the time of the injury, and they differ in some material respects in their versions of this occurrence. These differences, however, have been resolved in appellee's favor by the verdict of the jury, and we may

state the facts as he related them to the jury. He and Ashcraft were seeking to remedy some trouble with the crank-shaft of appellant's light engine. About a week before the accident appellee had taken this crank-shaft to Glenwood, and had brought it back and had it fitted to its place in the engine. It became loose again, and a new crank-shaft was ordered, and when it came it was found not to fit its bearings. It was necessary to take out the Babbitt metal in the bearings, and re-Babbitt them, and appellee was directed to assist Ashcraft in doing this work, and he described the manner of his injury as follows: "We started to work on it at 7 o'clock, got the engine torn down, got the crank torn down, and we started on the Babbitt metal to chipping it out. We worked on it until about 12 or 1 o'clock, pretty close around there, when I received the accident. Just before 12 o'clock I went to the machine shop to look up a Babbitt ladle and also a small bellows which I knew was out there, and was going to use it in blowing out this fine dust out of the anchor hole in one of the bearings. I had already got one of these bearings cleaned out, the left-hand bearing, and when I came back in John says to me: 'We are getting along slow; it would be a good plan for you to go ahead and work on this bearing here and let me finish chipping this out over here.' So I picked up the lantern setting on top of the engine. I was holding my lantern above my head and had a small end punch which I was using in cleaning out the anchor hole that was required to hold the Babbitt metal in the bearings. These holes are about half an inch apart, drilled into the casting to give this metal a hold so it will set there and let the shaft turn free in the metal. Now, I was standing there holding this light and cleaning out this fine dust out of these holes. * * * I was cleaning out these anchor holes with a small end punch and holding the lantern in my left hand above my head. I had my back to John Ashcraft who was working on the right-hand bearing behind me. I had been working there, I judge, fifteen minutes, when Ashcraft spoke to me. He says, 'Grover, hold the light around,' he says,

'a little closer so I can look at what I am doing.' I turned around with the light, thinking he wanted to get his bearings and see what he was doing. I never dreamed he was going to chip at that time. I turned square around and just as I turned around and threw the light over where he was working he struck the chisel with the hammer and a piece of Babbitt metal flew in my eyes."

He further testified that at the time the blow was struck the chisel was in a slanting position which made it more probable that the metal would fly in his direction and that the chisel would not have been in this position had time been given to adjust it.

Special interrogatories were submitted to the jury, to which the following answers were made:

"1. Was Ashcraft negligent, and if so, in what did his negligence consist?

Answer: Yes, when Ashcraft called Grover's attention and struck the chisel with the hammer unexpectedly.

2. Was Grover negligent, and if so, in what did his negligence consist?

Answer: No, he was not."

It is first insisted that Ashcraft was not negligent, but the jury, in answer to the interrogatories, has specially found that he was negligent in striking the chisel an unexpected blow, and we cannot say the evidence is not sufficient to support this finding.

(1) It is next insisted that the risk was an ordinary one and was assumed by appellee. But such is not the case. The servant is relieved of the assumption of this risk under Act 69, Acts of 1907, p. 162, entitled "An Act to give a right of action against an employer for injuries or death resulting to his agents, employees or servants either from the employer's negligence or from the negligence of some of his other employees, servants or agents, and to repeal all Acts and parts of Acts in conflict herewith."

Objection is made to the first instruction given at appellee's request upon the ground that it imposed a

degree of care beyond the requirements of the law, in that it told the jury that it was appellant's duty "to exercise ordinary care to protect plaintiff from danger," and that the instruction was inapplicable under the issues joined. This instruction was a lengthy one and announced familiar principles of the law of master and servant, and told the jury that if the Act of "said John Ashcraft caused plaintiff to look in his direction and without notice or warning to plaintiff, after causing plaintiff to look in his direction, cut said Babbitt metal with his chisel, causing a piece of said metal to chip off and fly into the eye of the plaintiff, destroying the sight of the same, and that the said John Ashcraft in thus striking said metal and causing a piece of the same to fly into the eye of the plaintiff at the time failed to exercise ordinary care to protect plaintiff from danger, and that his act in thus cutting the metal was negligence and the proximate cause of the injury, and that the plaintiff at the time was exercising ordinary care for his own safety, and had not assumed the risk," that the jury should find for the plaintiff in such sum as would fully compensate him for the injuries received.

We think this a correct declaration of the law as applicable to the facts of this case.

The complaint alleges that appellant is a foreign corporation, and this fact is not denied, and it is said, therefore, that the Fellow-Servant Act cited above violates the Fourteenth Amendment to the Constitution of the United States, in that it denies appellant the equal protection of the law. This question has been thoroughly considered by this court and decided adversely to appellant's contention. *Ozan Lbr. Co.* v. *Biddie*, 87 Ark. 587; *Aluminum Co.* v. *Ramsey*, 89 Ark. 522; *Soard* v. *Western Anthracite Coal, etc., Co.*, 92 Ark. 504; *St. L. S. W. Ry. Co.* v. *Burdg*, 93 Ark. 92; *Ark. Stave Co.* v. *State*, 94 Ark. 34; *St. L., I. M. & S. Ry. Co.* v. *Brogan*, 105 Ark. 545; *St. L., I. M. & S. Ry. Co.* v. *Ledford*, 90 Ark. 543; *Keich Mfg. Co.* v. *Hopkins*, 108 Ark. 578; *Chapman & Dewey Land Co.* v. *Woodruff*, 116 Ark. 189.

And the fact that appellant is a foreign, instead of domestic, corporation, can make no difference. The statute applies to them alike. *Woodson* v. *State*, 69 Ark. 521; *Western Union Tel. Co.* v. *State*, 82 Ark. 309.

(2) It is finally insisted that error was committed by the court in refusing to reprimand counsel for appellee for statements contained in his closing argument. This argument consisted in a statement by Mr. Frank Pace that he would not represent corporations in cases of this character for fear that he might do some cripple an injustice, and that he would suffer the loss of his arms, or would have his tongue cleave to the roof of his mouth, before he would represent a corporation in an attempt to defeat the assertion of a claim as just and meritorious as the one the jury was then considering. We think this argument was too impassioned and, therefore, an improper one, but we cannot say that it was prejudicial in this case. Counsel for appellant had severely criticised appellee's testimony and had argued that it was false, yet he stated that the experience and skill of Mr. Pace was such through connection with many cases of this kind that he could, and would, make it appear plausible, notwithstanding it was false. This attack invited the response, and while the response was perfervid it was but the expression of counsel's own view. Personalities should be avoided, as they tend to throw no light upon the issues of the case, but one who throws down the gauntlet may not complain against him who picks it up where the challenged party does no more than repel the challenge or defend himself from some charge which might militate against the cause he represents.

Finding no prejudicial error the judgment is affirmed.

DIGGS v. STATE.

Opinion delivered December 18, 1916.

HOMICIDE—DEFENSE OF INSANITY—INSTRUCTIONS.—In a prosecution for homicide, the defendant interposed the plea of insanity, and was convicted of murder in the first degree. *Held*, the evidence was sufficient to support the verdict, and that the case was submitted to the jury upon proper instructions. (The case of *Bell* v. *State*, 120 Ark. 530, cited and approved.)

Appeal from Conway Circuit Court; *A. B. Priddy*, Judge; affirmed.

W. P. Strait, for appellant.

Edw. Gordon, of counsel.

1. There was strong testimony indicative of defendant's insanity; he labored under some hallucination of an impending or existing condition serious to himself and his safety. 12 Blandford on Insanity, 103; 1 Wharton & Stelle Med. Jur., § 390; Taylor's Med. Jur., p. 740, 784-5.

2. The court erred in refusing instruction No. 1, asked for defendant. Instruction No. 2 refused is a correct statement of the law. The question as to mental capacity to commit murder in the first degree has often been decided by this court. Insanity as an excuse for crime, or as a condition lowering the grade thereof, is in line with drunkenness or intoxication—mental incapacity. 97 Ark. 103; 76 *Id.* 286; 102 *Id.* 506; 40 *Id.* 511; 64 *Id.* 523; 120 *Id.* 530.

3. The presumption that when insanity is shown to exist at one time, it continues as a matter of law and exists at the time of the commission of the offense, unless the testimony shows a recovery. 76 Am. St. 85, note; 13 Abb. Pr. N. S. 207; 34 Oh. 372; 190 Pa. St. 138; 77 *Id.* 205.

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

1. The instructions upon the question of insanity are correct. 26 Ark. 334; 40 *Id.* 511; 50 *Id.* 330; 54

Id. 588; 64 *Id.* 523; 98 *Id.* 132; 81 Ala. 577; 165 U. S. 373; 96 N. W. 417; 50 Atl. 1113; 52 *Id.* 434; 96 Am. St. 429; 107 Ky. 624; 12 Cyc. 169; 21 *Id.* 663.

2. It is no error for a trial judge to refuse a needless repetition of instructions. 52 Ark. 180; 58 *Id.* 472; 72 *Id.* 384; 74 *Id.* 33; 80 *Id.* 20.

3. The delusion was no excuse. 54 Ark. 601; 10 Cl. & F. 200.

HUMPHREYS, J. Appellant was indicted, tried and convicted of murder in the first degree in the Conway Circuit Court, on the 12th day of October, 1916. Sentence was imposed and the case is here on appeal.

Appellant's only defense was insanity. For a thorough understanding of the case, it will only be necessary to make the following resume of the facts. On June 29, 1916, about noon, appellant, a negro man, shot and instantly killed Mrs. Hoggard, a feeble white woman 78 years of age. This old lady was passing through appellant's horse lot when he fired the fatal shot. He forbade her coming in. She either did not hear him, or hearing, heeded not his command and he shot her down. Some five years before this time, he had bought a portion of the 40-acre tract of land upon which he lived at the time of the killing, from Mrs. Alice Rogers, a daughter of Mrs. Hoggard. In the contract, or deed for the sale of a portion of her land to appellant, Mrs. Rogers reserved the right for her mother to occupy the house in which she then lived on said tract, for her mother's lifetime. Differences grew up between Mrs. Hoggard and Tom Diggs, the appellant. Tom Diggs had tried to procure the arrest of Mrs. Hoggard for threatening to kill him. Mrs. Hoggard had prosecuted Tom Diggs for trespassing on her portion of the land. On this account, at one time he was put in jail but was afterward discharged. He had on various occasions, consulted officers and lawyers as to how he could get Mrs. Hoggard off the land. He had prevented her from getting water at his well.

F. H. Hammett was the first to arrive on the scene after the killing. Mr. Hammett had seen the negro lower the smoking gun from his shoulder and return to the house. Not knowing that the negro had killed Mrs. Hoggard, he went in to get a drink of water and first talked to the negro about working for him. He finally noticed that the negro had buck shot in a shell and asked him in a casual way "What in the devil are you shooting at this time of the day, there is nothing out there." The negro answered, "Well, I just shot a thief." The following conversation was had: "That so, Tom?" "I just shot a thief been bothering my chickens and eggs." "Have you killed that old spotted dog that has been bothering around?" "No, sir, wasn't a dog; it was down there by the corner of the barn." While drinking Hammett looked over in the lot and said, "Tom, what is that over there?" He said, "That is old lady Hoggard." "Negro, did you shoot her?" "Yes, sir." "You sure played hell now." "Well, I reckon maybe I did." "How bad is she shot?" "I don't know." "Do you know whether she is dead?" "No." "I am going to see." "All right, help yourself." "Tom, she is dead." "I don't know; I aimed to do it and did it."

Appellant then told Hammett that she had been disturbing him a great deal and trespassing on his premises; that he tried to get along with her and couldn't. Hammett then asked him to surrender, but he declined and in answer to Hammett's question as to whether he intended to fight it out, said he guessed that was what it amounted to. Through the advice of Hammett, he sent his children away from home so that they might not get killed in any subsequent encounter.

In a short time thereafter, Dr. J. B. Eddy, Sterling Garrett and F. H. Hammett went to the home of the negro and through a promise of protection until the officers came, persuaded the appellant to surrender to them. He told them that, "It seems that was the only way to get rid of it." He admitted the killing when he reached Blackville, the nearest town, and said that he did it "just to get rid of it."

Until two years before the killing, this negro had been a church member, a trustee therein, and superintendent of the Sunday school. At about that time he changed his whole attitude toward the church and claimed that churches and everybody connected with them were all wrong. He circumcised himself, claiming he did it under the direction of God. He asserted a belief in the doctrine of free love and attempted to form an association among his people of that kind. He became obstinate and declined to reason on questions with his friends, except in the way he thought. He would at times brood and spend much of his time reading. He was not as sociable with the community as before. His relatives testified that his uncle was supposed to have been insane and that their cousin Liddy on appellant's father's side was insane. Some of the lay witnesses, basing their opinion upon appellant's change of attitude toward the church, on moral questions and in temperament, expressed the opinion that he was insane at the time he did the killing. The only physician who testified in the case was Eddy, who had practiced in appellant's family and had known him and was familiar with his conduct. In his testimony he said: "I think that Tom Diggs was sane upon the issue involved in this killing. Under the circumstances surrounding this case, I think the defendant was sane in the matter." He said that he had heard that Diggs was off and watched him all the time he was in his custody to see if he could detect the least feature to lead him to believe that he was insane, but that "he was seemingly just as correct as he had ever seen him." Eddy said on cross-examination that, "Independent of any general knowledge of circumstances, and on a statement of facts as detailed in the evidence, I would think that a negro that would kill a white woman would be a fool and would be foolish to kill anybody unless they were more or less insane. Without any excuse a negro man who would take a gun and go kill an old white woman, that itself would be an act that ordinarily would indi-

cate a want of intelligence and realization of the consequences and effect of the act."

Appellant conducted his business in the usual way and made a living for himself and family.

The court gave 25 instructions defining murder, malice express and implied, the effect of the admission of the killing, the distinguishing essentials between murder in the first and second degree, the punishment for murder in the first and second degrees, defining manslaughter, the punishment for manslaughter, the manner of weighing evidence and the usual instructions on questions of reasonable doubt and presumption of innocence. On the questions of sanity or insanity, the court gave the following instructions:

"15½. Gentlemen of the Jury: Counsel for defendant interposes the defense of insanity, and this is a defense which the law recognizes. Where an accused is on trial for murder in the first degree and the State proves the killing under circumstances that would constitute murder in the first degree, if the homicide was committed by a sane person then if the killing is admitted and insanity is interposed as a defense, such defense cannot avail, unless it appears from a preponderance of the evidence, first, that at the time of the killing that the defendant was under such a defect of reason from disease of the mind as to not know the nature and quality of the act he was doing or, second, if he knew it that he did not know he was doing what was wrong; or third, if he knew the nature and quality of the act and knew it was wrong, that he was under such distress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease to resist the doing of the wrong act, which act was the result solely of his mental disease."

"16. You are instructed that one who in the possession of a sound mind commits a criminal act under the impulse of passion or revenge, which may temporarily dethrone his reason, or for the time control his will, cannot be shielded from the consequence of his

act by the plea of insanity. That insanity will only excuse the commission of a criminal act when it is made to appear affirmatively, by evidence fairly preponderating, that the person committing the act was insane.

"17. On the question of sanity or insanity of the defendant you will consider all the evidence offered in the case, the homicide itself, the manner in which it was committed, and the attending circumstances, the life, habits and conduct of the defendant, as well as his mental capacity or perverseness, if any, from his birth up to the present time, to determine whether or not the defendant was of sound or unsound mind at the time of the commission of the crime charged.

"20. The court instructs you that before you can convict the defendant you must find from the testimony both as to the commission of the offense, and the condition of defendant's mind, beyond a reasonable doubt, that he is guilty of the charge upon which he is being tried; and, if upon a fair consideration of all the testimony, you entertain a reasonable doubt as to his guilt or innocence, then it would be your duty to give him the benefit of the doubt and acquit him.

"22. The court further instructs you that in order to constitute a homicide, murder in the first degree, according to these instructions, the killing must have been wilful, deliberate, malicious and premeditated; and there must have been an intent in the mind of the defendant to take the life of the deceased at the time the act was committed, and this intent must have been formed after deliberation and premeditation, and premeditation as used in these instructions means thought of beforehand; deliberation means a weighing in the mind of the consequences of a course of conduct as distinguished from acting upon a sudden impulse without the exercise of the reasoning powers. It is immaterial how long the premeditation existed, so that it did exist and precede the homicide.

"23. You are instructed that the opinions of both expert and non-expert witnesses as to the mental con-

dition of the defendant both before and since the killing of Mrs. R. L. Hoggard, has been put in evidence in this case and is proper and competent to be considered by you along with all the other evidence in the case in determining whether or not Tom Diggs at the time and in the killing of Mrs. R. L. Hoggard was sane or insane as described and within the meaning of the instructions given you by the court. These opinions do not, as a matter of law, supplant your duty and province of determining this question, but is to be considered by you and weighed by the same rules applicable to any other testimony; and, like all other testimony, given just such weight, as you gentlemen, seeking to find and disclose the truth, may think it justly deserves."

The defendant asked 13 instructions, most of them touching upon the question of insanity. They range from mere delusions to total incapacity.

The testimony is so meager and general on the question of insanity that it is rather hard to frame specific instructions on that question

This court said in the case of *Bell* v. *State*, 120 Ark. 530, "that when the killing was admitted, the defense of insanity cannot avail unless it appears from a preponderance of the evidence, *first* that at the time of the killing that the defendant was under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, *second*, if he did know it, he did not know that he was doing what was wrong; or, *third*, if he knew the nature and quality of the act, and knew that it was wrong, that he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease, to resist the doing of the wrong act, which act was the result of his mental disease." This court further said in that opinion on page 556, in substance, that after the court had declared the above tests and announced the burden of proof, it would be better for him simply to instruct the jury that if they believed from the preponderance of the evidence that the appellant was insane, they

should acquit him, otherwise they should convict him of the crime charged.

We think instruction number 15½ given by the court, covers each of the tests of insanity laid down by the court in the case of *Bell* v. *State*. That instruction, together with other instructions given by the court on the question of insanity, certainly covered every test of insanity under the evidence in this case necessary to give an impartial trial to the appellant, such as is guaranteed to him by the constitution and laws of our State. It seems to us that the rule laid down in the Bell case, *supra*, was strictly adhered to in the trial of this cause. Instructions ought to be responsive to the evidence. As far as we are able to observe, the instructions given in this case are peculiarly applicable and responsive.

There being no error in the instructions submitting the question of insanity to the jury, and ample evidence of a substantial nature to support the verdict of the jury, the judgment is in all things affirmed.

EAST *v.* SOUTHERN COTTON OIL CO.

Opinion delivered December 18, 1916.

1. APPEAL AND ERROR—MOTION FOR NEW TRIAL MUST APPEAR, WHERE—PRACTICE.—Although the motion for a new trial should not appear in the bill of exceptions, when it does so appear and there is no contention that it is improperly set out, the court, on appeal, will treat it as though it appeared in the proper place in the transcript.
2. APPEAL AND ERROR—UNNECESSARY ACT BY TRIAL COURT—EXCEPTION. Where an unnecessary act is done by the trial court it is not necessary to except to it; so when the trial court sustained a demurrer to certain paragraphs in appellant's answer and cross-complaint, and the appellant duly excepted to such action, the act of the trial court also striking out the said paragraphs is surplusage.
3. FACTORS AND BROKERS—REPLEVIN BY OWNER—COMMISSIONS AND OTHER CHARGES.—Appellant purchased cotton seed for appellee, under a contract which made the former liable for loss of the same, and giving appellant a right to commissions for purchasing and storing the cotton seed, and *held* that under the contract, appellee could not maintain an action in replevin for the seed without paying the appellant the amounts due him as commissions and for storage.

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

STATEMENT BY THE COURT.

Appellee brought suit in replevin against appellant in the Clark Circuit Court for about 14 tons of cotton seed in possession of appellant, same being stored in a little house just in the rear of the livery barn of appellant in Arkadelphia. The complaint stated that appellee was the owner of the seed and entitled to the immediate possession thereof, and that the defendant unlawfully detained same, and asked for $50.00 damages for the detention of said seed.

Appellant filed an answer and cross-complaint. The first paragraph of the answer denied that appellee was the owner and entitled to the possession of said seed and denied that he had damaged it in any sum by the retention of said seed. The second paragraph of the answer set out the contract between appellant and appellee, under which the seed were purchased. The contract was made an exhibit to the answer and is as follows:

"Contract between plaintiff and defendant, made on August 11, 1915.

"First: The Oil Company (plaintiff) hereby employs the second party (defendant) and the second party accepts such employment to purchase sound cotton seed for the Oil Co. at Arkadelphia during the season beginning September 15, 1915, ending March 15, 1916; but this contract may be rescinded and terminated at any time by either party by notice to the other party.

"Second: The second party shall receive as compensation a salary of fifty dollars per month, for six months, starting September 15, 1915. On all purchases over two hundred tons, the Oil Company agrees to allow a commission of one dollar and fifty cents per ton. The Oil Co. agrees to allow forty cents per ton to cover house rent and loading on each ton bought for their account.

"Third: The Oil Company to give defendant quotations and instructions as to buying said seed and defendant to give diligent effort to purchasing, and defendant will make daily written reports of said purchases showing quantity, cost of each load on forms furnished by the company; and if defendant can buy seed at prices lower than quotations the Oil Company is to have the benefit.

"Fourth: Defendant not to report seed unless they are actually delivered and deposited in the storage place, and not to purchase any seed for future delivery unless authorized.

"Fifth: The Oil Co. can arrange for cashing seed tickets in the town where purchased, but if the cashing of said tickets cannot be satisfactorily arranged, then the Oil Company will advance such sums of money as it deems proper to defendant, with the understanding that such sums advanced are trust funds to be used and accounted for under the direction of the company and to be used only in the purchase of seed.

"Sixth: The company provides a house for storing of seed purchased by defendant and scales for weighing, which are suitable for the purpose, and defendant is responsible for any loss in weight arising from errors in weighing, theft, drying, handling or any other cause. All seed shipped to the company shall be weighed at such point the company may designate; and defendant is responsible for any difference in weight between what is shown by his reports and the weights at such designated point in excess of the weights shown at said designated point.

"Seventh: Defendant is to keep all seed under lock and key and see that the scales are in good order.

"Eighth: Defendant is to ship seed as directed by the company and to ship all reported purchases and received in storage.

"Ninth: Defendant, during the existence of this contract, will not sell or purchase cotton seed for any other person.

"Tenth: The contract not binding until ratified by Memphis manager of the Southern Cotton Oil Company."

He, in substance, alleged that under this contract he purchased 308 tons of cotton seed and that he was entitled to $1.50 per ton on 110 tons as commission for purchasing same and 40 cents per ton on 308 tons for storage and loading, making a total sum of $288.00 for which he was entitled to a lien on the seed then in his possession. Paragraph 3 of said answer and cross-complaint was in substance the same as paragraph 2, but in the nature of a cross-complaint, asking for $150.00 damages for his wrongful discharge by appellee in addition to the amounts claimed for commissions and storage, making a total claim of $438.00, for which he asked judgment.

A demurrer was filed to the second and third paragraphs of the answer and cross-complaint, which demurrer was sustained by the court and exceptions saved to said ruling by the defendant. In addition to sustaining the demurrer to the two paragraphs of the answer and cross-complaint the court struck out the paragraphs.

The court declined to permit appellant to make a defense under the second and third paragraphs of his answer and cross-bill and sitting as a jury, found for appellee and rendered judgment against appellant for 10 tons of cotton seed and the costs of the suit. Appellant filed his motion for a new trial, which was overruled, exceptions were saved and this cause is brought here on appeal. The motion for a new trial appears in the bill of exceptions and does not appear otherwise as a part of the record in this cause.

McMillan & McMillan, for appellant.

1. Defendant had a lien for his commissions and for storage, and the right to retain possession until these were paid. 27 Ark. 90; 58 Am. Dec. 167; 13 *Id.* 298; Story on Agency, § 262; 50 Am. Rep. 378; Am. Cas.

1913 C. 1015; 16 Ark. 90, 92; 31 Am. Dec. 46-48; Paley on Agency, 109; 38 Am. Dec. 292; 22 *Id.* 551.

2. The facts set up in paragraphs 2 and 3 of the answer were a proper defense and counterclaim. 56 Ark. 250. A counterclaim is proper in replevin. 73 Ark. 464; 60 *Id.* 387; 71 *Id.* 408; Am. Cas. 1913 A. 108.

John H. Crawford and *Dwight H. Crawford*, for appellee.

1. There is no motion for a new trial in the record proper. 43 Ark. 391; 76 *Id.* 400; 27 *Id.* 725; 34 *Id.* 698; 35 *Id.* 536; 72 *Id.* 320; 80 *Id.* 410; 84 *Id.* 342; 91 *Id.* 443; 111 *Id.* 196-211; 83 *Id.* 517. See also 13 Ark. 316; 26 *Id.* 653; 33 *Id.* 830. We cannot look to the bill of exceptions for a motion for a new trial.

2. A paper stricken from the record can be brought back into the record only by and in the bill of exceptions. 4 Ark. 450; 5 *Id.* 166-7, 179; 6 *Id.* 535-7; 36 *Id.* 484-6; 53 *Id.* 307, 311; 5 *Id.* 223-6.

3. There was no exception to the action of the court in striking the plea from the files. 4 Ark. 454.

4. There can be no counterclaim or set-off in replevin. Kirby's Digest, §§ 6853, 6857, 6869.

5. The counterclaim section of the code is inconsistent with later sections of said code. 22 Nev. 333; 40 Pac. 96; 11 Fed. Cas. 222.

6. East was not a factor. Story on Ag. (5 Ed.), § 33; 19 Cyc. 115.

7. Appellant did not offer to make any definite proof of any fact. 88 Ark. 563, 571; 97 *Id.* 564; 123 Ark. 548.

HUMPHREYS, J. (after stating the facts). Appellee contends that the motion for a new trial has no place in the bill of exceptions and therefore that no motion for a new trial appears in the record and that for this reason the cause should be affirmed.

(1) Our court held in the case of *Farquharson* v. *Johnson*, 35 Ark. 536, that it was necessary for the motion for a new trial to appear in the bill of exceptions,

and the court could not take notice of it unless it was there. In later cases, the court held that the proper place for a motion for a new trial was in the record and not in the bill of exceptions. Because the court ruled in 35 Arkansas that it could not take notice of a motion for a new trial unless it appeared in the bill of exceptions, it is now contended that since the court holds that the bill of exceptions is not the proper place for a motion for a new trial, the same reasoning should apply and no notice should be taken of the motion for a new trial unless it appeared in the transcript separate and apart from the bill of exceptions. Should we adopt the reasoning of learned counsel, the court would suspend the consideration of this cause and direct a writ of certiorari to bring up the motion for a new trial. This would bring about an unnecessary delay of the case. While the bill of exceptions is not the proper place for the record entries and the pleadings, and while the motion for a new trial is a pleading, yet it is here and we will treat it as transferred to its proper place rather than delay the cause and issue the writ. No contention is made that the motion for new trial is incorrect in any respect.

(2) It is also contended that when a paragraph is once stricken from a pleading, that the only way to get it back into the record is by saving an exception and getting it back through the route of a bill of exceptions. The case of *Blackmore* v. *President*, 4 Ark. 454, is cited in support of this contention. We do not overrule this case, but hold that when an unnecessary act is done by a trial court, that it is unnecessary to except to it. No motion was filed to strike these paragraphs. They were demurred to, the demurrer was sustained and appellant saved his exceptions. The order sustaining the demurrer was sufficient. The order striking the paragraphs was clearly surplusage.

Having disposed of these technical contentions, we now proceed to a consideration of the real issue in the case. It is conceded by appellee that if appellant was a factor or broker that he would have a right to retain the possession of the cotton seed until his commissions,

advances and expenses were paid. Many authorities are cited in both briefs with reference to the law applicable to brokers and factors. It is unnecessary to discuss these authorities in this opinion. The rights of appellant depend upon the construction of the contract. The contract provides for a commission for purchasing this seed. It also allows 40 cents per ton to cover house rent and loading each ton bought for their account and makes appellant responsible for any loss in weight arising from errors in weighing, theft, drying, handling or for any other cause. It requires appellant to keep the seed under lock and key.

(3) In the case of *Hill* v. *Robinson*, 16 Ark. 93, our court said that cotton could not be recovered in replevin until the party picking and hauling it had been paid for the picking and hauling. It is true in that case that Hill the picker was to pay himself out of the cotton for picking and divide the balance. In the contract before us, it is not specifically agreed that appellant should have a portion of the cotton seed for his work, but it was agreed that he should have a commission for purchasing the seed and 40 cents a ton for loading and storage, and he was required to stand any loss in weights or loss from other causes. Under this provision of the contract if he had this seed in his own house for storage, he was clearly a warehouseman. These provisions in the contract certainly give him some right in the seed. It is conceded by appellee that it could not maintain replevin if appellant was a factor or broker under the terms of this contract. The terms of the contract may not make him technically a factor or broker, but we are convinced that the contract created an interest in or lien on the cotton seed purchased to the extent of the commission due for purchasing the seed and the charges for storing same. Both amounts should be paid by appellee before it could bring a suit in replevin for the seed. Making him responsible for any shortage in weight or loss by theft, drying, handling or any other cause, together with his right to a commission for purchasing same and

the pay for storing same, coupled with possession, takes him out of the category of naked purchasing agents.

This being our view, we think the court erred in sustaining the demurrer to paragraphs two and three of the answer and cross-complaint. For this error the cause is reversed and remanded with instructions to overrule the demurrer and for further proceedings.

LONDON v. MCGEHEE, TRUSTEE.

Opinion delivered December 18, 1916.

1. APPEAL AND ERROR—FAILURE TO BRING ORAL TESTIMONY INTO BILL OF EXCEPTIONS.—Where the record shows that the cause was heard upon oral testimony and that that testimony was not brought into the record by bill of exceptions, this court will presume, on appeal, in favor of the finding and judgment of the trial court, that every fact necessary to sustain the judgment was proved.
2. APPEAL AND ERRORS—ERRORS NOT APPEARING UPON THE FACE OF THE RECORD.—Errors not appearing upon the face of the record, and errors which were not called to the attention of the trial court, cannot be raised, for the first time, on appeal.
3. APPEAL AND ERROR—REVERSAL—PREJUDICIAL ERRORS.—This court only reverses for errors appearing in the proceedings of the trial court that are prejudicial to the rights of the appellant.
4. APPEAL AND ERROR—BILL OF EXCEPTIONS—AMENDMENT IN VACATION—EXPIRATION OF TIME FOR FILING.—A circuit judge has no power in vacation to add to or amend a bill of exceptions after the expiration of the time for the filing of the same.

Appeal from Crawford Circuit Court; *Jas. Cochran*, Judge; affirmed.

STATEMENT BY THE COURT.

This was a suit by the appellee against appellant in ejectment to recover the possession of certain lands in Crawford county. The complaint set up that the lands had been foreclosed at a trustee's sale for the payment of an indebtedness due to the Alma Cash Store in the sum of $202.20, and that the appellee was the owner and entitled to possession under deed made in pursuance of such sale, and that appellant was in

the actual possession and refused to surrender the same to the appellee.

The appellant answered, admitting that he executed a mortgage upon the land, but denied that the mortgage was foreclosed or his title divested, and denied all the other material allegations of the complaint.

The record shows that on December 8, 1915, "this cause was called for trial and the plaintiff appeared by his attorneys, Starbird & Starbird, but the defendant was not present; but upon the plaintiff announcing ready for trial, and by consent of the plaintiff, the court, sitting as a jury, heard the cause, and the following testimony was introduced by plaintiff to prove his cause, which testimony is as follows:" Then follows a recital showing that the deed of trust and other papers were introduced in evidence by the plaintiff. Then follows this recital in the bill of exceptions: "This was all the evidence except the oral testimony of J. F. McGehee."

The court found in favor of the appellee. Appellant filed a motion for a new trial, the court overruled the same, and appellant duly prosecutes this appeal.

Wear & London, for appellant.

1. Defendant did not have to set up in his motion for new trial errors apparent upon the record. The trial was by the court and a jury was not waived. Kirby's Digest, § 6170. A question of fact was involved and a jury trial was necessary.

2. It devolved on plaintiff to prove his title by proper records. So far as this court knows, P. H. Thompson, trustee, was not substituted according to law. 55 Ark. 326; 91 *Id.* 354.

3. Both deeds of trust were not foreclosed. 27 Cyc. 1135 (6) and (b).

4. There was lack of evidence to justify the court in finding for plaintiff.

5. Appellant was unable to attend the trial by reason of illness and never consented to a trial by the court.

C. A. Starbird, for appellee.

1. The errors are not set up in the motion for a new trial. 93 Ark. 85.

2. Oral evidence was heard. The presumption is that P. H. Thompson was properly substituted as trustee. 90 Ark. 59; 93 *Id.* 85; 95 *Id.* 582.

3. None of the grounds set up here are assigned in the motion for a new trial. The bill of exceptions recites that the case was heard upon oral evidence. The presumptions are that the necessary proof was made. The motion for new trial does not assign that the judgment is not supported by the evidence. 71 Ark. 82; 83 *Id.* 77; 89 *Id.* 570.

WOOD, J. (after stating the facts.) Appellant contends that he was sick at the time the cause was called for trial in the circuit court and was therefore necessarily absent; that the court erred, in his absence, in trying the cause, sitting as a jury, without his express consent; that there was an issue of fact involved that entitled him to a trial by a jury.

Appellant further contends that there were two deeds of trust, which were given in connection with each other and covered the same real estate, and that only one of these deeds of trust was introduced in evidence, and that both were necessary to the foreclosure proceedings; also that the trustee making the sale was not the original trustee and was not properly substituted. Appellant also contends that the evidence was not sufficient to sustain the verdict, and that on account of appellant's illness, as set up in his motion for a new trial, showing that it was impossible for him to attend, the court erred in trying the issues of fact sitting as a jury, and in other particulars mentioned, and asks that the judgment be reversed. The motion for new trial did not assign as error the action of the court in

sitting as a jury. The bill of exceptions contains the recital that "this was all the testimony except the oral testimony of J. F. McGehee."

(1) The uniform holding of this court is that where the record shows that the cause was heard upon oral testimony and that testimony has not been brought into the record by the bill of exceptions, this court will presume, on appeal, in favor of the finding and judgment of the trial court that every fact necessary to sustain the judgment was proved where evidence adduced at the proper time would have justified the court's ruling. *Railway* v. *Amos*, 54 Ark. 159; *Tucker* v. *Hawkins*, 72 Ark. 21, 22; *K. C., Ft. S. & M. Ry. Co.* v. *Joslin*, 74 Ark. 551, 553; *Hempstead Co.* v. *Phillips*, 79 Ark. 263, 266; *Jonesboro L. C. & E. Ry. Co.* v. *Chicago Portrait Co.*, 81 Ark. 327.

(2) Some of the errors of which appellant complains here were not preserved and the attention of the court called to them in the motion for a new trial. Such of these as were contained in the motion for a new trial and that do not appear upon the face of the record cannot be raised for the first time in this court.

(3) This court only reverses for errors appearing in the proceedings of the trial court that are prejudicial to the rights of the appellant. Oral testimony might have been introduced at the trial of the cause that would have shown that the judgment of the court, notwithstanding the errors of which appellant complains, was correct, and that these errors were therefore not prejudicial. For instance, oral testimony might have shown that the amounts due under both deeds of trust were past due and unpaid; that demand had been made for such payment and refused, and that appellant had no defense to the foreclosure proceedings; that the trustee was properly substituted, and that the mortgages were properly foreclosed. If such proof had been made, appellee would have been entitled to a judgment, notwithstanding the court may have erred in trying the

cause sitting as a jury without the express consent of the appellant.

From the record presented to this court no prejudicial errors appear in the rulings and judgment of the trial court and the same must be affirmed.

