

ARKANSAS REPORTS

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CASES DETERMINED

IN THE

Supreme Court of Arkansas

FROM

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JAMES V. JOHNSON

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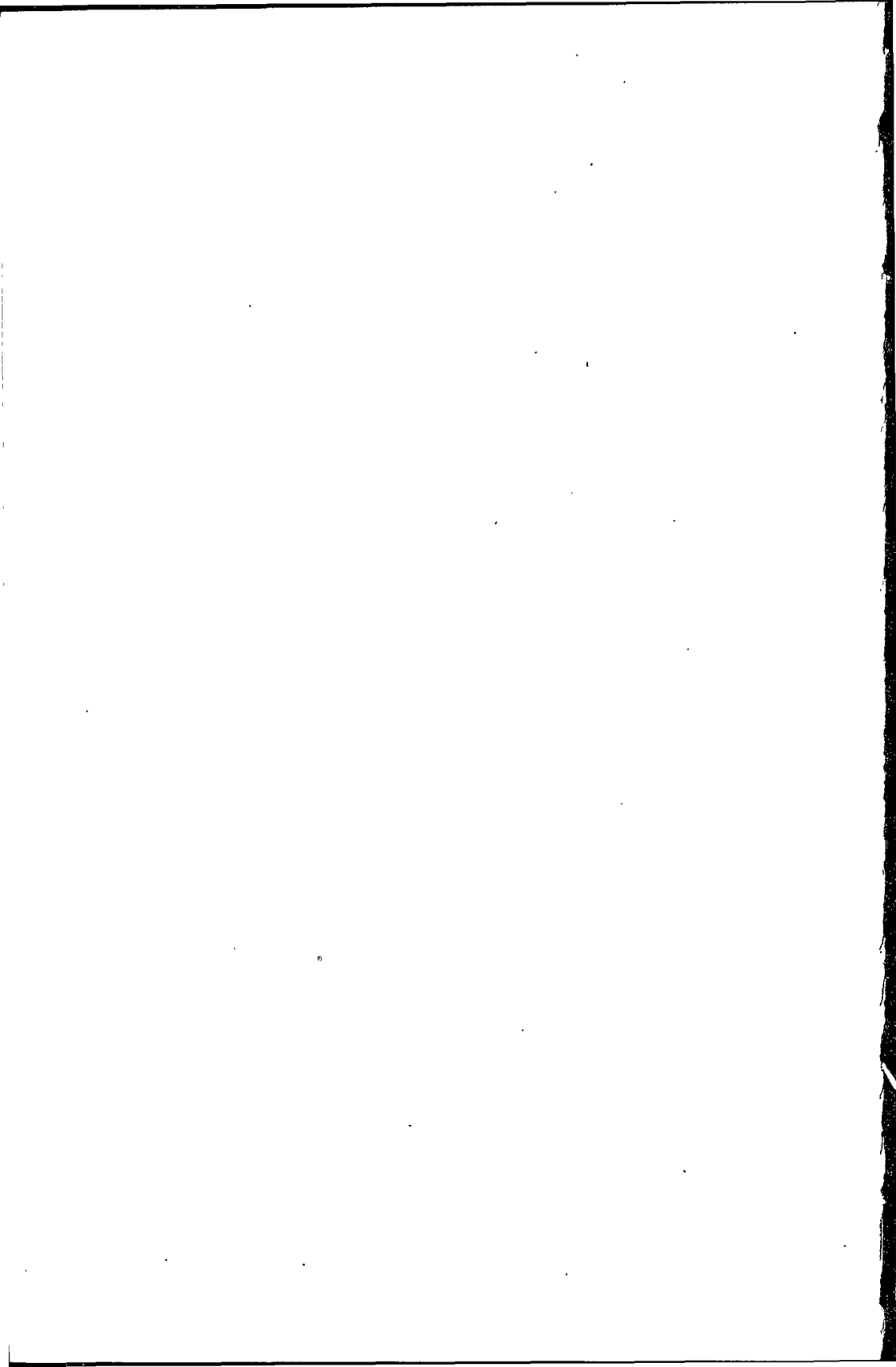
OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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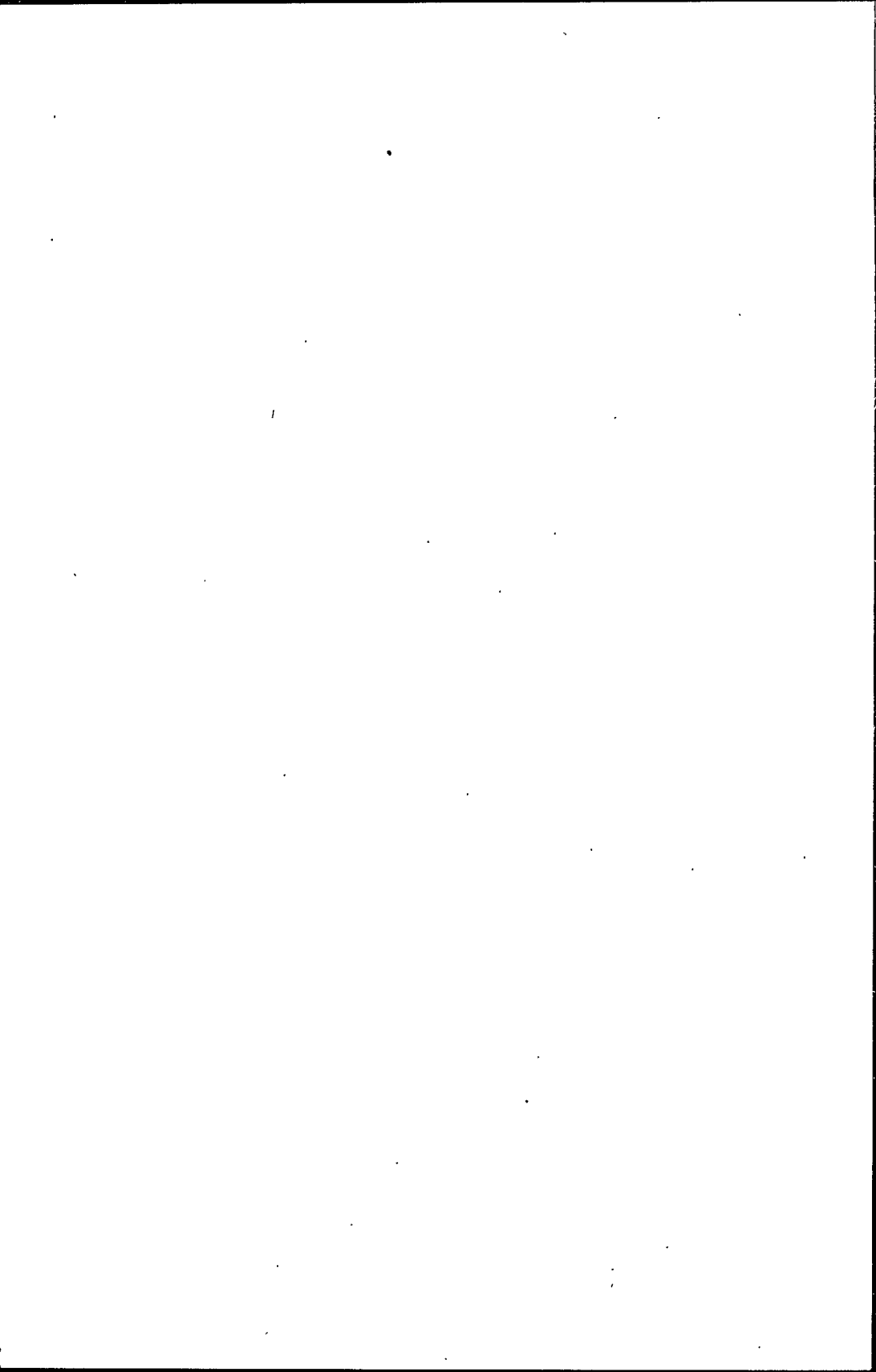
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CASES DETERMINED
IN THE
SUPREME COURT OF ARKANSAS

ABBOTT, ADMINISTRATOR, *v.* JOHNSTON.

Opinion delivered May 28, 1917.

1. VENDOR'S LIENS—FORECLOSURE—LIMITATIONS.—In suits to foreclose a vendor's lien where the legal title has been conveyed to the vendee, the lien is barred when the debt is barred.
2. ADMINISTRATION—STATUTES OF LIMITATION AND NON-CLAIM—WAIVER.—An administrator is without authority to waive either the statute of limitations or of non-claim.
3. LIMITATIONS—VENDOR'S LIEN—PAYMENT OF IMPROVEMENT TAXES.—Although his vendor's lien is barred by limitations, where the lienor paid improvement taxes on the land in an attempt to preserve his lien, he is entitled to a lien on the land for the amount of these taxes.

Appeal from Sebastian Chancery Court, Fort Smith District; *Wm. A. Falconer*, Chancellor; reversed.

Read & McDonough, for appellants.

1. The action is barred by both the statutes of non-claim and limitations. The claim was never probated and hence barred by non-claim. Kirby's Digest, § 110, as amended by Act May 28, 1907; 9 Ark. 411; 14 *Id.* 246; 18 *Id.* 334; 23 *Id.* 604; 39 *Id.* 577; 97 *Id.* 492; 99 *Id.* 523; 112 *Id.* 6; 92 *Id.* 522; 94 *Id.* 60; 65 *Id.* 1. An administrator has no right to pay a debt not duly probated. 65 Ark. 1; 14 *Id.* 246.

2. There was no *valid* agreement between appellee, administrator, and Johnston to extend the payment of the note. Payment of past due interest is not a sufficient consideration.

3. A vendor's lien can not be enforced after bar by the statute of non-claim. 92 Ark. 522; 28 *Id.* 267; 41 *Id.* 523, etc.

4. The five-year statute of limitations is a complete bar. There was no act of defendants, or either of them, to remove the bar, and the administrator could not waive the bar. 65 Ark. 1; 23 *Id.* 604; 112 *Id.* 6, etc.

5. Plaintiff is not entitled to recover for taxes and assessments paid by him. The payment was voluntary. The note and claim were barred. 46 Ark. 167; 86 *Id.* 175.

Hill, Fitzhugh & Brizzolara, for appellees.

1. A stronger case of estoppel and waiver than this can not be conceived. 92 Ark. 522 was not decided until Nov. 29, 1909. The case in 112 Ark. 6 is clearly distinguishable from this. This case falls within the rule in 18 Cyc. 472.

2. Plaintiff is clearly entitled to recover for the taxes and assessments paid by him, \$137.88. He was not a volunteer, but paid same in good faith to protect his lien. 47 Ark. 62, 66; 99 Pac. 304.

McCULLOCH, C. J. Appellee, W. J. Johnston, instituted this action in the chancery court of Sebastian County, Fort Smith District, against the administrator and heirs of W. R. Abbott, deceased, to foreclose a vendor's lien on a certain tract or lot of real estate in the city of Fort Smith, which appellee conveyed to said decedent on February 28, 1907. The action was instituted as aforesaid on December 14, 1915, and the only defense offered is a plea of the statute of non-claims and of the five-years statute of limitations. The note in suit was for the sum of \$1,000.00, executed by the decedent, W. R. Abbott, contemporaneously with the execution of the deed to him by appellee, and was due and payable two years after date. Abbott died in June, 1907, leaving a large estate, considerably encumbered, however, with debt, and still being the owner of the lot conveyed to him by appellee. The total consideration for the conveyance

to appellee by Abbott was the sum of \$2,500.00, of which \$625.00 was paid in cash, and Abbott executed the note in suit, and also another note for the sum of \$875.00, payable one year after date. Letters of administration on the estate of said decedent were duly issued by the probate court of Sebastian County to C. W. Jones, and he proceeded with the administration of the estate.

Appellee did not probate either of the notes against the estate, but the administrator paid the first note without the same having been probated, and also made two interest payments on the note in suit. The first interest payment was made by Jones on March 15, 1909, when he paid the interest for two years, and the second payment was made by the administrator on June 18, 1910, when he paid \$80.00, the interest for one year, up to February 28, 1911. It is alleged in the complaint, and the evidence shows, that at the time those interest payments were made the administrator was endeavoring to conserve, as best he could, the interests of the estate of the decedent, and that he requested appellee not to institute proceedings to foreclose the vendor's lien on the land until the expiration of the period for which the interest was paid, and that appellee acceded to that request and agreed that he would not seek to foreclose his lien until after the period covered by the interest payments. The various payments made by Jones as administrator were reported to the probate court in his annual accounts current, and those accounts were approved by the court. Jones filed with the probate court his final account current as administrator on August 16, 1911, and in that account appears an item among the liabilities of the estate as follows: "W. J. Johnston, lien note, balance due \$1,000.00 on note not probated;" and in the list of assets of the estate the lot purchased by the decedent from appellee was described in connection with the statement that "there exists a lien note of \$1,000.00" In connection with his account the administrator tendered his resignation, and there is in the present record a copy of the order of the probate court showing the appearance of

said administrator and the widow and heirs of said decedent, by their several attorneys, that the widow withdrew her objections previously filed against said account current, and that there being no other objections, the account current was approved by the court, and the resignation of Jones as administrator was accepted, and that S. H. Abbott, the present administrator in succession, was appointed.

It is thus seen that both the statute of non-claims and five years statute of limitations bar appellee's right of recovery, if applicable under the facts of the present case. Learned counsel for appellee insist that neither are applicable on account of the action of the administrator in making payments on the notes, notwithstanding the fact that the same had not been probated in accordance with the statute, and that by entering into an agreement with appellee for an extension of time, and the conduct of the heirs in consenting to the approval by the probate court of the account current filed by said administrator containing a report of said payments, the statute bar was waived. The Act of March 25, 1889 (Kirby's Digest, § 5399), relates only to limitation of actions to foreclose mortgages or deeds of trust, and has no application to actions to foreclose an equitable lien held by a vendor of real estate. Limitations on actions of the latter class come within other statutes. In the case of *Linthicum v. Tapscott*, 28 Ark. 267, it was held (quoting from the syllabus) that "a vendor's lien is a remedy or security, not a right of property, and does not vary the nature of the debt or take it out of the operation of the statute of non-claim, and can not be enforced after the bar of the statute has attached to the debt." The case of *Allen v. Smith*, 29 Ark. 74, seems to conflict with the rule announced in the case just cited, for the court there said that in proceedings to foreclose a vendor's lien it was unnecessary to probate the claim before the commencement of the suit. In the latter case, however, the court was considering, not the bar of the statute of non-claim, but the question of necessity for probating the claim before instituting an

action to enforce the lien. It does not appear from the opinion whether or not the time for probating the claim against the estate of decedent had expired, but the court merely held that if the proper affidavit of non-payment was made before the commencement of the suit, it was not essential that the claim should first be allowed by the probate court. The apparent conflict, therefore, disappears upon a careful analysis of the ruling of the court in the two cases. At any rate, the law announced in *Linthicum v. Tapscott*, *supra*, is the settled rule in this State, and has been subsequently followed, and the same reasons stated in that case are given for the rule. For instance, in *Waddell, Admr. v. Carlock*, 41 Ark. 523, Mr. Justice EAKIN, speaking for the court, in distinguishing the rule of limitations with respect to suits to foreclose vendor's liens where the legal title had been conveyed to the vendee, and in cases where the vendor had merely executed a title bond and reserved the legal title as security, said:

“Although the legal title vested in a mortgage, and that retained by a vendor by title bond, are securities for money, and dissolve away on payment; yet they are something more than the equitable lien raised by a court of equity. They, to some extent, give a right in the property itself by virtue of a legal title, which can not be taken from them, until the vendor fulfills his own obligations. They are legal liens, and may outlive the debt. That is, may be enforced after the debt is barred by the statute, but not after it has been satisfied. The possession of the mortgagor, or vendee is consistent with this *jus in re* of the creditor, and the bar to its enforcement does not arise until the person in possession has, for the statutory period, asserted a right to the land, adverse to the lien, or done acts from which his intention to claim adversely may be implied. * * * The equitable vendor's lien is of a different nature. It rests upon no legal or contractual right, and is supported by no legal estate. It is the pure creation of the courts of equity, having really no substantial existence until the courts

are invoked to declare it, for the purpose of satisfying a debt. They will not raise it to galvanize a corpse, and revive a debt already declared dead by the policy of the law."

(1) The effect of the rule announced and adhered to by this court is that in suits to foreclose vendor's liens where the legal title has been conveyed to the vendee, the lien is barred when the debt is barred. That is the rule now in suits to foreclose mortgages as a result of the statute already mentioned, passed to change the rule with respect to such foreclosures.

(2) The first contention is that the act of the administrator in making payments on the note and in entering into an agreement with appellee for an extension of time waived the operation of each of the statutes pleaded. This contention would be sound if the administrator possessed authority to waive the operation of the statute, but it has been decided by this court with respect to both the statute of non-claim and to the general statute of limitations that an administrator has no such authority. The court so decided with regard to the waiver of the statute of non-claims in the case of *Rhodes v. Cannon*, 112 Ark. 6, and as to a waiver of the general statute of limitations in *Cox v. Phelps*, 65 Ark. 1. There seems to be very little authority on the question of power of administrator to waive the statute of limitations, and there is conflict in the little authority we have on that subject, but this court has taken a position on the question, and we must treat it as settled in this State that an administrator has no authority to waive the operation of the statute of limitations. In the opinion in *Cox v. Phelps*, *supra*, it was first pointed out that the basis of the rule that partial payments revive a debt barred by limitations or form a new point from which the statute will begin to run as to debts not then barred, is that the payments are treated as "an admission of the continued existence of the debt and an implied promise to pay the balance." Then the opinion proceeds to hold that since the administrator has no authority under the statutes of the State to enter into

an express agreement for the waiver of the period of limitations, it follows that an agreement can not be implied from a payment made by him on the debt. The question seems to have been thoroughly considered by the court at that time, and there was a dissenting opinion filed, holding that the payments by the administrator operated as a waiver of the statute and formed a new point for the running of the statute. The doctrine of our decision on the subject is in accord with a statement of the law by Mr. Wood in his work on Limitations (Vol. 1, § 101), where the law on the subject is stated as follows:

“Not only must the debt be identified, and the payment be shown to be a part payment, but * * * It must have been made by the debtor in person, or by some one authorized by him, to make a new promise on his behalf. A part payment, whether made before or after the debt is barred by the statute, does not revive the contract, unless made by the debtor himself, or by some one having authority to make a new promise on his behalf for the residue.”

The question is, therefore, settled against the contention of appellee, and we must hold, following the former decisions, that an administrator has no authority to waive the operation of either of the two statutes pleaded.

There being an entire want of authority on the part of the administrator to deal with the matter in any agreement with appellee with respect to the extension of the debt, a mutual mistake of the two parties to such an agreement would not afford grounds for equitable relief against the operation of the statute, nor would it be sound to hold, as contended by counsel for appellee, that the heirs waived the operation of the statute by consenting to the approval by the probate court of the administrator's account current, containing the references to the payments on the note and the balance due thereon. The heirs were not parties to the agreement with appellees for extension of time, nor were they connected with it in any way that would bind them. They did not occupy

any situation with relation to appellee which imposed on them the duty of repudiating the alleged agreement between appellee and the administrator. It is not alleged, or proved, that they even knew that the administrator entered into an agreement with appellee for an extension of the time or a waiver of the statute of non-claim. All that the heirs did was to refrain from filing exceptions to the accounts current and to consent that the final account should be approved by the probate court. We discover nothing whatever in that act which would call for the application of the equitable doctrine of estoppel so as to prevent the heirs from pleading the statute of non-claim, and the statute of limitations.

There is no suggestion in the record of lack of merit in the claim of appellee except that the enforcement of his lien is barred by the statute of limitations. The statutes on that subject apply with full force to the most meritorious claims, and courts can not refuse to give the statute effect merely because it seems to operate harshly in a case involving an obviously meritorious claim. Our conclusion, therefore, is that the chancellor erred in declaring a lien in appellee's favor for the amount of the note.

(3) It appears further that the administrator failed to pay the improvement taxes on the lot in question, and that appellee has since his conveyance to the decedent, paid said assessments, amounting in the aggregate to the sum of \$137.88, and the chancellor decreed appellee a lien on the lots for that amount. The payments were made by appellee to protect the lien on the property and the fact that his remedy for the recovery on his note is barred does not prevent him from recovering the amount paid out in protection of that lien.

We are of the opinion, therefore, that the chancellor was correct in decreeing a lien for the amount paid out for the improvement taxes, and this is so irrespective of the statutory bar against recovery on the note. The decree is, therefore, reversed, and the cause is remanded with directions to enter a decree dismissing the com-

plaint as to recovery on the note, but decreeing in favor of appellee for amount paid out by him in discharge of improvement assessments on the property. It is so ordered.

SMITH v. DIERKS LUMBER & COAL COMPANY.

Opinion delivered May 28, 1917.

1. TIMBER DEEDS—RIGHT TO REMOVE AT CONVENIENCE.—A timber deed provided that the vendee could cut and remove the timber at its convenience, *held*, the vendee was under the duty to cut and remove the timber within a reasonable time.
2. TIMBER DEEDS—"REASONABLE TIME."—Eight years held more than a reasonable time in which to begin cutting timber, although defendant's mill had burned, and the price of lumber had declined.

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

The appellants *pro se*.

1. There is no time limit in the deed, and the law fixes a reasonable time. 93 Ark. 10; 99 *Id.* 112; 124 *Id.* 574; 77 *Id.* 116. Defendants have had such reasonable time.

2. The burning of the mill, stringency in money market, falling market or misfortune does not excuse defendant. 124 Ark. 187; 114 *Id.* 421; 116 *Id.* 393; 93 *Id.* 452; 61 *Id.* 315; *Polzier v. Beene*, 118 Ark. 94. The deed should have been canceled.

D. B. Sain, for appellee.

1. The decree of the chancellor has all the presumptions in its favor and it must be made very clear that it was wrong.

2. The contract here differs materially from those in the cases cited by appellants. Here it is agreed that the timber might be removed *at the convenience* of the company.

3. The timber could not be reached and cut without financial loss, and this, under the contract, excused the delay.

STATEMENT BY THE COURT.

Appellants, who are the widow and heirs at law of James Smith, deceased, instituted this action in the chancery court against Dierks Lumber & Coal Company to cancel a timber deed executed to it by James Smith. On the 8th day of March, 1900, James Smith executed to the Dierks Lumber & Coal Company a deed to all the merchantable timber on one hundred and twenty acres of land owned by him in Howard County, Arkansas. The deed provided that the timber might be cut and removed from the lands at the convenience of the Dierks Lumber & Coal Company. At the time of the execution of the deed, the Dierks Lumber & Coal Company owned a large mill at De Queen, Arkansas, with a tramroad extending out into the woods for a distance of about thirty miles. The timber in question was situated a little beyond the end of the tramroad. In May, 1908, the defendants' mill at De Queen was destroyed by fire and has never been rebuilt. At the time the mill was destroyed, the tramroad had been extended from the west to within 250 yards of the land in question and, according to the testimony of the officers of the lumber company the timber would have been cut and removed from the land within sixty days if the fire had not occurred. They also testified that they had not rebuilt the mill owing to a decline in the price of lumber, which occurred soon after the mill was destroyed by fire, and to the further fact that they had not been financially able to secure the funds to rebuild the plant and that it would soon again be in operation and that the timber would be removed.

The court found in favor of the defendant company and the complaint of the plaintiffs was dismissed for want of equity. The case is here on appeal.

HART, J., (after stating the facts). The first question raised by the appeal is the construction to be given to the timber deed in question. It will be remembered

that the deed contains a clause that the company may cut and remove the timber at its convenience.

(1) In the case of *Fletcher v. Lyon*, 93 Ark. 5, the court held that a timber deed which conveys "all timber, standing or fallen, with the right to cut and remove same at any time," contemplates that the timber should be removed within a reasonable time and without unreasonable delay. That case is controlling here and we hold that it was the duty of the company under the deed in question to cut and remove the timber within a reasonable time.

(2) The mill plant of the company was destroyed by fire in May, 1908. According to the testimony of the officers of the company, it had extended its tramroad to within 250 yards of the land in question and the timber would have been cut and removed from it within sixty days if the fire had not occurred. The present action was commenced on April 11, 1916, and at that time the company had not rebuilt its mill. The delay is accounted for by the officers of the company on the ground that the company could not procure money with which to rebuild the mill on account of its size and cost and from the further fact that soon after the fire occurred there was a fall in the price of lumber and it has not since been profitable to operate a mill. These matters constituted no excuse for the nonperformance of the contract on the part of the company.

In *Ingram Lumber Co. v. Ingersoll*, 93 Ark. 447, the court held that a party to a contract may not excuse his failure to perform it by showing the stringency of the money market where the contract did not provide for a release in such a contingency.

Again in *Newton v. Warren Vehicle Stock Co.*, 116 Ark. 393, the court held that where a company contracted to purchase and remove timber within a certain time, the fact that misfortune overtook it will not excuse it from liability for a breach of the contract.

In the case of *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776, in discussing a precisely similar question the

court said, "The accident of a falling market or undue delay in rebuilding the mill after its destruction; these, and similar disturbances, should exert no influence with the jury. But when the mill was destroyed by fire, a reasonable time was allowed for its reconstruction."

In the present case eight years was allowed to elapse before the company commenced to rebuild its mill. This was an unreasonable time.

It follows that the chancellor erred in dismissing the complaint of the plaintiffs for want of equity. For the error that decree must be reversed and the cause will be remanded with directions to the chancellor to grant to the plaintiffs the relief prayed for in their complaint. It is so ordered.

THE UNITED ASSURANCE ASSOCIATION *v.* FREDERICK.

Opinion delivered May 28, 1917.

1. BENEFIT INSURANCE—AGE OF APPLICANT—KNOWLEDGE OF AGENT.—The knowledge of the agent of a benefit insurance company, who wrote the application, as to the applicant's age, is imputed to the company.
2. INSURANCE—WHO MAY BE BENEFICIARY IN LIFE POLICY.—When acting in good faith the insured may name whom he pleases as beneficiary in a life policy, whether the beneficiary has an insurable interest in his life or not.
3. BENEFIT INSURANCE—PENALTY AND ATTORNEY'S FEE.—In an action on a benefit certificate, *held*, it was improper to assess a penalty and attorney's fee against the defendant.
4. BENEFIT INSURANCE—NOTICE OF ASSESSMENTS DUE.—In the absence of an express provision in the contract, the mere posting of a notice that assessments are due is not sufficient, where the contract provides for a forfeiture of the certificate where assessments are not paid.
5. BENEFIT INSURANCE—NOTICE OF ASSESSMENTS DUE.—Where deceased held a certificate in appellant insurance order, *held*, the order would be liable on the same, if the deceased, or some one for him, paid all assessments against him, of which he received notice.

Appeal from Jefferson Circuit Court; *W. B. Sorrels*, Judge; modified and affirmed.

W. P. Strait, for appellant.

1. The court committed reversible error in giving instruction No. 1 for appellee as to *notice*. It throws the responsibility on the appellant to get this notice to, and into the hands of the assured or beneficiary. The contract does not require this and if the notice was placed in the mails in the ordinary way, properly addressed, the association discharged its duty under the contract. *Mutual Aid Union v. Wadley*, 125 Ark. 449. The contract provides for notice by *ordinary mail*. The testimony shows that the notice was mailed as provided, and there is no testimony that it was not received. The instructions asked by appellant are almost verbatim copies from the cases above cited. The burden was on appellee to show performance of all the provisions of the contract.

2. It was error to refuse No. 9 asked by appellant, as to applicant's age and health. The statement as to age was material and a warranty. 3 Joyce on Ins., § 1970; Cooley's Briefs on Insurance, 1130; May on Ins., § 156; 82 Ark. 400; 150 S. W. 393; 58 *Id.* 528; 96 *Id.* 495. If he did not know his age or guessed at it, the responsibility was on the applicant and not the insurer. 58 Ark. 528; 89 *Id.* 471; 84 *Id.* 57. The fact that the agent encouraged him in the erroneous statement does not relieve him. 58 Ark. 277.

3. The beneficiary had no insurable interest in the life of the assured. 98 Ark 52; *Ib.* 340; 104 U. S. 775.

4. It was error to assess the penalty and attorney's fees. The statute is purely penal and should be strictly construed. Besides fraternal benefit associations are exempt from the general insurance laws of this State. Kirby's Digest, § 4352; 104 Ark. 423. The assessment is without warrant of law and is error.

Taylor, Jones & Taylor, for appellee.

1. Every assessment was paid of which notice was received. There is no proof in the record that any member of his circle had died which would authorize an assessment and a forfeiture, if not paid within the time

provided. Forfeitures are not favored in law and when invoked all prerequisites necessary to sustain the forfeiture must be affirmatively shown. 2 Bacon Life & Acc. Ins. (4 ed.), § 484; 2 S. W. 495; 68 S. E. 842.

2. There is no evidence to show a forfeiture for nonpayment of assessment, whether notice was given or not, and plaintiff was entitled to a peremptory instruction. But the court submitted the question to the jury by instruction No. 1, and it is correct and properly given. Authorities, *supra*.

3. This instruction was not specifically objected to and appellant can not now complain. 78 Ark. 247; 84 *Id.* 81; 92 *Id.* 472; 93 *Id.* 509; 96 *Id.* 184. But the instruction is correct, as forfeitures are not favored and the policy is construed most strongly against the company. 113 Ark. 174; 58 *Id.* 528; 86 *Id.* 115. See also Bacon Life & Acc. Ins. (4 ed.), Vol. 2, § 489. The members must be notified, either orally, or by delivery through the mail or otherwise. 50 Mich. 273; 14 N. Y. Supp. 76.

4. There was no misrepresentation as to age or health. The agent made the estimate of age himself. 106 Ark. 91; 113 *Id.* 174; 81 *Id.* 205; 71 *Id.* 295; 111 *Id.* 435.

5. There was no proof as to whether the beneficiary had any insurable interest in the life of insured or not. A person may take out insurance on his own life and name anyone he pleases as beneficiary. 116 Ark. 527; 77 *Id.* 60.

6. The damages and attorney's fees were properly assessed. 86 Ark. 115; 92 *Id.* 378; Act 115 Acts 1905. This company is not exempt under Kirby's Digest, § 4352, and 104 Ark. 417.

SMITH, J. The appellant is a mutual insurance society organized under the laws of this State for the relief of its members, and for the mutual aid of beneficiaries of such members in case of death of the member. It is not based upon any subscribed or paid-up capital stock, either in whole or in part, but alone upon membership dues and *pro rata* assessments upon its members. Its business is conducted substantially as follows: A small

membership fee, or policy fee, is charged the applicant upon becoming a member and receiving a certificate thereon. When such party is accepted as a member, and the policy or beneficiary certificate issued, the member is assigned to a circle, the membership being divided into circles of not exceeding 1,000 members each. In the event of the death of any member of any given circle, all the members in said circle are assessed a certain stipulated amount, according to the age and length of time such member has belonged to the association, from the proceeds of which the beneficiary named in the certificate of insurance receives payment of the value of the policy. The application, by-laws, and beneficiary certificates of the association all constitute a part of and, together, make up the contract between the parties. No medical examinations are made previous to accepting a member, but the statements of the applicant contained in his application are made warranties and the truth thereof a condition precedent to the right of recovery.

Ben Hegwood was a member of the appellant company and, as such, held a policy payable to Adam Frederick, the appellee, who had no insurable interest in the life of the assured.

Upon the death of Hegwood, appellant refused to furnish necessary blanks for proof of death, it being asserted by the company that the member stood suspended at the time of his death for the nonpayment of an assessment, due notice of which had been given by mail. The application and certificate provided that notice of assessment should be given Frederick, and he testified that he had paid all assessments of which he had ever received notice. The application contained the following provision in regard to notice:

"It is understood that the value and conditions of this policy to be issued on this application shall be as follows: * * * It is understood that the secretary of the United Assurance Association is to notify said applicant, by ordinary mail, to the last known address and to that stated, of any death occurring in the circle of

which policy-holder is a member, which will make applicant liable for assessment, and of the proper amount of the assessment due thereon, and prompt payment of the same must be made within fifteen days to the Home Office, and failure on the part of appellant to pay the assessment within thirty days from date of notice, as provided by the by-laws, forfeits and voids this policy."

The policy contained the following language upon this subject:

"Upon the death of any member of the above named circle, the within named member shall within thirty days from the date of the notice thereof, which the secretary of this association shall have mailed to the within named member, pay to this association an assessment which shall be equal to the sum of one cent for each year of the age of the within named member at the time of the issuance of this policy plus the sum of one cent for each month of time the within named member has been a member of this association, provided, that with the eightieth month from the date of this policy the maximum assessment shall have been reached and will amount to \$1.34."

Upon the issue of notice, the court gave the following instruction:

"1. If you believe from a fair preponderance of the evidence that the defendant issued unto Ben Hegwood the certificate of membership introduced in evidence, and that all assessments of which he received notice were paid by him, or some other person for him, and that the said Ben Hegwood died on the 18th day of July, 1916, then your verdict should be for the plaintiff in the sum provided in the certificate of membership, together with interest thereon at the rate of 6 per cent per annum from the 22d day of August, 1916, to date."

The correctness of this instruction presents the principal question in the case, although other questions are presented, and these latter questions will be first considered.

(1) The by-laws of the order provided that no certificate should be issued to any person who was over 55 years of age. And there was offered in evidence the marriage record of Hegwood, which showed that on November 14, 1898, he was 45 years old, and, if this statement of his age was true, he was beyond the insurable age permitted by the appellant company on December 12, 1914, when the certificate sued on was issued. But the proof shows that Hegwood made no statement of his age, and the agent of the company who wrote the application testified that, from questions which he asked Hegwood, he estimated Hegwood's age to be 54, and wrote that figure down as being his age, and that Hegwood was an illiterate negro who did not, and could not, read the application, and signed it by mark. This proof being undisputed, there was no issue as to the misrepresentation in regard to age, because the knowledge of the agent who wrote the application is imputed to the company. *Hutchins v. Globe Life Ins. Co.*, 126 Ark. 360, 190 S. W. 446; *Fidelity & Casualty Co. v. Meyer*, 106 Ark. 91; *Maloney v. Maryland Casualty Co.*, 113 Ark. 174; *Mutual Reserve Fund Life Association v. Cotter*, 81 Ark. 205.

(2) The right to recover is denied because the beneficiary had no insurable interest in the life of the member. The proof is undisputed, however, that the member took out this policy himself, and that the beneficiary knew nothing of the application until after it had been written. While appellee would have had no right to have taken out this policy himself, because he had no insurable interest in the life of the assured, still the assured had the right so to do. In the case of *Langford v. National Life & Acc. Ins. Co.*, 116 Ark. 527, a syllabus is as follows:

"A person may take out insurance on his own life, and name any one that he pleases as beneficiary, and where there is no understanding between the insured and the beneficiary, at the time the policy is taken out, the policy will be held valid, although the beneficiary had no insurable interest in the life of the insured, and the policy

will not be rendered void, if, thereafter, the beneficiary paid the premiums on the policy up to the time of the insured's death." See, also, *Matlock v. Bledsoe*, 77 Ark. 60; *Prudential Ins. Co. v. Williams*, 113 Ark. 373.

(3). An attorney's fee, together with a penalty, were assessed against appellant, and this action of the court is questioned as not being authorized by law. We think counsel is correct in this contention. Statutes providing penalties are strictly construed, and the penalty is not charged in any case unless there is express statutory authorization therefor. Under the authority of the case of *Knights of Maccabees v. Anderson*, 104 Ark. 417, we think the penalty and attorney's fee should not have been charged.

To return to the consideration of the correctness of appellee's instruction numbered 1, set out above, on the question of notice of assessments, it may be said that counsel for appellant insists that notice is given when a letter, containing the information in regard to the assessment, is deposited in the mails, and that, if this is done, it is immaterial that the notice was never, in fact, received. Counsel argues that such is the meaning of the language above quoted from the application and the policy, and that this is the effect of our decision in the case of *Mutual Aid Union v. Wadley*, 125 Ark. 449. But we do not agree with counsel in either contention. In the case cited, there was proof tending to show that notice had been sent by mail, which we held sufficient to warrant the submission of that question to the jury. The trial court had taken the contrary view, and we reversed the judgment on that account. We did not there discuss the presumption arising from proof of the mailing of a letter. The point in that case is correctly summarized by the syllabus, which is as follows:

"It is a question for the jury, whether notice was sent out to deceased that an assessment against her was due, and whether she received the same, where, by the contract of insurance, deceased's policy was to become

void for failure to pay an assessment after proper notice."

We there decided only that the facts recited presented a question for the jury to say whether notice was given. Had that question been submitted in the court below in that case, the beneficiary would have been entitled to appropriate instructions on the presumption arising from the proof of mailing a letter, the law of which subject is thoroughly discussed in the following cases: *Southern Engine & Boiler Works v. Vaughan*, 98 Ark. 388; *Bluthenthal v. Atkinson*, 93 Ark. 252; *Merchants' Exchange Co. v. Sanders*, 74 Ark. 16; *Click v. Sample*, 73 Ark. 194; *Planters' Mutual Ins. Co. v. Green*, 72 Ark. 305.

The question not having been previously decided by us, we proceed to consider it upon its merits. It may be conceded that the contract of insurance might have made the proof of mailing notice conclusive of the fact of notice. But a construction so harsh in its nature, and so disastrous in its practical operation, is not to be adopted unless the language employed requires that construction, for contracts of this character are construed most strongly against the company which chooses the language employed in the contract. A recent case involving a similar principle is that of *Columbian Woodmen v. Hewitt*, 122 Ark. 480. There the policy provided that the assured, in the event of injury, should furnish satisfactory proof thereof, and to make this meaning clear, further provided that "satisfactory proof shall be taken to mean an X-ray photograph made and certified by a physician selected by the Eminent Director." It was there said:

"The contention of learned counsel for appellant is that furnishing an X-ray photograph showing a fracture of the arm is a condition precedent to the right of recovery. We do not so interpret the language of the contract, according to the amended by-laws. The provision undoubtedly constitutes a requirement that satisfactory proof of the injury be furnished, and it undertakes to define what satisfactory proof is. According to its lan-

guage an X-ray photograph is defined to be satisfactory proof, but it does not state that the X-ray examination and the photograph thereof must show the fracture. This is an important distinction, for if it had been intended to make the right to recover depend upon the fact that an X-ray photograph revealed the existence of a fracture, then it could have been expressed in more appropriate language. * * * Unless the contract itself expressly makes the right of recovery depend upon the existence of the loss as disclosed in the proof furnished, the assured has the right to resort to other proof in the trial of his suit."

(4) The insurance company may write into its contract a requirement that certain proof, and that only, shall be considered, just as it might prescribe that notice given in a certain manner shall be conclusive of the question that notice was given, or that notice shall be given in a certain way, and that no other notice shall be required. But unless it is so provided, the question, whether notice of a particular assessment was given to a member liable therefor, is to be decided by a consideration of the applicable rules of evidence.

Under the terms of the contract involved in the instant case, the undertaking and agreement on the part of the insurance company was to notify the insured. It was not provided that, upon the maturity of an assessment, the company, through its proper officer, should deposit in the mail a notice of the levy of an assessment, and the amount thereof, and that the policy should forfeit if the assessment was not paid within a certain number of days from the date of mailing; but its language is that they shall notify the insured, and the insured was not in default, nor was his policy liable to cancellation or forfeiture, until the lapse of the time limited from the date of the notice of the assessment.

The question under consideration was involved in the case of *Home Benefit Association v. Jordan*, 191 S. W. 725, Tex. Court of Appeals. The duty of the company

to notify its members of the levy of assessments was there expressed in the following language:

"He (the secretary) shall keep the books of the society, make record of all bonds on the minute book, notify all members by postal card of assessments regularly made by the board of directors."

And the constitution of the insurance company in that case, among other things, provided that "All assessments must be paid within fifteen days from the date of the call. Members failing to pay same within the time prescribed shall stand suspended, and will no longer be entitled to any of the benefits of the society."

It was there said (to quote from the syllabus):

"Where the constitution of a mutual benefit association which levied assessments only upon death of a member required the secretary to notify by postal card all members liable, the word 'notify' should be construed 'to make known,' so that, where the insured failed to receive a postal card mailed by the secretary, notifying him of an assessment, such failure excused insured's failure to pay the assessment, and his beneficiary could recover.

(5) Appellee's instruction numbered 1, set out above, conforms to the views here expressed, and it is, therefore, approved as correctly construing the language of the application and policy set out in reference to the giving of notice.

The judgment will be modified by striking out the allowance of penalty and attorney's fee, and in all other respects is affirmed.

RUSHING v. HORNER.

Opinion delivered May 28, 1917.

- 1: HOMESTEAD—EXCHANGE FOR OTHER LANDS.—A probate court can not authorize a guardian to exchange the homestead lands of a ward for other lands.

2. HOMESTEAD—SALE—DEBT—VALIDITY.—The probate sale of a minor's homestead by the guardian is absolutely void if the estate is in debt at the time.

Appeal from Garland Chancery Court; *J. P. Henderson*, Chancellor; reversed.

Hogue & Heard, for appellants.

1. The sale of the homestead was void, because the court had no jurisdiction to order or approve the sale. 65 Ark. 355. The interest of the minors was too indefinite and uncertain for the court to determine its value, or what price it should bring. The estate was in debt; the widow was alive and had not abandoned her interest.

2. Mrs. Rushing's testimony makes a clear case of unmistakable fraud. 1 Story Eq., § 187; 34 Wis. 105; 89 Ark. 168; 47 *Id.* 445; 37 *Id.* 316; 51 *Id.* 335. Her testimony is corroborated by the records that the payments credited were not made.

3. The probate court was imposed on in obtaining the order and confirmation. The transaction was an exchange of the minor's homestead for other lands. This can not be done. 95 Ark. 256; 47 *Id.* 460.

4. A guardian, upon sale of his ward's property, can not receive anything except money in payment, and if he attempts so to do, and afterwards fails to account for and pay over in money the proceeds of such sale, the ward may maintain an action against the purchaser for the purchase money, or set aside the sale. 63 Ind. 129; Perry on Trusts, § 835.

5. It was, in law, a fraud on the part of the guardian (11 S. C. 551). The purchaser is liable for the full value of the property. 34 Ark. 451; 1 White & Tudor's Leading Cases in Eq., p. 59.

C. Floyd Huff, for appellees.

1. The chancellor's findings here are clearly sustained by the evidence. 92 Ark. 35.

2. The burden of proof was on appellants. All the parties are dead except Mrs. Rushing and she is not corroborated. If there was any conspiracy she was *parti-*

ceps criminis. Death has closed the lips of one party and the law seals the mouth of the other, and we doubt if Mrs. Rushing's testimony is competent. In many particulars it is shown to be false. The order was regularly obtained; the sale was necessary for the support and maintenance of the minors; the land was duly appraised and sold for an adequate price; the sale was confirmed and the notes paid. No fraud is shown and the decree should be affirmed.

HUMPHREYS, J. Appellants instituted suit in the Garland Chancery Court against appellees to set aside an order of the probate court to sell lot 15, block 54, in the second subdivision of the Hot Springs Land & Improvement Company, in the city of Hot Springs, Arkansas; and to cancel all the proceedings appertaining thereto, and conveyances made thereunder for the alleged reasons:

First, because the probate court had no jurisdiction to order or approve the sale.

Second, because the sale was procured by fraud.

Third, because the transaction was an exchange of other property for the homestead.

An agreement was reached by which the Scott-Mayer Commission Company was to retain its lease on said property during the lease term, by paying the rent into the registry of the court. By this agreement, said company was eliminated from the litigation.

The widow and children of John J. Horner, deceased, filed answer, denying all the material allegations of the bill.

The cause was heard by the chancellor upon the issues joined and proof adduced from which he found that the probate court had jurisdiction to order and confirm the sale; that the homestead was not traded for other property; and that the sale was not induced by fraud or collusion.

The bill was dismissed for want of equity on the 17th day of August, 1916, from which an appeal has been prosecuted to this court.

The property involved in this suit was the homestead of W. W. Rushing, at the time of his death, which occurred on December 20, 1898. Said property was assigned to the widow and appellants as a homestead, and another piece of real estate valued at \$1,100 was assigned to the widow as dower in the landed estate of her deceased husband. The widow, Sarah A. Rushing, was appointed guardian for appellants on the 16th day of October, 1899. She procured an order to sell the homestead on the 29th of August, 1900, for the maintenance and education of appellees. In pursuance to said order, the property was sold at public sale to John J. Horner, husband and father of appellees, for \$2,050, evidenced by two notes of \$1,025 each, payable, respectively, in three and six months. On the 24th of December thereafter, deed was made by the guardian to the said Horner, reciting consideration of \$1,025 cash and note for \$1,025, due May 23, 1901. The deed contained a rental clause for the interest of Sarah A. Rushing in the homestead. On the same date Sarah A. Rushing executed a quitclaim deed for her interest in the homestead to the said Horner for an expressed consideration of \$500.00. Col. John M. Harrell, conceded to be an attorney of reputation above reproach, was the attorney who directed and counseled the guardian. He prepared the guardian's deed and entered the following payments upon the two notes aforesaid:

“This note credited with a cash payment of five hundred and seventy-one (\$571.00) dollars.” (This credit appears on the face of the first note just above the signature of the maker, J. J. Horner).

“Hot Springs, Arkansas, November 28, 1900.

“Received from J. J. Horner this day \$600 to be credited on these notes in addition to credit on face hereof.
S. A. Rushing, Guardian.”

(This credit appears on the back of the note).

“Credit received November 28, 1900 on the within note \$146.00, which is that much of the sum of \$600 in-

dorsed on the first note credited on this note, leaving due \$879.00."

(This credit appears on the face of the second note just above the signature of the maker, J. J. Horner).

"Received the amount of within note, payment in full, this December 28, 1900."

(This credit appears on the back of the second note).

John J. Horner died on the 3d day of August, 1905. On the 25th day of February, 1905, the court house and the papers in the case burned. The record proper was saved, which disclosed that the order of sale was made by proper application and on notice in the manner provided by law; and that the sale was confirmed by the court. Col. J. M. Harrell has since died. Mrs. Rushing gave testimony in substance to the effect that she exchanged the property in question for two lots described as follows: Lots forty-seven and forty-eight in block four, in what is known as Gains & Williamson's addition to the city of Hot Springs, and \$800 in cash; that she was overreached and influenced to sacrifice the homestead property by J. J. Horner, under the advice and direction of Col. J. M. Harrell, who had been selected as her attorney by Horner.

Her evidence is not in accord with the records of the court, deeds, notes with credits thereon, and the bank records.

It is strenuously insisted by appellant that the sale and all proceedings thereunder should be set aside for fraud. The chancellor found against appellants on this issue. We have read the entire record very carefully and are of the opinion that the finding of the chancellor is in accord with the facts and circumstances. The evidence is too uncertain and conflicting upon which to base a finding of fraud. The immediate parties to the transaction are dead except Mrs. Sarah A. Rushing, who is the chief witness for appellants. The record evidence and circumstances in the case do not support her testimony. We

can not say the finding of the chancellor is contrary to a clear preponderance of the evidence on the issue of fraud.

(1) It is also insisted that the sale is void because it is contrary to law for a probate court to authorize a guardian to exchange the homestead lands of a ward for other lands; and because this homestead was in part exchanged for other land. The appellants are correct in their statement of the law. In treating upon this question, this court said in *Gatlin v. Lafon*, 95 Ark. 256, "It (referring to the homestead) can not be lawfully exchanged for an interest in other lands to serve the same purpose." We can not follow learned counsel for appellants in their conclusion that an exchange of property was made in the instant case. The records of the probate court and the deed and notes executed in pursuance of the sale reflect the fact that the property was sold for \$2,050.00, and paid for in money, not property. The finding of the chancellor on this point was adverse to appellants and is not contrary to a clear preponderance of the evidence.

(2) And lastly, it is insisted by appellants that the probate court had no jurisdiction to order the sale of the homestead. The reason assigned is that the estate of W. W. Rushing, deceased, was in debt at the time of the sale of the homestead. The latest expression of this court is to the effect that the probate sale of a minor's homestead by the guardian is absolutely void if the estate is at the time in debt; that in order to invest a good title in the purchaser at the guardian's sale, the record of the probate court should affirmatively show that the estate was free from debt; that the necessary essentials to give jurisdiction must appear on the record; that no presumptions can be indulged in favor of the judgment ordering the sale of a minor's homestead; that the burden rests upon the party asserting title under the sale to establish that the judgment ordering the sale of a minor's homestead recites the necessary essentials to give the court jurisdiction. *Tipton, Admr. Ex Parte*, 123 Ark. 389.

The judgment in this case ordering the sale of the homestead was burned and in order for appellees to sustain their title to the property it became necessary for them to establish that the judgment ordering the sale contained the jurisdictional recital that the estate of W. W. Rushing, deceased, was not in debt at the time the order for the sale of the homestead was made. No such showing appears. The evidence shows that the estate was in debt at the time the order for the sale of the homestead was procured. On this account, it will be necessary to reverse the decree of the chancellor.

There is some evidence in the case to the effect that extensive improvements were made upon this property by appellees. We are unable to determine, in the present state of the proof, the enhanced value of the real estate by reason of the improvements. Nor are we able to ascertain the rental value of the property in its improved condition, per month or per annum, beginning three years before the institution of this suit. It seems that the case was not fully developed with reference to rental value, net profits and betterments.

For the error indicated, the decree of the chancellor is reversed and the cause remanded for a new trial, with privilege to either party to make further proof.

McCULLOCH, C. J., (dissenting). Appellants are the assailants in this controversy, involving the validity of the judgment of the probate court directing the sale. Appellees hold under a deed executed by the guardian, pursuant to a sale made under the direction of the court, which deed is at least *prima facie* evidence of the validity of the sale. Kirby's Digest, § 3799.

In the absence of proof, the presumption ought to be indulged that the probate court found the existence of facts necessary to confer jurisdiction. The burden is, or ought to be, placed on the attacking party to show that the court did not have jurisdiction.

The decision in the present case is, I think, a far-reaching extension of the rule announced in *Tipton, Ex parte*, 123 Ark. 389, which strips the probate court of the

last vestige of presumption of regularity heretofore attending their judgments, when drawn in question collaterally.

SMITH, J., concurs.

MILLER v. MILLER.

Opinion delivered June 4, 1917.

1. ADVERSE POSSESSION OF WIDOW AGAINST REMAINDERMAN.—A. was widow, and B. the son and only heir of deceased. A. had occupied certain lands with deceased, and continued to do so after his death. *Held*, in order for A. to set the statute of limitations in motion against B. it was necessary for her to hold the title adversely, and to have exercised such acts of ownership as to indicate an intention on her part to hold the land adversely to B., the remainderman.
2. REFORMATION OF DEEDS—MUTUAL MISTAKE.—Deed reformed to conform to the intention of the parties.
3. APPEAL AND ERROR—APPEAL FROM CHANCERY—ERRONEOUS REASONS FOR RULING.—A cause will not be reversed where the chancellor reached a correct conclusion, although by erroneous reasoning.

Appeal from Hot Spring Chancery Court; *J. P. Henderson*, Chancellor; affirmed.

H. B. Means, for appellant.

1. The finding of the chancellor that there was no mutual mistake, leaves only one question for this court; does the fact that appellee used and occupied the land for more than seven years vest the title? The testimony fails to show adverse possession; but does show that her possession was merely *permissive* and not hostile nor *adverse*. 43 Ark. 486; 68 *Id.* 554; 59 *Id.* 268; 12 L. R. A. (N. S.) 1147; Ann. Cases, 1913, E 487, A 561; *Ib.* 1912 C, 644.

Henry Berger, for appellee.

1. The court held there could be no reformation as there was no mutual mistake. 77 Ark. 614; 74 *Id.* 614; 79 *Id.* 592; 83 *Id.* 131; 89 *Id.* 309; 101 *Id.* 135. But if the half acre was omitted by mutual mistake, the deed should

be reformed so as to include the *old homestead* as enclosed and occupied by appellee for 18 years. 84 *Id.* 623; 149 S. W. 60.

2. The true rule is settled in 68 Ark. 551; 43 *Id.* 469; 100 *Id.* 555. The appellant is barred. 80 *Id.* 444; 50 *Id.* 626.

3. A title by adverse possession may be quieted. 38 Ark. 181; 34 *Id.* 547; *Ib.* 524; 101 *Id.* 409.

STATEMENT BY THE COURT.

This suit was instituted by appellee against the appellant, Jas. J. Miller, to reform a deed.