WOOD, J. (on re-hearing). Appellant, in his motion for a re-hearing, calls our attention to what purports to be the testimony of J. F. McGehee, which appellant, by certiorari, has brought into the transcript, and which he claims is a part of the record of the proceedings in this cause. It appears that this testimony was taken orally, and was not copied or made a part of the record at or after the trial of the cause and before the time expired for the filing of the bill of exceptions. But after the time for the filing of the bill of exceptions had expired, and after the bill of exceptions had been signed by the trial judge and had been filed with the clerk, a statement of the testimony of J. F. McGehee was reduced to writing and presented to the trial judge, and he, in vacation, ordered the testimony to be made a part of the record.

(4) The testimony of J. F. McGehee taken at the time of the trial could not be brought into the bill of exceptions and made a part of the record in this way. If the testimony had been reduced to writing by appellant and had been presented to the trial judge before the time expired, or if it had been identified by the presiding judge and ordered filed and made a part of the bill of exceptions before the expiration of the time for the filing of the bill of exceptions, then if such testimony had been inadvertently omitted from the bill of exceptions the circuit court could have corrected such omission and had the same supplied by *nunc pro tunc* entry. Or, if the testimony had been reduced to writing and filed with the clerk as a part of the bill of exceptions, and had been inadvertently omitted by the clerk in making up his transcript, such evidence could have been supplied by certiorari issuing out of this court. Such, however, was not the case with the testi-

mony which appellant now asks us to consider as a part of the bill of exceptions. This testimony, as we have stated, was not reduced to writing and identified by the presiding judge and filed and thus made a part of the bill of exceptions. Therefore, any attempt to supply the same by an order of the judge in vacation and after the time for the filing of the bill of exceptions had expired could not have the effect of bringing such statement into the record by bill of exceptions. A circuit judge has no power in vacation to add to or amend a bill of exceptions after the expiration of the time for the filing of such bill of exceptions. See *Stinson* v. *Shafer*, 58 Ark. 110; *Madison County* v. *Maples*, 103 Ark. 44; *Routh* v. *Thorpe*, 103 Ark. 46. Therefore, this court cannot treat the purported testimony of J. F. McGehee as a part of the bill of exceptions, and the motion for rehearing is denied.

REIFF v. REDFIELD SCHOOL BOARD.

Opinion delivered December 18, 1916.

1. CONTRACTOR'S BOND—PUBLIC WORK—RIGHT OF MATERIALMAN.—Where a bond is executed pursuant to Act 446, p. 462, General Acts of 1911, providing that a contractor's bond given thereunder, for the faithful performance of public work, shall inure to the benefit of those furnishing labor and materials, an action may be maintained thereon by one of such persons to recover for services rendered or material supplied in the fulfillment of the contract.
2. CONTRACTOR'S BOND—LIABILITY OF SURETY.—A building contractor's bond given to secure the performance of a contract to build a schoolhouse, held to have been executed in accordance with the terms of Act 446, p. 462, General Acts of 1911.
3. PUBLIC OFFICERS—SCHOOL DIRECTORS.—School directors are public officers, and the rules respecting their powers are the same as those that are applicable to the powers of public officers generally.
4. BONDS—NAME OF OBLIGEE—MISTAKE—EFFECT.—A bond executed under Act 446, p. 462, General Acts of 1911, is not affected by a mistake in the naming of the obligee, where it clearly appears that it was intended that the bond was taken pursuant to the statute.
5. CONTRACTOR'S BONDS—LIABILITY ONLY FOR MATERIALS USED.—A contractor's bond, executed under Act 446, General Acts of 1911, is liable only for materials that are actually used in the construction of the building.

6. CONTRACTOR'S BOND—LIABILITY OF SURETY—CONVERSION OF PROPERTY.—A surety on a contractor's bond, executed under Act 446, General Acts of 1911, will be liable for a conversion by it of materials furnished for the construction of the improvement, but a co-surety, who had no part in such conversion will not be so liable.

7. CONTRACTOR'S BOND—PUBLIC WORK—LIABILITY OF SURETY.—The surety on a bond executed pursuant to Act 446, General Acts of 1911, is presumed to know that the bond is executed as though the terms of the statute were a part thereof.

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

Carmichael, Brooks, Powers & Rector, for appellants.

1. The bond was not given as required by Act No. 446, Acts 1911, p. 462. The bond was to the Redfield School District; the bondsmen did not qualify; the sureties were not approved by the clerk nor was the bond filed according to law. It does not contain the proper recitals. There can be no recovery. 86 Ark. 212; 17 *Id.* 483; 79 *Id.* 550; 74 *Id.* 545; 81 *Id.* 235; 100 *Id.* 253; 109 *Id.* 508; 111 *Id.* 379; 126 Am. St. 1095.

2. The Redfield School District sustained no injury. 65 Ark. 27.

3. Defendants are bound only according to the terms of the bond. 60 C. C. A. 623; 79 Ark. 530.

4. There was no liability unless the material and labor went into and became part of the improvement. Kirby's Digest, § 4970; Act 446, Acts 1911; 85 Ark. 158.

Mehaffy, Reid & Mehaffy, for appellee.

1. The fact that the bond was made to the school district instead of the State is not material. The object of the bond was to guarantee the performance of the contract. 8 Neb. 344; 1 N. W. 243, 347; 17 Wend. 67; 26 *Id.* 502; 27 N. W. 233; 52 *Id.* 567-8; 64 *Id.* 1050; 32 Pac. 466; 51 Ark. 205; 10 *Id.* 89; 128 Pac. 266. The bond was not void but was available to anyone sustaining injury. 17 Wend. 67; 26 *Id.* 502; 25 Ky. 472; 84 Fed. 114.

2. School directors are public officers. 81 S. W. 1237; 88 *Id.* 1; 79 N. E. 481; 84 Ark. 540; 87 S. W. 941; 49 *Id.* 705; 77 Va. 518; 22 Pac. 628. The bond was intended to secure all materialmen. 86 Ark. 212; Acts 1911, p. 464, § 3. No statutory bond is void for want of form. Kirby's Digest, § 6368.

3. The materialmen have the right to sue on the bond. 111 Ark. 373; 115 N. W. 811; 117 S. W. 611; 126 *Id.* 530; 159 Ill. App. 139; 134 S. W. 18; 32 Pac. 466; 53 N. E. 793; 21 N. W. 83; 56 N. E. 680; 46 S. W. 625; 6 Cyc. 83; 168 S. W. 61; 42 S. E. 858; 105 N. W. 319; 160 S. W. 270; 151 N. W. 942; 138 N. W. 102.

HART, J. On February 19, 1915, the Board of Directors of Redfield School District and the Clark Pressed Brick Company, of Malvern, Arkansas, instituted this action in the chancery court against the Aetna Accident & Liability Company, J. W. Sanders and H. F. Reiff, to recover $527.56 and the accrued interest alleged to be the balance due for 85,000 bricks that were used in the construction of a school house by said school board. The material facts are as follows:

On the 27th day of June, 1914, the Redfield School Board of Redfield, Arkansas, entered into a contract in writing with S. A. Sanders to erect a school building for the district for the consideration of $6,100.00 to be paid him by the district. The contract contained plans and specifications as to the manner of the performance of the work, but inasmuch as none of its provisions, except article 5, have any bearing on the issues raised by the appeal we need only refer to that article.

Article 5 provided, in substance, that should the contractor at any time fail in any respect to prosecute the work with diligence or fail in the performance of any of the agreements of the contract, upon such neglect or failure being certified by the architect, the owner shall have the right after three days written notice given, to terminate the employment of the contractor and take possession of the premises for the purpose of completing the work and may employ any other persons to finish

the work and provide the materials therefor. Sanders entered into a bond in the sum of $12,500.00 with J. W. Sanders, H. F. Reiff and the Aetna Accident & Liability Company as his sureties, payable to the Redfield School Board for the faithful performance of the contract. One of the conditions of the bond was that S. A. Sanders should faithfully and promptly perform and keep all the conditions and agreements contained in the contract and should pay for all labor and materials for same.

S. A. Sanders, the contractor, died September 12, 1914, before the school house was finished. The work on the building ceased after his death and the school board gave written notice to his sureties of that fact and notified them that within three days from that date the board would take possession of the building and complete it according to the terms of its contract with Sanders. At the expiration of three days, the board took possession of the building and completed it according to the terms of the contract. It was proved that the Clark Pressed Brick Company, of Malvern, Arkansas, had shipped to the contractor 85,000 brick to be used in the construction of the school house and that all of these brick went into the construction of the building except about 11,000; that of these, 4,000 were used in another school house and that 7,000 were sold for $42.00 at the instance of the agent of the Aetna Accident & Liability Company; that there was $527.56 and the accrued interest due the brick company.

The chancellor found that all the bricks furnished went into the building except 11,000, and that there was due the Clark Pressed Brick Company $527.56 with $46.44 interest; that the Aetna Accident & Liability Company is liable for 7,000 of the brick which were sold by reason of having authorized and directed the sale of said brick, but that as to the 4,000 brick which were not sold, and which were not used in the construction of the building, that neither of the defendants were liable. A decree was entered in accordance with

the findings of the chancellor and the case is here on appeal.

The defendant Reiff was engaged in the lumber business and furnished lumber to the contractor to be used in the construction of the school house in question, and procured the Aetna Accident & Liability Company to sign the bond and agreed to indemnify it from all losses thereunder. He signed the bond as surety because he was interested in the contract to the extent that he was furnishing the contractor the material that went into the school house.

The correctness of the decision of the chancellor holding the sureties liable depends upon whether or not the bond was executed pursuant to Act 446 of the Acts of 1911 and the construction to be given thereto. See General Acts of 1911, p. 462. Section 2 of the Act reads as follows:

"Section 2. Public Officers—Whenever any public officer shall, under the laws of this State, enter into a contract in any sum exceeding one hundred dollars, with any person or persons, for the purpose of making any public improvements, or constructing any public building, or making any repairs on the same, such officer shall take from the party contracted with, a bond with good and sufficient sureties to the State of Arkansas, in a sum not less than double the sum total of the contract whose qualifications shall be verified, and such sureties shall be approved by the clerk of the circuit court in the county in which the property is situated, conditioned that such contractor, or contractors shall pay all indebtedness for labor and material, furnished in the construction of said public building, or in making said public improvements."

(1) In the absence of a statute the right to sue on a public contractor's bond given to the owner of the property for labor and material furnished is dependent entirely on the terms of the bond. Without some provision promising to pay the laborers and materialmen, an action cannot be maintained. This is the effect of our decision in *Eureka Stone Co.* v. *First*

Christian Church, 86 Ark. 212, and *Russellville Water & Light Co.* v. *Sauerman*, 109 Ark. 501. On the other hand where a bond is executed pursuant to the statute providing that a contractor's bond given thereunder for the faithful performance of public work shall inure to the benefit of those furnishing labor and materials, it is well settled that an action may be maintained thereon by one of such persons to recover for services rendered or material supplied in the fulfillment of the contract. Case note to Ann. Cas. 1916 A, at p. 761, and many cases from quite a number of states are cited.

In such cases the purposes contemplated by the legislative requirement, as to the bond to be given, are not merely to secure the public in respect to the accomplishment of the work contracted for, but it is also intended to secure or protect those doing labor or supplying materials for the contractors, even though there may be no responsibility on the part of the public agency to them. It is contended by counsel for the defendants that the bond in question was not executed pursuant to the statute above quoted, but we cannot agree with counsel in this contention. It will be noted that the statute requires that the bond be "conditioned that such contractor, or contractors shall pay all indebtedness for labor and material furnished in the construction of said public building, or in making said public improvements." One of the conditions of the bond is that "they (referring to principal and sureties) will pay for all labor and materials for the building."

(2–3) The undertaking of the bond follows the statute and we are clearly of the opinion that it was the intention of the parties to execute a bond in compliance with the terms of the statute. The bond was filed in the office of the clerk of the circuit court in the county where the school house was to be erected and was approved by him. It is also insisted that the board of school directors are not public officers within the meaning of the statute but in the case of *A. H. Andrews Co.* v. *Delight Special School District*, 95 Ark. 26, it was

held that school directors are public officers and that the rules respecting their powers are the same as those that are applicable to the powers of public officers generally. That is to say, that in addition to the powers given by the statute to a board of officers it has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or which may be fairly implied from the statute granting the express powers.

This court in *Blanchard* v. *Burns*, 110 Ark. 515, recognized that school directors were public officers within the meaning of the statute in question. There it was held that the directors of a school district are not individually liable to a person furnishing building material to a contractor who was building a school house because of their failure to require a bond of the contractor as provided in Act 446 Public Acts of 1911, p. 463.

(4) It is insisted that the bond was not executed under this Act because the school district and not the State as required by the Act is named as the obligee in the bond. We do not agree with counsel in this contention. In *State* v. *Wood*, 51 Ark. 205, the court held that the bond of a county treasurer, by the terms of which he and his sureties bind themselves that he shall truthfully account for and pay over all moneys which may come to his hands by virtue of his office is valid, although it names no obligee; and that under our statute, the State may bring an action on such bond for the use of the county to replace money never legally drawn from the treasury and for the amount of which the treasurer is a defaulter. This case was cited in *Ihrig* v. *Scott*, 32 Pac. 466, by the supreme court of the State of Washington, where it held that a contractor's bond given to the directors of a school district under a statute providing that when public buildings are erected the contractors shall give bond, is not void in naming the obligee, because the statutory form is not followed. The court said, "That a mistake in the naming of the obligee is not a fatal defect in a bond which is executed

pursuant to the requirements of a statute, in the interest of the public, when, notwithstanding such error, it clearly appears from the bond taken as a whole that it was intended to be such a one as is required by the statute, is fully established by the authorities. (See *State* v. *Wood*, 51 Ark. 205; *Bay County* v. *Brock*, (Mich.) 6 N. W. 101.) The simple fact, then, of the want of the proper obligee in this bond, is not fatal to it, if, from its terms, the object for which it is executed appears."

In *Bay County* v. *Brock*, Judge Cooley said, in substance, that while the statute in such cases ought to be obeyed literally, yet, that, in so far as it names the nominal obligee in the bond, it is to be regarded as a directory provision merely. That the obligee is not named because of any interest in the condition but merely that there may be a promisee and a party in whose name to bring suit. As said by Judge Cockrill in *State* v. *Wood*, *supra*, the reason is stronger for the enforcement of the rule since the adoption of the Code, for an action in such cases might be prosecuted by the State, as a trustee of an express trust, or by the real party in interest—that is, by the person entitled to receive the money, who in this instance, is the materialman. See also *Huffman* v. *Koppelkom*, 8 Neb. 347, 1 N. W. 243; *Crook Co.* v. *Bushnell*, 13 Pac. 886.

(5) Again it is contended by counsel for the defendants that the sureties on the bond are not liable for material that did not go into the construction of the building. In construing Section 4970 of Kirby's Digest, giving materialmen a lien for materials furnished for any building by virtue of a contract with the owner, the court held that the materials furnished for a building must be actually used in it before a lien will be acquired. *Central Lumber Co.* v. *Braddock Land and Granite Co.*, 84 Ark. 560. This construction resulted from the language of the statute giving the lien. So we think from the language of the statute in the present case, that it is only intended to make the bond liable

for materials that were actually used in the construction of the building.

(6) In the instant case the secretary of the school board testified that of the 85,000 brick furnished, all but 11,000 were used in the construction of the building and the court held that the sureties were only liable under the bond for the amount of the brick used in erecting the school house. Of the remaining 11,000 brick shipped to the contractor, but not used in erecting the building, 4,000 of them were used in another school house by the directors and the court properly held that the sureties on the bond were not liable for the value of these brick. The Aetna Accident & Liability Company directed that the other 7,000 brick should be sold and the court held it to be liable therefor, not because of its being surety on the bond, but because it took charge of the brick and authorized and directed their sale. This amounted to a conversion of the brick and the court properly held the Aetna Company liable therefor. The defendant Reiff was not properly held liable for the sale of these brick because he did not authorize or direct the sale thereof.

(7) Finally it is insisted that there is no liability on the bond under the facts. Counsel claim that the evidence shows that the school board refused to allow the bondsmen to finish the job on the death of Mr. Sanders and that they spent more money than was necessary to complete the school building according to the contract.

We do not deem it necessary to express an opinion as to whether or not the facts are as contended by counsel as we prefer to rest our decision upon the issues squarely presented by the pleadings. This bond was given pursuant to a statute for the protection of persons furnishing materials and labor for the construction of public buildings. The construction placed by the plaintiffs upon the condition of the bond is not correct. It means that the contractor will pay his laborers and materialmen as he has agreed with them, and this is what the act intends. The contractor's bond pro-

vided by the statute is for their use and security and the sureties are presumed to know the statute, the terms of their undertaking, the character and responsibility of the contractor and his ability to carry out his contract. In short, the sureties are presumed to have understood the nature and extent of their principal's obligation when they signed the bond. The statute in question is a part of their contract and they must be presumed to have known that the covenant in the bond was made for the benefit of the laborers and materialmen. The evidence shows that the decree was only for the materials that went into the building. Thus it becomes immaterial to decide whether or not the district paid more money than was necessary to complete the school building according to the contract or refused to allow the bondsmen to complete the building. It is true the school district was made a party to this action but it was only a nominal party. The only question at issue was whether or not the bondsmen were liable to the brick company for materials furnished and used in the construction of the building.

It follows that the decree must be affirmed.

AMERICAN NATIONAL INSURANCE COMPANY *v.* WHITE.

Opinion delivered December 18, 1916.

1. TRIAL—CONTINUANCE—DISCRETION.—An application for a continuance is addressed to the sound judicial discretion of the trial court, and the court's ruling will not be a ground for a reversal of the judgment unless there has been a manifest abuse of its discretion.
2. TRIAL—CONTINUANCE—ABSENT WITNESS—DILIGENCE.—It is the duty of a party wishing to have a certain witness at a trial, to have a subpoena issued and placed in the hands of the sheriff before the day of the trial, and the party will not be justified in relying solely upon his own efforts to locate and procure the attendance of the witness.
3. TRIAL—CONTINUANCE—ABSENT WITNESS—NECESSARY SHOWING.—A cause should not be continued on account of the absence of a witness, where there is no assurance that if the continuance was granted that the attendance of the witness in person, or his deposition, could be procured.

4. EVIDENCE—CAUSE OF DEATH—VERDICT OF CORONER'S JURY.—In an action to recover on a policy of life insurance, the verdict of a coroner's jury is not admissible as original evidence of the cause of the insured's death.

5. LIFE INSURANCE—PROOF OF DEATH—VERDICT OF CORONER'S JURY.—The insured was killed by being shot; neither the policy nor the by-laws of the insurance company required that the verdict or record of the coroner's inquest be furnished as part of the proof of death; *held*, although such verdict and record were furnished by the beneficiary to the company in an effort to settle the claim, such evidence was not admissible in an action by the beneficiary to recover on the policy.

6. LIFE INSURANCE—CAUSE OF DEATH—VIOLATION OF LAW.—A policy of life insurance provided that the company was relieved from liability if the insured's death was caused by a violation of the law. The insured was killed by being shot. *Held*, it was for the jury to determine whether the insured was shot in cold blood or justifiably, and that the trial court properly refused, under the evidence, to direct a verdict for the defendant company.

7. LIFE INSURANCE—PENALTY AND ATTORNEY'S FEES.—Insured was in arrears a small amount on her policy, which amount was not disputed; *held*, in an action to collect the amount of the policy, after deceased's death, that the inclusion of this amount in the prayer for damages would not bar a recovery for penalty and attorney's fees.

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

Troy W. Lewis, for appellant.

1. The court erred in refusing a continuance. 22 Ark. 164; 21 *Id.* 460; 99 *Id.* 399; 71 *Id.* 182; 60 *Id.* 564; 8 Iowa 536; 80 Ky. 480; 1 Yeates, 20; 48 S. C. 1. Due diligence was shown and the court clearly abused its discretion. 10 Ark. 527; 42 *Id.* 273; 85 *Id.* 334; 61 *Id.* 142.

2. The court erred in refusing to permit defendant to introduce the record of the coroner's inquest. 129 Ill. 557; Kirby's Digest, § 818; 65 Cal. 417; 129 Ill. 557; 168 *Id.* 408; 158 *Id.* 289; 1 Greenleaf on Ev., § 556; Starkie on Ev. 404; 25 Beav. 605; 19 Ohio Ct. Ct. 502; 101 Fed. 206; 41 C. C. A. 307.

3. The court erred in refusing a new trial for newly discovered evidence. Kirby's Dig., §§ 6215-6219; 61 Ark. 287; 2 *Id.* 133. The evidence was not

cumulative. 2 Ark. 346; 11 *Id.* 671; 26 *Id.* 496, etc. Defendant has alleged and shown facts from which it appeared that it could not have ascertained such evidence by due diligence. 148 S. W. 271; 25 Ark. 380, etc. The newly discovered evidence was material. 11 Ark. 671. It was not cumulative and the motion was supported by proper affidavit. 30 Ark. 723; Kirby's Digest, § 6219. See, also, 11 Ark. 671; 74 *Id.* 377. This court will reverse for refusal to grant a continuance. 80 Ark. 817; 93 *Id.* 346; Cyc. Dig. Ark. Rep. 1, p. 363, § 966; 22 Ark. 164.

4. The court erred in giving the peremptory instructions asked by defendant. The death was the result of violating the law and the policy was void. 73 Ark. 274; 18 Dig. Ins. Cas. 186; 68 Fed. 825; 99 Mass. 317; 18 Mo. 109; 19 *Id.* 506; 39 *Id.* 122; 90 Am. Dec. 455; 96 N. Y. 614; 67 Ind. 478; 57 S. W. 614; 99 N. W. 376; 5 Mo. App. 236; 88 *Id.* 633; 98 *Id.* 733; 73 S. W. 923; 96 N. Y. 614; 13 Allen (Mass.) 308.

5. The court erred in giving plaintiff's instructions and in reading Kirby's Digest, § 1798. Also in refusing to give defendant's instructions 2 and 3, and in assessing penalty and attorney's fees. 111 Ark. 554; 92 *Id.* 387.

W. H. Pemberton, for appellee.

1. The only question which the jury had to pass upon was: Did the assured die as a result of the violation of law? The premiums were paid and if the court's instructions are correct and the finding of the jury supported by the testimony the judgment should be affirmed.

2. The continuance was properly refused. No diligence was shown.

3. The record of the coroner's inquest was properly refused as evidence. 99 Mass. 325.

4. There was no error in refusing a new trial on account of newly discovered evidence.

5. The law of this case is settled in 73 Ark. 274; 45 N. Y. 422; 13 L. R. A. (N. S.) 258, 262.

6. The instructions are correct and the penalty and attorneys' fee properly allowed.

HART, J. In October, 1915, Marie White instituted this action against the American National Life Insurance Company to recover upon a policy of life insurance. The undisputed facts are as follows:

On February 6, 1914, the insurance company issued an insurance policy in the sum of $500 on the life of Leana Wells, and Marie White, her sister, was named as the beneficiary in the policy. Between seven and eight o'clock on the night of November 10, 1914, Tillie Clark shot and killed Leana Wells in the city of Little Rock, Arkansas.

One of the provisions of the policy was that no recovery be had thereunder should the insured "die as the result of a violation of the law, during the first year of the continuance of the policy, and that in such event the liability of the company should be limited to the amount of the premium actually paid thereon." The policy was in force at the time Leana Wells was killed by Tillie Clark and the company defended this action on the ground that the provision of the policy just quoted was violated. To sustain its defense, the insurance company introduced evidence substantially as follows: It was shown that Tillie Clark worked at a boarding house in the city of Little Rock and was a small active woman; that Leana Wells was a large woman and that both of them were negroes; that Leana Wells had complained to the proprietress of the boarding house that Tillie Clark was interfering between her and her husband, and that she was going to kill her.

The proprietress of the boarding house testified that she did not think from the way Leana Wells acted that she intended to kill Tillie Clark, but that it was all bluff, like negroes usually engaged in; that Leana Wells was killed a few minutes after she left the boarding house.

E. M. Harrington was the only eye-witness to the killing who testified in the case. His testimony is sub-

stantially as follows: I stepped out on the front porch of the boarding house in Little Rock, Arkansas, about 7:30 or 8 o'clock on the night of November 10, 1914. As I looked over towards an electric light diagonally across the street, I saw under a large tree possibly twenty-five feet from the corner, two women scuffling, possibly not in anger. A moment afterward they broke away rather hurriedly, and one of them started to run. Just after I noticed them break away, I saw the flash of a gun and at the same time heard a report. It afterward turned out that the smaller of the two women had the gun. The little woman was Tillie Clark and the larger one Leana Wells. The little woman ran across the street and the larger one pursued her and every ten or twelve feet, it seemed that the large woman was getting closer and the smaller woman would turn and fire at her with her pistol. I think the large woman had a stick or something of that kind in her hand. The little woman stopped and turned around and shot the first time or two over her shoulder, but when she shot the other times, she turned and deliberately waited for the larger woman to approach her. She seemed to turn around more deliberately and take a better aim. She fired the first shot when she was about five or six feet away. When she fired the next shot, she was probably 15 feet away from the larger woman. When the smaller woman would run, she would get farther ahead of the larger woman. but when she stopped to shoot, the larger woman would gain on her. Whenever the larger woman was nearer to the smaller one, she would strike at her, but I don't remember that she ever hit her. She was so far away.

The jury returned a verdict for the plaintiff, and the defendant has appealed.

(1) It is first insisted by counsel for defendant that the court erred in not granting it a continuance on the ground of the absence of witnesses whose testimony was material to the defense. The application for continuance was addressed to the sound judicial discretion of the trial court, and the court's ruling will not be a

ground for a reversal of the judgment unless there has been a manifest abuse of its discretion. The continuance was asked on account of the absence of Tillie Clark and a man named Bruck, who, it is claimed, witnessed the killing. It was stated that Tillie Clark would testify to a state of facts tending to show that she acted in self-defense in killing Leana Wells and the particular facts she would testify to were set out in the motion for a continuance. The motion also set out the facts which would be testified to by Bruck and the purport of his testimony was to corroborate that of Tillie Clark. The record shows that Tillie Clark killed Leana Wells on November 10, 1914; that the coroner's inquest was held the next day and that Tillie Clark and Bruck were witnesses. The plaintiff, through her attorney, demanded payment of the policy, and upon being refused, instituted this action on October 9, 1915. The case was duly set down for trial on the 3d day of February, 1916.

(2) The defendant admits that it did not have a subpoena issued for these witnesses until the morning of the trial, but it shows that a law clerk in the office of its attorney had occasion to go about the city of Little Rock collecting, and that on his run he would make inquiries as to the whereabouts of these witnesses, and could not find them. It is also shown that defendant had its agents in the city of Little Rock soliciting insurance, and that these agents made inquiries for the witnesses and failed to find them. It was ascertained about eighteen days after the trial that Tillie Clark was living in the city of Little Rock and had been living there ever since the killing. On the morning of the trial, the defendant's attorneys learned that the witness, Bruck, had gone first to the Isthmus of Panama and later to some place in South America and the attorneys' informant told him that he believed that by writing to the witness's former address in Panama that he would be able to find his present address in South America. Under this state of facts we do not think the court abused its discretion in refusing to grant a continuance. In regard to the witness, Tillie Clark, it may be said she

had during the whole time been living in the city of Little Rock. It is true the defendant states that its agents made a search for her and were not able to find her. This is not sufficient. A subpoena should have been issued and placed in the hands of the sheriff for service. A party to an action can not usually claim that he has used due diligence in procuring the attendance of a witness by his own efforts merely to locate the witness. It is true it is his duty to notify the officer where the witness is if he knows the witness' residence and the officer does not. In the present case due diligence required that a subpoena be issued and placed in the hands of the officer at an earlier date than the morning of the trial. It is the duty of the sheriff to ascertain if the witness is in his county, and to serve the process on him. He has facilities for finding people not possessed by the ordinary citizen, and that is one of the reasons why it is made his duty to serve the process issued by the court. As we have already stated, the case was duly noted for trial, and it can not be said that the sheriff could not have found a witness whom the proof showed to have resided all this time in the city of Little Rock.

(3) In regard to the witness, Bruck, it may be said that there is no reasonable assurance that, if the continuance had been granted, his testimony could have been procured by deposition or otherwise at the next term of the court. The defendant had merely been informed that he was somewhere in South America, and that his address might be found out from persons who knew him at his former address in Panama. This showing was too indefinite and we do not think the court abused its discretion in refusing to grant the continuance. After Tillie Clark was found, a motion for new trial was filed on the ground of newly discovered evidence. What we have said above, disposes of this point, and we do not think the court abused its discretion in refusing a continuance on that account.

(4) The next assignment of error presents the question of whether the verdict of the coroner's jury

was admissible as original evidence of the cause of the insured's death. This question has never been decided by this court. In the case of *Grand Lodge A. O. U. W.* v. *Banister*, 80 Ark. 190, the court said that it had no hesitancy in holding that the verdict of the coroner's jury does not make out a *prima facie* case of death from the cause stated in the verdict, but at most could only be considered by the trial jury along with the other testimony in the case. The court held, however, that inasmuch as the verdict of the coroner's jury was introduced at the request of appellant, it was unnecessary to decide whether or not it was competent evidence. The court said that the weight of authority seemed to be against the admissibility of such evidence in civil cases of this kind, and a number of authorities on both sides of the question are cited in the opinion. There are authorities sustaining the admissibility of such records at the common law. "The law gives such high credit to an inquisition of death, found before a coroner, that anciently the judges would not receive a verdict acquitting a person of the death of a man found against the accused by the coroner's inquest, unless the jury finding such acquittal had also found what other person did the act, or by what other means the party came to his death, because it appeared by the coroner's view, on record, that a person was killed." 2 Bac. Abr. 431. Under our statute, the coroner's jury makes an *ex parte* investigation of the supposed crime resulting in homicide for the purpose of aiding in the administration of the criminal laws of the State. Other persons having property interests depending upon the cause of the death are not allowed to participate in the hearing before the coroner's jury with a view to establish rights by the verdict. While the coroner's inquest is made on behalf of the State, and a record of it is required to be made and kept, it can not on any well grounded principle of Amercan Common Law become evidence in another suit as to the cause of the death investigated. There is no good reason why a stranger to the proceedings should be in any wise bound by the verdict or that it should

be evidence against him of the cause of the death. If such verdict be admissible as evidence, it follows from its very nature that it might also constitute proof of the main fact and of every essential fact in issue. It might not only show the fact of death by violent and external means within a day covered by the policy, but might also find that the person slaying the insured was justified or was not justified in killing him. In either event a property right of one or the other litigants would be determined by a verdict of which no notice was given to him and without an opportunity to cross-examine the witness whose oaths established it. He would be deprived of his property without due process of law; for the first verdict might be sufficient to maintain the action or sustain the defense, as the case might be, if it was the only evidence offered or obtainable, and thus the verdict of the trial jury would be merely a formal ratification of the coroner's verdict. We can not see any well grounded reason why such a verdict should be evidence against a stranger to the proceedings. In addition to the authorities cited in the *Banister case*, see *Aetna Life Insurance Co.* v. *Milward*, 118 Ky. 716, 4 A. & E. Ann. Cas. 1092; *Cluff* v. *Mutual Benefit Life Ins. Co.*, 99 Mass. 325.

(5) Again, it is insisted that the verdict of the coroner's jury and the testimony of witnesses taken at the coroner's inquest should have been introduced in evidence because a copy of the same was furnished defendant as a part of the proof of death made out by the plaintiff and authorities are cited in support of their contention. We think, however, this proposition is decided against the defendant by the principle announced in the case of *Fidelity & Casualty Co.* v. *Meyer*, 106 Ark. 91. In that case it was held that where a life insurance policy contained no provision for a waiver of privilege, and no physician's certificate was necessary as part of the proof of death, there was no waiver by the furnishing as part of the proof of death to the insurer a certificate of the attending physician in a voluntary attempt to secure a settlement. There was no provision

in the policy requiring the verdict of a coroner's jury, and the testimony taken at the inquest to be furnished to the insurance company as a part of the proof of death. The question of the death of the insured is not an issue in this case. The undisputed evidence shows that she was killed by Tillie Clark. The only issue of fact in the case was whether or not Tillie Clark was justifiable in killing her.

The rule is that where by the terms of the policy, the record of a coroner's inquest is required to be attached to proofs of death made by the beneficiary or his agent, such record is admissible upon the trial of a case upon the ground that it contains admissions of the beneficiary against his interest as to the cause of death. No such rule of evidence obtains, however, where the terms of the policy or the by-laws of the company do not require the verdict or record of the coroner's inquest to be furnished to the company as part of the proof of death. In cases like this the proof of death is made in an effort to settle the loss without a suit, and it has no connection whatever with the trial where the company refused to make payment.

The rule contended for can have no application where the record of the coroner's inquest is not furnished pursuant to the requirements of the policy, but merely as a voluntary act in an effort to secure a settlement. Any other rule could hardly fail to be conducive of abuse or injustice.

(6) It is next earnestly insisted by counsel for defendant that the court erred in refusing to direct a verdict for the defendant. In the case of the *Supreme Lodge of Knights of Pythias* v. *Bradley*, 73 Ark. 274, the court held: "A death received while retreating from a personal difficulty in good faith, and not for the purpose of gaining a vantage ground to renew it, although deceased began the assault with a weapon capable of inflicting great bodily harm, was not a death received while in violation of any criminal law, within a policy of insurance providing that if the assured's death should be received in a violation or attempted viola-

tion of any criminal law, then the amount to be paid on the policy should be in proportion to the whole amount as the matured life expectancy is to the entire expectancy at date of admission of such member."

In the opinion the court quoted from the case of *Bradley* v. *Insurance Co.*, 45 N. Y. 422, as follows: "So long as the evidence falls short of establishing that the homicide was legally justifiable, I can see no safe rule by which the court could be guided in deciding that the provocation proved was the cause of the killing, and in withdrawing that question from the consideration of the jury."

The effect of the holding is that where the evidence is conflicting as to whether the homicide was legally justifiable or was the result of malice or excessive violence on the part of the stranger the question of proximate cause and the adequacy of the provocation is for the jury. In a case note to 13 L. R. A. (N. S.), at page 262, the rule is stated as follows:

"A personal encounter between the assured and his slayer has been the cause of the greater number of cases in which has arisen the question whether the assured's death was within the exception of a policy relieving the insurer if the death was caused by a violation of law. In such cases it may be laid down as a generally accepted rule that, if the assured's adversary is guilty of unjustifiable homicide in killing the assured, the latter's death is not within the exception; while, on the other hand, if the assured is slain under such circumstances as render the killing justifiable homicide, there is a violation of law on the part of the assured within the exception."

Tested by this rule of law it can not be said that the court should have directed a verdict for the defendant. We do not deem it necessary to review the evidence, but consider that a mere reading of it is sufficient. We need therefore only refer to it as set out in the abstract.

Finally it is insisted that the court erred in allowing an attorneys' fee and penalty as provided in the statute.

(7) When the insured was killed, she was in arrears in the sum of $3.90 on her premiums, and this amount, according to the terms of the policy, should have been deducted from the amount of the policy. The jury found for the plaintiff for the face of the policy less $3.90. This was an insignificant sum, and doubtless, if the plaintiff's attention had been called to it, she would have amended her complaint so as not to ask for that sum. It is obvious that plaintiff only contended for the amount due her under the policy, and that by the terms of the policy the company had a right to deduct the $3.90 from the face of the policy. The $3.90 is such an insignificant sum compared with the face of the policy that it is evident the plaintiff, by mistake, did not deduct it from the face of the policy in her complaint. It was conceded throughout the trial that the $3.90 was not in issue. If the insurance company desired to avoid the penalty and attorney's fees, it should have offered to confess judgment for the amount of the policy, less the $3.90; and not having done so, the court properly allowed the attorney's fees and penalty provided for in the statute. *Great Southern Fire Ins. Co.* v. *Burns & Billington*, 118 Ark. 22.

We have not overlooked the assignments of error in regard to the giving of instructions relied upon for a reversal of the judgment; but we do not deem it necessary to set them out or to review them here. It is sufficient to say that the instructions given by the court were according to the principles of law laid down in this opinion and fully and fairly presented the respective theories of the parties to the jury.

The judgment will be affirmed.

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

Opinion delivered January 1, 1917.

CARRIERS—COMPELLING WHITE PASSENGER TO RIDE IN NEGRO COMPARTMENT—DAMAGES.—A railway company will be liable in damages to a white woman passenger, who was invited to ride in the negro compartment of the passenger coach, by the company's conductor, the white compartment being crowded with men who were smoking; but where the women rode only three or four miles, a verdict of $250 damages will be reduced to $50.

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

Thos. S. Buzbee and *Geo. B. Pugh*, for appellant.

1. The verdict is excessive. 88 Ark. 282; 119 Pac. 810; 85 S. W. 299; 138 *Id.* 216; 136 *Id.* 2; 95 Atl. 209.

M. S. Cobb, for appellee.

Taking into consideration all the elements of damage and the facts, the judgments are not excessive. The cases cited by appellant are not in point.

McCULLOCH, C. J. The plaintiffs, Mrs. Lennie E. Allison and Miss Ida Trussell, white persons, instituted separate actions against the Chicago, Rock Island & Pacific Railway Company to recover damages on account of having been required, as alleged, to ride in a negro coach with negroes. The plaintiffs were sisters, and Miss Trussell died during the pendency of the actions. The action instituted by Miss Trussell was revived in the name of the administrator of her estate, and the two actions were consolidated and tried together. The case has been here on a former appeal and the judgments against the defendant were reversed. 120 Ark. 54. On the second trial, the jury returned a verdict assessing damages in the sum of $250 in favor of each of the plaintiffs, and the only question raised on this appeal concerns the excessiveness of the award of damages.

The incident out of which the claim for damages arose took place on March 18, 1913, and Mrs. Allison was then about eighteen years of age and unmarried. Her sister, Miss Trussell, was about fourteen years old. They boarded the train at Price for the purpose of riding to Lawrence, another station three or four miles distant, and were in company with their brother, a lad about twelve years old, and a Mr. Wyatt and the latter's wife. Mrs. Wyatt was chaperoning the party, as Mrs. Allison states in her testimony. There was only one coach, divided into two compartments—one for white passengers and the other for colored passengers. The compartment for white passengers was crowded with men, many of whom were smoking, and the conductor directed the three ladies to go into the negro compartment, telling them that his wife was riding in there, and that it would be more comfortable for them on account of the crowded condition of the other compartment and the fact that it was filled with tobacco smoke. Mr. Wyatt and the boy were given seats in the white compartment with the men.

There is a conflict in the testimony as to the precise time when the conductor made this explanation to the ladies of his reason for putting them in the negro compartment. The conductor testified that he made that explanation to the ladies when he invited them into the negro compartment, but Mrs. Allison testified that the explanation was made after they had taken seats in there and when they protested against remaining in there. She states that the conductor told her that his wife was in that compartment, and pointed to a veiled lady sitting across the aisle, but that she (witness) could not discover whether the woman was white or colored. It is undisputed that the white compartment was crowded with men who were smoking, and that the conductor's wife was in the negro compartment, sitting across the aisle from the plaintiffs. Mrs. Allison gives no reason for doubting the truth of the conductor's statement that the lady across the aisle was his wife, and it is not contended that the conductor treated the

ladies otherwise than with the utmost courtesy, unless it can be said to have been a discourtesy to politely invite them into the colored coach where his wife was seated. The conductor admitted that his act was in violation of the rules of the company about separating white and colored passengers, but stated that he did what he thought was for the comfort of the ladies, as he had done for his wife.

We are of the opinion that the jury's award of damages was clearly excessive. Mrs. Allison stated in her testimony that she rode unwillingly in the negro compartment, and was frightened and nervous and felt humiliated on account of having to ride with negroes, but with her brother and the husband of Mrs. Wyatt, the chaperone, sitting near by, and the conductor's wife sitting across the aisle, her fears appear to us to have been groundless. They only rode three or our miles—perhaps covering a period of ten or fifteen minutes—and the discomfort and sense of humiliation could not have been very considerable under those circumstances. We appreciate the fact that it was distasteful to the ladies to be thus forced by circumstances to ride in the compartment set apart for negro passengers, but when it comes to measuring the discomfort in an award of damages, we think that the injury sustained was not very considerable. It is difficult to find a rule whereby such damages can be measured, but we think that fifty dollars is a sufficient sum for each of the ladies to recover on account of the violation of their rights.

The amount to be recovered by each of the plaintiffs is reduced to that sum, and the judgments are accordingly modified.

MAYS v. BLAIR.

Opinion delivered January 1, 1917.

CONTRACTS—PURCHASE OF LAND—DEFECTS IN SELLER'S TITLE—GOOD FAITH OF BUYER.—Appellant agreed to purchase certain land from appellee; there were certain defects in appellee's title to a small portion of the land which appellee was endeavoring to correct. *Held*, where appellant, not acting in good faith, tendered the amount of the purchase price then due, and brought an action to recover the amount paid, shortly thereafter, without permitting appellee a reasonable time in which to perfect his title, that the chancellor properly dismissed appellant's suit for want of equity.

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

Bratton & Bratton, for appellant.

1. Appellant was not compelled to wait until court to make tender under the decision of this court in 120 Ark. 69. 3 Cyc. 491.

2. Appellant had the right to act upon the opinion at once and made a legal tender and was entitled to a judgment for the return of his money. Mays attempted to comply with the orders of court and actually tendered the balance due. The decree should be reversed. 51 Iowa, 537; 125 Ind. 106; 85 Ark. 30.

S. W. Woods and *A. Y. Barr*, for appellees.

1. No tender was ever made in good faith. 65 Ark. 392; 67 *Id.* 340; 34 *Id.* 582. The tender was not of the full amount due. 4 Ark. 251; 21 *Id.* 559.

2. But if a valid tender had been made, Mays failed to keep it up. 85 Ark. 30; 30 *Id.* 505; 38 *Id.* 329; 90 *Id.* 206.

3. The time fixed was reasonable, and the findings of the chancellor are not clearly against the weight of the evidence. 71 Ark. 605; 68 *Id.* 314; 68 *Id.* 134; 73 *Id.* 489.

McCULLOCH, C. J. Appellant and appellee entered into a written contract for the sale and conveyance by the latter to the former of 125 lots in the town of Leslie,

Arkansas, for the agreed purchase price of $10,000 of which $2,000 was paid at the time of the execution of the contract and $1,000 was paid later. Defects appeared in the title which had to be perfected, and negotiations were finally broken off and appellant instituted an action in the chancery court against appellee to recover the sum paid under the contract, and alleged that appellee had failed to furnish a marketable title. The chancery court decreed in appellant's favor for the recovery of the sum of $1,000 paid as aforesaid, but refused to decree a recovery of the sum of $2,000 paid at the time of the execution of the contract. Both parties appealed to this court.

We found, in considering the case, that the title of appellee was imperfect only as to a small interest in some of the lots, and that appellant had wrongfully broken off negotiations without giving appellee reasonable time within which to perfect the title, and we reversed the decree on the cross-appeal of appellee, Blair, with directions to dismiss the appellant's complaint for want of equity unless he elected to complete the contract "by tendering the purchase price, in which event appellee should be given a reasonable opportunity to perfect the title so as to make it marketable." *Mays* v. *Blair*, 120 Ark. 69.

The case was decided by this court on July 12, 1915, and a petition for rehearing was overruled on September 25, 1915, when the judgment of this court became final, and the mandate was sent down to the lower court. Nothing further appears to have occurred between the parties until February 15, 1916, when appellant called appellee into a banking room in the town of Leslie and in the presence of witnesses made what he claims to have been a legal tender of the balance of purchase price of the land and demanded a conveyance with an abstract showing a marketable title to the land. The conversation between the parties was taken down by a stenographer, with whom arrangements had been previously made by appellant, and it appears in full in the record in this case. It is

evident that appellant was acting under the advice of his counsel and was preparing himself for a further controversy with appellee. He read to appellee a prepared written statement in which he recited the litigation between the parties, and the effect of the decision of this court, and containing the announcement that he was ready to comply with the contract by paying the balance of the purchase price when a marketable title, as defined by the Supreme Court, was duly tendered, and he offered to allow appellee thirty days within which to perfect the title. Appellee informed appellant in this conversation that he had been making efforts to secure quitclaim deeds from certain parties which would cure the defect in the title, and that he would, within a reasonable time, secure these deeds, and proposed to do so by the time that the chancery court convened at the next term. The question arose between the parties as to payment of interest, and appellant said that he would pay interest if the court decided that he was legally liable for the same.

At the next term of court the cause was heard upon oral testimony, and the court found that appellant had not made a proper tender to appellee of the balance of the purchase price, and also held that the time specified by the appellant for the completion of the title was unreasonable, but the court offered to fix sixty days as a reasonable time within which appellee should perfect the title, which offer appellant refused, and the court dismissed the complaint for want of equity.

We are of the opinion that the court was justified in finding from the evidence that the alleged tender was not made in good faith, but that appellant was merely seeking an advantageous position to further pursue the controversy without attempting to carry out his contract. In fact, appellant was asked while on the witness stand if he really wanted the land, and he replied that he wanted to comply with his contract, which may be fairly interpreted to mean that he

wanted to stay within the letter of his contract but was unwilling to say that he wanted to buy the land. The court was therefore justified in finding that not only there was a failure to make a legal tender of the money, technically speaking, and also that the proposal of appellant was not made in good faith, but merely for the purpose of placing himself in a position to pursue the controversy further, without being compelled to comply with his contract. The court offered to require the appellee to remedy the defects in the proportionately small interests in the title within sixty days, which was a reasonable time, and when appellant again broke off the negotiations by his refusal to accept those terms, the court properly dismissed his complaint for want of equity.

The decree is therefore affirmed.

SMITH, J., dissents.

HUMPHREYS, J., not participating.

RIDER v. STATE.

Opinion delivered January 1, 1917.

CATTLE TICK ERADICATION—SUFFICIENCY OF INFORMATION.—In a prosecution for an alleged violation of a rule promulgated by the Board of Control of the Agricultural Station concerning cattle tick eradication, *held*, the language set forth in the information sufficient to put defendant upon notice as to the specific offense with which he was charged.

Appeal from Franklin Circuit Court, Ozark District; *James Cochran*, Judge; affirmed.

T. A. Pettigrew, for appellant.

1. The information charges no crime. There is no such offense as "failing to dip cattle." Acts 1907, § 5; and Rule 7 of Board Control. Criminal Statutes are strictly construed and no case is to be brought by construction within a statute, unless it is completely within its words. 38 Ark. 519; 53 N. Y. 511; 5 Denio, 76; 3 Humph. 483; 49 Ark. 488.

2. The district is void for want of definite description. 122 Ark. 491. It is also void for patent ambiguity in description of the boundary. 30 Ark. 657; 40 *Id.* 237; 41 *Id.* 495; 60 *Id.* 487; 68 *Id.* 150.

3. The penalties of Kirby's Dig., §§ 2447-8, do not apply. 92 Ark. 155. The instructions are not based on the evidence. 65 Ark. 222; 78 *Id.* 177; 86 *Id.* 109.

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

Troy Pace, of Counsel.

1. Under the ruling in *Davis* v. *State*, 53 A. L. R. 257, the judgment should be affirmed. All the questions raised are settled there except the sufficiency of the information.

2. The information was sufficient; it sets forth every fact and circumstance necessary to constitute an offense. 102 Ark. 454; 98 *Id.* 577; 94 *Id.* 65; 95 *Id.* 48; 84 *Id.* 487, etc.; Kirby's Dig., §§ 2228, 2243; 94 Ark. 578.

3. Misnaming the offense is of no consequence. 90 Ark. 599; 77 *Id.* 480; 71 *Id.* 80; 36 *Id.* 242; 34 *Id.* 275; 102 *Id.* 655.

McCULLOCH, C. J. This is a prosecution for alleged violation of a rule promulgated by the Board of Control of the Agricultural Station concerning cattle tick eradication, and the case is ruled by the recent opinion of this court in *Davis* v. *State*, 126 Ark. 260, except as to the sufficiency of the information filed by the prosecuting attorney instituting the prosecution.

It is contended that the information is not sufficient because it merely charges the defendant with having refused to "dip certain cattle," without alleging specifically that he refused to comply with the regulation by bringing his cattle, when ordered by the inspector, to "a regular disinfecting station for the purpose of having them properly dipped." We think

that the language set forth in the information is sufficient to put the defendant upon notice as to the specific offense with which he is charged.

Affirmed.

WILLIAMS v. NORTON.

Opinion delivered January 1, 1917.

1. WILLS—RIGHT TO SELL OR RENT LANDS—BEQUEST OF PROCEEDS—DESCENT OF THE FEE.—Deceased made a will appointing his two sons as executors, and giving them power to rent or sell his real estate, paying one-third of the proceeds to his widow, and two-thirds to his widowed daughter as long as she remained a widow. *Held*, the testator did not devise a fee simple estate in one-third of his property to his widow, nor a fee simple estate in two-thirds thereof to his widowed daughter.
2. WILLS—DEVISE OF LANDS—EXPRESS OR IMPLIED INTENTION—PRESUMPTION AGAINST PARTIAL INTESTACY.—In the absence of any language in a will which either expressly, or by necessary implication, carries the idea that the testator intended to devise the fee simple title to his lands to any one, the presumption against partial intestacy cannot be indulged.
3. WILLS—LANDS OF TESTATOR—INTENTION—RIGHT OF HEIR.—The heirs will inherit the lands of the deceased unless the same are given to others.

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

STATEMENT BY THE COURT.

This suit was instituted by the appellees against the appellants for partition of certain lands in Hempstead county. The cause was heard upon an agreed statement of facts, substantially as follows:

A. B. Williams died in 1895. He owned some 4,200 acres of land and certain personal property. He was survived by R. B. Williams, John E. Williams, Hugh B. Williams, Nal Williams, Ora Field Ratcliff and Kate Old, his children, and Annie G. Williams, his widow.

E. C. Old was adjudged a bankrupt on July 29, 1912, and N. B. Norton is the trustee in bankruptcy

of his estate and was authorized to bring this suit. All parties to the suit are of age.

Mrs. Kate Old died intestate in 1905, leaving the following children: E. C. Old, Oscar D. Old, Thos. E. Old, and Katherine Old McRae. The other children of A. B. Williams are all dead, leaving children surviving them. The widow of A. B. Williams is still living, and has, since his death, intermarried with C. O. Steel.

The heirs of Mrs. Kate Old claim to own the land which belonged to the estate of their grandfather, A. B. Williams, and which by this suit are sought to be partitioned under his will, which was duly probated.

By the second and third paragraphs of the will he gave to his wife his homestead in the town of Washington and certain other lands, specifically designated, "to have, hold, use and enjoy, with the rents and profits thereof for and during her natural life;" and also his "household and kitchen furniture, including pictures, silverware, and other like things," except the piano.

In other clauses of the will he also bequeathed to his wife certain other articles of personal property (naming them), and $100 out of any money that he might have on hand at the time of his death.

He gave to his grandson, Elias Carruth Old, his gold watch. He gave his law library to his son, R. B. Williams, in payment of $160 borrowed from him.

The twelfth and thirteenth paragraphs of the will read as follows:

"Twelfth: I hereby nominate and appoint my sons, R. B. Williams and Nal Williams, the executors of this my last will, with all the power I can give them by law to settle my affairs of my estate. I give them full power to collect, compromise, adjust, compound and settle all and any debts due me the same as if I were living. I wish them to collect all debts due me which may be collected and to pay all just debts which I may owe. I do not want them to be required to give any security on their bond for the execution of this

will or to be required to do anything in the probate court except probating this will. I give them power to rent, lease or sell any lands except those reserved in the second item of this will. I wish them to sell any of my lands on such terms as they may think right and to take notes for the same and give bonds for title to convey them with full and plenary powers in the disposition of my lands. In case of trouble about titles or possession of any lands of mine, I give them full power to compromise and adjust such differences as fully and completely as I could do if living."

"Thirteenth: I hereby wish the proceeds of the sale of my lands which my executors may sell to be disposed of as follows: One-third thereof to my wife, Annie G., so long as she lives, and the other two-thirds to my daughter, Kate Old, for the use of herself and children so long as she may remain a widow. She is now destitute with a family of children, and more in need than any other of my children."

In the fourteenth paragraph he remitted any debts that his children might owe him, and he gave to each of them the sum of $1.00. This paragraph concludes as follows:

"If I have made any omissions in the directions about my bequests herein, my said executors are fully empowered to supply them. My son, R. B. Williams and I own some land jointly as tenants in common, which I wish disposed of as I have directed about my lands held in my own right. Any residuum not provided for herein I wish to be given to my daughter, Kate Old."

The court found that Mrs. Annie G. Steel, formerly Mrs. A. B. Williams, is the owner in fee simple of an undivided one-third share of all lands belonging to the estate of A. B. Williams, deceased, and that the heirs of Mrs. Kate Old are the owners in fee of the remaining undivided two-thirds of those lands, and found that such lands could not be partitioned, and therefore entered a decree ordering that the lands be sold and the proceeds be divided in accordance with the finding,

after paying the taxes that were a first charge upon the lands.

Appellants have appealed from the decree in favor of the heirs of Mrs. Kate Old, and the appellees appeal from the decree in favor of Mrs. Annie G. Steel, formerly the widow of A. B. Williams.

Etter & Monroe, for appellants.

1. All rules of construction are designed to ascertain and give effect to the intention of the testator, and that intention must be ascertained by the wording of the will as applied to the subject matter under the surrounding circumstances. 105 Ark. 558; 12 L. R. A. (N. S.) 661; Gardner on Wills, 366.

2. It was not the intention to give Mrs. Old or her heirs all his property after the widow and Mrs. Old had been provided for. It is plain that he intended to provide for Mrs. Old and her children so long as she remained a widow, and if any was left let it go where the law casts it. Under the *residuum* clause Mrs. Old only was entitled to any personal property overlooked and not otherwise provided for in the will. 56 Am. DeC. 451; 112 Ark. 533. An heir cannot be disinherited by implication. 56 Am. Dec. 451. Intent to disinherit is essential. *Ib.* See also *Ib.* 518; 113 Ark. 500; 1 New Eng. Rep. 699; 78 Me. 142; 9 L.R. A. 575, note; 50 Ill. 67; 17 *Id.* 288; 28 L. R. A. (N. S.) 1100, note. The words "so long as she remains a widow" imply a continuance of the estate during widowhood and no longer. 152 Mass. 523; 170 *Id.* 506; 49 N. E. 916; 28 L. R. A. (N. S.) 1102, note.

3. The intention of the testator must prevail. 104 Ark. 445; 111 *Id.* 54; 12 L. R. A. (N. S.) 661; 105 Ark. 558. The executors under the will hold the fee in trust for the heirs of the testator, after providing for Mrs. Old so long as she remained a widow, then after her death or marriage the estate would go to all the heirs, subject to the widow's dower. 53 Ark. 365, and cases *supra*.

J. W. Morrow, for appellee.

1. The lands in controversy were devised in fee to Kate Old under the *residuum* clause of the will. 40 Cyc. 1567 (11); 131 N. Y. 227; 7 Words & Phr. 6170. The gift to the executors was a power and conveyed no property. 40 Cyc. 1820-3; Sugden on Powers (8 Ed.) 112. Title does not pass to the executors unless there are express words to that effect. *Ib.* 114; 31 Cyc. 1038, 1088, 1091 (3 A. & B.); 68 Ark. 409.

2. The *residuum* clause carried the real estate. It vested in Mrs. Old subject to be defeated by the execution of the power. 5 Am. & E. Am. Cas. 805 and note, p. 810. Where the power is not executed the real estate passes to the residuary legatee. 26 Pittsb. Leg. J. (N. S.) 105; 82 Atl. 189; 7 A. & E. Ann. Cases, 948; 40 Cyc. 1668 (111), 1682 (C.); 31 Cyc. 1091; 91 Mo. 836; 14 Am. St. 664; 40 Cyc. 1834, § 4, 1768 (c). The lands being undisposed of passed by the *residuum* clause to Kate Old. Authorities *supra;* 40 Cyc. 1580; 131 N. Y. 227.

3. The presumption is that the testator disposed of his whole estate. 2 Redfield on Wills, 235; 90 Ark. 152; 104 *Id.* 439; 105 *Id.* 558.

4. Under clause 13 of the will the widow was not entitled to one-third of the proceeds of the lands. The language is not sufficient to create a trust in her. 40 Cyc. 1727 (L.) 1749 (11). A mere privilege or discretion is not sufficient. *Ib.*

WOOD, J. (after stating the facts). In *Finlay* v. *King's Lessee*, 3 Peters, 346, Ch. J. Marshall said: "The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail."

Our own court has reiterated this rule in almost every case in which the construction of a will is involved. In the very latest case, *Harrington* v. *Cooper*, 126 Ark. 53, the court, said: "In construing the pro-

visions of a will the intention of the maker is first to be ascertained, and, when not at variance with recognized rules of law, must govern. The intention of the testator must be gathered from all parts of the will and such construction be given as will, if possible, give force and meaning to every clause of the will." See, also, *Little* v. *McGuire*, 113 Ark. 497; *Archer* v. *Palmer*, 112 Ark. 527; *Webb* v. *Webb*, 111 Ark. 54; *Galloway* v. *Darby*, 105 Ark. 558; *Parker* v. *Wilson*, 98 Ark. 553.

When the language of this entire will is considered we do not discover any purpose upon the part of the testator, A. B. Williams, to devise his real estate in fee simple to anyone. In the 12th paragraph of his will he gives his executors "full and plenary powers" in the disposition of his lands; that is, "to rent, lease or sell any of his lands," on such terms as they might think right, except his homestead and other lands, which he specifically designates, that were given to his wife, Annie G. Williams, "to hold, use and enjoy during her natural life." So far as his other real estate was concerned, the testator intended that his two sons, his executors, in whose "business capacity and integrity he had unlimited confidence," should dispose of the same in any manner they saw proper. If they rented the lands the rental proceeds were to be divided equally between his wife and his widowed daughter, Mrs. Kate Old, and if his executors sold any of the lands the proceeds of the sale were to be divided between his wife as long as she lived and Mrs. Kate Old as long as she remained a widow, one-third going to the wife and two-thirds to Mrs. Old.

In the first clause of his will the testator states that "it was not likely that he would have any ready money on hand at the time of his death," and that his wife would "be destitute of any ready money and without any certain income." In another clause of his will he states that his daughter, Kate Old, was destitute, with a family of children, and more in need than any other one of his children. To certain of his

children, whom he names, he gives the nominal sum of $1.00.

These expressions of solicitude for his wife and widowed daughter show that he regarded them as more dependent upon him than any of the other beneficiaries named in the will, and it was his evident intention to make final disposition of all of the personal property of which he might die possessed by specific bequests, and if anything was omitted of such personal property that his executors should have full power to supply the same. There is not a single word in the will that indicates a purpose upon the part of the testator to devise the real estate of which he died seized. He does not even vest the title of such real estate in his executors as his trustees with power to sell. The whole will shows that the purpose of the testator was to have his estate wound up in such way that his debts should be paid and that his wife, as long as she lived, and his widowed daughter and her children, as long as she remained a widow, should be provided for out of the rents and the proceeds of any sales that might be made of his real estate. This was the dominant purpose of those paragraphs of the will giving the executors power to rent, lease or sell any of his lands (except those reserved in the second paragraph) upon such terms as they might think right, and designating the manner in which the proceeds should be divided.

The testator, in different paragraphs of his will, had bequeathed certain designated articles of personal property to his wife, and other designated articles to certain of his children. For instance, to his son and law partner his library, with the understanding that it should pay a debt that he owed this son; and a piano to his daughter, with the understanding that the debt he owed her also should be cancelled. While there is no testimony in the record as to the value of these articles of personal property, they were doubtless worth fully as much or more than the debts he owed these children, and he made these specific bequests to his wife and the particular children named no doubt

for the reason that, under the circumstances, he deemed such bequests most appropriate for them. The whole will shows that the testator had no intention of favoring one child above another in the bequests of personal property, but it does show that, so far as the proceeds to be derived from the rent or sale of his real estate, he intended that Mrs. Old should be preferred to them on account of her necessities.

After making bequests of various designated items of personal property, the will shows that the testator thought there might be some omissions, and that if he had omitted any items these should go to his daughter. After the testator had made his will he added a codicil, bequeathing to his daughter, Ora Field Ratcliff, the set of books known as Encyclopedia Brittanica. This codicil shows that he had omitted to mention (in the will proper) and to make bequest specifically of all of his personal property. The clause "any residuum not provided for herein I wish to be given to my daughter, Mrs. Kate Old," also shows that the testator had in mind that there might be certain personal property that he had not specifically bequeathed to any of the other beneficiaries, and such as he had not thus disposed of he wished to give to Mrs. Old. The words "any residuum not provided for herein" could not have referred to his lands, and were obviously not intended by the testator as a devise of lands to his daughter, Mrs. Old. The testator had made the only disposition of the lands that he desired to make, by conferring upon his executors unlimited power to sell or lease the same. If the testator had intended to devise the lands to Mrs. Old and to vest a fee simple title in her to the exclusion of the other heirs, being a lawyer of ability, as the agreed statement of facts shows that he was, he doubtless would have employed more appropriate language. It would be a strained construction of the language used, in connection with all the other provisions of the will, to hold that it vested in Mrs. Old a fee simple title to the lands mentioned in the petition in the

suit for partition. The language of the will clearly indicates that it was the purpose of the testator that his lands should be sold by his executors, if necessary, for the support of his widow during her life and for the support of Mrs. Old and her children as long as she remained a widow. But certainly there is no language in the will that would justify the conclusion that the testator intended not only to provide for Mrs. Kate Old and her children as long as she remained a widow, but also to vest in her the fee simple title.

Being a lawyer of ability, and therefore familiar with the technical terms that are used to devise real estate in fee simple, it is inconceivable that A. B. Williams would have used the vague terms in the residuum clause quoted if he had intended to devise his lands in fee simple to Mrs. Old. If such had been his intention he doubtless, in express terms, would have said that if there remained any real estate after the executors had carried out the purposes of his will as expressed in other paragraphs, that such residuum be devised in fee simple to Mrs. Old. The language of the will, as above stated, excludes any such intention. In the absence of any language in the will which either expressly or by necessary implication carries the idea that he intended to devise the fee simple title to any one, the presumption against partial intestacy so far as the lands are concerned can not be indulged.

In the old English case of *Denn* v. *Gaskin*, 2 Cowp. 657 (1777), Lord Mansfield declared, that "though the intention is ever so apparent, the heir at law must of course inherit unless the estate is given to somebody else." That rule has never been departed from so far as we are advised, either in England or in this country. The reason for the doctrine is that courts cannot make wills for parties and by so doing annul the laws of descent and distribution.

Schauber v. *Jackson*, 2 Wend. 13, is one of the leading cases in this country, and where the provisions of the will were somewhat similar to the one here under review, only the language of the will was much stronger to

raise a devise by implication to the exclusion of the heir at law than is the language of the will in the case at bar. The court for the correction of errors there held, "if there is not sufficient in a will to take the case out of the rule of law that all of the estate which is not legally and sufficiently devised to some other person must go to the heir, the heir will take whatever may have been the intention of the testator."

Following this decision, the Supreme Courts of Virginia and Georgia, also in cases where there is an exhaustive review of the authorities, held that "an heir can be disinherited only by express devise or necessary implication, so strong that a contrary intention cannot be supposed; that the heir cannot be disinherited unless the estate is given to somebody else." *Boiseau* v. *Aldridges*, 5 Leigh's Rep. 222, 27 Am. Dec. 590; *Wright* v. *Hicks*, 12 Ga. 155, 56 Am. Dec. 451.

In the last above case it was held (quoting syllabus): "Intent to disinherit heir is essential to raise an estate by implication, the presumption being, in the absence of plain words in the will to the contrary, that the testator intended that his property should go in the legal channel of descent." See, also, *Doe ex dem. Clendenning* v. *Lanius*, 3 Ind. 441, 56 Am. Dec. 518.

Applying the doctrine of the above cases to the will under review, there is certainly no language in it that either expressly or by necessary implication overcomes the presumption that A. B. Williams intended that his real estate, subject to the uses to which he had subjected it under the provisions of his will, should go in the legal channel of descent. To hold otherwise would be to make a will for the testator, and one too that would create an unjust discrimination in favor of the heirs of Mrs. E. C. Old as against the other heirs of the children of A. B. Williams. To our minds, after a careful reading of this will, it never entered the mind of A. B. Williams, by the provisions of his will, to deny any of his children their rights to an equal inheritance in such lands as might remain after the purposes of the support and maintenance of his widow

and widowed daughter, as expressed in his will, had been carried out. To construe this will as favoring one set of grandchildren to the exclusion of another we believe would do violence to the intention of their grandfather, as gathered from a consideration of the will as a whole.

The court erred, therefore, in decreeing the heirs of Mrs. Old two-thirds of the proceeds derived from the sale of the lands ordered by it. The court also erred in awarding to the widow absolutely one-third of the proceeds of the sale of these lands. The widow, under the law, was entitled to one-third interest in these lands for life as her dower. The testator did not make any provision for the widow in his will in lieu of dower. Upon a sale of the lands in partition the widow will be entitled to one-third of the proceeds, not absolutely, but only to the benefit of the use of such proceeds as long as she lives.

The decree is, therefore, reversed, and the cause will be remanded for further proceedings according to law and not inconsistent with this opinion.

BOYNTON LAND & LUMBER COMPANY v. DYE.

Opinion delivered January 1, 1910.

1. DAMAGES—CONTRACT TO CUT AND HAUL TIMBER—LOSS OF PROFITS.—Loss of profits is the measure of damages for breach of a contract with plaintiff to cut and haul timber for defendant, but from this must be deducted the cost of work done by defendant, which it wa sthe plaintiff's duty to perform under the contract.
2. CONTRACTS—BREACH—EVIDENCE OF MOTIVE.—In an action for damages for breach of contract, evidence of the defendant's motive for committing the breach is inadmissible, and when admitted over proper objection, constitutes prejudicial error.

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

C. A. Cunningham and *Jones, Hocker, Sullivan & Angert*, of St. Louis, for appellant.

1. The court erred in admitting evidence to show a supposed motive or intent on part of defendant for the breach of the contract. 113 Ind. 282-4; 70 Kans. 801; 70 Pac. 671; 90 U. S. (23 Wall.) 471, 480; 120 Ga. 606; 71 Ill. 540; 189 Mass. 124; 127 Mich. 548; 37 Hun. 519; 3 Grant (Pa.) 198; 130 Wisc. 84

2. Instruction 18 as to the measure of damages was erroneous. Loss of profits cannot be recovered. Nor did the court enumerate the elements of damages nor fix a criterion by which the jury could fix the profits. 140 Mo. App. 200; 123 S. W. 1634; 150 N. C. 183; 70 Kans. 801; 75 Ky. (12 Bush) 134; 13 Cyc. 49.

3. The evidence does not establish a breach of the contract by appellant.

4. It was error to allow the jury to assess as damages the amount expended for the construction of slab roads. Sedgwick on Dam. (9 Ed.), § 607.

R. A. Nelson and *G. E. Keck*, for appellee.

1. The evidence tending to show a motive or intent for the breach was admissible for the purpose of throwing light on the question of whether or not defendant breached the contract, and the court so specifically told the jury in instruction No. 15. The evidence was relevant. 16 Cyc. 847-8; 10 R. C. L. 927, 928, § 91; 29 Ark. 386; 10 *Id.* 228.

2. There was only a general objection to instruction 18 on the subject of "profits" recoverable. 73 Ark. 530.

3. Profits lost are recoverable as damages on breach of contract. 95 Ark. 365.

4. The breach was proven by the evidence. This was a fact to be submitted to the jury. 75 Ark. 88; 76 *Id.* 538.

5. The amount expended for slab roads was recoverable as reasonable and necessary expenses incurred. 8 R. C. L. 495; 53 L. R. A. 33; 169 Mass. 326; 21 L. R. A. (N. S.) 692; 95 Ark. 209.

HART, J. Appellee entered into a contract with appellant whereby he was to cut and haul timber to appellant's mill from a certain tract of land near it for a stipulated price, and this action is instituted by him to recover damages for an alleged breach of the contract by appellant. The contract was made in March, 1914, and under it appellee was to receive the sum of $2.75 per thousand feet for the timber cut and hauled by him from the land to appellant's railroad tracks, where the haul was a half of a mile or less and $3.25 per thousand where it exceeded a half of a mile. Appellee worked under this contract until some time in April or May when the mill was shut down. He commenced work under it again in September and continued to work until about December. Appellee stated that information reached him that the company would not let him work under the contract any longer and he asked the general manager about it; that the general manager referred him to the woods foreman; that he was unable to find the woods foreman, who had gone to St. Louis, and that finally after going from one officer to another, he was told that he could not do any more work under the contract; that no reason was given for stopping him. Appellee then stated what profit he had been making while at work under the contract. He also stated that he had expended a certain amount of money in building slab roads for the purpose of hauling timber.

According to the testimony adduced by appellant, it did not stop appellee from working under the contract but its officers stated that they were anxious for appellee to continue hauling the timber. The officers of the company admitted that appellee had leased certain farm lands from appellant and that they had given him notice to vacate these lands when his lease terminated but they said that it had no connection whatever with the timber contract.

Testimony was also adduced by appellant tending to show that it furnished the slabs at the request of appellee to build the road and hauled them to the point on its tracks from which the slab roads were to be

constructed; that they did this whenever requested by persons with whom the company had made a contract for hauling timber but that it was understood that the company was not to be charged for the labor performed in constructing the slab roads. Persons engaged in hauling timber for appellee under his contract testified that they helped build the slab roads and that it was done for the benefit of appellee, and that they made no charge for their services.

The jury returned a verdict in favor of appellee and the case is here on appeal.

(1) It is first contended by counsel for appellant that loss of profits is not the measure of damages for breach of contracts like the one under consideration. We do not agree with counsel in this contention. Logging and lumbering, in their various phases, constitute a business which has been carried on so extensively that the costs and profits of any particular enterprise are no longer a matter of conjecture or speculation, but can be estimated with such certainty as to warrant the use of profits lost as a measure of damages in actions for breach of such contracts. See case note to 53 L. R. A. at p. 52; *Alf Bennett Lumber Co.* v. *Walnut Lake Cypress Co.*, 105 Ark. 421; *Ford Hardwood Lbr. Co.* v. *Clement*, 97 Ark. 522; *Beekman Lumber Co.* v. *Kittrell*, 80 Ark. 228; *Grayling Lumber Co.* v. *Hemingway*, 124 Ark. 354, 187 S. W. 327.

It is also contended that the court erred in allowing to be submitted to the jury the question of whether or not appellant was liable to appellee for the amount expended by him for the construction of the slab roads. In this contention we think that counsel are correct. In estimating the damages, if any, which appellee was entitled to recover, the cost of constructing the slab roads was a part of the expense to be borne by appellee in performing his contract and should have been deducted from his gross profits in order to arrive at his net profits.

Appellee was not entitled to be put in a better position by reason of the breach than he would have

been if appellant had allowed him to carry out the contract. *Magnolia Metal Company* v. *Gale*, 189 Mass. 124; Sedgwick on Damages, 9th Ed., Sec. 607. But it is contended by counsel for appellee that appellant, in an independent contract, agreed to pay him for building the slab roads. We do not think so. Appellee's own testimony does not go to the extent of establishing the fact that appellant either by an express or an implied contract agreed to pay him for constructing the slab roads. His own testimony establishes no more than the fact that appellant permitted him to construct the slab roads and hauled him the slabs from its mill over its log road to the point where he commenced to build the slab roads. The other testimony shows that this was done for the benefit of appellee and was done pursuant to a custom of appellant with all its haulers and that it was understood in such cases that the roads should be constructed without any cost to appellant except to furnish the slabs. Hence the court erred in submitting to the jury the question of appellant's liability to appellee for the construction of the slab roads but under the evidence should have told the jury as a matter of law that appellant was not liable therefor.