The appellee alleged that she is the widow of Jacob Miller, who died in the year 1906; that Jas. J. Miller, appellant, is the son of Jacob Miller by a former marriage and that Mollie Gus Miller is the wife of Jas. J. Miller. After the death of Jacob Miller, she and Jas. J. Miller entered into an agreement by which she was to relinquish her dower in four or five tracts of land owned by Jacob Miller in consideration that Jas. J. Miller would deed his interest in fee simple to her, Mary J. Miller, in a piece of property which was the homestead of Jacob Miller at the time of his death, consisting of a house and lot described as follows:

Part of the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of section 22, township 4 south, range 17 west, more particularly described as commencing at a point 258 feet north of the SE corner of said tract, thence west 239 feet, north 270 feet, thence east 239 feet, thence south 270 feet, containing one acre more or less.

That by mutual mistake the deed executed by the appellant, Jas. J. Miller, and his wife, Mollie Gus Miller, was made to read:

Commencing at the SE corner of the SE quarter of Sec. 22, Tp. 4 S., R. 17 west, running on section line North 4 chains to place of beginning, thence west 2 $\frac{1}{2}$ chains, thence North 4 chains, thence East 2 $\frac{1}{2}$ chains, to Section line, containing One Acre, more or less.

The appellants admitted that they entered into an agreement with appellee for a division of the property

but denied that there was a mutual mistake in their deed to the appellee but alleged that the deed which they executed to the appellee was in accord with the terms of the agreement between them and fully expressed the intention of the parties to the agreement.

The appellee testified that she was married to Jacob Miller in 1898, and had lived on the land in controversy as their homestead ever since. Her husband, Jacob Miller, had been dead about ten years. The land was enclosed by a fence when she and Miller were married and is enclosed by the same fence at the present time. She and her stepson, Jas. J. Miller, agreed upon a division of the property after the death of her husband, Jacob Miller. He was to let her have the old home place and she was to assign him the other property. She thought that this was her home and had worked it for ten years. If Miller knew better, he knew more than witness did. Witness thought at the time she received the deed from him it contained all that was under fence, had no experience in land description, thought it was all hers, did not know anything to the contrary until last fall when she was trying to sell it and the deed did not call for the entire parcel of land that she was supposed to own. The land she claimed is 270 feet front by 239 feet deep. There was nothing said about her owning more land than the deed called for until she undertook to sell the land. She exhibited as a part of her testimony the deed from Jas. J. and Mollie Gus Miller.

The appellee was corroborated by her son, Will Dawson. He stated that the fence was at the same place; that he resided with his mother and Jacob Miller, his step-father, during the entire time of their marriage. The piece of land in controversy was enclosed with a fence all that time. The line fence between his mother's property and Jim Miller's had been renewed under Jim Miller's direction by Jack Hall. The fence is now at the same place that it was before the death of Jacob Miller and is at the same place it was when the property was deeded to witness' mother. There was nothing said about this

description of the land until his mother tried to sell the property about a year before.

The appellant, Jas. J. Miller, testified that there was no mutual mistake; that there was nothing said about the fence being the dividing line. The deed describes one acre which is the original homestead, that the witness' father purchased from Bob Thrasher. He afterwards purchased other lands joining it on the west. It was agreed that Mary J. Miller was to have one acre and I was to have the other property. Witness had no knowledge that she claimed more than the one acre until about one year ago. The west fence is where it was when they made the deeds. "I was living in Little Rock at the time," said the witness. Witness visited Malvern, where appellee, his step-mother, resided possibly twice a year. Jack Hall built no fence for witness, might have done some little patching. On witness' visits to Malvern he always visited his step-mother, observed that she was using all the land in the enclosure and witness made no objections. He let her use it just because he did not want the renters to have it. She never made any complaint to witness that the deed was not correct.

Mrs. Mollie Gus Miller, the wife of appellant, testified that she was present when the deeds were made dividing the property. It was her understanding that it was one acre that was intended to be deeded to Mary J. Miller. There was nothing said about the fence west of the property deeded Mary J. Miller being the line.

Upon the above testimony the court found that there was no mutual mistake in making the deeds and no reformation may be had, but that Mary J. Miller, the appellee, had acquired title to the property in controversy by adverse possession and that the interest in Jas. J. Miller created a cloud on appellee's title. A decree was entered divesting the title out of Jas. J. Miller to the land in controversy and vesting the title in the appellee. From that decree this appeal has been duly prosecuted.

WOOD, J., (after stating the facts). (1-2) The court was correct in vesting the title in the appellee, but was in

error in grounding its decree on the theory that the appellee had acquired title by adverse possession for more than seven years. There had been no visible change in the possession of appellee since the death of her husband. Her possession was amicable in its origin insofar as the appellant, Jas. J. Miller, was concerned. In order to have set the statute of limitation in motion it was necessary for the appellee to have held the title adversely and to have exercised such acts of ownership as to indicate an intention on her part to hold the land adversely to appellant, who was the remainderman. Appellee's possession was permissible so far as the appellant was concerned and it remained so until the appellee indicated a purpose to sell the land and nothing was done by the appellee herself until that time that was calculated to bring home to the appellant any knowledge of the fact that it was her purpose to hold the land adversely to him. Such we think is the correct conclusion.

The testimony of appellee is clear and convincing to the effect that after the death of her husband, she and her step-son, the appellant, entered into a contract by which the appellant was to deed her his interest *in the old home place* in consideration of her in turn deeding to him her dower in certain other tracts of land. As she understood it, it was the land on which she had resided with her husband since their marriage, in 1898. She said she had no experience in land descriptions and never measured the land as described in the deed, but she thought that it was all hers under the contract. Appellant admits there was a contract to convey the old homestead, but says there was no mutual mistake in making the deed but he does not enter into detail in explaining the terms of the contract. He simply states that it was agreed that Mary J. Miller was to have one acre and that he was to have the other property, but he states also that the west fence, a part of the fence enclosing the homestead was continued where it was when the deeds were exchanged. He visited his step-mother at least

twice a year and observed that she was using the property that enclosed the homestead.

This testimony convinces us that the terms of the contract between Mrs. Miller and her step-son, Jas. J. Miller, the appellant, was as she states it. The testimony is clear, unequivocal and convincing that the contract contemplated that appellant was to convey his interest in the homestead, and that the old homestead as the parties then understood, consisted of the land that was enclosed and occupied as a homestead, which embraced the parcel now in controversy. The testimony of Mrs. Jas. J. Miller is of no probative effect and does not contradict or lessen the weight to be allowed to the testimony of the appellee. For although she says she was present at the time the deeds were made, she does not say that the contract between her husband and the appellee contemplated that her husband should deed to the appellee only one acre. She says that it was *her understanding* but does not say that it was the understanding between the parties to the contract. The testimony upon the whole meets every requirement of the law to entitle the appellee to a reformation of her deed in accordance with the contract as she stated it to be.

(3) In the recent case of *Dawkins v. Petteys*, 121 Ark. 498, we said, "The ultimate fact to be determined on appeal in chancery cases is not whether the chancellor pursued correct and logical mental processes in reaching his conclusion, but whether the conclusion itself is correct. *Harriage v. Daly*, 121 Ark. 23; *Dicken v. Simpson et al.*, 117 Ark. 304, 174 S. W. 1154."

Although the chancellor did not base his conclusion upon sound reasons, the decree was nevertheless correct and is therefore in all things affirmed.

YAZOO & MISSISSIPPI VALLEY RD. CO. v. JACKSON.

Opinion delivered June 4, 1917.

1. APPEAL AND ERROR—JURY VERDICT.—On appeal the verdict of a jury will not be disturbed where there is substantial evidence to support it.
2. APPEAL AND ERROR—MULTIPLICATION OF INSTRUCTIONS.—It is not error for the trial court to refuse a requested instruction covered by one already given.
3. WATERS—STANDING WATER—DAMAGES—OBSTRUCTION OF DRAINAGE.—Where a railway embankment caused water to stand on plaintiffs' property, they can recover damages from the defendant, although plaintiffs were required by a city ordinance to drain all water from their premises which stood there for twenty-four consecutive hours.

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

Fink & Dinning, for appellants.

1. The pleadings here raise the same issue as on the former appeal of Jackson. 123 Ark. 1. It was error to refuse instruction No. 2 asked by defendants as the judgment was reversed on the Jackson appeal case for refusing it.

2. Plaintiffs can not recover for the cost of filling up holes underneath buildings, which they were required to do by ordinances of the city of Helena. Instruction No. 15 requested by appellants should have been given.

3. The action is barred by the three-years statute of limitation.

P. R. Andrews and *J. G. Burks*, for appellees.

1. The evidence was conflicting, but the jury were the judges of the credibility of the witnesses, and their verdict as to the time the work was done and the damages is conclusive. 92 Ark. 569; 112 *Id.* 57, 507; 113 *Id.* 417; 70 *Id.* 136; 74 *Id.* 604; 102 *Id.* 57; 108 *Id.* 578; 67 *Id.* 47.

2. Instruction No. 2, refused, was covered by No. 4, given. 99 Ark. 597; 88 *Id.* 524; 102 *Id.* 417; 88 *Id.* 433; 93 *Id.* 564; 89 *Id.* 178; 93 *Id.* 548; 83 *Id.* 61.

3. Instruction No. 15 was abstract. Because an ordinance of the city required appellees to fill all low places, does not release appellants from liability for the damages resulting from appellants' negligence.

4. The action is not barred. The proof shows that the roadbed was raised within three years and was the cause of the injury.

HART, J. Appellees sued appellants to recover damages alleged to have been sustained by the appellants negligently raising their roadbed, which changed the flow of the water in front of appellees' premises and caused it to overflow the same. Appellants denied liability and pleaded the statute of limitations in bar of the action.

The present action was commenced April 20, 1916. J. M. Jackson, one of the appellees, testified that he, Lydia Daggett, and Martha Green, the other appellees, each owned a one-ninth interest in lots 1, 2, 3, 4 and 5 on the west side of Natchez street, between Arkansas and Missouri streets; that there is a one-story brick building on lot 1 and two frame store buildings on lot 2, and six frame one-story houses on lots 3, 4 and 5; that the Louisville, New Orleans and Texas Railroad Company has a part of its roadbed on Natchez street in front of these store houses and that the Yazoo & Mississippi Valley Railroad Company has leased the road of its co-appellant and operates a railroad over the same; that in October, 1913, they raised their roadbed along Natchez street in front of appellees' store houses two or three feet and also obstructed a ditch or drain which had formerly carried off the water on the west side of Natchez street; that prior to the raising of the roadbed the waters had never overflowed their property or gotten under their houses; that the ditch or drain on the west side of the street had been sufficient to carry away all the surface water which flowed along there; that since the raising of appellants' roadbed appellees' store houses overflow every time there is a hard rain and that thereby causes water to stand under the floors of their store houses nearly all the time. The city engineer of the city

of Helena, in which this property is situated, corroborated the testimony of Jackson in every respect. Other witnesses placed the whole amount of damages to the property at between nine and ten thousand dollars.

On the other hand evidence adduced by appellants tends to show that the work of raising the roadbed along Natchez street in front of appellees' store houses was completed in January, 1913, that the only work done in October, 1913, was raising the crossing at Missouri street and that this had no effect whatever in causing the waters to flow or accumulate under appellees' store houses.

It was also shown that in raising the roadbed appellants did not obstruct the ditch or drainage on the west side of Natchez street and that the work done by them did not cause water to flow or accumulate on appellees' premises after every hard rain.

The jury returned a verdict in favor of appellees in the sum of \$3,000, and from the judgment rendered appellants prosecute this appeal.

J. M. Jackson originally instituted an action against these appellants to recover damages based upon this same cause of action. On appeal the court held that the raising of the embankment along Natchez street in front of these business houses was a permanent injury to the land and that the whole damage could not be recovered by one of the tenants in common. In other words the court held that in case of a tenancy in common, where there is a holding in severalty, each separate owner must sue for his share of the property or injury thereto. *Louisville, N. O. & Tex. Rd. Co. v. Jackson*, 123 Ark. 1. Lydia Daggett and Martha Green then joined with Jackson in instituting the present suit to recover the damages to their three-ninths interest in said premises. There was a sharp conflict in the testimony on all points. The witnesses for appellees testified in positive terms that the embankment along Natchez street in front of appellees' store houses was raised in October, 1913, and the witnesses for appellants were equally positive that this work

was completed in January, 1913, more than three years before this suit was instituted. The testimony of the witnesses for appellees also showed that when appellants raised their roadbed they obstructed the ditch or drain in front of the store houses of appellees, which had formerly carried off all the surface water on the west side of Natchez street and that now after every hard rain the water flows into their stores and accumulates in the low places under the floors.

On the other hand witnesses for the appellants testified that no ditch or drain was obstructed by the raising of the roadbed along Natchez street and that the store houses of appellees were not overflowed by the waters from Natchez street unless the gutters were stopped up; that when the gutters in front of the houses were free from obstructions no water flowed over the sidewalks and into the houses of appellees after every hard rain. Some testimony was adduced by appellants tending to show that the ground in the alley in the rear of the stores was higher than the floors of the stores and that water flowed from there into the houses.

(1) The amount of damages recovered by appellees was also proved. The jury were the judges of the credibility of the witnesses and by its verdict settled the conflict in the testimony. Under the settled rules of this court we can not disturb on appeal the verdict of a jury where there is substantial evidence to support it.

(2) Counsel for appellants insist that the judgment should be reversed because the court refused to give instruction number 2, asked by appellants. The instruction is as follows:

"The court instructs the jury that if it finds from the testimony in this case that the plaintiffs were not the owners of the property mentioned in the complaint at the time the alleged acts of negligence were committed by the defendant, then your verdict will be for the defendant."

It is true on the former appeal the court said that a precisely similar instruction was correct and that the

court erred in refusing to give it. While the court refused the instruction requested, it did give instruction number 4, which is as follows:

"The court instructs the jury that if it finds from the testimony that the plaintiffs were the owners of the property mentioned in the complaint at the time of the commission of said acts of negligence jointly with other owners as tenants in common, then you will find for the plaintiffs only such *pro rata* parts of the damages sustained by the property through the negligent acts of the defendants, as their interest in the property bears to the whole interest in the property." The instruction given limited the right of appellees to recover for the injury done to their share of the property. It is well settled that the court is not required to multiply instructions on the same point and the court, therefore, did not err in refusing to give instruction No. 2, as requested by appellants.

(3) Again it is insisted that the court erred in refusing to give instruction number 15, which is as follows:

"The court instructs the jury that the plaintiffs are not entitled to recover in this suit any sum that they might be required to expend for the purpose of filling up the low places beneath their buildings in such manner as to prevent water from standing thereunder and becoming stagnant."

There was introduced in evidence an ordinance of the city of Helena which requires the owners of all lots in said city to drain all places where water stands for twenty-four consecutive hours after raining has ceased, if drainage can be secured, and if not, it requires such owners to fill such places with dry, clean earth.

Counsel for appellants insist that inasmuch as a material part of the damage recovered in the present action was the cost of filling up low places under the floors, that appellees should be prevented from recovering this item of damages on account of the ordinance just referred to. We do not agree with counsel in this contention. The duty of appellees to the city of Helena

under that ordinance was a collateral matter and had no connection with the damages suffered by them on account of appellants raising their roadbed.

According to the testimony of appellees no water had been accustomed to flow or accumulate on their lots until the roadbed in front of the houses was raised and the ditch obstructed. If this act on the part of appellants caused water to stand on appellees' lots for more than twenty-four hours after a rainfall, appellees, under the ordinance would either be required to drain this water from their lots or to fill their lots up so that the water would not stand there. But because appellees would be required to do this under the police power of the city, such act affords no reason for releasing appellants from liability to appellees.

It follows that the judgment will be affirmed.

RUST *v.* KOCOUREK.

Opinion delivered June 18, 1917.

1. APPEALS—FROM COUNTY COURT—PARTIES.—Appellant, a landowner appealed from an order of the county court approving the report of the viewers looking to the establishment of a road district. *Held*, thereafter other parties could not make themselves appellants in the matter in the circuit court. The remedy of others objecting was by way of certiorari.
2. CERTIORARI—WILL BE GRANTED, WHEN.—The allowance of the writ of certiorari lies with the circuit judge, and the writ should be refused when the party seeking it fails to show that he has proceeded with expedition after discovering that it was necessary to resort to it, especially where great public inconvenience will result from its issuance.
3. ROADS—ESTABLISHMENT OF PUBLIC ROADS.—In proceedings looking to the establishment of public roads, under the statutes, the report of the viewers can not be considered until the succeeding term of the county court after the term at which the viewers are appointed.
4. ROADS—ESTABLISHMENT—PREMATURE HEARING.—In proceedings to establish a public road, a premature hearing of the report of the viewers does not affect the jurisdiction of the court, and the judgment of the

court will not be disturbed where the rights of the complaining parties have not been prejudiced.

Appeal from Prairie Circuit Court, Northern District; *Thomas C. Trimble*, Judge; affirmed.

C. B. & Cooper Thweatt, for appellants.

1. The report of the viewers should have gone over to the following term of court and been read publicly on the second day thereof. Kirby & Castle's Digest, § 3257. The appearance of Rust at the adjourned term did not waive jurisdiction. 15 Am. & E. Enc. Law, p. 385. The county court had no jurisdiction and its judgment is *coram non judice* and void. 48 Ark. 151; 6 *Id.* 491; 90 *Id.* 197. The other remonstrants were proper parties, as the trial was *de novo* in the circuit court. 2 Enc. Pl. & Pr. 168; 104 Ark. 371.

2. The judgment is against the evidence. The road was not shown to be of public convenience or utility. 15 Am. & Eng. Enc. Law 354.

3. The court erred in dismissing the petition for a review for want of jurisdiction. Kirby & Castle's Digest, § 3257. The public utility of the road and its cost are doubtful and an order for a review was proper.

Gregory & Holtzendorff and *Emmet Vaughan*, for appellee.

1. There is a sharp conflict in the testimony and the verdict or finding will not be disturbed on appeal. 103 Ark. 260; 104 *Id.* 162.

2. The circuit court had no jurisdiction. Notice was given as required by law. Kirby's Digest, § 2995. The county court had jurisdiction. No one appeared except appellant Rust, and he only filed oral objections. A remedy for citizens whose lands are affected is provided by Kirby's Digest, § 3005. Rust was the only remonstrant.

3. The other remonstrants were not proper parties. No notice of the day the viewers meet is provided for by law. 47 Ark. 431; 98 *Id.* 346. Even if the law requires

the report of the viewers to lie over until the succeeding term, Rust can not complain. He appeared and orally objected and took an appeal and he is the only party in interest who has any standing in court.

McCULLOCH, C. J. Appellees, who are citizens and landowners of Prairie County, presented their petition to the county court of that county for the establishment of a public road. Notice was duly given of the presentation of the petition, which was heard by the court on February 7, 1916, a day of the January term. The court appointed viewers in accordance with the provision of the statutes, and fixed the day on which they were to view and lay out the road, and assess damages to the property owners, and directed the viewers to make report on March 1, to which date the court was adjourned. The viewers made report, which was taken up for consideration on March 2, 1916, and W. H. Rust, one of the appellants, appeared and remonstrated against the establishment of the road. The county court, after hearing the matter, approved the report of the viewers and made the order establishing the road in accordance with the prayer of the petition, and also approved the award of damages made by the viewers to appellant Rust, who thereupon filed his affidavit and bond for appeal to the circuit court. The appeal was granted and perfected, and when the cause came up in the circuit court appellant Rust filed a written remonstrance of numerous other land owners in the locality against establishing the road, and the court proceeded to hear the matter upon the evidence, oral and otherwise, adduced before the court. The finding of the circuit court was in favor of the establishment of the road, as adjudged by the county court. An appeal was taken to this court in the names of Rust and the other parties, whose names appear upon the remonstrance.

(1-2) Appellant Rust was the only party properly before the circuit court remonstrating against the judgment establishing the road. He was the only one who appeared in the county court, and his was the only appeal

taken to the circuit court. The appeal of Rust did not give other interested parties the right to join in the circuit court. In fact, the record did not show that the other persons named in the remonstrance were made parties, as the written remonstrance was filed by Rust himself in the circuit court. But, even if those parties had appeared, it was, as before stated, too late for them to get into the controversy as appellants from the order of the county court. If they had any remedy at all it was by application to the circuit court for *certiorari* to review the proceedings in the county court, and an application to the circuit court for that writ would have brought up for consideration different questions from those involved in this appeal. *Certiorari* is not a writ of right, but one of discretion and the allowance rests in the discretion of the court, and the writ should be refused "when the party seeking it fails to show that he has proceeded with expedition after discovering that it was necessary to resort to it, especially where great public inconvenience will result from its issuance." *Johnson v. West*, 89 Ark. 604

Treating Rust as the only complaining party, we proceed to consider whether or not there is any error in the record of which he can complain. In the first place, it is insisted that the county court was without jurisdiction, and consequently that the judgment establishing the road was void because the court proceeded prematurely in hearing the report of the viewers. The statute does not specifically provide when, or at what term of court, the report of the viewers shall be made. It is provided in the statute that on presentation of the petition the court may appoint the viewers and shall fix the day on which the view and assessment of damages shall be made. Kirby's Digest, § 2996. The viewers are required by statute to make report, and it is provided that the court "on receiving the reports of the viewers aforesaid, shall cause the same to be read publicly on the second day of the term, and if no legal objections shall be made to said reports, and the court is satisfied that such road, or

any part thereof, will be of sufficient importance to the public to cause the damages and the compensation which have been assessed as aforesaid to be paid by the county, and that the amount so assessed is reasonable and just, and the report of the viewers being favorable thereto, the court shall order," etc. Kirby's Digest, § 3003.

(3) It appears to be clearly contemplated by the statute that the report of the viewers shall not be considered until the succeeding term of the court after the term at which the viewers are appointed. No other interpretation can reasonably be put upon the language of the statute, for it is stated therein that the report shall be read publicly "on the second day of the term." The design of the law-makers was to provide a definite time so that complaining property owners might know when to appear, as there is no provision for notice to be given of the filing of the report.

(4) It does not follow, though, that the judgment of the county court is absolutely void because the report of the viewers was heard prematurely. The action of the court, though premature, was not void, as the filing of the original petition for the establishment of the road and giving notice in accordance with the terms of the statute conferred jurisdiction, and the premature consideration of the report of the viewers was merely an error committed in the exercise of jurisdiction. *Lonoke County v. Carl-Lee*, 98 Ark. 345. The premature entry of a judgment in an adversary proceeding is declared by our statutes to be a clerical misprision, and not affecting the jurisdiction of the court. Kirby's Digest, § 4430. The statute does not apply to special proceedings of the county court for the establishment of public roads, but the principle is the same as declared by this court in the case just cited.

While the hearing of the report was irregular on account of being premature, the rights of appellant Rust were not prejudiced because he appeared there and resisted the order and took an appeal to the circuit court. He represented no one but himself, and can not complain

on the ground that other property owners may have been deprived of the opportunity to be heard on account of the premature consideration of the report.

Therefore, in disposing of the case so far as it concerns appellant Rust, we hold that he has not been prejudiced, and, therefore, the judgment as to him is correct. The other appellants are not properly parties. The evidence was conflicting concerning the public necessity for the opening of the road, but we feel bound by the finding of the circuit judge on that issue.

Judgment affirmed.

LESS v. IMPROVEMENT DISTRICT NO. 1 OF HOXIE.

Opinion delivered June 18, 1917.

LOCAL IMPROVEMENT—VARIANCE BETWEEN PETITION AND ORDINANCE.—

The organization of a local improvement district is invalid when the petition provided for "sidewalks where now needed and the streets to be improved," and the ordinance provided that "the sidewalks and streets within the proposed district be improved."

Appeal from Lawrence Circuit Court, Eastern District; *Dene H. Coleman*, Judge; affirmed.

Basil Baker and *Horace Sloan*, for appellant.

1. The district and the commissioners were estopped to deny the existence of a valid corporation, after incurring a debt while holding itself out as a valid district. 81 Ark. 391, 402; *Thompson on Corporations*, § § 1124, 1951, 1953; 70 Ark. 451.

2. The district was validly organized. 114 Ark. 23; 110 *Id.* 544. There was no variance in the petition and ordinances. Where a district has been properly established a mandamus will issue compelling it to pass an ordinance to levy assessments. 41 Ark. 52. Sidewalks are part of the streets. 59 Ark. 494. An ordinance will not be invalidated for mere clerical errors. 122 Ark. 326.

W. E. Beloate, for appellee.

1. The district had no valid existence. There is a variance between the petition and ordinance and uncertainty as to the proposed improvements. The petition is jurisdictional and the work authorized must follow it. 110 Ark. 544; 59 *Id.* 344; Kirby's Digest, § § 5676-7-8.

2. There is no estoppel.

STATEMENT BY THE COURT.

This is a proceeding by mandamus in which Ruth Less seeks to compel the commissioners of Improvement District No. 1 of the town of Hoxie, Arkansas, to collect assessments in said district for the purpose of paying an indebtedness due the plaintiff. The commissioners interposed the defense that the district had no valid existence. The facts are as follows:

In the year 1912, ten owners of real property in the town of Hoxie signed a petition in which they asked "that sidewalks be laid where now needed and that the streets of the said town of Hoxie be improved within the territory hereinafter described, and that for the purpose of making said improvements the following territory be laid off and established as an improvement district." Then follows a particular description of the territory sought to be laid off into the improvement district. An ordinance was passed by the town council, "that the sidewalks be and the streets be improved within the limits of said territory and that the same be made into an improvement district for that purpose." Then follows a particular description of the territory which is the same as the territory embraced in the petition. The commissioners for the improvement district were duly appointed and qualified. They entered into a contract with W. E. Swink for the construction of sidewalks within the district. Swink borrowed \$1,000.00 from Ruth Less for the purpose of being used in making the improvements, but did not use it for that purpose. Swink gave an order upon the commissioners of the district for \$1,000.00 payable to Ruth Less or bearer on the first sums

collected or realized from the sale of bonds of the said improvement district. This order was accepted by the commissioners of the district. No bonds were ever sold by the commissioners of the district and the improvements were finally abandoned for the reason that the commissioners were advised that the district had never been legally formed. Swink neglected to pay Ruth Less the \$1,000.00 and as above stated she instituted this proceeding by mandamus to compel the commissioners to levy an assessment on the real estate situated in the district for the purpose of paying her. The court found the issues in favor of the improvement district and denied the petition of the plaintiff. From the judgment rendered the plaintiff, Ruth Less, has appealed.

HART, J., (after stating the facts). In the case of *Meehan v. Maxwell*, 115 Ark. 594, the court held: "Where the petition to the city council asking for the formation of an improvement district provided that the district was for the 'purpose of building and laying concrete sidewalks on all public streets of the entire town,' and the ordinance provided for the 'laying and building concrete sidewalks on either or both sides of all public streets within the town,' the ordinance will be held to change, or depart from, the terms of the petition, and the ordinance was therefore invalid." This case controls here. In the first place it will be noted that there is a variance between the petition and the ordinance. The ordinance provides that the sidewalks and streets within the proposed district be improved. The petition provides that the sidewalks where now needed and the streets be improved. This leaves it to the discretion of the commissioners to determine the sidewalks they might cause to be improved. This could not be lawfully done under the decision just referred to. It is necessary that there should be no uncertainty about the improvement which it is proposed to make. The reason for the rule was stated at length in *Cox v. Road Improvement District No. 8 of Lonoke County*, 118 Ark. 119, and nothing can

be added to what was there said. In that case the court said:

“The details and plans of the improvement may be worked out by the board of improvement after the establishment of the district petitioned for, but the discretion of the board is limited to carrying out the purpose of the petition. It is not contemplated that upon and after the establishment of the district there shall be any doubt about the improvement to be constructed. Otherwise, property owners might sign the petition under the apprehension that a certain road or street was to be improved, only to learn after the district had been established, and the plans had been approved, that they were mistaken or had been deceived. One of the purposes of requiring a petition in writing is to prevent such controversies.”

The question concerning the organization of this improvement district has been before us twice before. *Boaz v. Coates*, 114 Ark. 23, and *Gibson v. Hoxie*, 110 Ark. 544. We can only decide cases however on the record made in the court below. In neither of these cases was the question now raised referred to or made an issue in the case.

In the case of *Gibson v. The Town of Hoxie*, it was claimed that the ordinance establishing the district was not properly published. A curative act was passed to cure this defect. The court held that the case fell within the principle that it is within the power of the Legislature to cure all omissions in proceedings as to matters which could have been dispensed with in the beginning.

In the case of *Boaz v. Coates*, the court held that where the proceedings for the laying of sidewalks by an improvement district in a city were regular up to the publication of the ordinance levying the assessment, the fact that the ordinance was invalid, will not prevent the city council from passing a new ordinance and publishing it in accordance with the laws then in force. The defect in the organization of the district as shown by the record on this appeal could not be cured by any ordinance passed for that purpose.

As stated above there can be no uncertainty about the proposed improvement district and our cases treat the petition as jurisdictional. It can not be left to the judgment of the commissioners to decide what sidewalks should be laid.

It follows that the judgment of the circuit court was correct and must be affirmed.

TURNER v. STATE.

Opinion delivered June 18, 1917.

1. LIQUOR—ILLEGAL SALE.—The evidence held sufficient to warrant a conviction for the illegal sale of liquor, the proof showing that cider sold by defendant contained from six to seven per cent. alcohol.
2. CRIMINAL LAW—FORMER ACQUITTAL.—A plea of former acquittal will not be sustained unless it affirmatively appears that the prosecution in the case where the plea is interposed is for the same offense as that for which the defendant has already been acquitted.
3. TRIAL—STATEMENT OF JUROR AFTER TRIAL.—The affidavit or statement of a juror made after the trial, is not competent to impeach a verdict in which he has joined.

Appeal from Lonoke Circuit Court; *Thomas C. Trimble*, Judge; affirmed.

Trimble & Williams, J. B. Reed and Geo. M. Chapline, for appellant.

1. The court erred in overruling the plea of former acquittal. It was a question for the jury. Kirby's Digest, § § 2303-4-5; 23 Am. & Eng. Enc. Law (2 ed.), 571; 34 S. W. 753; 43 Ark. 374; 31 Mo. 197.

2. The court erred in giving additional instructions to the jury privately. Kirby's Digest, § 2395; Ferris & Roskopf Instructions to Juries, § 95; *Mason v. State*, 127 Ark. 289.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The plea of former acquittal was a matter of law for the court and was properly overruled. It must af-

firmatively appear that the prosecution was for the same offense. 54 Ark. 227; 48 *Id.* 34; 45 *Id.* 97; 32 *Id.* 722. See also, 26 Ark. 260.

2. A juror can not be examined to establish a ground for a new trial, etc. Kirby's Digest, § 2423. The affidavit of the juror was incompetent. 59 Ark. 132; 67 *Id.* 266; 29 *Id.* 293.

HART, J. On the 10th day of February, 1917, the grand jury of Lonoke county returned an indictment against Charley Turner for unlawfully and feloniously selling cider containing alcoholic and intoxicating liquors. He was tried before a jury and convicted, his punishment being fixed by the jury at a period of one year in the State penitentiary. The case is here on appeal.

(1) The testimony on the part of the State tended to show that the sheriff of Lonoke county went to the place of business of the defendant in December, 1916, in Lonoke county, Arkansas, and bought from him two quarts of cider, paying therefor the sum of fifty cents. He took these bottles of cider to Little Rock to a chemist to be analyzed. The chemist testified that one of the bottles contained seven and eight-tenths per cent. alcohol and the other six per cent. alcohol; that the average beer contained three per cent. of alcohol and that a beverage containing that amount of alcohol was considered intoxicating. Several other witnesses testified that they had purchased cider from the defendant at his store in Lonoke county, Arkansas, during the latter part of the summer and during the fall of 1916; that they drank the cider and it made them drunk.

On the other hand the defendant denied having sold any cider that contained alcohol and stated that the persons who got drunk had purchased cider from him and mixed with it alcohol they had obtained elsewhere. Other witnesses were introduced by the defendant whose testimony tended to corroborate his statements and to show that he had not been engaged in the sale of cider which contained any appreciable amount of alcohol. The jury were the judges of the credibility of the witnesses and

the testimony for the State was legally sufficient to warrant the verdict.

(2) It is next contended by counsel for the defendant that the court erred in overruling his plea of former acquittal. The defendant offered in evidence to sustain his plea of former acquittal the following agreed statement of facts: On the 9th day of February, 1917, the grand jury of Lonoke county returned in open court an indictment against the defendant in which it is charged that in October, 1916, he was guilty of selling one quart of alcohol and intoxicating liquors; that upon this indictment the name of M. A. Marshall appeared as a witness; that on the 10th day of February, 1917, the grand jury returned an indictment against him for selling intoxicating liquors and that M. Phelps and "Preacher Evans" were named as witnesses; that on the 27th day of February, 1917, the defendant was tried under indictment numbered 1750, being the indictment returned on the 9th day of February, 1917, and was acquitted; that the prosecuting attorney elected to prosecute him on the said charge upon a sale made to M. A. Marshall; that the State was permitted to prove the sale of the cider by the defendant to other persons than M. A. Marshall and that the cider sold to them contained alcohol in sufficient quantities to make it intoxicating; that the jury were told under the instructions of the court that it could not convict the defendant of any other offense except the sale to M. A. Marshall and that the testimony of the other sales should be considered simply as a circumstance to show whether or not the cider sold to M. A. Marshall was intoxicating or contained alcohol, and as to whether or not he was selling cider which was intoxicating; that the defendant had objected at that trial to the evidence on the part of the State showing the sale to other parties except M. A. Marshall. The court refused to allow the defendant to introduce his plea of former acquittal in evidence before the jury. The defendant duly saved his exceptions to the ruling of the court.

The court did not err in its ruling in this regard. It is true the state, having elected to prosecute the defendant for selling to M. A. Marshall could not, under that indictment, prosecute him for selling to any other person. It could not prove that he had made sales to other persons in aid of its proof that the defendant was guilty of selling to M. A. Marshall, an offense for which he was being prosecuted. The court however did not admit the evidence of sales to other persons for either of these objects, but solely for the purpose of showing that the cider sold to the witnesses was the same kind of cider that was sold to M. A. Marshall and would produce intoxication. It was a disputed question of fact as to whether the cider sold to M. A. Marshall was intoxicating and it was admissible as tending to show that it was intoxicating and to show that other cider bought at the same place produced intoxication upon those who drank it. *Devine v. Commonwealth*, 107 Va. 860, 13 A. & E. Ann. Cas. 361. It may be stated here that it would perhaps have been better to have asked such witnesses what effect the cider had upon them without proving that the accused had sold it to them. The agreed statement of facts, however, shows that the prosecution of the defendant in that case was for selling cider containing alcohol or intoxicating liquors to M. A. Marshall and that his sales to other persons was not an issue in that case. Hence the defendant's plea of former acquittal in that case could not have availed him as a defense to the prosecution in the present case. A plea of former acquittal will not be sustained unless it affirmatively appears that the prosecution in the case where the plea is interposed is for the same offense as that for which the defendant has already been acquitted. *Evans v. State*, 54 Ark. 227; *State v. Blayhut*, 48 Ark. 34.

(3) The next contention of counsel for defendant is that the court erred in giving an additional instruction to one of the jurors privately. Owen Dansby, one of the jurors, made an affidavit that after the jury had returned into court and reported that they were unable to agree on the verdict, that he stepped up to the presiding judge

and in a low tone of voice asked if they could give the defendant a lighter punishment in case the jury returned a verdict of guilty; that the court remarked that this could not be done; that the least punishment was for one year and that if the jury should convict the defendant his case would be in the hands of the Governor.

In regard to this alleged error it is only necessary to say that 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. *Capps v. State*, 109 Ark. 193; *E. O. Barnett Bros. v. Western Assurance Co.*, 126 Ark. 562, and *Reiff v. Interstate Business Men's Accident Assn. of Des Moines, Iowa*, 192 S. W. 216, 127 Ark. 254. It follows that the judgment must be affirmed.

HAYS v. McDANIEL, STATE TREASURER.

Opinion delivered June 18, 1917.

1. STATE—RIGHT TO BORROW MONEY AND PAY INTEREST THEREON.—The Act of 1917 authorizing the borrowing of a certain sum of money to cover deficiencies in the State's general revenue fund, to issue interest-bearing evidences of indebtedness therefor, to levy a tax to create a sinking fund to pay the interest and principal of said loan, and for other purposes, *held* valid.
2. STATE DEBT BOARD—The State Debt Board, as provided for in Kirby's Digest, *held* to be in existence for the purpose of this act.

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

Geo. W. Hays, appellant, *pro se*.

1. The Act is unconstitutional and void. It is violative of Const., Art. 16, § 1. The Constitution of 1874 intended to put the State out of the money-borrowing and interest-paying business. There is no provision giving the Legislature power to issue interest-bearing bonds, notes, warrants or scrip. The only authority given was to provide for the outstanding indebtedness that existed at the time of its adoption. Art. 16, § 2.

The conditions that existed and the intention of the people at the time should be carefully considered. 10 Pac. 641; Black on Const. Law (2 ed.) 68, § 48 *et seq.*; 1 Tiedeman State and Federal Control of Persons and Property, 7 to 21.

The State is prohibited from loaning its credit and from issuing bonds bearing interest except as stated above. Also from issuing any interest-bearing evidences of indebtedness, scrip or warrants. The State is a "municipality."

2. The State Debt Board has long since performed its mission and is now out of existence and is not re-established by the Act. The Act is void for lack of provision for its execution. Kirby's Digest, § § 6462, 6463, etc. It was not a permanent *debt board*, but created for certain specific purposes, which being fulfilled it automatically ceased to exist.

3. 102 Ark, 470 is not in point.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The act violates none of the three clauses of Art. 16, § 1, Const. 1874.

The issue of notes to provide for its *own* credit and purposes is not a "*loan of credit*" by the State, but is to cover any deficiency in its general revenues. It is for the State's own benefit and use and in no sense a loan of its credit for or to others. 10 Fed. Cas. No. 5756.

2. The State is not mentioned in the second clause, which only applies to counties, cities, towns and municipalities. It does not apply to the State.

3. "Warrants" and "scrip" are synonymous. They are orders on the Treasurer to pay when he has funds available. 8 Wash. 497; 21 Fed. 699; 46 La. Ann. 714; 60 Fed. 203. The State is not prohibited from issuing interest-bearing certificates of indebtedness or notes. The Legislature is supreme, and may legislate upon all questions affecting the general welfare of the people, unless *prohibited* or restrained by the Constitution. It

needs no grant of power or authority. 102 Ark. 478-9; 85 *Id.* 175.

4. The State Debt Board is composed of the Governor, Secretary of State and Auditor. Acts 1887, p. 269; Acts 1889, p. 158; Acts 1891, p. 234; Acts 1899, p. 270. It is a continuing board and has never been abolished.

SMITH, J. The General Assembly, at its 1917 session passed an act, Act No. 100, p. 478, entitled, "An Act to borrow money to cover deficiencies in the State's General Revenue Fund, to issue interest-bearing evidences of indebtedness therefor, to levy a tax to create a sinking fund to pay the interest and principal of said loan, and for other purposes." The State Debt Board is charged with the performance of certain duties in the execution of the provisions of the act, but the persons composing this board are not named in this act. The Treasurer of State, *eo nomine*, is charged with the duty of registering negotiable promissory notes which the act provides shall be issued by the State Debt Board in the negotiation of the loan of money there authorized, and the act imposes certain other duties upon the State Treasurer. Appellant, who is a citizen and taxpayer of the State, filed a complaint, in which he alleged that the Treasurer of the State is about to perform the duties imposed upon him by said act, and will do so unless enjoined from so doing, and the complaint contained a prayer for this relief.

As ground therefor, it is alleged that the act is unconstitutional, being violative of Section 1 of Article 16 of our Constitution. It is further alleged that the act is void for indefiniteness, in that it does not designate the members of the State Debt Board and the membership of said board is not otherwise designated.

The section of the Constitution referred to reads as follows:

"Neither the State nor any city, county, town or other municipality in this State shall ever loan its credit for any purpose whatever; nor shall any county, city,

town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the present existing indebtedness, and the State shall never issue any interest-bearing treasury warrants or scrip."

This section contains three inhibitions, as follows:

First, that neither the State, nor any city, county, town or other municipality therein, shall ever loan its credit for any purpose whatever.

The second inhibition is that no county, city, town or municipality shall ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the indebtedness existing at the time of the adoption of the Constitution.

The third is that the State shall never issue any interest-bearing treasury warrants or scrip.

The act of the Legislature under consideration does not violate the first subdivision of this section 1 of article 16 of the Constitution, because the act does not contemplate any loan of the State's credit. No ordinary definition of the word "loan," nor ordinary construction of the language of the clause in which it appears, can make it cover the act which the State is here seeking to do. The State is not lending its credit, but is proposing to use its credit for its own purposes. The State is not undertaking, in any manner, to assume any obligation for any purpose other than its own use, and this use of its credit can not be called a loan thereof. The construction of the language employed, which we think is ambiguous, is reinforced by a consideration of the contemporaneous history, which discloses the evil against which the Constitution was providing. The State had loaned its credit, and in a manner which had largely destroyed this credit, whether employed for its own use, or loaned in promotion of interests which it had undertaken to foster. It appears that the Constitution-makers have employed a word which denies to the State the right to permit an-

other agency to use its credit, but which does not deny the State its right to use this credit for its own purposes.

The second inhibition is, that no county, city, town or municipality shall ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the indebtedness existing at the time of the adoption of the Constitution. It is said that the word "municipality" here employed, includes the State. But we do not agree with counsel in this contention. If it be conceded that the word municipality has sometimes been used by courts and text-writers as of sufficient breadth to include a sovereign State, it does not follow that it was so employed here. The framers of the Constitution were dealing with a subject of the highest importance and evidently chose their language with great discrimination, and we can not assume that they intended the word "municipality" to embrace the State. To do so would render meaningless and wholly unnecessary the third clause of this section, which provides that the State shall never issue any interest-bearing treasury warrants or scrip. This second clause inhibits the issuance of any interest-bearing evidences of indebtedness. Treasury warrants and scrip are evidences of indebtedness, and it would have been an idle thing to do to prohibit the State, along with the counties, cities and towns therein, from issuing any interest-bearing evidences of indebtedness, and then, in the following clause of the same section, to repeat the inhibition against the issuance of a form of indebtedness which was inhibited under the preceding clause.

The State is intended and is designated only in the first and third clauses of this section of the Constitution, and the State alone is designated in the third clause, and we must, therefore, conclude that the State would have been named in the second clause had it been intended that its inhibitions should apply against the State.

The Constitution is not a grant of power to the State, and we are not required to look to the Constitution for authority for legislative action. The State, acting

through its Legislature, may borrow money for its own uses unless that right is denied to it by the Constitution and the only inhibition against the State there contained, in this respect, is that it shall not issue any interest-bearing treasury warrants or scrip.

We have more than once said that a statute, enacted shortly after a constitutional convention, by a Legislature containing members of the convention, should be given weight as indicating the construction put upon the Constitution under which the statute is enacted. *Speer v. Wood*, 128 Ark. 183, 193 S. W. 785. A session of the General Assembly, which convened in the year in which the Constitution was adopted, and which numbered several members of the constitutional convention among its membership, passed an act to provide means for paying the expenses of the State government, and to retire outstanding Auditor's warrants and Treasurer's certificates. Acts 1874 (December 23, 1874), page 72. Section 11 of this act is as follows:

"Sec. 11. None of said bonds shall be sold for money for any other purpose than to defray the expenses of the State government and the proceeds of such sales shall be applied to that purpose exclusively, and shall be apportioned by said board among the various appropriations for paying the said expenses in such manner as may best serve the interest of the people, and no money shall be paid out by the Treasurer except in pursuance of such apportionment; *provided*, that not more than five hundred of such bonds shall be sold for money in any one year."

The case of *Jobe v. Urquhart*, 102 Ark. 470, involved the right of the Board of Commissioners of the State Penitentiary, who were acting under the authority vested in them by the act of the General Assembly, approved June 24, 1897, to buy a convict farm for an agreed sum paid in cash and for a balance to be paid annually with interest. The right of the officials acting for the State to enter into a contract involving the payment of interest was there questioned. The court there said:

“The General Assembly has plenary powers to contract for and create interest-bearing indebtedness on the part of the State, except to issue interest-bearing treasury warrants or scrip. But the authority to bind the State to the payment of interest on her indebtedness must be plainly expressed and not implied. * * * But the appellee insists that, if the board was not authorized to contract for interest, its action in so doing was ratified by the subsequent action of the Legislature in the passage of the act approved May 31, 1909. In answer to this position, it must be conceded in the outset that the Legislature had the power and the right to extend the legal liability of the State in respect to the item of interest and to provide for its payment by appropriation of a fund for that purpose; but this must be done in the manner pointed out by the Constitution.”

The negotiable promissory notes which the act under consideration authorizes the State Debt Board to sell, are evidences of indebtedness, but they are not treasury warrants or scrip. The meaning of treasury warrants or scrip is well known. The State and many of the counties, then and now, have been and are compelled, through lack of public revenue, to draw these treasury warrants, commonly called scrip. This scrip is an order on the Treasurer to pay the sum named whenever available funds are in the treasury. Sections 3412 and 1459 of Kirby's Digest. The exigencies of government require the issuance of these treasury warrants or scrip whether they can be cashed upon presentation or not, but, for reasons which the makers of the Constitution thought sufficient, it has been provided that not even the State may issue interest-bearing treasury warrants or scrip. This is the inhibition of the third clause of the section of the Constitution above quoted, and is the only inhibition as against the right of the State to use its credit for its own governmental purposes.

It is finally insisted that the act is void for uncertainty, for the reason that it does not designate the persons composing the State Debt Board. It was not neces-

sary that the act should do so. Section 6462 of Kirby's Digest provides that the Governor, Secretary of State, Auditor and Treasurer of State are constituted a State Debt Board for the purposes mentioned in the act there digested. It is said that the purposes of that act have been performed and that, therefore, the board has ceased to exist. We do not stop to inquire whether all duties imposed by law upon this board have, in fact, been performed, for the reason that the act creating the board has never been repealed. The Legislature may have thought that future duties could and would be imposed upon this board and the act under consideration has done so, and we think it unnecessary that the Legislature should have re-created a board which it had never abolished.

Finding no error in the decree of the court below, the same is affirmed.

SEBASTIAN STATE BANK v. HOLLAND.

Opinion delivered June 18, 1917.

1. BANKS AND BANKING—EMPLOYMENT OF ATTORNEY.—A bank is responsible on a contract of employment of an attorney by the year through its officers, if ratified by its directors; the president's and cashier's authority to employ may be implied from the course of the conduct of the bank's affairs.
2. ATTORNEY'S FEES—RIGHT TO—AMOUNT.—Appellee performed certain services for appellant as its attorney in the conduct of certain litigation. *Held*, under the evidence that appellee was entitled to a fee of \$100 for such services.

Appeal from Sebastian Circuit Court, Fort Smith District; *John H. Vaughan*, Special Judge; affirmed.

Geo. W. Johnson, for appellant.

1. The cashier had no authority to retain Judge Holland as attorney by the year, and the board of directors never authorized nor ratified the appointment. 118 Ark. 157.

2. The cross-complaint is barred by the three-years' statute of limitation. An attorney's right of action ac-

crues when the suit in which he is employed is terminated; usually when reduced to judgment. Kirby's Digest, § 4487; 39 Ark. 50; 65 *Id.* 159; 6 Corpus Juris, 655; 27 Ark. 343; 91 *Id.* 162.

3. Where an attorney is personally interested in a case, as a party, he can not charge a fee for services performed. 6 Corp. Jur. 729-732 and 748.

Geo. W. Dodd, for appellees.

1. The board of directors knew of the appointment of Holland and of the contract. The cashier was a director and managing agent of the bank, and it was the custom of the bank for the cashier to employ the attorney. The bank accepted his services. In small towns the cashier runs the bank. He is the agent of the bank. 5 Cyc. 470-472. Corporations are bound by *ultra vires* contracts after they are executed. 91 Ark. 367; 96 *Id.* 308; 96 *Id.* 594.

2. The claim is not barred. The statute did not commence to run until the Hughes case was disposed of in the chancery court, and that was within the three years.

HUMPHREYS, J. Appellant, as assignee of the Sebastian County Bank, instituted this suit against appellees on the 3d day of September, 1915, in the circuit court of the Fort Smith District of Sebastian County, upon a judgment obtained by the Sebastian County Bank against appellees for \$137.00 before C. R. Tate, a justice of the peace in Sebastian County, on the 15th day of June, 1910.

Appellee Holland filed answer, pleading payment, and a cross-bill claiming \$413 for legal services rendered the Sebastian County Bank before appellant took over its assets and assumed its liabilities.

Appellant filed a reply, denying payment and liability on cross-bill, and invoked the three years' statute of limitations as a special defense to appellee's claim on account of legal services.

The cause was tried by the court sitting as a jury, on the pleadings and evidence adduced, upon which it based its findings of fact and law adverse to appellant.

The original suit was dismissed and judgment rendered on the cross-bill in favor of John H. Holland for \$100.00.

From this judgment an appeal has been properly prosecuted to this court.

It is insisted that the evidence is not sufficient to support the finding of the court to the effect that the Sebastian County Bank employed John H. Holland by the year, upon agreement that his yearly retainer of \$50.00 per year and special fees should be credited upon any indebtedness that John H. Holland might become obligated to pay said bank, directly or by indorsement on notes for others, during his employment. The finding of the court will not be disturbed on appeal if there is any substantial legal evidence to support it. The evidence shows that R. O. Herbert, cashier of the bank, employed Holland in the year 1909 as regular attorney for the bank at an annual retainer of \$50 per year, with the understanding that he should receive a reasonable fee, in addition thereto, for each case in which he represented the bank; and that his annual retainer and other fees should be credited on any indebtedness that Holland might incur to the bank during his employment. This arrangement continued until the 1st day of August, 1912, when Holland moved to Fort Smith from Greenwood. The relationship of general attorney then ceased, but under an agreement that Holland should remain in all cases then pending.

(1) The records of the bank fail to show that the directors authorized the cashier to employ Mr. Holland, and for this reason, it is insisted that the evidence is insufficient to support the court's finding. Appellant has cited the case of *Dent v. Peoples Bank of Imboden*, 118 Ark. 157, in support of its contention that an officer of the bank can not employ an attorney by the year without authority from the board of directors. The court so

held in that case. But the same case is also authority that a bank is responsible on a contract of employment of an attorney by the year through its officers, if ratified by its directors; and also authority for the doctrine that the president's and cashier's authority to employ may be implied from the course of the conduct of the bank's affairs. There is ample in the evidence relating to the conduct of the bank's affairs from which to reasonably infer that the directors not only knew that Mr. Holland had been employed by the year, but to infer that they ratified the employment by the cashier. The finding of the court in this regard is supported by the evidence. Under the contract, the court was correct in treating the amounts due Holland for annual retainers as payments upon his indebtedness to the Sebastian County Bank. The amounts due as retainers more than liquidated the judgment upon which this suit is based.

It is insisted that reversible error was committed by the court in finding that appellant was indebted to appellee in the sum of \$100 as a fee for services rendered in the case of *Sebastian County Bank v. T. J. Hughes* and the subsequent proceedings growing out of it, wherein Celia Hughes attempted to prevent the sale of property levied upon to satisfy the original judgment. Holland brought suit for the bank and obtained judgment against Hughes in the month of January, 1912, for \$2,000. He raised an execution and levied upon real estate supposed to be the property of T. J. Hughes. Celia Hughes, claiming to be the owner thereof, instituted proceedings by injunction to prevent the sale. Holland filed answer to the injunction proceedings. The injunction was dissolved by the chancery court on the 17th day of February, 1914. The decree dissolving the injunction was attacked by motion and bill of review. At the April terms, 1914, of the chancery court, the motion was overruled and a demurrer sustained to the bill of review. The case found its way to the Supreme Court, where it was decided on the 12th day of April, 1915, adversely to Celia Hughes.