(2) Over the objection of appellant, appellee was permitted to show that he and his brother were summoned to appear before the grand jury and that indictments were returned against certain officers of appellant for carrying concealed weapons; that their fines were paid by appellant and that the managing officers of appellant became angry on this account and so expressed themselves to certain persons and stated further that appellee and his brother were causing trouble to appellant and that they did not want them to work for appellant any longer. Error calling for a reversal of the judgment is assigned because of the act of the court in admitting this testimony to go before the jury. We think the action of the court in this respect was prejudicial to the rights of appellant and for that reason the judgment should be reversed. The rule is well settled that in actions for breach of a contract, the losses

sustained do not usually involve any other than pecuniary elements, and for that reason, the motive which causes the breach of the contract cannot increase the injury. Hence the right of recovery is wholly independent of the motive which induced the act or omission which constitutes the cause of action. No foundation for exemplary damages was shown. The intent and motive of appellant or whether its officers acted in good faith or not was wholly immaterial.

The sole question was whether or not appellee's rights were invaded and if so, the amount of damages suffered by him. The particular reasons or motives which appellant or its officers may have had in refusing to permit appellee to continue to work under his contract were not in issue. *Jenkins* v. *Kirtley*, 70 Kan. 801, 70 Pac. 671; *Moyer* v. *Gordon*, 113 Ind. 282; *The Grand Tower Co.* v. *Phillips*, 90 U. S. (23 Wall.) 471; *Duche* v. *Wilson*, 37 Hun. (N. Y.) 519.

For the errors indicated in the opinion the judgment will be reversed and the cause remanded for a new trial.

DRAINAGE DISTRICT NO. 7 *v.* TERRY.

Opinion delivered January 1, 1917.

1. DRAINAGE DISTRICTS—FORMATION—NOTICE.—In the organization of a drainage district the publication of a notice that three persons, naming them, had petitioned to be constituted a drainage district, held insufficient under the drainage laws of the State.
2. DRAINAGE DISTRICTS—FORMATION—NOTICE.—The notice of a petition for the formation of a drainage district must clearly and specifically declare that purpose, so that one reading it may ascertain from it just what is intended, without any extraneous matter or other source o information.
3. DRAINAGE DISTRICTS—FORMATION—AMENDATORY ACTS—NOTICE.—All pers ons are charged with knowledge of the amendatory acts to the general drainage laws of the State, but land owners are not required to take notice of proceedings to organize a drainage district, until a notice, such as is required by the statute, is properly published.
4. DRAINAGE DISTRICTS—FORMATION—REVIEW ON CERTIORARI.—The validity of the orders of the county court, constituting a drainage district, may be questioned in a collateral attack on *certiorar i* to review those orders.

5. APPEAL AND ERROR—JURISDICTION—COLLATERAL ATTACK.—Where jurisdiction is to be exercised in a special matter, inquiry may be made even in a collateral attack, as to whether or not jurisdictional requirements have been complied with.

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

J. T. Coston, for appellants.

1. The notice was sufficient under the Act. It contained everything required by law. Acts 1911, p. 199; 122 Ark. 418.

2. No notice was required. Kirby's Digest, §§ 1434, 1439, 1437; Acts 1909, p. 839, § 10; Acts 1911, p. 109.

3. Argues other points not decided by the court.

4. The question cannot be raised by certiorari—only by appeal. Acts 1911, p. 199; 129 S. W. 818; 114 *Id.* 919; 49 Ark. 533.

Coleman, Lewis & Cunningham and *P. A. Lasley*, for appellee.

1. The notice was insufficient and the court never acquired jurisdiction. Acts 1911, p. 109; Acts 1909, p. 839; Kirby's Digest, § 1414, *et seq.*

2. Certiorari was appellees' only remedy. The time, twenty days, within which to appeal, had expired and there was no other remedy. Acts 1909, § 34; Acts 1911, 835, etc.; 64 Ark. 108.

SMITH, J. A number of propositions are discussed in the very excellent briefs in this case, but we find a single question decisive of all of them, and will therefore consider this question only.

Drainage District No. 7 was organized under the general drainage law of 1903, contained in sections 1414-1450 of Kirby's Digest. Later, three persons who are owners of real property in this district caused the following notice to be published:

"DRAINAGE NOTICE.

"Notice is hereby given that S. E. Simonson, R. C. Rose and W. O. Anthony, three owners of real property within Drainage District No. 7, have petitioned the county court to constitute them a Drainage District under the terms of the drainage laws passed by the Legislature in the year 1911.

"Notice is further given that said petition will be heard on the first Monday in November, 1915.

"W. M. TAYLOR, County Judge.
"J. H. LONG, County Clerk."

The county court made an order constituting Drainage District No. 7 a drainage district under the provisions of the Drainage Act of 1909. Act No. 279, p. 829, Acts of 1909.

The circuit court held, upon a review of this proceeding upon *certiorari*, among other things, that this notice did not meet the requirements of the law, and that therefore the county court did not acquire jurisdiction to make the requested change. This section reads as follows:

"Sec. 34. This Act shall not repeal the drainage laws now in force, but it is an alternative system; and the drainage districts may be organized under this Act, or under the statutes which are in force at the time of the passage hereof. Any district which has heretofore been organized, or which may be hereafter organized under the existing statutes, may become a drainage district under the terms of this Act, as follows: If three owners of real property within any such district shall petition the county court to constitute them a drainage district under the terms hereof, the county court shall give notice of the application by two weeks' publication in some newspaper published and having a *bona fide* circulation in the county, and of a time when said petition will be heard. All owners of real property within the district shall have the right to appear and contest the said petition or to support the same. The county court shall hear the evidence and shall either

grant the petition or deny the same, as it deems most advantageous to the property owners of the district; and if it grants the petition the said district shall have all the rights and powers and be subject to all the obligations provided by the terms of this Act; *provided*, however, that if a majority of the land owners of the district, or the owners of a majority of the acreage therein, petition for the adoption of this Act, the county court must make an order declaring that such district shall henceforth be governed by the terms of this Act; and such duty may be enforced by mandamus."

(1-2) We think the court below correctly held the notice to be insufficient. Such notice should be so definite and certain that one reading it might ascertain from it just what was intended without reference to any extraneous matter or other source of information. The notice should definitely apprise the land owner who reads it, and who has no other information on the subject, that it is proposed to constitute a drainage district which had been organized under the act found in Kirby's Digest, a district under the Act of 1909, *supra*. A land owner in this district might not know who Simonson, Rose and Anthony were, and the statement that they were property owners within Drainage District No. 7, and had petitioned the court "to constitute them a drainage district under the terms of the drainage laws passed by the Legislature in the year 1911" falls far short of stating that the petitioners will request the court to change the operation and control of a drainage district organized under the provisions of the statute found in Kirby's Digest to the alternative system provided for in the Act of 1909, *supra*. This change is authorized by section 34 of the drainage act of 1909, which provides that the Act of which it is a part shall not repeal the prior law, although both Acts take up the entire subject of drainage and each provides a complete drainage system, but section 34 of this last Act provides that the last Act is an alternative and not a substituted system.

This section 34 is re-enacted without change as Act 54 of the Public Acts of 1911, p. 32, except that the amended Act provides that this section 34 shall not apply to Poinsett county. In effect, therefore, Act No. 54 of the Public Acts of 1911 is a special Act which exempts Poinsett county from the provisions of a section of a general act.

Other drainage legislation of 1911 of a general nature included Acts 49, 136 and 221.

Act No. 49 purports to amend section 7 of Act No. 3 of the Acts of 1907, but in fact amends section 7 of Act No. 111 of the Acts of 1907, and deals with the collection of overdue assessments and provides for the notice to be given in the proceedings to collect them.

Act No. 136 amends section 12 of Act No. 279 of the Acts of 1909, and provides for the levy of additional assessments of taxes against the betterments.

Act No. 221 amends sections 1, 2, 3, 4 and 34 of the Drainage Act of 1909. The amendment to section 34 is to the effect that if a majority of the land owners of the district, or the owners of a majority of the acreage therein, petition for the adoption of the Act of 1909, the county court must make an order declaring that such district shall thereafter be governed by the terms of this act, and shall appoint commissioners of his own selection who shall carry the act into effect, with a proviso that the act should not apply to certain drainage districts in Poinsett county nor to Crittenden or Phillips counties.

(3) All persons must be and are charged with knowledge of these amendatory acts and of their effect upon the statutes which they purport to amend, but nothing in any of these acts requires the land owner to take notice of a proceeding similar to the one now under review until a notice conforming to the law has been published and jurisdiction thereby conferred upon the court. It is urged that the notice employs substantially a portion of the language of the act authorizing this proceeding and is therefore sufficient. But it employs a portion only of such language, and it is only by in-

tendment that one reading the notice might conclude that three property owners within a drainage district which had been established under one act were petitioning the county court to transfer the operation and control of that district from the provisions of the act under which it was created to the provisions of another act.

The notice should clearly and specifically declare this purpose, and having failed to do so we conclude that the court below was correct in holding the proceedings had thereunder to be void.

(4-5) It is insisted that the question here considered could properly be raised only by appeal, and that the validity of the orders of the county court cannot be questioned in a collateral attack on *certiorari* to review these orders. But the contrary was held in the case of *St. L., I. M. & S. R. Co.* v. *Dudgeon*, 64 Ark. 108, in which case it was said that where jurisdiction is to be exercised in a special matter, inquiry may be made even in a collateral attack as to whether or not those jurisdictional requirements have been complied with. It appears here that the jurisdictional requirement was not met, and we therefore affirm the action of the circuit court in quashing the proceedings in the county court.

SCULLIN *et al.*, RECEIVERS MISSOURI & NORTH ARKANSAS RAILROAD COMPANY *v.* EOFF

Opinion delivered January 1, 1917.

CARRIERS—DAMAGE TO FREIGHT—JACK—LIMITED LIABILITY OF CARRIER.—Appellee shipped a jack over appellant's line of railroad. There were three freight rates afforded by appellant, viz. the immigrant rate, the limited liability and the unlimited liability rates; the latter being the highest. The jack could not be shipped under the first rate, but was shipped under the second contract, appellee paying the limited liability rates. The jack was injured in transit *Held*, although appellee had no knowledge of the existence of an unlimited liability contract, that having shipped under a contract limiting liability he was bound thereby.

Appeal from Boone Circuit Court; *John I. Worthington*, Judge; modified and affirmed.

W. B. Smith, J. Merrick Moore and *H. M. Trieber*, for appellants.

1. This was an interstate shipment. Alternate rates were not denied the shipper, but were offered him. He accepted and chose the cheaper rate and agreed to the released valuation clause in the bill of lading. That is the limit of recovery here. 241 U. S. 319; 233 *Id.* 97; 111 Ark. 430; 226 U. S. 491.

2. The verdict is excessive and the cause should be reversed unless appellees remit all in excess of $100.00.

G. J. Crump and *E. G. Mitchell*, for appellees.

1. Plaintiffs asked for the two rates and the agent refused all but the one which was paid. Plaintiffs showed the agent the jack and told him it was worth $2,000.00. Defendant's agent charged the highest rate and offered no other. The company is liable for the full value of the animal. 94 Ark. 106; 81 *Id.* 469; *Eoff* v. *Scullin, Receiver*, 120 Ark. 452.

SMITH, J. Appellees shipped, in interstate commerce, as part of a mixed shipment of live stock, a jack, from Smithton, Missouri, to Bellefonte, Arkansas. The jack developed car founder as a result of rough handling and delay in transit. The shipment moved over the Missouri Pacific Railway from Smithton to Joplin, and thence to destination over the line of appellants. It was appellees' intention to ship directly through to their destination, but the agent of the initial carrier billed the jack only to Joplin, at which point shipments from one road were diverted to the other, and the shipment was re-billed at Joplin to its final destination. The rate paid at destination was $99.70, being the rate from Smithton to Joplin on the basis of the valuation of the jack released to $100.00, plus a $2.00 switching charge at Joplin, plus the rate from Joplin to Bellefonte on the released valuation basis. The combination of rates paid by appellees exceeded the through rate from Smithton to Bellefonte, on the basis of the valuation released to $100.00, by the sum of $28.40. This excess charge was

voluntarily refunded. According to appellants the refund was made when, upon checking up, it was ascertained that appellees were entitled to it and should have been charged only the joint rate, instead of the combined local rates. But according to appellees the refund was made only when the information had been communicated to appellants that this suit would be brought.

At the time of this shipment there were three rates in force. The lowest of these is the immigrant rate, to which appellees would not have been entitled, and under which they did not undertake to ship. The second rate is the one commonly used and designated as the limited liability contract. The third form of contract is for unlimited liability, and the amount of the rate under that contract depends upon the declared valuation. An addition of 25 per cent. to the rate based on a valuation not exceeding $100.00 is charged for each $100, or fraction thereof, in excess of a hundred dollars. For instance, if the jack had been declared to be worth $500.00, the rate would have been 200 per cent. of the released valuation rate. In other words, there was an increase of one-fourth of the limited liability rate for every $100.00 of excess valuation. The tariff sheets further provided that animals of a declared valuation exceeding $800.00 per head would be carried only by special arrangement.

A judgment was rendered for $2,250.00, the full value of the jack, and it is insisted by appellants that it is liable only to the extent of the hundred dollars on account of the provision to that effect in the contract of shipment. Appellees say they should be allowed to recover the full value of the jack because they were denied the right to ship under any other contract, and, as we understand their position, they claim the benefits of an unrestricted contract because they were afforded the opportunity only of shipping under the contract issued them.

We have searched this record in vain for any evidence to support a finding that appellees desired to ship

under an unlimited contract. The proof does show that they made complaint against the rate which was charged and that the agent told them they would ship under this contract if they shipped at all. But there is nothing in the testimony of appellees themselves to show, or intimate, that they complained about the limitations of liability; nor is there any proof that they desired to ship, or would have shipped, under the higher rate had the opportunity been afforded, and while they did testify that they discussed the value of the jack with the agent of the initial carrier, the proof is to the effect that they were complaining against the excessiveness of the rate charged. They testified that when the car was re-billed at Joplin, Missouri, the agent of the railway there told appellees they could have saved money by telling a lie and claiming they had an immigrant car, as shipments of that character went at the cheaper rate. Appellee Eoff testified that he asked this agent why it was that he could ship a car of stock from Bellefonte to Kansas City at a lower rate, and was told that his shipment was a mixed one and that he paid on the entire shipment at the highest rate charged for any part of the shipment. He also testified that he requested a lower rate and that it was refused.

It appears that appellees shipped at the lowest available rate. They were not entitled to the immigrant rate, and therefore had no choice of shipping under it. The testimony would support a finding that they knew nothing of the unlimited liability rate and were not told about it. But there is no testimony that they desired such a contract, or would have used it had it been available. Their complaint to the agent was that the rate charged was too high, and they paid this rate only because they were told they would have to do so if they shipped at all.

In the recent cases of *C. N. O. & T. P. Ry. Co.* v. *Rankin*, 241 U. S. 319, and *B. & M. Rd. Co.* v. *Hooker*, 233 U. S. 97, and in other decisions of the Supreme Court of the United States there cited, the law is declared to be that it is immaterial that the shipper does not know

of the choice of rates if such choice exists. It may be the law that, notwithstanding the carrier has complied with the law by establishing the different rates, and filing the proper tariff schedules with the Interstate Commerce Commission, and thereby entitled to use a form of contract restricting liability; yet if they deny shippers the right of choice between the forms of contract and require the use of a restricted liability contract, they cannot claim that exemption from liability which inures to the carrier which had in fact offered its shippers this choice. But this record does not present that question.

We have no right whatever to inquire into the reasonableness of any of these rates, and it is not denied that appellant had the right to use the form of contract here employed, and as the proof does not show any refusal to permit appellees to ship under the more expensive form of contract we must modify the judgment to conform to the stipulations of the contract under which the shipment was made.

Appellees argue that the decision upon the former appeal is the law of this case (*Eoff* v. *Scullin et al., Receivers, etc.*, 120 Ark. 452), and that it was there held, in effect, that this was a common law contract of shipment with all the liabilities incident thereto. Such, however, is not the effect of that decision. Upon the former trial from which that appeal was prosecuted the court below held that there could be no recovery of any amount because the shipper had not given notice of the injury and damage to the jack within one day after arrival at its destination as stipulated in the contract. We held this provision unreasonable and unenforceable as applied to the facts of that case and remanded the cause for further proceedings. No other question was there determined.

The judgment of the court below will be reduced to $100.00, and, as thus modified, will be affirmed.

McBRIDE v. AETNA LIFE INSURANCE COMPANY.

Opinion delivered January 1, 1917.

1. INDEMNITY INSURANCE—LIABILITY OF THE INSURER.—Under a contract of indemnity insurance, the insurer does not assume liability, but there must be an actual loss sustained by reason of an enforced payment of the judgment liability of the insured before the obligation of the insurer matures; this is the distinction between indemnity and ordinary liability insurance.
2. INDEMNITY INSURANCE—NATURE OF LIABILITY.—On a policy of indemnity insurance, the insurer only indemnifies the assured against *actual loss.*
3. INDEMNITY INSURANCE—ASSIGNMENT.—A policy of indemnity insurance contained a clause restricting the assignment thereof, but *held,* where the liability was undisputed, that the insurer could not escape where both the assignee and assignor were joined as parties plaintiff.
4. INDEMNITY INSURANCE—PAYMENT.—A policy of indemnity insurance provided that no action should lie except for loss or expense "actually sustained and paid in money." *Held,* a recovery could be had under the policy, where a payment was made by the sale of the assured's property.
5. INDEMNITY INSURANCE—LOSS—INTEREST.—In an action against an insurance company to recover for an actual loss sustained, interest runs from the date the actual payment was made by the assured.

Appeal from Pope Chancery Court; *Jordan Sellers,* Chancellor; modified and affirmed.

U. L. Meade and *Pace, Seawel & Davis,* for appellant.

1. The policy is an indemnity insurance policy and a liability insurance policy. 66 Ark. 562; 64 *Id.* 174. This court does not follow the rule in 72 N. H. 485.

2. The policy was assignable with or without the written consent of the insurer. Kirby's Digest, §§ 509, 517-18; 66 Ark. 243; 12 Idaho 653; 10 A. & E. Ann. Cas. 328; 157 Fed. 514; 85 C. C. A. 106; 138 Fed. 426; 133 *Id.* 816. The assignment as collateral vested in appellant a title sufficient to enable him to collect the proceeds. 112 Fed. 759; 68 Ark. 391; 77 *Id.* 60: 44 *Id.* 564; 95 *Id.* 482.

3. Under the terms of the contract appellee was liable. There was a substantial compliance, if not a strict one, with the clause as to expenses actually sustained and paid in money, etc. 81 Ark. 92; 79 *Id.* 160; *Ib.* 266; 94 *Id.* 419; 80 *Id.* 49; 89 *Id.* 471; 67 *Id.* 553. See also 2 Ark. 360; 8 *Id.* 494; 78 *Id.* 93; 100 Minn. 1; 10 A. & E. Ann. Cases, 673; 135 Mich. 189; 3 A. & E. Ann. Cases, 480.

4. As the assignee appellant occupies the same relation to the insurer as did the insured. 210 N. Y. 233; 53 L. R. A. (N. S.) 632; 50 Wisc. 44; 18 L. R. A. (N. S.) 121.

5. The appellee is liable for all costs and expenses, interest from the date of judgment and for the full sum of the $5,000.00. 152 Fed. 961; 82 C. C. A. 315; 12 L. R. A. (N. S.) 478; 132 Fed. 623; 157 *Id.* 514; 85 C. C. A. 106; 120 Ky. 218; 9 A. & E. Ann. Cas. 162; 135 Mich. 189; 3 A. & E. Ann. Cases, 478.

Roscoe R. Lynn, for appellee.

Cockrill & Armistead, of counsel.

1. This is an indemnity policy only. 66 Ark. 562; 64 *Id.* 174.

2. The assignment vested no right of action in appellant. 119 N. W. 308.

3. There can be no recovery except for money paid out by the assured. Payment by a sale of property is not sufficient. 159 N. W. 553.

4. Interest was erroneously allowed. 52 Wash. 124; 100 Pac. 190; 157 Fed. 519.

5. Costs should not have been allowed.

6. The real value of the lease was not more than $1,000.00, and in no event can appellant recover more than the lease sold for, and the mules $77.00, and the $426.00 paid with interest from *the date paid.*

McCULLOCH, C. J. This is an action instituted to recover on an indemnity policy issued by the defendant, Aetna Life Insurance Company, to the Arkansas Anthracite Coal Company, and by the latter assigned

to W. F. McBride. The suit was instituted for the benefit of plaintiff McBride, but the Arkansas Anthracite Coal Company, the original holder of the policy, joined as a party plaintiff.

The undertaking on the part of the insurance company, set forth in the policy, is to indemnify the assured "against loss and expense arising or resulting from claims upon the assured for damages on account of the bodily injuries or death, accidentally suffered or alleged to have been suffered, by an employee or employees of the assured * * * whether said injuries or death are accidentally suffered or alleged to have been suffered." And the policy further provides that "no action shall lie against the company to recover for any loss, and for expense under this policy, unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after the actual trial of the issue." The liability of the company is by the terms of the policy limited to the sum of five thousand dollars for loss sustained through the death or injury of a single person. There is also a clause in the policy which provides that "no assignment of interest under this policy shall be valid unless the written consent of the company is endorsed hereon." McBride was an employee of the Arkansas Anthracite Coal Company, and while working for his employer in a coal mine received personal injuries for which he recovered judgment in an action at law for the sum of $16,500.00 and costs of suit. McBride's injury occurred during the life of the policy, and the defendant concedes that it is liable for loss sustained by the coal company, the assured, for any sums actually paid by the latter in satisfaction of the judgment or any part thereof.

McBride's judgment against the coal company was rendered in November, 1913, and the sum of $426.25 was paid to McBride by the coal company on March 13, 1914. Subsequently the property of the coal company was placed in the hands of a receiver by an order of the chancery court in a suit instituted by McBride, the property consisting of some live stock and a

lease on about three hundred acres of mining lands, and the houses built thereon. The terms of the lease under which the coal company held the lands provided for the payment of royalties which amounted to about $2,500.00 a year, and the proof shows that there were debts in the way of back pay rolls owing by the coal company amounting to something over $2,000.00. The live stock was sold separately by the commissioner of the chancery court, and brought the sum of $77.60, which was paid over to McBride, and he bid in the leasehold and other property of the coal company at the commissioner's sale for the sum of $5,000.00 and credited that amount on the judgment; but his bid was made pursuant to an agreement with the Southern Anthracite Coal Mining Company to the effect that he would bid that amount for the property and transfer his bid to said Southern Anthracite Coal Mining Company for the sum of $1,000.00 payable in cash. That agreement was carried out and said amount paid to McBride by the Southern Anthracite Coal Mining Company, was all he received out of the purchase price of the sale. The sale was made on January 2, 1915, and was subsequently confirmed by the chancery court and a deed made by the commissioner to the Southern Anthracite Coal Mining Company.

The Arkansas Anthracite Coal Company, on February 4, 1914, assigned the policy to McBride, which was before the aforementioned payment of $426.25. This action was originally instituted at law, but by consent of parties was transferred to the chancery court. Considerable testimony was submitted to the chancellor, directed mainly to the question of the actual value of the assets of the Arkansas Anthracite Coal Company at the time of the sale by the commissioner, in order to determine whether the amount of the payment to McBride should be treated as one made in good faith for the full amount of the bid, or whether the real payment only amounted to the sum of $1,000.00, which was in fact paid over to him by the Southern Anthracite Coal Mining Company. There is a sharp conflict in that testimony, but we are of the opinion

that the chancellor correctly found that, considering the royalties due under the lease and the back pay rolls due by the coal company, which constituted a fixed liability and had to be discharged before the mine could be operated, the sum of $1,000.00 which was actually paid over to McBride was a fair value for the equity of the coal company, and that that sum should be treated as the actual amount paid by the coal company on the judgment.

The chancellor found that the defendant insurance company was liable for said sum of $426.25, paid as aforesaid to plaintiff McBride by the coal company, and the sum of $77.60, the amount for which the live stock and other personal property was sold, and said sum of $1,000.00 received out of the proceeds of the sale of the lease, together with the $191.85 costs in the original suit, making a total of $1,695.70; and, after adding interest since the date of the original judgment and deducting a credit of $237.00 on unpaid premiums, rendered a decree in accordance with that finding. The plaintiff McBride appealed, and the defendant insurance company has cross-appealed.

The contention of plaintiff is that the judgment should have been for the full amount of the $5,000.00, treating the total amount of his bid for the property at the commissioner's sale as a payment on the judgment, but, as before stated, we are of the opinion that the chancellor was correct in holding that the sum of $1,000.00 was the full amount actually paid, and that that should be the limit of the plaintiff's recovery upon that item of payment. This court has heretofore decided that an insurance policy of this kind constitutes a contract of indemnity and is not one to assume liability, and it therefore follows that there must be an actual loss sustained by reason of an enforced payment of the judgment liability of the assured before the obligation of the insurer matures. This is the distinction between that kind of insurance and what is ordinarily termed liability insurance. *Fidelity & Casualty*

Co. v. *Fordyce*, 64 Ark. 174; *American, etc. Ins. Co.* v *Fordyce*, 62 Ark. 562.

The company only indemnifies the assured against actual loss, and the question to be determined is what the actual loss was, and when the proof is considered in its proper light it is found that the sum of $1,000.00 was the extent of the loss of the assured on that payment. The fact that the sum of $5,000.00 was actually credited on the judgment does not create a liability, notwithstanding that it reduced the liability under the judgment to that extent, for whatever the credit may have been on the judgment the actual loss sustained by the assured was the $1,000.00 which was paid over to the plaintiff McBride out of the proceeds of the sale. Whatever may be the differences of opinion between the witnesses concerning the value of the property, the best evidence of the real value is the net price which the plaintiff agreed to accept and which the Southern Anthracite Coal Mining Company agreed to pay. Anything more than that would not constitute a *bona fide* payment on the judgment.

(3) The plaintiff also contends on his appeal that he should have been allowed to recover the court costs incurred in his various efforts to collect the judgment, but we are of the opinion that the chancellor was correct in holding that he was only entitled to recover the costs paid out in the original litigation, and which was adjudged in McBride's favor against the coal company. That amount he was entitled to recover, for the reason that the payment of those costs fell within the indemnity provided by the policy. *Maryland Casualty Co.* v. *Omaha Electric Light & Power Co.*, 157 Fed. 514.

On the part of defendant it is contended that the decree was erroneous in several respects and should be reversed. The first contention is that the assignment of the policy was unauthorized and vested no right of action in the plaintiff McBride, but since the original holder of the policy, as assignor, is joined as a plaintiff, it is not a matter of any concern to the defendant whether the policy was properly assigned or not. There

is undoubtedly a liability on the part of the company to the extent of the amount paid out in satisfaction of the original judgment, and it is a matter of no concern to the company which of the plaintiffs recover it so long as it is protected by the presence of both the assignor and the assignee as parties plaintiff in the action. It is certain, however, that the clause in the policy against assignment without consent of the company applies only to assignments during the lifetime of the policy, and not to an assignment of liability which has already accrued under the policy. *Maryland Casualty Co.* v. *Omaha Electric Light & Power Co., supra.*

(4) Next it is insisted that there can be no recovery of the $1,000.00, because it was not paid in money, but resulted from the appropriation of the coal company's property. Stress is laid in the argument on the express provision of the policy that no action shall lie except for loss or expense "actually sustained and paid in money," but we think the payment in the sale of the property was equivalent to payment in money and falls within the terms of the policy. It is scarcely fair to construe the language to mean that it applied only to currency actually handed over and not to a *bona fide* payment made in other property. If that construction were put upon the policy it would be absolutely worthless to an assured who was unable to pay money and whose property would be subjected to sale, and he would thus be deprived of the indemnity for which he had contracted. Such result should not be permitted to follow under the contract unless the language admits of no other construction.

(5) The contention of the defendant with respect to costs has already been disposed of in the discussion of the plaintiff's contention in that respect. We are of the opinion, though, that the court erred in allowing interest from the date of the original judgment instead of the date of the payment. The actual loss of the insured, which the insurer undertook to indemnify against occurred when the payment was made, and interest could only begin to run at that date. The assured

enjoyed the benefit of the retention of the amount for which it was liable until the date of payment, and therefore was not entitled to recover interest.

The decree of the chancellor will therefore be modified so as to allow judgment for interest on the several payments from the respective dates on which they were made, and the clerk of this court will make the computation accordingly. In all other respects the decree will be affirmed.

HALL v. EQUITABLE SURETY COMPANY.

Opinion delivered January 1, 1917.

1. INDEMNITY CONTRACT—NATURE OF THE LIABILITY.—Appellee executed a bond for $500 to an employer to indemnify it for certain losses sustained through the acts of a certain employee. Thereafter appellants executed a bond to indemnify the appellee for any loss sustained by reason of its previous contract The employee aforesaid was short in his accounts, and appellee paid the amount of the same to the employer, and sued appellants on their agreement. *Held*, the bond executed by appellants was an indemnity contract, and not one of surety or guaranty, that Kirby's Digest, §§ 7921 and 7922, did not apply, and that appellee was not required to bring an action against the original employee before suing the appellants.
2. INDEMNITY CONTRACT—NATURE OF THE AGREEMENT—SURETY CONTRACT.—In an indemnity contract, the engagement is to make good and save another from loss upon some obligation which the assured has incurred, or is about to incur, to a third person; while a contract of guaranty and suretyship is a promise to one to whom another is liable.

Appeal from Poinsett Circuit Court; *J. F. Gautney*, Judge; affirmed.

STATEMENT BY THE COURT.

L. F. Cornelison on or about November 24, 1913, began working for the St. Louis & San Francisco Railroad Company as agent at Lepanto, Arkansas. The St. Louis & San Francisco Railroad Company required the said Cornelison to execute to them a bond. The Equitable Surety Company, a corporation under the laws of the State of Missouri, executed a bond on the

24th day of November, 1913, to the St. Louis & San Francisco Railroad Company in the sum of $500.00.

On the 23d day of April, 1914, appellants executed a bond to the appellee which recites in part as follows: "That whereas we the undersigned have requested the Equitable Surety Company to sign and execute a certain bond or undertaking executed on behalf of L. F. Cornelison in favor of the St. Louis and San Francisco Railroad Company effective November 24, in the sum of $500.00, and whereas the Company (Equitable Company) has signed and executed or is about to sign and execute the said instrument upon condition of the execution and delivery hereof and upon the security and indemnity hereby and herein provided. Now therefore in consideration of the premises and of the sum of $1.00 in hand paid to us by the company we the undersigned hereby covenant and agree with the company its successors and assigns in manner following:

"That we will at all times indemnify and keep indemnified the company, and hold and save it harmless from and against any and all demands, liabilities and expenses of whatsoever kind or nature, including counsel and attorneys' fees, which it shall at any time sustain or incur by reason or in consequence of having executed the said instrument; and that we will pay over, reimburse and make good to the company, its successors and assigns, all sums and amounts of money which the company or its representatives shall pay or cause to be paid or become liable to pay, under its obligation upon said instrument, or as charges and expenses of whatsoever kind or nature, including counsel and attorneys' fees, by reason of the execution thereof, or in connection with any litigation, investigation or other matters connected therewith, such payment to be made to the company as soon as it shall have become liable therefor, whether it shall have paid out said sum or any part thereof or not.

"That in any settlement between us and the company the vouchers or other proper evidence showing payment by the company of any such loss, damage or

expense, shall be *prima facie* evidence against us of the fact and amount of our liability to the company, provided that such payment shall have been made by the company in good faith, believing that it was liable therefor."

Cornelison did not sign the bond. Appellee instituted this suit against the appellant on the above bond, alleging that it had been forced to pay the railroad company by reason of the bond it had executed to that company the sum of $217.75, the amount due said railroad company by Cornelison.

The appellee introduced in evidence a verified account in the sum of $217.75 which it had paid the railroad company on the 29th day of September, 1915.

On September 5, 1916, Girdley, one of the appellants, wrote the appellee and demanded that it file suit against Cornelison. Suit was not filed within thirty days after the receipt of this letter by the appellee. The appellant Girdley testified that he would not swear that the itemized statement of what the appellee had paid for Cornelison was not true.

The amended bill of exceptions shows that the question came up as to whether sections 7921 and 7922 of Kirby's Digest applied to the bond in suit, and the court ruled that those sections did not apply to this particular bond, but that the bond in suit came within section 7923 of Kirby's Digest, and that the giving of notice and the failure to file suit within thirty days thereafter did not relieve the sureties, and that the only question in the lawsuit was the question of amount.

The court told the jury that the itemized statement of account filed and sworn to was *prima facie* evidence of its correctness until denied under oath.

The jury returned a verdict for the appellee in the sum of $217.75, and from a judgment entered in appellee's favor for that sum, this appeal is duly prosecuted.

S. L. Gladish, for appellants.

1. The bond was for the payment of money and appellants were sureties merely. They were released

from all liability by the failure to sue Cornelison after due notice to do so. Kirby's Digest, §§ 7921-2; 32 Cyc. 99; 48 Ark. 254; 39 So. 54; 90 Pac. 328.

2. Such a bond is construed against the insurer company. 80 Ark. 54.

3. The notice was sufficient.

Mardis & Mardis, for appellee.

1. Appellants are principals in the bond. Cornelison did not sign the bond nor is he a party to the contract. The contract is an original one of indemnity, and §§ 7921-2 Kirby's Digest, do not apply. *Ib.* § 7293.

2. Girdley only gave notice and Hall would still be liable. 29 Ark. 579.

WOOD, J. (after stating the facts). Section 7921, Kirby's Digest, provides: "Any person bound as surety for another in any bond, bill or note for the payment of money or the delivery of property may at any time after action hath accrued thereon by notice in writing require the person having such right of action forthwith to commence suit against the principal debtor and other party liable."

Section 7922 provides: "If such suit be not commenced within thirty days after the service of such notice and proceeded in with due diligence in the ordinary course of law to judgment and execution, such surety shall be exonerated from liability to the person notified."

Section 7923 provides: "The two preceding sections shall not extend, first, to the bond of any executor, administrator, guardian or other person given to secure the performance of his trust or the duties of his office; nor, second, to any bond with collateral conditions except bonds with collateral conditions exclusively for the payment of money or the delivery of property, or exclusively for the performance of a covenant or agreement for the payment of money, or delivery of property."

The court correctly ruled that sections 7921 and 7922, *supra*, had no application to the bond under consideration.

Cornelison was not the principal in the bond. He did not sign the same, nor did appellants sign the same as his sureties. The case of *Town of Monticello* v. *Cohn & Kuhn*, 48 Ark. 254, cited by the appellants has no application, for that case was a suit against a principal and his sureties for the payment of a certain sum of money. There the recitals of the bond show that it was signed by the principal and by the sureties. They were designated respectively as such.

The court held in that case that the sureties having given the notice provided by the statute to the obligee to sue the principal in the bond, which the obligee had failed to do, the sureties were thereby exonerated.

The bond under consideration is not a contract of suretyship in any respect, nor is the contract under review one with any collateral undertakings whatever, in the sense contemplated by the statute. Sections 7921 and 7922, *supra*.

Manifestly the statute is applicable only in those cases where there is a principal debtor, or obligor, and a surety. In such cases where the surety has notified the creditor or obligee as prescribed by the statute, then such creditor or obligee cannot maintain an action against the surety until he has brought suit and pursued the same with diligence to judgment and execution against the principal debtor or obligor.

Where the contract takes the form of ordinary suretyship, "the agreement of the surety is that he will do the thing which the principal has undertaken."

If the contract assumes the form of a guaranty, then "the agreement of the guarantor is that the principal will do what he is bound to perform." 12 R. C. L. 1057, sec. 6, but the bond in suit is not that of suretyship in any form. It is an original contract of indemnity between the appellants and the appellee, by which the appellants undertake to indemnify the appellee against any "demands, liabilities and expenses," which it may

have incurred, or any sums of money which it may have paid in good faith, or have become liable for by reason, or in consequence of having executed the bond to the railway company.

Contracts of indemnity "are distinguished from those of guaranty and suretyship in that in indemnity contracts the engagement is to make good and save another from loss upon some obligation which he has incurred, or is about to incur, to a third person, and is not as in guaranty and suretyship a promise to one to whom another is answerable." 22 Cyc. 80.

"A contract of indemnity is original and independent, to which there is no collateral contract and with respect to which there is no remedy against the third party." 20 Cyc. 1402 and cases cited in Note 33.

In *Vandiver & Co.* v. *Pollak*, 107 Ala. 547-553, it is said: "Indemnity springs from contract express or implied, or in a general way may be defined as an obligation or duty resting on one person, to make good any loss or damage another has incurred while acting at his request or for his benefit." See also 14 R. C. L. 43, secs. 1 and 2.

The bond under the above definitions is clearly an indemnity contract, and not one of surety or guaranty. There is nothing in the record to show that the appellee—the obligee in the bond—had any remedy whatever against the third party, Cornelison. The bond sued on does not show that Cornelison was indebted to appellee. Nor does it show any undertaking upon the part of appellants to pay any debt of Cornelison to appellee.

There were no exceptions to the instructions of the court, and there was evidence under the instructions to sustain the verdict. The judgment is therefore correct and it is affirmed.

MELTON v. MELTON.

Opinion delivered January 1, 1917.

1. HOMESTEAD—ABANDONMENT.—In order to constitute an abandonment, the party having the homestead right must have removed from the home with the intention at the time never to return thereto; or if he had no such intention at the time, he must have formed the intent afterward never again to occupy the abandoned premises as a home.
2. HOMESTEAD—ABANDONMENT.—The abandonment of a homestead is almost, if not entirely, a question of intent, and the burden of proof is on the party asserting that the homestead has been abandoned; the facts that the claimant had not lived on the premises for about seven years, and that he rented the same, are not inconsistent with a claim of homestead.
3. GIFTS—DELIVERY.—Delivery is essential to complete a gift *inter vivos* or one *causa mortis*.
4. GIFTS—PAROL GIFT OF LAND.—In order to establish a parol gift of land, there must be some testimony tending to show that the real estate was delivered to the donee, and that the donee took possession of the real estate under and by virtue of the gift.

Appeal from Columbia Chancery Court; *R. L. Searcy*, Special Chancellor; affirmed.

STATEMENT BY THE COURT.

This suit was instituted by the appellant against the appellee at law to recover possession of Lots 25 and 26 in the town of Magnolia. The appellant set up title by virtue of an inheritance from her father, James R. Melton, deceased. The appellee in her answer denied the allegations of the complaint, and set up that she was the widow of Seeb Melton, and that her husband was the son of James R. Melton, and that James R. Melton during his lifetime conveyed the property to Seeb Melton. That her husband gave the property to her. She also set up that she and her husband had occupied the property as a homestead, and that they were so occupying the same at the time of her husband's death. She asked in the prayer of her answer that if it was determined that she was not the owner that she be decreed a homestead in the prop-

erty. She asked that the cause be transferred to equity, which was done.

After the cause was transferred to equity the appellant filed an amended and substituted complaint, alleging title to the property the same as in her original complaint, and asked that her title to same be quieted and confirmed as against the appellee, and also asked that the dower interest of the appellee in the property be allotted, and after allotment of the dower interest that appellant be decreed possession of that portion of the property remaining after such allotment of dower to appellee. Appellee filed an amendment to her answer and cross-complaint, substantially the same as set up in the original, but in this she did not claim any homestead in the property.

The facts showed that J. R. Melton was the owner of the land in controversy at the time of his death; that appellant, Eliza Melton, was his daughter, and W. S. Melton was his son. It appears from the testimony that on the 14th of January, 1893, James R. Melton purchased the land in controversy from H. C. Smith, receiving a warranty deed. After this purchase from Smith, W. S. Melton, the son of J. R. Melton, and husband of the appellee, went into possession of the property and occupied the same as his homestead until his death. J. R. Melton at the time of his death also owned Lots 23 and 24, which he occupied as his homestead.

The court, among other things, found that no valid gift of Lots 25 and 26 was ever made by James R. Melton to W. S. Melton, or by W. S. Melton to the appellee, Lulu Hicks Melton. That under our laws of descent and distribution the legal title to Lots 25 and 26 was in the appellant. That W. S. Melton died without any children or lineal descendants, and that the lots in controversy were an ancestral estate, and that the appellee therefore was entitled to be endowed with a one-half interest in the lots in controversy for her life; that she was also entitled to the lots in con-

troversy as a homestead; that she had not abandoned the same as a homestead.

The effect of the court's finding was that W. S. Melton died the owner of the property in controversy, and occupying the same as his homestead; that he had no children or lineal descendants, and that the title to the property was in appellant, his sister; but that the appellee, the widow of W. S. Melton, was entitled to dower in the lots in controversy, and also entitled to a homestead right in the lots, and that she had not abandoned such homestead. The court entered a decree establishing the legal title to the lots in controversy in the appellant, but denying her prayer for the possession of the property and to have dower allotted in same to the appellee. Other facts stated in opinion.

C. W. McKay, for appellant.

1. The court erred in finding that appellee was entitled to a homestead and in declining to allot dower. The preponderance of the evidence shows an abandonment of the homestead. 101 Ark. 101; 37 L. R. A. (N. S.) 807; 22 Ark. 400; 37 *Id.* 283; 41 *Id.* 309; 48 *Id.* 539; 55 *Id.* 55; 73 *Id.* 174; 83 S. W. 913; 17 *Id.* 365; 76 Am. Dec. 432. The intent of the owner will be governed by all the circumstances. 74 Ark. 88; 76 *Id.* 575; 68 *Id.* 76. No present and abiding intention to return to it is shown. 55 Ark. 58; 21 Cyc. 621. See also 107 Ark. 284.

Stevens & Stevens and *Kilgore & Joyner*, for appellee.

1. The burden was on appellant to show an abandonment—the lots having been once impressed with the homestead right. 6 Enc. Ev., p. 534; 10 N. W. 804. The evidence must show removal with the intention of not returning. 62 N. W. 470; 11 S. W. 502; 76 *Id.* 751; 37 Ark. 283; 22 *Id.* 404.

2. This was not an ancestral estate. In ejectment plaintiff must prove title. 80 Ark. 31, etc. The

rule is the same in suits to quiet title. 82 Ark. 294; 99 *Id.* 137; 4 Enc. Ev. 576-7; 14 Cyc. 152; 11 S. W. 10; 13 Current Law 10; 13 *Id.* 1307.

3. There is no evidence that appellant's brother owned the lots at his death. But if he did he parted with the title by gift to his wife. The title passed from J. R. to his son, the husband of appellee. Declarations of a donor subsequent to parting with title are admissible. 6 Enc. Ev. 212. So are acts of ownership. *Ib.* 214; 6 L. R. A. (N. S.) 508. See 108 Ark. 277, a case like this. Also 88 S. W. 977; 81 Ark. 328. The decree should be reversed on the cross appeal. 32 Ark. 116; 82 *Id.* 45.

WOOD, J. (after stating the facts). The appellant contends that the court erred in finding that the appellee was entitled to a homestead in the lots in controversy and in refusing to have the dower of appellee in the property allotted and set aside. W. S. Melton and appellee, his wife, had occupied the property in controversy as their home several years before the death of W. S. Melton. About eight months before the death of W. S. Melton, he and appellee went to appellee's father's, where they remained until W. S. Melton died. During this time they returned occasionally to their home, the last time being about four months before W. S. Melton died. After the death of W. S. Melton, the appellee moved all of her furniture out of the house and rented the property; she had not lived on the property since the death of her husband; she at one time stated in joke, since the death of her husband, that she would take $3,500.00 for the property; she had not resided on the place for a period of about seven years. On one occasion, after her husband's death, appellee told the appellant that she did not know that she would ever live on the property in controversy again.

(1–2) The above is substantially the testimony upon which the court found that there had been no abandonment of the homestead upon the part of the appellee after the death of her husband, and this

finding is not clearly against the preponderance of the evidence. It is a well established rule of law that in order to constitute an abandonment the party having the homestead right must have removed from the home with the intention at the time never to return thereto; or, if he had no such intention at the time, he must have formed the intent afterwards never again to occupy the abandoned premises as a home. In *Stewart* v. *Pritchard*, 101 Ark. 101, 37 L. R. A. (N. S.) 807, we said: "The abandonment of a homestead is almost, if not entirely, a question of intent. This intent must be determined from the facts and circumstances attending each case." The burden was on the appellant to show that appellee had abandoned her homestead, and the evidence is not sufficient to establish that fact by a clear preponderance. There is no testimony in the record to show that the appellee, after the death of her husband, had acquired in her own right another homestead. The fact that she had not lived on the land in controversy for about seven years, and that she had rented same, was not inconsistent with a claim of homestead. While these facts tend to show a change of residence, they are not sufficient of themselves to establish an abandonment of the homestead. At least, it is not sufficient to warrant this court in reversing the finding of the trial court that there had been no abandonment. See *Robinson* v. *Swearingen*, 55 Ark. 55-58.

It will be observed that appellee did not tell appellant that she never intended again to live on the property in controversy. She stated that she did not know that she would, but that is quite a different thing from a positive statement that she would not, and to constitute an abandonment it must appear that there was a positive, affirmative intention, as we have shown, never to occupy again as a home the premises once impressed with a homestead character. There is nothing in the testimony to show that appellee was applying the property in controversy to other uses inconsistent with the homestead purposes. A rental of the property is not inconsistent with an intention to

return and occupy the premises as a homestead. In the absence of some affirmative testimony to the effect that appellee had expressed an intention never to return and occupy the premises as a homestead, and in the absence of any testimony showing a use of the property by appellee inconsistent with the claim of homestead, it cannot be said that the finding of the chancellor that there was no abandonment is against the preponderance of the evidence.

The decree, therefore, on appellant's appeal must be affirmed.

The appellee, on her cross-appeal, contends that the court erred in finding that there was no valid gift by her husband, W. S. Melton, to the appellee.

Appellee, at one place in her testimony, when asked how she obtained title to the property, answered, "Through my husband; his mother and sister deeded him the property and he was to leave it to me." At another place in her testimony she stated that she made improvements on the place, believing that it was her's and her husband's. Further along in her testimony she stated that before her husband's death he told her that whatever interest he had in the place he gave it to her. That was "during his last illness." He stated this because witness had improved the property and taken care of her husband, who was afflicted with tuberculosis. For that reason "he expressed on his death-bed that the title—whatever interest was in him—he wanted me (his wife) to have the place." In answer to leading questions she stated that she never would have made the repairs and improvements that she did make if her husband had not turned the property over to her. She stated that her husband gave her the place about eight or nine years before he died. He did that when she began to put a good many improvements on the place.

There was testimony by several witnesses to the effect that W. S. Melton had said before his death that he had given the lots to his wife for the money she had put on them; that it had cost her a great deal

and he wanted her to have it. One witness testified that just before his death W. S. Melton wanted to come to town to fix the deed to his wife to the lots, claiming that he had given her the property for advances made in improvements and his support.

(3) Now if appellee acquired a fee simple title to the property in her own right it was by virtue of a gift of the same from her husband. But the above testimony is not sufficient to establish a gift of the land in controversy, either as a *donatio inter vivos* or *donatio causa mortis*. At least the finding of the court to the effect that there was no gift is not clearly against the preponderance of the evidence, for whether the alleged gift be considered one *inter vivos* or *causa mortis* delivery was essential to the completion of the gift. *Hatcher* v. *Buford*, 60 Ark. 169; *Marshall Bank* v. *Turney*, 105 Ark. 116, 118.

There is no testimony in this record to warrant the finding that the appellee took possession of the property and made improvements thereon under and by virtue of the alleged gift. She and her husband lived on the property as their homestead and continued to live thereon until his death. There was no visible change in the character of the possession from the time she first went on it as the wife of W. S. Melton, the owner of the property, and the time when she claims that she made the improvements thereon as her property, and under such circumstances it cannot be determined that her possession and the expenditures that she made upon the place were traceable to a gift of the property to her by her husband.

(4) The testimony shows that she entered into the possession of the property originally as the wife of W. S. Melton and occupied the same with him as their homestead, and there is nothing in the record to show that the character of such possession was ever changed or that she, at any time prior to his death, claimed that she was in possession in any way other than by virtue of the fact that she was the wife of W. S. Melton. There was no deed from Melton to his wife, and in

order to establish a parol gift of real estate there must be some testimony tending to show that the real estate was delivered to the donee and that the donee took possession of the real estate under and by virtue of the gift.

In *Young* v. *Crawford*, 82 Ark. 38, 45, quoting from Prof. Pomeroy, we said: "A parol gift of land will not be enforced unless followed by possession and by valuable improvements made by the donee. * * * When the donee takes possession and makes outlays upon valuable and substantial improvements in execution of the donation *, * * a parol gift of land will be specifically enforced."

The above case and other cases cited by counsel for appellee, to-wit: *Naler* v. *Ballew*, 81 Ark. 328, and *Guynn et al.* v. *McCauley et al.*, 32 Ark. 116, are not in appellee's favor, for the facts of those cases clearly show that there was a delivery of the property and possession taken under and by virtue of the gift. Not so here. The court was correct in finding the lands in controversy were ancestral.

The judgment of the chancery court is in all things correct, and it is therefore affirmed.

NOTHWANG v. HARRISON.

Opinion delivered January 1, 1917.

1. EVIDENCE—WRITTEN CONTRACT—ADDITIONAL CONTRACT.—Evidence of a contract, additional to a written one, is admissible. Parties may make subsequent contracts varying the terms of a prior one.
2. CONTRACTS—CONSIDERATION.—An agreement as to the time or manner of the exercise of some legal right, when so acted upon that the right has become valueless unless it may be enjoyed pursuant to the agreement, is a sufficient consideration to support a contract to that effect.
3. TIMBER CONTRACTS—EXTENSION AGREEMENT.—Appellee, under a contract with appellant, had a certain time in which to cut and remove certain timber. *Held* an agreement between the parties extending the time for cutting and removing, without any additional consideration, was valid.

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

John D. Shackelford, for appellant.

1. Oral testimony to contradict the deed was not admissible. 94 Ark. 130; 95 *Id.* 131; 102 *Id.* 575; 112 *Id.* 1.

2. The court erred in refusing plaintiff's instructions Nos. 1 and 7. Plaintiff had a lien under § 400 of Kirby's Digest. It was error to give defendant's instructions Nos. 3, 6 and 8. They are not the law. There was no consideration for the extension of time and no promise to extend the time was ever made. The jury were misled and the verdict is not sustained by the evidence.

Dunaway & Chamberlin, for appellees.

1. Appellees did not attempt to contradict the written timber sale contract. They proved a subsequent valid agreement extending its terms.

2. There is no error in the refusal nor giving the instructions. 91 Ark. 43; 96 *Id.* 156; 64 *Id.* 627.

SMITH, J. Appellant sold appellees certain timber standing on lands which he owned on December 30, 1911, and gave them two and one-half years in which to cut and remove it. Certain timber was cut after the expiration of this time by appellees, and this suit was brought to recover its value. The complaint recited that timber had been cut on other lands owned by appellant which he had never sold appellees. There was also included in the complaint a count for damages resulting from throwing timber and brush in a creek in such a manner as to dam up the creek and cause it to overflow appellant's lands.

It was alleged that the timber in controversy had been manufactured into shingles and a lien upon them was claimed, and an attachment was sued out and levied upon the shingles.

The answer denied all the material allegations of the complaint, and while it was admitted that certain

trees had been cut after the expiration of the time originally granted it was alleged that an extension of the time had been given for cutting these trees. Appellees asked for damages on account of the attachment and to compensate the cost of repairs they were compelled to make to a road used by them in hauling out their shingles, which appellant had obstructed.

A timber deed was executed at the time the original contract was entered into which described the land upon which the timber had been sold, the same being four forty-acre tracts of land, for the consideration of $600.00. Appellees erected a mill to manufacture this timber, and after its completion it was ascertained that the mill was not situated on any one of the forty-acre tracts of land described in the deed. It was contended by appellees that the mill was on land on which they had bought the timber, as they claimed to have bought all of appellant's timber, but they later discovered that the deed did not describe the land on which the mill was located. Appellees testified that when this discovery was made they negotiated with appellant for the satisfaction of the demand for the timber so erroneously cut, and for the extension of the time to cut the timber described in the deed. These negotiations were concluded by the payment of a hundred dollars to appellant, who executed the following receipt:

"Little Maumelle, Arkansas.
March 26, 1913.

"Received one hundred from Harrison brothers for balance of adjoining the timber they bought from me on same condition as the other, and I agree to extend the lease for six months after the original lease expires. (Signed) W. Nothwang."

(1) Appellant contends the extension mentioned was for the purpose only of allowing appellees to manufacture the timber they had on hand at the mill after the expiration of the lease on January 1, 1915. But this is controverted by appellees, and this difference has been decided in appellees' favor by the jury. It is

said that the introduction of this writing tended to vary the terms of the original deed, inasmuch as appellees were permitted to testify in regard to the negotiations which led up to its execution. But such is not the case. Appellees are not attempting to vary the original contract. They simply sought to show that subsequent to the execution of the original contract, and for the additional consideration, they had obtained a further extension of time to cut the timber and had, for the same additional consideration, paid for the timber erroneously cut. No rule of evidence would exclude such testimony. Parties may make subsequent contracts which vary the terms of a prior contract.

It is insisted that the court erred in giving at appellees' request instruction numbered 8, which reads as follows:

"You are instructed that if you find from the evidence that defendants refrained from cutting their timber which they could have had time to cut during the remainder of the year 1914 under a promise from the plaintiff that they could cut and remove their timber after January 1, 1915, then this would constitute a valuable consideration sufficient to support the claim of extension of time."

(2-3) It is said, first, that the instruction is erroneous because there is no proof upon which to base it. But appellees testified that before the expiration of the time to cut the timber they represented to appellant that on account of the depressed timber market they would like an extension of time beyond January 1, 1915 (the time specified in the timber deal) to cut the timber, and that appellant acceded to this request, whereupon they did not cut the timber in the time granted in the deed, but cut it in the extended time. It is said this promise is void as being unsupported by any consideration. But we do not think so. Appellees would have exercised a legal right within the time limited except for appellant's promise that the right might thereafter be exercised. It may be true that appellant derived no profit or advantage from this

agreement, but it is not essential that he should have done so. It is sufficient if the party to whom the promise was made suffered some detriment or disadvantage on account of the promise. An agreement as to the time or manner of the exercise of some legal right when so acted upon that the right has become valueless unless it may be enjoyed pursuant to the agreement, is a sufficient consideration to support a contract to that effect.

In Page on Contracts, section 274, a valuable consideration is defined as follows:

"Sec. 274. A valuable consideration is some legal right acquired by the promisor in consideration of his promise, or forborne by the promisee in consideration of such promise. A common form of stating the same principle is that a valuable consideration for a promise may consist of a benefit to the promisor, or a detriment to the promisee.

"The use of 'benefit' and 'detriment' in this connection needs explanation. While correct if properly understood, it is liable to misconstruction. 'Benefit' does not refer to any pecuniary gain arising out of the transaction, nor 'detriment' to any pecuniary loss. It is not possible to wait till the transaction is concluded and the books balanced, to see whether a consideration existed originally. 'Benefit' as used in this rule means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled; 'detriment' means that the promisee has, in return for the promise forborne some legal right which he would otherwise have been entitled to exercise. The question of the ultimate financial loss or gain is foreign to the doctrine of consideration, if the parties each have received what they have agreed upon."

See, also, sections 67 and 69 of the article on "Contracts" in 6 Ruling Case Law. See, also, Elliott on Contracts, sec. 203; Beach on the Modern Law of Contracts, sec. 167; Parsons on Contracts, p. 482; Hammon on Contracts, p. 675.

Many cases are cited by the above authorities in support of the law as there announced.

It is earnestly insisted that the court erred in refusing appellant's instruction numbered 7, as follows:

"You are further instructed that if you find from the testimony that any of the shingles attached and levied upon by the sheriff in this case were shingles produced from the plaintiff's timber, which was cut since the first of 1915, then your verdict will be for the plaintiff, and you will sustain the attachment."

A consideration of this instruction would involve the discussion of the evidence in the case, which appellant says is insufficient to support the verdict. The instruction set out would have been a proper one had the testimony in appellant's behalf been undisputed, but such is not the case. Indeed, there is, to the contrary, a sharp conflict in the testimony upon most of the questions of fact involved; but these conflicts have been resolved by the verdict of the jury against appellant's contention.

A verdict was returned by the jury in appellees' favor upon their counterclaim in the sum of $500, and we cannot say this verdict is unsupported by the evidence, or is excessive. The jury has found, upon conflicting evidence, that appellees did not wrongfully cut any of appellant's timber, and, consequently, the attachment was wrongfully sued out and appellant was liable for any damage to the timber occasioned thereby. There was also proof to the effect that appellant had torn up a road which appellees had prepared for their use in hauling out the products of their mill, and when this road was repaired it was again obstructed by appellant and the timber was damaged on account of the delay thus occasioned. But all of these questions were submitted to the jury under instructions which properly declared the law applicable to the respective contentions of the parties.

Finding no prejudicial error the judgment of the court below is affirmed.

BARRON-FISHER-CAUDILL COMPANY v. RHODA.

Opinion delivered January 1, 1917.

1. APPEAL AND ERROR—APPEAL FROM JUSTICE COURT—AMOUNT IN CONTROVERSY—REPLEVIN.—A. owned mules and mortgaged them to B. B. brought an action in replevin before a justice, and sold the mules to satisfy his claim. A.'s defense was that the note secured by the mortgage had been paid. In the trial in the circuit court, the jury found in A.'s favor. *Held* the fact that the jury's verdict recited that they found for A. on his "counterclaim," when the record failed to disclose that a counterclaim had been made by A. did not make the matter of counterclaim an issue in the case, so as to deprive the justice of jurisdiction on the grounds that the counterclaim was above the jurisdictional amount.
2. CONVERSION—DAMAGES.—Where property is unlawfully taken from the owner, the measure of damages is the market value of the property taken.

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

P. A. Lasley, for appellant.

1. The court had no jurisdiction of appellee's cross-complaint. His claim was in excess of $300.00, exclusive of interest. The amount of the demand or claim governs; not the amount recovered. 44 Ark. 100; 13 *Id.* 40; 103 *Id.* 143; 95 *Id.* 43; 57 *Id.* 266; 50 *Id.* 380; 64 *Id.* 551; 77 *Id.* 582; 111 *Id.* 352.

2. The court erred in its instructions. The value of the mules was what they sold for. 86 N. W. 25.

3. The checks all bore the words "in full for clearing," etc. Appellee after accepting them cannot be heard to say that appellant was indebted to him.

Gravette & Rodgers, for appellee.

1. The claim of appellee was within the jurisdiction of the justice. The amount of appellant's claim, the note, was under $300.00, and this determined the jurisdiction. Const., Art. 7, § 40; 100 Ark. 248; 40 *Id.* 77; 56 *Id.* 592; 34 *Id.* 419.

2. A justice has jurisdiction if the original indebtedness is over the limit, where the balance due and claimed amounts to less, or has been reduced within the

limit by fair credits. 6 Ark. 533; 7 *Id.* 165. The amount due was within the limit. The amount of each separate demand—not the aggregate sum of various items—determines jurisdiction. 1 Ark. 252; 74 *Id.* 615; 78 *Id.* 595; 89 *Id.* 435; 66 *Id.* 278; Kirby's Digest, § 6079, 6082.

3. The note had been paid by work under contract and there is no error in the instructions. There was no accord and satisfaction. A check for a less sum, than the debt or marked "in full payment" may be explained and it may be shown that it was in full payment. 94 Ark. 158.

HUMPHREYS, J. Appellant was the owner of a note and mortgage executed by W. O. Rhoda to secure a note for $250 and interest, on two mules. The appellant brought suit in replevin before H. C. Hall, a justice of the peace of Chickasawba Township, Mississippi county, Ark., to recover possession of said mules, in order that appellant might sell them under the mortgage to satisfy said indebtedness. A bond was given and the mules were seized and sold for the sum of $186.00. The replevin suit was continued for a time and finally set down for hearing. Appellant failed to appear on the day of trial and judgment was entered in favor of appellee for the possession of the mules and their value fixed at $300. Judgment was also rendered in favor of appellee for $75 damage for the wrongful detention of said mules. The only written pleading filed in the justice of peace court was an affidavit for replevin. The cause was appealed to the circuit court and tried on said affidavit, the oral plea of payment of said note and mortgage by appellee, the oral evidence of witnesses and other proofs. Judgment was rendered in favor of appellee for $199.13. The form of the verdict of the jury is as follows:

"We, the jury, find for the defendant upon the cross-complaint in the sum of $199.13."

Appellant took the necessary steps and appealed the case to this court.

(1) It is contended that the cross-complaint was for an amount in excess of the jurisdiction of the magistrate's court. In other words that it exceeded $300, exclusive of interest. While the judgment shows that the cause was tried on the complaint, answer and cross-complaint, and while the verdict recites that defendant recovered upon the cross-complaint, the record recites that there were no written pleadings. No answer or cross-complaint appears in the record. On page 20 of the transcript it appears that "The defendant, in open court, admits the execution of the note; the mortgage securing same; and pleads payment, and assumes the burden of establishing his plea of payment." The only issue presented by the record was as to who was entitled to the possession of the mules, and this depended upon the question of the payment of the mortgage. If the mortgage had not been satisfied by payment or otherwise, the appellant was entitled to the mules for the purpose of foreclosing its mortgage; but if said appellee was entitled to the possession of the mules, and the appellant wrongfully sold them, appellee was entitled to recover their value. The question of a counterclaim was not an issue in the case, hence the cases of *Hunton* v. *Luce*, 60 Ark. 147, and *Kilgore Lumber Co.* v. *Thomas*, 95 Ark. 43, on the question of counterclaim beyond the jurisdiction of a justice of the peace have no application to the facts in this case. Under the facts in this case the verdict of the jury, and judgment of the court based thereon, were necessarily for the value of the mules wrongfully taken and sold by the appellant, and the fact that the verdict recited that it was upon the cross-complaint cannot change its evident meaning. This is so because the only issue between the parties was as to whether the mortgage had been paid, and we must presume that the verdict was responsive to that issue. The evidence as to the value of the mules ranged from $175 to $300 and the jury might well have found the value to be $199.13 including interest.

(2) Appellant insists that the court erred in not instructing the jury to the effect that the appellee "Would be entitled to a credit only for the amount that the property sold for if the sale was had fairly and honestly, openly and after due notice was given." This is not the test. Where property is unlawfully taken from a party the measure of damages is the market value of the property. The court told the jury in instruction 5, that if they found for the appellee it would be their duty "To ascertain from a preponderance of the evidence in this case the fair and reasonable value of the two mules about which the controversy arose at the time the two mules were sold under the direction of the plaintiff and report said value to the court which will be a fair and reasonable value of the property at the time." This instruction presented the correct rule.

It appears that the checks issued by appellant in payment of the improvements from time to time made by appellee on appellant's land in payment of the note and mortgage had written on them "paid in full." Appellee testified that the checks were furnished to him for the purpose of paying men engaged in helping him and not for his services. Appellant contends that the court should have instructed the jury to the effect that these words written on the checks were conclusive and precluded appellee from claiming anything furnished for improvements unless some fraud was shown. The court instructed the jury in instruction 8, that the indorsement of said words made a *prima facie* case against appellee and raised the presumption of full payment, but such a presumption might be overcome by a preponderance of evidence.

We do not think that the words "paid in full" indorsed on checks are conclusive, so this question was submitted to the jury on proper instructions. There being no error in the record, the judgment is in all things affirmed.

RIBELIN v. HOLDER.

Opinion delivered January 1, 1917.

1. TRIAL—FILING DEMURRER—DISCRETION OF COURT.—Where the issues in a cause pending in chancery have been made up for more than a year, it is not improper for the chancellor to refuse to permit the defendant to file a general demurrer on the eve of the trial.
2. APPEAL AND ERROR—FINDINGS OF CHANCELLOR.—Where the decree of the chancellor is not against the preponderance of the evidence, it will not be disturbed on appeal.

Appeal from Logan Chancery Court, Southern District; *W. A. Falconer*, Chancellor; affirmed.

John P. Roberts, for appellant.

1. The decree of the chancellor is clearly against the preponderance of the evidence and should be set aside. 92 Ark. 359; 93 *Id.* 283; 94 *Id.* 301; 98 *Id.* 189; 107 *Id.* 372; 83 *Id.* 340.

2. The chancellor abused his discretion in refusing a continuance.

J. H. Evans, for appellees.

1. The continuance was properly refused. No abuse of discretion is shown. Appellant had new counsel and all his witnesses were present. No injury resulted and no good purpose could have been served by further postponement. The issues had been made up for a year and leave to file a demurrer was properly refused.

2. The testimony was all oral. While the findings are persuasive only, in chancery cases, yet this court will not set them aside unless clearly against the preponderance of the legal evidence. The findings of the chancellor are amply sustained by the testimony. The inference is that if Ribelin had produced his books they would have shown that the indebtedness due by McCormack had been paid.

HUMPHREYS, J. On the 5th day of May, 1912, one of the defendants, C. N. McCormack, being indebted to the appellant, S. A. Ribelin, in the sum of $389.41, executed a chattel mortgage on certain machinery used in a gin and other personal property, to secure said

indebtedness and to further secure the payment of $100 which the said S. A. Ribelin had paid the Bank of Belleville for him and to further secure any other indebtedness which the said C. N. McCormack might owe the said S. A. Ribelin on the 20th day of October, 1912. Nearly two years thereafter, C. N. McCormack executed a chattel mortgage on a large part of the same property to J. J. Hall, B. Nixon, C. M. Gilliam and A. A. Holder, to secure an indebtedness due them for $360.32, subject to the mortgage in favor of S. A. Ribelin for $339, reciting that the mortgage was given to S. A. Ribelin in the spring of 1912.

In the summer or fall of 1914, C. N. McCormack sold the major portion of said property so mortgaged, as well as other property, to S. A. Ribelin, in satisfaction of all indebtedness due Ribelin by McCormack, and Ribelin made disposition of said property.

During the years 1912, 1913 and 1914, Ribelin advanced bagging and ties, groceries, etc., to McCormack, who was in the ginning business, and collected from McCormack's customers most of the money charged for ginning. He collected about $2,100. This suit was brought by A. A. Holder, C. N. Gilliam and B. Nixon against C. M. McCormack, S. A. Ribelin and J. J. Hall in the Southern District of the Logan chancery court, seeking a return of the mortgaged property from appellant and praying that said property be sold to satisfy the amount rightfully due appellant and that the balance be applied to the payment of the debt due from McCormack to appellees. Hall was made a party defendant because he would not unite with the other parties as a party plaintiff. An answer was filed to the complaint denying all the material allegations therein and alleging that the mortgaged property was turned over by the mortgagor, McCormack, to the appellant to satisfy the indebtedness due him and that the property so taken was of less value than his claim.

The complaint was filed on the 12th day of January, 1915. The answer was filed on Feb. 2, 1915. The

cause was continued from time to time on the application of appellant until the 7th day of February, 1916. The last continuance was had in September, 1915, at which time the cause was set for trial on the first day of February, 1916, term of said court, at 9 o'clock A. M. On that day neither the appellant nor his attorneys appeared and the cause was passed until 9 o'clock A. M., the following day. Judge Priddy, one of the attorneys for appellant, had been elected to the circuit bench and Mr. Chambers, his partner, telephoned that he was engaged in the trial of a cause in the probate court at Danville. Appellant then employed Jno. P. Roberts to represent him. The cause was passed until 2 o'clock in the afternoon, at which time a continuance was asked for the reason that Jno. P. Roberts had just been employed and was not familiar with the case. The motion for continuance was overruled and appellant excepted. He then asked permission to file a general demurrer to the complaint. The court denied the request and appellant excepted. The cause proceeded to trial on oral evidence. The chancellor found that at the time appellant took the property mortgaged to appellees, C. N. McCormack did not owe appellant anything that was secured by the mortgage given by McCormack to Ribelin on the 25th day of May, 1912, and due October 20, 1912; he also found that the property in question exceeded in value the amount due by McCormack to appellees. He gave judgment against appellant for the amount due appellees by McCormack and ordered appellees to surrender to appellant all securities which they held from the defendant McCormack, and ordered that execution issue on said judgment. Appellant excepted. He obtained time to file his bill of exceptions, which was done, and this cause is here on appeal.

Appellant contends that the chancellor abused his discretion in denying the continuance and in refusing to permit him to file a demurrer. He also contends that the judgment rendered by the chancellor

is contrary to a preponderance of the evidence or is not supported by a preponderance of the evidence.

There is no showing that appellant lost any of his rights on account of the court forcing him to trial. His son, who attended to all his business, was present with all of his witnesses. He was ably represented by counsel. We can not see any abuse of discretion by the chancellor in refusing the continuance.

(1) The issues were made up more than a year before the trial and it was not an abuse of the chancellor's discretion to refuse to permit appellant to file a general demurrer on the eve of the trial.

We have read the evidence carefully to see whether the findings of the chancellor were contrary to a preponderance of the evidence. Appellant kept an account between himself and C. N. McCormack covering the whole period of time and contented himself on the trial with memoranda instead of producing his books. The memoranda from which he testified, touched only one side of the account. He could not give the total amount of credits nor the dates thereof to which C. N. McCormack was entitled. He had been notified by counsel for appellees to bring his books and his only excuse for not doing so was inconvenience. C. N. McCormack did not keep an account and testified that when they had settlements the account and old notes were taken into consideration and that he would execute a new note for any balance that he might owe appellant.

(2) Appellant received more than $2,100 in cash on his claim, and the burden was placed upon him by all the circumstances of this case to show the items of debit and credit in the account he kept between C. N McCormack and himself. In the case of *Goerke* v. *Rodgers*, 75 Ark. 72, it was said that the findings of chancellors are persuasive. In the case of *Johnson* v. *Elder*, 92 Ark. 35, the court said: "Where the chancellor's finding is not clearly against the preponderance of the evidence, it must be sustained." The decree of the chancellor in this cause is not against the preponderance of the evidence and is in all things affirmed.

BARNETT BROS. v. WESTERN ASSURANCE CO.

Opinion delivered December 11, 1916.

1. APPEAL AND ERROR—FAILURE TO ABSTRACT INSTRUCTIONS.—A failure to abstract an instruction on appeal, will be taken as a waiver of any objection thereto.
2. APPEAL AND ERROR—OBJECTION TO ADMISSION OF TESTIMONY.—An objection to the admission of testimony can not be made for the first time on appeal.
3. APPEAL AND ERROR—LEGAL SUFFICIENCY OF THE EVIDENCE.—Where the appellant contends on appeal that the evidence is not legally sufficient to sustain the verdict of the jury, he must file an abstract of all the testimony in the case.
4. APPEAL AND ERROR—MOTION FOR NEW TRIAL.—Where the giving of erroneous instructions is not set out in the motion for a new trial, objections thereto will be deemed to have been waived.
5. APPEAL AND ERROR—IMPEACHMENT OF VERDICT—AFFIDAVIT OF JUROR.—The affidavit of a juror or evidence of statements made after the trial by a juror are not competent to impeach a verdict in which he has joined.