(2) The evidence is undisputed that Holland conducted the proceedings in behalf of the bank until the hearing before the chancellor on the 17th day of February, 1914, and that he was present on that date. At that time, Geo. W. Johnson had been retained by the Sebastian County Bank as its regular attorney and became active in the Hughes case. The evidence is conflicting as to the extent of Holland's participation in the proceedings from February 17, 1914, to the 18th day of January, 1915, when the transcript was lodged in the Supreme court. He took no part in the proceedings in the Supreme Court. There is ample in the evidence to support the finding of the trial court to the effect that Holland rendered legal services to the bank in the Hughes cases to the amount of \$100 within the statutory period of limitations, and therefore his claim is not barred. We have read the evidence carefully and can not follow learned counsel in his contention that Holland abandoned the Hughes case. The most that can be said is that by common consent the active control of the proceedings was assumed by the regular attorney of the bank. At the time the case was appealed to the Supreme Court, it may be said that Holland's connection had been effectually severed, but by assent and acquiescence and not by abandonment. When the entire control of the case passed to Mr. Johnson, the regular attorney for the bank, Holland's fee matured and his right of action therefore accrued within three years next before he filed his cross-bill.

No error appearing in the findings of fact and declarations of the law by the court, the judgment is affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.
v. TAYLOR.

Opinion delivered June 25, 1917.

1. OBSTRUCTION OF ROADS—REMEDY—INJUNCTION.—A property owner by injunction may prevent the obstruction of a road giving ingress and egress to his property, where, by reason of such obstruction, he suffers a damage in addition to that suffered by the public generally.
2. INJUNCTION—INJURY TO PROPERTY OF INDIVIDUAL—OBSTRUCTION OF HIGHWAY.—One who suffers a peculiar injury in his property rights, in addition to those suffered by the public at large may prevent, by injunction, the obstruction of a highway.

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

Troy Pace and *W. G. Riddick*, for appellant.

1. It was not established that this was a public road. It had never been worked by overseers or public authorities. Its use by the public was very light; only occasional travelers used it; it was not a public road by prescription. 83 Ark. 236, 240. It was a mere trail through the forest.

2. There was nothing to show that the crossing over the track in place of the one under the bridge did not comply with the law. The finding is, therefore, against the testimony.

3. The act had been repealed. Act 36, Acts 1905, was repealed by Act 89, Acts 1913, p. 328. The construction of the crossing, on the track across the highway was not a public nuisance, or nuisance *per se*. 92 Ark. 546. The remedy was by suit at law for damages, and the chancery court had no jurisdiction.

4. A private individual can not maintain injunction for nuisance; the remedy is by indictment or other proceeding at law for the common good. 40 Ark. 83; 89 *Id.* 175.

J. M. Shinn, for appellee.

1. The road was used openly, continuously and adversely for more than seven years under a claim of right,

and not permissively. 105 Ark. 460; 102 *Id.* 553; 83 *Id.* 370; 79 *Id.* 5; 50 *Id.* 53; 47 *Id.* 431; 112 *Id.* 341.

2. The findings of fact by the chancellor will not be disturbed unless clearly against the preponderance of the evidence. 112 Ark. 341; 105 *Id.* 460.

3. The crossing over the track is shown not to comply with the law as to grade. The act of the Legislature had not been repealed. The chancery court had jurisdiction; the damages were irreparable. The public was damaged and appellee suffered special damages in addition to what the public suffered.

McCULLOCH, C. J. Appellee instituted this action in the chancery court of Boone county to enjoin appellant from obstructing a public road, over which the railroad passed, and which is alleged to be the only means of ingress and egress to and from appellee's farm. It is alleged in the complaint that appellee owned a farm a short distance from the railroad, and that the only way to reach it was along a public road acquired by prescription, over which appellant's railroad passed at bridge No. 152, and that appellant was about to fill in the bridge and stop the passway along the public road without leaving any convenient route of travel for persons accustomed to use the road. It is also alleged in the complaint that the road is the only outlet from appellee's farm and that irreparable injury will be inflicted to the farm by reason of its accessibility being impaired, and appellant, in its answer, denied that there was a public road along the way; denied that injury would be inflicted to appellee's lands by reason of the stopping up of the roadway under the bridge, and also pleaded that a grade crossing had been established conveniently near bridge No. 152 sufficient to accommodate persons traveling along that way.

There is conflict in the testimony on the issues of fact presented, but we are of the opinion that the findings of the chancellor on that issue are not against the preponderance of the evidence. It is shown that the road in question has been in use more than seven years, and the

proof is sufficient to justify a finding of acquisition by the public of the right to travel over the road. The proof also is sufficient to show that appellee has no other outlet reasonably convenient to travel from his farm, and that substantial damages would be inflicted if this road is shut up. The proof also is sufficient to show that the grade crossing established at bridge No. 152 is not serviceable by reason of the fact that it is too steep. The occupancy of a street or other highway by a railroad is not a nuisance *per se*. *Lonoke v. Chicago, R. I. & P. Ry. Co.*, 92 Ark. 546. Such occupancy may become a nuisance by reason of obstruction of the highway to the exclusion of its use by the public.

One who suffers a peculiar injury in his property rights in addition to those suffered by the public at large may prevent, by injunction, the obstruction of a public highway. *Texarkana v. Leach*, 66 Ark. 40.

It is insisted by counsel for appellant that, while the proof may be sufficient to establish the fact that the grade crossing was too steep for convenience of the travelers, it does not show that the statute regulating such crossings has not been complied with. The answer to that contention is that appellant pleaded compliance with the terms of the statute with respect to grade crossings as an excuse for obstructing the road under the bridge, and thereby assumed the burden of proving that a statutory grade crossing had been established. It is urged, too, that the statute referred to has been amended so as to fix a different grade from that set forth in the pleadings, but the answer to that contention is that the chancellor did not specify any particular grade, but rendered an alternative decree requiring appellant either to refrain from obstructing the road under the bridge, or to comply with the statute of the State by constructing a grade crossing. All that appellant has to do to satisfy the terms of the decree is to show that it has complied with the law in regard to grade crossings.

It is further insisted that appellee's remedy, if any, is to recover damages in an action at law or by indict-

ment for the illegal infraction of the penal statute, but we think that the equitable remedy exists where it is shown that the party seeking relief will suffer substantial damages in addition to that which the general public will sustain. The injury in that way is irreparable within the meaning of the rule restricting equitable remedies.

Decree affirmed.

HUMPHREYS, J., disqualified.

GREEN v. STATE.

Opinion delivered June 25, 1917.

FENCING DISTRICTS—PENALTY.—The penalty provided in Act of 1915, p. 707, relative to fencing districts, does not apply to a district formed under the Act of 1907, p. 474.

Appeal from Pike Circuit Court; *Jefferson T. Cowling*, Judge; reversed and dismissed.

W. S. Coblenz, for appellant.

1. The last statute (Act 1915), amending the former statute, operates as a dissolution of the former district, but if the district was not abrogated, the penalty of the new statute does not apply. 31 Ind. 11; Black's Law Dict. 1204; 36 Cyc. 1224; 25 *Id.* 613; 68 Ark. 433; 89 *Id.* 598; 53 *Id.* 334. See also, 36 Cyc. 1083, 1165. The district formed in 1907 was completely annulled and abrogated and it was no violation of law for hogs to run at large. The only remedy was to impound.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

The act of 1915 does not disturb the legal existence of districts created under the Act of 1907; it merely amends that act and appellant is liable to penalty prescribed by the latter act. Acts 1915, 708, § 1; 36 Cyc. 1083 (2), *Id.* 1223, § 5; 83 Va. 204; 110 N. Y. 216; 102 Me. 506. The amendatory act did not disturb the legal ex-

istence of the old district and appellant violated the law under the amendatory act, as the offense was committed subsequent to the latter act.

McCULLOCH, C. J. Appellant was convicted of the charge of violating the terms of a special statute applicable to Pike County, authorizing the creation of stock districts and forbidding the running at large therein of certain animals. The original statute under which the district was formed (Acts of 1907, p. 474), authorized the county court of Pike County, upon petition of a majority of the electors of that county, or any subdivision thereof, or of persons whose cultivated lands were to be included, to form a district consisting of not less than five square miles, wherein hogs, sheep and goats, or such class or classes of those animals as might be specified in the petition, should be prohibited from running at large. The statute specified what should constitute a lawful fence within the district so formed, and provided further that any of the forbidden stock found running at large could be impounded by the owner of the land or other person in possession, and detained until the fees, expenses and damages be paid. No other penalty was provided.

The statute was amended by the General Assembly in 1915 (Acts of 1915, p. 707), the first section being amended so as to require that a district so formed should consist of not less than "five miles square," instead of "five square miles," as provided in the original act, and also to prohibit the running at large of geese in a district so formed. Another section of the statute was amended so as to prescribe a penalty of not less than \$5.00 nor more than \$25.00, to be assessed against any person permitting stock to run at large in the district.

A district was formed under the Act of 1907, prior to the enactment of the amendatory statute in 1915, and the charge against appellant is for allowing his stock to run at large in said district since the passage of the last statute.

The contention of counsel for appellant is that the last statute, amending the old one, requiring a district so

formed to be not less than five miles square, operates as a dissolution of districts of smaller area formed under the old statute; and also that, even if the old district was not abrogated by the new statute, the penalty prescribed in the new statute does not apply to it. The new statute works a material change in the shape of a district. Under the old statute, the only requirement was that there should be an area of at least five square miles, whereas, under the last statute, the requirement is that it must be at least five miles square. The amendment of the old statute is in express terms, and necessarily constituted a substitution of the new statute for the old one.

There can be no question about the new statute being exclusive so far as it operates prospectively, as no authority remains in the county court under the old statute to create a district not in accordance with the requirements of the new statute. The Attorney General insists that the new statute does not work an abrogation of a district formed under the old statute and relies upon the rule stated in some quarters that an amendatory act should not be construed so as to give it a retroactive effect to affect proceedings instituted or judgments and orders rendered prior to its passage, unless specified in express terms. 36 Cyc., p. 1223.

It is perhaps better for us not to decide now what effect the new statute has on the existence of a district formed under the old act, as it is not necessary to do so in this case. We think the contention of appellant that the penalty feature of the new statute does not apply to a district formed under the old act, is sound. The effect of the new statute is to substitute its provisions and to incorporate them fully into the old statute, the same as if they had been originally written there, but if the terms of the old statute are to be treated as unaffected by the new so far as concerns districts already formed, then it necessarily follows that the penalty feature of the statute, which is only prospective in its operation, could not be operative so far as concerned districts which depended entirely for their validity upon the terms of the

old statute. In other words, we hold, without deciding whether or not the old district remains in force, that, conceding that it does, the penalty prescribed under the new statute does not apply to it, and that the only penalty enforceable there is the one prescribed by the terms of the old statute of impounding stock found running at large. The judgment of the circuit court imposing the penalty on appellant is, therefore, reversed and the cause dismissed.

HEINEMANN v. SWEATT.

Opinion delivered June 25, 1917.

1. LEGISLATIVE ENACTMENTS—IMPROVEMENT DISTRICT—IMPROPER DESCRIPTION.—In the creation of a road improvement district the Legislature included certain lands therein; *held* although the court is certain that the Legislature did not describe the land intended, the court has no power, in considering the act, to order a change in the description.
2. IMPROVEMENT DISTRICTS—DESCRIPTION OF LANDS INCLUDED.—Much is to be left to the judgment and discretion of the Legislature in creating improvement districts, and the courts should always respect that determination, unless it is manifestly arbitrary, but it is the duty of the court to interfere where the statute shows on its face that it is arbitrary.
3. IMPROVEMENT DISTRICTS—ARBITRARY DESCRIPTION—VALIDITY.—Act No. 165, Acts of 1917, undertook to create an improvement district and in describing lands to be included therein, named a tract several miles from the proposed improvement and omitted intervening tracts. *Held*, the statute would be construed as arbitrary, and the court, being without authority to change the descriptions, that the whole statute is declared void.

Appeal from Jackson Chancery Court; *Geo. T. Humphries*, Chancellor; reversed.

Campbell & Suits, for appellant.

1. A local improvement district must be composed of adjacent, compact, contiguous and continuous territory. The question of boundaries is closely scrutinized. The lands must be contiguous. 126 Ark. 416; *Ib.* 172; 122 Ark. 491; 120 *Id.* 230; 105 *Id.* 380; 35 *Id.* 58; 15 Cyc.

309; 28 *Id.* 120, 150, 193; 54 Ark. 321; 55 *Id.* 609; *Ib.* 618; 35 Cyc. 856-7; 38 *Id.* 601.

2. The Legislature can not confer on Jackson County extraterritorial authority.

3. Publication in a newspaper in Jackson County can not bind lands in Woodruff County. 96 Ark. 410, does not help defendant.

Jno. W. & Jos M. Stayton, for appellees.

1. The Legislature intended to include the $W\frac{1}{2}$ of section 28, not 26, a mere clerical error which is subject to correction. 35 Ark. 59; 37 *Id.* 495; 58 *Id.* 116; 100 *Id.* 180.

2. But the $W\frac{1}{2}$ of section 26 may be stricken out and the validity of the act supported. 92 Ark. 100; 89 *Id.* 466.

3. No extraterritorial jurisdiction is conferred upon the Jackson County court. 96 Ark. 417.

4. Publication in Jackson County newspapers was sufficient. 83 Ark. 348; 96 *Id.* 424.

MCCULLOCH, C.J. This is an attack upon the validity of a statute enacted by the General Assembly of 1917 (Act No. 165), creating a road improvement district designated as Road Improvement District No. 3 of Jackson County, to improve a public road in that county known as the Newport and Augusta Road, which is specifically described in the statute. The controversy arises in a suit instituted by appellant who is the owner of a tract of land within the boundaries of the district, against the commissioners named in the statute, and appellant seeks to restrain the commissioners from proceeding with the construction, the assessment of benefits and levy of taxes, and the issuance of bonds. The territory embraced in the district is not described by metes and bounds, but each tract of land embraced therein is described according to the method of description adopted on the plats of the government survey. The lands lie in a compact body on each side of the road to be improved, except that one tract of eighty acres is disconnected from the other lands,

and lies two miles distant from any of the other tracts, and two miles distant from the road to be improved, the intervening lands not being embraced in the district.

The situation thus described with respect to the one disconnected tract is the ground for the principal attack made in this case on the validity of the statute. The road is on the section line between sections sixteen (16) and seventeen (17), sections twenty (20) and twenty-one (21), sections twenty-eight (28) and twenty-nine (29), and sections thirty-two (32) and thirty-three (33), in township (11) north, range two (2) west, but no part of section twenty-eight (28), which abuts on the road, is described. The east half of each of the other sections abutting on the west side of the road are included, and the west half of section twenty-six (26) in that township is included, the last named tract being entirely disconnected from the main body of lands described, and all of sections twenty-seven (27) and twenty-eight (28) lie between it and the proposed road.

It is insisted by counsel for appellee that the inclusion of the east half of section twenty-six (26) was an obvious error in framing the statute and that the east half of section twenty-eight (28) was intended to be included, and ought to be treated as being included in the district instead of the tract in section twenty-six (26). In support of that contention counsel call attention to the form in which the framers of the statute grouped the descriptions as clearly indicating an intention to describe the west half of section twenty-eight (28) instead of the west half of section twenty-six (26). All of the lands on the east side of the road are first described and then the following numbers are given in describing the lands on the west side:

“The west half of sections sixteen (16), twenty-one (21), twenty-six (26) and thirty-three (33), of township eleven (11) north, range two (2) west.”

(1) The method of description adopted by the Legislature does, indeed, indicate an intention to embrace all the lands abutting on the west side of the road, and this

would indicate that a mistake was made in describing a portion of section twenty-six (26) instead of a portion of section twenty-eight (28), but it is quite a different question for us to undertake to treat this as merely a clerical error and undertake to correct the error by substituting a description of land which the framers of the statute entirely omitted. We may be fully satisfied that the Legislature intended to describe section twenty-eight, but yet we are powerless to correct the error, for the simple reason that to do so would be purely a matter of legislation on our part. That would constitute an amendment of the statute to conform to what we conceive to be the legislative intent. In other words, the case presents a situation where we are reasonably certain that the language used does not express the legislative will, yet we are not at liberty to substitute the language which we think will express it.

The question comes down to this: Could the owner of the west half of section twenty-eight (28) complain if we were to construe the statute to include that tract? Unquestionably, the owner could complain, for the simple answer to that construction would be that the Legislature has not written the words into the statute which would constitute authority to assess that tract of land as a part of the lands affected by the improvement. It would be clearly a judicial encroachment upon the rights of the owner of that tract for the courts to undertake to substitute words describing that tract of land instead of words which the framers of the statute used in describing another tract. If the Legislature had given any other method of description, even though it conflicted with the present designation of boundaries by listing the lands, we might by construction reconcile the two descriptions by striking out words in one of the methods adopted so as to conform to the other method, but here we only have one method of describing the lands and that is by listing the numbers according to the government plats, and, if we discard that description, we have nothing else to resort to in ascertaining what lands are to be included.

(2) We are of the opinion, therefore, that we must treat the language describing the lands literally, and say that the Legislature intended to describe the west half of section twenty-six (26); and to omit the lands in section twenty-eight (28). That being true, it necessarily follows that the act is, on its face, arbitrary and discriminatory in that it embraces a tract of land two miles distant from the other lands in the district and from the proposed road, and omits the intervening lands. In other words, the Legislature authorizes the taxation of a tract of land two miles distant from the improvement and omits the two sections of land intervening, and it is a demonstrable mistake on its face. Much is to be left to the judgment and discretion of the Legislature in creating improvement districts, and the court should always respect that determination, unless it is manifestly arbitrary, but it is the duty of the court to interfere where the statute shows on its face that it is arbitrary. *Coffman v. St. Francis Drainage District*, 83 Ark. 54.

(3) It is next contended that we may strike out the description of the land in section twenty-six (26) so as to eliminate that tract from the operation of the statute and uphold the district as to the other lands described. Counsel invoked the doctrine often announced in decisions of this court to the effect that the unconstitutional portion of a statute may be stricken out without impairing the effect of the remainder where the provisions are wholly independent and it can be seen that the lawmakers would have enacted the remaining part of the statute. *Parkview Land Co. v. Road Improvement District No. 1*, 92 Ark. 93, is a typical case announcing that doctrine. The doctrine can not be applied, however, in a case like this which affects the validity of an assessment of lands according to legislative determination. We must treat the statute as a determination by the Legislature that it is appropriate and just to impose the cost of the improvement upon all of the tracts of land included in the district, and if we strike out one of the tracts we vary the legislative decision and impose an additional burden on

the other lands described. We can not include section twenty-eight (28) in the district because the Legislature has given no authority to do so, and to uphold the validity of the district with section twenty-six (26) excluded would be to create an improvement district different from that authorized by the Legislature. This feature of the case is, we think, ruled by the decision of this court in *Norton v. Bacon*, 113 Ark. 566, where we said: "To exclude the territory from the plat would be to form a district of less territory than that included in the boundaries set forth therein; and, on the other hand, if we should include that territory in the district, it would be done without notice having been given to the owner as required by the statute. So we think that there is a fatal variance between the description of the lands embraced in the notice and those included in the plat and that this invalidates the formation of the district."

The principle announced in that case was reaffirmed in *Paschal v. Sweptston*, 120 Ark. 230. The tract of land in question forms a very small part of the large territory embraced in the district, but we can not treat it as being too insignificant to be seriously taken into account in adjudicating the rights of the parties who own lands in the district. We do not know what its value really is compared with the other lands in the district. We must assume, at least, that it is of substantial value, and that is sufficient to call for the application of the principle herein announced, for if we undertake to vary the application of those principles according to the amount or value involved, we would have a very uncertain rule.

Our conclusion, therefore, is that the words of description employed by the lawmakers can not be varied and that, reading the descriptions literally, we find a statute which is so arbitrary and discriminatory on its face that it is void. The decree is, therefore, reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

CRITTENDEN INVESTMENT CO. v. WHITMAN.

Opinion delivered June 25, 1917.

JUDICIAL SALES—REPORT OF COMMISSIONER—FINALITY.—The report of the commissioner in chancery, concerning a sale of lands by him as commissioner, *held, prima facie* correct, and to furnish a sufficient basis for the confirmation of the sale, and also is *prima facie* proof of a redemption within the statutory period.

Appeal from Mississippi Chancery Court, Osceola District; *Chas. D. Frierson*, Chancellor; affirmed.

L. P. Berry, for appellant.

1. The lands were not redeemed within the time allowed by law. If Act 262, Acts 1909, applies the time for redemption had expired, but if the Act 1915, passed eighty-four days after the sale applies the redemption is in time. The last act is not retroactive, and does not apply to sales prior to its passage. It can not affect vested rights. 86 Ark. 255; 8 Cyc. 940, note 56.

The right to redeem depends on the statute in force at the time of sale. 51 Ark. 453; 99 *Id.* 324; 105 Ark. 40.

J. T. Coston, for appellee.

1. The land was redeemed within the year. The report of the commissioner shows it. The law presumes the commissioner did his duty and that the redemption money was paid within the year. 96 Ark. 477; 19 Md. 375; 60 Tenn. (1 Baxter) 410.

2. The so-called receipt is no part of the evidence and should not have been admitted as part of the transcript. 114 Ark. 184; 127 Ark. 274.

STATEMENT BY THE COURT.

The board of directors of the St. Francis Levee District instituted an action in the chancery court against Jessie Murray et al., and certain lands in Mississippi County to foreclose the lien of the levee district for the unpaid levee taxes for the year 1913.

At the September term, 1914, of the chancery court a decree was entered for the amount of the unpaid levee

taxes and the amount due upon each tract was set opposite a particular description of the tract of land. The decree provided that if the judgment for the taxes be not paid that the lands be sold in payment therefor. The clerk of the court, under our statutes, is *ex-officio* commissioner in chancery and was appointed by the court to make the sale.

The lands involved in this suit were embraced in the decree and are described as follows:

The east half of northeast quarter, section 33, township 10 north, range 8 east, and the northeast quarter of section 33, township 11 north, range 8 east, all in Mississippi County, Arkansas.

At the February, 1915, term of the chancery court the commissioner filed a report showing that the lands embraced in this action and which were particularly described in the report had been sold after having been advertised as directed in the decree and that the Crittenden Investment Company became the purchaser thereof. The court made an order directing that the cause be continued for the expiration of the right of redemption.

At the September, 1916, term of the chancery court the commissioner filed his report as follows:

"Your subscriber respectfully reports that in pursuance of the directions and authority contained in the decretal order made and rendered by this Honorable Court at its September term, 1914, in the cause therein pending wherein the Board of Directors of St. Francis Levee District is the plaintiff and Jessie Murray *et al.* and certain lands were the defendants, he did on the 17th day of November, 1914, after due advertisement in the manner and for the length of time as prescribed by law, in the Osceola Times, a newspaper published in the Osceola district of said county and State aforesaid, offer for sale to the highest bidder, for cash, at the front door of the courthouse in the city of Osceola, Arkansas, the lands described in the above-mentioned decree for the levee taxes for the year 1913, report of which sale has been filed and approved by this Honorable Court, and this re-

port is final thereto. *The following list of lands were redeemed after and within one year from the day of the sale:*

Description	S. T. R.	Date Redemption
NE $\frac{1}{4}$	33 11 8	-----
E $\frac{1}{2}$ NE $\frac{1}{4}$	33 10 8	2/5/16

All of which is respectfully submitted.

M. A. Potts,

Commissioner in Chancery."

At the same term of the court, the Crittenden Investment Company filed exceptions to the report and in its exceptions stated that it had become the purchaser of the lands at the commissioner's sale thereof for the sum of \$29.29, and said land had not been redeemed within one year from the date of sale. The exceptions were duly verified by one of the attorneys of the company. The exceptions were overruled by the court and the Crittenden Investment Company has appealed.

HART, J., (after stating the facts). There appears in the transcript what purports to be a redemption certificate showing the date of redemption of one of the tracts of land in controversy in this case and on another page what purports to be a list of lands returned delinquent by the St. Francis Levee District. The lands in question are particularly described in those papers. In response to a petition for *certiorari* by appellees, the clerk certified that these pages of the transcript were not properly a part of the record on this appeal. There is nothing in the record tending to contradict the certificate of the clerk and it will be taken as correct.

It appears from the decree itself that the exceptions were heard on the original complaint and decree, proof of publication, the report of sale, and the exceptions thereto by the Crittenden Investment Company. The report of sale states that the lands in question were redeemed within one year from the day of sale. This report was made by the clerk of the court, who under our statute is *ex-officio* commissioner in chancery. Acts of 1903, page 323.

The commissioner made his report of sale in the discharge of an official duty as directed by the decree of sale. The Crittenden Investment Company, being the purchaser at the sale, made itself a party to the action for all purposes connected with the sale. It filed exceptions to the report of the commissioner, but no proof was offered in support of its exceptions. The report of the commissioner was *prima facie* correct and furnished sufficient basis for the confirmation of the sale. 24 Cyc. 33; *Childress v. Harrison*, 1 Baxter (Tenn.) 410; *Wigginton v. Nehan* (Court of Appeals of Kentucky), 76 S. W. 196; *Oliphant v. Burns* (Court of Appeals of New York), 40 N. E. 980; *Laidley v. Jasper*, 49 W. Va. 526, 39 S. E. 169, and *Bolgiano v. Cooke*, 19 Md. 375.

There is contained in the report opposite the description of one of the tracts the figures "2/5/16." It is contended that these figures indicate that the land was redeemed on February 5, 1916, which was more than a year after the day of sale. It is true figures are sometimes used to indicate the day of the month and the year on which transactions occurred, but we do not think that these figures should be sufficient to overcome the positive statement of the commissioner that the lands were redeemed within one year from the day of sale. It must be remembered that both the figures and the statement that the lands had been redeemed within one year from the day of sale were made by the commissioner in an official report to the court and the figures used are not sufficient proof to overcome the positive words used in the report that the lands had been redeemed within one year from the day of sale.

It is also sought to uphold the decree on the ground that the period of redemption was extended to five years by Act 43 of the Acts of 1915. See Acts of 1915, page 123. On the other hand, it is contended by the counsel for appellant that the sale having been made before the passage of this act that it did not apply. The views we have expressed make it unnecessary to decide this question.

It follows that the decree will be affirmed.

MILLS, RECEIVER FT. SMITH & WESTERN RD. Co., v.
FRANKLIN.

Opinion delivered June 25, 1917.

1. CARRIERS—COLD WAITING ROOM—DAMAGES—JURY QUESTION.—Appellant, a passenger on defendant railway, testified that she was obliged to wait several hours in a waiting room without a fire, and that she sustained certain injuries thereby. Defendant's employees testified that there was a fire in the room. *Held*, whether the failure to heat the room was the proximate cause of the injury was for the jury.
2. CARRIERS—INJURY TO PASSENGER—FAILURE TO HEAT WAITING ROOM.—Plaintiff, a passenger, sued the defendant for damages resulting from exposure to cold in a waiting room in which no fire was maintained. *Held*, an instruction on the measure of damages properly included compensation for "pain and anguish, if any, both of body and mind, * * and for the diminution, if any, of her physical health and vigor, and also such sums of money as the evidence shows, if any, she was compelled to expend for medicine and medical attention."
3. CARRIERS—DUTY TO MAINTAIN COMFORTABLE WAITING ROOMS.—A carrier of passengers is required to keep its waiting rooms comfortably warm for passengers, and it is liable for damages resulting from a failure to discharge that duty.

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

Warner & Warner, for appellant.

1. The court erred in refusing to instruct the jury to return a verdict for defendant. Defendant was not an insurer of plaintiff's safety while in the waiting room and owed her no duty to exercise the highest degree of care for her protection. The only duty imposed by law was to exercise ordinary care to protect her while she was waiting at the station. 96 Ark. 311; 33 L. R. A. (N. S.) 855. A carrier is not responsible for delays caused by *vis major*, or act of God—high water and washouts. Even if negligent in not properly heating the waiting room, plaintiff could not recover damages because her injuries—pneumonia and inflammation of the ovary—were not shown to have been the natural and probable consequence of any act of negligence of defendant.

It is fundamental that no case of negligence is established unless a causal connection between the act of neg-

ligence and the injury sustained is clearly established. 100 Ark. 462; 97 *Id.* 576; 66 *Id.* 68; 69 *Id.* 402; 4 R. C. L. 1141; § 584; 48 L. R. A. (N. S.) 93. The burden was on plaintiff to show negligence and that the alleged injuries were proximately caused by defendant's negligence. 13 Cyc. 216; 76 Ia. 744; 21 Ark. 433; 30 *Id.* 50, 55; 116 *Id.* 82; 23 Fed. 14. Verdicts can not be based or predicated upon conjecture or mere speculation. 183 S. W. 538; 70 So. 467; 88 S. W. 767; 96 *Id.* 1045; 190 Fed. 717; 65 So. 981; 133 N. W. 142; 105 Ark. 161. See also 137 Pac. 705; 24 U. S. (L. Ed.) 256.

2. The court erred in refusing to give instruction No. 9, requested by defendant. It is the duty of a person rightfully upon depot premises to exercise ordinary care for his own safety and to exercise such care as is commensurate with the apparent danger to be avoided under the particular conditions. 119 Ark. 287; 120 *Id.* 394, 399.

3. It was error to give No. 4, requested by plaintiff on the measure of damages. 79 Ark. 484; 102 *Id.* 246; 101 *Id.* 90; 118 *Id.* 13, 16; 8 R. C. L. 442, § 14; 105 Ark. 205; 109 *Id.* 4.

4. It is error to give conflicting instructions. 65 Ark. 259; 95 *Id.* 509; 99 *Id.* 377; 110 *Id.* 197.

Oglesby, Cravens & Oglesby, for appellee.

1. There was no error in refusing the peremptory instruction. Plaintiff was a passenger in defendant's waiting room. 96 Ark. 311, cited by appellant, is a different case. Plaintiff's instruction No. 1 states the law. 70 Ark. 136. On defendant's own instructions the jury found that defendant failed to exercise ordinary care in heating its waiting room.

2. The question of proximate cause was submitted to the jury on proper instructions. 83 Ark. 584; 94 U. S. 469. The case 100 Ark. 462 is not applicable. Whether the failure to heat the waiting room was the proximate cause of the injuries was a question of fact for the jury—the evidence is conflicting and the verdict should not be disturbed.

3. The cases cited by appellant do not apply. 119 Ark. 287; 120 *Id.* 394.

4. Instruction No. 4 for plaintiff was properly given. 83 Ark. 584. There is no reversible error.

STATEMENT BY THE COURT.

Appellee sued appellant to recover damages for failing to keep heated a waiting room at one of the stations on appellant's line of road where she was compelled to stay for several hours while waiting for a train.

According to the testimony of appellee she went from Fort Smith, in the State of Arkansas, to Boley, in the State of Oklahoma, on January 16, 1916. She boarded one of appellant's passenger trains on January 21, 1916, for her home at Fort Smith. She had her baby with her and was in good health at the time. About 1 o'clock p. m. of that day her train arrived at Dustin, Oklahoma, where she was told by the conductor that she would have to get off the train on account of the high water and wait at the station for the next train. She was told that she would get a train about 7:30 o'clock that evening. She was a colored woman and went into the colored waiting room at Dustin. There was no fire in the waiting room and it was very cold and damp. She requested the employees of appellant to build a fire in the waiting room. She was told that the flue was stopped up with soot and that no fire could be made. She was not allowed to pull down an open window because she was told that some smoke came into the room from another part of the station building if the window was closed. She never left the waiting room but one time and that was to go into the baggage room to get a quilt to wrap up her baby, who was cold. She was compelled to remain there from 1 o'clock p. m. on January 21 inst. to 4:10 o'clock a. m. on January 22. On account of the exposure to the cold appellee had a hard chill, followed by a fever, before getting on the train. After arriving at Fort Smith, she was confined for about four weeks, suffering from pneumonia, which affected her left ovary. On account of her sickness she was compelled to

expend about \$150 for medicine, a nurse and physician. She suffered intense pain, and further testified at the trial that she then suffered with her ovary, back and head, and was unable to do her household work. A colored physician attended her and he testified that she had a severe case of pneumonia in the right lung and that this was brought on by her exposure to the cold. He further testified that her left ovary finally became infected.

The testimony on the part of appellant tended to prove that the waiting room had a fire and that it was comfortable. That no smoke could have gotten into the negro waiting room and that coal was put in the stove at regular intervals during all the time appellee was in the waiting room and that it was kept comfortable during the whole time she was there. It is also shown by the defendant that she had ovarian trouble before she made the trip in question; that while pneumonia frequently results from exposure and sometimes develops in six hours, that ovarian trouble could not develop in six hours after contracting pneumonia.

The jury returned a verdict for appellee in the sum of \$750, and from the judgment rendered appellant prosecutes this appeal.

HART, J., (after stating the facts). (1) It is earnestly insisted by counsel that the court erred in not directing a verdict for appellant. We think the question of whether or not the failure to heat the waiting room was the proximate cause of appellee's injury was one of fact for the jury. Counsel for appellant insists that the verdict could only have been the result of conjecture or surmise on the part of the jury, but we do not agree with them in this contention. Appellee testified that she was perfectly well when she started on her journey and until after she was exposed to the cold for several hours in the waiting room at Dustin. She stated that she had not been exposed to cold at any other time during her journey, but on the other hand that she had been perfectly comfortably situated until she went into the colored waiting room at Dustin. According to her testimony she was exposed

to the cold there from 1 o'clock in the afternoon until 4 o'clock in the morning. She was compelled to sit in a cold room with the window up and the station agent failed or refused to build a fire for her. She had a severe chill followed by a fever when she left there for home. She suffered from a severe case of pneumonia, and, according to her own testimony and that of her physician, her left ovary became affected by reason thereof. The evidence adduced in her behalf was flatly contradicted by that adduced in favor of appellant. This raised an issue of fact for the jury to determine. This court upheld the verdict of a jury under a similar state of facts in *Kansas City Southern Railway Co. v. Cobb*, 118 Ark. 569, and *St. L., I. M. & S. Ry. Co. v. Hook*, 83 Ark. 584.

(2) It is next insisted by counsel for appellant that the court erred in giving instruction No. 4 on the measure of damages. The instruction is as follows:

"You are also instructed that if you find for the plaintiff you will award her such damages as will fairly compensate her for all pain and anguish, if any, both of body and mind, suffered by plaintiff on account of the injuries received and for the diminution, if any, of her physical health and vigor, and also such sums of money as the evidence shows, if any, she was compelled to expend for medicine and medical attention."

Various objections are raised to the instruction. In the first place, it is urged by counsel that it was the duty of appellee to have gone to some house in Dustin where there was a fire when the agent refused to build a fire in the waiting room. It may be said that this objection does not affect the measure of damages but rather bears on the question of the contributory negligence of appellee. Besides, there were no houses in the town of Dustin where negroes were entertained and the nearest negro residence was three and one-half miles in the country. Appellee was expecting the train to arrive at any time from 7:30 in the afternoon until 4:10 o'clock the next morning. It therefore was not practical for her to have gone in search of another place to stay, even if she had been rea-

sonably certain there was a place of entertainment open to her in the town. According to the testimony of appellee and her physician her exposure to the cold in the waiting room caused her to have pneumonia. She also testified that she contracted acute inflammation of the left ovary by being exposed to the cold in the waiting room; that she suffered severe pain and continued to suffer it at the time of the trial. From this the jury might have found that she would necessarily suffer pain for a period of time in the future. The instruction is in accord with the principles of law laid down in *Arkansas Southwestern Railroad Co. v. Wingfield*, 94 Ark. 75, and *Scullin et al., Receivers, v. Vining*, 127 Ark. 183, 191 S. W. 924.

In *St. Louis, Iron Mountain & Southern Railway Co. v. Hook, supra*, the court held that in an action against a railroad company for injuries resulting from the company's failure to heat its waiting room, causing the plaintiff to be ill for some weeks from a dangerous malady, it was not error to instruct the jury to compensate plaintiff "for the diminution, if any, of his physical health and vigor occasioned by the alleged wrong sued for."

(3) Complaint is also made by appellant at some of the instructions given by the court at the request of appellee and at the refusal of the court to give certain instructions asked by appellant. We do not deem it necessary to set out these instructions or to comment on them at length. In the case of *St. L., I. M. & S. Ry. Co. v. Hook, supra*, and *K. C. So. Ry. Co. v. Cobb, supra*, the court held that it was the duty of a railroad to keep its waiting rooms comfortable and to provide reasonable accommodations for passengers at their stations. The court further held that in the discharge of this duty the railroad company must exercise ordinary care to keep its waiting rooms comfortably warm, and if it fails to exercise such care and the passenger suffers injury as a direct result of such failure, the railroad company will be liable in damages. The court gave instructions both at the request of appellant and appellee in accord with the principles of law laid down in those cases.

The only issue of fact was whether or not the railroad company failed to heat its waiting room and whether this was the proximate cause of appellee's injury. Appellee on the one hand testified that there was no fire in the waiting room and that she suffered so much in consequence that she contracted pneumonia. On the other hand, appellant's agents testified that there was a fire in the waiting room. This disputed question of fact, together with the accompanying question of whether or not this caused appellee's illness, was fully and fairly submitted to the jury according to the principles of law above announced.

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

BROWN v. CONE.

Opinion delivered June 25, 1917.

PRINCIPAL AND AGENT—HORSE DEALER—AUTHORITY TO WARRANT.—

The general agent of a horse dealer *held* to have the implied authority to warrant the soundness of horses intrusted to him for sale.

Appeal from Chicot Circuit Court; *Turner Butler*, Judge; reversed.

Street & Burnside, for appellant.

1. It was error to give the peremptory instruction. A clear case of warranty by the agent, Shaw, was made. The unsoundness of the mules was not an apparent, but a latent, defect. There was an express warranty as to soundness, and the agent was acting within the apparent scope of his authority. 48 Ark. 138, 145; 19 L. R. A. 822; 103 Ark. 86; 49 *Id.* 323; 96 *Id.* 460; 17 L. R. A. 642; 67 Wash. 403; 29 Am. Cas. 474; *Oliphant on Horses* (3 ed.), 124; 31 Cyc. 1354.

2. What constitutes a warranty was a question for the jury. 11 Ark. 341; 94 *Id.* 293; 97 *Id.* 438; 99 *Id.* 490; 48 *Id.* 177; 71 *Id.* 305.

3. There was a conflict in the evidence, and it was error to take the case from the jury. 103 Ark. 425; 89 *Id.* 368.

U. J. Cone, for appellee.

1. Shaw was not the general agent of Cone. He was a special agent to sell and had no authority to warrant soundness; nor was it within the apparent scope of his authority. 48 Ark. 138; 31 Cyc. 1269, note 34; 103 Ark. 86; 103 Ind. 274; 155 *Id.* 274; 58 N. E. 194; 29 Am. Cas. 474, 480, 483, etc.

A person dealing with an agent must ascertain his authority. 62 Ark. 33, 40; 92 *Id.* 320; 105 *Id.* 111, 115; 117 *Id.* 173; 23 *Id.* 411; 31 *Id.* 212; 100 *Id.* 360; 94 *Id.* 505; 55 *Id.* 629; 31 Cyc. 1322. The transactions and declarations of an agent are not of themselves evidence of his agency as against the principal. 33 Ark. 252; 78 *Id.* 321; 85 *Id.* 256; 31 *Id.* 212; 93 *Id.* 603; 44 *Id.* 213, etc. The warranty, if made was a collateral contract. 40 Cyc. 492; 35 *Id.* 366, note 81. If made, it was outside of the agent's apparent authority. 31 Cyc. 1353; 35 *Id.* 367, note 89; 31 *Id.* 1567-8; Clark's El. Law, No. 149, citing Tiffany on Eq. No. 180.

3. The burden of proof, as to agency, was on appellant. The presumption is that Shaw had authority and it devolved on the principal to show that Shaw had no authority to make the warranty. 31 Cyc. 1647 (9); 105 Ark. 111; Am. Cas. 1914, D. P. 800.

4. The act of the agent, within the scope of his agency, binds the principal. 31 Cyc. 1552; 1554, and note 35; 114 Ala. 377; 136 N. C. 443; 67 L. R. A. 977; 22 Conn. 379; 58 Am. Dec. 429; Mechem on Agency, 550. The agent was not personally bound. *Ib.*; 26 N. Y. 117; 134 *Id.* 108; 31 N. E. 246; 89 Am. Dec. 64; 22 Conn. 379; 58 Am. Dec. 429; 11 *Id.* 111; 91 *Id.* 469, 471; 31 Cyc. 1553, 1642; 9 *Id.* 316-17; 92 Ark. 535.

STATEMENT BY THE COURT.

John Brown sued W. T. Cone and John Shaw before a justice of the peace to recover damages for an alleged

breach of warranty for the soundness of two mules bought by him from them. He obtained judgment by default before the justice of the peace and the defendants appealed to the circuit court. The facts are substantially as follows:

W. T. Cone lived at Montrose, Arkansas, and sent his agent, John Shaw, to Eudora, Arkansas, to sell a car load of mules for him. Shaw sold two young mules to John Brown for the sum of \$300. When Brown got home that afternoon he discovered that the mules had a severe form of distemper. He called in a veterinary surgeon to treat the mules. One of them died and the other one finally recovered.

According to the testimony of John Brown and other persons who were present when the sale was made, Shaw warranted the mules to be sound in every respect. Brown said that after he got home and made a closer examination of the mules, he discovered that they had a swelling in the throat which at once developed into a severe case of distemper; that this was not observable except by close inspection of the mules. On the other hand, Shaw denied that he warranted the mules to be sound, and said that he expressly so stated to Brown, and told him that he would have to take the mules on his own judgment or the judgment of some other person who might examine them for him. His testimony was corroborated by that of other witnesses.

Cone testified that Shaw did not have any authority to warrant the soundness of the mules. But it is fairly inferable from all the testimony in the case that Cone was a dealer in mules and that Shaw was his general agent for the sale of them. At the conclusion of the evidence the court directed a verdict for the defendants and the plaintiff has appealed.

HART, J., (after stating the facts). The court directed a verdict for the defendants on the ground that Shaw had no authority, real or apparent, to warrant the soundness of the mules. Counsel for the defendants seek to uphold the verdict on the authority of *United States*

Bedding Co. v. Andre, 105 Ark. 111. In that case the court held that a traveling salesman has no implied authority to enter into a contract for advertising his principal's business in a newspaper or upon billboards. The court held that to justify an implication of authority in an agent, it must appear that the act of the agent was necessary in order to promote the duty or carry out the purpose expressly delegated to him. The court said: "An agent has authority to do all that he is expressly directed to do; and he also has implied authority to act in accordance with the custom or usage of the business which he is employed to transact and to do what is reasonably necessary to accomplish that which he is directed to do."

We do not think that case controls here. There the agent was a traveling salesman, who was authorized to solicit orders for and make sales of the goods of his principal. The company sent out large printed advertisements with the goods which could be placed on billboards. The agent made a contract with a person to post these advertisements on his billboard. He had no authority to make such a contract, and the court properly held that his act was beyond the apparent scope of his authority.

In *Oak Leaf Mill Co. v. Cooper*, 103 Ark. 79, in an opinion delivered by the same judge who wrote the opinion in the case just cited, the court held that a principal is not only bound by the acts of his general agent, done under express authority, but he is also bound by all acts of such agent which are within the apparent scope of his authority, whether authorized by the principal or not. The court said that a principal is not only bound by the authority actually given to the general agent, but by the authority which the person dealing with him has a right to believe has been given to him.

In *Keith v. Herschberg Optical Co.*, 48 Ark. 138, the court said that a general agency is where there is a delegation to do all acts connected with a particular business or employment. There is some conflict of authority in the decisions as to whether the general agent of a horse

dealer has the implied authority to warrant the soundness of the horses intrusted to him for sale. 31 Cyc. 1354. We believe the better reasoning is that he has such power. The underlying principle is that the agent being in charge of the sale of the horses is intrusted with all powers proper for making the sale, and that a warranty of quality and soundness is usually necessary for the proper performance of that power. Cone was a dealer in horses and shipped them out to nearby towns in car-load lots in charge of Shaw to sell them. Shaw had full power to control the terms of sale. This included power to do everything usual and necessary to its accomplishment. It is perfectly evident that Shaw would be very much hampered in the sale of the horses if he did not have the power to warrant their soundness. Shaw was in charge of the business of selling the horses for Cone, and when he warranted the soundness of a horse sold by him, he may be fairly presumed to be acting within the scope of his authority. *Belmont's Executor v. Talbot* (Court of Appeals of Kentucky), 51 S. W. 588; *Skinner v. Gunn*, 9 Porter (Ala.) 305; *Lane v. Dudley* (N. C.), 5 Am. Dec. 523.

It follows that the court erred in directing a verdict for the defendants, and for that error the judgment will be reversed and the cause remanded for a new trial.

COOK v. STATE.

Opinion delivered June 25, 1917.

1. ¹³ LARCENY—CONVICTION—PROOF OF ROBBERY.—Defendant may be indicted and convicted of larceny, although the proof shows the crime of robbery. (*Coon v. State*, 109 Ark. 346.)
2. LARCENY—MONEY—DESCRIPTION.—Proof of the stealing of paper and silver money will support a conviction under an indictment charging the stealing of gold, silver and paper money.

3. LARCENY—MONEY—PROOF OF VALUE.—Where the stealing of money is charged in an indictment it is unnecessary to prove its value. Only the stealing of so many dollars need be proved.

Appeal from Conway Circuit Court; *A. B. Priddy*, Judge; affirmed.

Sellers & Sellers, for appellant.

1. There was a total failure of proof as to value.
2. There was a variance in the money alleged to have been stolen and the proof.
3. The offense was not larceny, but, if anything, robbery.
4. The remarks of the prosecuting attorney were improper and prejudicial.

The indictment charges that defendant stole "thirty-one dollars, gold, silver *and* paper money of the value of thirty-one dollars."

In charging the unlawful taking of money by larceny, etc., the money need not be more particularly described "further than to allege gold, silver *or* paper." Kirby's Digest, § 1844. The kind and value must be proven. 25 Cyc. 86; 31 Am. St. 905; 9 Metc. (Mass.) 134; 86 Ark. 343; 71 Ark. 418; 80 *Id.* 495; 117 *Id.* 108.

There is a fatal variance between the indictment and proof. Wharton, Cr. Law (11 ed.), Vol. 2, § 1191, p. 1497; *Ib.* (8 ed.), § 217; *Ib.* (10 ed.), § 126; 101 Mass. 207; 9 Metc. 134.

There is no proof of larceny. If a crime at all, it was robbery. Kirby's Digest, § 2026; 2 Wharton's Cr. Law, § 854; 32 S. W. 980; 70 Am. Dec. 176-7-8; 33 Ark. 561; 43 S. E. 736; 57 L. R. A. 432; 66 S. W. 27.

The remarks of the prosecuting attorney were prejudicial, and the court erred in not directing the jury not to consider them. There is absolutely no proof as to the value of the money alleged to have been stolen. Cases *supra*. The State having alleged that gold money was stolen, must prove it. The court erred in refusing the instructions requested by defendant.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The proof of value was sufficient. It was shown to have been *money*, greenback or currency and silver. The ordinary acceptance and meaning of the words used will be attributed to the words by the courts. 34 Ark. 158; 14 Serg. & R. 51; 34 Fed. 678; 9 So. Dak. 74; 110 U. S. 421.

"Money" and "dollars" mean lawful money of the United States. 23 Fed. Cas. 179; 103 U. S. 792; 44 Ala. 661; 148 Ind. 324; 164 N. Y. 137; 20 Pac. 175.

"Greenback" means lawful currency of the United States, and hence money of standard value. "Currency" means any form of the paper money of the United States, and implies genuineness and par value. 25 Ark. 215; 83 Ala. 51; 23 Ind. 21; 64 Fed. 110; 35 Ill. 158; 8 Minn. 324; 27 Mich. 191; 110 U. S. 421; 23 La. Ann. 609. It is unnecessary to prove the value of money, as it is itself the standard of value. 1 Wharton, Cr. Law (10 ed.), § 955; 39 Ill. 233; 63 Ala. 12; 25 Cyc. 128; 120 Ga. 543; 38 Mo. 388; 21 Wis. 610; 21 Fed. Cas. No. 14705; 20 Ia. 267, etc.

2. There is no variance. The proof was that it was money. Kirby's Digest, § 1717; 71 Ark. 415. Where different articles of property alleged to have been stolen, a conviction will be sustained by proof of larceny of *any* of them of greater value than ten dollars. 80 Ark. 495; 73 *Id.* 101.

3. Every case of robbery is also a case of larceny. 49 Ark. 147; 33 *Id.* 561. Appellant can not complain of the court's leniency. 80 Ark. 495; 78 *Id.* 284.

4. The remarks of counsel were not prejudicial but harmless. 105 Ark. 467; 110 *Id.* 538; *Johnson v. State*, 128 Ark. 302.

SMITH, J. Appellant seeks by this appeal to reverse the judgment of the court below sentencing him to the penitentiary for a period of one year for the crime of grand larceny. The indictment charges that appellant "did take and carry away thirty-one dollars, gold, silver,

and paper money, of the value of thirty-one dollars, of the personal property of B. B. Gordon, * * * etc.”

The proof on the part of the State tended to show that the money was taken from the person of Gordon, the owner thereof, by robbery, and appellant asked instructions to the effect that a conviction could not be had under an indictment charging larceny if the proof showed that the crime committed was robbery. But the court refused to submit this question to the jury.

It is urged that the indictment is defective, in that it fails to properly describe the money alleged to have been stolen, and that there is a variance between the indictment and the proof, in that the indictment alleges the larceny of gold, silver and paper money, whereas the proof shows the larceny only of paper and silver money; and that there was a failure of proof, in that the value of the money stolen was not shown.

It is also assigned as ground for reversal that prejudicial error was committed by an improper argument of the prosecuting attorney.

We will discuss the assignments of error in the order stated.

(1) No error was committed in refusing to charge the jury as requested in regard to the crime of robbery. This exact question was decided in the case of *Coon v. State*, 109 Ark. 354, where it was said: “But even if the facts of the case constituted the crime of robbery, it would have been incorrect to give an instruction to the jury that on that account the accused should be acquitted of larceny, the crime charged in the indictment. The charge of robbery includes a charge of larceny, and even though the accused be guilty of the higher offense of robbery, the State has the right to elect to indict for the crime of larceny, which is embraced therein, and seek a conviction for the crime of larceny, ignoring the higher offense. *Routt v. State*, 61 Ark. 594.”

(2) The indictment sufficiently describes the property alleged to have been stolen. Section 1844 of Kirby's Digest is as follows:

"Section 1844. In all prosecutions for the unlawful taking of money by larceny, embezzlement or otherwise, it shall not be necessary to particularly describe in the indictment the kind of money taken or obtained further than to allege gold, silver or paper money, and a general allegation in the indictment, and proof of the amount of money taken shall be sufficient."

Nor do we think there was any variance between the allegations of the indictment and the proof because there was no proof of the larceny of any gold money. It would have been improper to have alleged disjunctively the larceny of gold, silver or paper money; but it was entirely proper to allege the stolen property was gold, silver and paper money, and these allegations are sustained by proof of the larceny of money of either kind.

(3) Nor do we agree with counsel that there was any failure of the proof to show the value of the property stolen. The owner of the property had testified that he had gotten his pay check *cash*ed and that he had \$31.05 on his person. He was asked: "How much *money* did you have in your pocket;" and he answered, "I had \$31.05." "Q. How much silver did you have, if you remember?" and he answered, "I had one dollar and a nickel." "Q. How much greenback or currency?" and he answered, "I had two tens, a five, two twos, and a one, and one dollar in silver and a nickel." If this proof was not sufficient, one could hardly expect to find a case where the testimony would support a charge of larceny committed by stealing money. The words, "money," "cashed," "silver," "greenbacks," "currency" and "*dollar*" were employed here, and in each instance the parties were referring to the medium of exchange in use in this country. In the case of *The State v. Downs*, 148 Ind. 327, the Supreme Court of that State said:

"It is apparent, therefore, that if 'two dollars' necessarily implies money, there is no valid objection to the indictment in omitting an allegation of value. 'Dollar is the money unit of the United States.' 5 Am. & Eng. Enc. of Law, p. 854. Where a testator directed his executors

to place the sum of 'twenty thousand dollars' in some good investment, it was held that 'there is no ambiguity about the word "dollars."' If any word has a settled meaning at law, and in the courts, it is this. It can only mean the legal currency of the United States, not dollars invested in lands, or stocks.' *Halstead v. Meeker's Executors*, 18 N. J. Eq. 136. 'Money' in its strict technical sense, is coined metal, usually gold or silver, upon which the government stamp has been imposed to indicate its value. In its more popular sense, any currency, token, bank notes, or other circulating medium in general use is the representative of value, a generic term, and covers everything which by consent is made to represent property and passes as such currently from hand to hand. 15 Am. & Eng. Enc. of Law, p. 701. 'Money' designates the whole volume of the medium of exchange regardless of its character or denomination. A 'dollar' is of the volume of money, and is by law made a money unit of the value of one hundred cents. 'Two dollars', therefore, could only mean a specific sum of money, or money, the value of which is fixed by law, and requires no proof. See *Burrows v. State*, 137 Ind. 474, 45 Am. St. 210; *McCarty v. State*, 127 Ind. 223; *Graves v. State*, 121 Ind. 357."