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

Oscar Barnett, for appellant

Argues the merits of the controversy which are not gone into by the court.

Mehaffy, Reid & Mehaffy, for appellees.

1. Rule 9 has not been complied with. No abstract is filed. 75 Ark. 571; 101 *Id.* 117. The instructions are not set out. 86 Ark. 104-9; 90 *Id.* 398, 406. The presumption is that the court properly instructed the jury. 75 Ark. 347; 88 *Id.* 449; 78 *Id.* 374; 95 *Id.* 108; 100 *Id.* 328; 75 *Id.* 571; 55 *Id.* 547; 79 *Id.* 170; 95 *Id.* 108; 79 *Id.* 85; *Ib.* 427; 78 *Id.* 426; 76 *Id.* 138; 88 *Id.* 449; 89 *Id.* 439; 92 *Id.* 622. See also 95 Ark. 108; 79 *Id.* 85, 427; 78 *Id.* 428.

2. The motion for new trial does not show proper objections either to the evidence or court's charge.

HART, J. Appellants sued appellees to recover on a fire insurance policy issued by the Western Assurance Company in their favor on a dwelling house

situated in the town of Malvern. Appellees denied liability and set up several grounds of defense. The case was tried before a jury which returned a verdict in favor of appellees. From the judgment rendered, appellants prosecute this appeal.

(1) Counsel for appellants insist that the judgment should be reversed because the court erred in refusing a certain instruction requested by them. We need not set out this instruction for we cannot consider this alleged error. Appellants have failed to abstract the other instructions given by the court. It is true they insist that no other instruction presenting the theory contained in this instruction was given, but this was a question for the court, and under the uniform and repeated rulings of this court we must have an abstract of the instructions given in order to see whether there was error in refusing to give an instruction asked by an appellant. We must, therefore, take their action as a waiver of the objection to the instruction. *St. L., I. M. & S. Ry. Co.* v. *Boyles*, 78 Ark. 374; *DeQueen & Eastern Ry. Co.* v. *Thornton*, 98 Ark. 61; *Reeves* v. *Hot Springs*, 103 Ark. 430; *Keller* v. *Sawyer*, 104 Ark. 375.

(2-3) It was also contended that the court erred in overruling appellants' motion to exclude the testimony of the witness, A. H. Kelley. The record does not show that appellants asked the court to exclude the testimony of this witness and under the settled rules of the court we cannot consider this assignment of error. It is also insisted that the evidence does not warrant the verdict. In cases where it is insisted that the evidence is not legally sufficient to sustain the verdict, there must be an abstract of all testimony in the case. In this instance appellants have only given excerpts from the testimony of some of the witnesses and have not made an abstract of the testimony as required by rules of the court. We must, therefore, indulge the presumption that there was sufficient evidence to warrant the trial court in submitting the case to the jury. *Queen of Arkansas Ins. Co.* v. *Royal*, 102 Ark. 95.

(4) It is also insisted that the court erred in the instruction given on behalf of appellees. Appellants did not make these alleged errors grounds of their motion for a new trial and not having done so they will be deemed to have waived them. *The Railways Ice Co.* v. *Howell*, 117 Ark. 198; *St. L., I. M. & S. Ry. Co.* v. *Jacks*, 105 Ark. 347.

The bill of exceptions contains the recital that it is admitted by the court that the members of the trial jury came to the presiding judge after the trial was over and told him that they had rendered their verdict without regard to the law or the evidence and had done appellants an injustice in rendering a verdict against them.

(5) Counsel for appellants set this up as one of their grounds for a new trial. It is well settled in this State that the affidavit of a juror or evidence of statements made after the trial by a juror is not competent to impeach a verdict in which he has joined. *Griffith* v. *Mosley*, 70 Ark. 244, and cases cited; *Fain* v. *Goodwin*, 35 Ark. 109; *Pleasants* v. *Heard*, 15 Ark. 403. The reason given is that if it were permissible to impeach a verdict by the affidavits of jurors or third parties as to statements alleged to have been made after the trial by one of the jurors, then the solemn act of the jury would be defeated. Again the admission of such evidence would open the door to tampering with jurymen after their discharge and would also furnish to dissatisfied and corrupt jurors the means of destroying the verdict to which they assented. The same reasons of public policy which would render it improper to permit a juror to impeach his own verdict, for the misconduct of himself, or his fellows, by affidavit, would apply to admissions made by him to the trial judge after rendering the verdict and after having been discharged from the case. Many other authorities sustaining the rule will be found in a case note to the A. & E. Ann. Cases 1913 D, at page 1194.

The judgment will be affirmed.

BRISTA v. STATE.

Opinion delivered January 8, 1917.

1. HOMICIDE—WILFUL KILLING—DEGREE.—Appellant, after an altercation with one S., went, in company with others and armed, in search of him. The inmates of S.'s house refusing to open the door, members of appellant's company fired into the house, killing a little girl. Some seventeen shots were fired; defendant testified that he did not fire a shot. *Held*, the wilful, deliberate, malicious and premeditated shooting and breaking into the house, under the circumstances shown, resulting in the killing of the girl, constituted murder and not manslaughter.
2. HOMICIDE—MURDER.—Under the above facts, *held*, that appellant was guilty of murder, although he did not fire the fatal shot.

Appeal from Union Circuit Court; *C. W. Smith*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellant was indicted for murder in the first degree, the indictment, in apt words, charging him with that crime committed by the killing of one Sweetie Stacher.

The testimony for the State tended to show substantially the following facts: On the night of the 14th of May, 1915, the appellant, who is a white man, had an altercation with a negro who is designated in the record as "Sky Blue." The fight occurred in the town of Felsenthal. The negro knocked appellant down. Immediately after the fight appellant went to his house, got his pistol and came back to look for the negro. In company with three other white men they surrounded a restaurant in the town in search of Sky Blue. It was about 11 o'clock at night. They went to the door of the restaurant and told them to open the door, which they refused to do, and several shots were fired. Appellant then went through the restaurant looking for the negro, Sky Blue. Then appellant and his companions were joined by others and they went to what they thought was Sky Blue's house. Appellant and one of his companions went to the front of the house and called for Sky Blue. The negroes in the

house told appellant and his companions that Sky Blue was not there. Appellant and one of his companions told them that if they did not open the door they would shoot it open. Nobody answered and they commenced shooting. The negroes then opened the door, when it was discovered that one of the shots had struck the little baby girl, Sweetie Stacher, in the head, "shooting out her brains" and killing her.

One of the party had an automatic shotgun and appellant and another of the party had pistols. Two different pistol shots were fired at the front of the house. One pistol flashed on one side of the door and the other on the other side.

The appellant, after testifying as to the fight with Sky Blue, and to the fact that he had armed himself, and had gone in company with others to where they had been informed Sky Blue lived, and to the fact of the shooting substantially as shown by the testimony of the witnesses for the State, further testified: "—I did not fire a single shot down there at that house as my pistol was already empty." He further testified that he saw the flash of the pistols that were fired into the house. One of the pistols was fired by a man by the name of Matthews and another by a man by the name of Hinson. There were first two shots fired, and then ten or fifteen shots fired, in all. Appellant, in company with others, went into the house, but did not find the negro they were looking for. After they left the house one of the parties in the company, Rufus Ely, went back to the house and told the negroes not to know anybody in the crowd; if they did he would come back and kill them.

When appellant and his companions went down to the house appellant did not know that they were going to fire into it. He did not expect to find the negro Sky Blue down there.

Upon the above facts appellant was found guilty of involuntary manslaughter. He filed a motion for a new trial, and assigned as error that the verdict was contrary to the law and contrary to the evidence,

and that the court erred in giving separately instructions for the State numbered 1 to 13, inclusive. From a judgment of the court sentencing him to imprisonment in the State penitentiary for a period of six months he prosecutes this appeal.

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

Appellant was guilty. The verdict is supported by the evidence and there are no prejudicial errors.

WOOD, J. (after stating the facts). The wilful, deliberate, malicious and premeditated shooting and breaking into the house, under the circumstances shown, resulting in the killing of Sweetie Stacher, as charged in the indictment, constituted murder instead of manslaughter. The jury having accepted the testimony on behalf of the State tending to show that appellant was one of the parties who did the shooting, should have returned a verdict against him for murder instead of manslaughter. Even if appellant did not fire the fatal shot, the undisputed evidence shows that he was present, aiding, abetting and assisting in the wicked and malignant acts of lawlessness which resulted in the death of this little girl. He was, therefore, guilty, according to his own testimony and the undisputed evidence, of murder instead of manslaughter.

There are no prejudicial errors in the record and the judgment is therefore affirmed.

TURNER v. THOMASON.

Opinion delivered January 8, 1917.

ADVERSE POSSESSION—CLAIM OF OWNERSHIP—MISTAKEN BOUNDARY.—Where one takes possession of, and encloses land under a belief of ownership, and holds the same for the statutory period, claiming ownership, without any recognition of the possible right of another thereto on account of a mistake in the boundary line, such possession and holding is adverse, and, when continued for the statutory period, will divest the title of the former owner who has been excluded from possession.

Appeal from Calhoun Circuit Court; *C. W. Smith*, Judge; affirmed.

C. L. Poole and *J. S. McKnight*, for appellant.

1. A plaintiff in ejectment must recover upon the strength of his own title and must prove same before he can recover.

2. The record of surveys under the law is *prima facie* correct. Kirby's Digest, § 1142; 50 Ark. 65. If the Reddin survey is correct the line is not only "full" but is almost 6 chains long. Where a line is short the shortage is prorated among the four forty acres of the section. Why not prorate when the line is "long" and divide the surplus in similar manner.

3. The county surveyor has no authority to change the lines established by the U. S. Kirby's Digest, § 1136. He must conform to the original survey *Ib*. Here he attempted to change an established line without authority and there is no evidence to support the verdict.

John Baxter and *R. W. Baxter*, for appellee.

1. No exceptions were saved to the instructions.

2. The evidence shows that Reddin did not change the original lines or corners, but simply located a lost corner; found the section line too short and prorated the shortage. 97 Ark. 193. Oral testimony is admissible to show that, when the field notes give a section full it is not full by actual measurement. 97 Ark. 193.

3. Thomason held the strip of land as his own and adversely for more than twenty years. This gave him title.

4. The case was properly submitted to a jury; the evidence sustains the verdict and this court will not disturb it.

WOOD, J. Appellee and appellant are adjoining land owners, appellee owning the southeast quarter of the southeast quarter and appellant the northeast quarter of the southeast quarter of section 11, township 13 south, range 13 west. This suit was brought by the appellee against the appellant to recover possession of a strip of land from fifteen to twenty feet wide "nearly all the way across the north side of" appellee's forty. Appellee alleged that the appellant took possession of said strip of his land without right or permission of the appellee.

The appellant denied that he took possession of the piece of land described in the complaint, but stated "the truth to be that the land he now occupies and where he has his fence established is on the southern border of the northeast ¼ of the southeast ¼ of section 11, township 13 south, range 13 west." He also set up, by way of cross-complaint, that the appellee had claimed possession of a strip of land along this border thirty to forty feet wide clear across the south border of appellant's tract.

Appellee introduced a surveyor whose testimony tended to show that he made a survey and established a lost section corner between sections 11, 12, 13 and 14. He enters into detail showing the surveys that he made in order to establish this lost corner. He established the corner and then measured the section line between sections 11 and 12, and proved the same both ways and found it to be short 66 links. He prorated this shortage between the four forties of section 11, established the line between the two forties in dispute, letting the appellee bear one-fourth of the shortage. He found a wire fence there south of the line, about ten feet at

the east end and about twenty feet at the west end. The fence was entirely within appellee's land.

The appellee testified that the fence that the surveyor testified about was afterward taken away by him, and that after he removed the fence the appellant took the posts and put his wire on them, and is now claiming to this fence.

Appellant introduced testimony of surveyors which tended to show that the line between appellant and appellee was south of the wire fence. In other words, that all of the land occupied by appellant and enclosed by his fence was owned by him, and even more.

(1) It thus appears that there was a decided conflict in the testimony as to the correct line between the appellant and the appellee. The issue was submitted to the jury upon correct instructions, and there was evidence to sustain the verdict. The case is ruled on the facts by *Tolson* v. *Southwestern Improvement Ass'n*, 97 Ark. 193, and *Buffalo Zinc & Copper Co.* v. *McCarty*, 125 Ark. 582.

(2) Even if appellee had no title to the land in controversy by purchase, the evidence was amply sufficient to sustain a finding that he had acquired title by adverse possession. Appellee testified that he owned the land in question for more than twenty years and had been in the open, peaceable and adverse possession of it for more than seven years, having same under fence and claiming it as his own.

The undisputed testimony brings appellee's contention in this respect within the rule announced in *Goodwin* v. *Garibaldi*, 83 Ark. 74, where we held that "When one takes possession of land under the belief that he owns it, encloses it and holds it continuously for the statutory period under claim of ownership without any recognition of the possible right of another thereto on account of mistake in the boundary line, such possession and holding is adverse, and, when continued for the statutory period, will divest the title of the former owner who has been thus excluded from possession."

The judgment is correct and it is therefore affirmed.

SCULLIN *et al.*, RECEIVERS, MO. & N. ARK. RD. CO. *v.* ROUTH.

Opinion delivered January 8, 1917.

1. RAILROADS—EMERGENCY—EMPLOYMENT OF SURGEON—ACT OF SUBORDINATE EMPLOYEE.—Subordinate employees of a railroad company, who, under ordinary circumstances, have no authority to bind the railroad company by contracts for medical attendance on its servants or passengers, have an implied authority to make such contracts in its behalf in cases where there is an urgent necessity for the immediate employment of a physician or surgeon to attend to servants or passengers who have been injured by conditions or occurrences incident to the operation of a railroad.
2. RAILROADS—EMPLOYMENT OF PHYSICIAN IN EMERGENCY BY CLAIM AGENT—CONTINUING SERVICES.—A railroad company will be liable to a physician, who was instructed by the company's general claim agent to attend upon a certain person injured in a collision, for the continuing services of the physician, there being no evidence that one of the company's own physicians could have taken charge of the case.

Appeal from Boone Circuit Court; *John I. Worthington*, Judge; affirmed.

W. B. Smith, *J. Merrick Moore* and *H. M. Trieber*, for appellants.

1. The services and expenses were not authorized by the general manager or superintendent, or ratified by such officials. There was no pressing emergency to give rise to implied authority in the assistant claim agent. A railroad company is not bound by the contract of its unauthorized agents, and against the rules of the company. 53 Ark. 377.

2. The authority of the agent expires when the emergency ceases. 53 Ark. 377; 65 *Id.* 300; 87 *Id.* 197.

3. There was no evidence to justify a submission of any of the items to the jury, it appearing from appellee's own testimony that all the charges were unauthorized. The company surgeon was available at the place of injury.

C. M. Cooke and *J. Loyd Shouse*, for appellee.

1. The Cook bill is the only one in controversy. The other bills are O. K.'d. Appellee had previously presented similar bills which were paid. The company

surgeon could not be had. This was a case of emergency under the rules of the company and there were circumstances of ratification also. 96 Ark. 511; 67 Wisc. 529; 24 *Id.* 388; Story on Agency (Bennett Ed.), § 253; 13 Ga. 53; 58 *Id.* 564; 26 Me. 84; 38 Ala. 208. A verdict should have been directed for appellee.

2. Anyway it was a question of fact for the jury. The cases cited by appellants are not in point. 65 Ark. 300; 87 *Id.* 197.

3. There is no error in the instructions.

HART, J. Appellee sued appellants before a justice of the peace on an account for medical services. He obtained judgment and appellants appealed to the circuit court. The case was tried in the circuit court upon facts substantially as follows:

Dr. C. M. Routh, the appellee, is a physician residing at Harrison, Arkansas, a station on appellant's line of road. A collision occurred on appellant's line of road near Green Forrest, Arkansas, and Ernest Cook was severely injured. His leg was broken and he suffered from a double compound fracture. The general claim agent of the railroad telephoned appellee to go to Green Forrest and take charge of Cook and carry him to Cook's home at Batavia, which was about nine miles distant from Harrison. Appellee did so and charged for this service $10.00, which he says was a reasonable price. Septic infection set in from some poisonous condition of the wound, and it became necessary for someone to continue to treat Cook. Appellee made 28 more visits to him and charged therefor $7.50 for each visit, which he says was a reasonable price, Batavia being, as we have already seen, about nine miles from Harrison.

Appellee stated that the general claim agent of the railroad and his assistant both knew that he was continuing to treat Cook and directed him to do so. The claim agent admitted that he had called appellee to take charge of Cook after Cook had been injured in the wreck and also admitted that he knew that appellee continued to treat him and that it was necessary for some

physician to treat him but he stated that he had no authority to employ a physician except in cases of emergency.

The railroad company introduced its rules in regard to the employment of physicians and the same are as follows:

"A. This company will not recognize any responsibility for board, medicine, medical and surgical attention, nursing or funeral expenses, except such as contracted for by its general manager or superintendent.

"B. When persons or employees are injured, the nearest company surgeon should be called. If the case is urgent, and the company surgeon cannot be immediately procured, the conductor, agent or officer in charge, if unable to procure instructions from the proper authority, is authorized to call the nearest surgeon available to administer first aid and care to the patient until the company surgeon can take charge of the case."

The jury returned a verdict in favor of appellee in the sum of $210.00. From the judgment rendered this appeal is prosecuted.

(1) Appellee also sued for services rendered other employees of the railroad company, but inasmuch as he has taken no appeal, and as counsel for the railroad company concede that the verdict of the jury was based upon the services furnished to Cook, we need only consider those items. This court has adopted the rule that where subordinate employees of a railroad company, who under ordinary circumstances have no authority to bind the railroad company by contracts for medical attendance on its servants or passengers, have an implied authority to make such contracts in its behalf in cases where there is an urgent necessity for the immediate employment of a physician or surgeon to attend to servants or passengers who have been injured by conditions or occurrences incident to the operation of a railroad. *St. L., A. & T. Ry. Co.* v. *Hoover*, 53 Ark. 377; *Ark. Southern R. R. Co.* v. *Loughridge*, 65 Ark. 300; *Bonnette* v. *St. L., I. M. & S. Ry. Co.*, 87 Ark. 197.

The urgency and necessity of the employment of appellee by the claim agent who was in charge at the scene of the accident was submitted to the jury under proper instructions, but counsel for appellants contend that under the rule announced in our decisions above, the liability of the railroad arises with the emergency and with it expires. They contend that the emergency ceased before appellee rendered all the services for which he obtained judgment, and that on this account the verdict is without evidence to support it. We do not think the doctrine of implied authority in such cases has any application to the facts of this case; for under the rules the claim agent had express authority to employ a physician within certain limitations. Under the rules introduced in evidence by the railroad company, when persons or employees are injured, the nearest company surgeon should be called, if the case is urgent and the company's surgeon cannot be immediately procured, the conductor, agent or officer in charge, if unable to procure instructions from the proper authority, is authorized to call the nearest surgeon available to administer first aid and care to the patient until the company's surgeon can take charge of the case.

(2) There was sufficient evidence to warrant the jury in finding that when the wreck occurred in which Cook was injured, that the general claim agent of the company took charge and was unable to secure a surgeon of the company and that he called in appellee to take charge of the case. It is true that on cross-examination appellee admitted that the company had a local physician at Batavia, near where Cook resided, but it was not shown that this physician or any other physician of the company was in a position to take charge of Cook. This was a matter peculiarly within the knowledge of the company. Its officers knew at what time one of its surgeons could take charge of the case and the burden of proof was on appellants to establish this fact. They did not do so, and there is nothing in the record tending to show that a surgeon of the company could have taken charge of the case at

any time while the services were being rendered by appellee.

The verdict is sustained by the evidence and the judgment will be affirmed.

ADAMS v. VIRGINIA-CAROLINA CHEMICAL COMPANY.

Opinion delivered January 8, 1917.

1. FERTILIZERS—INSPECTION—SALE.—A recovery of the purchase price of commercial fertilizer can not be had unless the laws of this State regulating such sales have been complied with.
2. FERTILIZERS—NECESSARY INSPECTION.—Act 183, Acts of 1913, requires shippers of fertilizers to notify the Commissioner of Agriculture of all shipments of fertilizers, but the act does not require an inspection of every shipment before delivery to the consignee.

Appeal from Calhoun Circuit Court; *C. W. Smith*, Judge; affirmed.

J. S. McKnight and *C. L. Poole*, for appellant.

1. We deny all liability on the notes because (1) the fertilizer was worthless and of no commercial value. (2) The fertilizer sacks were not tagged nor inspected by the commissioner of agriculture or any of his inspectors as required by law. Acts of 1913, No. 183. The court erred in refusing defendant's instruction No. 1 and in giving plaintiff's instructions Nos. 2 and 3. Act 183, *supra*, is in all respects like Act 398, Acts of 1907, p. 995, which was construed in 105 Ark. 672, where it was held that it was a good defense that the fertilizer had never been analyzed or tagged as required by law. Acts of 1913, p. 758; 105 Ark. 672; 123 *Id.* 279.

2. The court erred in permitting the certificate of the commissioner of agriculture to be introduced in evidence, as it does not show the guaranteed chemical composition of the fertilizer nor that it was ever analyzed as the law directs. *Ib.*

John Baxter and *R. W. Baxter*, for appellee.

1. The fertilizer came up to the guaranteed commercial value. The court gave as part of its instructions

sec. 3 of Act 183, Acts of 1913. This submitted the whole question to the jury and that is in substance what appellee's instructions 2 and 3 did. The jury found against appellant on this question.

2. The appellee complied with the fertilizer laws of Arkansas. The evidence shows proper analysis and inspection. Act 183, *supra*.

3. This is a case of interstate commerce and the laws of Arkansas do not apply. 168 S. W. 290; 113 U. S. 727; 120 *Id.* 489; 217 *Id.* 91; 57 Ark. 24; 114 S. W. 791.

SMITH, J. Appellee was the plaintiff below, and brought suit against appellant upon three promissory notes aggregating $530.00. The execution and non-payment of the notes was admitted, but liability thereon was denied upon two grounds. The first of these grounds was that the notes were given in payment of a consignment of fertilizer which was worthless and of no commercial value, and the second ground was that the sacks of fertilizer were not tagged or inspected by the commissioner of agriculture or by any of his inspectors, as the laws of this State direct.

The first question was submitted to the jury under instructions which directed the jury to "deduct three times the amount of the deficiency in commercial value from the note" if the fertilizer fell more than three per cent. below the guaranteed commercial value. Inasmuch as the jury found for the plaintiff for the full amount of the notes sued on, it may be assumed that there was no finding that the fertilizer fell more than three per cent. below the guaranteed commercial value. Indeed, the jury could hardly have found otherwise than it did on this question, in view of admissions on the part of appellant in letters written by him to appellee, appellant's satisfaction with the fertilizer being therein fully expressed.

The important question in the case is whether or not the right of action was defeated by the failure to have the fertilizer inspected or tagged. The court

refused to submit this question to the jury. The testimony on the part of appellant is to the effect that the car containing the fertilizer was shipped direct from Memphis to Harrell, Arkansas, and the seals of the car were not broken upon its arrival there, and that no one inspected the fertilizer there or elsewhere in this State.

On the part of appellee, the proof was to the effect that the car was shipped from Memphis on March 7, 1914, and that each and every sack of the fertilizer had attached thereto the appropriate inspection tag of the State of Arkansas for the season including March 1, 1914, and that all laws and customs in regard to such shipment were complied with, and it is admitted that these tags were on the sacks when were they unloaded from the car.

There was also offered in evidence the certificate of the Commissioner of Mines, Manufactures and Agriculture that pursuant to the provisions of Act No. 183 of the Acts of 1913, the appellee company had filed an affidavit and certificate of the names of the brands of commercial fertilizers, and the guaranteed chemical composition of the same, to be offered for sale in this State during the year ending September 30, 1914, and this certificate included all the names and brands of fertilizer embraced in the shipment to appellant, and the certificate recited that these brands had been duly registered in the office of the Commissioner of Mines, Manufactures and Agriculture, and "that they had complied with the provisions of the law with reference to the registration of the aforesaid brands." This certificate also contained a warning that it "did not authorize the shipment of fertilizer in this State unless the same is properly tagged as per the statutes of Arkansas."

(1) The case of *Florence Cotton Oil Co.* v. *Anglin*, 105 Ark. 672, is authority for the statement that a recovery of the purchase price of commercial fertilizer cannot be had unless the laws of this State regulating such sales have been complied with. But we think under the evidence set out above the court below

properly held that no failure to comply with the law was shown. Counsel for appellant insists that under the law there must be an inspection of each consignment of fertilizer, and that suit cannot be maintained to recover the purchase price of any shipment unless there was an inspection of that shipment. We do not agree with counsel, however, that this condition is imposed, and this construction of the fertilizer statute is decisive of this case.

The act does require, however, that the names and addresses of all "manufacturers or manipulators" of fertilizers shall be filed with the Commissioner of Mines, Manufactures and Agriculture, together with the guaranteed analysis of the fertilizer, and that the name and address of the manufacturer, and the guaranteed analysis of the fertilizer, and the weight of the package, shall be branded on or attached to each package. Section 5 of this Fertilizer Act of 1913 provides the minimum percentage of plant food which any fertilizer may contain. Section 7 provides for the manner of procuring tags to be placed upon the packages of fertilizer and the fees to be paid therefor, and section 9 provides that it shall be unlawful to sell or to offer for sale in this State any fertilizers that have not been registered with the Commissioner of Mines, Manufactures and Agriculture as required by the act. Section 11 provides that the Commissioner of Mines, Manufactures and Agriculture shall appoint one inspector for the State at large and one inspector for each railroad commission district in the State, and provides for their compensation. Section 12 provides how the inspections shall be made and the report to be made thereof. Sections 13 and 14 authorize the employment of a chemist and fixes his compensation and prescribes his duties. Section 15 authorizes the Commissioner of Mines, Manufactures and Agriculture to establish rules and regulations in regard to the inspection, analysis and sale of fertilizers in any manner not inconsistent with the provisions of the act. Section 17 requires each shipper to mail to the Commissioner notice of such shipment on

forms furnished by the Commissioner for the purpose. Section 18 of the act makes a failure to comply with its terms a misdemeanor and prescribes the punishment therefor.

(2) The purpose of the act in requiring shippers to notify the Commissioner of shipments of fertilizer is to afford the opportunity, if it is thought proper, to have an inspection made of any particular shipment, so that it may be determined whether various shipments do in fact correspond with the guaranteed analysis, but the act does not require an inspection of every shipment before delivery to the consignee. The inspection fee of 25c. per ton fixed by section 7 of the act could not be expected to raise sufficient revenue to compensate the large number of inspectors whose services would be required to perform that duty.

There being no proof of any failure to comply with the provisions of this act by appellee, the court below properly refused to submit that question.

Finding no prejudicial error, the judgment is affirmed.

THOMAS v. THOMAS.

Opinion delivered January 8, 1917.

1. GUARDIAN AND WARD—EXPENDITURES FOR WARD.—The probate court is without discretion to approve the expenditures of a guardian for the maintenance and education of his ward, so far as they exceed the income of the ward's estate, unless such expenditures have been made under the direction of the court.
2. GUARDIAN AND WARD—INTEREST ON WARD'S MONEY.—Where the ward's land is sold by order of the probate court, the guardian, after receiving the money, has a reasonable time to lend the money before he is chargeable with interest.
3. GUARDIAN AND WARD—INTEREST.—Where nothing in the record shows that a guardian could have loaned his ward's money at a rate of interest higher than 6 per cent, the guardian will not be charged with a rate higher than that sum.

Appeal from Clay Chancery Court, Western District; *Chas. D. Frierson*, Chancellor; reversed.

J. L. Taylor, for appellant.

1. The court erred in dismissing the complaint. It alleged fraud and is sustained by proof. 63 Ark. 450; 77 *Id.* 351. The case 181 S. W. 908, upon which the chancellor relied is not decisive, as no sufficient fraud was alleged. The charges for board, clothing and doctor's bill was not a just or legal claim. 63 Ark. 159; *Id.* 450. Gross frauds sufficient to wipe out the entire estate of the minor were shown. Cases *supra*. See also 24 Ark. 574. No previous order had been obtained from the probate court and the allowance for board, etc., was for a time before the guardian was appointed or the money received.

2. For a guardian to obtain credits for sums not expended for the benefit of his ward is a fraud for which his final settlement will be set aside in equity and restated. 63 Ark. 450.

3. Interest should have been charged at 10 per cent.

G. B. Oliver, for appellee.

1. The demurrer was properly sustained. The acts constituting the fraud must be specifically alleged and proved. 77 Ark. 351; 181 S. W. 908.

2. If sufficiently alleged, the fraud was not proven nor supported by the evidence. 63 Ark. 450. Chancery courts do not correct mere errors of the probate court; they only set aside judgments procured by fraud. 99 Ark. 529; 42 *Id.* 186; 97 *Id.* 459; 34 *Id.* 63.

3. The accounts had been settled and the balance due paid into court and the guardian and bondsmen discharged. At least his bondsmen are not liable.

4. There is no equity in plaintiff's claim.

HUMPHREYS, J. Marion Thomas became the guardian of his son, the appellant, on the first day of April, 1905. W. D. Polk and H. H. Williams signed the guardian's bond as sureties. Ivan Thomas, the appel-

lant, was eleven years of age at the time, and his entire estate consisted of an undivided interest in the S. W. ¼ of the N. W. ¼, Sec. 10, Twp. 21, R. 4, E. in Clay county, Arkansas. On application of the guardian the land was sold on November 27, 1905, on three months' credit. The portion of purchase money due appellant amounted to $203.35. On the 14th day of February, 1906, the guardian filed his first and final settlement, in which he took credit for $160 by voucher No. 3, representing an allowance made by the probate court to the guardian on the 14th day of February, 1906, for board, clothing and doctor's bills for the years 1902, 1903, 1904 and 1905. On the same date, the probate judge restated the account filed, and found the guardian owed appellant $8.21, and directed that the guardian and his bondsmen be discharged upon the payment of said sum into court. On the 25th day of April following, the guardian paid said amount to the clerk of the court. On July 23, 1906, the guardian presented a claim to the court for clothes and board in the sum of $8.21 from the fourth Monday of April to the fourth Monday in July, which account was allowed and ordered paid. The clerk then paid said sum to the guardian.

Appellant brought this suit in equity against his guardian, Marion Thomas, and his bondsmen, H. H. Williams and W. D. Polk, to falsify and surcharge the account, alleging "that the guardian failed to charge himself with interest on the sum collected from the sale of said real estate from the date of sale until his final settlement; that he took credit for $160 for board and clothing and doctor's bills and credit for $8.21 for board and clothing; that the item of $160 was greatly in excess of the income of the estate; that said sum was never paid out or expended for appellant's benefit; and that said guardian never intended to make any charge on these items at the time they were furnished; that during the years 1902–3–4 and 5 the appellant was living with his guardian, who was his father, as a member of his family, receiving support from said defendant

and rendering services required by parents of their children, which services so rendered by appellant were sufficient compensation for his board, clothes, etc.; that these facts were fraudulently concealed from the probate court at the time he presented his claim for same." An answer was filed denying the material issues, which answer contained a demurrer to the complaint. The cause was heard on the pleadings and depositions. The chancellor dismissed the bill and this cause is here on appeal.

(1) Section 3792 of Kirby's Digest provides that the guardian shall not be allowed more than the clear income of the estate for the maintenance and education of the ward unless the expenditure is directed by the probate court. In construing this statute, this court said in the case of *Campbell* v. *Clark*, 63 Ark. 450, that "The language of this statute could not well be made stronger than it is, and we are of the opinion that it was intended to be, and is, mandatory. This statute, in our opinion, takes from the probate court the discretion to approve the expenditures of a guardian for the maintenance and education of his ward, so far as they exceed the income of the ward's estate, unless such expenditures have been made under the direction of the court." It was also said in that case that if the guardian obtained credits in his final settlement for sums which he had not expended for the benefit of his ward, it would be such a fraud as would warrant a court of chancery in restating and correcting such settlement. In the case of *Nelson* v. *Cowling*, 77 Ark. 351, this court held that if a guardian did not account for money he had received as guardian that it was within the jurisdiction of the chancery court on complaint to correct the account in that particular.

The undisputed evidence in this case shows that the guardian collected $203.35 from the estate of appellant and that he took credit for $160 for board, clothing, etc., which he had not expended for appellant out of the money so collected. This credit for board and clothing covered a period almost entirely prior to his

appointment as guardian for his son. At that time appellant was living at home with his father in the relationship of parent and child; the father had no intention whatever of charging his son any board for the years 1902, 1903, 1904 and 1905. The charge was clearly an afterthought and had the effect of absorbing the entire estate of the boy. This could not be done without first obtaining an order from the probate court. It was clearly a fraud in the law which courts of chancery will recognize.

(2) It is contended that the guardian should be charged with interest from November 27, 1905, the date of the sale of the land, until April 25, 1906. We cannot agree with counsel for appellant in this contention. In the first place, it is not shown that the guardian received any interest from the purchaser of the real estate at the time the purchase money was paid. The court ordered the land sold on a credit of three months and there is no showing that any interest was charged on the purchase price. After receiving the money, the guardian would have a reasonable time to lend the money before he would be chargeable with interest. He did not receive the money until February 14, 1906, the date he made his final settlement and procured his discharge.

It is also contended that the bondsmen are not responsible for $8.21 charged by the guardian, Marion Thomas, for board and clothing from the first Monday in April, 1906, to the first Monday in July, 1906, for the reason that this credit was obtained by the guardian after he and his bondsmen were discharged. They are correct in this contention.

(3) It is contended by appellant that whatever balance is found due, after the account is corrected, from the guardian and his bondsmen to appellant should bear 10% interest from the date of final settlement to the present time. There is nothing in the record to show that this money was loaned by the guardian for 10%. In the case of *Campbell* v. *Clark*, *supra*, the guardian was charged only 6% per annum

from the date of final settlement. There is nothing in this record showing that the guardian could have loaned the money at a higher rate of interest than the legal rate. This court held in the case of *Parker* v. *Wilson*, 98 Ark. 553, that the guardian should not be charged with a greater rate of interest than 6%, the legal rate, unless it appeared from the evidence that the guardian could have loaned the money on good security at a higher rate of interest. In the instant case the guardian did not loan the money at all, but used it believing it was his own after he and his bondsmen had been discharged.

On final settlement, it appeared that the guardian was indebted to his ward, the appellant herein, in the sum of $8.21, which amount was paid into the court. Without authority of law he obtained this amount from the clerk of the court and, of course, is indebted to appellant in that sum in addition to the sum of $160 for which he wrongfully obtained a credit. His bondsmen, two of the appellees herein, are responsible jointly with him for the item of $160. The decree herein must be reversed, and a decree will be entered here against the appellees, Marion Thomas, W. D. Polk and W. W. Williams, for $160 with interest at the rate of 6% per annum from the 14th day of February 1906, until paid, together with all costs, and a decree will be rendered against the guardian, Marion Thomas, for $8.21, together with interest thereon at the rate of 6% per annum from February 14, 1906, until paid.

BURRUS v. BUTT.

Opinion delivered January 8, 1917.

DOWER—DEATH OF WIDOW BEFORE ASSIGNMENT—RIGHT OF HER ADMINISTRATOR TO RENT.—The administrator of a deceased widow can not recover rents on her unassigned dower interest in real estate, unless she had prosecuted her claim therefor in her lifetime.

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

J. T. Coston, for appellant.

The demurrer was improperly sustained. The cause did not abate and the widow was entitled to rent. The cause of action was properly revived in the name of the administrator. 176 S. W. 309; Kirby's Digest, §§ 77, 4602.