We adopt the reasoning of the Attorney General on this subject and quote as follows from his brief:

"Since money is itself the standard of value, it follows that it is not only unnecessary to prove its value but that it is impossible to do so. If value of money was susceptible of proof then money would not be the standard of value, but that thing in the terms of which the value of money was proved would be the standard of value. One might as well speak of measuring the length of a standard yard stick as to speak of ascertaining the value of a standard dollar in money."

Section 1826 of Kirby's Digest defines the difference between grand larceny and petit larceny, and that difference is made to depend upon whether the value of the property stolen exceeds \$10 or not. It is made grand larceny by statute to steal certain forms of property with-

out reference to its value; but where value is essential, it is expressed in dollars, and the property here stolen was dollars, and it would have been a work of supererogation, if not, indeed, an impossibility, to have accurately stated the value of the property stolen except as so many dollars.

In support of their contention that there is a variance between the allegations of the indictment and the testimony, in that the proof fails to show the larceny of any gold, counsel cite authorities holding that, where several things are alleged to have been stolen, and a single value given for all the goods in a lump, a conviction is possible only if the taking of all the goods is proved, since, if the proof shows that a part only of the goods was taken, the value of all of them being in a lump, there is no showing of the separate value of the goods. These cases can have no application here, because the property stolen was of a single kind, and the proof showed the larceny of even more property than that alleged, and the question of value is concluded, because the property stolen was itself money, the thing which measures value.

The owner of the property was himself arrested, and, upon his arrest, he referred to the fact that appellant had stolen his money. In his argument to the jury, the prosecuting attorney referred to this fact, whereupon counsel for appellant objected to the argument, and now assigns as error the action of the court in failing to reprimand the prosecuting attorney for having made the argument. It appears, however, that, upon objection to the argument having been made, the court stated that this testimony had been excluded, whereupon the prosecuting attorney stated that he did not know the testimony had been excluded and that he would discuss other features of the testimony, which he immediately proceeded to do. If it be conceded that the argument itself was improper, we think no prejudice resulted from the incident referred to. The prosecuting attorney did not question the ruling of the court, and did not attempt to make the argument which the court had held improper. Upon the

contrary, it affirmatively appears, from his statement, that he was not attempting to do so. His statement is in the nature of an apology for having referred to evidence which had been excluded, and we think it impossible that any prejudice could have resulted from this incident.

Finding no prejudicial error, the judgment of the court below is affirmed.

ECHOLS v. TRICE.

Opinion delivered June 25, 1917.

IMPROVEMENT DISTRICT—FORMATION—SIGNATURE TO PETITION—WITHDRAWAL—VALID REASON.—One who signs the original petition for the formation of an improvement district, under § 2, Act 338, Acts 1915, can withdraw his name at the time the petition is presented to the county court for hearing, upon presenting valid reasons therefor in writing, and the reason that the signer has changed his mind about the project is not a valid reason.

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

Roy D. Campbell, for appellant.

The remonstrants complied with section 2 of the Act, and *valid* reasons are assigned for the removal of their names from the original petition. The case in 75 Ark. 154 is not a similar one. See 40 Ark. 290.

The appellees *pro sese*.

The reasons given are not *valid* ones, or "for good cause shown." See Webster Dict. and Bouvier Law Dictionary; 75 Ark. 154; 51 *Id.* 164; 40 *Id.* 290; 70 *Id.* 175. The reasons assigned are mere statements of opinion, not supported by any proof. All these reasons existed when remonstrants signed the original petition.

HUMPHREYS, J. Appellants were remonstrants against the organization of Road Improvement District No. 1, to construct a rock road from Cotton Plant, in Woodruff County, to the Prairie County line, under Act 338 of the General Assembly of the State of Arkansas

for the year 1915. They had signed the original petition for the creation of the district, but when the petition was presented to the county court for hearing, they sought to withdraw their names and property from the petition for the following reasons:

First. "That upon a thorough examination of the Act of the General Assembly of the State of Arkansas, No. 338, under which act the said improvement is proposed to be organized, they believe that to construct a road under said act is inexpedient and impracticable and that said act does not contain proper safeguards as to necessary expenses and cost of construction."

Second. "That also upon further consideration of the proposed matter, they do not believe that it is for the best interest of the people whose lands shall be assessed, to be burdened with additional taxes and assessments."

Third. "They further state that they believe that the benefits which will accrue from the proposed rock road improvement will not be in just proportion to the expense that will necessarily be incurred in its construction."

Fourth. "They further state that it is their opinion that under the act in question there is no limitation to the ultimate cost of the improvement and are therefore unwilling that their lands shall be included in the proposed district."

The county court denied the request of the remonstrants to withdraw from the petition and counted their lands in ascertaining the necessary number of acres to organize the district, and by order established the district. From that order an appeal was prosecuted to the circuit court and the cause there tried by the court sitting as a jury, upon the original files in the county court and upon an agreed statement of fact eliminating all questions in issue except one, which is as follows: "Are the reasons assigned by the parties asking to have their names and lands removed from the petition valid reasons under the law in question?" The circuit court ad-

judged the reasons assigned insufficient, and affirmed the judgment of the county court establishing the road improvement district. The remonstrants took the necessary steps and have lodged an appeal in this court questioning the correctness of the judgment of the circuit court.

The single question presented by this appeal is whether the reasons assigned for withdrawing appellants' names and lands from the original petition are valid reasons.

Under section 2 of Act 338 of the Session Acts of Arkansas, 1915, any person may withdraw his name from the original petition for the organization of the district upon presenting valid reasons therefor in writing, at the time the original petition is presented to the county court for hearing. The sum total of the reasons assigned for withdrawing their names is that in their opinion the construction of the road will be inexpedient, impractical, burdensome, disproportionate in benefits to the costs, and with no safeguard or limitation on the cost of construction. The reasons assigned might well be made grounds for an attack on the organization of the district by parties not signing it, but are not the character of reasons contemplated by the act for the withdrawal of names from the original petition. Parties signing the petition must consider the questions of expediency and practicability of the improvement; the extent of the burden; the probable benefits as compared with the estimated costs; and the sufficiency of the safeguards and limitations on the cost, before signing the petition. There is no good reason why these matters should not be thoroughly considered by the property owners before signing the petition for the establishment of the district. They could have ascertained the extent of the safeguards and limitations thrown about the construction of the improvements, and could have examined the plat of the district and the estimate of the highway engineer approximating the cost of the improvement before placing their names on the petition. *Lamberson v. Collins*, 123 Ark. 205.

The construction contended for would enable signers of petitions for the establishment of improvement districts to withdraw their names from the petitions by filing a statement to the effect that they had changed their minds as to the meaning of the act itself; as to the expediency of making the improvements; as to the comparative benefits as related to the costs, and as to the extent of the burden. In other words, the construction contended for would at once place a number of the signers of the petition in the double aspect of petitioners and remonstrants on the questions necessarily involved in, and prerequisite to, the establishment of the district.

We think it quite clear that a property owner who signs his name to the petition can not withdraw therefrom without written application and proof showing valid reasons therefor, which means a sound, sufficient reason—a reason upon which he could support or justify his change in attitude. Certainly an excuse that existed at the time of signing his name to the petition would not be a sound reason for withdrawing his signature. Such a construction would enable a man to play fast and loose; to withdraw his signature and land on a mere change of mind or heart. The word *valid* must necessarily possess an element of legal strength and force. Inconsistent positions have no legal strength and force. We think the only proper construction to give the words *valid reason*, in the first clause of section 2 of the act, is to attach that meaning capable of being defended or supported. The only character of reason capable of standing the test in law is some good reason which will justify the change in the attitude of the petitioner, such as fraud, deceit, misrepresentation, duress, etc. The statute is silent as to what reasons were intended. Learned counsel for appellants has cited no authority to aid us except Webster's definition of the word *valid*.

Giving full meaning to Webster's definition of the word *valid* in the connection used, we think our con-

struction of the first clause of section 2 of the act clearly reflects the intent of the Legislature.

No error appearing, the judgment is affirmed.

CRANFORD v. STATE.

Opinion delivered June 25, 1917.

1. EVIDENCE—PRIOR STATEMENTS—ASSAULT.—In a prosecution for assault with intent to kill, evidence of statements made by defendant, a few months prior to the killing as to his attitude toward "scabs," to which class the prosecuting witness belonged, are admissible.
2. EVIDENCE—ASSAULT—STATEMENTS ON A SIGNBOARD.—Defendant was charged with an assault with intent to kill upon one K. K. was a strikebreaker and had been denominated a "scab" by defendant. *Held*, parol evidence was admissible to prove the writing upon a sign placed on defendant's premises, the signboard being lost: "No scabs allowed to cross this way," it appearing that the strikebreakers passed that place going to and from work.
3. EVIDENCE—CONDUCT OF BLOODHOUNDS.—Evidence of the performance of bloodhounds in trailing offenders is admissible when the proper foundation for the introduction of such testimony is laid.
4. VENUE—PROOF.—Venue may be established by a preponderance of the evidence, and may be proved by circumstantial evidence.
5. JUDICIAL NOTICE—CITIES, TOWNS AND COUNTIES.—Courts take judicial notice of the location of cities and towns in the State as well as boundaries of counties.

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

Brickhouse & Chamberlin, for appellant.

1. Outside the detailed action of the bloodhounds, there is absolutely no testimony to sustain a conviction. Sometimes bloodhounds are capable of trailing criminals, but the action of bloodhounds does not constitute a better guide to the truth than the sworn testimony of human beings. Defendant and a disinterested witness both swear that Cranford was at home when the shot was fired. This testimony overcomes the conclusions reached by the dogs. 64 So. 215; 97 N. W. 593. There

was no corroboration whatever of the dogs which in any wise connects defendant with the crime. 90 Ark. 123. Bloodhound evidence is unsafe. 97 N. W. 593.

2. The venue was not proven. 77 Ark. 119.

3. The statements, attributed to defendant, if ever made, were incompetent, as they had no connection whatever with the commission of the crime. The statement as to "scabs" was no part of the *res gestae* and inadmissible. It was prejudicial. 73 Ark. 152. As to the sign nailed on a tree, its purpose was to create prejudice. It was error to admit proof of what it contained. The sign was not lost or destroyed, nor was it shown that Cranford had anything to do with it. The sign was the best evidence and it was error to admit secondary evidence. 82 Ark. 102.

4. There is absolutely no testimony to sustain the verdict outside of the unreliable dog trailing.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The statement as to "scabs" was not irrelevant. It was admissible as showing a motive. 62 Ark. 119; 39 S. W. 672; 2 Ind. 438; 93 Ind. 272; 85 Ala. 7. No objections were made to the testimony.

2. No objection was made as to the sign. Part of the testimony was admissible at least. 86 Ark. 23; 96 *Id.* 52; 84 *Id.* 377; 82 *Id.* 555; 87 *Id.* 554. The testimony was not prejudicial, as the facts were otherwise proven by competent testimony. 82 Ark. 447; 79 *Id.* 453; 78 *Id.* 77; 103 *Id.* 315; Kirby's Digest, § 2229. It was competent to show the *animus* of defendant against that class of persons of which the prosecuting witness was a member. 85 Ala. 7; 93 Ind. 272.

3. The evidence is sufficient to sustain the verdict. The testimony as to the action of the dogs was competent. No proper objections were made. Bloodhound evidence was admissible for what it was worth, at least. 8 R. C. L., § 177; 98 Ala. 10; 92 Miss. 613; 85 Kans. 435; 147 Ala. 97; 143 N. C. 607; 35 So. 76; 46 Tex. Cr. 461;

145 Ala. 46; 174 Ind. 395; 103 Ky. 41; 77 Oh. St. 34; 12 Cyc. 393. The dogs were trained, tested and accurate, and testimony as to their trailing was competent. Nebraska only holds otherwise. 97 N. W. 593. See 69 Ark. 177; 31 *Id.* 196.

4. The venue was proven. This court will take judicial knowledge that Bauxite is in Saline County. 90 Ark. 596. Venue may be proved by circumstantial evidence. The Saline County line is eight miles from Bauxite and there is testimony that the crime was committed not more than two miles from Bauxite. 99 Ark. 134; 91 *Id.* 492.

5. Only the substance of the testimony is set out, and its sufficiency will be presumed. 74 Ark. 427; 57 *Id.* 459; 105 *Id.* 608-614. Where all the evidence is not set out in the bill of exceptions, it will be presumed that the evidence is sufficient. 84 Ark. 73; 77 *Id.* 195; 74 *Id.* 551; 72 *Id.* 21, etc.

HUMPHREYS, J. Appellant, R. C. Cranford, was indicted, tried and convicted in the Saline Circuit Court for assault with intent to kill H. W. O'Kelly, and his punishment was fixed at one year in the penitentiary.

From the judgment and sentence, he has prosecuted an appeal to this court.

It is insisted that the court erred in admitting statements made by appellant during the summer and prior to the alleged assault on the 1st day of September, 1916, as follows:

"If these scabs knew what I know they would be at home with their families."

"If those damned scabs knew what I know, they would be home with their families if they have any families."

(1) O'Kelly, who was shot, was one of a class denominated by appellant and other strikers as "scabs." The witnesses testified that appellant made these statements to them during the summer prior to the shooting on September 1, 1916, and while a strike was on at the Bauxite Company's plant, at Bauxite, Arkansas. The

testimony was clearly admissible as tending to establish bad feeling toward a class of which O'Kelly was a member, and a probable motive for committing the crime with which appellant was charged.

(2) It is next insisted that the court erred in permitting witnesses to testify that a sign was put up in front of appellant's place during the strike, in words as follows: "No scabs allowed to cross this way." Parties referred to in the sign had been going to and from their work over a trail way across the land appellant lived on. He had called them "scabs" on several occasions and had assumed a hostile attitude toward some of them. The sign was posted in front of his place. When on the witness stand, he did not deny being the author of the sign. Under all the facts and circumstances, the objection to this testimony on the ground that the evidence did not show appellant knew, or had anything to do with putting up the sign, is not tenable. It is said, however, that it was error to admit parol proof of the inscription on the signboard. Three witnesses testified to the inscription without objection on that ground. Even if the inscription on the board were the primary and best evidence, which we doubt, it was not prejudicial error to permit the third witness to testify to the inscription, when the inscription had been sworn to by two other witnesses without objection for that reason. *Castevens v. State*, 79 Ark. 453; *Crowley v. State*, 103 Ark. 315.

We doubt if the inscription comes within the rule of written instruments, but if so, this writing must have been treated as in the possession and control of appellant, if in existence, and, being in his possession, it was admissible to prove the contents by secondary evidence. The witness testified that he did not know where the signboard was, so, if lost or destroyed, it was admissible to establish the inscription by parol testimony.

But it is insisted that the inscription in no way connected appellant with the crime. We think it is a circumstance tending to show *animus* against a class of

which O'Kelly was a member and to establish a motive for the assault.

Again, it is insisted that the court committed reversible error in admitting the action and performance of bloodhounds in trailing the supposed offender. Immediately after O'Kelly was shot, on the morning of September 1, 1916, guards were placed at the scene of the shooting to prevent anyone from walking over the trail. O'Kelly was removed to Bauxite, and Bob King, owner of the bloodhounds, was brought to Bauxite from Conway, arriving at the scene of shooting about ten o'clock on the same day. The dogs took up a hot trail at a hickory tree about twenty yards from where O'Kelly was shot. The trail was not lost by the dogs until they arrived at appellant's house. The dogs were let in the house and went to a drawer of a dresser and scratched on it. The drawer was opened and five No. 12 gauge cartridges were found. The dogs then went to the north room in which a 12 gauge double-barrel shotgun was found under the bed. The right barrel had been recently fired. The dogs were then carried in an automobile to Bauxite, where they again took up the trail and located appellant in the office where he was under arrest. The dogs were of a pure strain of blood, registered, and the oldest one was a graduate of a training school for bloodhounds. Both dogs were experienced in trailing offenders of the law. The testimony showed that they were accurate, certain and reliable.

(3) This court has held in two recent cases that the evidence of the performance of bloodhounds in trailing offenders is admissible when the proper foundation for the introduction of such testimony is laid. *Holub v. State*, 116 Ark. 227; *Padgett v. State*, 125 Ark. 471.

Preliminary to the introduction of evidence touching the action and performance of the bloodhounds, sufficient proof was given showing that the dogs possessed qualities, training and accuracy in trailing human beings. The proper foundation was laid for the admission of this testimony.

Appellant contends that the evidence is not sufficient to sustain the verdict. The question of whether appellant shot O'Kelly as alleged, was an issue of fact to be determined by the jury. A case will not be reversed on appeal if there is any legal evidence to support the verdict. If the evidence of the action and performance of the bloodhounds were eliminated, it might be argued with some force, on motion for new trial, that the verdict was contrary to the weight of the evidence. But even then, on appeal, there would be much legal evidence left to support the verdict. When the evidence of the action and conclusion of the bloodhounds is taken in connection with all the other facts and circumstances in the case, it can be said with a degree of certainty that there is ample legal evidence to support the verdict.

(4-5) Lastly, it is insisted that the case ought to be reversed because of the absence of proof of venue. The facts established that the shooting occurred within about two miles of the town of Bauxite. Venue may be established by a preponderance of the evidence. Direct evidence is not required. It may be proved by circumstantial evidence. The courts will take judicial notice of the location of cities and towns in the State, as well as boundaries of counties. Bauxite is in Saline County and the circumstances and direct proof, when taken together, clearly show that the crime was committed within that county. The following cases support the conclusion of the court that the venue in the instant case was sufficiently established. *Holloway v. State*, 90 Ark. 123; *Lyman v. State*, 90 Ark. 596; *Douglass v. State*, 91 Ark. 492; *Farr v. State*, 99 Ark. 134; *King v. State*, 110 Ark. 595.

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

J. W. BLACK LUMBER CO. *v.* KINGMAN PLOW CO.

Opinion delivered June 25, 1917.

1. SALES—FARM IMPLEMENTS—REPAIRS—CUSTOM.—Where farm implements were purchased, if a custom to furnish repairs and parts prevailed, in the absence of an understanding between the parties, the seller is bound to furnish the same only for a reasonable time.
2. EQUITY JURISDICTION—EXTENT.—Where equity jurisdiction has been invoked by the appellant to determine the validity of a contract, the power of the court extends over all matters connected with the original bill, whether presented by answer or cross-bill.

Appeal from Clay Chancery Court, Western District;
Chas. D. Frierson, Chancellor; affirmed.

G. B. Oliver, for appellant.

1. A buyer may rescind the contract of purchase of implements on hand, where there has been a breach of the condition of a contract in some essential or substantial particular, which goes to the essence of the contract and renders the defaulting party incapable of performance. 35 Cyc. 135, 2A. Here the proof is conclusive of the custom to furnish repair parts, and that the failure and refusal rendered the implements useless and of no value.

2. The notes were each for \$100.00 and exclusively within the jurisdiction of a justice of the peace. Art. 7, § 40 Const.; 19 L. R. A. (N. S.) 1064-5; 1 Ark. 31; 37 *Id.* 164. The chancery court had no jurisdiction.

The appellee *pro se*.

1. Hammond had no authority to make the contract to furnish repairs for *eternity*. Appellee furnished repairs for a reasonable time, so long as it was able to do so. Appellee was not bound by Hammond's agreement—he was only a collector. 2 Corp. Jur. 555; 74 Ark. 557; 11 *Id.* 189; 64 *Id.* 217; 55 *Id.* 270; 187 S. W. 39; 2 Corp. Jur., § 202.

2. The alleged representation of Hammond is not binding, as it was promissory merely and not a misstatement of existing facts, and appellee is not estopped. 191 S. W. 922.

3. The alleged representation was merely a matter of opinion, but if the agreement was made it was not to be performed within a year. 20 Cyc. 239. It was not in writing. 80 Ark. 276.

4. The custom was not proven. 12 Cyc. 1040; 19 Ark. 270; 89 *Id.* 591; 81 *Id.* 549; 90 *Id.* 70; 48 Ga. 601.

5. The court having jurisdiction, invoked by appellant, had jurisdiction to dispose of the whole controversy. 76 Pac. 767; 16 Cyc. 124; 17 Ark. 340; 37 *Id.* 164.

G. B. Oliver, for appellant, in reply.

1. The custom was part of the contract. Bishop on Cont., § 457; 9 Cyc. 582 C. 1, 2.

2. The court had no jurisdiction on the cross-bill. 11 Cyc. 673, 5, 699-2. Consent can not give jurisdiction. 33 Ark. 31; 88 *Id.* 1; 90 *Id.* 195; 34 *Id.* 399; 85 *Id.* 213.

HUMPHREYS, J. Appellant brought suit against appellee in the Western District of the Clay Chancery Court to rescind a contract for the purchase of farming implements, for the alleged reason that appellee had refused to carry out the terms of the contract by supplying repairs for the implements; and to impound and cancel four \$100 notes appellant had executed and delivered to appellee in payment for the implements. The complaint alleged that the notes were executed to appellee upon promise that it would furnish, or cause to be furnished, to appellants, repairs and parts with which to repair said implements; that appellant was a non-resident of the State with no agent in the State upon whom service could be made; that the First National Bank of Corning had possession of said notes for collection. Appellee answered, admitting the execution and delivery of the notes by appellant, but denying that the implements were sold under contract to furnish repairs and parts or that the notes were executed in pursuance of such a promise; and, by way of cross-complaint, alleged that appellant had executed and delivered to appellee four notes of \$100 each, due and payable on the first day of May, June, July and August, 1916, bearing interest at the rate of

8 per cent. per annum from date until paid, in settlement of balance due for said implements; that after the sale of the implements, appellee became insolvent and discontinued the operation of its factory and could no longer furnish repairs and parts for the implements it had sold to appellant.

The cause was heard upon the pleadings and evidence adduced, upon which the court decreed a dismissal of the bill for want of equity, and rendered judgment in favor of appellee upon its cross-bill in the sum of \$469.00 with interest from October 5, 1906, at the rate of 8 per cent. per annum.

From that decree an appeal has been prosecuted to this court.

(1) The implements in possession of appellant at the time this suit was instituted were purchased from appellee in 1912 and 1913. Payments were made from time to time but in the fall of 1914 the account was closed by the execution of notes. On February 15, 1916, appellant executed the notes constituting the basis of this suit in renewal of the notes given in the fall of 1914. The original notes executed in 1914 were obtained by a Mr. Hammond, collecting agent of appellee, who stated that appellee would continue to furnish repairs for the implements. Appellee had not invested Mr. Hammond with authority to make an agreement to furnish repairs and parts for implements. Neither was it informed that such an agreement had been made. The evidence is conflicting as to whether the renewal notes sued upon were executed before or after appellee had failed to furnish repairs and parts for the implements. No specific contract was made for repairs and parts at the time the implements were purchased in 1912 or 1913. It was customary for manufacturers who sold implements at Corning to sell repairs and parts for them. Appellant's testimony is to the effect that they bought the implements with this custom in view. M. G. Hoffman testified that they were unable to get any repairs and parts after the spring of 1915. If the custom prevailed and became

a part of the contract, the most favorable construction a buyer could invoke would be to hold the seller bounden to furnish repairs and parts for a reasonable time. We think if appellee furnished parts and repairs through the spring of 1915, for implements furnished in 1912 and 1913, its contract was performed in all good conscience and equity. Especially is this so, in view of the fact that appellee became insolvent and was unable to continue the manufacture of the repairs and parts; and in view of the further fact, that the notes were renewed and extended on February 17, 1916. The chancellor's finding and decree on the merits of the original bill is in accordance with the weight of evidence and our construction of the contract.

(2) It is contended by appellant that the cross-bill should have been dismissed also, for the reason that it asked affirmative relief on matters purely legal in nature; and in amount within the exclusive jurisdiction of a justice of the peace. Each note was for \$100.00, exclusive of interest, and within the exclusive jurisdiction of a justice of the peace, under section 40, article 7, of the Constitution.

Appellee contends for the rule, that equity having acquired jurisdiction for one purpose will administer complete relief. In discussing the rule that relief of a purely equitable nature can not be given in an action properly begun and prosecuted at law, Mr. Justice EAKIN, in the case of *Little Rock & Ft. Smith Ry. Co. v. Perry*, 37 Ark. 164, said:

"With regard to actions begun in chancery, which upon their face appear to be exclusively and wholly cognizable at law, as for instance, a bill to obtain judgment upon a note, or an ejectment bill without equitable elements, the rule is the same. It is always, however, to be borne in mind that if there be any equitable element to which the jurisdiction of a court of chancery may attach, then by the old doctrine, the court in the same proceedings may administer all legal relief connected with the

subject-matter and essential to do full and complete justice at once to all parties before it.”

In the instant case, appellant selected the forum and alleged matter peculiarly within the jurisdiction of a court of equity. The notes in question were drawn into the suit, impounded and sought to be canceled. They are directly connected with the subject-matter alleged in the original bill. Unnecessary multiplicity of actions is abhorred by the law. The very object of a cross-bill should be to enable parties to adjust all differences, growing out of the same transaction, in the same suit. In the instant case, appellant brought appellee into court touching the validity of the notes sought to be enforced by cross-bill. The subject-matter of the original bill and cross-bill is one and the same thing, so interwoven that no distinction can be made between the one or the other. The equity jurisdiction having been invoked by appellant to determine the validity of the contract, we think the power of the court extended over all matter connected with the original bill, whether presented by answer or cross-bill.

No error appearing, the decree is, in all things, affirmed.

LISKO v. UHREN.

Opinion delivered June 25, 1917.

1. APPEAL AND ERROR—FINDING OF JURY.—The finding of a jury, when supported by substantial evidence, will not be reversed on appeal, although it appears to be against a preponderance of the evidence, in the absence of a showing that the trial judge abused his discretion.
2. TRIAL—CONDUCT OF JUDGE—OPINION.—A trial judge may not, in the presence of the jury, during the progress of a trial, express an opinion touching the weight of the evidence.
3. EVIDENCE—CONTRADICTING WITNESS ON COLLATERAL MATTERS.—It is not permissible for a party to draw out immaterial and collateral matters on cross-examination, and afterwards contradict the witness as to those matters.
4. EVIDENCE—IRRELEVANT TESTIMONY—WHEN ADMISSIBLE.—Irrelevant testimony is admissible where showing the bias of the opposite party, and when its introduction is limited to that purpose.

5. NEW TRIAL—NEW EVIDENCE.—A new trial will not be granted because of newly-discovered evidence, where the appellant did not exercise diligence to procure the same in the first instance.

Appeal from Prairie Circuit Court; *Thos. C. Trimble*, Judge; affirmed.

Manning & Emerson, for appellant.

1. The verdict is overwhelmingly against the testimony. There is no testimony to sustain it, where the physical facts are taken into consideration. The jury had no right to disregard arbitrarily the plain, undisputed statements of witnesses who said they saw the water running over from one field and into the other. 101 Ark. 532. Besides the physical facts show negligence on part of appellee. A verdict will be set aside where it is against the clear weight of the evidence. 70 Ark. 385; 34 *Id.* 632; 10 *Id.* 492; 151 S. W. 288; 96 Ark. 37-42.

2. The remarks of the court in the presence of the jury clearly tended to discredit appellant's testimony, thereby expressing its opinion. 123 Ark. 146-152.

3. The court erred in the rejection and acceptance of certain testimony of Medendorff. It was prejudicial error.

4. It was error to refuse a new trial on account of newly-discovered evidence.

Trimble & Williams, for appellee.

1. The verdict is sustained by the evidence and should not be disturbed. 85 Ark. 195; 100 *Id.* 599; 98 Ark. 311; 94 *Id.* 586.

2. The remarks of the court were not an expression of opinion, but were made merely for the purpose of avoiding repetition and nothing else.

3. There were no errors in the admission or exclusion of testimony. 101 Ark. 153; 99 Ark. 616-7; 104 *Id.* 494-5. It is not permissible for a party to draw out immaterial and collateral matters on cross-examination and afterwards contradict the witness as to such matters. 104 Ark. 494-5.

4. Appellant in his motion for a new trial did not comply with the law in seeking a new trial upon newly-discovered evidence. 106 Ark. 388; 46 *Id.* 201. Due diligence was not shown. 85 Ark. 38; 70 *Id.* 244. The alleged evidence is cumulative merely. 25 Ark. 89; 60 *Id.* 481; 66 *Id.* 481; 86 *Id.* 122; 46 *Id.* 201.

5. Appellee plead that the damages were caused by excessive rainfall and his evidence shows it. The pleadings are considered as amended to conform to the proof. 124 Ark. 390; 100 *Id.* 217; 40 *Id.* 360.

6. Where there is a conflict in the evidence, the verdict is conclusive.

HUMPHREYS, J. Appellant instituted a suit against appellee in the Southern District of the Prairie Circuit Court, alleging that appellee, who owned a rice farm adjoining his land, had wilfully, maliciously, negligently and carelessly pumped water from a large well on his rice lands and flooded certain lands of appellant, and thereby destroyed 20 tons of hay; and by a continuation of so flooding the land, prevented him from harvesting 30 tons of growing grass, to his total damage in the sum of \$200.00.

Appellee filed answer denying the material allegations of the complaint.

The cause was heard by a jury upon the pleadings, evidence adduced and instructions of the court, which resulted in a verdict and judgment for appellee. The case is now before us on appeal.

Four alleged errors are insisted upon by appellant for a reversal of the judgment.

(1) First. It is contended that the evidence is not sufficient to support the verdict. The evidence is conflicting as to whether the damage to the hay was caused by water pumped from the rice well or by excessive rains. Appellee did not plead that the damage occurred by excessive rainfall, and now it is contended that the court erred in admitting proof showing that the damage was caused by the rains. No objection was made or exception saved to the admission of this character of evidence

at the time. For that reason alone we can not now pass upon the competency of the evidence. A reasonable inference might be drawn from the whole evidence in the case that the hay was damaged on account of excessive rains. We are inclined to the view that a preponderance of the evidence reflects that the damage was caused by floods from the well, but we are also of the opinion that there is sufficient legal evidence of a substantial nature to sustain the verdict on appeal to this court. On account of the superior position occupied by the trial court for weighing evidence and testing the credibility of witnesses, this court will not disturb verdicts of juries because contrary to a preponderance of the evidence, unless the discretion of the trial judge has been obviously abused. The attitude of this court with reference to verdicts of juries and courts sitting as juries is clearly stated in all of its phases in the following cases: *Shaufelberger v. Mattix*, 85 Ark. 195; *Taylor v. Grant Lumber Co.*, 94 Ark. 566; *Blackwood v. Eads*, 98 Ark. 304; *McIlroy v. Arkansas Valley Trust Co.*, 100 Ark. 596.

(2) Second. It is insisted that the trial court expressed an opinion in the presence of the jury that appellant was not endeavoring to confine himself to the truth and facts in the case. It is not permissible for the trial judge, in the presence of the jury, during the progress of the trial, to express an opinion touching the weight of evidence. It was so held in the case of *Roe Rice & Land Co. v. Strobhart*, 123 Ark. 146, cited by appellant. We might add that it is within the exclusive province of the jury to pass upon the credibility of witnesses and not the privilege of the trial judge to directly or indirectly reflect upon their testimony. If the language used by the learned judge in the instant case in any way contravenes the principles just announced, then this case should be reversed and remanded for a new trial.

John Lisko, witness in his own behalf, was recalled, and was being questioned concerning the amount of hay damaged during the second cutting. The court said to

the attorney who was examining the witness, "You have gone over that." The attorney responded that the witness did not say how much. The court responded "He said he did not know how much, he just guessed at it." It is very clear that the court was attempting to restate the testimony given by the witness touching this particular matter when first on the witness stand. By reference to the original testimony it will be seen that the witness did not himself attempt to definitely state the number of acres or the number of tons of hay damaged. The witness stated he did not know, and referred to the fact that he had procured parties to measure the land. The purpose of the court was to prevent repetitions in the evidence. The remark was not the expression of an opinion on the weight of the evidence, nor a criticism on the testimony of the witness.

(3) Third. It is urged that the court erred in excluding a question propounded to appellant as follows: "I will ask you if on yesterday you and Mr. Medendorff were talking about this case and you offered to get an automobile and take him and any three men he would select and go down there and look at this field of yours, both fields, and let them decide whether or not the water came through there upon your fields from the Uhren place."

Medendorff had stated in response to a cross-question by appellant's counsel that he had no recollection that appellant had made such a proposition to him. The question propounded to and answer given by Medendorff was not material to any issue in the case. It was wholly collateral. It is not permissible for a party to draw out immaterial and collateral matters on cross-examination and afterwards contradict the witness testifying to such matters. *Brock v. State*, 101 Ark. 147.

No error was committed by excluding the above question propounded to appellant.

(4) Our attention is also called to the fact that appellee was permitted to establish by Robert Medendorff that appellant attempted to rent the rice land out from

under appellee. It is said that this evidence was wholly irrelevant and tended to prejudice the jury against appellant and to discount the weight of his evidence. The evidence did not tend to establish the issue presented by the pleading, and in that sense was irrelevant, but no error was committed by the court in admitting the evidence, if admissible for any purpose. Appellant became a witness in his own behalf, and it was proper for appellee to introduce evidence tending to show that appellant was biased or prejudiced against him. The evidence was admissible as tendings to establish bias. It would have been the duty of the court to limit the evidence to the sole purpose of bias if the appellant had made the request at the time.

(5) Fourth. It is insisted that the court committed error in refusing to grant a new trial on account of newly-discovered evidence. We have read the affidavits in support of the motion for new trial on account of newly-discovered evidence, and find that the evidence is cumulative. We also think appellant might have obtained practically all the alleged newly-discovered evidence before the trial had he exercised proper diligence.

No error appearing in the record, the judgment is affirmed.

QUINN v. REED.

Opinion delivered July 2, 1917.

1. COUNTY WARRANTS—INTEREST—REISSUANCE—ACTION TO RESTRAIN BY CITIZEN AND TAXPAYER.—Under art. 16, § 13, of the Constitution, a citizen and taxpayer may bring an action to restrain the county judge, clerk, and treasurer from reissuing outstanding county warrants for the payment of interest for forbearance until a future day.
2. COUNTY WARRANTS—REISSUANCE—INTEREST.—Under art. 16, § 1, of the Constitution, the Legislature is without power to authorize the county court to issue warrants or other evidences of indebtedness in any form for the payment of interest for future forbearance.

3. COUNTIES—OBLIGATIONS—INTEREST.—There is no authority in this State for the payment of interest at all by counties.

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

John W. Wade and *Rose, Hemingway, Cantrell, Loughborough & Miles*, for appellant.

1. The act is not unconstitutional. The reissue of warrants is a judgment and warrants can be made payable at a future day. 122 Ark. 557; 98 *Id.* 299. It merely provides that the county court may pay, for the value of his indulgence, to the holder not to exceed 6 per cent. per annum. This is not interest, nor do the warrants bear interest. Orders issuing warrants are judgments, and the Legislature can make judgments against counties bear interest. 50 Ark. 416; 66 *Id.* 247. See also 68 Ark. 83; 103 *Id.* 468.

2. None of the provisions of the Constitution are violated. Cases *supra*; 36 Ark. 89. The warrants are not interest-bearing. Cooley, Const. Lim. (7 ed.) 236. The act must be clearly unconstitutional. 207 U. S. 88; 32 Ark. 144; 99 *Id.* 1; 102 *Id.* 166; 85 *Id.* 171; 100 *Id.* 175. Every doubt should be resolved in favor of constitutionality. *Ib.* The Legislature is supreme, when its acts are not violative of the Constitution. The act is not within the evil intended to be remedied. A reissued warrant is not an interest-bearing evidence of indebtedness.

Callaway & Huie, for appellants, as *amici curiae*.

1. Statutes are presumed to be constitutional and all doubts are to be resolved in their favor; they must be plainly violative of the Constitution and forbidden in express words or by necessary implication. 63 Ark. 576; 66 *Id.* 466; 1 *Id.* 552; 11 *Id.* 451; 15 *Id.* 664; 36 *Id.* 171; 58 *Id.* 407; 56 *Id.* 485; 59 *Id.* 513; 39 *Id.* 353; 93 *Id.* 612; 114 *Id.* 156; 119 *Id.* 314.

Every word in the Constitution should be expounded in its plain, obvious and common sense meaning. 52 *Id.* 336; 60 *Id.* 343. It must be forbidden plainly. 99 Ark. 100; *Ib.* 136.

2. Judgments against counties bear interest. Kirby & Castle's Dig., § 6390. See also 80 Ark. 109; 50 *Id.* 416.

Mehaffy, Reid & Mehaffy, for appellee.

The act is unconstitutional. 36 Ark. 89; 50 *Id.* 416. Interest is a premium paid for the use of money. 121 N. W. 1072, 2 Words & Phr. (2 Series) 1145. It is true the warrant is not interest-bearing on its face, but it is within the inhibition if it bears interest at all. No subterfuge nor evasion is allowed. 157 Fed. 5141; 130 S. W. 52; 96 Pac. 45; 17 L. R. A. (N. S.) 552, and cases cited.

McCULLOCH, C. J. Appellee, representing himself as a citizen and taxpayer of Pulaski County, instituted an action in the chancery court of that county to restrain the county judge, clerk and treasurer from reissuing the outstanding county warrants and issuing separate warrants for the payment of interest for forbearance until a future day.

It is alleged in the complaint that the outstanding warrants of the county exceed in amount, to the extent of \$150,000, the county revenues derived this year from taxation and other purposes. The defendants offer justification for the reissuance of the county warrants and the issuance of separate warrants in payment of interest for the forbearance until the warrants are to be presented in the future, under an act of the General Assembly of 1917, Act 378, p. 1814, entitled "An Act authorizing the county court of Pulaski County to refund its county warrants." That statute provides that the county court of Pulaski County may call in its warrants for reissuance payable to bearer at a future date, and that the county court "is authorized to pay to parties accepting any of said reissued warrants payable at a future date, a fair sum, representing the value of their indulgence in waiting for payment at such future date, such price to be paid either in money or warrants, but not to exceed the equivalent of 6 per cent. per annum for the time for which said indulgence is granted."

The court sustained a demurrer to the answer, and appellants declined to plead further and suffered final

judgment to be rendered against them in accordance with the prayer of the complaint.

(1) If the proceedings of the county officials as recited in the complaint are unauthorized by law, it constituted an illegal exaction within the meaning of Section 13 of Article XVI of the Constitution, which provides that "Any citizen of any county may * * * institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." Appellee is, therefore, entitled to maintain the suit. *Lee County v. Robertson*, 66 Ark. 82.

The contention of appellee is that the statute is void and that the proposed proceedings are illegal because in conflict with the provisions of Section 1, Article XVI of the Constitution of 1874, which reads as follows:

"Neither the State nor any city, county, town or other municipality in this State shall ever loan its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the present existing indebtedness, and the State shall never issue any interest-bearing treasury warrants or scrip."

On the other hand, learned counsel for appellants insist that this provision of the Constitution forbids only the issuance by counties and municipalities of evidences of indebtedness, which on their face bear interest, and that the provision does not prohibit counties or municipalities from entering into contracts in another form for the payment of interest.

We think that to sustain this argument would be to give too restricted a meaning to the language of the Constitution, and that such an interpretation would admit of the most flagrant evasions. This court has, in fact, expressly decided against that interpretation in the case of *Jacks & Co. v. Turner*, 36 Ark. 89, where it was held that a statute declaring that registered county warrants

should bear interest was in conflict with the provision of the Constitution now under consideration. It is worthy of note that the circuit judge who tried that case below, and the justice of this court who wrote the opinion here, were both members of the Constitutional Convention, and they shared the same view in the interpretation of this particular provision. That case did not involve evidences of indebtedness bearing interest on their face, but the decision related to the power of the Legislature to make such evidence of indebtedness interest-bearing upon being presented and registered on account of lack of funds. Mr. Justice EAKIN, in disposing of the question, said:

“Formerly, the holder of any county warrant might have presented it to the county treasurer, whose duty it was, in case of no funds, to indorse the fact upon the warrant, with the date, after which the warrant bore interest, at the rate of 6 per cent. per annum. This made it an interest-bearing evidence of indebtedness, which was not permissible after the adoption of the new Constitution.”

In giving full scope to that decision, which was an interpretation of the Constitution not a great while after its adoption, we are constrained to hold that the inhibition reaches not only to evidences of indebtedness which bear interest on their faces, but also to separate contracts for the payment of interest for future indulgence. If the proceeding now under consideration is permissible under the Constitution, it amounts to no less than the issuance of separate evidences of indebtedness to cover interest.

County warrants are what the name implies, orders on the treasury for the payment of money, but in a sense they constitute, while outstanding, evidences of indebtedness of the county. If separate warrants can be issued for interest to accrue in the future, then other evidences of indebtedness could be issued with separate contracts to pay interest in the future. The fact that the evidence of an agreement to pay interest is in the form of an order on the treasurer does not rescue it from the constitutional

ban against the issuance of interest-bearing evidences of indebtedness.

Counsel for appellant rely upon the decision of this court in *Nevada County v. Hicks*, 50 Ark. 416, where it was held that this provision of the Constitution did not prevent judgments against counties bearing interest under a general statute making all judgments bear interest. This court took occasion, however, in the opinion in that case to distinguish the ruling from the decision in *Jacks & Co. v. Turner*, *supra*, by pointing out that the charge of interest resulted from contract in the former case and that it resulted merely by operation of law in the case then under consideration. In the opinion the court said:

"The interest allowed in a judgment, where interest is not stipulated for in the contract sued on, is not by virtue of the contract between the parties to the suit, but is by operation of law, and is in the nature of a penalty provided by the law for delay in payment of the principal sum, after it becomes due. In the case of a judgment rendered against a county, by a court of competent jurisdiction, the rendering of the judgment can not, in any just or reasonable sense, be regarded as a contract by the county. The judgment is the decision or sentence of the law fixing the amount due, and we fail to see how the allowance of interest in a judgment on a claim due by a county can be construed as the contract of a county to pay interest—or as the issuing by the county of interest-bearing evidences of indebtedness."

(2-3) The language just quoted is a clear recognition by the court of the construction of the Constitution which prohibits counties and municipalities from issuing evidences of indebtedness constituting a contract for the payment of interest whether the interest appears on the face of the contract or otherwise. We hold now that that is what the framers of the Constitution meant, and that the county court exceeds its power when it undertakes to issue warrants or other evidences of indebtedness in any form for the payment of interest for future forbearance. There is no authority in this State for the payment of in-

terest at all by counties, for the old statute making judgments bear interest, even against counties, has been amended so as to exclude judgments against counties from its operation. Kirby's Digest, §§ 5387, 5388.

Interest is nothing more nor less than compensation for forbearance, or, as otherwise defined "legal damages for injurious detention of money." *McDonald v. Loewen* (Mo.), 130 S. W. 52. Contractual interest is usually a temporary expedient, and the fact that the plan under consideration contemplates only a temporary postponement of the county debt does not alter its objectionable character.

If the Legislature has no power to declare county evidences of indebtedness to be interest-bearing after registration on account of lack of funds, then certainly it has no power to authorize the county court to enter into a separate contract for the payment of interest.

With the policy of the law, we have nothing to do, our only concern being as to its validity when measured by the terms of the Constitution. It may be that in the present emergency it would be a good thing for the county to procure a postponement of the presentation of its outstanding warrants to a future date by paying interest, but the Constitution forbids that, and we must all obey the mandate. The chancery court was, therefore, correct in reaching the conclusion that the proposed statutory plan for reissuance of the warrants is invalid, and the decree is affirmed.

BLEDSOE v. STATE.

Opinion delivered July 2, 1917.

1. CRIMINAL LAW—DISQUALIFICATION OF JUDGE ACTING AS ATTORNEY BEFORE GRAND JURY.—A circuit judge is disqualified to try a cause " * * in which he may have been of counsel," under Art. 7, § 20, of the Constitution. *Held*, the provision in the Constitution relates to a case in which the judge was counsel before he assumed the duties of the judgeship.

2. CRIMINAL LAW—INDICTMENTS—CONDUCT OF TRIAL JUDGE—DISQUALIFICATION.—The circuit judge of Garland County *held* not disqualified to preside in a trial, under Art. 7, § 20, of the Constitution, when he assisted in the examination of witnesses before the grand jury who found the indictments.
3. SHERIFFS—FAILURE TO SEIZE AND BURN GAMBLING PARAPHERNALIA.—The evidence *held* sufficient to support a conviction of the sheriff of Garland County for failure to seize and burn gambling paraphernalia, used in the operation of a certain gambling house in the city of Hot Springs.
4. EVIDENCE—PROOF OF CRIMINAL INTENT—SIMILAR ACTS.—When the issue is one of good or bad faith, it is admissible to prove a series of similar acts done about the same time, as tending to establish the particular intent.
5. SHERIFFS—FAILURE TO PERFORM DUTIES—PROOF OF INTENT.—A sheriff was charged with wilfully omitting and failing to serve a writ to seize and burn certain gambling devices. In determining the defendant's intent, proof is admissible of his action in reference to other orders of like nature about the same time.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; affirmed.

Murphy & McHaney and *J. S. McConnell*, for appellant.

1. The judge was disqualified to sit or preside in the trial. Const., art. 7, § 20; 2 R. C. L. 938; 23 Cyc. 587; 78 Miss. 175; 84 Am. St. 622; 15 R. C. L. 534; 12 *Id.* § 24; 20 Cyc. 1340; 12 R. C. L. 1040, § 24; 60 Ark. 425.

2. The evidence was not sufficient to support the verdict.

3. There was error in the admission of evidence. Appellant was indicted for an alleged wilful failure to execute only one burning order, that of January 27. Other burning orders were not admissible in evidence.

4. The second instruction was error. It makes appellant responsible for an error of judgment, however honest his course.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The judge was not disqualified. Kirby's Digest, § 2210; Const., art. 7, § 20; 31 Ark. 35; 61 *Id.* 88; 12 Cal. 523.

2. The evidence is ample to sustain the verdict.

3. It was not error to admit the various burning orders issued in January. The chief issue was whether appellant's failure to serve the warrant placed in his hands was wilful and intentional, or otherwise. They tended to show his intent. 75 Ark. 427; 72 *Id.* 586; 80 *Id.* 495; 81 *Id.* 25; 84 *Id.* 119; *Ib.* 16; 43 *Id.* 367; 49 *Id.* 449; 62 *Id.* 119.

4. Instruction No. 2, given, was not error. It did not hold appellant to the exercise of *judgment*, but *did* hold him to the exercise of *diligence*. 2 Tex. App. 158; 120 Ga. 924; 4 Blackford (Ind.) 171; 76 N. C. 197.

HUMPHREYS, J. Appellant, sheriff of Garland County, was indicted, tried and convicted in the Garland Circuit Court of misdemeanor in office, for failure to seize and burn gambling paraphernalia used in operating a gambling house over the Mint Billiard Parlor at No. 706½ Central avenue, Hot Springs, Arkansas. A fine of \$5 was assessed by the verdict. A judgment of ouster and for the fine and costs was rendered against appellant, from which he has prosecuted an appeal to this court.

The first assignment of error insisted upon by appellant for reversal is the overruling of his motion suggesting the trial judge's disqualification and requesting him to certify such disqualification. At the February, 1917, term of said court the trial judge had instructed the grand jury to investigate the gambling situation in Hot Springs with relation to whether certain officers of the county were countenancing and condoning gambling. The judge conducted the examination of a large number of witnesses summoned to appear before the grand jury to testify concerning the gambling situation. As a result of the examination, the grand jury returned two indictments against appellant and one against the prosecuting attorney.

The validity of these indictments was questioned at the next term of court because the trial court had participated in the investigation, whereupon the court directed the jury to reinvestigate the gambling situation as it ex-

isted in Hot Springs in the months of December, 1916, and January, 1917. At the request of the prosecuting attorney, Mr. Wootton, of the firm of Martin, Wootton & Martin, on account of his familiarity with the former investigation, was permitted to assist in the new investigation. The court specially charged the grand jury with reference to the line of investigation to be pursued, and announced that writs for the seizure and burning of gambling paraphernalia had been issued and placed in the hands of the sheriff, and suggested that the jury examine into whether or not the sheriff had faithfully executed the writs.

(1-2) New indictments were returned against the sheriff by the grand jury on April 4, 1917, charging him with the identical offenses charged against him in the former indictments. It is insisted that the new indictments, being based upon the same testimony developed by the judge in the original investigation, stand in the same attitude as the former indictments as related to the alleged disqualification of the trial judge. In other words, if his participation in the first investigation disqualified him from sitting as judge in the trial of those cases, then it is insisted for the same reason that he is disqualified from sitting as judge in the trial on the present indictment. Section 20, article 7, of the Constitution of Arkansas forbids a judge who was of counsel in a case to sit or preside in the trial of the cause. The particular part of section 20, article 7, invoked by appellant to disqualify the judge is as follows: "Or in which he may have been of counsel. * * *" This clause of the Constitution relates to some case in which the judge was counsel before he assumed the duties of the judgeship. The very language clearly imports such construction. It must necessarily relate to cases in which the judge participated as attorney or counsel before assuming his duties as judge, because by section 25 of the same article of the Constitution, circuit judges are denied the right to appear as attorney or of counsel in any case during their incumbency in office. It being clear to us that the latter part of sec-

tion 20 has reference to those cases only in which the judge participated prior to entering upon his duties, it follows that there was no constitutional bar to his sitting as judge in the instant case, for the conduct complained of by appellant occurred after the judge assumed his official duties. If, however, the spirit of the clause is broad enough to include cases in which a judge accepted employment or volunteered his services as an attorney or as counsel after he assumed the duties of his office, we are of opinion that the participation in the examination of witnesses before the grand jury, upon whose testimony the original indictments were returned, did not constitute him either an attorney or counsel in the cases. His assistance was requested by the grand jury. The prosecuting attorney was not in a position to assist them. The situation was an extraordinary one. The majesty of the law was at stake. An acute issue was drawn as to whether law should prevail or whether crime should run rampant and offenders go unpunished. The exigencies of the times demanded radical action on the part of the circuit judge. We think his participation in the original grand jury proceedings falls far short of constituting him an attorney or of counsel in the particular cases now pending before the court. His participation in the examination of witnesses might have been urged as cause for quashing the original indictments, but can not be urged as a disqualification of the judge under the latter part of section 20, article 7, of the Constitution of Arkansas, in the instant case.

(3-4). It is contended that there is not sufficient legal evidence to support the verdict. This court is committed to the doctrine that if there is any legal evidence to support the verdict, it will not be disturbed on appeal. The evidence is overwhelming that gambling houses were being operated openly, both day and night, during the months of December, 1916, and January, 1917, in the city of Hot Springs. During that time as many as six writs for the seizure and destruction of gambling paraphernalia were placed in the hands of appellant. The returns

upon the writs show the seizure and destruction of only an insignificant part of the gambling devices used during those months by the several gambling houses. The Mint gambling house ran three or four poker tables, a senate table, a 21 table, a faro bank table, a klondike table, a crap table and a roulette wheel. From seventy-five to one hundred men frequented the Mint and engaged in play each day from noon until midnight, in the months of December and January. Other popular resorts known as the "New York," the "Ohio Club," "Warwick," "Monarch," etc., were richly furnished and equipped with the same character of paraphernalia and operated day and night during the same period. It is true that appellant made quite a number of unsuccessful raids on the gambling houses and was disappointed with the results of his search, but the finding of the jury was to the effect that he failed to exercise proper diligence in the search for and destruction of these gambling devices. Gambling houses were operated during that period in such open defiance of law that we can not say the verdict is unsupported by any legal evidence.

(5) It is insisted that the court erred in admitting all writs issued in the month of January, 1917, by the circuit judge for the seizure and destruction of gambling devices, and appellant's returns thereon. Appellant was charged with wilfully omitting and failing to serve a writ to seize and burn gambling devices on the 27th day of January, 1917, used in operating a gambling house at No. 706½ Central avenue. Only a small number of the devices in use at that place were seized. The question for the jury to determine was whether appellant had made a faithful search and honest effort to seize the devices. The test of appellant's guilt or innocence was his intent. If his purpose was not to seize and burn the devices, he was guilty. If, on the contrary, his purpose was to seize and burn them, he was innocent. There was no better way to ascertain his intention than by showing his action in reference to other orders of like nature about the same time. When the issue is one of good or bad

faith, as in this case, it is admissible to prove a series of similar acts about the same time as tending to establish the particular intent. *Howard v. State*, 72 Ark. 586.

Lastly, it is contended that the court erred in giving instruction No. 2, because it is said the instruction fixes responsibility upon appellant for an error of judgment. We are unable to place such a construction upon the language used by the court. It fixes responsibility upon appellant if he failed to exercise proper diligence in serving the writ or if he failed to make an honest effort to seize and destroy the gambling devices named in the writ.

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

DAVIS, STATE BANK COMMISSIONER, *v.* MOORE.

Opinion delivered July 9, 1917.

Appeal from Grant Circuit Court; *W. H. Evans*, Judge; reversed.

GRAHAM *v.* DAVIS, STATE BANK COMMISSIONER.

Opinion delivered July 9, 1917.

Appeal from Jefferson Chancery Court; *John M. Elliott*, Chancellor; affirmed.

1. CORPORATIONS—LEGISLATIVE AMENDMENT TO CHARTER.—The Legislature, under Art. 12, § 6, of the Constitution, may amend or revoke charters granted to corporations, without any restriction except that no injustice shall be done to the corporators.
2. CORPORATIONS—AMENDMENT TO CHARTER BY LEGISLATURE.—The power to revoke or amend a corporation's charter, includes the power to impose any new terms which work no injustice to the stockholders within the meaning of the provision of the Constitution.
3. BANKS AND BANKING—DOUBLE LIABILITY OF STOCKHOLDERS—CONSTITUTIONALITY OF STATUTE—RETROACTIVE EFFECT.—The provision of the Act of 1913, p. 462, making stockholders of banks liable for the debts of the bank to an amount equal to the amount of their stock in said bank, *held* to be retroactive in effect, and to be valid under the Constitution.
4. STATUTES—BORROWED STATUTES—CONSTRUCTION.—A statute taken from that of another jurisdiction is taken with its judicial interpretation.

5. BANKS AND BANKING—DOUBLE LIABILITY OF STOCKHOLDERS—RIGHT OF SUIT.—Under § 23 of the Act of 1913, p. 462, the enforcement of stockholders' liability is not dependent upon an order of the chancery court, but the duty of enforcing the liability is placed independently upon the Bank Commissioner.
6. BANKS AND BANKING—ENFORCEMENT OF DOUBLE LIABILITY.—It is for the Bank Commissioner to determine when the double liability of stockholders is to be enforced.
7. BANKS AND BANKING—ENFORCEMENT OF DOUBLE LIABILITY—REMEDY OF SHAREHOLDER.—The remedy of a shareholder for the correction of mistakes of the Bank Commissioner in declaring an excessive amount due must arise in the distribution of the funds.

Moore, Smith, Moore & Trieber, for appellant in *Davis v. Moore*.

1. The act is not unconstitutional. Art. 12, § 6, Constitution, Ark.; 4 Wheat 518. The Legislature has power to impose the double liability upon stockholders of corporations. 21 N. Y. 9; 98 Mich. 472; 26 Me. 196; 9 R. I. 194; 70 Minn. 538; 5 Wis. 577; 108 Ky. 21; 111 Cal. 57; 1 Black. 587; 179 U. S. 46; 15 Wall. 478.

2. It is not against the Fifth Amendment to the Constitution of the United States. 104 U. S. 155; 123 *Id.* 131; 147 *Id.* 490. Nor against the Fourteenth Amendment, Constitution of the United States. 164 U. S. 684; 8 Wall. 498; 94 U. S. 673; 99 *Id.* 628; 201 *Id.* 216.

3. Nor is it unconstitutional as violative of article 2, section 8, or article 2, section 1, State Constitution. Section 53 of the act is identical with the National Banking statutes. See cases *supra*. The Bank Commissioner has authority to determine the necessity of an assessment and his determination is conclusive. *Supra*.

4. No injustice is done to the corporators. Art. 12, § 6, Const.; 64 Ark. 83; 69 *Id.* 521, 530; 87 *Id.* 587; 94 *Id.* 27.

5. Defendant is estopped under sections 4 and 20 of the act to attack the constitutionality of the act. 21 S. W. 39; 65 *Id.* 312; 16 N. Y. 116; 94 U. S. 673.

6. An order of the chancery court was not a prerequisite to this suit. § 53 act; Rev. Stat. U. S., § 5234; 164

U. S. 684; 107 *Id.* 251. The decision of the Bank Commissioner is conclusive. 8 Wall. 498; 94 U. S. 763; 99 *Id.* 628; 201 *Id.* 216. It is not necessary to prove that the bank is solvent. Nor was it material to prove that the money and debts due the bank had been collected, or exhausted. 92 U. S. 156; 25 Col. 551; 104 Me. 141; 120 Mich. 1.

7. The stockholders were liable for all debts, etc., outstanding January 15, 1915, whether incurred before or after January 1, 1914. 116 Ark. 472. By *continuing* business after the new act became effective, it is conclusively presumed to have *continued* under Act 113. See 118 Ark. 176; 124 *Id.* 531; 120 Mich. 1; 149 Fed. 305; 12 Ark. 769; 81 N. W. 1059.

8. Interest should be allowed. 94 U. S. 437; *Ib.* 673; 56 Neb. 288.

Mehaffy, Reid & Mehaffy, for appellee.

1. The act is unconstitutional as an impairment of the stockholders' contract. Art. 1, § 1, Constitution, U. S. No additional burden can be imposed. 54 Ark. 111; 69 *Id.* 407; 69 *Id.* 521; 85 *Id.* 346; 89 *Id.* 418; 94 *Id.* 27; 19 Oh. St. 369; 5 Dill. 348.

2. It is contrary to article 12, section 6, Constitution of Arkansas. *Supra.*

3. Appellees not estopped. 31 Ark. 701.

4. Stockholders are not liable for debts, etc., made before January 1, 1914. The act is not and can not be retroactive. 116 Ark. 472; 38 Conn. 408; 4 Denio (N. Y.) 374; 33 Vt. 84; 15 Wis. 548; 47 S. E. 893.

5. It was not shown that the bank was insolvent when it closed. 129 N. Y. S. 993.

6. Appellant can not maintain this suit. No order of a chancery court was obtained. It was material to allege and prove when the debts, etc., were incurred. 1 Michie on Banks, etc., 238; 70 Pac. 454.

Taylor, Jones & Taylor, for Graham.

1. The act is unconstitutional. Const., art. 12, § 6; 54 Ark. 111; 58 *Id.* 407; 69 *Id.* 521; 85 *Id.* 346; 89 *Id.* 418;

94 *Id.* 27. Especially if the act is retroactive. Cook on Corp. (5 ed.), § 501; Morawetz on Corp., § 1098, p. 1098; Beach on Private Corp., § 40; Thompson, Law of Corp., § 5417; Black on Const. Law, 535; Spelling on Private Corp., § 1028; 1 Rose, Notes U. S. Rep., p. 942; 64 N. J. L. 217; 43 Atl. 435; 58 N. J. Eq. 97; 68 N. J. L. 588; 90 Am. Dec. 617; 83 Ga. 61; 47 S. E. 893; 57 N. W. 595; 54 Ark. Law Rep. 338.

2. The finding of the Bank Commissioner is not a *quasi-judicial* determination; but if so, a court of chancery should direct him to give the act its proper construction and then levy such assessments as are reasonably necessary to pay the debts contracted since the statute became effective. Cases *supra*.

Bridges, Wooldridge & Wooldridge and Moore, Smith, Moore & Trieber, for Davis.

1. The act is not unconstitutional. See cases cited *supra*.

2. A law is not retrospective when it deals with future maintenance of existing conditions. 166 U. S. 290; 342; 133 N. Y. Sup. 152; 148 Mass. 368; 19 N. E. 390.

3. There is no estoppel. The action of the commissioner is conclusive. Cases *supra*. See also 63 S. W. 776. No order of a chancery court was necessary. See authorities cited in brief for appellant, *Davis v. Moore*.

McCULLOCH, C. J. In each of the two actions now under review John M. Davis, as Bank Commissioner of the State, was the plaintiff seeking to enforce against one of the stockholders in a bank the liability imposed by the banking law for the debts of the banking corporation to the extent of an amount equal to the par value of the stock held in such corporation. In the Moore case the Bank Commissioner sued the stockholders of the Bank of Leola, a defunct banking corporation, and in the Graham case the Bank Commissioner sued the stockholders of the defunct Bank of Pine Bluff.

The Bank of Leola was incorporated and began business in the year 1907, and was found to be insolvent and

was turned over by the board of directors to the Bank Commissioner on January 15, 1915. On April 29, 1915, the Bank Commissioner made a call on the stockholders for the full amount of the double liability prescribed by statute, and upon the defendant's failure to respond he instituted this action on July 23, 1915. The evidence shows beyond substantial dispute that The Bank of Leola was insolvent at the time that its affairs were taken over by the receiver appointed by the Bank Commissioner; that its liabilities, exclusive of the liability to stockholders on their shares of stock, was \$45,862.82, and that the assets of the bank, according to the appraisement of the fair market value amounted only to the sum of \$25,306.96, thus showing insolvency to the extent of the sum of \$20,555.86 of liabilities over the assets. The evidence shows that a considerable portion of the liabilities of the bank existing at the time it was taken over by the Bank Commissioner was incurred prior to January 1, 1914, the date on which the present banking law went into effect. The conclusion reached by the court with respect to the imposed liability under the statute renders unnecessary to inquire how much of the indebtedness was incurred prior, and how much subsequent to the said date on which the banking law went into effect. The case was tried before the court sitting as a jury and there was a finding by the court in favor of the defendant. The Bank Commissioner appealed from the judgment rendered by the court on its finding.

The Graham case was transferred from the circuit court to the chancery court, and was heard by the chancellor upon the pleadings, the decree being in favor of the Bank Commissioner, from which the defendant prosecuted an appeal.

The same questions arise in each case, and may be disposed of in one opinion. The statute under which this litigation arose was an act of the General Assembly of 1913, approved by the Governor March 3, 1913, Acts of 1913, page 462. The last section, however, provides that the act should not take effect until January 1, 1914. The

sections of the statute which are necessary to notice in the consideration of these cases read as follows:

"Section 4. The Secretary of State shall turn over to the State Bank Department all papers, books, records, charters, articles of partnership, articles of agreement and amendments thereto, in his office relating to banks, trust companies and savings banks. It shall be the duty of each bank heretofore organized and doing business in this State to report within thirty days after this act goes into effect to the Bank Department, a full and complete list of its stockholders, or members, as the case may be, showing the residence and the amount of stock or interest owned by each, and all such banks as shall make such report and declare its purpose to continue business under this act shall be authorized to do so without the payment of any additional fee, or without the filing of any additional articles of agreement or articles of partnership, providing the legal fees have once been paid for such service. Any bank, trust company or savings bank that shall fail to make report and declare its purpose to continue business, shall not be allowed to do business in this State, and all such as have not paid fees shall pay the same fees as are provided for herein."

"Section 20. Any bank organized under the laws of this State shall be permitted to receive money on deposit, and to pay interest thereon; to buy and sell exchange, gold, silver, coin, bullion, uncurrent money, bonds of the United States, or of this State, or of any city, county, school district, or other municipal corporation or improvement district thereof, and State, county, city, township, school district, or other municipal or improvement district indebtedness; to lend money on chattel and personal security, or on real estate secured by deeds of trust; provided, that all such institutions now organized and doing business in this State are hereby permitted to continue such business; but in all other respects their business, and the manner of conducting same, and the operation thereof shall be carried on subject to the laws of this State, and in accordance therewith."

Section 36 reads in part as follows:

"The stockholders of every bank doing business in this State shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock."

Other sections provide for the Bank Commissioner taking charge of a bank when found to be insolvent, either on the initiative of the directors of the bank, or on the initiative of the commissioner himself, and full authority is conferred by the statute upon the Bank Commissioner to wind up the affairs of the bank by collecting the debts due and claims belonging to it, and assets, converting the same into money and discharging its liabilities. The concluding paragraph of section 53, which sets forth the power and duties of the commissioner, reads as follows:

"The commissioner shall collect all debts due and claims belonging to it and upon the order of the chancery court of the county in which it is doing business, may sell or compound all bad or doubtful debts, and on like order may sell all its real and personal property on such terms as the court shall direct; and if necessary to enforce the liabilities of its stockholders."

It is contended that the statute is unconstitutional, especially if construed to have a retroactive effect so as to make stockholders liable for debts of the bank incurred prior to the time that the statute went into effect, for the reason that it would constitute an impairment of the obligation of the contract between a bank and its stockholders. We are unwilling to give assent to that view of the question at issue, for to do so would disregard prior decisions of this court.

(1) The Constitution of 1874 (article 12, section 6) reads as follows:

"Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing

and revokable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State, in such a manner, however, that no injustice shall be done to the corporators."

That provision of the Constitution has been construed by this court to empower the lawmakers of the State to amend or revoke charters granted to corporations, without any restrictions except that "no injustice shall be done to the corporators." *Railway Company v. Gill*, 54 Ark. 101; *Leep v. Railway Company*, 58 Ark. 407; *Railway Company v. Paul*, 64 Ark. 83; *Woodson v. State*, 69 Ark. 521; *Ozan Lumber Co. v. Biddie*, 87 Ark. 587; *Arkansas State Co. v. State*, 94 Ark. 27.

In each of those cases it was held to be within the province of the Legislature to impose new terms and obligations upon corporations under the reserve power to amend or revoke charters, and it was held that it was a matter for determination in each case as to whether the legislation came within the constitutional inhibition that "no injustice shall be done to the corporators." The doctrine was so carefully and learnedly elaborated by Judge BATTLE in the *Leep* case, *supra*, that it is unnecessary to renew the discussion.

The doctrine clearly applicable to the present case was summed up in that opinion as follows:

"Natural persons do not derive the right to contract from the Legislature. Corporations do. They possess only those powers or properties which the charters of their creation confer upon them, either expressly, or as incidental to their existence; and these may be modified or diminished by amendment or extinguished by the repeal of the charters."

The same doctrine was forcefully reiterated by Judge RIDDICK in the case of *Woodson v. State, supra*.

But it is argued that those cases have no application to the questions now presented for the reason, it is stated, that the court was dealing solely with the question of the relative rights of the public and of the corporation itself,

whereas in the present cases we deal with the rights of the stockholders and that the statute operates as an impairment of the contract between the corporation and its stockholders. The fundamental error of the argument is in the assumption that the statute deals with the contract between the stockholder and the corporation. We think, on the contrary, that the statute deals entirely with the rights of the public as against the corporation and its stockholders, fixing the terms under which the franchise may be operated. The liability of stockholders for the debts of the corporation arises altogether by force of the statute and not out of the contract between the stockholders and the corporation. The obligation of that contract is merely that the corporation shall answer to the stockholders to the extent of the par value of the stock and the accumulated profits. In other words, the value of the stock is the measure of the contractual liability of the corporation to its stockholders. The Supreme Court of the United States in *Christopher v. Norvell*, 201 U. S. 216, in discussing the question of liability of stockholders under the National Banking Law, said that "although in a limited sense there is an element of contract" in a person having become a shareholder in a corporation, the liability of a shareholder as such "has its sanction in the statute creating liability against each shareholder."

We think that our own cases cited *supra*, deciding as to the validity of other statutes, are conclusive of the question now before us, but there are decisions of other courts on statutes similar to the one now involved which hold that such statutes are free from the objections now urged. *Williams v. Nall*, 108 Ky. 21; *McGowan v. McDonald*, 111 Cal. 57; *Bissell, Receiver, v. Heath*, 98 Mich. 472.

(2) The effect is the same, so far as concerns the validity of the statute, even when it is construed retrospectively so as to make the stockholders liable for debts already incurred before the statute went into effect. The statute constituted an imposition of new terms upon which corporations of this character may continue to do

business, and, as before stated, the power to amend or revoke the charter includes the power, of course, to impose any new terms which work no injustice to the stockholders within the meaning of the provisions of the Constitution. Subscribers for or purchasers of stock in a banking corporation prior to the enactment of the statute now under consideration took their stock charged with notice of the power of the law-makers to amend the provisions of the law with respect to the terms upon which corporations may do business. This is so by virtue of the express reservation in the Constitution of the power of the law-makers to amend or revoke charters, and there can be no legal objection to legislation of this kind which does no injustice to the holders of shares of stock in a corporation. They took the stock with notice of the power of the Legislature and must abide by any reasonable provision which the Legislature may from time to time prescribe. The statute does not, it must be remembered, impose any unconditional liability on the stockholders. The liability arises, not by virtue of the statute alone, but it arises upon the acceptance of those terms by a continuation of the corporation in the banking business. Section 4 declares a period of time within which all banking corporations had after the act went into effect to signify acceptance of the new terms prescribed by the statute or to discontinue the business sought to be regulated by the statute. Section 20 defines the banking business and the proviso therein preserves the corporate status of all such concerns, whether the charter powers were the same as prescribed by the new statute or not, but compels them in all other respects to comply with the terms of the new statute.

(3) It is thus seen that the statute was intended only to prescribe terms upon which banking corporations might thereafter continue in business, and it imposed no additional liability upon the stockholders unless those terms were accepted by a continuance of the corporation in that business. So the statute falls within the principle announced so often by this court, that the Con-

stitution reserves the power of the law-makers to amend charters of corporations by prescribing new terms upon which they may do business, or even to revoke charters of corporations found to be injurious to the public interest, either an amendment or revocation, being without injustice to the stockholders.

We do not think that this statute falls within the terms of the limitation upon the power of the Legislature with respect to confining amendments to those which do no injustice to the corporators. The statute, as we have already seen, does not impose an absolute liability on the shareholder of stock, nor does it compel the corporation or its stockholders to accept the provisions of the statute. It does not operate in any sense as a confiscation of the shares of stock, for the corporation may be wound up and in that way the property interest of the stockholders preserved or an individual stockholder may sell his stock if he objects to the corporation continuing business under the new terms prescribed. It can not be assumed that the new terms prescribed by the statute operate as an impairment or depreciation of the value of the stock, and that an objecting stockholder would be unable to dispose of his shares of stock at full value. The statute is reasonable and just alike to the public and to stockholders in banking corporations, and for that reason, if for no other, it can not be assumed that the imposition of new methods of business and new terms upon which a corporation may operate business would depreciate the market value of stock in such corporation.

It is evident, we think, that the Legislature intended to give a retroactive effect to this statute so as to make it apply to all banking corporations which continue in business. We do not ignore the well-known presumption against giving, by implication, a retrospective effect to statutes. The rule is, we know, that every statute is presumed to have been intended to act prospectively unless otherwise expressed, but when this statute is considered as a whole, it is obvious that the Legislature intended to impose liability for all the indebtedness of a bank

whether it accrued prior to the time the act went into force or thereafter. It is difficult to separate the obligations of a going business concern like a bank. Of course, after it becomes insolvent it would be possible for the Bank Commissioner to ascertain and separate the obligations of the bank which accrued subsequent to a certain date and impose the statutory liability against stockholders only as to such indebtedness. But that would not be the convenient or orderly method of winding up the affairs of such a corporation and applying its assets ratably among the creditors. The statutory scheme would, not, we think, be complete and efficacious unless construed to impose liability on the stockholders for its debts irrespective of the time when contracted, and this affords a strong reason for construing the statute as operating retroactively. At any rate, the statute declares that stockholders of "every bank doing business in this State"—that is to say, all who did business in the State, after the statute went into effect—"shall be liable for all contracts, debts and engagements of such bank" to the extent of their stock, etc., and the clear inference from this language is that from and after the period stated the stockholders should be liable for all debts of the bank whether contracted before or after that time.

Our conclusion, therefore, is that the statute applies retroactively, and that as such it is not in conflict with the Constitution of this State or of the United States.

(4-5) There are still other important questions involved in these appeals. It is claimed that under the peculiar language of section 23, hereinbefore quoted, which is the only part of the statute conferring authority on the commissioner to sue a stockholder to enforce the double liability for indebtedness of the bank, he can do so only when ordered by the chancery court. The language of this section, as well as that of many other provisions of the statute, are copied from the National Banking Act of Congress, which had been construed by the Supreme Court of the United States prior to the passage of our statute. In other words, our statute is a borrowed one,

and, according to established canons of construction, we take the statute with its judicial interpretation. It seems clear to us from analysis of the language of this section that that part of the statute which relates to the enforcement of double liability is not dependent upon an order of the chancery court, but the duty is imposed upon the Bank Commissioner, independently, to enforce that liability.

The further question is raised whether or not the action of the Bank Commissioner in levying the assessment for the stockholders is conclusive as to the necessity for the call and the amount thereof. In other words, is it open to inquiry whether or not the corporation is insolvent, and, if so, to what extent is it necessary to impose liability on the stockholders, or is the act of the Bank Commissioner conclusive of those questions in a suit to enforce the liability? That question is, we think, concluded under the doctrine of the effect of borrowing a statute with its interpretation from another jurisdiction. The provisions of our statute are almost identical with the National Banking Act with regard to the enforcement by the Bank Commissioner of the double liability of stockholders. Neither of the statutes provide in detail how the liability shall be enforced, but each of them do provide that it shall be enforced, under our statute by the Bank Commissioner, and under the National Banking Law by the receiver appointed by the comptroller. Each of the statutes declares the double liability in precisely the same language and authorizes the Bank Commissioner, or the receiver appointed by the comptroller, as the case may be, to take charge of the assets of the bank and distribute the same. The Supreme Court of the United States in a number of cases, beginning with the case of *Kennedy v. Gibson*, 8 Wall. 498, has decided that the decision of the comptroller as to the insolvency of the bank, the necessity for imposition of double liability on the stockholders and the amount thereof, is conclusive and can not be controverted by the stockholders in a suit brought by the comptroller to enforce the liability.

(6-7) Giving effect, as we should, to this interpretation of the borrowed statute, we must hold that the action of the Bank Commissioner in making the assessment of liability of individual stockholders is conclusive in an action to enforce that liability. The remedy of a stockholder for the correction of mistakes of the Bank Commissioner in declaring an excessive amount due, must arise in the distribution of the funds. Of course, we are speaking now with reference to an assessment made by the commissioner free from any charge of fraud or collusion. It is unnecessary to determine now what the remedy of a stockholder would be where a charge of that kind is made against the good faith of an assessment.

It follows from what we have said that the circuit court erred in its decision of the Moore case, and that the judgment in that case is reversed and the cause remanded for further proceedings in accordance with this opinion. The decree of the chancery court in the Graham case was correct and the same is affirmed.

WEBSTER v. GOOLSBY.

Opinion delivered July 2, 1917.

1. PLEADING AND PRACTICE—STIPULATION AS TO FACTS.—Where parties file a stipulation in justice court agreeing to certain facts, without limitation upon the use of the writing, it may be used at any stage of the litigation and after appeal to the circuit court.
2. PLEADING AND PRACTICE—AGREED STATEMENT OF FACTS—WITHDRAWAL.—Where an agreed statement of facts is filed, it can be withdrawn only with the court's permission, otherwise it remains binding on the parties (except where fraud has been practiced). The trial court has a discretion to permit or refuse the annulment of a stipulation.

Appeal from Miller Circuit Court; *George R. Haynie*, Judge; reversed.

Will Steel, for appellant.

1. There was no evidence upon which to base instruction No. 2, for plaintiff, submitting the question as to whether or not "plaintiff drew upon defendant for

an amount not exceeding what was due him'' upon the first three cars which were shipped. This issue should not have been submitted for the further reason that the contract, as shown by the agreement and stipulation of counsel, expressly provided that invoices and bills of lading should be mailed to Webster, and Goolsby had no right to make drafts under his contract.

Goolsby accepted settlement for 80 per cent. of said three cars, which was materially less than the total of the two drafts.

Another objection was, it submitted the question as to the good faith of plaintiff, etc.

2. It was also error to permit the jury to disregard the stipulation of counsel filed in court. This stipulation was binding in the trial in the circuit court. 85 Ark. 605; 4 Wigmore on Ev., § § 2588, 2590-3; Greenl. on Ev. (14 ed.), § 186; 24 Am. Rep. 40; 68 Me. 215; 36 Cyc. 1283, 1292; 16 *Id.* 964-5, 973-C; 145 S. W. 1086; 21 Am. Dig., § 18; 68 So. 865; 194 Ill. App. 232; 1 R. C. L. 778; 19 L. R. A. 95.

3. The testimony of H. M. Barney, plaintiff's attorney, should have been excluded. It prevented the case from being tried *de novo* in the circuit court on its merits. 87 Ark. 231.

4. The stenographer's telegrams were admissible as office records and entries made at the time of the transaction. 57 Ark. 415.

5. The verdict was excessive.

William H. Arnold, for appellee.

1. Under section 3151, Kirby's Digest, the account stands proven for the amount claimed. The evidence supports the verdict.

2. There is no error in the instructions. Goolsby was acting in good faith and believed he was complying with his contract. 6 R. C. L., § § 324, 331, 333, 342; 97 Ark. 278; 105 *Id.* 353.

3. Parol evidence was inadmissible to vary, qualify or contradict a valid and unambiguous written contract. 95 Ark. 131; 105 *Id.* 50.

4. H. M. Barney's testimony was admissible. The question was fully presented to the jury in instructions for both parties, whether or not the contract was first broken by Webster or Goolsby.

In view of the verdict, the agreement signed by Mr. Barney is immaterial and unimportant. Failure of one party to a contract to comply with its terms releases the other from compliance with it. 65 Ark. 320; 97 *Id.* 522. See also 80 *Id.* 528; 86 *Id.* 103.

SMITH, J. This suit was commenced by appellee in the court of a justice of the peace to recover a balance alleged to be due upon three cars of lumber shipped to appellant by appellee. The contract of sale was evidenced by a writing, the material portions of which are as follows:

"Potts Camp, Miss., Aug. 12, 1913.

"To John M. Goolsby, Myrtle, Miss.:

"Fifty M. Ft. ash lumber at prices named F. O. B 15c rate to Evansville, Ind., for immediate shipment. (Dimensions described.)

"Mr. Goolsby agrees to ship this stock and guarantee the inspection. National lumber rules to govern the inspection. In case of dispute, National man to be called on to go through stock. Terms 80 per cent. upon receipt of B-L and invoice. Balance when I receive returns from customers. Bill everything to N. A. Webster from N. A. Webster at Evansville, Ind., till further notice (Goolsby has copy of this; mail him formal order) and mail me B-L and invoice, show routing on each B-L. Stock can be either green or dry, but must be well mfg. of good widths and lengths. In event you ship green oak, put sticks between each course to prevent staining and damaging.

"N. A. Webster,

"Per J. W. Runyan.

"Accepted, J. M. Goolsby.

“Also one or more cars plain and Qtd. oak at prices named delivered on an Evansville rate of frt. same instructions apply as given on ash.

“Plain Red & W. Green or dry.”

The clause in the contract, “Also one or more cars plain and Qtd. oak,” was indefinite, and, according to appellant, this question was taken up with appellee by a Mr. Runyan, who was appellant’s agent and who had acted for appellant in making the original contract of sale, and, after some correspondence and negotiation, it was agreed that the contract should be construed as meaning 100,000 feet of oak at the prices set out in the contract.

Three cars of lumber were shipped under the contract, each containing some oak, and, together, they contained the equivalent of one car of oak. The date of the shipment of these cars is one of the questions of fact involved in the case. Upon the shipment of the first car, appellee drew on appellant, with invoice and bill of lading attached, and payment of the draft was refused by appellant upon the ground that appellee had no authority to draw. The lumber had been shipped under an open shipment, that is, it had not been shipped C. O. D., and all the cars were shipped in the same manner, and, in due course, were delivered to appellant’s customer at their destination. One of the issues in the case was the authority of appellee to draw the drafts with invoices and bills of lading attached. Appellant testified that he had contracted against the right of appellee to draw on him with bill of lading and invoices attached, and that these writings should be mailed to him so that he might have time to thoroughly check over the invoices and ascertain that drafts had not been drawn for more than 80 per cent. of the value of the lumber covered by the invoice and to make it unnecessary to have an inspector on the ground as the lumber was being loaded out.

Whatever may have been the reason leading to the use of the language employed, it appears that appellant’s construction of the contract is correct, and that under its

terms appellee had no right to draw on appellant with the invoices and bills of lading attached, and the court should have so told the jury. It is said, however, that after a controversy arose over the first car shipped a conference was had between appellee and Runyan, when it was then agreed that shipment should continue under the contract, and that appellee might draw for a sum not exceeding 80 per cent. of the invoice price of the lumber shipped. It was competent for the parties to subsequently amend their written contract by changing its provisions, and if it was so changed as to confer the right to draw with invoice and bill of lading attached, instead of mailing them to appellant, then appellee thereafter had the right to draw with invoice and bill of lading attached.

At the trial in the justice of the peace court the following stipulation was entered into:

“Agreement on Partial Statement of Facts.

“The undersigned attorneys representing respectively the plaintiff and the defendant in the above styled cause hereby agree upon and admit the following facts and waive formal proof thereof in the trial of this cause: ‘That in the contract between the parties hereto, said John M. Goolsby sold and agreed to furnish said N. A. Webster, 50,000 feet of ash lumber and 100,000 feet of plain and quartered oak lumber, that the contract as to the said ash lumber is the written contract attached hereto marked Exhibit “A” and made a part hereof,’ and that said contract was signed thereon as indicated by said J. M. Goolsby, that said contract was the contract between said parties as to said plain and quartered oak lumber except the phrase in said contract, ‘One or more cars plain and quartered oak,’ was not satisfactory and to explain, make definite, and in lieu thereof it was agreed between the parties hereto, in which agreement J. W. Runyan represented the defendant as his agent, that said phrase in said contract should read and mean and in lieu of said phrase ‘100,000 feet of plain and quartered oak lumber.’

“That in figuring the amount due on the lumber shipped in three cars shipped a mistake of \$100 in the addition was made and that said mistake was first called to J. W. Runyan’s attention in a letter hereto attached marked Exhibit ‘B’ and made a part hereof, and that said Runyan also received two other letters which are hereto attached and said letters were by said Runyan turned over to said Webster, said two letters being marked Exhibits ‘C and D’ hereto.

“W. H. Arnold and H. M. Barney,

“Attorneys for Plaintiff.

“Will Steel,

“Attorney for Defendant.

“Filed 9th of November, 1915.

“J. C. Edwards, J. P.”

It is admitted that Mr. Barney, acting for Goolsby, was his attorney at the time, and had all the authority possessed by an attorney, and that nothing was said about limiting the use of the stipulation to the trial in the justice court, although Mr. Barney testified this was his intention at the time, and that he entered into the stipulation for the purpose, only of securing a trial there, as the cause had been pending in the justice court for some time. It is true that, after the trial in the justice court, appellant took the deposition of Runyan; but no part of the deposition related to the matters covered by the stipulation. Appellant’s attorney explains his failure to take a deposition upon these questions by saying that those matters were covered by the stipulation, and he considered it unnecessary to do so.

Three cars of lumber were shipped, and two drafts were drawn, and one of the issues of fact was whether the last draft covered all three of the cars, or only the first two. The relevancy of this question is that, if the draft covered only two cars, instead of three, it was drawn for an excessive amount, in that it exceeded 80 per cent. of the invoice price of the lumber shipped. The quantity and value of the lumber is not now in dispute, but the amount shipped did not equal the amount covered by the

contract, and as appellant had sold the lumber which he had contracted to buy from appellee, he was required to purchase this lumber to fill his own contracts of sale at a price greater than that named in his contract with appellee, and he filed a counterclaim in which he asked judgment for this difference in price by way of damages. The quantity of oak covered by the contract became a highly important question, and appellant contends that the stipulation fixed this amount at 100,000 feet, whereas there was admitted in evidence a letter from appellant to appellee confirming the original contract as a sale of one or more cars of oak.

When evidence was first offered tending to contradict the recitals of the stipulation, counsel for appellant objected to any evidence having that purpose upon the ground that the truth of the matters covered by the stipulation was concluded by the recitals of that instrument. Counsel for appellee contended that the stipulation covered only the trial in the justice court, and the court heard the evidence set out above on that issue, but reserved a decision at the time, and finally allowed the jury to consider this stipulation, along with all of the other evidence in the case, as determining what the truth was in regard to the facts there recited. This ruling was made after the introduction of the evidence was concluded and the instructions were being settled. Counsel for appellant said, "Your Honor, I understood that the court was to instruct the jury relative to my request that the written agreement of counsel filed in the lower court with the exhibit attached was the contract between the parties hereto, and I would like for the court to instruct the jury that this written agreement is the contract between Goolsby and Webster, and is binding in this trial."

This request was refused, and that action of the court is assigned as error. .

(1) We think this action of the court was erroneous. There was either a stipulation or there was none. If there was such a stipulation, it should have been given effect. It would be, and is, an anomalous situation to

have litigants stipulate as to what the facts are for the purposes of a trial, and then to admit evidence contradicting the recitals of such stipulation. There was a stipulation. This fact is not questioned; but it is said that it was intended for use in the trial in the justice court only. Presumptively this is not true. The stipulation contained no such limitation, and, in the absence of such limitation, the presumption is that it was intended for use at any stage of the litigation. 16 Cyc., pp. 973, 974. In 1 Ruling Case Law, page 778, paragraph 5, it is said: "Where parties to a case agree to submit the same for decision upon an agreed statement of facts and nothing is said in the agreement to the contrary, each party is absolutely bound and concluded by the statement of facts, thus agreed to, so far as the trial in which the stipulation made is concerned, and where the agreement is not expressly limited to use in the trial in which it is made, it is admissible in evidence as an admission in any other trial or litigation between the same parties where the same issues are involved, but it is not absolutely binding and conclusive upon the parties in other litigation."

(2) The authorities are to the effect that the court may permit parties who have entered into a stipulation to withdraw therefrom and to annul the stipulation. But permission to this effect must be obtained, and valid cause therefor shown, and, in the absence of such permission obtained and cause shown, the stipulation remains binding on the parties thereto, and all the parties thereto have the right to assume that its terms will not be questioned, and the right to its use will not be resisted. The rule, of course, is otherwise where fraud or imposition was practiced in the procurement of the stipulation, for in such cases there is no stipulation. But it is not here contended that any fraud or imposition was practiced in the preparation of the stipulation in this case. A number of cases on this subject are cited in the note to the case of *Northern Pacific R. R. Co. v. Barlow*, 20 N. D. 197, 126 N. W. 233, 24 Am. & Eng. Ann. Cas., p. 763. These cases hold that the trial courts have a discretion in deter-

mining when and under what circumstances parties will be permitted to annul their stipulations, and announce the rule to be that the discretion of the court on this subject will not be reversed unless an abuse of this discretion is shown.

This appears to be the proper, as well as the general, rule. Here the court did not annul the stipulation, but let the jury consider it along with all the other evidence in the case in determining what the agreement between the parties was. And this action was erroneous.

As tending to show the number of cars of lumber covered in one of the drafts drawn on appellant by appellee, appellant undertook to offer in evidence a telegram to him from his stenographer, and his reply thereto, but this evidence was excluded by the court, and that action is assigned as error. We think the court properly excluded this evidence, as appellee was in nowise a party to this correspondence, and the same is objectionable as a self-serving writing.

A number of other questions are discussed in the briefs, but, in view of what we have said, we find it unnecessary to discuss them here.

The judgment will be reversed and the cause remanded for a new trial.

SMEDLEY v. STATE.

Opinion delivered July 2, 1917.

1. TRIAL—CONTINUANCE—DILIGENCE.—Appellant *held* to have failed to exercise due diligence to procure the attendance of a witness, and that therefore the trial court did not abuse its discretion in refusing to grant a continuance.
2. SEDUCTION—PROOF THAT DEFENDANT WAS UNMARRIED.—In an indictment charging seduction, an allegation that defendant was an unmarried man is surplusage, and proof that he was unmarried is not necessary to conviction.
3. SEDUCTION—PROOF THAT PROSECUTING WITNESS WAS UNMARRIED.—In a prosecution for seduction, *held*, the evidence showed that the prosecuting witness was unmarried.

4. SEDUCTION—CORROBORATION.—On a charge of seduction corroboration of the female is required both as to the promise of marriage and the act of sexual intercourse.
5. SEDUCTION—CORROBORATION.—In a prosecution for seduction, appellant contended that the prosecuting witness was not corroborated. Appellant was asked how many times he had had intercourse with her, and replied "I never tried to keep up with them." *Held*, this was sufficient corroboration of the act of intercourse.
6. SEDUCTION—CONFESSION OF GUILT.—Evidence of a confession of guilt by the defendant, *held*, competent.
7. EVIDENCE—SEDUCTION—CROSS-EXAMINATION.—In a prosecution for seduction, it was proper for the prosecuting attorney, on cross-examination, to ask the appellant if he had not been tried before for seducing another girl, on the issue of appellant's credibility as a witness.
8. SEDUCTION—HEARSAY EVIDENCE—SIMILAR ACT WITH OTHER MEN.—In a prosecution for seduction testimony by one W. that one M. told him (W.) that he (M.) had been intimate with the prosecuting witness, is incompetent.
9. APPEAL AND ERROR—INSTRUCTION—CURE OF ERROR.—An instruction, although faultily worded, is not prejudicial, where the court followed it with a correct instruction on the same issue.
10. SEDUCTION—MOTIVE OF FEMALE—INSTRUCTION.—Prayer for an instruction that if the prosecutrix consented to sexual intercourse either through passion or curiosity, even though there had been a promise of marriage, that defendant would not be guilty, was properly refused.

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

W. S. Coblentz and *W. T. Kidd*, for appellant.

1. The motion for continuance should have been granted. The testimony was material and due diligence shown. 55 S. W. 204; 42 Ark. 273; 60 *Id.* 564.

2. The indictment alleged that defendant and the prosecutrix were both unmarried. There is not a syllable of proof that either of them were single. The burden was on the State to prove the allegation. 35 Cyc. 1345; 93 Cal. 74; 108 Mo. 658; 1 Wis. 209; 114 Ark. 310; 8 R. C. L. 219.

3. There was no corroboration of the prosecutrix, unless it be certain admissions of defendant. The admissions or confessions, if made, were not voluntary nor free from improper influences. 74 Ark. 397; 1 R. C. L. 559; 66

Ark. 53; 28 *Id.* 121; 50 *Id.* 501; 47 *Id.* 172; 22 *Id.* 336; 50 *Id.* 305; 66 *Id.* 506. See also 1 R. C. L. 584.

4. Proof of other crimes was not admissible. Jones on Ev., § 143. The question as to whether defendant had not been compelled to leave Pike County for seducing another girl was improper and prejudicial. 39 Ark. 278; 73 *Id.* 262; 72 *Id.* 586; 91 *Id.* 555.

5. Under peculiar circumstances affording a presumption of truth hearsay evidence is admissible. 12 Ark. 782; 1 R. C. L. 575.

6. The statute provides that the promise must be *express*. It was error to give the first instruction without this word. Kirby's Dig., § 2043. The peremptory instruction asked by defendant should have been given, as there was no proof that either defendant or prosecutrix were unmarried. 35 Cyc. 1345.

7. If prosecutrix consented through curiosity or passion, then no crime was proven. 35 Cyc. 1333; 79 Ala. 14; 112 Ga. 871; 132 Mich. 58. Passion, instead of the promise, may have been the inducing cause.

8. The trial was not in accord with well-established rules of law. 116 U. S. 616.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The continuance was properly refused for want of due diligence. The matter was within the sound discretion of the court below. The burden to show abuse of discretion was upon appellant. 79 Ark. 594; 82 *Id.* 203; 91 *Id.* 497; 94 *Id.* 169; 103 *Id.* 352; 100 *Id.* 132; 78 *Id.* 36; 92 *Id.* 28.

2. It was not necessary to prove that defendant was unmarried. Kirby's Digest, § 2043; 95 Ark. 555; 98 Mo. 368; 16 So. 264; 69 Ark. 322; 73 *Id.* 139; 77 *Id.* 23; 84 *Id.* 67. Whether a person is married or unmarried may be proved by circumstantial evidence. 95 Ark. 555; 92 *Id.* 421; 66 Minn. 327; 52 N. J. L. 207; 8 Kan. 220.

3. The testimony of the prosecutrix was corroborated by defendant's own testimony. 84 Ark. 67; 92 *Id.* 421.

4. The confessions or admissions were not made under duress. Whether voluntary or not was a matter addressed to the sound discretion of the court below. 72 Ark. 145.

5. The question as to whether he left Pike County once before for seducing a girl was on cross-examination and merely affected his credibility as a witness. 100 Ark. 324; 74 *Id.* 397; 44 *Id.* 122, 141; 8 N. D. 548, etc.

6. The testimony of Westfall as to what Hamilton told was hearsay purely, and inadmissible.

7. No specific objection was made to the first instruction because it omitted the word "express." 95 Ark. 100; 73 *Id.* 315; *Teel v. State*, 129 Ark. 182. But if error, it was cured by No. 4 given by appellant. 17 Ark. 292.

8. There was no error in refusing No. 5 asked by appellant. It is ambiguous. There was no testimony as to "curiosity" or passion. Besides, it was covered by other instructions given. Trial courts are not required to duplicate instructions.

WOOD, J. Appellant was indicted at the March term, 1917, of the Pike Circuit Court for the crime of seduction, the indictment charging that Will Smedley, "on the 1st day of April, 1916, being a single and unmarried man, did unlawfully and feloniously obtain carnal knowledge of one Rosa Jackson, a single and unmarried female, by false expressed promise of marriage," etc.

I. The indictment was returned on the 21st of March. Appellant was arrested on that day. The case was called for trial on March 26. Appellant moved for a continuance, setting up that one Mike Hamilton was a material witness in his behalf; that he resided within four or five miles of Murfreesboro, in Pike County; that he had a subpoena issued for him on the morning of the 24th of March, 1917; that he was temporarily absent, but

would return in a short time to his home; that if present he would testify that he had had sexual intercourse with Rosa Jackson two times in January, one time in February and three times in March, of the year 1916, and a number of times since that date. The motion was in due form. The court overruled the motion, and this ruling is made one of the grounds of the motion for a new trial.

(1) The motion discovers that the absent witness lived within four or five miles of the courthouse. Three days elapsed after the warrant was served on appellant before he asked for a subpoena for this witness. While the motion discloses that he was temporarily away, it does not show that the witness was beyond the jurisdiction of the court. The burden was upon appellant to show that he had exercised due diligence, and the showing is not sufficient, at least to convince us, that the trial court abused its discretion, that is, that he acted arbitrarily or capriciously, upon the showing made, in overruling appellant's motion. *Lofton et al. v. State, Use, etc.*, 41 Ark. 153, 155; *Jackson v. State*, 94 Ark. 169; *Morris v. State*, 103 Ark. 352; *Stripling v. State*, 100 Ark. 132.

II. Counsel for appellant next contend that, inasmuch as the indictment alleged that the appellant was a single and unmarried man, and that the prosecutrix, Rosa Jackson, was a single and unmarried female, and that inasmuch as the statute is leveled at the crime of obtaining carnal knowledge of a female by virtue of any feigned expressed promise of marriage, that to sustain the charge it was necessary for the State to prove that the man and the woman involved were single persons, and that there was no such proof.

(2) The statute provides: "Any person who shall be convicted of obtaining carnal knowledge of any female by virtue of any feigned or pretended marriage, or of any false or feigned expressed promise of marriage, shall, on conviction," etc. Kirby's Digest, § 2043. "The statute," says this court in *Davis v. State*, 95 Ark. 555, 557, "is leveled at the seducer, whether he be a married man or a single man. It was not necessary, therefore, that the

indictment should allege that the defendant was a single, and unmarried man." Such an allegation is in no manner descriptive of the offense, and it therefore may be treated as surplusage, and proof that the alleged seducer was unmarried was not essential to conviction.

(3) Conceding, without deciding, that it was essential for the State to prove that the female was unmarried, there is ample testimony in the record to warrant the conclusion that the prosecutrix was unmarried. The prosecutrix, at the time of the alleged intercourse, was but a little over sixteen years of age, and she is referred to by appellant's counsel, throughout her examination as a witness, as "Miss Rosa." The testimony of the prosecutrix tends to show that her intercourse with the appellant was the first act of the kind. The prosecutrix speaks of the appellant's promise to marry her, and her whole testimony is predicated upon the idea that she was not a married person.

The mother of the prosecutrix testified concerning the association of appellant with the prosecutrix for nearly a year, visiting her every Sunday. One of the witnesses spoke of the young people associating together, including "Miss Rosa." And there are references in the testimony to appellant's promising to and obtaining a license to marry the prosecutrix.

From all the circumstances the jury were warranted in finding that the prosecutrix was an unmarried person. Whether or not she was married could be proved by circumstances. *Nichols v. State*, 92 Ark. 421; *Davis v. State*, 95 Ark. 555.

III. The prosecutrix testified that she met Will Smedley in January, 1916, and began having intercourse with him about May, 1916. He promised that if she would have intercourse with him that he would marry her. She did not at first consent, but the next time he visited her, about two weeks after the promise, she yielded and the act of intercourse took place.

(4) On a charge of seduction, corroboration of the female is required both as to the promise of marriage and

the act of sexual intercourse. Kirby's Digest, § 2043; *Cook v. State*, 102 Ark. 363; *Nichols v. State*, 92 Ark. 421, and cases cited.

(5) Appellant contends that there was no corroboration. The appellant, when asked how many times he had intercourse with Rosa Jackson in 1916, replied: "I never tried to keep up with them." This was sufficient corroboration of the act of intercourse. *Wilhite v. State*, 84 Ark. 67. Appellant testified that he began going with the prosecutrix in February, 1916, and had kept her company at different times throughout the year. The mother of the prosecutrix testified that appellant kept the company of the prosecutrix every Sunday from February 5 until December 28, 1916. One of the prosecutrix's relatives testified to the same effect, and also that he had not seen any other boys keeping her company during that time. The prosecutrix's mother also testified that when she told appellant that he had ruined her daughter through a contract of marriage that appellant replied: "You are mistaken; I know I did; I am going to take her." Witness replied: "Now is the time." Appellant turned and came to the clerk's office and got his license right along with the witness.

Another witness testified that he asked appellant if he promised to marry the girl and appellant answered, "Yes." This witness further testified that when Mrs. Hathcock, the mother of the prosecutrix, in his presence, was demanding that appellant should marry the prosecutrix the appellant said, "That is what I have been aiming to do."

This testimony was sufficient corroboration of the prosecutrix of the promise of marriage.

IV. But the appellant contends that the above testimony, tending to show the admissions of appellant as to the sexual intercourse and promise of marriage, was obtained under duress, and that the court erred in overruling appellant's motion to exclude the same.

(6) It was elicited on cross-examination of the mother of the prosecutrix that on the occasion when she

met appellant and when she was going with him to the clerk's office for the purpose of getting a license that she had a pistol in her satchel and had armed herself with the pistol with the intention of looking for Smedley. She stated that her husband, while they were on the way, had called the constable, and that they all walked on together. She brought the pistol because she didn't know what she might need it for. He didn't know anything about her having the pistol.

The constable testified that he heard Mrs. Hathcock, on that occasion, say to Smedley, "You know what you have got to do." Smedley replied, "No." She said, "You have got to go to the courthouse and get your license and marry my girl," and Smedley replied, "I am not ready, I have got to have some more clothes," and she said, "Your clothing is better than the shape you left my daughter in, and you have got to go and get your license and marry the girl." He replied, "I have been aiming to do that." The appellant was not under arrest.

The appellant himself testified that on that occasion he told Mrs. Hathcock that if he had to marry the girl he guessed he could do so, because "she said I had to or take the consequences." He expected her to use the gun she had. He did not see the gun but knew she had one as he had seen one down at the house. He was not scared when she opened the purse, and did not go to the courthouse scared.

Conceding that the above testimony tended to show conduct on the part of the appellant in the nature of a confession of guilt, the court nevertheless, under this testimony, did not err in holding that what appellant said and did was free and voluntary. The competency of the evidence was primarily for the court to determine, and his finding on the issue has substantial evidence to sustain it. We can not say that the court erred in admitting the evidence. Its weight was for the jury. *McLemore v. State*, 111 Ark. 457; *Brewer v. State*, 72 Ark. 145.

(7) V. On cross-examination the prosecuting attorney, over the objection of appellant, asked appellant

the following questions: "Isn't it a fact that you left Pike County before this for seducing another girl? Isn't it a fact you did seduce another young lady in Pike County and it hung in the courts until it was worn out and during the principal part of the time you were a fugitive from Pike County;" and similar questions. These questions were proper, on cross-examination, as affecting the appellant's credibility as a witness. *Younger v. State*, 100 Ark. 324.

(8) VI. The court refused to permit witness J. A. Westfall, on the part of the appellant, to testify that Mike Hamilton told him that he was in trouble with the prosecutrix and had been intimate with her. Such testimony was pure hearsay and incompetent.

(9) VII. Appellant urges that the cause should be reversed because the court told the jury that if they found beyond a reasonable doubt that appellant obtained carnal knowledge of the prosecutrix by reason of a false promise of marriage, etc., they should convict. Appellant contends that the instruction should have used the words "false express promise of marriage."

No specific objection was made to the instruction on account of the omission of the word *express*. *Teel v. State*, 129 Ark. 182, and cases there cited. Besides, if it was error to omit this word, the error was cured because the court granted appellant's prayer for instruction in which the jury were told that unless the prosecutrix is corroborated "both as to the act of intercourse and the express promise of marriage, if any, your verdict must be for the defendant." There was no conflict in the instructions.

(10) VIII. The court refused to grant appellant's prayer for instruction telling the jury, in effect, that if the prosecutrix consented to sexual intercourse, either through passion or curiosity, even though there had been a promise of marriage, their verdict should be for the defendant.

In *Taylor v. State*, 113 Ark. 520, 527, we said: "But this statute can only be invoked by the female who to the

very time of her fall had held her virtue, so to speak, as 'the immediate jewel of her soul,' and who was only induced to surrender it through the promise of the man whom she trusted to marry her and solely from a desire to have him keep that promise. The woman who yields her virtue for sexual pleasure and uses the promise of marriage only as a cloak or subterfuge to hide her disgrace is not within the pale of the protection of this particular statute."

"Curiosity" is defined as "Eager concern to get knowledge of, or a wish to engage the mind with, anything novel, odd, strange or mysterious." Funk & Wagnall's New Standard Dictionary.

While it is generally supposed, at least among men, that the gentler sex are possessed of almost boundless curiosity, yet it has not hitherto been conceived or suggested by any author on criminal law, so far as the writer is aware, that a woman might be prompted to yield her maidenhood and sacrifice her virtue out of mere curiosity. Certainly, therefore, no such issue should be submitted to a jury to determine unless there was some evidence to justify it. In this case there was none, and the instruction in this particular was wholly abstract and well calculated to lead the jury into the realm of speculation as to the motive that prompted this young girl to surrender her virtue to the man she loved, when, according to her testimony, there was only one motive, to wit, the express promise of marriage.

There is no error in the record, and the judgment must therefore be affirmed.

ROBERTSON v. STATE.

Opinion delivered July 2, 1917.

LIQUOR—ILLEGAL SHIPMENT—"BONE DRY LAW."—Defendant was indicted for causing to be shipped liquor "from one point in the State of Arkansas to another point * *" in violation of the act approved January 27, 1917, known as § 9 of the "Bone Dry Law." Held, under the indictment it was improper to charge the jury that defendant could be convicted for an interstate shipment.

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

A. F. Barham, for appellant.

1. Defendant was not guilty. There is no evidence connecting him with the crime charged, of inducing a railroad company to transport liquor; nor that it was transported for delivery to him or any one for him.

2. The instructions were highly prejudicial to defendant. The instructions asked by defendant correctly state the law and should have been given.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

The evidence shows appellant equally as guilty as his "pal," Ed Thomas, as if he had ordered the whiskey himself. 18 Ark. 198; 10 *Id.* 378; 27 *Id.* 355. He at least induced the carrier to *deliver*. 80 Ark. 495; 73 *Id.* 101. He *accepted* the liquor from the company. There is no error in the instructions, and the evidence plainly shows a violation of the "bone-dry law."

SMITH, J. Appellant seeks by this appeal to reverse the judgment of the court below imposing upon him a fine of \$100 and a sentence of thirty days in jail for a violation of the act of the 1917 session of the General Assembly, Act 13, entitled "An act to prohibit the shipment of intoxicating liquors into this State, and to prevent shipments of the same from one point or locality in this State to any other point or locality within this State, * * * etc.," popularly designated the "bone-dry law." The act was approved January 24, 1917.