Churchill M. Buck, for appellee.

The demurrer was properly sustained. The suit abated on the death of the widow. Dower had never been assigned to the widow. No statute can be found allowing such a suit. It was not decided in 176 S. W. 309 that the administrator could recover in another forum, nor did the court undertake to pass on that question. Kirby's Digest, §§ 77, 139; 8 Ark. 41; 2 Scribner on Dower (2 Ed.) § 50; 21 L. R. A. 188; 21 *Id.* 188; 1 Cyc. 65; 14 *Id.* 968, notes 2, 3, 4 and page 1009, note L, 34 N. E. 209.

HUMPHREYS, J. James W. Martin died on the 10th day of January, 1912, leaving his widow, Mrs. S. E. Martin. In April, 1914, she commenced a suit in the probate court of the Chickasawba District of Mississippi county against the appellees herein for an assignment of dower. The cause was tried in the probate court and appealed to the circuit court, where she obtained an interlocutory decree for her dower interest in the N. W. quarter of section 5, south half, S. E. quarter section 21, S. W. quarter section 22, N. W. quarter section 27, and the north half section 28, all in township 15 north, range 12 east. Commissioners were appointed to assign the dower, but before the dower was assigned the widow died intestate, and the cause was revived in the name of J. J. Burrus, administrator. The administrator then moved for rents, which motion was overruled. He excepted and prayed an appeal to the Supreme Court. That case was styled *Burrus* v. *Butt et al*, and is reported in 118 Ark. 335, 176 S. W. 308. Mrs. Martin did not ask for rent in that case. Rents and mesne profits were not issues

therein until after her death, and then made so on the motion of her administrator. It was not held in the case of *Burrus* v. *Butt*, *supra*, that the administrator could maintain an independent action in any other forum for rents. The court remarked in rendering the opinion that if the administrator had any right to recover any rents and profits, he must assert it in an original action in another forum. The administrator then brought this suit for rents and profits against appellees in the Chickasawba District of Mississippi county for one-third of the rents and profits for the years 1912 and 1913 on said real estate. A demurrer was sustained to the complaint, the bill dismissed and the cause is here on appeal.

The question is now directly presented to us, whether the administrator of a deceased widow can recover rents on her unassigned dower interest in real estate unless she had prosecuted her claim therefor in her lifetime. Appellant cites section 77, Kirby's Digest, in support of his contention that the cause of action for rents and profits survives to the administrator of the widow. Said section reads as follows: "Until the widow's dower be apportioned, the court shall order such sums to be paid to her out of the rent of the real estate as shall be in proportion to her interest therein."

In the second edition of Scribner on Dower, it is laid down as a general rule that if a widow die before the damages for the detention of the dower interest in the land is ascertained, the right to rent is entirely lost and that no action can be maintained by the executor for the rents and profits. Second Edition, Scribner on Dower, Vol. 2, section 50.

The statute in question is personal to the widow. It is a mere privilege. It is not that character of action which survives to the widow's representative.

Appellant has also called our attention to section 4692, Kirby's Digest, in the chapter on "Landlord and Tenant." The section reads as follows: "The executor or administrator of any person to whom any rents shall

have been due and unpaid at the time of the death of such person, may have the same remedy by action against the tenant, his executor or administrator, for the recovery thereof that the testator or intestate might have had." This section could only apply to such actions as survive to the administrator. If the widow had applied for rents in the original action under section 77, Kirby's Digest, she could have recovered rents prior to the assignment of dower, and until dower was assigned. Not having applied, no action survives to her administrator. The demurrer to the complaint was properly sustained and there being no error in the record, the decree dismissing the bill is affirmed.

CRANE COMPANY v. HEMPSTEAD.

Opinion delivered January 8, 1917.

CONTRACTS—ACCEPTANCE OF OFFER—MEETING OF THE MINDS.—One W. owed money to appellant and H. wrote to appellant on December 11th, asking an extension of time for W., saying that W. would pay appellant "or I will see that he does." Appellant replied recounting its indulgences to W., and stating that the extension would not be given for a later date than January 5th or 10th. *Held*, there being no distinct acceptance of H.'s offer, the judgment of the trial court, that there was no meeting of the minds of the parties, would not be disturbed.

Appeal from Ouachita Circuit Court; *C. W. Smith*, Judge; affirmed.

Carmichael, Brooks, Powers & Rector and *A. N. Meek*, for appellant.

1. Hempstead was a partner. His name was used as a part of the trade name. He signed the letter of credit and in correspondence the account was referred to as that of the Watson-Hempstead Plumbing Co. This placed Hempstead on notice that his name was being used as a part of the firm. If not a partner to the contract, he at least was a partner by estoppel. He permitted his name to be used and by acquiescence and conduct is liable as a partner by estoppel. George on

Partnership, p. 87; 29 Ark. 513. He is also bound by his correspondence. He was being held out to the world as a partner.

2. He was liable as a guarantor. Childs on Sur. & Guaranty, pp. 2, 129; 71 Ark. 586.

T. D. Wynne and *J. W. Warren*, for appellee.

It is admitted that Hempstead was not a partner; that he only guaranteed the account to the extent of $200.00, and this amount he paid in full settlement of his liability. The correspondence does not show liability nor did Hempstead ever hold himself out as a partner or do any act making him liable. Hempstead was doing no more than using his good offices to induce Watson to pay the bill. The findings of the court are sustained by the evidence and the judgment should be affirmed.

McCULLOCH, C. J. This is an action instituted in the circuit court of Ouachita county by appellant, Crane Company, a corporation, against R. D. Watson and James Hempstead, alleged to be partners doing business under the firm name of Watson-Hempstead Plumbing Company, to recover on an open account in the sum of $216.73 for goods and merchandise sold and delivered. Watson failed to answer, but the appellee Hempstead filed an answer denying that he was a partner or that he had purchased any goods from appellant. The complaint, as amended, contained an allegation to the effect that appellee had, on a certain date after the debt to appellant was incurred, entered into a writing whereby he undertook to pay the debt in consideration of an extension of time, and appellee in his answer denies that allegation. There was a trial of the issue before the court sitting as a jury, and the court found in favor of appellee, Hempstead, but rendered a judgment by default against Watson in appellant's favor. The only question presented for our consideration is whether or not there is evidence sufficient to sustain the court's finding in favor of appellee Hempstead.

The allegation of the complaint is that Hempstead was a partner in the business, but there is a stipulation in the record concerning the facts of the case in which it is conceded that Hempstead was not a partner of R. D. Watson nor a member of the firm of Watson-Hempstead Plumbing Company. This disposes of the charge that Hempstead was a co-partner and responsible for the debt on that account.

It is contended that even though Hempstead was not a partner, he held himself out to plaintiff as such, and for that reason he is liable for the debt. This contention could be answered merely by the statement that there is no allegation in the complaint that Hempstead by his conduct held himself out as a partner, but even if that were an issue in the case we are of the opinion that the evidence shows abundantly that Hempstead did not hold himself out as a partner, but on the contrary he advised appellant as to his relations with Watson.

It appears from the evidence that Watson and Hempstead were brothers-in-law, and that when Watson went into business at Camden in the early part of the year 1911, Hempstead undertook to assist him in the purchase of goods. Hempstead resided at Fordyce, which is about thirty miles distant from Camden. When the account was opened with appellant, Hempstead entered into a written agreement with appellant whereby he undertook to guarantee the payment of Watson's account to the extent of two hundred dollars, and in a letter written by Hempstead at the time the written guaranty was sent in he explained that he had no interest in the business but was merely assisting Watson in a friendly way. It is true that the name Hempstead appeared on the letterheads, but we think that there was enough evidence to justify the court in finding that this was done without authority from Hempstead, and that he had fully apprised appellant as to his relations with the business, merely as a friend of Watson and not as a partner. Appellee paid the amount of two hundred dollars and withdrew his guaranty, and the writing was surrendered to him at the time he made

the payment. This eliminated the guaranty from the case.

The next contention is that the evidence establishes the liability of Hempstead on the ground that he undertook to pay the debt in consideration of an extension of time. There is in the record considerable correspondence between appellant and Hempstead, and it all tends to show that Hempstead was really acting in a friendly way with respect to the financial embarrassment of his brother-in-law, Watson. There is in the record a letter dated December 17, 1913, written by Hempstead to appellant, in which he asked for more time for Watson, and stated that he (Watson) "will borrow the money and pay you or I will see that he does." Appellant replied to this letter at considerable length, recounting the indulgences of the past, and wound up by stating that the extension would not be given for a later date than the 5th or 10th of January. The letter did not contain any distinct acceptance of appellee's offer to see that Watson would borrow the money to pay the account, or he would pay the account, but merely referred to that as a suggestion, and it appears that Hempstead made no reply.

The court was, we think, justified in finding that there was no meeting of minds of the parties upon an extension so as to operate as a new consideration for Hempstead's agreement to pay the debt. If appellant had meant to hold Hempstead liable, it ought to have distinctly accepted his offer and stated the terms of the extension, so that the correspondence as a whole would represent a specific agreement with respect to the subject matter.

We must treat the findings of the court the same as a verdict of the jury, and since there is sufficient testimony it becomes our duty to leave the findings undisturbed.

The judgment is therefore affirmed.

McCLINTOCK v. SKINNER & COMPANY.

Opinion delivered January 8, 1917.

1. EVIDENCE—PROOF OF CONSIDERATION—WRITTEN AGREEMENT—PAROL EVIDENCE.—The recitals and consideration named in a deed or mortgage cannot be contradicted by parol evidence for the purpose of defeating the conveyance, but it is competent to prove by such evidence that the consideration has not been paid as recited, or to establish that other considerations not recited in the deed were agreed to be paid, when such evidence does not contradict the terms of the writing.
2. HUSBAND AND WIFE—WIFE'S CHATTELS—ACTS OF OWNERSHIP BY HUSBAND.—Where a married woman permits her husband to hold her chattels, and deal with them as his own, she will be estopped, as against his creditors, to claim them as hers.
3. CHATTEL MORTGAGES—MORTGAGE BY HUSBAND—ASSUMPTION BY WIFE.—Where a husband mortgaged certain mules belonging to him, a release of the mortgage by the mortgagee is a sufficient consideration for an assumption of the debt by the wife.

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

STATEMENT BY THE COURT.

Mrs. W. I. McClintock instituted this action before a justice of the peace against C. E. Skinner & Company and W. D. Polk to recover two mules which she claims they wrongfully took possession of and converted to their own use. There was a verdict and judgment for the plaintiff in the justice court and the defendants appealed to the circuit court.

In the circuit court the evidence was substantially as follows:

On the 18th day of April, 1914, Mrs. W. I. McClintock executed a chattel mortgage on the mules in controversy and on her crop to C. E. Skinner & Company, and at the same time she executed to them a note for $200.00, due and payable on or before the first day of November, 1914. The note was recited in the mortgage and the mortgage further recited that Skinner & Company agreed to furnish Mrs. McClintock supplies to be used in planting and cultivating her crops of corn

and cotton. The mortgage also contains a condition as follows:

"Now if I shall pay said aforementioned indebtedness together with the accrued interest thereon, according to the terms expressed in said note, and shall also pay to the said C. E. Skinner & Company all other indebtedness owing by me to him for supplies furnished as aforesaid, or by any other lawful claims or demands which he may have against me at any time prior to the foreclosure of this mortgage, together with the costs of execution and recording of this instrument, then this mortgage shall be void."

Mrs. McClintock purchased supplies from Skinner & Company to the amount of $164.83. Skinner & Company also charged her up with $113.28 which was the debt of her husband and which had been secured by him by a mortgage on the same mules in the year 1913. W. I. McClintock owed Skinner & Company $113.28 at the time of his death, which was on the 31st day of December, 1913. He did not own $300.00 worth of property at the time of his death. Mrs. McClintock gathered her cotton crop and turned it over to Skinner & Company in the fall of 1914. The cotton was sold and she was credited with the sum of $200.89.

Mrs. McClintock testified that the mules belonged to her; that she gave to W. I. McClintock the money with which to purchase these mules in 1905, and that he purchased them for her; that in 1906, they were married and lived together until her husband's death as above stated; that she continued to trade with Skinner & Company because her husband had always traded there; that in the fall of 1914, she concluded to sell the mules but that Skinner & Company sent her word that there was a balance due on her mortgage and that she turned the mules over to them in payment therefor; that they never gave her an itemized account of her mortgage debt and that she did not know at the time she turned the mules over to them that they had charged her with the $113.28, which was the debt of her husband; that Skinner & Company did not tell her

that her husband owed them anything at the time she signed the note and mortgage and that she never agreed to pay the debt of her dead husband.

On the other hand, it was proved by Skinner & Company that Mrs. McClintock agreed to pay the $113.28 which her husband owed them at the time she executed the mortgage and that this sum was a part of the $200.00 note executed by her on that occasion; that the remainder of the note was for supplies already furnished to her by Skinner & Company and for supplies to be thereafter furnished her by them.

Evidence was introduced by both parties to corroborate their theory of the case. There was a verdict and judgment for the defendants and the plaintiff has appealed.

C. T. Bloodworth, for appellant.

1. There is no legal evidence to support the verdict. It is uncontradicted appellants' supplies only amounted to $164.83, and that the cotton crop paid $200.89; more than she owed. She never assumed her husband's mortgage debt.

2. It was error to admit in evidence the mortgage of her husband and to permit C. E. Skinner to testify that her mortgage "secured the balance due on the W. J. McClintock account." The security only extends to the debts set forth in the instrument. While parol evidence may be admitted to show the circumstances under which an instrument in writing is executed, yet when it is clear and unambiguous, it is inadmissible to vary or contradict its terms. 12 Ark. 428; 22 *Id.* 227; 30 *Id.* 753; 55 *Id.* 571; 50 *Id.* 259; 55 *Id.* 353; 66 *Id.* 399; 91 *Id.* 463.

3. The court erred in its instructions to the jury. Cases *supra*. It was also error to permit appellee to introduce various mortgages given by her husband to J. M. Hawks. These only served to confuse the issues.

4. The introduction of the itemized statement in which Skinner placed the item "Bal. W. I. McClintock acc't assumed under mortg.," was prejudicial. The

mortgage was the only instrument competent to look to for proof of the assumption of her husband's debt. McClintock died with less than $300 worth of personal property, and the mules became the wife's property, regardless of who purchased them.

J. N. Moore, for appellees.

1. The evidence is ample to support the verdict. If there was error in the admission of testimony it was invited error. 75 Ark. 251; 77 *Id.* 464; 66 *Id.* 292, 588.

2. But it was not error to prove the consideration of the mortgage by parol. 99 Ark. 218; 75 *Id.* 89; 66 *Id.* 513; 90 *Id.* 426; 18 *Id.* 65, and many others. The evidence did not contradict the mortgage but only tended to show what items entered into the consideration. By her own contention she would still owe $163.11.

3. There is no error in the instructions as to the title to the mules. They follow the law. The case is a bundle of inconsistencies on the appellant's part, lacking even plausibility and without merit. The verdict is for the right party.

HART, J. (after stating the facts). It is insisted by counsel for the plaintiff that there is no evidence legally sufficient to support the verdict.

Defendants furnished supplies to plaintiff in the sum of $164.83 and she paid them in cotton in the sum of $200.89.

(1) The evidence shows that the mules were very small and also very old and that they were not worth more than the $77.00, the balance claimed to be due them by Mrs. McClintock including the $113.28. So it will be seen that the contention of the plaintiff that the evidence is not legally sufficient to warrant the verdict depends upon whether or not she is liable for the debt which her husband owed Skinner & Company at the date of his death. She testified that she did not assume this debt and that nothing was said to her about it at the time she executed the mortgage to Skinner & Company. On the other hand they testified that she

specifically agreed to assume this debt of her husband and that it constituted a part of the $200.00 for which she gave her note and which was secured by the mortgage, she executed on the two mules and on her crop, but counsel for plaintiff contend that the court erroneously admitted this testimony over his objections. He insists that it is in violation of the rule which prohibits a party from contradicting the terms of a written contract by parol evidence. We do not agree with counsel in this contention. This court has held that although the recitals and considerations in a deed or mortgage cannot be contradicted by parol evidence for the purpose of defeating the conveyance, it is competent to prove by such evidence that the consideration has not been paid as recited, or to establish the fact that other considerations not recited in the deed were agreed to be paid; when it does not contradict the terms of the writing. That parol evidence to establish the fact that Mrs. McClintock agreed to assume and pay off the mortgage indebtedness of her husband as a part of the consideration for the mortgage which she executed to Skinner & Company was competent, see the following cases: *J. H. McGill Lumber Co.* v. *Lane-White Lumber Co.*, 90 Ark. 426; *Felker* v. *Rice*, 110 Ark. 70, and *Livingston* v. *Pugsley*, 124 Ark. 432.

(2-3) It will be remembered that the mules in question were purchased by W. I. McClintock in 1905, and that he and the plaintiff were married in September, 1906. After they were married, W. I. McClintock several times mortgaged the mules in question to Skinner & Company for supplies. Mrs. McClintock objected to the introduction of these mortgages in evidence and now assigns as error, calling for a reversal of the judgment the action of the court in admitting them. We think they were competent as tending to show that the mules belonged to her husband. It is well settled that where a married woman permits her husband to hold her chattels out as his own, she will be estopped as against his creditors to claim them as hers. *Roberts* v. *Bodman-Pettit Lumber Co.*, 84 Ark. 227;

Mitchell v. *State*, 86 Ark. 486; *Latham* v. *First National Bank of Fort Smith*, 92 Ark. 315. During the time they lived together as husband and wife the husband mortgaged these mules for supplies and his wife knew where he was trading. At the time of her husband's death he owed Skinner & Company $113.28 and this amount was secured by a mortgage on these mules. According to the testimony of the defendants, Mrs. McClintock knew of this fact and agreed to assume and pay off this indebtedness. The testimony was competent as tending to show that the mules belonged to her husband and the release of their mortgage on the mules would furnish a consideration for her assuming her husband's debts.

Counsel for plaintiff also assigns as error the action of the court in permitting a witness to testify that the plaintiff once told him that she did not want any law suit, but that her attorney urged her to go on with it and that she was going to do so because it did not cost her anything. If it be conceded that the evidence should not have been permitted to go before the jury, we cannot see how it prejudiced the rights of the plaintiff. It merely showed that she did not want to have a law suit but felt compelled to go on with it to protect her rights. Counsel also urges a reversal of the judgment on account of certain instructions given by the court. We need not set out these instructions; for their correctness depends upon whether or not the court was right in admitting the testimony above referred to. Having held that the court correctly admitted the testimony, the instructions based on such evidence are correct.

We think that the respective theories of the parties to this lawsuit were fully and fairly submitted to the jury in the instructions given by the court and the judgment will be affirmed.

THE W. T. RAWLEIGH MEDICAL COMPANY v. HOLCOMB.

Opinion delivered January 8, 1917.

VENDOR AND PURCHASER—RELATIONSHIP—WHEN NOT A JURY QUESTION.—Appellee entered into a contract with appellant to sell medical goods procured from the appellant. *Held*, the relationship between the parties was that of vendor and purchaser, and not principal and agent, and that it was error, under the facts, to submit to the jury the issue of the nature of the relationship.

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

Henry Berger, for appellant.

1. This case presents substantially the same questions as those involved in 115 Ark. 166. But the contract is entirely different. In the above case the contract was ambiguous and parol evidence was admissible with letters, circulars and the conduct, etc., of parties, etc., to determine the relationship of parties. Where the contract is unambiguous, and is neither doubtful, uncertain nor equivocal in meaning, etc., parol evidence cannot be introduced to enlarge its terms. *Ib.* See also 2 Taylor on Ev., § 1035; 53 Wisc. 415; 17 C. B. (N. S.) 578. Here the contract is perfect and complete.

2. It was error to allow appellee to testify on his cross-complaint as to his damages. Lost profits must be ascertainable within reasonable certainty, and not merely speculative, contingent and uncertain. 65 Nebr. 646; 91 N. W. 508; 74 N. Y. Supp. 764; 70 Kans. 409; 78 Pac. 861; 108 La. 171; 32 So. 456; 15 Okla. 493; 82 Pac. 502; 157 Ind. 271, 61 N. E. 561; 1 Gall. 315, Fed. Cas. No. 8, 403; 65 Am. Dec. 602; 3 Sutherland on Dam. (3 Ed.), 2136; Sedgw. on Dam., § 183, 111 Ark. 484.

3. The court erred in giving instruction No. 4 for plaintiff. This was, in effect, a peremptory instruction that plaintiff could not recover on his cross-complaint because he sustained no damages. Yet appellee was permitted to testify that he was the agent of

appellant company. This was error. 181 S. W. 604. There was also error in No. 5, given for appellee which told the jury that the contract and sale of goods was void and cannot be enforced. 183 S. W. 741.

4. The contract and articles furnished constituted a sale of merchandise by a citizen of Illinois to a citizen of Arkansas, and was an interstate transaction which cannot be regulated by statute.

J. C. Ross, for appellee.

1. This case is controlled by 115 Ark. 166, and 124 Ark. 539. The substantial provisions of each contract are the same. The conduct of parties under each contract is exactly the same. Appellant never complied with the laws of Arkansas authorizing it to do business in this State.

2. Reviews the letters, circulars and evidence and contends that there is no error for which the judgment should be reversed. Holcomb was a mere agent and appellant was transacting business here contrary to law. Cases *supra*.

SMITH, J. It is insisted by learned counsel for appellees that we have here a case which presents the same question decided in the case of *Clark* v. *J. R. Watkins Medical Co.*, 115 Ark. 166, and also in the case of *J. R. Watkins Medical Co.* v. *Williams*, 124 Ark. 539, and that this case is, therefore, controlled by the opinions in those cases. There are points of similarity between the cases, yet we do not find here the uncertainty in the relationship of the parties which was developed by the proof in the former cases and which we said warranted the submission to the jury of the question of the determination of the relationship between the parties and supported the jury's finding that this relationship was that of principal and agent, and not that of vendor and purchaser. We set out in full a copy of the contract between the parties to this litigation. It is as follows:

"(1) This agreement made this 27th day of June, A. D., 1914, at Freeport, Illinois, between the W. T.

Rawleigh Medical Company, party of the first part, hereinafter called the Company, and N. W. Holcomb, of Bismarck, Arkansas, party of the second part.

"(2) Witnesseth, That for and in consideration of the promises and agreements hereinafter contained, to be kept and performed by the party of the second part, the Company, unless prevented by strikes, fires, accidents or other causes beyond its control, promises and agrees to sell and deliver to the party of the second part, f. o. b. cars at Freeport, Illinois, or, at its option, any other regular place of shipment, in such reasonable quantities as the party of the second part may from time to time order, all medicines, extracts and other products manufactured or sold by it, such goods to be sold and delivered to the party of the second part at the usual and customary wholesale list prices, such prices to be shown by invoice of each shipment.

"(3) At its option, the Company will also sell party of the second part, partly on credit, a medicine wagon, such as said party of the second part may choose from current catalog, circulars, or other descriptions, and charge said wagon to his account at its customary credit price less any cash payment said second party may make.

"(4) The Company further agrees to re-purchase from said party of the second part, at any time during the term of, or promptly after the termination or expiration of this contract, and at the wholesale prices then current, such medicines, extracts and other products of its manufacture as he may then have on hand in as good salable condition as when originally sold to him, on return of such products promptly by prepaid freight to Freeport, Illinois, or such other regular factory shipping point as may be designated by the Company in writing, and provided that said second party will pay the Company's actual expense of receiving, inspecting and overhauling all such goods.

"(5) The party of the second part promises and agrees to pay the Company the wholesale prices f. o. b. cars at Freeport, Illinois, or other regular place of ship-

ment as aforesaid, for all medicines, extracts and other products furnished him from time to time, including any balance due on wagons, as hereinbefore provided by weekly payments, and that at the termination or expiration of this agreement for whatever cause, said second party further promises and agrees to pay in cash the balance due said Company on account for all medicines, extracts, other products, and wagon sold and delivered to him, as hereinbefore provided. But the time of making such payments, or any or all of them, may be extended by said Company without notice to the guarantors of this agreement, and without prejudice to the interests or rights of said Company.

"(6) It is further understood and agreed that if said party of the second part pays his account in full on or before the fifteenth day of each month he will be allowed a cash discount of three per cent. (3%) from the usual and customary wholesale list prices.

"(7) And it is further agreed between the parties hereto that this contract is subject to acceptance at the home office of said Company in Freeport, Illinois, and that unless previously terminated for any reason by either party upon written notice, shall expire by limitation December 31, 1914.

"(8) At the expiration of this contract the Company hereby agrees to make a new contract, if signed by acceptable guarantors, with said party of the second part, without requiring his account to be paid in full at that time, provided the amount of his purchases and the condition of his account has been satisfactory to said Company.

"(9) And it is further agreed by and between the parties hereto that this instrument constitutes and shall constitute the sole and entire agreement by and between the parties hereto, unless wholly cancelled, revoked or modified by the expressed written agreement of the parties hereto, to which has been affixed the corporate seal of the party of the first part.

"(10) In Testimony Whereof, the party of the first part has caused this agreement to be executed in

its corporate name by its President and its corporate seal to be hereunto affixed; and the said party of the second part has hereunto set his hand and seal, the day and year first above written.

"The W. T. Rawleigh Medical Company,
"By W. T. Rawleigh, President,
"(Seal) "N. W. Holcomb,
"Accepted
"July 2, 1914 "(Seal)
"At Freeport, Illinois. "Second Party sign in Ink."

A comparison of the provisions of this contract will disclose several material variations between it and the one set out in the opinion in the case of *Clark* v. *Medical Co., supra.*

We said in that case, as it had been said in many others, that it was the duty of the court to construe a contract and declare its meaning where its terms were unambiguous. We said, however, in that case, and in the case of *Medical Co.* v. *Williams, supra,* that the contract there under consideration was ambiguous, and that the conduct of the parties in the performance of its terms added to the ambiguity, and that there was presented in each of those cases the question for the jury to determine whether the parties occupied the relation of principal and agent, or that of vendor and vendee.

We have here the evidence of the acts of the parties to the contract done in the performance of its provisions; but we think there is nothing in this evidence which shows any amendment of the contract or changes the relationship of the parties from that of vendor and vendee, as set out in the contract, to that of principal and agent. We review this evidence in its light most favorable to appellees.

Appellant manufactures a great variety of medicines, extracts, and other articles which are sold extensively over the greater portion of the United States by persons who occupy the same relation to it as that of appellee, N. W. Holcomb, who was sued, in conjunc-

tion with his guarantors, for the balance due by him to the appellant company. During the course of the business out of which this litigation arose, there was considerable correspondence between the parties, which was offered in evidence, and there were various circulars relating to the conduct of the business which appellant sent to all persons engaged in the sale of its products. Among these circulars was one relating to the assignment of territory in which prospective salesmen were advised about the choice of territory, and the representation was made that exclusive territory would be given to each representative. When the contract was closed with Holcomb, it was discovered that a portion of the territory assigned him had been previously assigned another representative named Ott, and this fact formed the basis of a counterclaim for damages by Holcomb. It appears, however, that this counterclaim for damages was not pressed by appellee in the court below, as he rested upon the primary proposition that the appellant company had no right to maintain this suit in any event. This contention was based upon the proposition that the appellant company was a foreign corporation and had not complied with the laws of this State permitting it to do business herein; and that the relation between it and appellee was that of principal and agent, and not that of vendor and vendee, and that the appellant company, therefore, had no right to maintain this suit. Appellee briefs the case upon this issue solely, and it is necessary to determine only that question to dispose of this appeal.

The assignment of territory to appellee mentioned above contained the following direction: "Keep this form and attach to copy of contract," and there was furnished at the time a booklet of instructions entitled, "Rawleigh's Territory List." This book of instructions, and the letters and circulars sent out by appellant company, contained a great many suggestions to its representatives as to the conduct of the business, and directions in regard to the remittance of money, the direction in regard to the remittances being that

the agent should remit each week one-half of the receipts from the business until the account was balanced, and the letters from appellant in regard to these remittances evidenced great dissatisfaction with the manner in which Holcomb was conducting the business. Appellee and other salesmen were sent monthly statements which were prepared on blanks furnished for this purpose. Appellee attaches much importance to the following statement printed on the various monthly statements sent him. We quote as follows:

"At the low prices and liberal terms under which we furnished Rawleigh Products, we expect you

"1st. To sell all you can for cash.

"2nd. To collect promptly for all products used.

"3rd. To report the full sum of your Total Cash Receipts, Traded, etc., every week.

"4th. To collect up all of your old bills closely.

"5th. To remit liberally and regularly.

"6th. To gradually reduce your account after you begin on your collections.

"7th. To pay off your account with the company in full within a reasonable time.

"THE ABOVE IS WHAT WE EXPECT OF YOU.

"Do these figures indicate that you are reducing and paying off your account with us as fast as you should? If not, please send us some EXTRA PAYMENTS with each of your Reports from now until you have reduced your account to what it should be at this time, or pay it up in full. Remember, your account must be paid some time, and the more and faster you send in the money the quicker you can get on a cash basis."

The evidence is to the effect that the appellant company assigned exclusive territory to appellee and to other representatives, and that no one representative was permitted to invade the territory of another. Appellee desired to employ his son to assist him in his work and wrote the company for permission to employ

him, and in reply to this request received a letter containing the following statements:

"In regard to running two wagons, it is against our policy for any man to have sub-agents, so if you have an applicant, send us his application at once, have him furnish contract and help us get him started in a part of your territory if it is sufficiently large to enable two men to keep busy. You will find that you will have all that you can do to keep your stock of products checked up, to collect up and take care of your own business without becoming responsible for another man's work. Then, too, experience has taught us that having sub-agents has not proven satisfactory, therefore do not do so, but instead send us application of the man you have interested and help us get him started to work."

We think the evidence we have set out is a fair summary of the testimony which appellee says warranted the court in submitting the question of the nature of the relationship of the parties to the jury and supports the jury's finding that the relation was that of principal and agent. We do not agree with him, however, in this contention. We recognize the former cases cited above as presenting an exceedingly close question as to whether or not the court should not have declared, as a matter of law, that the relationship in those cases was that of vendor and vendee, and not that of principal and agent, and whether there was error in submitting this question to the jury at all. There is no such ambiguity in this contract as there was in the one involved in those cases, and the opinion in those cases set out many indicia of agency which were disclosed by the evidence, which are not found here. We said in the opinions in the above cited cases that the mere designation of one as an agent did not make him such, and that one might sell his goods to whom he pleased and might prescribe other exactions in regard to the price to be charged and the manner of reselling without changing the character of the transaction as a sale. We are constrained to believe that

the parties to this litigation have entered into a contract of bargain and sale, and not one of principal and agent, and that there is nothing in their subsequent conduct which changed the nature of this relation. It follows, therefore, that the court should have declared, as a matter of law, that the appellant company had the right to maintain this suit and to recover such sum, if any, as the proof showed was due it after all just credits had been allowed appellee. The judgment of the court below must, therefore, be reversed and the cause will be remanded for a new trial.

JAGGERS v. GRAHAM.

Opinion delivered January 8, 1917.

1. APPEAL AND ERROR—EXCLUDED TESTIMONY.—Objections to the exclusion of testimony must be brought into the record by way of bill of exceptions.
2. APPEAL AND ERROR—IMPROPER INSTRUCTIONS.—Instructions alleged to have been improperly given must be set out in the abstract.
3. REAL ESTATE BROKERS—COMMISSIONS.—Appellant, with the right to sell certain property belonging to appellee, interested one W. in the purchase. W. refused to purchase. Appellant did not have the exclusive right of sale; after two years W. purchased the property through the instrumentality of one M. *Held*, a finding by the jury that appellant was not the procuring cause of the sale, would be upheld on appeal.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; affirmed.

Davies & Davies, for appellant.

1. The verdict is contrary to the law and the evidence. Appellant was the procuring cause of the sale, and the evidence shows it.

2. The instructions to the jury are erroneous. As the instructions are not set out in the abstract nor passed on by the court, it is unnecessary and useless to cite the many authorities for appellant.

3. The court erred in the admission and rejection of evidence to the prejudice of appellant. Mrs. Jaggers

made the sale; did more than enough to entitle her to her commissions. 101 Ark. 376; 105 *Id.* 213; 87 *Id.* 321; 103 *Id.* 414; 37 *Id.* 593; 89 *Id.* 24; 97 *Id.* 438; 99 *Id.* 490; 96 *Id.* 379, and many others.

A. J. Murphy, for appellee.

1. Appellant's exceptions to the rulings of the court in admitting and excluding evidence can not be considered, as no specific reference was made to such exceptions in the motion for a new trial.

Appellant has failed to set out the instructions, and this court will presume that the jury were properly instructed. 116 Ark. 271.

2. However, the jury were properly instructed as to the law. 88 Ark. 373; 89 *Id.* 185; 102 *Id.* 200. A broker must show that his efforts were the efficient and proximate cause of the sale. 127 N. W. 277; 129 S. W. 419; 181 Fed. 909; 93 Am. Dec. 718; 44 L. R. A. 348, etc.; 100 N. W. 90; 36 N. E. 294; 62 N. Y. S. 1102.

3. The evidence shows an abandonment of endeavor by appellant and that a new agent intervened and was the procuring cause of the sale. 38 Am. St. 441; 88 N. W. 15; Ann. Cases, 1913 D., p. 824, and note and many others. See, also, 71 S. E. 745.

4. The verdict is sustained by the evidence.

HUMPHREYS, J. The appellant, Mrs. J. R. Jaggers, filed a suit in the Garland Court of Common Pleas for commissions on a sale of certain real estate in the city of Hot Springs, against the appellee, C. M. Graham. She alleged in her complaint that Graham had listed said real estate with her for sale and had agreed to pay her a commission of five per cent. in case she should make a sale of said real estate; and that in pursuance of the agreement she sold said real estate to Will Woodcock for the sum of $2,000, and prayed for a judgment against Graham for the sum of $100 and costs.

The appellee denied the material allegations of the complaint.

A writ of attachment was procured and levied on property belonging to appellee on the ground that

he was a non-resident of the State. Judgment was rendered against the appellee by default and the attachment was sustained and the property ordered sold to satisfy said judgment. An appeal was taken from said judgment to the circuit court, and there tried, which resulted in a verdict and judgment for appellee. Appellant filed her motion for a new trial, which was overruled; exceptions were saved and she was granted sixty days in which to file her bill of exceptions, which she did, and this cause is here on appeal.

Appellant, in her motion for a new trial, sought to set aside the verdict of the jury because the court "excluded certain evidence and admitted certain evidence upon the trial as shown by the stenographer's notes;" and now insists that the judgment should be reversed on this account.

(1) In the abstract and brief the particular evidence ruled out by the court is set out, but appellant failed to set it out in her motion for a new trial and thereby lost her right to insist upon it as reversible error. The reference in the motion for new trial to the evidence admitted and excluded is too general. She should have called the attention of the trial court to the specific evidence erroneously admitted or excluded. *West. Union Tel. Co.* v. *Duke*, 108 Ark. 8.

(2) The appellant insists that the judgment should be reversed because it was submitted to the jury on improper instructions. The instructions are not brought into the abstract and therefore the court must presume that the case went to the jury with proper instructions. *Bray Clothing Co.* v. *McKinney*, 90 Ark. 161, and cases cited on page 163 in support of this rule of practice.