The act contains twenty-one sections, and makes unlawful numerous acts and omissions there denounced.

The indictment charges that the appellant "did induce and cause a common carrier to transport, ship and deliver from one point in the State of Arkansas to another point ardent, malt, vinous, fermented, alcoholic and intoxicating liquors, without then and there revealing to said common carrier aforesaid the nature and contents thereof, * * * etc.," and was evidently based upon section

9 of this act. This section makes it unlawful for any person to cause or induce any carrier, or any person, to carry, transport, or deliver, from one point or place in this State to any other point or place in this State, for delivery to himself or other person, any package, trunk, or valise containing any liquors, the sale of which is prohibited by the laws of this State, without notifying the common carrier, or other person who carries the same, the true nature and character of the shipment, or without marking, on the outside of the package containing the liquor, where it can plainly be seen and read, words indicating the contents of the package and the character and quantity of the liquor.

The proof showed the shipment of a trunk from Caruthersville, Missouri, to Blytheville, Arkansas, containing fourteen quarts of whiskey, without designation indicating its contents, and the circumstances as shown by the testimony in regard to its shipment are such as to warrant the jury in the finding which, by its verdict, it must have made, that appellant was concerned in the shipment of the trunk. In its shipment the trunk was carried through a number of stations in this State on the line of the railroad over which it was shipped, and the court treated this as a shipment from one point in this State to another point in this State, as is indicated by an instruction in which the jury was told that "If you find that the railroad company had in its possession liquors shipped contrary to the act just read to you and carried the liquor along its line of railroad for any distance whatever and at some point after conveying the liquors between any two points in the State, or from a point out of the State to a point in the State, and delivered the same to a point in this district in this county in this State to the defendant here, it would be sufficient for the purposes of this case."

This instruction is erroneous, because a shipment from a point without this State to a point within this State can not be regarded as an intrastate shipment, even though, before it reaches its destination, it passes, after

crossing the boundary line of the State, from one point in this State to another point in the State.

The court, in its charge, referred to other sections of the statute, and told the jury what acts on the part of the appellant would be sufficient to constitute a violation of them. This was erroneous and prejudicial, because there were no counts in the indictment based upon the sections of the statute referred to by the court, and, so far as appears from the record, the verdict may have been based upon a finding that appellant's conduct would have constituted, and did constitute, a violation of the sections referred to by the court, although he was not guilty of a violation of the section of the statute upon which the indictment was evidently based.

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

RIDDLE v. BALLEW.

Opinion delivered July 2, 1917.

LOCAL IMPROVEMENT—FORMATION—OMISSION OF PROPERTY NAMED IN ORIGINAL PETITION.—The organization of a local improvement district is invalid where the ordinance establishing the district as prayed for omits certain portions of land included by the property owners in the original district.

Appeal from Prairie Chancery Court, Northern District; *John M. Elliott*, Chancellor; reversed.

Gregory & Holtzendorff, for appellant.

1. This is a direct attack upon the validity of the district. The petition included the south half of blocks C and D. The ordinance creating the district omitted these two half blocks. The petition is jurisdictional, and the failure to embrace these half blocks in the ordinance was fatal. 104 Ark. 298; 115 *Id.* 163.

Emmet Vaughan, for appellee.

The property was nonassessable, and it was not material that it be included in the ordinance. 86 Ark. 205;

42 *Id.* 536; 56 *Id.* 354; 12 L. R. A. 852; 62 Md. 127; 26 N. E. 403; 126 Ind. 261, etc.

STATEMENT BY THE COURT.

On the 29th of August, 1916, twenty-three persons claiming to be the owners of certain real property within certain territory in the incorporated town of Des Arc presented their petition to the town council for the organization of an improvement district for the purpose of building sidewalks and crossings within said territory, which is as follows: "All of blocks 2, 3, 10, 11, 18 and 19 in the Erwin survey of said town; all blocks 17, 19, 20 and the south half blocks C and D, 21, 22, 23; and also all of blocks 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 69, 70, 71 and 72, in the Watkins' survey of said town."

The town council passed an ordinance establishing the district as prayed for, except as to the south half of blocks C and D. This was omitted from the ordinance creating the district.

In a second petition, in which the property was described as in the first, a majority in value of the property owners petitioned for the appointment of commissioners. This suit was instituted by the appellant, who was a citizen and taxpayer of the proposed district, and in his complaint he alleged the above facts, and asked that the appellees, who were commissioners of the proposed district, be perpetually enjoined from issuing bonds or making any improvement under the ordinance creating the district.

The answer admitted that the south half of blocks C and D were omitted from the ordinance establishing the districts, but set up that this did not invalidate the ordinance for the reason that the land omitted was dedicated by the original owners who had laid out and incorporated the town as a public park and for church purposes, and that from the time of such dedication the land omitted had been maintained as a public park and for

church purposes and was therefore not subject to assessment for local improvements.

There was also a general demurrer to the complaint, which the court sustained, holding that inasmuch as the land omitted was dedicated by the owners to the town of Des Arc for the use of the public for church purposes and other purposes for the free and beneficial use of the public it was not subject to assessment for local improvements, and that not being taxable it was immaterial and nonprejudicial to the district, that the same was not included in the publication of the ordinance establishing the district, and dismissed the complaint for want of equity.

WOOD, J., (after stating the facts). In *Bell v. Phillips*, 116 Ark. 167, quoting from *Kraft v. Smothers*, 103 Ark. 269, 272, we said: "The foundation of the improvement was the petition of the owners of real property situated in the proposed district. Under the statute, the extent and character of the improvement as expressed in the ordinance must substantially comply with the terms of the petition upon which it is based."

We also quoted from *Smith v. Improvement Dist.*, 108 Ark. 141, 144, as follows: "Our statute requires, as a prerequisite to the exercise of the authority conferred upon the city council, that a petition be first filed designating the boundaries of the district so that it may be easily distinguished. This is for the benefit of the property owners. * * * A special limited jurisdiction is conferred upon the city council to lay off the district as designated by the property owners in the first petition, and the council must conform strictly to the authority conferred upon it."

In *Board of Improvement No. 60 v. Cotter*, 71 Ark. 556, we held that, "the filing of the required petition signed by ten resident property owners was mandatory and jurisdictional." See, also, *Whipple v. Tuxworth*, 81 Ark. 403; *Boles v. Kelley*, 90 Ark. 29.

In *Voss v. Reyburn*, 104 Ark. 298, we held; quoting syllabus, "Where an attempted publication of an ordi-

nance creating an improvement district omitted two half blocks from the proposed improvement district, the variance is material and destroys the validity of the attempted organization."

And in *McRaven v. Clancy*, 115 Ark. 163, we held, quoting syllabus: "In the organization of a local improvement district under Kirby's Digest, section 5666, a certain lot was omitted from the publication, although it was included in the original petition and the ordinance. *Held*, the statute is mandatory and a proper publication being jurisdictional, the statute must be strictly complied with, and the district held not to be properly organized."

It would seem from the doctrine of these cases that as the petition for the establishment of the district is jurisdictional, the city council has no authority to establish a district, the boundaries of which are not in conformity with the territory as described and set up in the petition. It is not within the power of the council to amend the petition of the property owners. This the property owners could do themselves and conform their petition by way of description to such property as they might ascertain would meet with the approval of the council and insure the creation of the district in accordance with their wishes. But here this was not done, and the ordinance creating the district and all proceedings thereunder are therefore void.

We do not reach the question as to whether or not the lands included in the original petition, but omitted from the ordinance, were subject to assessment for local improvements, and we therefore leave that question where it was under our statute and decisions prior to the lodging of this appeal.

It was for the property owners, and not the council, to determine what property they desired to have included within their improvement district, and the council could not determine that question for them without their consent as expressed in a petition in conformity with the

statute. Neither had the chancery court any jurisdiction to determine that question for the property owners.

It follows that the court erred in holding that the ordinance establishing the district as indicated was valid, and for this error the decree is reversed and the cause remanded with directions to enter a decree granting the appellant the relief prayed for in his complaint.

OZARK FRUIT GROWERS ASSOCIATION v. TETRICK.

Opinion delivered July 2, 1917.

APPEAL AND ERROR—ISSUE RAISED BY THE PLEADINGS—SUBMISSION TO JURY.—It is the duty of the court to submit a cause to the jury, only upon issues raised by the written pleadings, or within the pleadings treated as amended to conform to the proof.

Appeal from Benton Circuit Court; *J. S. Maples*, Judge; reversed.

Rice & Dickson, for appellant.

Defendant acted only as agent to sell upon a commission. There is no proof whatever of a sale, and hence no evidence whatever to sustain the verdict.

Defendant had no power to buy; its powers were limited by its charter to acting as agent for others.

HUMPHREYS, J. Charles Tetrick and Roy Broadhurst, partners, brought suit against appellant in the Benton Circuit Court to recover \$144.43, representing an alleged balance due them on a commission contract for the sale of three cars of green apples at a minimum of 70 cents per hundred-weight, f. o. b. cars, Avoca, Arkansas, less 5 per cent. commission for making the sale.

Charles Tetrick and Dwight Lee, partners, also brought suit against appellant for \$217.15, representing an alleged balance due them on a commission contract of similar import.

Appellant answered, denying the material allegations in each complaint; and by way of further answer, said that it acted as selling agent for the apples on a 5

per cent. commission, without limitation on the price, time, place or terms of sale.

By agreement of parties, the cases were consolidated for convenience of trial.

The court sent the cases to the jury under instructions defining the issues to be whether appellant bought the apples outright for 70 cents per hundred-weight, on board cars at Avoca, or whether it acted in the capacity of sales agent only, upon a 5 per cent. commission basis. The jury returned verdicts against appellant in favor of Charles Tetrick and Dwight Lee for \$51.91, and in favor of Charles Tetrick and Roy Broadhurst for \$68.35, upon which judgments were rendered.

Proper steps were taken and an appeal has been prosecuted to this court.

The sufficiency of the evidence to support the verdict is questioned. There seems to be a total absence of evidence in support of the theory that appellees sold the apples outright to appellant on board the cars at Avoca, less 5 per cent. commission. In fact, the entire testimony of appellees tends to establish the theory that appellant engaged to sell either all or a part of the apples, on the track at Avoca, at a minimum of 70 cents per hundred-weight, less a 5 per cent. commission. The undisputed evidence showed that appellant had no charter powers to buy products outright. It was incorporated for the sole purpose of acting as intermediary between shipper and buyer. The cause should have been sent to the jury within the written pleadings, or within the pleadings treated as amended to conform to the proof.

There being no evidence to support the issue of outright sale, presented to the jury by the court's instructions, the judgment is reversed and the cause remanded for a new trial.

LAY, ADMINISTRATOR, v. GAINES.

Opinion delivered July 2, 1917.

1. VENDOR AND PURCHASER—LIEN FOR PRICE—RECITAL OF CONSIDERATION.—A vendor of land has in equity a lien on the land for the purchase money, although a deed in absolute form has been executed reciting a different amount paid as purchase price, and this lien is good as against the vendee, or any person purchasing with notice of the fact that the purchase money has not been paid.
2. VENDOR AND PURCHASER—PROOF OF CONSIDERATION.—It constitutes no violation of the rules of evidence for a vendor to be allowed to show that the price has not in fact been paid, and that the amount is different from that recited in the deed.
3. VENDOR'S LIEN—ACCEPTANCE OF OTHER SECURITY—PRESUMPTION.—The acceptance of personal security will not necessarily displace a vendor's equitable lien, nor constitute a waiver thereof; but it does raise a presumption of an intention to waive the lien on the land, but this presumption may be rebutted by proof of a contrary intention.
4. PLEADING AND PRACTICE—REPLY TO ANSWER.—A reply to the answer, is proper under the Code only when a counterclaim, or set-off is pleaded in the answer.

Appeal from Searcy Chancery Court; *Ben F. McMahon*, Chancellor; affirmed.

S. W. Woods, for appellant.

1. No contemporaneous oral contract or agreement can be used to vary or contradict the terms or recitals of a deed. 87 Ark. 283; 80 *Id.* 505; 20 *Id.* 293.

2. Gaines is not entitled to recover even if he sold the lands, mill and other property to Abbott alone for \$800. He filed no answer or reply to the allegations of Rainbolt's answer and for the purposes of this said allegations are taken as true and need not be proven. Kirby & Castle's Dig., § 7576; 41 Ark. 17; 88 *Id.* 406. Gaines could not accept Rainbolt's money on the purchase price of the lands and then repudiate the agreement. 10 R. C. L., p. 694, § 22; 28 L. R. A. (N. S.) 637; 36 Ark. 96. He had no lien for the purchase money of wagons, tools or personal property. The payments should have been applied on the purchase money for the lands. While Abbott was a defendant, his interests were adverse to appel-

lant's. His testimony as to transactions and conversations with Rainbolt should have been excluded. Kirby & Castle's Dig., § 3403; 43 Ark. 307; 53 *Id.* 550.

3. The findings of the chancellor are not supported by the evidence. The whole case is now before this court.

The appellee, *pro se*.

1. The lands were chargeable with an equitable vendor's lien, so long as they were in the hands of Abbott or those claiming under him with notice that all the purchase money had not been paid. 18 Ark. 142; 21 *Id.* 202; 29 *Id.* 357; 31 *Id.* 728. Oral testimony was admissible to show that a note given was for the purchase money of the lands, with all the buildings, machinery, etc., on them for \$800.

2. Rainbolt's defense was that the lands only sold for \$400 and the personal property for \$300, etc. It was not necessary to reply or deny these allegations. The answer was evasive and did not positively show that he had notice of the lien. Nor did he show positively that he was an innocent purchaser. 29 Ark. 563. The evidence establishes every allegation in the complaint.

As to the competency of Abbott's testimony, 43 Ark. 307 is in point.

3. Appellant sets up no title; did not allege that he was an innocent purchaser for value and hence was entitled to no relief. The decree is right.

McCULLOCH, C. J. Appellee instituted this action in the chancery court of Searcy County against G. W. Abbott to recover the amount of a balance due on a promissory note alleged to have been executed by Abbott to appellee for the purchase price of a tract of land situated in that county. A vendor's lien on the land was asserted and there was a prayer in the complaint for the enforcement of the lien by a sale of the land. Appellant's intestate, I. L. Rainbolt, was made a party defendant under the allegation that he was a junior lienor in that he had accepted from Abbott a mortgage on the land, with full knowledge of appellant's prior lien. Abbott

made no defense, but Rainbolt appeared and defended on the ground that appellee was not entitled to a lien on the land. He alleged in his answer that the note exhibited with the complaint for the sum of \$700, included \$400 for the price of the land, and \$300 balance due on the sale to one Carmody of a sawmill and other machinery situated on the land, and that Carmody signed the note as evidence of his liability. The deed executed by appellee to Abbott conveyed the land (120 acres) by proper description and recited the sum of \$400 as consideration for the conveyance. The deed does not recite whether or not the consideration was in fact paid, and contains no reference to the note. Rainbolt died during the pendency of the cause in the court below and there was a revivor in the name of appellant as administrator of his estate. On final hearing the court decreed in appellee's favor for the recovery of the sum of \$249.57, found to be balance due on the note, and decreed a foreclosure of the lien on the land.

The evidence adduced by appellee was to the effect that there was a sale of the land by appellee to Abbott and Carmody and that the sale included the sawmill outfit which was situated on the land, but that there was no sale of the sawmill separately from the sale of the land. Appellee owned the land with the sawmill situated thereon, and sold the whole thing to Abbott and Carmody. One hundred dollars of the purchase price was paid and Abbott and Carmody executed to appellee a promissory note for \$700. The deed was executed subsequently and conveyed the land to Abbott alone. No question was raised in the suit about Carmody's rights in the land, except that it is claimed on the part of Rainbolt that he was separately the purchaser of the sawmill, but the testimony adduced by appellee was sufficient to justify a finding to the contrary.

We have, therefore, a finding of the chancellor upon testimony which appears to preponderate to the effect that the note of \$700 executed by Abbott and Carmody

was for the purchase price of the land, which included the sawmill outfit as fixtures thereto.

(1-2) The evidence adduced by appellee further shows that Rainbolt was fully advised of the fact that the note was given for the purchase price of the land, notwithstanding the recital in the deed of the consideration of \$400 without mentioning the note, and that Rainbolt was advised of this fact at the time that he subsequently accepted the mortgage. In other words, the testimony shows that Rainbolt was not an innocent purchaser, but had full knowledge of the fact that the balance of the purchase money on the land was unpaid. A vendor of land has in equity a lien on the land for purchase money, although a deed in absolute form has been executed reciting a different amount paid as purchase price, and this lien is good as against the vendee, or any person purchasing with notice of the fact that the price has not been paid. *Scott v. Orbison*, 21 Ark. 202; *Holman v. Patterson's Heirs*, 29 Ark. 357. It constitutes no violation of the rules of evidence for a vendor to be allowed to show that the price has not in fact been paid and that the amount is different from that recited in the deed.

The contention of Rainbolt that the price of the land was only \$400 and that the balance of the amount of the note represented the price of the sawmill machinery sold to Carmody, was, as before stated, refuted by the testimony adduced by appellee.

(3) There is a further contention by appellant that if Carmody was not separately a purchaser of the sawmill outfit, he must be treated as a surety on the note, and that the acceptance by appellee of security constituted a waiver of the lien. The acceptance of personal security will not necessarily of itself displace the vendor's equitable lien, nor constitute a waiver of the lien. It raises a presumption of an intention to waive the lien on the land, but the presumption may be rebutted by proof of a contrary intention. *Lavender v. Abbott*, 30 Ark. 172; *Mayes v. Hendry*, 33 Ark. 240; *Springfield & Memphis Rd. Co. v. Stewart*, 51 Ark. 285.

The evidence in the case shows abundantly that there was no intention to waive the lien. In fact, the evidence shows that there was no acceptance of security, as Carmody signed the note at the time that the purchase was made by him and Abbott, and that subsequently Carmody withdrew from the transaction and the deed was made to Abbott alone.

(4) It is further contended by appellant that appellee, on account of having failed to file a reply to the answer, ought to be treated as having admitted the allegations in the answer to the effect that the purchase money of the land was only \$400, and that the balance of the note was for the purchase price of the sawmill plant as a separate purchase. A reply is proper under our Code only when there is a counterclaim or set-off pleaded in the answer. Kirby's Digest, § 6108.

There was neither a counterclaim nor set-off filed in this action, and the facts just referred to were pleaded by appellant's intestate as a defense to the cause of action set out in appellee's complaint. The decree is affirmed.

HUMPHREYS, J., disqualified.

LANCASTER v. CASE.

Opinion delivered July 2, 1917.

TRESPASS—ACTS DONE UNDER AGENT'S DIRECTION.—Defendant will not be liable for cutting trees on plaintiff's land, where plaintiff's agent on said land had authority to cut the trees, and where defendant acted at the agent's request.

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

Godwin & Harris and *Ira J. Mack*, for appellant.

1. The verdict and judgment are contrary to the law and the evidence. The entering and cutting are admitted, but the defense is that it was done under permission of one Matlock, a tenant of plaintiff, under the honest belief

that the tenant had authority to give permission. But no such permission was given or proven. Nominal damages, at least, should have been given for the trespass and injury. 38 Cyc. 1123, 1064; 14 Ark. 431; 1 *Id.* 448.

2. The court erred in refusing to permit plaintiff to make proof as to damages suffered. 67 Ark. 374; 71 *Id.* 305; 116 *Id.* 206; 125 *Id.* 332.

3. It was error to allow proof as to results of January overflow on lands other than plaintiff's, and in giving instruction No. 5 for defendant. There was absolutely no proof that Matlock was plaintiff's agent, or had any authority to cut timber on the river front. 2 Cyc. 1066.

Samuel M. Casey, for appellee.

1. There was no proof absolutely to sustain the allegations of the complaint as to damages. There was no washing or caving of banks when the trees were cut.

2. There was no error in giving instruction No. 5.

3. Plaintiff was not even entitled to nominal damages. The jury really found that plaintiff's agent gave defendant permission to cut the timber.

SMITH, J. Appellant sued to recover damages alleged to have been sustained by him by reason of the wrongful and unauthorized cutting of the timber on certain lands owned by him lying on the bank of White river and the consequent caving of the banks resulting from denuding the land of the standing timber.

Appellee defended upon the ground that he had authority to cut the trees which he did cut, and that no damages had resulted from their cutting. Two principal questions are presented, and these are questions of fact. Other questions are discussed, but they are subordinate to these principal questions.

The first assignment of error is that appellant was not permitted properly to fully develop the elements of damage for which he should have had compensation. This assignment of error might appear more plausible had the jury found for appellant in any sum, but it did

not do so, as the verdict returned was a general finding in favor of defendant. The court, however, did permit appellant to show the number of trees cut, and their location, and the action of the water as influenced by the cutting of the trees, and the depreciation in the value of the land as a result thereof. No attempt was made to recover the value of the trees as such, the cause of action being predicated upon the theory that the cutting of the trees had resulted in caving banks and in a washing away of the soil, and if it could be said that any evidence was improperly excluded, it was evidence which tended only to increase the amount of the damage on this account, and there was sufficient evidence to support a verdict for some damages, had appellant's theory of the case been accepted, and if there was any competent evidence excluded it was evidence which would only have tended to support a larger verdict.

Evidence on the part of appellee tended to show that no substantial damage had been sustained, although the cutting of a number of trees is admitted.

It is insisted by appellant that he should, at least, have had judgment for nominal damages, as certain of his trees were cut under appellee's direction, and the correctness of this contention presents the real question in the case.

Over the objection and exception of appellant, the court gave an instruction numbered 5, which reads as follows:

"5. You are instructed that if you find from the evidence that Matlock was plaintiff's agent and was in charge of his land and had authority to cut timber on said land, authorized and told the defendant that he could cut said timber and that acting from this authority he cut same, then your verdict should be for the defendant."

It is said there was no evidence upon which to base this instruction, and that if this instruction is disapproved as being without evidence to support it, a judgment for at least nominal damages must be awarded appellant. In deciding whether the instruction was, in fact,

abstract, we need consider only that evidence which is said to furnish a basis for it, and such evidence may be summarized as follows:

Appellee operated a ferry across White river, and had paid appellant \$25 for the use of a right-of-way across appellant's land. The trees were cut so that one approaching the ferry could see the river banks and know whether a congestion of traffic made the ferry inaccessible. The land was in charge of one Matlock, who was appellant's tenant, and Matlock, and the tenant preceding him, had both cut trees for the purpose of clearing and cultivating the land. That for the purpose of cultivating the land, Matlock had cut some of the timber standing on the land in question, and had told appellee that when he had the time he would cut the remainder, but as Matlock was otherwise engaged, appellee cut down the timber for Matlock, who cut it up and hauled it away and sold it, apparently without objection on appellant's part. There was other testimony that Matlock had cut other trees in the spring, and that he was clearing up the timber in patches so that it would not shade the land and he could put the river bank in cultivation, and that appellee did, at once, for Matlock what this tenant was doing gradually.

There was contradiction of this evidence, but we assume that these conflicts were resolved in appellee's favor, and that when this was done the jury found that Matlock was in possession of the land for the purpose of clearing and cultivating it and had the right, as an incident thereto, to cut down the standing timber, which right he was exercising as it suited his convenience, and that appellee, for his own purposes, did, at Matlock's invitation, a thing which Matlock himself could rightfully have done. *Conway v. Coursey*, 110 Ark. 557. If this were true, the instruction is not abstract, and no error was committed in giving it.

Finding no prejudicial error, the judgment is affirmed.

KEMP v. STATE.

Opinion delivered July 2, 1917.

LIQUOR—ILLEGAL SALE—DEFENDANT AS BUYER'S AGENT.—In a prosecution for the illegal sale of liquor by defendant to one W., under the evidence *held*, it was reversible error not to submit a requested instruction that defendant would not be guilty, if the jury found that he acted merely as W.'s agent.

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

Holland & Holland and *Ben Cravens*, for appellant.

1. To give the State's testimony its strongest probative force, it fails to show appellant guilty. At most it shows him guilty of procuring. The testimony at least raised a question of fact for a jury and instruction No. 1 requested by defendant should have been given. No. 2, also asked, was improperly refused.

No. 6 for the State is clearly erroneous and misleading. 90 Ark. 587.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The proof is ample to establish guilt under the law. Act 30, Acts 1915, § 2; 105 Ark. 462; *Williams v. State*, 129 Ark. 344.

2. There is no error in the instructions given or refused. The law applicable was most admirably stated in instruction 6. Every phase of the case was fully covered by Nos. 6 and 7.

McCULLOCH, C. J. Appellant is charged with the offense of selling intoxicating liquor, alleged to have been committed in the month of January, or early in February, of the present year. He was convicted in the trial below on the testimony of one Whybark to the effect that the witness applied to appellant on a street in the city of Fort Smith for a pint of whiskey, and that he gave appellant money for the price of the whiskey, and that appellant agreed to get it for him, and that he later found it in his

room at the place at which he had directed appellant to deliver.

There was little, if any, conflict between the testimony of Whybark and that of appellant himself. Their testimony coincided substantially as to what took place between them, but appellant went a little further in his testimony and told about getting the whiskey and delivering it at Whybark's room. Both of the men testified that Whybark accosted appellant near the latter's taxicab stand or office in Fort Smith, and asked appellant about getting some liquor, or if he knew where he could get some. Appellant replied that whiskey was a very scarce article, and Whybark then suggested that he had heard that a negro bootlegger was plying his illegal commerce around one of the railroad stations in the city of Fort Smith. Appellant agreed to procure a pint of whiskey for Whybark and accepted the sum of \$1 from the latter to pay for it. Appellant testified that he made inquiry around the railroad station and learned that a negro named Williams was selling whiskey, and that he bought a pint of Williams and carried it to Whybark's room and left it there. He testified that he had no relations whatever with Williams and bought the whiskey purely as an accommodation for Whybark.

There were some suspicious circumstances in the case which would have warranted the jury in finding that appellant was interested in the sale, or that he was really the seller of the whiskey himself; or the jury might have found, on the other hand, that appellant acted purely as a matter of accommodation for Whybark, and accepted the money and bought the liquor for him without making himself in any manner an intermediary between the purchaser and the seller. Counsel for appellant asked the court to give the following instruction, among others, which the court refused to give:

"You are instructed that if the defendant, at the request of the prosecuting witness, and solely as the agent of the prosecuting witness and without having any interest in the sale of the liquor other than to procure the

liquor for the prosecuting witness, went to the party from whom the whiskey was purchased and with the money furnished him by Whybark, and without making any profit or having any pecuniary interest or other interest in the sale, purchased whiskey which he carried to Whybark, as a matter solely to accommodate Whybark, and not for the purpose of procuring a purchaser for the whiskey, or to assist in any way the seller in making the sale, then you should acquit the defendant. The court tells you that an intermediary, as mentioned in these instructions, is one who is employed to negotiate a matter between two parties and who for that reason is considered as the mandatary of both."

We think the court should have given that instruction in order to place before the jury appellant's contention concerning the effect of the transaction between him and Whybark. The evidence was, as before stated, sufficient to warrant the jury in finding appellant guilty on the theory that he procured whiskey from some one else, and was in fact the seller in the transaction with Whybark, but there was another view of the testimony which justified the finding that appellant did not act as the seller, nor as the agent of the seller, nor as an intermediary between the seller and the purchaser.

The Attorney General relies, to sustain the ruling of the court, on the decision in *Bobo v. State*, 105 Ark. 462, and also the recent case of *Williams v. State*, 129 Ark. 344, but we do not think that the decisions in either of those cases sustain the ruling of the court in failing to give the instruction set out above. The instruction might not be a strictly accurate statement of law in a case where there was evidence tending to show that the accused person acted as an intermediary between the seller and the purchaser so as to become a participant in the sale itself. In this case there is, however, no circumstance, so far as concerns the procurement of the whiskey from the illicit vendor by appellant, which would justify the inference that appellant acted as an intermediary between the parties to the sale, or that his participation in the transac-

tion was a factor in bringing about the sale. On the contrary, the parties agreed that Whybark offered a suggestion to appellant as to the place where liquor could be obtained and merely requested appellant to go to the place and buy the whiskey for him; so, if that was all that was done, appellant was not such a participant in the sale as would make him a party to it.

Appellant was, as before stated, entitled to have that feature of the case submitted to the jury, and we think that it constituted reversible error for the court to refuse to do so. There was no such element in this case, so far as the testimony below shows, of appellant withholding the name of the party from whom the liquor was to be obtained, as was the fact in *Bobo v. State, supra*, nor was there any element of apparent community of interest between appellant and the party from whom the liquor was obtained, as in the *Bobo* case, so as to connect appellant with the vendor of the liquor and constitute him a necessary factor in the sale.

According to appellant's contention, he did nothing except to carry out the wishes of Whybark in taking the money and buying the liquor from a person at the locality suggested. For the error in refusing to give the instruction, the judgment is reversed and the cause remanded for a new trial.

HOUSER v. BURCHART & LEVY.

Opinion delivered July 2, 1917.

1. APPEAL AND ERROR—FINDING OF CHANCELLOR.—This court, on appeal, will not disturb the finding of fact made by a chancellor, unless such finding is against the clear preponderance of the evidence.
2. ACCORD AND SATISFACTION—RESCISSION.—The parties to an accord and satisfaction, may by a subsequent agreement rescind the same and restore the debt to its original status.
3. ACCORD AND SATISFACTION—RESCISSION.—Where by mutual agreement a note which has been the subject of an accord and satisfaction is restored to the holder, and notes and accounts received by him in

satisfaction are returned to the other party, there is a rescission of the accord and satisfaction, and each party is restored to his original status.

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

L. C. Going, for appellant.

1. The payments should be credited on the mortgage debt. The debtor has the primary right to direct the application of payments. 91 Ark. 458; 38 *Id.* 285. The mortgage notes were the oldest item and all credits, even in the absence of direction, should have been credited thereon. 70 Ark. 516; 51 *Id.* 198.

2. The matter was compromised and settled. A completed sale was made. The contract was never abrogated nor new one made. An accord was made and executed and never rescinded. It was a bar to an action on the original claim. Corp. Jur. 1-523-B; 524 note, 13.

Killough, Lines & Killough, by *T. E. Lines*, for appellees.

1. There are no payments that should be applied on the note by operation of law. The rule as to application of payments is fully stated in 91 Ark. 465, overruling 38 Ark. 285, and 57 *Id.* 595, relied on by appellant. A settlement and final closing of the original transaction was had. From then the mortgage notes were treated as a separate transaction from the running account. The payments were made to cover specific purchases and were so applied at the time and could not be credited on the notes. 70 Ark. 516 has no application.

The maturity of the note fixes the time for the application. 91 Ark. 466.

2. Only the balance of the account current was paid or settled by the compromise.

3. The contemplated purchase of the Houser stock was not complete and the title did not pass.

4. If there was an agreement of accord and satisfaction, it was rescinded; but there was none. 1 R. C. L.

178, and art. 2; 1 Corp. Jur. 523-4, art. 2; 38 S. W. 446; 58 N. W. 982; 36 L. R. A. 335.

STATEMENT BY THE COURT.

A. Houser instituted this action in the chancery court against Burchart & Levy to restrain them from foreclosing a mortgage which he had given them on certain lots in the town of Wynne, Arkansas, to secure the sum of \$2,000. In his complaint he alleges that Burchart & Levy are threatening to foreclose their mortgage and that the same has been satisfied; that if a sale of the lots is made under the mortgage a cloud will be cast upon his title. The facts are as follows:

A. Houser resided at Wynne, Arkansas, and wished to enter the mercantile business there. Burchart & Levy were wholesale merchants at Memphis, Tennessee. For the purpose of establishing a line of credit with them to enable him to purchase goods from them, A. Houser executed to them two promissory notes for one thousand dollars each, dated December 11, 1906, and due respectively one and two years after date. To secure the payment of these notes, he executed to Burchart & Levy a mortgage on certain lots in the town of Wynne. He purchased goods from Burchart & Levy to the amount of several thousand dollars. It is conceded that he made the following payments on the notes:

December 24, 1907, cash.....	\$500.00
February 15, 1912.....	100.00
February 15, 1912.....	100.00
February 15, 1912, discount 2 per cent.....	40.00

Total	\$740.00
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In addition to this, it is claimed by Houser that in March, 1909, he made an additional payment of \$700 and that this, with the other payments made by him, paid in full the notes. A. Houser's wife, in the main, conducted the business for him, and they both testified that on the 4th day of March, 1909, they were in Memphis and went into the store of Burchart & Levy, when Mr. Houser

handed to a member of the firm his check for \$700 and asked that it be credited on the mortgage indebtedness. At this time Mr. Houser owed Burchart & Levy an account for merchandise sold them, but Mrs. Houser stated that the payment was applied to the mortgage debt in order that their property might be released from the mortgage. She stated that her husband had borrowed \$1,000 and made the payment out of the money so borrowed and that the remaining \$300 was used in replenishing their stock of goods. On the other hand, Leo J. Levy, the cashier of the firm, and the son of one of the partners, testified that it was a part of his duties to receive payment of all moneys paid the firm, and that the \$700 check was applied in payment of the account of Mr. Houser. He first stated that the check was brought in by Mr. Houser and handed to him already written out. Upon the check being exhibited to him, he admitted that it had been filled out by himself and then signed by Mr. Houser. He stated positively, however, that the check was to be credited upon the account of Mr. Houser. He testified that during the preceding year Mr. Houser had purchased about \$1,500 worth of goods and had only paid about \$100; that in March, 1909, he owed the firm a balance of over \$1,300 and had not bought any goods or paid any sum on account for some time prior to the payment of the \$700 check on his account; that this payment was made because the firm refused to let him have any more goods until he made a payment on his account; that the \$500 payment on the note had a notation on the check that it was to be credited on the note. No such notation appears on the \$700 check. The bookkeeper of the firm of Burchart & Levy corroborated the testimony of Leo Levy to the effect that it was agreed that the check for \$700 should be credited on the account and that it was so credited. Mr. Burchart, a member of the firm, corroborated the testimony of Leo Levy, and stated further that Mr. and Mrs. Houser afterwards admitted to him that the mortgage indebtedness had not been paid.

On the first day of November, 1910, Burchart & Levy entered into a written agreement with Houser in which it was stated that in consideration of the release of certain indebtedness to various firms by Houser, and Burchart & Levy obtaining a release in full for same, that Houser sold and delivered to Burchart & Levy his entire stock of goods to be sold by Burchart & Levy for the benefit of his creditors. Mr. and Mrs. Houser testified that a part of the consideration for the execution of this instrument was that Houser should pay certain local debts in the town of Wynne to the amount of between five and six hundred dollars and that she should release her claim for salary to the amount of about \$2,300; that she and her husband carried out their part of the agreement; that Burchart also agreed to discharge his mortgage indebtedness as a part of the consideration and that the stock of goods was turned over to him under the terms of the agreement. On the other hand, Burchart denied that he had agreed to release the mortgage but stated that it was expressly understood that the mortgage was not released, but that the agreement only contemplated a release of the account which was not secured by mortgage. Burchart admitted that the storehouse was locked up and the keys turned over to him after the agreement was executed. He said that the agreement was executed on condition that he secure the release of the other creditors as stated in the agreement and that he was unable to procure them to release their claims against Houser; that because of his failure to secure releases from the other creditors that it was agreed between him and Houser that another agreement should be made in substitution of the former one. In any event, a similar agreement was executed on the 10th day of November, 1910, between Houser and H. A. Ferris, as trustee, for the other creditors. By the terms of this instrument, Ferris took charge of the goods and sold them for the benefit of the creditors of Houser. This agreement was signed by Burchart & Levy and by Houser. Ferris took charge of the stock of goods under this agreement and

sold it, paying the proceeds of sale after deducting the expenses to the creditors ratably.

Ferris testified that he made an inventory of the stock of goods which aggregated \$2,455; that he sold them for \$1,350; that this gave the creditors a dividend of something over 30 per cent. He also testified that it was expressly understood between Burchart & Levy, Mr. Houser and himself that this agreement was made in lieu of the former one, that he told them that he would not have anything to do with the matter unless this agreement was substituted for the first one and that the new agreement was executed in substitution of the old one in order that he, Ferris, might have complete charge of the matter.

After the submission of the cause Mrs. Houser died. The property in controversy was an estate by the entirety and inasmuch as no personal judgment was sought against Mrs. Houser, no order of revivor was made.

The chancellor found the issues in favor of Burchart & Levy. He found there was a balance due on the mortgage of \$1,083.14 and a decree of foreclosure was entered of record. A. Houser has appealed.

HART, J., (after stating the facts). (1) On the question of the application of the payment of the \$700 check but little need be said. It is the settled rule of this court not to disturb on appeal the finding of fact made by a chancellor unless such finding is against the clear preponderance of the evidence. Tested by this rule, we can not say that the finding of the chancellor should be disturbed. It is true that both Mr. and Mrs. Houser testified that they directed the credit to be upon the mortgage indebtedness in order that the property might be released from the mortgage. On the other hand, a member of the firm to whom the payment was made testified in positive terms that the payment was made for the express purpose of being applied to the account so that Mr. Houser might purchase other goods. He is corroborated by the bookkeeper of the firm. The other circumstances

also tended to corroborate him. Houser was behind in his account to the firm in an amount of over \$1,300. He wished to purchase more goods with which to continue his business, and it was necessary that a payment should be made on his account to enable him to do so. When the \$500 payment was made on the mortgage it was so noted on the check by which the payment was made. No such notation was made on the \$700 check. This and other circumstances were proper to be considered by the chancellor in determining whether or not Houser directed the payment to be applied to the note or agreed that it might be applied upon his account which was unsecured.

(2) By agreement of the parties the contract between Burchart & Levy and Houser made on the 1st day of November, 1910, in regard to the release of Houser was rescinded by the contract of November 10, 1910. The parties to an accord and satisfaction may by a subsequent agreement rescind the same, and restore the debt to its original status. *Heavenrich v. State* (Minn.), 58 N. W. 982. In that case the court said:

“The findings of fact, including the sixth, as to which error is assigned, are fully sustained by the evidence. On those findings the only question is, can creditor and debtor, having made an accord and satisfaction, rescind the same, by a subsequent agreement, so as to restore the debt to its original status, and so that it may be sued without reference to the accord and satisfaction, or the agreement rescinding it? We can conceive of no reason why they can not. It is true that by the accord and satisfaction, so long as it stands, the debt is extinguished. But when it is rescinded, matters stand as though it had never been made.”

(3) In *Feder v. Ervin*, 38 S. W. 446, 36 L. R. A. 335, the Supreme Court of Tennessee held that when by mutual agreement a note which has been the subject of an accord and satisfaction is restored to the holder and notes and accounts received by him in satisfaction are returned to the other party, there is a rescission of the ac-

cord and satisfaction, and each party is restored to his original status.

It follows that the decree must be affirmed.

HEARD *v.* McCABE.

Opinion delivered July 2, 1917.

1. APPEAL AND ERROR—ABSENCE OF BILL OF EXCEPTIONS.—In the absence of a bill of exceptions it will be presumed that there was evidence to warrant the trial court in dismissing a portion of plaintiff's complaint.
2. PLEADING AND PRACTICE—VEXATIOUS SUIT—DISMISSAL.—A circuit court has authority to dismiss an action which is shown to be without merit, and brought for vexatious purposes solely, of harassing and annoying the person sued.

Appeal from Baxter Circuit Court; *J. B. Baker*, Judge; affirmed.

Rhoton & Helm, Z. M. Horton and Hogue & Heard, for appellant.

1. The contract was in the form of a written letter signed by appellee as set up in the first count. The second count was upon a *quantum meruit*, which was erroneously dismissed. Appellant found a purchaser and appellee sold the timber to the purchaser furnished by appellant.

2. It was error to allow the answer to interrogatory No. 11 of *C. M. Pate* to be so changed as to make it show that witness said the reverse of what he did say.

3. It was error to exclude the letters from appellant to Chess-Wymond Company, and those from that company to appellant. They were all competent.

4. Appellant was certainly entitled to recover on a *quantum meruit*. 66 Mo. App. 424; 59 Ga. 588.

5. The suit was not barred. 96 Ark. 681. The suit was within the three years. 93 Ark. 215; 102 *Id.* 65.

McCULLOCH, C. J. The bill of exceptions which appears in the record in this case has heretofore been stricken out by an order of the court on the ground that

it was not properly certified by the trial judge. We have before us, therefore, a case tried by a jury without the proceedings at the trial being preserved in a bill of exceptions, and we can only look to the state of the record itself to determine whether or not error was committed by the trial court.

It is urged that, notwithstanding the absence from the record of a bill of exceptions, there is error apparent on the face of the record in the ruling of the court striking out the second paragraph of appellant's complaint.

Appellant sued appellee in the circuit court of Baxter County, the subject-matter of the cause of action in each paragraph of the complaint being commissions alleged to have been earned by appellant on a sale of appellee's timber. The first paragraph of the complaint sets up a written contract between appellant and appellee whereby the latter employed the former to sell his land or timber for a commission of fifty cents per acre; and the second paragraph sets up an oral contract between said parties on the same date as the written contract set forth in the preceding paragraph for a sale of the same land and timber, and that it was a part of the agreement that appellee was to pay appellant for his services "whatever the services of the plaintiff to the defendant were really worth." It is alleged in each paragraph that the two contracts referred to were entered into between the parties "on or about the first day of March, 1909," and that appellant effected a sale of the timber on April 15, 1910. The present action was instituted February 24, 1913, although process was not served on appellee until August 23, 1913. Appellee filed a motion to dismiss the complaint on the ground that the litigation instituted by appellant was vexatious and without merit. It is alleged in the motion that appellant had previously brought an action against appellee in the circuit court of Searcy County on the same cause of action, and dismissed the same after all the testimony had been adduced before the jury, and subsequently instituted another action against appellee in the circuit court of Pulaski County on the

same cause of action and dismissed that action, too, after the trial of the cause had progressed beyond the introduction of evidence and approached a point of final submission to the jury.

It was further alleged in the motion that each of said prior actions had been instituted in counties other than that of appellee's residence, and that appellant had practiced deceit and had resorted to fraudulent artifices to induce appellee to come into those counties for the purpose of serving process on him, and that the present action, as well as the two prior ones, were instituted by appellant for vexatious purposes and solely to harass and annoy appellee into submitting to a compromise. It is alleged that there was no merit in the cause of action set forth in the complaint, and that the same were then barred by the statute of limitations.

The court heard the motion and entered an order overruling the motion so far as it related to the first paragraph of the complaint setting up the cause of action on the written contract, but sustaining the motion and dismissing the action as to the second paragraph, setting up an oral contract.

It appears from the record of the former proceedings that the complaint in the other action had been based upon the same cause of action as that set forth in the second paragraph. The cause then proceeded to trial on the first paragraph, appellee having filed his answer, and there was a verdict of the jury in appellee's favor. Appellant filed his motion for new trial, alleging, as one of the errors of the court, the ruling striking out the second paragraph of the complaint. The motion for new trial was overruled, and ninety days was given within which to file a bill of exceptions.

(1) In this state of the record we must assume that the ruling of the court upon the motion to dismiss was supported by sufficient evidence. If the court had the authority to dismiss the action on the allegations set forth in the motion, we must, in other words, assume that the evidence was sufficient to support the finding of

the court upon the issue of fact presented by the motion. *Billingsley v. Adams*, 102 Ark. 511; *Armstrong v. Lawson, Admr.*, 128 Ark. 39, 193 S. W. 258.

(2) The only remaining question is whether or not a circuit court has the power to dismiss an action which is shown to be without merit, and brought for vexatious purposes. The court in which an action is brought has that power if the facts just stated constitute grounds for abatement or dismissal. The fact that an action is brought through bad motive or for vexatious purposes is not sufficient to justify a dismissal, but where, in addition to that, it is shown that the cause is without merit and is brought solely for the purpose of harassing and annoying the person sued, then it may be dismissed by the court, for such conduct constitutes an abuse of the privilege of having an adjudication of asserted rights. 14 Cyc. 432. This principle was recognized in *Turrentine v. St. L. S. W. Ry. Co.*, 96 Ark. 181, and *Floyd v. Skillern*, 121 Ark. 454.

In the *Turrentine* case, *supra*, after holding that it was error for the trial court to dismiss an action solely on the ground that plaintiff had not paid the costs of a former action, we said: "We do not mean to say that it is beyond the power of a trial court to dismiss an action found to have been instituted not in good faith, but vexatiously, for the purpose of harassing and annoying the adversary party. This would be an abuse of process, which the court could correct by dismissal of the action."

Giving the presumption, which we must, from the silence of the record, we hold that there is no error of the court shown in dismissing the second paragraph of appellant's complaint.

Judgment affirmed.

FREELS v. STATE.

Opinion delivered July 2, 1917.

1. CRIMINAL LAW—CONDUCT OF JURY—DISCRETION OF TRIAL JUDGE.—A trial judge, in a criminal prosecution, has a wide discretion to keep the jury from coming under any influence which will prejudice the defendant's case, and to set aside a verdict, where something has occurred calculated to produce an improper verdict.
2. CRIMINAL LAW—MISCONDUCT OF JURY.—A new trial will not be granted merely because the jury, in a capital case, in a body, walked through the cemetery where deceased was buried, while being out for exercise by permission of the trial court.
3. EVIDENCE—DYING DECLARATIONS.—Whether declarations are made under a sense of impending death so as to render them admissible as dying declarations is a preliminary question for the trial court, and its finding will not be disturbed if there is evidence to support it.
4. EVIDENCE—DYING DECLARATIONS.—Statements made by deceased after he was shot, as to the circumstances under which he was wounded, made under the belief that he was going to die, are admissible in a prosecution for his murder.

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

Rice Pearce of Tennessee and *S. L. Gladish*, for appellant.

1. Appellant did not get a fair and impartial trial. Any misconduct of the jury presumptively vitiates the verdict. The jury were permitted to ramble around in Violet Cemetery and look at the freshly-made grave of the deceased, etc. Mrs. Sullinger also sat by the side of the State's attorney during the trial.

During the argument of counsel for the State, admonished the jury to go to Violet Cemetery and look upon the freshly-made grave of Edrington and think of his last words, "He shot me while I was begging him not to and I had my hands to my face." No one can know what influence this improper conduct and remarks had with the jury. 109 Ark. 193; 12 Am. & E. Ann. Cas. 176; 129 Ga. 425.

2. The court improperly admitted dying declarations. 125 Ark. 209; 1 R. C. L. 537-9; 90 S. W. 311; 24

Id. 229; 23 So. 77; 11 Coxler C. 250; 1 R. C. L. 545; 12 Atl. 701; 36 S. E. 434; 46 S. W. 127; 12 Bush, 271. The statements or declaration were not made when deceased realized that death was certain and imminent.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The affidavits of the three jurors were not admissible and can not be considered to impeach the verdict. Kirby's Digest, § 2423; 109 Ark. 193; 191 S. W. 226; *Turner v. State*, ms., June 18, 1917. The other affidavit shows no merit in appellant's contention that the incident vitiates the conviction. 12 Cyc. 669, b; 5 N. D. 516, 564; 126 N. C. 1095; 74 Mo. 292; 65 N. H. 221; 96 Iowa, 188; 42 N. Y. App. Div. 392; 109 Ark. 149. Nobody was guilty of any culpable conduct. The whole matter was within the sound discretion of the court below. 26 Ark. 334; 28 *Id.* 155; 40 *Id.* 454; 29 *Id.* 248; 104 *Id.* 212; 84 *Id.* 572; 65 N. H. 221.

2. The dying declarations were properly admitted. Deceased was conscious of impending death. 2 Ark. 229; 58 *Id.* 47; 1 R. C. L., § 81; McKelvey on Ev., § 186; 127 Mass. 455; 121 Mo. 434; 89 Va. 171.

WOOD, J. Appellant was convicted of murder in the second degree under an indictment in proper form charging him with murder in the first degree, in the killing of one James Edrington.

The testimony on the part of the State tended to show that three men, one Ferguson, James Edrington and one George, had been playing at a game of dice. The men were drinking and Freels was drunk. They got into what is termed in the evidence as a "friendly drunken row." The men at the time were on a place occupied by Freels, and not far from Freels' house.

George testified that Freels had a bottle of whiskey and passed his bottle often. Edrington gave Freels \$2 for the bottle of whiskey, just to keep it, not to buy it. Freels decided he wanted the whiskey back; so he pushed Edrington over and got hold of it. They had a scuffle.

Edrington was laughing at the time. Freels seemed to be a little "sore." Edrington told Freels that he was a good friend of his, but wanted him to let him alone about the whiskey. Edrington hit him in the face, not very hard. Freels got up and came towards Edrington. Edrington shoved him back the second time and told him to behave himself, and hit him rather hard. Freels started down the road. Edrington overtook him, caught him by the arm, and Freels jerked loose from him. Freels went to his home and came back. Witness then tells about a controversy between himself and Freels, and continues: "About this time Jim Edrington was driving down the road in a buggy, and told Freels not to shoot him, and drove on down until he got within about twenty steps of him; then Freels leveled the gun on Edrington, Edrington threw his hands over his face, telling Freels not to shoot him, but kept going towards Freels, and when he got within twelve feet Freels fired."

Another witness testified that at the time the shooting occurred Edrington was not making any demonstration whatever. "When Freels shot Edrington had his hands over his face, laying over in the buggy; the top of the buggy was down."

The above sets out enough of the testimony to show the circumstances of the encounter from the viewpoint of the State.

It was contended on the part of the appellant (and testimony was adduced by him tending to prove) that no row occurred between Edrington and Freels; that Freels, Edrington and George, who were in a buggy going to Freels' place, got out of the buggy when they arrived at a certain point on Freels' place for the purpose of engaging in a game of dice; that no row occurred between Edrington and Freels, but that Freels went to sleep soon after they got out of the buggy, because he was so drunk, and that when he woke he went to the house after his gun at the suggestion of Jim George for the purpose of joining one Pittman in a hunt on the following Sunday; that George had taken some money from Freels

while he was asleep; that Edrington followed Freels for a distance and told him that George had taken his money, and told Freels to make George give it to him. Freels returned with his gun and demanded of George that he give him the \$25 that he had taken from him while he was asleep. George pulled out the money to give it to Freels, but instead of giving it to him he grabbed the gun and in the scuffle that took place over the gun the same was accidentally discharged and inflicted the wound in James Edrington's arm and shoulder.

Edrington was taken to a hospital in Memphis. Two physicians and surgeons attended him. He lingered for thirty-nine days and finally died. One of the surgeons who attended him at Memphis testified that the cause of his death "was septicemia following the gunshot wound." This surgeon testified that the wound began about three and a half inches down from the shoulder and ranged upward through the shoulder. Witness didn't think it would have been in favor of the deceased to have cut his arm off at the shoulder.

A physician and surgeon introduced on the part of appellant testified, in answer to a hypothetical question setting forth the nature and condition of Edrington's injury, that the only treatment that should have been given and the operation that should have been made was to have taken the arm off at the shoulder and to have removed all foreign matter; that the fact that he lived so long would have been in his favor, and that he more than likely would have recovered had his arm been amputated. The lacerated flesh and foreign matter would have a tendency to bring about and set up septicemia. The witness, on cross-examination, testified that the doctors who treated Edrington in Memphis stood high as physicians.

The physician who administered first aid to Edrington on the ground after he was shot, testified that it was understood that they would take Edrington to Memphis. He administered a hypodermic to overcome the shock. It would probably last three hours, and was given him about thirty minutes before they started to Memphis. It

would have a quieting effect on the patient. Edrington didn't think he would get well. Said Freels shot him, and shot him for nothing. He was under the influence of liquor at the time he made this statement, and it was such that those present would recognize it. The influence of the liquor lasted him until he got to Memphis.

A witness by the name of Goodman testified that Edrington made statements to the witness about dying; never did say anything except that he was going to die. When witness had this talk with him he was conscious. He told the witness that when witness met him at the train when he arrived at Memphis, and also the next morning when he was operated on. Witness tried to talk him out of it, but he insisted that he was going to die. Said the man shot him for nothing, and he asked him not to, and begged him not to shoot. Edrington never changed his statement, but repeated it. Witness did not know whether they gave him opiates or anaesthetics, and didn't know whether he was under the influence of those things at the time he made the statements or not. He talked rational to witness for ten days. After ten days his mind became flighty; didn't seem to be anything wrong with his mind the first ten days.

S. E. Edrington, the father of deceased, testified that he saw his son before he was taken to Memphis on the afternoon that he was shot, and went to see him at the hospital several days after the shooting, and talked to him about the result of his wound, and he said he was going to die; didn't express any hope of getting well at all. Said he was worse than they thought he was. Said Freels shot him for nothing; that when he saw he was going to shoot him he fell over in the buggy and threw his hands up to keep Freels from shooting him in the face. It was about two or three days after the shooting before witness had the conversation with Edrington in the hospital at Memphis. He never said he could get well. Witness was asked who brought the conversation up and answered as follows: "I talked to him this way: 'Was getting a lot better; going to get well; getting along all

right.' He said, 'No, Papa, I can't get well. I will never get well.' That was possibly two or three days after the shooting."

The jury took the case under deliberation about 9:30 o'clock Wednesday evening. They considered of their verdict until about 12 or 12:30 o'clock that night, when they retired. On Thursday morning the jury was permitted to go through Violet Cemetery, at the town of Osceola, where deceased was buried. As they walked through Violet Cemetery, they saw one Mrs. Chas. E. Sullinger, a relative of the deceased, sitting on the curb-ing around the lot where her mother was buried, and adjoining her mother's lot was the grave of James Edrington. Mrs. Sullinger had her head in her hands and was weeping. Mrs. Sullinger, throughout the trial of the appellant, sat by the side of the attorneys for the State.

During the argument of J. T. Coston, who was of counsel for the State, he "admonished the jury to go to Violet Cemetery and look upon the freshly-made grave of James Edrington and think of his last words, 'He shot me while I was begging him not to, and I had my hands to my face.'"

Appellant's counsel urged only two grounds for reversal of the judgment:

First, that the conduct of the jury in going through the cemetery where James Edrington was buried while deliberating upon their verdict, in connection with the argument of the counsel, was prejudicial to appellant and prevented him from having a fair and impartial trial.

Second, that the court erred in permitting the declarations of James Edrington while on his deathbed to be introduced in evidence.

Concerning the conduct of the jury in walking through the cemetery while deliberating upon their verdict, Mrs. Sullinger testified that she was an aunt of James Edrington, who was buried in his father's lot in the cemetery. She was in the cemetery on Thursday morning and saw the jury. She was sitting on the curb-stone at the foot of her mother's grave, which is in a lot

adjoining the lot in which James Edrington was buried. She was crying, but did not say anything to the jury nor notice them. The jury walked through the cemetery along the pathway, about thirty feet from where she was sitting and did not stop. She did not intentionally do anything for the purpose of affecting the jury. She did not know that the jury would be in the cemetery that morning. She came from her home four miles away. She hardly ever went to Osceola without going to her mother's grave. She was hard of hearing and did not hear all of Mr. Coston's argument. She did not hear him say to the jury for them to go over to Violet Cemetery and look at the grave of James Edrington and think of his last words.

The special bailiff having charge of the jury testified that on Thursday morning, after the case had been turned over to the jury the night before, he started out to give the jury a little exercise. Nobody suggested that they go into the cemetery. He was walking behind the jurors. When they got to the corner on the street where Judge Driver lived some one says, "Let's go to the cemetery." He did not think any of the jurors knew Mrs. Sullinger. They merely saw a lady sitting there. He did not know himself that it was Mrs. Sullinger. The lady was weeping and glanced around. The jury went straight on through the cemetery, and as they came back through the lady had gone. There was no effort upon her part to attract the attention of the jury. She did not speak a word to them, and the fact that she was in the vicinity of the grave of Edrington did not enter witness' mind. He heard no discussion among the jury about the presence of the lady there. He did not know where Edrington's grave was; neither did any of the jury. As they came back through the cemetery some one said, "Here is Edrington's lot here." They saw fresh tracks like some one had planted flowers. They stood there a moment or two and came back to the courthouse. Witness heard Mr. Coston's argument, and if he had been on the jury he

would not have taken the statement to mean that he should take the jury to see the grave.

This testimony shows conclusively that there was no prearranged plan on the part of the attorney and Mrs. Sullinger and the officer that the jury, while they were deliberating upon their verdict, should be conducted to the cemetery for the purpose of bringing them under any sinister influence that would be calculated to arouse their sympathies for the dead and their prejudice against the appellant, and thus to procure a verdict not in accordance with the law and the evidence.

It thus appears that Mrs. Sullinger, while the jury were passing through the cemetery, was at the grave of her mother weeping, which was also near the grave of James Edrington, her nephew. She was there to visit her mother's grave. It does not appear that the jury knew that it was the same lady who sat with the attorneys for the prosecution during the progress of the trial. Nothing was done or said by her to attract the attention of the jury. The jury did not know at the time where Edrington's grave was or the fact that she was seen weeping over or near his grave. But even if the jury had known that the lady seen by them in the cemetery was the same lady who sat with counsel for the State and thus manifested an interest in the prosecution and an anxiety for the conviction of appellant, still there is nothing in this incident of such gravity as to render abortive the trial and to call for the setting aside the verdict in this case. It would be a dangerous precedent to so hold, and would place the verdicts of juries in important criminal trials upon very slender props indeed, for it is often impossible to conduct such trials where, in one form or another, something does not occur, without design on the part of the trial court or any of those connected in any way with the trial, that would have a tendency to arouse sympathy or excite prejudice for or against the one side or the other in those who are inclined to be excessively impulsive and emotional. Every trial judge has had this

experience; and realizes that he is powerless to prevent such occurrences.

(1-2) But in all such cases the presiding judge must have a wide discretion in dealing with the situation as he finds it to prevent, where it is in his power, in the first place, the trial jury from being brought in contact with any outside conditions that are in the least calculated to exert an undue influence upon them. And in the second place, to set aside a verdict of conviction where anything occurs without his knowledge and beyond his power to prevent, that was well calculated to produce a verdict that in his judgment was tainted by passion, sympathy, prejudice, corruption, or any other sinister influence whatever, and therefore not responsive to the law and the evidence. Unless it appears that the trial judge has abused his discretion in dealing with all such matters this court, after he has ruled upon such issues, will not disturb his finding. Each case must depend upon its own peculiar circumstances, and as to whether the verdict in any case was likely the result of undue sympathy or prejudice, from any cause whatever, the jurors who rendered it must be judged by standards fixed for ordinary men.

The distinguished authors of the article on Criminal Law in Cyc. says: "A new trial will not be granted merely because the jury in a body, while in the charge of the officer, attended a theater, or a church, walked through the jail, or had their pictures taken in a photograph gallery, or in a capital case, while taking a ride by permission of the court, were carried by the scene of the homicide, or being out for exercise were taken beyond the confines of the State or county." 12 Cyc. 669, b; *Palmer v. State*, 65 N. H. 221; *Bowman v. Western Fur Mfg. Co.*, 96 Iowa, 188; *Haight v. City of Elmira*, 42 N. Y. App. Div. 392; *State v. Kent*, 5 N. D. 516, 564; *State v. Kinsauls*, 126 N. C. 1095; *State v. Baber*, 74 Mo. 292.

Even if it had been proved that the jury knew that Mrs. Sullinger was a near relative of James Edrington, and knew that she was at his grave weeping as they

passed by, the verdict could not have been set aside on that account. She sat with the attorneys for the prosecution during the progress of the trial, and had a right to do so. *Timer v. State*, 109 Ark. 139, 149. There the jury must have witnessed every emotion that she exhibited showing her love and devotion to her dead relative and her anxiety that his slayer should be punished. The eloquent appeal of counsel in her presence, as set forth in the record, must have had a far more cogent effect in superinducing sympathy in her behalf than would her mere presence in the cemetery silently weeping at the grave of her loved one. Yet it could not be contended for a moment that these remarks of counsel were beyond the pale of legitimate argument.

In *Dolan v. State*, 40 Ark. 454, 474, this court quoted from Wharton on Criminal Law (sec. 3111) as follows: "The general rule is that the verdict will not be set aside on account of the misconduct or irregularity of the jury, even in a capital case, unless it be such as might affect their impartiality or disqualify them from the proper exercise of their functions."

We can not presume that any ordinary man, qualified to serve as a juror, would be so susceptible to mere sentimental influence as to allow this momentary graveyard scene to awaken his sympathies for the weeping relative of the deceased to such an extent as to cause him to forget the solemn obligation of his oath to try the cause and a true verdict render according to the law and the evidence.

(3-4) Second. Whether declarations are made under a sense of impending death so as to render them admissible as dying declarations is a preliminary question for the trial court, and its finding will not be disturbed if there is evidence to support it. *Fogg v. State*, 81 Ark. 417; *Jones v. State*, 88 Ark. 579; *Robinson v. State*, 99 Ark. 208. In determining the question the court should consider all the facts and circumstances surrounding the declarant at the time the declarations were made, such as the character of the wound, the declaration of the de-

ceased himself that he could not live, and the fact that he died shortly afterwards. *Robinson v. State, supra; Cantrell v. State*, 117 Ark. 233. The question as to the admissibility of such declarations is for the court to determine; the weight and credit to be given them is for the jury. *Rhea v. State*, 104 Ark. 162.

In *Evans v. State*, 58 Ark. 47, the declarant, after he was shot, and five or six days before he died, said he was bound to die. He said six different times that he did not believe he would ever get well. In that case, the court, speaking through Judge BATTLE, said: "The declarations of a person who has been wounded, respecting the circumstances under which the wound was inflicted, are admissible in prosecutions for the killing of such person, if made at a time when he did not expect to survive the injury, and all hope of recovery has been supplanted by the conviction that he would certainly die. The time when made need not be when the declarant apprehended immediate dissolution. But they are admissible if made at any time when he believed that death was impending and certain."

Under the above doctrine, the court certainly did not err in holding that the declarations of Edrington set forth in the statement were admissible as dying declarations. While he lived thirty-nine days after his injury before he died, yet during all that time while he was conscious at all he realized that he was going to die. He had no hope whatever of recovery, and so expressed himself to his father-in-law and his father, while they were in attendance at his bedside. He knew better than those about him that he was fatally stricken. He could feel the shots in his body and insisted from the first to the last that he was going to die. So far as he was concerned, death was impending all the while and the statements were made with a consciousness of that fact.

There is no error in the record and the judgment must therefore be affirmed.

DALTON v. BROWN.

Opinion delivered July 2, 1917.

REDEMPTION—PURCHASER AT EXECUTION SALE UNDER JUNIOR LIEN.—

The purchaser at the execution sale under a junior lien may redeem the land from the purchaser at the execution sale under the senior lien.

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

T. W. Campbell and *W. L. Pope*, for appellant.

Since Bispham did not assert any right to redeem, Dalton's right to *all* of the surplus became absolute.

Bispham was a party to the suit, but made no claim to the surplus. He was the only person who ever had any right to interfere with Dalton's right to the surplus. Bispham did not elect to redeem, and Dalton, therefore, became the absolute owner of the surplus.

E. G. Schoonover, for appellee.

The sale to Brown conveyed all interest of Bispham, subject to the mortgage and the Schnabaum judgment, including Bispham's right to redeem. Kirby's Digest, § 4440; 10 R. C. L. 1346; 17 Cyc. 1329; 83 Me. 290. The court properly held that Brown had the right to redeem and was entitled to the surplus.

STATEMENT BY THE COURT.

The Randolph County Bank instituted an action in the chancery court against W. T. Bispham to foreclose a mortgage on eighty acres of land. A decree of foreclosure was duly entered of record and the land sold by the commissioner of the chancery court under the decree. There was a surplus of \$299.14 from the sale after satisfying the bank's indebtedness. E. Dalton filed an intervention in which he claimed it as a purchaser of the land at an execution sale against Bispham.

Ben A. Brown filed his answer to the intervention and claimed a surplus of the proceeds of the mortgage foreclosure on the ground that he had become the purchaser of the land at an execution sale under a junior

judgment and had a right to redeem from the sale under the senior judgment at which Dalton became the purchaser. The issues raised by Dalton's intervention and Brown's answer thereto were submitted to the chancery court upon an agreed statement of facts as follows:

It is stipulated and agreed by counsel that A. Z. Schnabaum obtained judgment against W. T. Bispham in Randolph Circuit Court in the sum of \$198; that said judgment was rendered January 21, 1915; that Pocahontas State Bank obtained judgment on the day of July, 1915, against W. T. Bispham for the sum of \$430; that execution was issued on said last named judgment on the day of January, 1916, and the east half of northwest quarter of section 21, township 19 north, range 1 east, in Randolph County, was duly levied on under said execution and said lands were duly advertised and by the sheriff of Randolph County were duly sold on January 25, 1916, to Ben A. Brown. That execution was duly issued on said judgment in favor of A. Z. Schnabaum on the day of February, 1916, and said execution was duly levied on said lands and the same were duly advertised for sale on March 11, 1916, and on said day said lands were duly sold under said execution to E. Dalton. That said Ben A. Brown bid on said lands the sum of \$354 and said Dalton bid on said lands the sum of \$55, and that said land was struck off to said respective parties at said bids. That said lands were owned by said W. T. Bispham at the date of each of said judgments, subject, however, to certain mortgage indebtedness; that said mortgage indebtedness has been foreclosed in this court since said execution sales and there now remains in the hands of the commissioner of this court in this cause a residue after discharging said mortgage indebtedness and all costs of said cause, the sum of \$299.14; that both said judgments against said Bispham have been satisfied by the proceeds of said respective execution sales, and that certificate of purchase of said lands under said execution sale held on January 25, 1916, was by said sheriff issued to Ben A. Brown on said day and certifi-

cate of purchase of said lands under said execution sale on March 11, 1916, was by said sheriff on said day issued to said Dalton.

At the trial said Brown tendered and offered to pay in open court to said Dalton the sum of \$63.25, being the amount of Dalton's bid on said lands with interest thereon at 15 per cent. per annum from the date of Dalton's purchase thereof until the trial in chancery court, which tender was by Dalton refused.

The chancellor found that Brown was entitled to receive the surplus in the commissioner's hands, after paying to Dalton the sum of \$63.25. A decree was accordingly entered, and to reverse that decree Dalton has prosecuted this appeal.

HART, J., (after stating the facts). It appears from the statement of facts that the mortgage of Bispham to the Randolph County Bank was the first lien on the land in question, and it is conceded by both parties that the mortgage lien is paramount to both of the judgment liens. Subsequent to its execution, on January 20, 1915, Schnaubaum obtained a judgment against Bispham. Under section 4438 of Kirby's Digest, this judgment became a lien on the land in question, subject to the mortgage lien, from the date of its rendition, and under section 4439 the lien continued for three years. The judgment creditor had an execution issued and levied on the land in question in February, 1916. Dalton became the purchaser at the execution sale. Section 3292 of Kirby's Digest provides that when any real estate, or any interest therein, is sold under execution the same may be redeemed by the debtor from the purchaser or his vendee, or the personal representatives of either, within twelve months thereafter. So it is beyond question that Bispham had the right to redeem from the execution sale at which Dalton became the purchaser. Between the date of the rendition of the first judgment and the execution sale under it, the Pocahontas State Bank obtained judgment against Bispham and levied upon and sold the land in question under execution to

satisfy its judgment. Brown became the purchaser at the execution sale. Bispham failed to exercise his right to redeem from that sale within the year. It is claimed by Brown that he being the purchaser at the execution sale under the junior judgment, and that Bispham, not having redeemed from that sale, that he succeeded to the rights of Bispham and had the right to redeem from the execution sale under the senior judgment.

In the case of *Turney v. Watkins*, 31 Ark. 429, the court held that a purchaser at execution sale of the equity of redemption in real estate, succeeds to all the rights of the mortgagor, among which is the equitable right of redemption by paying the mortgage debt. Under this authority a purchaser at an execution sale of the equity of redemption in real estate has a right to redeem from the mortgage. The reason is that he succeeds to the rights of the mortgagor. If the purchaser at the execution sale succeeds to the rights of the mortgagor and has the right to redeem from the mortgage, there seems to be no good reason why he should not by analogy have the right to redeem from the sale under a senior judgment where he purchases at an execution sale under a junior judgment. In other words, if he succeeds to the right of the mortgagor to redeem from the mortgage, he should also succeed to the mortgagor's rights to redeem from sale under execution. If he does not, his right to redeem from the mortgage would not avail him anything in cases like the present one. It would do Brown no good as purchaser at the execution sale under the junior judgment to redeem from the mortgage debt of Bispham if he could not also redeem from the execution sale under the senior judgment.

In *Porter v. Watson*, 76 Pac. 841, the Supreme Court of Kansas held that one who purchases real estate at execution sale subject to a prior judgment lien and obtains a valid sheriff's deed, may redeem as owner from a subsequent sale under such prior judgment.

We are of the opinion that the court properly held that Brown had the right to redeem as succeeding to the

rights of the owner from the sale to Dalton under the senior judgment and the decree of the chancellor will be affirmed.

WILSON v. STATE.

Opinion delivered July 2, 1917.

1. LIQUOR—ILLEGAL SALE—TIME—PROOF.—A conviction for the illegal sale of liquor held erroneous, because of lack of proof that the sale occurred after the passage of the act under which the indictment was found.
2. LIQUOR—ILLEGAL SALE—ACT OF INTERMEDIARY.—One who acts as the intermediary between the purchaser and the seller is a necessary factor, without which the sale could not have been consummated; he is interested in the sale in the sense of the law, whether he had any pecuniary interest or not; but if his interest is solely in the purchase, and his efforts are directed solely to buying or aiding in the purchase and not in the sale, he is not guilty under Act 30, Acts 1915.

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

Emmet Vaughan, for appellant.

1. Under the evidence, if defendant is guilty of any crime, it is for violation of Kirby's Dig., § 5135, making it a misdemeanor to *procure* intoxicating liquors for another. But he was not indicted for that offense, but the indictment was under section 2, Act No. 30, Acts 1915, page 98. This act does not repeal section 5135 *supra*. The act does not apply to this case. Defendant merely *purchased* liquor for others as agent; he did not *sell* any. 90 Ark. 589; 72 *Id.* 14. The penalties of the law are against the seller and not against one who buys. 90 Ark. 579; *Ib.* 589; 12 Cyc. 447; 124 Ark. 447; 124 Ark. 20. There is no evidence of the date of sale, which is material. If before January 1, 1916, it was not a felony.

2. The verdict is contrary to law. Instruction No. 1 should have been given for defendant. No. 2 is the law applicable to the facts of this case. 188 S. W. 815. No. 3 should have been given as asked by defendant. If de-

feudant only aided in the *purchase* of whiskey, he was not guilty. 124 Ark. 20.

3. One who acts as the agent or messenger of another in purchasing liquor is not guilty of making a sale, within the meaning of the prohibitory statute. 90 Ark. 579, 589; 25 Conn. 40; 25 Fla. 25; 52 *Id.* 409; 100 Ga. 579; 107 *Id.* 693; 127 *Id.* 283; 15 Ill. App. 288 135 Iowa, 523; 83 Kan. 183; 140 Ky. 146; 143 *Id.* 355; 115 Mo. 428; 60 Tex. Cr. 611; Ann. Cas. 1912 C 634.

There is no evidence that appellant sold the whiskey.

4. The court erred in instructing the jury upon the weight and sufficiency of the evidence.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The evidence shows a typical case of bootlegging. Appellant acted as the agent of the seller and the procurer or intermediary. It was not necessary for appellant to have a pecuniary or financial interest in the liquor or transaction, any interest or motive will be deemed sufficient. Both Kent and appellant were guilty. 125 Ark. 232; 105 *Id.* 462.

2. There is no error in the instructions. The remarks of the court can not be complained of. McDaniel was appellant's witness. The guilt of appellant was clearly established by his own witness and himself, and the instructions and comments of the court are immaterial. 104 Ark. 317; 93 *Id.* 313; 81 *Id.* 247; 73 *Id.* 453; 72 *Id.* 613.

3. There is no proof in the record as to when the sale occurred. The burden was on the State to show that it occurred between January 1, 1916, and the time of the finding of the indictment. There is an utter lack of proof and a reversal is imperative. Act No. 30, Acts 1915, p. 98; 38 Ark. 524; 77 *Id.* 441.

STATEMENT BY THE COURT.

Appellant was convicted under an indictment in correct form which charged him with unlawfully and feloniously selling and being interested in the sale of intoxi-

cating liquors, on or about the day of March, 1916, contrary to the provisions of Act No. 30 of the Acts of 1915.

Witness George Brightman, on behalf of the State, testified that Wilson told witness where he could get some booze. Witness went to the place designated and sat down and in a little while appellant and one Kent came back. Witness, the appellant and Kent sat down on a bench, appellant being between witness and Kent. Witness handed appellant a dollar and appellant slipped the booze over to witness. Appellant reached over like he was giving the dollar to Mr. Kent and witness thought he dropped it in Kent's hand and got the whiskey from Kent and slipped it around behind the witness. This occurred in about half an hour after witness asked the appellant about the booze. When witness asked where he could get some booze appellant said he might find some. Witness did not tell him where to go. Witness never bought any whiskey from Kent before that time. Witness told appellant to go and get him some whiskey. Dock McDaniel was with witness on that occasion.

McDaniel was introduced as a witness for the defense and testified that he met the appellant that night; that he was with George Brightman. He asked appellant if he could get witness some whiskey. Appellant replied that he didn't know, he would try to. Witness and George Brightman gave appellant a half dollar apiece; that Mr. Kent came along; that they were standing right close to where the railroad crossing is. Appellant spoke to Kent. Witness was about ten feet from Kent and appellant. Kent and appellant walked on down the road a piece, and appellant and Kent were standing there talking to some other colored fellows, and after they got through talking they came on back to where witness and Brightman were waiting and appellant handed Brightman the whiskey and witness and Brightman walked off and drank it.

Appellant himself testified as follows: "Mr. Brightman met me out in the middle of the street and says,

'Henry, do you know where I can get some booze?' I says, 'Mr. Brightman, I don't sell no booze.' He says, 'I know you don't, Henry. Mr. Kent has some and he won't sell that. I thought you knew where you could get some.' And I says, 'I don't know whether I can or not.' Mr. Kent was coming down the street, and I says, 'Wait and I will see;' and I spoke to Mr. Kent, and he crossed the railroad track and goes right down towards Beine creek, and he was not gone but a little while and come back to where George Brightman, George Loving and I were sitting on the bench. The bench was just like that, and I sat right there. Mr. Brightman sat right there. George Loving sat right there. The bench extended out like that, and Mr. Kent sat down on the end of the bench. Mr. Kent pushed the whiskey behind me like that, and Mr. Brightman reaches behind me and gets the whiskey and puts the dollar down here. He intended to put it on my leg but I knocked it off. Mr. Kent got the dollar from behind me and I never did touch the whiskey."

The court instructed the jury, in substance, that it was material for the State to prove the charge as alleged; that if appellant sold the whiskey or was interested in the sale, either directly or indirectly, or if he aided any one to bring about a sale to another, he would be guilty; that if money was given appellant to procure whiskey from some one unknown to the party who wanted to buy, or if the party who wanted to buy did not know where he could get the whiskey and appellant went and procured the whiskey from some one unknown to the buyer he became the agent of the seller and was equally as guilty, and if the jury believed that such were the facts beyond a reasonable doubt they should convict the appellant and assess his punishment at one year in the penitentiary.

Appellant requested the court to tell the jury that as a matter of law before they could convict they must find from the evidence that appellant was interested either directly or indirectly in the sale of intoxicating liquors as charged in the indictment; and further asked the court to tell the jury that the term "directly or indi-

rectly interested" means that defendant must have some interest in the sale, and that if they found from the evidence that appellant acted simply as an intermediary between the purchaser and seller and had no interest directly or indirectly in the sale he would not be guilty. In other words, if the jury found from the evidence that Brightman gave the money to appellant with which to purchase the said liquor, and that the appellant purchased the same and delivered it to Brightman, appellant was the agent of Brightman, and would not be guilty unless the jury further found from the testimony, beyond a reasonable doubt, that defendant was interested directly or indirectly in the sale.

The third prayer of appellant was as follows: "You are instructed that an indictment for the illegal sale of whiskey is not supported by testimony which only establishes the fact that defendant only aided in the purchase of whiskey."

The court refused these prayers.

WOOD, J., (after stating the facts). (1) Appellant contends that there was no evidence to show that the alleged offense was committed after the passage of the act under which the appellant was indicted and convicted. This contention the Attorney General concedes to be true, and we find upon examination of the record that the confession of error of the Attorney General is well taken. The testimony fails to show the date upon which the sale is alleged to have taken place. There is no testimony to prove that the alleged sale occurred after the passage of the law under which appellant was convicted. The burden was upon the State to show this. *Gill v. State*, 38 Ark. 524. The act took effect the first of January, 1916. The indictment charges that the sale was in March, 1916, but there is no proof of the allegation. *Steel v. State*, 77 Ark. 441.

(2) In view of a new trial it is sufficient to say that we find no error in the rulings of the court in giving or refusing instructions. The instructions given conform to

the law as already announced by this court in several cases. *Williams v. State*, 129 Ark. 344; *Stuart v. State*, 125 Ark. 232; *Bobo v. State*, 105 Ark. 462, and cases there cited.

The court did not err in refusing appellant's prayer for instruction No. 1, for the reason that it was covered by the instructions which the court gave. The prayers for instructions on the part of the appellant were not in correct form and were calculated to mislead the jury.

As one who acts as the intermediary between the purchaser and the seller is a necessary factor, without which the sale could not have been consummated, he is interested in the sale in the sense of the law, whether he had any pecuniary interest or not. But if one who is intermediary between the purchaser and the seller in effecting a sale of liquor acts solely as the agent or messenger of the purchaser, and does not in any manner assist the seller, and has no pecuniary or other interest in the sale, he is not guilty under the statute. In other words, if his interest is solely in the purchase and his efforts are directed solely to buying or aiding in the purchase and not in the sale, he is not guilty, for our statute does not make it unlawful to purchase liquor. *Dale v. State*, 90 Ark. 579; *Fenix v. State*, 90 Ark. 589; *Whitmore v. State*, 72 Ark. 14; *Payne v. State*, 124 Ark. 20, 24.

To be interested in the sale of liquor in the sense of the statute, is any interest whatever, pecuniary or otherwise, that operates as a motive and induces one to sell or to play a part in bringing about the sale of the prohibited liquors.

The remarks of the court to which objection is urged will not likely be repeated on another trial, and therefore we do not comment upon them.

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

WELLS FARGO & CO. EXPRESS v. STATE.

Opinion delivered July 2, 1917.

1. EXPRESS COMPANIES—DUTIES AS COMMON CARRIERS—DUTY TO RECEIVE GOODS FOR SHIPMENT.—It is the duty of an express company as an interstate common carrier for hire, to receive for transportation to consignees upon its line in the State of Arkansas, any article which was not prohibited by the laws of the State.
2. LIQUOR—PROHIBITION AGAINST DELIVERY.—In Act 13, Acts 1917, there is no absolute prohibition against the delivery of alcohol. The act makes it lawful to deliver it for medicinal and mechanical purposes.
3. LIQUOR—DELIVERY BY EXPRESS COMPANY.—An express company does not violate Act 13, Acts 1917, by delivering alcohol to a person who intended to use it strictly for medicinal and mechanical purposes. An express company, being an interstate common carrier and having a public duty to perform, is not guilty of a violation of the statute, if it delivered alcohol to the consignee, if it acted with reasonable care or due caution to avoid a violation of the statute.
4. LIQUOR—DELIVERY BY EXPRESS COMPANY—PROOF OF GOOD FAITH.—Where an express company is prosecuted for the violation of Act 13, Acts of 1917, by delivering alcohol to a certain person within the State, evidence of the good faith of the express company is admissible, as a defense to the prosecution.
5. LIQUOR—INTERSTATE SHIPMENT—DELIVERY BY EXPRESS COMPANY.—When alcohol is shipped from a point out of the State to a point in the State and delivered by a common carrier to a person in the State, the duty devolves upon the carrier to use reasonable care to learn for what purpose it is to be used, and it can only deliver the alcohol when, in the exercise of such reasonable care it is convinced that the alcohol is to be used for strictly medicinal or mechanical purposes.
6. LIQUOR—DELIVERY BY EXPRESS COMPANY—GOOD FAITH.—The question of the good faith of an express company, which has delivered an interstate shipment of alcohol to a person within the State, is one of fact for the jury.

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

J. C. Pinnix and Mehaffy, Reid & Mehaffy, for appellant.

1. The question of good faith in the delivery should have been submitted to the jury, as a defense and not merely in mitigation of punishment. There must be an intent to violate the law—delivery itself is not a crime.

169 S. W. 604, 603, 606; 157 S. W. 908; 66 So. 115; 219 Fed. 334; 164 Ia. 112; 145 N. W. 45.

The consignee told the agent that the consignment was for medicinal purposes. A receipt was taken and a truthful record made as required by law and filed with the clerk. The testimony shows due caution.

The transaction was interstate commerce. The burden was on the State to show a violation of the law.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. Good faith is not a defense. 47 Ark. 109; 102 *Id.* 16; 45 *Id.* 356. The testimony of good faith was admissible only in mitigation of punishment and not as a defense. 49 Ia. 650; 10 Met. (Mass.) 259; 52 Mich. 577; 110 N. C. 560; 8 R. C. L., § 17.

2. A mistake of fact or ignorance of law is no defense. Bish. Stat. Cr. (3 ed.), § 132; 2 Wharton, Cr. Law (10 ed.), § 1507; 1 McClain, Cr. Law, § 128; 88 Ind. 145.

STATEMENT BY THE COURT.

The Wells Fargo & Co. Express, a common carrier, was indicted in the Pike Circuit Court for bringing into and delivering whiskey in that county contrary to Act No. 13, approved January 24, 1917, being an act entitled "An Act to Prohibit the Shipment of Intoxicating Liquors Into This State," etc. The facts are as follows:

On March 2, 1917, Jas. R. Hogg & Co. delivered to Wells Fargo & Co. Express, at Poplar Bluff, Missouri, six quarts of alcohol consigned to C. E. Wilson, Murfreesboro, Pike County, Arkansas. On March 5, 1917, the agent of the express company at Murfreesboro delivered to Wilson six quarts of alcohol and took from him a certificate as follows:

"Murfreesboro, Ark., March 5, 1917.

"The undersigned, the consignee of six quarts alcohol for medicinal purposes, from James R. Hogg Dist. Co., at Poplar Bluff, Mo.

"As a condition to the delivery of said shipment to him by Wells Fargo & Co. Express, hereby certifies that

said alcohol is to be used for the purpose above stated, and is not intended to be used in violation of any law of the State of Arkansas.

“My business or location is feed business. My business address is Murfreesboro, and my residence is Murfreesboro.

(Signed) “C. E. Wilson.

(Signature of Consignee.)

“Witness: (Signed) Jas. Goodwin.”

It was also shown on behalf of the express company that it had taken the advice of counsel learned in the law and that it had issued circulars to its agents directing them to take every precaution to keep from violating the law, and that the company had used every effort to comply with the provisions of the law.

In rebuttal the State proved that Wilson ran a feed store in the town of Murfreesboro, and that he was noticed to be under the influence of alcoholic stimulants shortly after he received the shipment in question. The jury returned a verdict of guilty, and from the judgment of conviction the express company prosecutes this appeal.

HART, J., (after stating the facts). This appeal involves the construction of an act passed at the last session of the Legislature, approved January 24, 1917, prohibiting the shipment of intoxicating liquors into this State, etc. Act 13, Acts of 1917. The particular sections necessary for a construction of the issues raised by this appeal are sections 1, 16 and 17, which are as follows:

“Section 1. That it shall be unlawful for any railroad company, express company, or other common carrier, or any officer, agent or employee of any of them, or any other person, to ship or to transport into, or deliver in this State in any manner or by any means whatsoever, any alcoholic, vinous, malt, spirituous or fermented liquors or any compound or preparation thereof, commonly called tonic, bitters or medicated liquors, from any other State, Territory or district of the United States, or from any foreign country, to any person, firm or corporation

within this State, when the said liquors, or any of them, are intended by the person interested therein to be received, possessed or sold, or in any manner used except as provided or sold, or in any manner used except as provided in section 17."

"Section 16. That in any indictment or presentment for any violation of this act it shall not be necessary to negative the exceptions herein contained, or that the liquors, bitters and drinks were ordered shipped, transported or delivered for any of the purposes set out in the succeeding section hereof, but such exceptions may be relied upon as defense and the burden of establishing the same shall be upon the persons claiming the benefits thereof."

"Section 17. That nothing in this act shall make it unlawful (1) for any priest or minister of any religious denomination or sect to order and have shipped and delivered, wine for sacramental purposes; nor for any common carrier, corporation or person to ship, transport, carry or deliver wine for said purposes to any priest or minister of any religious denomination or sect; (2) for any person, firm or institution to have shipped and have delivered alcohol for strictly medicinal or mechanical purposes; but records shall be kept by the carrier or delivering party of all such wines for sacramental purposes and all such alcohol, and statements thereof shall be filed with the clerk of the circuit court within ten days after such delivery."

The circuit court, in effect, instructed the jury that the express company delivered the alcohol to Wilson at its peril and that the question of its good faith could not be considered except in mitigation of the punishment. The court likened it to the sale of liquor to a minor where such sale is prohibited by statute. In *Redmond v. State*, 36 Ark. 58, the court held that one who sells liquor to a minor without the written consent of his parent or guardian, violates the statute, although he is informed and believed at the time that the minor is of full age. The court further held that an honest mistake as to the minor's age

would mitigate the penalty. It is insisted that by analogy this principle controls here. We do not think so. There the prohibition of the statute was absolute. Under the statute one could not sell liquor to a minor without the written consent of his parent or guardian, and a sale made to him without such consent was illegal, whether the seller knew him to be a minor or not. The offense was one where guilty intent was not an essential ingredient in its commission and need not be approved. In short, the court held that in such a case the liquor dealer acts at his peril and must ascertain the facts.

(1-2) Section 17 of the act under consideration expressly provides that it is not unlawful for any person, firm or institution to have shipped and delivered alcohol for strictly medicinal and mechanical purposes. It was the duty of the express company as an interstate common carrier for hire to receive for transportation to consignees upon its line in the State of Arkansas any article which was not prohibited by the laws of the State. There was no absolute prohibition against delivering alcohol, but on the other hand the act made it expressly lawful to deliver it for strictly medicinal or mechanical purposes. The express company would not violate the statute if it delivered the alcohol to a person who intended to use it for strictly medicinal or mechanical purposes. The express company, being an interstate common carrier and having a public duty to perform, if it acted with reasonable care or due caution to avoid a violation of the statute, it should not be deemed guilty. Mr. Bishop says that a statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurred with his act, because the common law does not. Bishop on Statutory Crimes (3 ed.), § 132. Continuing in the same section, the learned author said:

(3-4-5) "One who, while careful and circumspect, is led into a mistake of facts, and, doing what would be in no way reprehensible were they what he supposes them to be, commit what under the real facts is a violation of a criminal statute, is guilty of no crime; because such is the

rule of the common law, and in construction it restricts the statute. Yet in some instances of this sort he incurs a civil liability." See also 1 McClain on Criminal Law, § 128; *Adams Express Co. v. Commonwealth* (Court of Appeals of Kentucky), 169 S. W. 603; *Adams Express Co. v. Commonwealth* (Court of Appeals of Kentucky), 112 S. W. 577. In the application of this principle the court should have admitted the testimony tending to show the good faith of the express company as a defense to the action and the court erred in not doing so and in limiting the testimony on this point to the mitigation of the punishment. It was the duty of the express company in receiving and carrying the alcohol from Poplar Bluff, Missouri, to Pike County, Arkansas, and in delivering it to Wilson at Murfreesboro to have acted in good faith and to have acted with ordinary care or due caution to avoid a violation of the statute. Common carriers are required to obey the law in like manner as other people are required to obey it. Its agents are required to exercise the same judgment as a reasonably prudent man would be required to exercise in the conduct of his own business. In short, when alcohol is shipped from a point out of this State to a point in the State and delivered by a common carrier to a person in this State, the duty devolves upon the carrier to use reasonable care to learn for what purpose it is to be used, and it can only deliver the alcohol when in the exercise of such reasonable care it is convinced that the alcohol is to be used for strictly medicinal or mechanical purposes. As stated in *Adams Express Company v. Commonwealth*, 169 S. W. 603, if the express company acts upon reasonable grounds in good faith after such investigation as ordinary care requires, and is misled, it is not liable; otherwise, it is liable. So, too, in the case of the *State v. Southern Express Co.*, 66 So. 115, in discussing this question, the Supreme Court of Alabama said:

"If in good faith and after proper investigation a common carrier of interstate commerce delivered liquors to a consignee without any knowledge upon its part that

such liquors are intended by the consignee for illegal use, then such carrier can not, we think, be held to have violated any law of this State."

In the case of *Jas. Clark Distilling Co. v. Western Maryland Railroad Co.*, 219 Fed. 334, the court held:

"Where intoxicating liquors are offered to a carrier for transportation from Maryland into West Virginia, for the alleged personal use of the consignee, the carrier is not bound at his peril to make sure that the liquors are not intended to be used contrary to the laws of such State, but is only required to act in good faith in a *bona fide* effort to prevent its instrumentalities being used to aid a violation of the law." The court said:

"In this case nothing need be decided other than that the defendant as a common carrier is bound to receive for shipment, and to transport and deliver in West Virginia, such liquors as are intended solely for the personal use of the consignee, even though the orders for them had been solicited by letters mailed at points outside the State. It has no right to accept for shipment, or to deliver in West Virginia, liquors which are intended by any person interested therein to be used in any way forbidden by the law of that State.

It is not bound at its peril to make sure that no liquor transported by it is intended to be used contrary to the State law. It need not create or maintain any special staff of investigators or detectives to aid it in determining such questions. It must, however, act in good faith. Its agents and employees who handle such shipments for it must keep their eyes open, and must exercise common sense to prevent it and its instrumentalities being used as aids in violation of the law."

(6) The question of the good faith of the express company in delivering the alcohol to Wilson was a question of fact for the jury in this case and the court should have instructed the jury as above indicated.

For the error in not doing so, the judgment must be reversed and the cause remanded for a new trial.

THOMPSON v. STATE.

Opinion delivered July 9, 1917.

1. **APPEAL AND ERROR—PRESERVING EXCEPTIONS.**—The facts upon which an assignment of error are based must be set forth in a bill of exceptions, and not merely in the motion for a new trial, as the latter operates only as an assignment of error and not as an authoritative narrative of the incidents of the trial.
2. **CRIMINAL LAW—REASONABLE DOUBT.**—Where the court instructed the jury that the presumption of innocence attended the defendant throughout the trial, and that the State must establish guilt beyond a reasonable doubt, it was not error to refuse to instruct the jury that if the facts and circumstances in proof were susceptible of two constructions, one of guilt and the other of innocence, that it was the duty of the jury to acquit.
3. **NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DISCRETION OF COURT.**—A motion for a new trial on the ground of newly-discovered evidence is left to the sound discretion of the trial judge, and this court will not disturb the ruling unless there has been an abuse of that discretion.

Appeal from Pope Circuit Court; *A. B. Priddy*, Judge; affirmed.

U. L. Meade, R. W. Holland and J. T. Bullock, for appellant.

1. The verdict is not supported by the evidence. Thompson's explanation of his possession of the cotton was sufficient and is corroborated.

2. All the character witnesses (except one) stated that his reputation was good.

3. In his explanation as to how he got the \$309 spent, he became confused and merely made a mistake.

4. A new trial should have been granted for newly-discovered evidence. 86 Ark. 481.

5. Instruction No. 2 for appellant should have been given. 58 Ark. 478. Other cases on conflicting presumptions are 97 Ark. 212; 34 *Id.* 511; 59 *Id.* 411.

6. The questions and conduct of the State's attorney were improper and prejudicial.

7. Instruction No. 3, asked by appellant, correctly states the law. No. 5, given for the State, is inaccurate

and misleading. Appellant was tried upon statements not true and since shown to be untrue. The evidence of mistake is undisputed.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The burden was on appellant to show affirmatively that the rulings of the court were erroneous. All doubts are resolved in favor of the court's rulings. 85 Ark. 514; 95 *Id.* 588; 84 *Id.* 342; 96 *Id.* 627. But no objections were made to any statements of counsel, nor any request made to instruct the jury to disregard them. It is too late after verdict. 100 Ark. 107; 91 *Id.* 93; 104 *Id.* 397; 103 *Id.* 505.

2. The objections to the testimony of Line and Shoptaw are not well taken.

3. In a prosecution for larceny, it is competent to prove, and is an evidence of guilt, that a defendant voluntarily paid or offered to pay the value of the stolen property. 121 N. C. 606. No objections were made as to the questions being leading.

4. There was no error in permitting the State to ask on cross-examination as to the reputation of defendant for honesty, etc., after the alleged offense; nor in asking Ledford if his brother-in-law had not been in the penitentiary. No prejudice resulted.

5. The admission of incompetent testimony is not prejudicial where the facts it tends to prove are admitted. 85 Ark. 123; 84 *Id.* 16; 88 *Id.* 135; 91 *Id.* 576.

6. There is no error in the instructions. Those given state the law. Besides the objections were general. 91 Ark. 555; 83 *Id.* 119. Those asked were erroneous.

7. One seeking a new trial for newly-discovered evidence must support it by affidavits of the witnesses by whom he proposes to prove the facts. 29 Ark. 62; 28 *Id.* 121. Due diligence was not shown, nor surprise. The matter was within the sound discretion of the court. 41 Ark. 229; 54 *Id.* 364; 28 *Id.* 124; 13 *Id.* 362.

McCULLOCH, C. J. The defendant, J. M. Thompson, was indicted by the grand jury of Pope County for the crime of grand larceny, the charge being that he stole a bale of cotton from U. G. Shoptaw, and on trial of the case the jury returned a verdict finding the defendant guilty of the offense charged in the indictment.

The evidence adduced by the State on the trial of the case tended to show that defendant stole three bales of cotton from the gin yard of Shoptaw and carried them to Russellville and sold them. The proof shows that the bales of cotton in question were ginned on October 16 and 17, 1916, and Shoptaw testified that he missed them from the gin yard on October 19, 1916, and later found the three bales at the cotton yard in Russellville and identified them as being the same bales of cotton that had been taken from his yard. He identified one of the bales by the number and the peculiarity of the lettering, and testified that the initials which had been stamped on the bale at the gin were rubbed out with dirt. He identified each of the three bales also by peculiarity in shape by reason of the shape of the press. There is little, if any, controversy as to the identity of the three bales of cotton found at the cotton yard in Russellville as being the same which were stolen from Shoptaw's gin yard, nor is there any controversy as to the fact that defendant took those three bales of cotton to Russellville and sold them. Defendant admitted that fact when he was arrested, and also testified on the trial that he carried the bales of cotton to Russellville and sold them. He denied, however, that he took the cotton from the gin yard, and testified that they were put into his possession by a stranger who gave the name of Hunt. His narrative of the circumstances is that he was engaged in hauling hay at the time and about day-break on October 18 started out on his day's hauling with an empty wagon and came upon a stranger on the road with three bales of cotton on a wagon, and that the man claimed that his team had broken down on him, and offered to pay defendant to haul the cotton to Russellville. Defendant testified that the man told him he would give

him \$1 to haul the cotton to Russellville, and would pay more if he (defendant) "was put to any extra trouble." He testified that he took the cotton on his wagon and offered to let the man ride to town with him, but that the man declined on the ground that he was wet and preferred to walk. Defendant stated that when he got to Russellville the man asked him to sell the cotton for him, and he went around to the cotton buyers and sold it and collected the money (about \$265) and carried it back to Hunt at the wagon yard and delivered it to him, Hunt at the same time paying him \$1 for the hauling. He testified that he heard that Hunt lived up about Dover somewhere, but had made inquiry and could not find him.

The proof on the part of the State was that defendant on that day paid out the sum of \$309 to different parties on debts that he owed. He claimed that he paid the debts with his own money, and that he had accumulated the funds by the sale of cotton out of his own crop gathered and sold before that time. The State made out a strong case of circumstantial evidence against defendant by reason of his possession of the recently stolen cotton. His explanation of his possession is far from satisfactory—at least the jury had the right to so regard it—and defendant's conduct was, to say the least of it, very suspicious. His narrative of facts concerning his possession of the cotton is corroborated to some extent by the testimony of other witnesses, but it can not be said that his evidence entirely breaks the force of the circumstances proved in the case, and we think that the testimony abundantly sustained the verdict.

(1) The first assignment of error in the motion for new trial relates to alleged misconduct of special counsel for the prosecution in the opening statement to the jury, but the bill of exceptions does not show that any such incident occurred as set out in the motion. In that state of the record we can not see that there was any misconduct or that anything prejudicial to defendant in that respect occurred. The facts upon which the assignment of error are based must be set forth in a bill of exceptions, as the

motion for new trial operates only as assignment of error and not as an authoritative narrative of the incidents of the trial.

The next assignment of error relates to the giving of instruction No. 5, on the subject of proof of the general reputation of defendant for honesty. Defendant's counsel offered testimony to establish his reputation in the community for honesty, and the State on rebuttal made a counter attack on his reputation. The court gave the instruction complained of, but we find no prejudicial error in it. Defendant asked the court to give an instruction in substance the same as the one given, but the court refused to give it on the ground that the refused instruction was already fully covered by the one given. The only objection made here to the instruction is that its tendency was to minimize the effect of the testimony relating to defendant's reputation. It is not claimed that the court in express language undertook to instruct the jury on the weight of that testimony, but it is merely claimed that the extent of the details of the instruction might have had the effect on the minds of the jury of minimizing the importance of that feature of the testimony. We do not think that the instruction is open to that attack, and we can discover no prejudicial effect which could reasonably have resulted.

(2) The next assignment of error is as to the refusal of the court to give instruction No. 2, requested by defendant, as follows:

"You are instructed that if the facts and circumstances in this case are susceptible of either of two constructions, one pointing to the guilt of the defendant and the other to his innocence, it will be your duty to adopt the construction consistent with the innocence of the defendant and acquit him."

The court gave an instruction on the subject of reasonable doubt, telling the jury, in substance, that the presumption of innocence attended the defendant throughout the trial and that it devolved upon the State to estab-

lish his guilt beyond a reasonable doubt. After having given that instruction, it was not error to refuse to give the other one requested by defendant on the same subject. *Green v. State*, 38 Ark. 304; *Reed v. State*, 54 Ark. 621. This view of the matter is not in conflict with the decision of this court in *Holder v. State*, 58 Ark. 473, where it was held that the trial court erred by modifying an instruction so as to tell the jury that although the facts proved were consistent with defendant's innocence, the jury were not bound to acquit him unless they had a reasonable doubt of his guilt.

(3) The only remaining assignment of error argued on the brief of counsel is that a new trial ought to have been granted for newly-discovered evidence. After the verdict was rendered counsel presented affidavits showing that he had made a mistake in his testimony concerning the times he had sold a part of the cotton out of his own crop that season, and that he had been led into that mistake by an erroneous sales account furnished him by a firm of merchants to whom he sold his cotton. The point of the newly-discovered testimony was that it would tend to strengthen defendant's contention that he had sold a sufficient quantity of cotton before October 18 to raise the amount of funds which he used on that day in paying his own debts. We have often held that a motion for new trial on the ground of newly-discovered evidence is left to the sound discretion of the trial judge and that this court will not disturb the ruling unless there has been an abuse of that discretion. In this case the trial judge might very well have taken the view that it was defendant's own fault that he had not possessed himself of accurate information concerning the date of the sales of his own cotton. He was a small farmer and raised only five or six bales of cotton that year and it was a matter within his own knowledge and he ought to have taken the pains to be accurate in his testimony and not wait until after trial to bring forth matter which would operate as a circumstance in support of his claim of innocence. In other words, it was a matter of discretion for

the trial court to determine whether he had displayed a sufficient amount of diligence to produce the evidence which he now offers in the event of new trial.

We are unable to find any error in the record, and, as the verdict is supported by sufficient evidence, it follows that the judgment must be affirmed, and it is so ordered.

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

Opinion delivered July 9, 1917.

INTERSTATE COMMERCE—CONFLICT BETWEEN INTERSTATE AND INTRA-STATE FREIGHT RATES.—Where the Interstate Commerce Commission has fixed a reasonable interstate freight rate upon certain commodities, the carrier may remove discrimination as to the same by placing the intrastate rate upon the same commodities at the same amount.

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

Edward J. White, Henry G. Herbel, Fred G. Wright of St. Louis, Mo., and *Troy Pace* and *W. R. Satterfield*, for appellant.

1. The demurrer to the answer should have been overruled. A carrier may apply on intrastate traffic moving over the same rails, between the same points, a freight rate that has been declared by the Interstate Commerce Commission to be reasonable on interstate traffic, moving between the same points in order to remove a discrimination between such rates. 234 U. S. 342; 205 Fed. 380; 38 I. C. C. 459; *Rowland v. R. R. Comrs.*, etc., 244 U. S. 106; *Am. Exp. Co. v. State*, 244 U. S. 617.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

The demurrer was properly sustained. The order of the Interstate Commerce Commission alone can not annul the lawfully established intrastate rates of a State, and the opinion in 234 U. S. 342, when properly construed

does not recognize any such power. The Interstate Commerce Commission has no power to prescribe or enforce minimum rates. The Arkansas Railroad Commission is given power to *make the rates that must be charged* by all common carriers in this State. But not so with the powers of the Interstate Commerce Commission. Its powers are set forth in section 15, act February 4, 1887, as amended by act June 29, 1906, and June 18, 1910. See 169 U. S. 466; 156 *Id.* 649; 183 Fed. 427; 149 U. S. 777; 178 Fed. 261; 184 *Id.* 118; 230 U. S. 417, 421-3; 161 N. W. 132.

SMITH, J. This suit was brought to recover the statutory penalty for a charge made on two intrastate shipments of lumber in excess of the rate fixed for such service by the Arkansas Railroad Commission. A charge of four cents per hundred pounds was made, whereas the rate fixed by the Arkansas Railroad Commission for the service charged for was three and one-half cents per hundred pounds.

The railway company admitted making the charge in excess of the rate fixed by the Arkansas Railroad Commission, and, in justification of its action in so doing, set up the following facts:

That the Memphis Freight Bureau of Memphis, Tennessee, for and on behalf of numerous persons engaged in business in that city, on June 22, 1914, filed its complaint before the Interstate Commerce Commission against the defendant, St. Louis, Iron Mountain & Southern Railway Company, and other railroads, which said proceeding is known as 7030 on the docket of the Interstate Commerce Commission, entitled "*Memphis Freight Bureau et al. v. St. Louis, Iron Mountain & Southern Railway Company et al.*," in which said complaint it was charged and alleged that the defendant railway company and other common carriers operating in the territory were charging rates, for the transportation of lumber in carload lots, from points on the line of the St. Louis, Iron Mountain & Southern Railway Company and other

common carriers in Arkansas and Louisiana to Memphis, which were unreasonable and unduly prejudicial to jobbers doing business in the city of Memphis. That, after a full hearing of all parties interested, the filing of briefs and the making of oral arguments, said cause was submitted to the Interstate Commerce Commission for its decision on April 27, 1915, and said commission, on May 9, 1916, rendered its decision and filed its report and order.

That by said report the commission found that the said rates charged by the St. Louis, Iron Mountain & Southern Railway Company and other common carriers, on shipments of lumber in carload lots from points on their lines in Arkansas and Louisiana to Memphis, Tennessee, were just and reasonable, these rates having been approved by the Interstate Commerce Commission. That the Railroad Commission of Arkansas had established a tariff regulating freight charges within the State of Arkansas to be collected by the St. Louis, Iron Mountain & Southern Railway Company and other common carriers on lumber in carload lots from one point in the State of Arkansas to other points in said State, and the rates which were being charged from points within the State of Arkansas to Memphis, Tennessee, exceeded more than one cent per hundred pounds the rates contemporaneously applied by the St. Louis, Iron Mountain & Southern Railway Company and other like carriers for the transportation of like shipments for like distances between points in Arkansas under such tariff made by the said Railroad Commission of Arkansas, and the Interstate Commerce Commission found and held that these rates subject Memphis to undue and unreasonable prejudices and disadvantages. That the said Interstate Commerce Commission, upon so finding, issued its order, 7030, in which, among other things, it notified and ordered the defendants, St. Louis, Iron Mountain & Southern Railway Company and other common carriers, to cease and desist, on or before August 1, 1916, and thereafter, from publishing, demanding, or collecting any

rates, for the transportation of lumber, in carload lots, from points on their lines in the State of Arkansas to Memphis, Tennessee, which exceeded, by more than one cent per hundred pounds, the rates contemporaneously applied by said common carriers to the transportation of like shipments, for corresponding distances, between points in Arkansas. A copy of said findings, report and order were attached, marked Exhibit "A," and made a part of the answer.