(3) Appellant insists that the judgment should be reversed for the reason that the verdict was contrary to the evidence and not sustained by sufficient evidence. The rule on appeal is that the verdict of the jury must stand if supported by any legal evidence of a substantial nature. *Burton* v. *Creel*, 122 Ark. 349. We find ample evidence in the record of a legal, substantial

nature to support the verdict of the jury. The controlling issue in the case was whether or not appellant was the procuring cause of the sale. The sale was not consummated until nearly two years after the first negotiations in which the appellant participated. She failed to consummate the sale herself at that time, and the appellee at her suggestion called on the purchaser and failed to make the sale. This was in the spring of 1912. In December, 1913, the negotiations were resumed between that purchaser and the appellee through another party, and the sale was consummated without any active participation therein by appellant. Appellant did not have the exclusive sale of said real estate. The purchaser, Will Woodcock, testified that he made up his mind definitely after the first negotiations not to buy the property; but after his home property was destroyed by fire in September, 1913, he purchased the property from appellee through the instrumentality of C. E. Marsh. The purchaser, Will Woodcock, testified that the appellant said nothing more to him about the sale of the property after the first negotiations and had nothing to do whatever with the sale of the property at the time he purchased it from appellee. C. E. Marsh testified to the same effect. There was sharp conflict in the evidence as to whether appellant was the procuring cause of the sale. Much of the evidence introduced by the appellee to support his contention that appellant was not the procuring cause of the sale, was of a legal, substantial nature.

No error appearing in the record of which this court can take cognizance, the judgment is in all things affirmed.

CARR v. HAHN & CARTER.

Opinion delivered January 1, 1917.

1. MECHANICS' LIENS—CHANCERY JURISDICTION.—Chancery courts have concurrent jurisdiction with the circuit courts in the enforcement of the mechanics' lien laws of the State.
2. MECHANICS' LIENS—SERVICE ON DEFENDANT OUTSIDE COUNTY IN WHICH ACTION IS BROUGHT.—Under the statutes of this State personal service on the defendant, in an action to enforce a mechanic's lien, had anywhere in the State, is sufficient, if the suit is instituted in the county where the property is located.

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

James A. Comer and *Powell Clayton*, for appellant.

1. A materialman's lien on a boat may be enforced in the chancery court of the county where the boat is situated, regardless of the residence of the owner. 30 Ark. 568; 56 *Id.* 544; 115 *Id.* 230

2. The court had jurisdiction and erred in quashing the service in Pulaski county. Personal service may be had anywhere in the State. Kirby's Digest, §§ 4983, 6072, 4970, 4976, 4987. Liens of materialmen are creatures of statute and must be enforced according to the statutes. 119 Ark. 43; 114 *Id.* 1; 102 *Id.* 539; 115 *Id.* 230.

3. Hahn entered his appearance. 59 Ark. 593; 77 *Id.* 412; 84 *Id.* 573; 109 *Id.* 77; 85 *Id.* 232. He voluntarily submitted to the jurisdiction.

John F. Clifford, for appellee.

1. The chancery court had no jurisdiction over defendant Hahn, a non-resident of Lincoln county, and who was summoned there. No appearance was entered by Hahn; he only appeared specially and objected to the jurisdiction at every step. The service in Pulaski county was properly quashed. 77 Ark. 416; 4 *Id.* 573; 9 Mich. 154; Kirby's Digest, §§ 4970, 4981, 4987; 30 Ark. 574; 56 *Id.* 544. The venue is determined by §§ 6072-3, Kirby's Digest.

HUMPHREYS, J. Appellant brought this suit in the Lincoln Chancery Court against appellees, seeking to enforce a materialman's lien for materials furnished in the construction of a certain boat in the possession of appellees in Lincoln county, at the time his suit was instituted. One of the appellees waived service in Pulaski county. The other appellee, E. J. Hahn, was served with process in Pulaski county. Appellee, E. J. Hahn appeared specially and filed the following motion to quash service: "Comes E. J. Hahn, by Jno. F. Clifford, his attorney, and appearing for this purpose only, moves the court to quash service of summons upon him, and as a reason therefor states that service upon both of the defendants has been had outside the confines of Lincoln county."

The complaint alleged that the materials were furnished and delivered on August 28, 1914, in pursuance of a contract made on the 30th day of March, 1914. This suit was instituted on the 28th day of October, 1914, and the summons was served on the 12th day of November, 1914. Many other pleadings were filed and proceedings had in the case, but it is unnecessary to refer to them, as the facts already stated are sufficient upon which to decide the controlling issue in the case. The court quashed the service and dismissed the bill; appellant excepted and the cause is here on appeal.

(1) The controlling issue in the case is whether the chancery court had jurisdiction and whether, having jurisdiction, personal service outside of Lincoln county, where the suit was instituted, was sufficient. Our court has held that the chancery courts of this State have concurrent jurisdiction with the circuit courts in the enforcement of our mechanics' lien law. *Murray* v. *Rapley*, 30 Ark. 568; *Kizer Lbr. Co.* v. *Mosely*, 56 Ark. 516; *Martin* v. *Blytheville Water Co.*, 115 Ark. 230.

(2) It is provided in the mechanics' lien law, section 4987, Kirby's Digest, that a party instituting his suit to enforce such liens, where the defendant is out of the county, may obtain service by issuing and pub-

lishing a warning order as in proceedings under attachment. Section 6059, Kirby's Digest, provides that "The plaintiff may, at any time before judgment, have a summons served on the defendant, if found in this State, although a warning order may have been previously entered against him, and after such service the case shall proceed as in other cases of actual service. It is provided in section 4983, of Kirby's Digest, that the mechanic's lien law shall be enforced against the property in the county where the property is situated. This is clearly a proceeding *in rem*. When the statutes are all construed together, it is very clear that personal service on the defendant anywhere in the State is sufficient if the suit is instituted in the county where the property is located.

The learned chancellor quashed the service and dismissed this bill on the theory that personal service could not be had if all the defendants resided in another county than the county in which the suit was instituted. This was error and the decree quashing service and dismissing the bill is reversed and the cause remanded for further proceedings.

ARKADELPHIA MILLING COMPANY *v.* BOARD OF EQUALIZATION OF CLARK COUNTY.

Opinion delivered December 4, 1916.

1. TAXATION—CORPORATIONS—TANGIBLE PERSONAL PROPERTY—WHERE ASSESSED.—All the tangible personal property of a corporation within a given county is to be assessed in the county at the place of the corporation's domicile.
2. TAXATION—CORPORATIONS—SITUS OF PERSONAL PROPERTY.—A domestic corporation was domiciled within a certain city, and owned personal property both within and without the city limits. *Held*, all its tangible personal property within the county must be assessed for taxation at the place of the corporation's domicile.

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

McMillan & McMillan, for appellant.

1. Kirby's Digest, § 6904, fixes the place of taxation in the township and district where situated and not at the domicile of the corporation. 54 Ark. 513; Black. on Int. Laws, pp. 220-1-2; 113 U. S. 571; 51 Am. St. 44-49; 64 Pac. 787.

2. The *situs* of personal property, for the purposes of taxation, does not follow the domicile of its owner. 80 Ark. 140; 166 U. S. 185-226; 56 Am. Dec. 522; 11 Wall. 423; 7 *Id.* 139, 150.

3. Taxation and protection or benefits should be reciprocal. Cooley on Tax., § 1515; 72 Am. St. 772; 19 Ill. 160.

John H. Crawford and *Dwight H. Crawford*, for appellee.

1. The property was transferred for the purpose of taxation to the domicile of the owner, and subject to taxation there. 54 Ark. 513; Kirby's Digest, § 6872; 62 Ark. 461-8; 30 *Id.* 439; 80 *Id.* 138; 141 U. S. 18; 166 *Id.* 185; 3 Ind. 481; 56 Am. Dec. 522; Cooley Tax (2 Ed.), 374; 137 Iowa 24; 15 L. R. A. (N. S.) 142; 11 R. I. 321; 23 Am. Rep. 460; 37 Cyc. 805-8, 821; Cooley Tax (2 Ed.), 22; Minor Conflict of Laws, § 123. Kirby's Digest, § 6936, governs this case. *Ib.*, § 6910; 22 Nev. 333; 40 Pac. 96; 11 Fed. Cas. No. 5, 931, p. 222.

2. The tangible property should be taxed at the domicile of the corporation. 37 Cyc. 952; Cooley Tax (2 Ed.) 373; 78 Ark. 187; 116 Ky. 562; 76 S. W. 381; 14 Ill. 163; 65 Am. Dec. 497.

3. Domestic corporations are assessed under § 6936 and not under § 6904. 78 Ark. 187. The *situs* of all corporation's personal property is at the domicile. Cases *supra*.

McCULLOCH, C. J. Appellant is a domestic corporation domiciled in the city of Arkadelphia, but part of its manufacturing business is conducted outside of the city limits and it owns personal property outside of those limits. The only question presented on this appeal

is whether the tangible personal property of appellant corporation should be assessed for taxation at the place of its domicile, inside of the city limits, regardless of the *situs* of the property in other portions of the county, or whether it should be assessed outside of the city limits and in the school district where situated.

Counsel for appellant relies upon section 17 of the General Revenue Act of 1883 (p. 218), which was brought forward into Kirby's Digest as section 6904, as fixing the actual *situs* of tangible personal property of a corporation, like that of an individual, as the place for taxation. That section reads as follows: "Sec. 17. Every person required to list property on behalf of others, shall list it in the same township or school district in which he would be required by law to list if such property was his own, but he shall list it separately from his own, specifying in each case the name of the person, estate, company or corporation to whom it belongs; and all real property and merchants and manufacturer's stock, and all the articles mentioned in section twenty (20) of this Act, and all personal property, farms, and real property, not in towns, shall be returned for taxation and taxed in the township, city or town or school district in which it is situated (all shares of stock in any national bank located in this State, whether held and owned by residents or non-residents of this State, shall be listed for taxation and taxed in the city, town, township or school district in which the bank is located), and all other personal property, moneys, credits, or effects, shall be entered for taxation in the township, school district, city or town in which the person to be charged with the taxes thereon resided at the time of listing the same by the assessor, if the person resides in the county in which such property, moneys and effects were listed, if not, then such property, moneys and effects shall be entered for taxation and taxed in the town, township or school district where it was situate when listed."

On the other hand, counsel for appellee contends that the section just quoted has no application to the

assessment of a domestic corporation, which is controlled by another provision of the statute (section 6936 of Kirby's Digest) and has been construed by this court in the case of *Harris Lumber Co.* v. *Grandstaff*, 78 Ark. 187, as fixing the *situs* of tangible corporate property for taxation purposes at the place of the domicile of the corporation itself. We are of the opinion that the contention of the appellee is correct and that the property was properly assessed at the place of the domicile of the corporation. It is true that in the *Grandstaff* case the court only passed upon the question of the right to assess tangible property of a corporation in a county other than the domicile of the corporation, and that decision only went to the extent of holding that the assessment must be in the county of the domicile, but the reasoning adopted by the court in reaching that conclusion was that the statute made no provision for disclosing the *situs* of the property and required the corporation to furnish a list of its personal property, which necessarily meant that it was to be assessed at the place of the domicile.

The statute there construed was subsequently amended so as to provide for the assessment of property of a corporation in the county where the property is situated, but when that statute is considered it makes it plainer that so far as the property in the county of the domicile of the corporation is concerned it is still to be assessed at the place of domicile and not in other portions of the county where the property is situated. Section 6936 was amended by the Act of May 29, 1907 (p. 1225), by adding to the fifth subdivision the words "and shall also show in what county such property is situated." Another section was also added, which requires the assessor of the county of the domicile to make a list of all personal property located in other counties and to certify the same to the assessor of the county in which such property is located. There is nothing said in the statute, as thus amended, about any requirements for specification of the exact location of the property in the county. The only requirement

is that the county shall be specified. So this leaves the statute without any requirements for information to the assessor of the particular location of the property, and it follows from the reasoning of the *Grandstaff* case, *supra*, that as this is the only method of assessment pointed out, it was intended by the framers of our statute to follow the old common law maxim that movable things follow the person, and assess all the property in the county of the corporation's domicile, at the place of its domicile.

The circuit court so decided, and the judgment is therefore affirmed.

LINCOLN RESERVE LIFE INSURANCE COMPANY *v.* MORGAN.

Opinion delivered January 15, 1917.

1. APPEAL AND ERROR—OBJECTION TO REFUSAL OF TRIAL COURT TO PERMIT WITNESS TO ANSWER QUESTION.—An objection to the refusal of the trial court to permit a witness to answer a question asked by appellant's counsel cannot be considered on appeal, where the record does not show what the answer of the witness would have been. This court reverses only for errors which are prejudicial.
2. EVIDENCE—AGE OF CERTAIN PERSON—ACTION ON INSURANCE POLICY.—In an action to recover on a policy insuring the life of one A., witness was asked to state his opinion of the age of A.'s daughter, A's age as given by himself in his application being disputed. *Held*, that issue was immaterial, and if it was material as a collateral matter, that the witness had not qualified as competent to express his opinion as to her age.
3. EVIDENCE—HEARSAY—PEDIGREE.—The date of a person's birth may be testified to by himself or by members of his family, although he must and they may, know the fact only by hearsay based upon family tradition.
4. EVIDENCE—HEARSAY—PEDIGREE—EXTENT OF RULE.—Under the exception as to pedigree, under the rule against hearsay, the term "pedigree" embraces not only descent and relationship but also the facts of birth, marriage and death, and the times when they occurred.

Appeal from Jefferson Circuit Court; *W. B. Sorrells*, Judge; affirmed.

The appellant *pro se*.

1. The court erred in refusing to allow the witness to state how old Fannie Morgan appeared to be. 78 N. W. 715; 96 *Id.* 186.

2. The evidence does not sustain the verdict. 61 Am. St. 751.

Irving Reinberger, for appellees.

1. No foundation was laid for the questions propounded. The evidence in reply to the question would be an expression of opinion merely on hearsay. 76 Ark. 288; 61 *Id.* 241; 64 *Id.* 523; 103 *Id.* 200; 6 Conn. 9, 13; Abbott Trial Ev. (2 Ed.) 112. The exclusion of immaterial evidence is not error. 5 Ark. 223; 55 *Id.* 12; *Ib.* 163; 95 *Id.* 158. The age was otherwise established. 74 Ark. 417.

2. A verdict upon conflicting evidence will not be set aside. 67 Ark. 433, 531; 65 *Id.* 116, 255; 102 *Id.* 200; 75 *Id.* 111.

HART, J. Appellees sued appellant to recover on a life insurance policy. The Afro-American Life Insurance Company issued a life insurance policy to Amos Morgan, a negro, for $1,000.00, and appellees, his daughters, were named as beneficiaries in the policy. Subsequently the name of the insurance company was changed to the Lincoln Reserve Life Insurance Company and the sole business of the company was to insure negroes.

Amos Morgan died and the beneficiaries complied with the requirements of the policy in giving notice and proof of his death. The company denied liability on the ground that Amos Morgan, deceased, fraudulently represented himself to be the age of sixty years when he was over that age and was not eligible to secure insurance in the company on account of being over age.

The jury returned a verdict in favor of appellees and the case is here on appeal.

In endeavoring to prove that Amos Morgan was over sixty years of age at the time he made application for the policy sued on, the company asked a witness

how old he was and the witness answered that he was fifty-five years old. The witness was further asked if he was acquainted with Fannie Morgan, a daughter of Amos Morgan, and he replied that he was. He was asked if he knew how old Fannie Morgan was and he replied that he did not. He was asked if she was older or younger than he was and he replied that he did not know. He was then asked the following: "Question: Well, in your opinion, how old is she generally regarded? (Objection by plaintiff and sustained by the court). Question: From her appearance, how old a woman would you take her to be?" "(Objection by plaintiff and sustained by court. Defendant duly saved its exceptions)."

Error is assigned on account of the action of the court in refusing to allow the witness to answer these questions.

(1) In the first place, it may be said that the record does not show what the witness would have answered or that his answers would have been in any wise prejudicial to its rights. It is well settled that a judgment will not be reversed unless it is shown that some prejudice will result to the rights of appellant. Hence, 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. *Ward* v. *Fort Smith Light & Traction Co.*, 123 Ark. 548; *New Hampshire Fire Insurance Co.* v. *Blakely*, 97 Ark. 564, and *Boland* v. *Stanley*, 88 Ark. 562.

(2) In the second place, the age of Fannie Morgan was not a material issue in the case and if it can be said that an inquiry into her age was not a collateral matter, still we do not think the witness could have been permitted to give his opinion as to her age unless he had detailed her appearance, manner and other facts upon which he based his opinion.

(3-4) The second assignment of error is that there is no evidence legally sufficient to support the verdict. One of the children of the insured was permitted to testify as to his age, and from her testimony

the jury was warranted in finding that he was not over sixty years of age at the time he made his application for the insurance policy. No objection was made to the introduction of this testimony. Besides it is well settled that the date of a person's birth may be testified to by himself or by members of his family, although he must, and they may, know the fact only by hearsay based on family tradition. This falls within the rule admitting such hearsay evidence in matters of "pedigree," which term embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when this occurred *Houlton* v. *Manteuffel* (Minn.), 53 N. W. 541, and cases cited; *Grand Lodge A. O. U. W.* v. *Bartes* (Neb.), 98 N. W. 715; 1 Greenl. Ev. 16 Ed. par. 114 c. & d. There was other evidence tending to show that Amos Morgan was under sixty years of age at the time he made application for the policy sued on.

The judgment will be affirmed.

WILLIAMS v. CARSON.

Opinion delivered January 15, 1917.

1. PARTNERSHIP—SECRET AGREEMENT BETWEEN PARTNERS.—A person dealing with a member of a partnership will not be bound by a secret agreement between the partners, in the absence of knowledge thereof.
2. EVIDENCE—ACTION IN REPLEVIN—STATEMENTS MADE IN ABSENCE OF PLAINTIFF.—In an action in replevin for certain mules which appellee alleged were sold to appellant, contrary to his wish, evidence of a conversation had in the absence of the appellant between one G., and appellee's alleged partner, *held*, inadmissible.

Appeal from Sebastian Circuit Court, Fort Smith District; *Paul Little*, Judge; reversed.

G. C. & Joe Hardin, for appellant.

1. One partner is the agent for the firm and his acts done in the course of the partnership business are the acts of the firm and the firm is bound by his acts. Strangers are not charged with knowledge of private

agreements between partners and definite notice must be given such third parties. Instruction No. 5 hence was error. 1 Lindley on Partnership, 176; 88 Ark. 417; 114 S. W. 922; 87 Ark. 412; 76 *Id.* 4; 61 Ala. 143; 78 Mass. 453; 42 N. H. 269; 50 N. C. 32; 45 Vt. 43; 41 Oh. St. 64; Cent. Dig. 252.

2. Instruction No. 2 for plaintiff was also error. The court states facts to the jury and points out the inference to be drawn. 43 Ark. 289; *Ib.* 165; *Ib.* 492; 53 *Id.* 381; 55 *Id.* 108, 244; 25 S. W. 282.

3. The court also erred in refusing the instructions asked by defendant. 80 Ark. 23; 91 *Id.* 26; 97 *Id.* 395; 42 *Id.* 390; 88 *Id.* 373; 63 *Id.* 513; 76 *Id.* 4; 92 *Id.* 271; 93 *Id.* 521; 45 U. S. 611; 74 Ark. 437; 87 *Id.* 412.

If there was a partnership, Lockridge had a right to make the trade. Cases *supra.*

A. A. McDonald and *Holland & Holland,* for appellee.

1. The questions of fact are settled by the verdict of the jury. There is no error in the giving or refusal of instructions. Review the instructions and cite 40 Ark. 551; 92 *Id.* 271; 122 S. W. 658; 66 Ark. 448; 63 *Id.* 30; 88 *Id.* 415; 80 *Id.* 23. The questions were: Was the property that of the plaintiff? If so, did Lockridge have authority to sell? These facts were properly submitted to the jury and the verdict is conclusive.

SMITH, J. Appellee was the plaintiff in a suit in replevin to recover the possession of two mules and a wagon. The suit was brought in the court of a justice of the peace, where there was a verdict for the defendant, and upon an appeal and trial in the circuit court there was a verdict for the plaintiff, and this appeal has been prosecuted from the judgment pronounced thereon.

Appellee and one Dolph Lockridge were partners, and one of the principal questions of fact presented by the record is the nature and extent of the partnership.

Appellee admits the existence of this partnership, but says it was confined to buying and selling cattle solely; while Lockridge testified that the partnership was not thus limited, but also included an agreement to buy and sell mules, horses, and wagons. It is undisputed that appellee had the money to operate on and was to furnish it for that purpose; and that Lockridge was to do the trading, and they were to divide any profits earned equally. Lockridge traded the wagon and team in controversy to appellant for other property and money, and testified that he had the authority so to do. Appellee, Carson, testified that the property traded to appellant Williams was his individual property, and that Lockridge had no authority to trade it. Appellee admitted, however, that Lockridge called him over the telephone and advised him that he had made this trade, and directed him to bring the mules to appellant's barn by 10 a. m. the following morning, and that he did so. That shortly after his arrival at appellant's barn he was shown two mules and a horse for which his team had been traded and was told that, in addition, they were to get $75.00 to boot. That he objected to the trade, but Lockridge said it had been made, and the bookkeeper gave Lockridge a check for the $75.00, but he told appellant he did not want to make the trade and that Lockridge was his partner only in buying and selling cattle, and that he had no right to trade these mules. Appellee refused to surrender the mules and wagon and this suit was brought.

A number of instructions were given, and among others, at the request of appellee, and over appellant's objection and exception, instructions numbered 2 and 5. These instructions are as follows:

"2nd. If you find from the evidence that D. C. Lockridge, in the sale by Graham to Carson, acted as the agent of Graham, you will consider such fact as tending to establish the fact that no partnership existed between Lockridge and Carson."

"5th. If you find from the evidence that Lockridge and Carson were partners, but that the contract of

partnership was that no trade was to be made by one without the consent of the other, that Carson did not consent to the trade, but objected to it to the defendant or his agent at or before its consummation, then your verdict should be for the plaintiff."

(1) There is testimony that a completed trade was made if Lockridge had the authority to make one; but it is said this instruction takes into consideration a private agreement that one partner should not trade without the consent of the other, and tells the jury that, if there was such an agreement, there was no trade if appellee did not consent to it but objected before its consummation. We think this instruction is erroneous. It too greatly restricts the authority of Lockridge if he was in fact a partner. One dealing with this partnership would not have been bound by any private agreement of the partners unless he was aware of its existence and was advised by the partner who claimed its protection that he would not be bound by the unauthorized act of his partner. This instruction does not so declare the law. It absolves appellee from being bound by the act of his partner if he objected to the trade before its consummation, even though he did not apprise Williams of the existence of this agreement and did not tell him that he would not be bound by the trade. See Lindley on Partnership, Vol. 1, p. 176; *Dodson* v. *Baskin*, 88 Ark. 417; *Buford* v. *Lewis*, 87 Ark. 412; *Alley* v. *Bowen-Merrill Co.*, 76 Ark. 4. Moreover, it leaves out of account the question of ratification by delivery. It is true another instruction given at appellant's request correctly declared the law to be that if appellee raised no objection to the trade until it had been consummated and the check for the $75.00 on the mules and horses had been delivered, then he would be held to have ratified the trade and would be bound by it, but the instruction set out authorizes a finding for the plaintiff (appellee) without reference to this question.

(2) We think, also, the second instruction should not have been given. The Graham referred to therein

testified that, in the course of the trade in which appellee acquired the property subsequently traded to appellant, he (Graham), made this statement to Lockridge, "I will pay you on what I owe you all above $275.00 you can get Carson to pay me for the mules." Lockridge testified that he bought the mules from Carson for the benefit of his firm. Graham testified that he sold them to Carson alone. The instruction charges the jury upon a question of fact, and relates to a conversation between parties had in the absence of appellant, and the evidence itself should not have been admitted except for the purpose of contradicting Lockridge, if it became material to do so. *Fechheimer-Kiefer Co.* v *Kempner*, 116 Ark. 486.

For the errors indicated the judgment of the court below will be reversed and the cause remanded for a new trial.

SCHOOL DISTRICT NO. 69 OF YELL COUNTY *v.* HUNDLEY.

Opinion delivered January 15, 1917.

1. SCHOOLS—CONTRACT WITH TEACHER—MEETING OF DIRECTORS.—In an action on a contract with a school district, to teach school, *held*, the evidence was sufficient to show a legal meeting of the directors.
2. SCHOOLS—CONTRACT TO TEACH—RATIFICATION.—A contract to teach school, made with plaintiff, *held*, to have been ratified by the district.

Appeal from Yell Circuit Court, Dardanelle District; *A. B. Priddy*, Judge; affirmed.

L. C. Hall, for appellant.

1. No contract can be binding on a school district unless made at a meeting of the directors at which all were present or had notice. 64 Ark. 491; 69 *Id.* 162. No notice was given Director Wallace. All persons who contract with school officers are presumed to know the extent of their powers. 127 S. W. 969.

2. There was no ratification by the directors. Usage cannot make a contract or effect the settled rules of law. 69 Ark. 313; 85 *Id.* 568.

3. The instructions are not warranted by the evidence. 85 Ark. 390; 87 *Id.* 243. Two directors may make a contract, if all are present at a meeting; but no meeting can be held unless all are present or had notice. 52 Ark. 515.

Jno. B. Crownover, for appellee.

1. There was such a meeting as would bind the district and the contract is binding. 53 Ark. 468; 90 *Id.* 339. All had notice and the contract was made by the two present. 52 Ark. 511; 81 *Id.* 143; 105 *Id.* 109; 108 *Id.* 1; 109 *Id.* 125; 110 *Id.* 264; 118 *Id.* 598; Kirby's Digest, § 7821.

2. The contract was ratified by the directors. 81 Ark. 143; 105 *Id.* 109; 110 *Id.* 264; 67 *Id.* 236.

3. Taking the instructions as a whole the case was fairly submitted to the jury. 6 Ark. 86, 428; 10 *Id.* 138; 17 *Id.* 385; 26 *Id.* 309; 53 *Id.* 468; 90 *Id.* 339; 36 *Id.* 449; 109 *Id.* 129; 118 *Id.* 599.

4. Usages and customs may be proven. 69 Ark. 313; 85 *Id.* 568; 84 *Id.* 382; 81 *Id.* 549; 89 *Id.* 591; 91 *Id.* 310.

SMITH, J. Appellee was the plaintiff below and alleged in her complaint that she had entered into a written contract with School District No. 69 of Yell county whereby she agreed to teach school for the period of three months for the consideration of $45.00 per month, and she testified, in support of the allegations of her complaint, that she performed the conditions of this contract by teaching school, and upon the trial she recovered judgment for $135.00, the amount sued for.

It was admitted upon the trial that appellee taught the school, but it was denied that she had any legal contract authorizing her so to do. This issue was submitted to the jury under proper instructions, one of

which was requested by appellant, which declared the law to be that a valid contract could not be made except at a meeting of the board of directors at which all the directors were present or of which all had notice; and it is urged by appellant that there is not sufficient evidence to support the finding that such a meeting was held. The proof shows this to have been a small district, and that there was no regular time for the meeting of the directors, and that no record was made or kept of the proceedings of the meetings that were held. The directors of the district were named Grant, Beck and Wallace, and the contract sued on was signed only by Grant and Beck. Wallace refused to sign, and testified that no meeting of the directors was ever held. Grant testified, however, that he undertook several times to call a meeting, but was unable to secure Wallace's attendance, and that he sent notice of a meeting on three different occasions by appellee, and sent notice of another meeting by Wallace's son. Appellee testified that she delivered these messages. Wallace attended the meeting of which he was notified by his son, but on account of the absence of Beck no business was attended to at that time, but he did not attend any other meeting.

(1) Grant testified that appellee had taught the winter school, and had given satisfaction, and had made application for the summer school, and that he and Wallace discussed her application and that Wallace stated he preferred having a man and could get one for $5.00 less per month than appellee asked, and that at one of the meetings which he had called, and which Wallace did not attend, he and Beck agreed to give the school to appellee, but did not agree on the price to be paid, that this question was left open to be determined later, and that a written contract was prepared on blanks furnished for that purpose, and that all the blank spaces were filled except the one relating to the amount of salary, and that later the amount of $45.00 per month was written into the contract, and he and Beck signed it, but Wallace refused to do so. We think

this evidence legally sufficient to support the finding that there had been a meeting of the directors.

(2) The question of ratification of the contract was also submitted to the jury, and upon this issue it was shown that, upon the day appointed by the contract for opening the school, Wallace appeared and notified appellee that a man named Tucker had been employed to teach the school and would do so and that she had no legal contract. It was shown, however, that Tucker had not been employed to teach the school and had no license which would have authorized him so to do. It is also shown that the other directors ordered the school to proceed and that while Wallace did not send his children to school, nearly all the other patrons of the school did send their children, and that the teacher's register was received by the directors at the close of the term and was used by them in making up the annual report which they were by law required to make, and Wallace admitted having stated to appellee before the school was taught, "If the other directors hired you, I cannot contrary them."

While this evidence is not all undisputed, it is legally sufficient, if accepted by the jury as true (and we must assume that this was done), to support the finding of ratification on the part of the district. *School District No. 56* v. *Jackson*, 110 Ark. 262.

The judgment of the court below is affirmed.

APPENDIX

I.

OPINIONS NOT REPORTED.

Bittick *v.* Crittenden; appeal from Chicot Chancery Court; Z. T. Wood, Chancellor; affirmed November 27, 1916, *per* Hart, J.

Childress *v.* Boyett; appeal from Hempstead Circuit Court; George R. Haynie, Judge; affirmed December 4, 1916, *per* Humphreys, J.

Clements *v.* Terrell, Exrx.; appeal from Hempstead Circuit Court; Geo. R. Haynie, Judge; affirmed December 11, 1916, *per* Hart, J.

Crigler *v.* Alma Cash Store; appeal from Crawford Circuit Court; James Cochran, Judge; affirmed December 4, 1916, *per* McCulloch, C. J.

Gage & Co. *v.* Hall, Admr.; appeal from Cross Circuit Court; W. J. Driver, Judge; affirmed November 27, 1916, *per* Hart, J.

Godfrey *v.* Bradley Lumber Co.; appeal from Bradley Chancery Court; Z. T. Wood, Chancellor; affirmed November 13, 1916, *per* Smith, J.

Goldstein *v.* Briggs; appeal from Boone Chancery Court; T. H. Humphreys, Chancellor; reversed January 8, 1917, *per* McCulloch, C. J.

Harris *v.* Ring; appeal from Conway Circuit Court; A. B. Priddy, Judge; affirmed December 18, 1916, *per* Humphreys, J.

Minnequa Cooperage Co. *v.* Davidson; appeal from Hot Spring Circuit Court, W. H. Evans, Judge; affirmed January 1, 1917, *per* Hart, J.

Parsons *v.* Russ; appeal from Carroll Chancery Court, Western District; T. H. Humphreys, Chancellor; affirmed November 20, 1916, *per* Smith, J.

Roach & Stansell *v.* Jacks; appeal from Lee Chancery Court; E. D. Robertson, Chancellor; affirmed January 8, 1917, *per* Wood, J.

Stackhouse *v.* Johnson; appeal from Randolph Circuit Court; J. B. Baker, Judge; affirmed January 1, 1917, *per* Wood, J.

Williams *v.* Thweatt; appeal from Prairie Chancery Court; John M. Elliott, Chancellor; affirmed December 4, 1916, *per* Wood, J.

II.

CASES DISPOSED OF ON MOTION.

W. M. Johnson *v.* E. D. Russell, trading as the Arkansas Brokerage Company; Pulaski Circuit Court, Third Division; G. W. Hendricks, Judge; advanced and affirmed as a delay case, with penalty, October 23, 1916; *per curiam.*

Chicago Rock Island & Pacific Railway Company *v.* Frank McMath; Calhoun Circuit Court; C. W. Smith, Judge; settled and appeal dismissed on appellant's motion, October 23, 1916; *per curiam.*

W. R. Russell, as Sheriff and Eli Brooks *v.* A. Z. Schnabaum; Randolph Chancery Court; George T. Humphreys, Chancellor; appeal dismissed by consent October 23, 1916; *per curiam.*

D. W. Cone *v.* C. A. Herrick; Pulaski Circuit Court, Third Division; G. W. Hendricks, Judge; affirmed on appellee's motion pursuant to rule seven, October 23, 1916; *per curiam.*

Mark McCain, Henry McCain and Joe McCain *v.* The State of Arkansas; petition for certiorari and for bail; Nevada Circuit Court; George R. Haynie, Judge; petition denied November 6, 1916; *per curiam.*

A. L. Wallen *v.* The State of Arkansas; Cross Circuit Court; W. J. Driver, Judge; appeal dismissed for failure to comply with the condition of the statute in misdemeanor appeals, November 6, 1916; *per curiam.*

Reuben Harpole *v.* The State of Arkansas; Perry Circuit Court; Guy Fulk, Judge; appeal dismissed on appellant's motion, November 13, 1916; *per curiam.*

Joe Noll *v.* The State of Arkansas; Franklin Circuit Court, Ozark District; James Cochran, Judge; three cases; appeals dismissed on appellant's motion, November 27, 1916; *per curiam.*

J. O. Sallee as Treasurer of Running Lake Drainage District *v.* J. B. Baker; procedendo to Randolph Circuit Court; J. B. Baker, Judge; writ of mandamus denied, December 4, 1916; *per curiam.*

Henry Roberson *v.* The State of Arkansas; Columbia Circuit Court; C. W. Smith, Judge; submission set aside and appeal dismissed on information furnished that appellant had been pardoned; December 11, 1916; *per curiam.*

Bob Fitzhugh *v.* The State of Arkansas; Cross Circuit Court; R. H. Dudley, special Judge; appeal dismissed on information furnished that appellant had been pardoned, December 11, 1916; *per curiam.*

Garrettson-Greeson Lumber Company *v.* Home Life & Accident Company; Dallas Circuit Court; motion for rule on clerk to file transcript; motion denied, no appealable order or final judgment appearing in the transcript tendered, December 18, 1916; *per curiam.*

Alfred Wilson *v.* The State of Arkansas; Jefferson Circuit Court; W. B. Sorrells, Judge; appeal dismissed for failure to comply with condition of the statute in misdemeanor appeals December 18, 1916; *per curiam.*

E. W. Hood *v.* Lena M. Hood; Pulaski Chancery Court; John E. Martineau, Chancellor; appeal dismissed on appellant's motion, December 18, 1916; *per curiam.*

A. N. Cole *v.* Lora Goolsby, *et al.;* Sebastian Chancery Court; W. A. Falconer, Chancellor; appeal dismissed on appellees' motion, pursuant to rule seven, January 8, 1917; *per curiam.*

J. H. Frost *v.* Lora Goolsby, *et al.;* Sebastian Chancery Court; W. A. Falconer, Chancellor; appeal dismissed on appellees' motion, pursuant to rule seven, January 8, 1917; *per curiam.*

Jacob M. Dickinson, Receiver of Chicago, Rock Island & Pacific Railway Company *v.* Ernest Pantone; Perry Circuit Court; G. W. Hendricks, Judge; settled and appeal dismissed by consent, January 8, 1917; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* Sallie A. Smith; Nevada Circuit Court; George R. Haynie, Judge; settled and appeal dismissed pursuant to stipulations of the parties, January 15, 1917; *per curiam.*

M. Boyer *v.* The State of Arkansas; Chicot Circuit Court; Turner Butler, Judge; appeal dismissed on information furnished that appellant had been pardoned, January 15, 1917; *per curiam.*

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devise to wife for life with remainder to a certain daughter, with certain qualifications, *held* to convey a fee simple estate to the daughter. *Id.*
mortgage by daughter. *Id.*
life estate with power of disposition conveys fee, when. *Thurman* v. *Symonds*, 216.
devise of fee, with devise over, *held* to pass the fee. *Wilkins* v. *Eanes*, 339.
construction of; estates to be vested early. *Id.*
devise of land to A. and B. with power to rent or sell, giving proceeds to certain other parties, did not give a fee in the lands to the latter. *Williams* v. *Norton*, 503.
presumption against partial intestacy will not be indulged, when. *Id.*
intestacy; inheritance by heir. *Id.*

WORK AND LABOR:

legal hours in saw and planing mills. *State* v. *Arkansas Lbr. Co.*, 107.

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