That, in obedience to said order of the Interstate Commerce Commission, the defendants filed, before the Interstate Commerce Commission, what is known as Supplement 18 to Missouri Pacific Tariff No. 1110-F, and which took effect, upon the class of freight herein mentioned, August 1, 1916. That said tariff was issued June 28, 1916, duly filed with the Interstate Commerce Commission and approved by it as Supplement No. 18 to I. C. C. No. A-2887. That, in this tariff, the rates were adjusted and filed to conform to the order of the Interstate Commerce Commission hereinbefore mentioned.

That, shortly after said tariff was filed with the Interstate Commerce Commission, and before it became effective, vigorous protest was filed against it by numerous shippers of lumber and other commodities named therein with the Interstate Commerce Commission, which was therein requested to suspend said rates, as it had the right and power to do under section 15 of the act to regulate commerce; but, after due consideration of said protest, it refused to suspend said tariff, but permitted it to go into effect.

That, prior to this time, the Railroad Commission of Arkansas had put into effect what is known as Standard Freight Distance Tariff No. 5, to regulate freight charges on the class of freight herein mentioned between points in the State of Arkansas. The defendants asked that the Arkansas Railroad Commission make its rates in compliance with the order of the Interstate Commerce Commission, so as not to make the rate, on the class of material herein mentioned, between points in the State of Ark-

ansas, more than one cent per one hundred pounds less than the rates fixed by the Interstate Commerce Commission tariff above mentioned; but the said Arkansas Railroad Commission refused so to do; therefore, it became necessary, in order for the defendants to comply with the order of the Interstate Commerce Commission, to put into effect a tariff, for shipment of said material between points in Arkansas, which would not be more than one cent per hundred pounds less than the rate checked in to comply with the order of the Interstate Commerce Commission, and, in obedience to said order of the Interstate Commerce Commission, defendant did put into effect, August 1, 1916, its tariff known as Tariff 5807, eliminating discrimination as ordered by the Interstate Commerce Commission, and under such tariff the correct, proper and legal charge upon the shipments mentioned and complained of in the complaint herein was, and is, four cents per one hundred pounds.

That defendants have been charging, and are charging, the rates mentioned in said Tariff No. 5807, for shipment of the material herein mentioned, in carload lots, between points in Arkansas, in order to comply with said order of the Interstate Commerce Commission. That the said rates are, in no case, higher than those filed with the Interstate Commerce Commission, but are one cent per one hundred pounds less than the rates to Memphis for similar distances.

The defendants state that it is impossible for them to comply with the opinion and order of the Interstate Commerce Commission, marked Exhibit "A" hereto, and with the tariff of the Arkansas Railroad Commission hereinbefore referred to as Standard Freight Distance Tariff No. 5, without charging interstate rates and establishing lower classifications, ratings and exceptions than were found reasonable by the Interstate Commerce Commission, and that the said order of the Interstate Commerce Commission and the rates fixed by the Arkansas Railroad Commission are in direct and irreconcilable conflict, and defendants allege that the rates fixed by the

Arkansas Railroad Commission, in its Standard Freight Distance Tariff No. 5, on the material mentioned in said order of the Interstate Commerce Commission, are null, void and of no effect.

To this answer a demurrer was filed, upon the ground that the facts recited did not constitute a defense to the complaint of the State, and, upon the hearing thereof, the demurrer was sustained, and, defendants refusing to plead further, the statutory penalty was imposed, and this appeal has been prosecuted to reverse that action.

Upon the authority of the case of *Houston, East & West Texas Ry. Co. and Houston & Shreveport R. R. Co. et al., Appellants, v. United States, the Interstate Commerce Commission et al.*, 234 U. S. 342, generally referred to as the Shreveport case, the State concedes the power of the Interstate Commerce Commission to make the order set out in the answer of the railway company; but the State does not concede that the effect of this order is to nullify the rates, or any of the rates, prescribed by the Arkansas Railroad Commission, or to justify the railway company in ignoring said rates.

It is said that this is true because the Interstate Commerce Commission does not prescribe, and has not prescribed, minimum rates, but has prescribed only maximum rates, and it is argued that the railway company can comply with the order of both the Interstate Commerce Commission and the rates fixed by the Arkansas Railroad Commission by the simple expedient of reducing its interstate rates to a point where they will not exceed, by one cent per one hundred pounds, the tariff rates fixed by the Arkansas Railroad Commission.

We think this argument does not properly take into account the far-reaching effect of the decision of the Supreme Court of the United States in the Shreveport case, *supra*, and we become convinced of this when we read the amplification of that opinion, and its application to the facts recited, in the recent case of *American Express Co. et al., Plaintiffs in Error, v. The State of South Dakota*

ex rel., et al., 244 U. S. 617. This last opinion was handed down by the Supreme Court of the United States on June 11, 1917.

The material facts out of which the litigation arose which was terminated by the decision of the Supreme Court of the United States in the Shreveport case, *supra*, are substantially similar to the facts of the instant case. Complaint was made to the Interstate Commerce Commission of rates which were alleged to be discriminating against Shreveport. This discrimination grew out of compliance with the intrastate rates fixed by the Railroad Commission of Texas. The Interstate Commerce Commission made substantially the same order as was made in the instant case, and this order was reviewed by the Commerce Court, and its action affirmed in an opinion by that court. See *Texas & Pacific Ry. Co. v. United States (Interstate Commerce Commission et al., Interveners)*, 205 Fed. 380.

In that case it was said that interstate carriers had the lawful right to charge the maximum rate approved by the Interstate Commerce Commission, and this and other cases appear to settle the law definitely to be, in any collateral inquiry, that the rate is reasonable which the Interstate Commerce Commission has approved, and that railroads have the right to charge the maximum rates thus fixed and approved, and it was there expressly held that, when an interstate rate had been thus approved and held reasonable, the carrier was at liberty to raise the intrastate rates to a level with that rate, and could not be compelled to reduce such reasonable interstate rates to a level with the current intrastate rates. That the authority of Congress was clear to prevent the interstate carrier from unjustly discriminating in its rates in favor of one person or locality against another person or locality under substantially similar conditions of traffic, and, in discussing how the carrier might avoid the discrimination, the court there said:

“But if the action of the Texas commission regarding these intrastate rates is in derogation of the regulat-

ing power of Congress, the petitioner is not bound by that action, but has the right to readjust its schedules in conformity with the order of the Interstate Commerce Commission."

In the same opinion it was also said:

"The commission also found by necessary inference, as its order clearly indicates, that the interstate commodity rates in question were not unreasonable, and this in effect sanctioned the continuance of those rates. It is likewise a necessary inference from the report and order that the unlawful discrimination against Shreveport, so far as commodity rates are concerned, was caused by the imposition of intrastate rates which are lower than petitioner is justly entitled to charge. This being so, it follows that petitioner is at liberty and has the right to comply with the commission's order by making a proper increase of its Texas rates. Indeed, since its interstate rates are not excessive, such an increase appears to be the only method of compliance which would be just to both shipper and carrier.

"When this order was made, upon the facts so ascertained and reported, it had the effect, in our judgment, of relieving petitioner from further obligation to observe the intrastate rates which the Texas authorities had prescribed. The petitioner was no longer under compulsion in respect of those rates, because the rate situation disclosed by the inquiry was subject in its entirety to the provisions of the Federal statute and the administrative control of the commission. The order of the commission therefore operated to release petitioner as regards the intrastate rates in question, from the restraint imposed by the State of Texas; and thereupon petitioner became entitled, if it did not choose to reduce its interstate rates, to comply with the order by advancing its Texas rates sufficiently to remove the forbidden discrimination. Its obedience was due to the superior authority, and it ceased to be bound by any inconsistent obligations. * * * It is sufficient to hold, as we do, that petitioner can not resist the order on the ground of involuntary action, because the

effect of that order was an exemption of these intrastate rates from Texas authority."

This commerce court has since been abolished by Congress, but, upon the appeal which was prosecuted from this decision, the case was consolidated with the case of *Houston, E. & W. T. Ry. Co. et al. v. United States (Interstate Commerce Commission et al., Interveners)*, 205 Fed. 391, under which style the opinion on the appeal is found reported in 234 U. S. 342. This is the case which we have said is commonly referred to as the Shreveport case, and in the opinion of the court handed down by Mr. Justice HUGHES, the decision of the commerce court was fully approved. These two appeals from the commerce court were argued and submitted together on October 28 and 29, 1913, and the opinion delivered on June 8, 1914, and the report of the case as well as the opinion itself indicate that the question decided received the most careful consideration. In concluding the opinion it was there said:

"In conclusion: Reading the order in the light of the report of the commission, it does not appear that the commission attempted to require the carriers to reduce their interstate rates out of Shreveport below what was found to be a reasonable charge for that service. So far as these interstate rates conformed to what was found to be reasonable by the commission, the carriers are entitled to maintain them, and they are free to comply with the order by so adjusting the other rates, to which the order relates, as to remove the forbidden discrimination. But this result they are required to accomplish.

"The decree of the commerce court is affirmed in each case."

In the brief filed on behalf of the State the argument is made that the order of the Interstate Commerce Commission alone can not annul the lawfully established intrastate rates of a State, and it is insisted that the opinion in the Shreveport case, when properly construed, does not recognize any such power in the Interstate Commerce Commission. In support of this view, the case of *State*

ex rel. Attorney General v. American Express Co., 163 N.W. 132, is cited, and such appears to have been the view of the Supreme Court of South Dakota as reflected in that opinion. But a writ of error was allowed December 11, 1916, and that decision was reversed by the Supreme Court of the United States in an opinion handed down on June 11, 1917. In reviewing the nature of the order of the Interstate Commerce Commission, designed to prohibit a discrimination against shippers in favor of intrastate shippers, the court, in this last cited opinion, said:

"In its specific direction the order merely prohibits charging higher rates to and from Sioux City than to and from the five South Dakota cities. It could be complied with (a) by reducing the interstate rates to the South Dakota scale or (b) by raising the South Dakota rates to the interstate scale or (c) by reducing one and raising the other until equality is reached in an intermediate scale. The report (which is made a part of the order) contains, among other things, a finding that the interstate rate which was prescribed by the commission was not shown to be unreasonable. This finding gives implied authority to the express companies both to maintain its interstate rates and to raise, to their level, the intrastate rates involved. The Shreveport case (*Houston E. & W. Texas Ry. v. United States*), 224 U. S. 342. For, if the interstate rates are maintained, the discrimination can be removed *only* by raising the intrastate rates."

In reversing the decision of the Supreme Court of South Dakota, it was there also said:

"2. The power of the Interstate Commerce Commission.

"The Supreme Court of South Dakota declares:

"If the purported order of the commission does, in any respect, regulate intrastate commerce, it is to that extent void owing to the commission's want of jurisdiction over the subject matter.

"That court denies not only the intent of Congress to confer upon the commission authority to remove an ex-

isting discrimination against interstate commerce by directing a change of an intrastate rate prescribed by State authority; but denies also the power of Congress under the Constitution to confer such power upon the commission or to exercise it directly. The existence of such power and authority should not have been questioned since the decision of this court in the Shreveport case.

"It is also urged that even if the commission had power, under the circumstances, to order a change of the intrastate rates, the order in question was invalid, because the commission, instead of specifically directing the change, undertook to give to the carrier a discretion as to how it should be done and as to the territory to which it should apply. The order properly left to the carriers' discretion to determine *how* the discrimination should be removed; that is, whether by lowering the interstate rates or by raising the intrastate rates or by doing both. In its general form the order is identical with that under consideration in the Shreveport case."

The necessary effect of these decisions is that the railway may charge the rate approved by the Interstate Commerce Commission in its interstate shipments, and that it may comply with the order of that commission to remove existing discriminations against interstate shipments by raising the intrastate rate to such a point that, according to the ruling of the Interstate Commerce Commission, a discrimination will not exist.

It follows, therefore, that the court erred in sustaining the demurrer, and that judgment will be reversed and the cause remanded with directions to overrule the same.

PARKER v. STATE.

Opinion delivered July 9, 1917.

1. CRIMINAL LAW—INTENT—INDICTMENT.—A charge that an act is feloniously done includes a charge that it is done wilfully and with criminal intent.
2. COUNTIES—OFFICERS—EMBEZZLEMENT.—There is no conflict between Kirby's Digest, § 1990, covering the misappropriation of public funds by county officials, and Special Act of 1911, p. 132, putting the officials of Polk County on salaries.
3. CRIMINAL LAW—RIGHT OF COURT TO DIRECT A CONVICTION.—In a criminal prosecution it is improper for the court to direct a verdict of guilty, and the court commits reversible error where it gives an instruction which is tantamount to a direction to find the defendant guilty.

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

Minor Pipkin and Steel & Lake, for appellant.

1. The indictment does not state facts sufficient to constitute a public offense. It does not charge that defendant knowingly and wilfully, and *with intent*, etc. Kirby's Digest, § 1842, has been repealed, and if sustained at all it must be under section 1990, and still is defective for want of averment of *intent*, knowledge and wilfulness. 58 Ark. 98; 69 *Id.* 454; 112 *Id.* 282; Acts 1911, No. 76.

2. The court erred in its charge to the jury. The oral charge of the court was really a direction to find the defendant guilty—a directed verdict. Kirby's Digest, § 7162; 48 *Id.* 78; 69 *Id.* 454; 112 *Id.* 282.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The indictment was drawn under section 1990, Kirby's Digest, and contains the words "*feloniously*" and "*fraudulently*." This is equivalent to *wilfully* and with *criminal intent*, etc. 71 Ark. 403; 111 Mo. 473; 53 Kan. 663. The special statute in no way repeals or modifies section 1990.

2. There is no error in the instructions given or refused. See 48 Ark. 81; 58 *Id.* 98; 112 *Id.* 282; 103 *Id.* 28.

3. The oral charge of the court states the truth from the record and is not a direction to return a verdict of guilty. It was the official duty of appellant to collect the fees as required by law and the failure to pay over the surplus above salaries, etc., rendered him guilty under the act of 1911. See 50 Ark. 276; 24 *Id.* 402; 49 *Id.* 449; 30 *Id.* 72; 25 *Id.* 311; 7 *Id.* 499.

STATEMENT BY THE COURT.

W. L. Parker was indicted for embezzlement charged to have been committed by converting to his own use public moneys which came into his hands as county clerk of Polk County. The material facts are as follows:

Parker was duly elected and qualified as county clerk of Polk County, for the term of two years from October 30, 1914. He entered upon the discharge of his duties and in compliance with the statute, on September 30, 1916, Parker, as county clerk, filed a report of the receipts and expenditures of his office. The report was duly verified and showed that he owed the county something over \$1,800. His report was duly examined and approved by the commissioners of accounts. Parker failed to pay over the money admitted by him to be due the county as required by the statute. The bondsmen of Parker were witnesses in the case and testified that they had a conversation with him in regard to the state of his accounts with the county. They said he admitted to them that he owed the county the amounts stated in his report, and upon being asked how it happened, his explanation was that the expenses of the office was so great that he couldn't run the office under the salary allowed. He stated to them on different occasions that the expenses of the county clerk's office was such that a person could not possibly keep it up on the amount allowed by law. The bondsmen made up the deficiency and paid it into the county treasury on March 9, 1917. Parker was behind with the county at that time in the sum of \$2,000. One of

the commissioners of accounts for Polk County for the year 1916 stated that the commissioners concluded the examination of Parker's accounts with the county on the 4th day of October, 1916, and that he owed the county, at that time according to their examination, \$2,130.35.

The court gave several instructions at the instance of the State including an instruction on reasonable doubt. It also gave several instructions at the request of the defendant. The jury retired to consider of its verdict, and, after having been out some time, the jury reported to the court that it was unable to agree upon a verdict. Whereupon the court orally charged the jury, over the objection of the defendant, as follows:

"Gentlemen: This is a case in which there is no conflict in the testimony. Ordinarily, when cases are submitted to a jury, it is on conflicting testimony; part of the witnesses swear one way and another swears directly to the contrary. Juries then have difficulty in determining which part of the testimony is true. When witnesses swear one way and another swears directly to the contrary, it is rather difficult to decide a case. This is a case in which there is no conflict. The law is simple and plain; the testimony is unconflicting. There is just one thing and that is embodied in your oath. Each of you said, 'I do solemnly swear to try the case according to the law and the evidence, so help me God.' Unconflicting testimony, the law is plain and simple. It is just a question of your oaths. That is the only matter before you."

The jury then returned a verdict of guilty and the punishment of the defendant was fixed by it at five years in the State penitentiary.

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

HART, J., (after stating the facts). The indictment in this case was returned under section 1990 of Kirby's Digest. The section reads as follows: "It shall be unlawful for any officer of this State, or of any county, township, city or incorporated town in this State, or any

deputy, clerk or other person employed by any such officer, having the custody or possession of any public funds, by virtue of his office or employment, to use any of such funds in any manner whatsoever for his own purpose or benefit, or to loan any of such funds to any person or corporation, whomsoever or whatsoever, or permit any person or corporation whomsoever or whatsoever to use any of such funds, or to pay or deliver any such funds to any person or corporation, knowing that he is not entitled to receive it, or for any such officer to wilfully fail or omit to pay over any such funds to his successor in office at the expiration of his term of office; but collectors of taxes, county treasurers and treasurers of cities and incorporated towns may deposit the public funds in their custody in incorporated banks for safekeeping; and the said officers and the sureties on their official bonds, the bank and the stockholders of the bank shall be liable for all funds that such bank on demand shall fail to pay to the person entitled to receive the same."

(1) It is contended by counsel for the defendant that the indictment is insufficient because it does not contain any averment that the misappropriation of the funds by the defendant was intentional or wilful. The indictment does charge, however, that the defendant "did then and there unlawfully, feloniously and fraudulently fail and omit to pay the amount as aforesaid to said county due by him, the said W. L. Parker, on settlement, and did then and there unlawfully, feloniously use said money and funds as aforesaid for his private purposes, and convert the same to his own use," etc. To charge that an act is feloniously done includes a charge that it is done wilfully and with criminal intent.

(2) Counsel for the defendant also urges that since the Legislature of 1911 passed a special statute paying the officials of Polk County salaries and prescribing the method of their accounting and settlement with county, that section 1990 of Kirby's Digest does not apply. The special act placing certain officials of Polk County on a salary may be found in the Special Acts of Arkansas for

1911, page 132. The act requires certain county officials of Polk County to keep a record of all moneys or other evidence of value received or earned by them as such officers under the laws of this State. It is also made the duty of such officers to make a report under oath quarterly to the commissioners of accounts and a final report to the commissioners of accounts at the expiration of their terms of office.

In these reports he is required to set forth the total amount of money, etc., received by them. It is made the duty of the commissioners of accounts to review and pass upon these reports. The officers named in the act are required to pay the excess of public moneys in their hands immediately into the treasury of Polk County after such accounts are passed upon by the commissioners of accounts. This special act has an entirely different object to that sought to be accomplished by section 1990 of Kirby's Digest, and it is readily apparent from reading the two acts that they in no wise conflict with each other.

(3) It is also contended that the oral charge to the jury copied in the statement of facts was tantamount to a directed verdict against the defendant and constitutes reversible error. In this contention we think counsel are correct. In the declaration of rights in the Constitution of 1874, article 2, section 10, it is provided among other things, that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed.

Article 7, section 23, provides that judges shall not charge juries with regard to matters of fact, but shall declare the law. In *Roberts v. State*, 84 Ark. 564, the court held that it was error to direct the jury to return a verdict of guilty in a prosecution for a misdemeanor which is punishable by imprisonment. The court quoted from Bishop on Criminal Procedure (2d ed.), Vol. 2, p. 813, the following:

"The judge is incompetent to convict one of crime, even though he acknowledge it, except on a plea of guilty.

The evidence is exclusively for the jury. However conclusive of guilt it may be, he can only tell them that, if they believe such and such to be the facts, the law demands a verdict of guilty; he can not otherwise direct such verdict."

In the case of *Shipp v. State*, 128 Tenn. 499, in discussing the question the court said:

"Whatever may be the rule in relation to misdemeanors, the weight of authority is overwhelming to the effect that in a prosecution for felony, where a plea of not guilty is interposed, it is not permissible for the court to direct a verdict of guilty or to pass on any question of fact unfavorable to the defendant. This is true even though the incriminating evidence is uncontradicted or conclusive."

In the case of *State v. Koch*, 34 Mont. 490, 8 A. & E. Ann. Cas. 804, the court said:

"Where the defendant in any criminal prosecution pleads not guilty, the trial court, no matter how conclusive the evidence may be, can not instruct the jury to return a verdict of guilty, as the defendant can not be deprived of his absolute constitutional right to have the question of his guilt or innocence determined by the jury without coercion by the court."

In the case of *Konda v. United States*, 166 Fed. 91, 22 L. R. A. (N. S.) 304, the court held that the question of whether or not a pamphlet for the mailing of which one is on trial, is non-mailable, can not be determined by the court as a matter of law, although the evidence is uncontradicted, and the jury can not be directed to bring in a verdict to that effect, but the question must be left to the determination of the jury. The reason the court may direct a verdict in a civil case and in a misdemeanor case where punishment is by fine only is that the court has the power to set aside verdicts in such cases and the action of the court cuts off the possibility of useless verdicts by directing the jury the only verdict which the court would let stand. But in criminal cases, where part of the punishment is by imprisonment, if the jury returns a verdict

for the defendant, the judge can not set it aside and order a new trial, even though it may think the evidence for the State is uncontradicted.

In the case of *State v. Riley*, 113 N. C. 648, 18 S. E., 168, the court held that, although the evidence for the State in a criminal case is uncontradicted, the court can only instruct the jury to return a verdict of guilty if they believe the State's evidence. In *U. S. v. Taylor*, 12 Fed. 470, the court said:

"By his plea of not guilty the defendant must be understood as denying the truth of the information or indictment and as not conceding the truth of what the witnesses for the government have sworn to. This is so, notwithstanding the fact that no witnesses for the defendant contradicted the statements of the witnesses for the prosecution. In this condition of the testimony it was the right of the jury to pass upon the credibility of the witnesses even if unimpeached as to character, and to consider whether, upon applying all the tests of manner, clear or confused statement, prejudice and accuracy of memory, they were to be believed. It was within the province of the jury to disbelieve the witnesses for the government." See also *Territory v. Kee* (N. M.), 25 Pac. 924; *State v. Wilson*, 62 Kan. 621, 52 L. R. A. 679; *State v. Godman*, 145 N. C. 461, 123 A. S. R. 467; *Huffman v. State*, 29 Ala. 40; Thompson on Trials (2 ed.), Vol. 2, § 2149.

We have held that upon the trial of a person indicted for an offense consisting of different grades, and there is no evidence to warrant submission of one of the lower grades to the jury, the judge is not required to instruct on that grade. For instance, if the defendant is indicted for murder and there is no evidence upon which to predicate an instruction of manslaughter the court is not required to instruct the jury on manslaughter. We have held that this is not an invasion of the province of the jury as to question of fact; but that it is simply applying the law to the facts. It would be quite a different ques-

tion, however, for the court to tell the jury that the facts on a certain decree of homicide were undisputed.

In *Harris v. State*, 34 Ark. 469, an exception was saved to the action of the court in giving an instruction after the close of the argument. This court held that such action of the court was not error but said: "Judges may not now, as under the former practice in charging juries, sum up the evidence, and tell them what facts are proven and what are not, and leave them to find such facts only as the court may deem disputed or doubtful, but it is the province of the court to declare the law applicable to the case, and the court is not obliged to be silent after the close of the argument." The oral charge was given by the court after the jury had failed to agree and had reported their disagreement to the court.

We are of the opinion that the oral charge in question in this case is neither more nor less than an instruction to convict. The court told the jury that the case was not open to dispute on any essential fact. This the court was not warranted in doing, and it in effect was an instruction to the jury to return a verdict for the State.

For this error the judgment must be reversed and the cause remanded for a new trial.

LUSK ET AL., RECEIVERS ST. LOUIS & SAN FRANCISCO
RAILROAD COMPANY v. COOPER.

Opinion delivered July 9, 1917.

1. JURISDICTION—QUESTION OF, MAY BE RAISED WHEN.—The question of jurisdiction may be raised for the first time on appeal.
2. JUSTICES OF THE PEACE—JURISDICTION—ATTORNEY'S FEES.—In an action under a statute allowing attorney's fees, where there is neither an allegation of fact which would justify the recovery of attorney's fees, nor a statement of any amount sought to be recovered, the general prayer for recovery of an attorney's fee in addition to the amount of actual damage will not defeat the jurisdiction of the justice of the peace, in whose court the action is brought.
3. RAILROADS—NEGLIGENT KILLING OF HORSE.—Evidence *held* sufficient to sustain a verdict against a railway company for the negligent killing of a horse.

Appeal from Crawford Circuit Court; *James Cochran*, Judge; affirmed.

W. F. Evans of Missouri and *B. R. Davidson*, for appellants.

1. Under the evidence a peremptory instruction should have been given for defendants. A constant lookout was kept, and any presumption of negligence was overcome by the proof. Everything possible was done to avoid the injury after the horse was discovered. 39 Ark. 413; 40 *Id.* 336; 41 *Id.* 161; 53 *Id.* 96; 67 *Id.* 514.

2. The justice had no jurisdiction and the circuit court acquired none on appeal. Const., art. 7, § 4; 44 Ark. 100; 45 *Id.* 346; 7 *Id.* 258; 13 *Id.* 40; 66 *Id.* 346; 77 *Id.* 582; 77 *Id.* 234; 11 *Id.* 309; 111 *Id.* 350; 114 *Id.* 304-9; 23 *Id.* 40. The question of jurisdiction can be raised at any time.

3. No negligence was proven. 41 Ark. 161. See also 48 Ark. 366-370.

Sam R. Chew, for appellee.

1. The court had jurisdiction. The only measure of damages was the value of the stock killed. 73 Ark. 120. The amount claimed determines jurisdiction. 122 Ark. 224; 83 *Id.* 372; 66 *Id.* 346.

2. The evidence of the engineer and fireman was contradicted, and the verdict is sustained by the evidence.

MCCULLOCH, C. J. Appellee instituted this action before a justice of the peace of Crawford County against appellants, as receivers of the St. Louis & San Francisco Railroad Company, to recover \$100, the value of a horse, alleged to have been killed through negligence in the operation of a train. In the complaint the value of the horse is alleged in the sum of \$100, and the prayer of the complaint is that appellee "may have and recover the sum of \$100 damages, and a reasonable attorney's fee." The case was tried in the circuit court on appeal and the trial resulted in a verdict in appellee's favor for the sum of \$100.

(1) The question of recovery of attorney's fee was not submitted to the jury, and that feature of the com-

plaint appears from the record to have been entirely ignored in the trial of the case. It is insisted here, apparently for the first time, that the justice of the peace had no jurisdiction, and that the circuit court acquired none on appeal, because the action was one to recover on account of damage to personal property, and that the amount in controversy exceeded the sum of \$100. The question of jurisdiction raises itself at any stage of the proceedings, and it may be raised here, even though not insisted on in the trial below. The statute (Kirby's Digest, § 6774, as amended by Acts of 1907, page 144) authorizes the recovery of attorney's fees in actions against railway companies for killing or wounding stock only where there has been a failure on the part of the company to post notice of the injury in accordance with the terms of the statute, or where, after the posting of notice, there has been a failure or refusal to pay within thirty days after demand. *Kansas City Southern Ry. Co. v. Anderson*, 104 Ark. 500; *St. Louis Southwestern Ry. Co. v. Cone*, 111 Ark. 309.

(2) The complaint contains no allegations concerning the posting of notice or refusal to pay after demand, and for that reason there is no statement of a cause of action for the recovery of attorney's fee. The burden is always on the complaining party to allege and prove his cause of action in that respect. *Kansas City Southern & Memphis Rd. Co. v. Summers*, 45 Ark. 295. Neither is there any specific sum demanded in the complaint for attorney's fee. It is unnecessary to decide whether or not a demand in the complaint for a specific sum as attorney's fee in addition to the sum of \$100 claimed as actual damages would put the cause of action beyond the jurisdiction of a justice of the peace, but we hold that where there is neither an allegation of facts which would justify the recovery of attorney's fee nor a statement of any amount sought to be recovered, the general prayer for recovery of attorney's fee in addition to the amount of actual damages will not defeat the jurisdiction of the justice of the peace. The prayer of the complaint in that

respect is purely surplusage and does not affect the jurisdiction of the court in which suit is brought.

(3) The only other question raised here is that concerning the legal sufficiency of the evidence. It is conceded that appellee's horse was killed by a train operated by servants of appellants, but it is contended that the testimony adduced by appellants overcomes the presumption of negligence beyond controversy. The horse was killed during the night at a road crossing near the station of Rudy by a passenger train, which the proof shows was running at a speed of about forty miles per hour. No one saw the horse killed except the engineer and fireman, and, according to their testimony in the case, they were both keeping a lookout and the fireman saw the horse on the right-of-way coming in the direction of the track and gave warning to the engineer, who sounded the whistle and applied the brakes, but the engine was too near the horse at the time to avoid striking him. The attention of the engineer was called to the presence of the horse on or near the track as the train rounded a curve coming out of a deep cut a short distance south of the place where the horse was struck. The engineer testified that the distance from the end of the cut to the crossing where the horse was struck was only about 100 feet, and that he did everything he could to avoid the injury after his attention was called to the horse being in danger. Appellee introduced testimony tending to show that it was about 800 feet from the end of the cut to the place where the horse was struck and that a person could see up the track that distance. It was also shown that the tracks of the horse were seen along between the rails for a distance of the length of two and one-half rails. It is thus seen that the testimony of the engineer was contradicted by that of other witnesses and the jury might have found that the horse was seen for a distance of 800 feet ahead of the engine running along the track, and that sufficient effort was not put forth by the trainmen to prevent the injury.

Judgment affirmed.

HOLUB v. STATE.

Opinion delivered July 9, 1917.

1. TRIAL—CONTINUANCES—DISCRETION.—Continuances in civil and criminal cases are within the sound discretion of the trial court, and the action of the court will not be disturbed, unless it has abused its discretion to the defendants' injury.
2. TRIAL—MOTION FOR CONTINUANCE—TIME FOR HEARING.—It is not an abuse of the courts' discretion to hear testimony on both sides, touching a continuance after some of the jurors have been selected.
3. APPEAL AND ERROR—CONDUCT OF JURY—TAKING PAPER TO JURY ROOM.—In a prosecution for larceny defendant relied upon a sale of the chattel to him. *Held*, under such facts he was not prejudiced by the jury's taking to the jury room with them an alleged bill of sale, upon which defendant relied, and for the authenticity of which he vouched.
4. LARCENY—SUFFICIENCY OF EVIDENCE.—The evidence *held* sufficient to sustain a conviction for larceny.

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

R. J. Williams and *Mann & Mann*, for appellant.

1. A continuance should have been granted to enable defendant to procure the attendance of the witness, Toms. The motion was in due form, filed in a fit time, gave the names and residences of the witnesses and set out all the facts he expected to prove. The testimony was material and not merely cumulative. Art. 2, § 10, Const.; 58 Ark. 549; 2 *Id.* 33; 10 *Id.* 527; 26 *Id.* 496; *Ib.* 496.

2. It was error to allow Tankersly to testify after the motion for continuance was overruled as to a conversation with one purporting to be a deputy sheriff over the telephone. It was error to admit this testimony after ten jurors had been empaneled and accepted, and in their presence and hearing.

3. The jury were allowed to take the bill of sale to the jury room, over appellant's objection.

4. The testimony does not support a finding that the hog was feloniously taken and carried away. No criminal intent is shown. 71 S. W. 482.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The continuance was properly refused. It did not contain the necessary allegations. The testimony was cumulative merely. Kirby's Digest, § 6173; 79 Ark. 594; 82 *Id.* 203; 86 *Id.* 317; 89 *Id.* 46; 100 *Id.* 149.

Every officer is presumed to do his duty; the *non est* return was evidence that the witness was not in Mississippi County. 49 Ark. 449; 100 *Id.* 180.

2. No prejudice resulted from the testimony on the rehearing of the motion for continuance, in the presence of jurors. But no objections were made in time. 56 Ark. 488; 56 *Id.* 4.

3. There was no error in allowing the jury to take the bill of sale with them. 94 Ark. 343.

4. The evidence is sufficient. The finding of the jury will not be disturbed. 104 Ark. 162; 101 *Id.* 51; 95 *Id.* 321.

STATEMENT BY THE COURT.

On the 26th of March, 1917, appellant was indicted by the grand jury of St. Francis County for the crime of grand larceny. The indictment, in correct form, charged him with the larceny of a hog, the property of one O. Jordan.

The case was called for trial on April 4, thereafter and appellant filed his motion for a continuance, in which he set up that immediately upon being arrested on the charge in the indictment he proceeded with due diligence to have subpoenas issued for all the witnesses desired by him; that one of the witnesses was John Toms; that he caused a subpoena for this witness to be directed to the sheriff of Mississippi County, where defendant was informed and believed that Toms resided; that the subpoena had not been returned, but defendant was informed that the sheriff of St. Francis County had been advised by the sheriff of Mississippi County that the subpoena had not been served on Toms; that the sheriff of Mississippi County had not used due diligence to serve

the subpoena; that defendant believed that Toms was residing within about a mile of Blytheville, in Mississippi County, and could easily be found; that defendant believed if Toms were present he would testify that defendant purchased from him, Toms, the sow that defendant is charged with having stolen in good faith and paid full value therefor; that Toms was not absent with the consent and connivance of the defendant, but, on the contrary, the defendant had endeavored to assist the officers in the location of the witness and believed that the witness could be easily found; that the facts were material to his defense. The defendant verified the motion by stating on oath that the facts set forth were true as he verily believed. The court overruled the motion.

After ten jurors had been accepted by both parties to try the case counsel for the State was granted permission to introduce testimony on the motion for a continuance. Counsel for defendant objected, which objection was overruled, and to which ruling the defendant duly excepted.

A deputy sheriff of St. Francis County testified, on behalf of the State, on the motion for continuance, that he talked over the phone to the sheriff's office in Mississippi County, and the party to whom he talked represented himself to be the chief deputy in charge of the sheriff's office. Over the objection of appellant, the witness was permitted to state that the party to whom he talked said that he could not locate Toms and had returned the subpoena *non est*. The conversation occurred after the subpoena had been forwarded to the sheriff of Mississippi County, and after the *non est* return had been made.

The clerk of St. Francis County testified that he issued two subpoenas for John Toms, directed to the sheriff of Mississippi County. He mailed one to the sheriff at Blytheville and delivered the other to defendant at his request. When the defendant asked for the subpoenas he stated that John Toms was at or near Blytheville, and that witness put such information in the

subpoenas. Holub asked witness for the subpoenas before the case was set and witness told him that he could not issue them until the case was set for trial, and he came back the next day, immediately after the case was set, and asked for the subpoenas.

J. D. Holmes testified on behalf of the defendant in support of the motion for continuance, that he was acquainted with John Toms; had known him all of witness' life. Toms was at Blytheville when witness left there a month or so before, and was there a week ago according to a letter witness received from him. Witness had not been at Blytheville nor seen Toms in a month and did not know personally where he was nor where he had been for the last month.

The court then overruled the motion and appellant excepted to the ruling on the ground that the testimony on the motion was taken at a time when ten jurors had been selected to try the case and in their presence.

The testimony on behalf of the State tended to show that the sow appellant is alleged to have stolen was the property of one O. Jordan, who purchased the same from one Sardin. The sow was about four years old and was marked in Sardin's mark. Sardin sold the sow to Jordan in September. The last time he saw her was on Friday after the Sunday when it was alleged that she had been stolen. Three or four days before the Friday mentioned the sow was at witness' place and witness put her up in his stable and Jordan, the owner, came down and got her. Other parties owned hogs of the same kind in the same community. It was not an uncommon stock.

Jordan testified that he lost the sow, describing her. He bought her from Sardin and took her to his home and put her up. She broke out in three or four days, and witness went to Sardin's looking for her and got information that she was at Holub's. He went to Holub's and told him that he wanted to see the sow that he had caught on the prairie. Holub told witness that she was in the barn. He found the sow in a box stall in the back of the barn. He told Holub that it was the sow that witness

had bought from Sardin. Holub replied that he bought her from John Toms. Witness told Holub to bring the sow to witness' lot. Holub replied that he did not get her there and he would not do so. Holub did not say anything about a bill of sale at that time. Witness got out replevin papers and was present at the time they were served. Holub said that he had just got back from where he had gone to see two parties who had witnessed a bill of sale for the sow when he, Holub, purchased her from Toms; that these two witnesses had been down to his place to look at the sow and they identified her as the same sow that he bought from Toms.

Other witnesses corroborated the testimony of witnesses Sardin and Jordan as to the identity and ownership of the sow in Jordan, and as to Holub's having her in his possession.

Another witness who testified on behalf of the State stated that Holub came to witness' house on the 25th of March, 1917, on Sunday morning, inquiring for cattle. Witness told Holub that he had not seen the cattle, but that there was a black sow there. Holub asked witness to go with him to look at the sow. Holub claimed the sow as his property. Holub came back, and two other men with him, and they took the sow. Holub said that he had hogs gone that he had not seen since last summer; that four had gone off at the same time; had not seen any of them until that morning. The place where Holub caught the hog that morning was a little over a mile from Holub's house. When Holub came back to witness's house after the sow he came in his wagon. They ran the hog out in the open, along the public road, where people could see them; no effort to conceal anything. Holub saw another man there, but did not stop trying to catch the hog.

Two witnesses testified that they were present when Toms sold Holub some hogs, a black sow and three shoats; that it was in June, 1916. They stated that a bill of sale was executed which they witnessed. A purported bill of sale was introduced. It recited as follows: "This certifies that I, John Toms, did sell to F. E. Holub, this

day, the following described hogs: One black sow, about two years old, weighing 185 pounds; three head of shoats, weighing about 80 pounds each, for a consideration of \$25.50; said hogs are marked crop and split and underbit in left ear." The instrument was signed by John Toms.

Two witnesses testified that at the request of Holub they accompanied and assisted him when he went with his wagon and brought the sow home.

The appellant himself testified, his testimony being the same as that of the other witnesses concerning the manner in which he first obtained possession of the hog after he had purchased her from Toms. He stated that he bought the hogs from Toms as evidenced by the bill of sale, took them to his home and turned them out on the range; that the sow he was charged with stealing was the same hog that he had bought from John Toms. He paid \$25.50 for the sow and three shoats. When Jordan came to his house and asked to see the hog that he had brought home he told him "all right," and went with him and showed him the hog. Jordan claimed her and appellant claimed her, and Jordan replevied the sow from appellant. Appellant went after the witnesses Burns and Holmes, who had witnessed the bill of sale. He did not know whether they would know where he was and he wanted them there as witnesses. He went to find John Toms and found that he had gone to Mississippi County. He had a summons issued for John Toms the day the case was set for trial the first time, gave the officers what information he had as to Toms' whereabouts; told them that he lived at Blytheville, and made every effort that he could to get him. Appellant took the bill of sale because he did not know Toms very well and did not know his mark. Appellant wrote the bill of sale.

Testimony was introduced by the State in rebuttal, tending to impeach Holub as a witness. The jury returned a verdict of guilty against appellant, and assessed his punishment at one year in the State penitentiary. A motion for a new trial was filed, assigning as errors the rulings of the court to which exceptions were duly saved.

The motion was overruled, and the court entered judgment sentencing appellant to the penitentiary, from which this appeal has been duly prosecuted.

WOOD, J., (after stating the facts). I. This court, in cases too numerous to mention here, has held that continuances, in criminal as well as civil cases, are, as a general rule, within the sound discretion of the trial court, and a refusal to grant a continuance is never a ground for a new trial unless it is made to appear that such discretion has been abused to the prejudice of the defendant. In some of our cases much stronger language is used in announcing the law to the effect that in passing on motions for continuance this court will not disturb the ruling of the trial court unless it appears that such ruling, in denying the same, is arbitrary and capricious, thereby manifesting such an abuse of the court's discretion as results in the denial of justice. *Smedley v. State*, 130 Ark. 149.

Perhaps the most cogent language used in this connection in any of our cases is that by Mr. Justice SMITH in *Loftin et al. v. State*, 41 Ark. 153, where he says: "It must be a flagrant instance of the arbitrary or capricious exercise of power by the circuit court, operating to the denial of justice, that will induce us to interfere."

But see the language of Judge LACEY, in the very earliest case upon the subject, in *Burrus v. Wise & Hyman*, 2 Ark. 33, 42.

In some of the cases the rule is expressed in this way: "Continuances are largely in the discretion of the trial court, and their discretion will not be controlled except in cases of manifest abuse." *Puckett v. State*, 71 Ark. 62, and cases there cited. While in other cases it is stated: "Motions for continuances in the cases are matters resting largely in the sound discretion of the trial court, and rarely afford grounds for reversal unless it is made to appear that such discretion has been abused." *Vannetta v. State*, 82 Ark. 203.

Whether the milder or the stronger language employed by our cases to express the rulings in regard to controlling the discretion of the trial court in matters of continuances be applied to the facts of this record, it seems clear to a majority of us that there was no abuse of the court's discretion in overruling the appellant's motion for a continuance. In the first place, the court might have very well concluded that inasmuch as the sheriff of Mississippi County had returned a *non est*, it would be confronted with the same conditions at the next term. Public officers will be presumed, until the contrary is shown, to have faithfully discharged their duty, and we can not assume that the sheriff, in making a *non est* return, did so without any attempt upon his part to obey the mandate of the subpoena in making an honest effort to find the witness and serve the same upon him. In the second place, the court did not abuse its discretion in concluding that the testimony of Toms would have been cumulative. The appellant himself and two other witnesses testified to all the facts that appellant claimed in his motion for a continuance would have been shown by the testimony of Toms, to wit: That the appellant purchased the sow in good faith from Toms. We have over and over again announced that it is not error to overrule a motion for a continuance on account of the absence of a witness whose testimony would be merely cumulative. *Goddard v. State*, 100 Ark. 149; *Johnson v. State*, 89 Ark. 46, and other cases cited in the Attorney's General's brief.

II. The action of the court in taking up the motion for a continuance after ten of the jury had been selected and permitting evidence to be adduced for and against the motion was not in regular order, but we fail to discover that anything was said or done by the witnesses, the attorneys or the court that was calculated in the least to cause any sensible juror to forget the obligation of his oath to try the case according to the law and the evidence.

III. There was no abuse of the discretion of the court in permitting the jury to take with them to the jury

room for examination in their deliberations the bill of sale. Appellant introduced this bill of sale himself. By so doing he vouched for its authenticity. He was relying upon it as a most convincing piece of evidence, and such being the case he certainly could not be prejudiced, at least would have no right to complain, that the paper was subjected to the most crucial inspection that the jury might make of it to test its genuineness. See *Harshaw v. State*, 94 Ark. 343. If it could not stand the test it was not competent evidence at all.

IV. It does not seem to us that the facts present a very strong case for conviction, but after a careful consideration of the evidence, which speaks for itself, and is fully set forth in the statement of the case, we can not say that the verdict is wholly without substantial evidence to sustain it. It was the province of the jury to weigh it and give it such credit as they believed the witnesses were entitled to, and when considered from the viewpoint of the strongest inference of guilt that might be drawn from it, it can not be said that there is no substantial evidence to sustain the verdict.

Finding no error, therefore, in the record, the judgment must be affirmed.

GARDNER v. STATE.

Opinion delivered July 9, 1917.

EMBEZZLEMENT—VARIANCE BETWEEN INDICTMENT AND PROOF.—Proof of the crime of embezzlement as set out in § 1841 of Kirby's Digest, will not sustain an indictment for embezzlement under Kirby's Digest, § 1839; the two statutes prescribe punishment for different offenses.

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

Powell & Smead, for appellant.

1. The court erred in overruling the motion for a continuance. The testimony was material and good cause and due diligence shown.

2. It was error to overrule the demurrer to the indictment. The names of the owners of the property stolen were not stated. 73 Ark. 33; 109 *Id.* 403; 117 *Id.* 299; 123 *Id.* 519. The obligation of ownership is essential.

3. The evidence does not support a material allegation in the indictment, that the funds were gold, silver and paper money. There must be proof of one of the kinds. 85 Ark. 499; 97 *Id.* 1; 54 *Id.* 611; 71 *Id.* 415; 84 *Id.* 285.

4. The court erred in the admission of evidence and the State failed to make out a case.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The indictment was good. Kirby's Digest, § 2231.

2. The evidence supports the verdict, and there is no variance. Incompetent evidence is not prejudicial where the facts are otherwise proved. 84 Ark. 16; 103 *Id.* 315, and others.

3. The proof shows embezzlement.

STATEMENT BY THE COURT.

On the 24th day of March, 1916, J. R. Gardner was indicted for embezzlement. The body of the indictment is as follows:

"The grand jury of Union County, in the name and by the authority of the State of Arkansas, on oath, accuse the defendant, J. R. Gardner, of the crime of embezzlement, committed as follows: The said defendant, on the 20th day of March, 1916, in Union County, Arkansas, then and there being the bailee of the heirs of John Cates, deceased, and as such bailee having received from the creditors of said estate \$300 in gold, silver and paper money of the value of \$300, the property of the said heirs of John Cates, deceased, as aforesaid, and being then and there the bailee of said heirs of John Cates, deceased, unlawfully and feloniously did convert and embezzle to his own use the said above described gold, silver and paper money, of the value of \$300, the property of the said heirs of John Cates, deceased, and so the said J. R. Gardner,

the above described money of the value of \$300, the property of the said John Cates, deceased, unlawfully and feloniously did steal, take and carry, against the peace and dignity of the State of Arkansas."

John Cates died intestate in Union County, Arkansas, leaving surviving him his widow, and several children as his sole heirs at law. The defendant Gardner had married one of his daughters, and was appointed administrator of his estate. As such administrator he took charge of the real and personal property belonging to the estate. The personal property and a part of the realty were sold in payment of the debts probated against the estate. The administrator filed his account current showing the assets received by him and the disbursements made by him. After paying the debts and the expenses incident to the administration of the estate, there was found to be a balance in his hands of \$409.52. This amount was ordered by the court to be distributed equally among the heirs of John Cates, deceased, and under the order of the probate court, the administrator was directed to pay each heir the sum of \$68.25.

The judge of the probate court testified that the defendant told him that he had the money in a bank in Union County and would get it and make the payments as directed by the court; that there was no money in the bank named by the defendant to his credit, and that he again urged the defendant to bring the money into court; that the defendant then told him he had the money at his house and would bring the money into court; that he failed to do this, and upon being brought into court the defendant told him that his wife was sick and that he had given all the money belonging to the estate to Henry Cates, one of the heirs.

It is further shown that the defendant failed to pay the heirs as directed by the order of the probate court, and that he had converted funds belonging to the estate to his own use. He was tried before a jury, which returned a verdict of guilty, and from the judgment of conviction he has prosecuted an appeal to this court.

HART, J., (after stating the facts). It is insisted by counsel for the defendant that there is a variance between the indictment and the proof. In this contention we think counsel is correct. The indictment was framed under section 1839 of Kirby's Digest, which provides in effect that if any carrier or other bailee shall embezzle or convert to his own use money, property, etc., which shall have come into his possession as such bailee, he shall be deemed guilty of larceny and on conviction shall be punished as in cases of larceny. The defendant should have been indicted under section 1841 of Kirby's Digest. The section reads as follows:

"Section 1841. Every executor, administrator or guardian who shall embezzle or fraudulently convert to his own use, or make way with or secrete with intent to embezzle, or fraudulently convert to his own use, any money, goods, rights in action, property, effects or valuable security of his testator, intestate or ward, shall be deemed guilty of larceny, and on conviction shall be punished as in cases of larceny."

The two sections provide that the offense of embezzlement as described in each section shall be deemed larceny and punished as such, but different classes of offenders are sought to be reached.

Mr. Wharton says: "A trustee is one to whom certain property is given to hold and use for the benefit of a person called a *cestui que trust*. The term, therefore, is more comprehensive than bailee, a bailee being simply the custodian of specific property, and is less comprehensive than that of agent, an agent being employed to acquire as well as to hold." Wharton's Criminal Law (11 ed.), Vol. 2, Par. 1299.

Administrators, executors and guardians are frequently named in statutes as persons who may commit embezzlements of funds intrusted to their care. *State v. Adamson* (Ind.), 16 N. E. 181; *State v. Gillis* (Miss.), 24 So. 25, and *People v. Page* (Cal.), 48 Pac. 326.

It is evident that the Legislature had in mind the distinction made by Mr. Wharton when it enacted section

1841 of Kirby's Digest. The crime defined in that section of the statute is purely a statutory crime. In order that an indictment for the offense described in the statute be sufficient, the facts should be charged which would bring the case within the terms of the statute. The proof on the part of the State tended to establish the guilt of the defendant under this section of the statute. The indictment, however, failed to charge facts which would bring the case within the terms of the statute. In short, the indictment charged a crime under section 1839 of Kirby's Digest, and the facts shown by the State establish the offense described in section 1841 of Kirby's Digest.

As we have already seen, the Legislature had in mind the punishment of different offenses in these two sections of the statute, and there was a fatal variance between the allegations of the indictment and the proof made in the case.

Therefore the judgment will be reversed and the cause remanded for a new trial.

FLAKE v. HILL.

Opinion delivered July 9, 1917.

APPEAL AND ERROR—FAILURE TO ABSTRACT RECORD.—A cause will not be reversed on appeal, where the appellant has failed to abstract the record.

Appeal from Franklin Circuit Court, Ozark District; *James Cochran*, Judge; affirmed.

Dave Partain, for appellant.

1. Bert Hill was not sworn as a witness.
2. The verdict is clearly excessive and contrary to law and the evidence. 81 Ark. 13.
3. Plaintiff absolutely failed to make out his case, even on his own testimony and not sworn to. He himself violated the contract.

G. O. Patterson, for appellee.

The court properly overruled the demurrer and refused appellant's instructions 1, 2 and 3. It properly gave Nos. 1 to 7 on its own motion.

The judgment is right on the evidence, even if appellee was not sworn. No errors are pointed out properly in the abstract of appellant.

HUMPHREYS, J. Appellee instituted this suit against appellants on the 2d day of February, 1915, in the Ozark District of Franklin County, to recover damages on account of the alleged unlawful withholding of certain chattels to which appellee was entitled by virtue of a compromise agreement and order entered in a replevin suit by appellant Flake against appellee.

All of the material allegations in the complaint were denied by appellants.

The cause was submitted to the jury upon the pleadings, evidence adduced, and instructions of the court. A verdict for \$65 was returned in favor of appellee and judgment rendered in accordance therewith. Proper steps were taken, and an appeal from the judgment has been lodged here.

Appellant insists that the judgment should be reversed—

First. Because appellee was permitted to give testimony without having been sworn.

Second. Because the verdict and judgment was excessive.

Third. Because the verdict was contrary to the evidence and the law.

Rule 9 of this court provides that the appellant shall abstract or abridge the transcript by setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all the questions presented to this court for decision.

No evidence whatever has been abstracted by appellants. The evidence abstracted by appellee in no way as-

sists appellants in maintaining their alleged assignments of error.

In reference to the first assignment of error this court has held that (quoting syllabus 1), "A cause will not be reversed because a witness was not sworn before being permitted to testify, where the omission was a mere inattention, and where appellant raised the question for the first time after verdict." *St. L., I. M. & S. Ry. Co. v. Hairston*, 125 Ark. 314.

We are not informed by the abstract as to whether appellee testified without taking the oath, or whether the oath was not administered through omission or mere inattention, or whether any objection was made at the time to the witness testifying without taking the oath required by law. From the abstract before us, the first intimation of any objection to the witness testifying on this account appeared in the motion for new trial.

With reference to the second and third assignments of error, it is impossible for us to intelligently pass upon them without exploring the transcript to ascertain what testimony was given.

For the failure to comply with rule 9 of this court, the judgment is affirmed.

DICKINSON, RECEIVER CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY v. HOUSLEY.

Opinion delivered July 9, 1917.

1. TAXES—ERRONEOUS ASSESSMENT—RECOVERY.—An action may be maintained for the recovery of taxes paid under an erroneous assessment, when the collector retains possession of the same, pending the result of the litigation.
2. TAXATION—ASSESSMENT FIXED BY TAX COMMISSION—CHANGE BY COUNTY.—The assessor and county board of equalization of a county are without authority to alter the assessments of railroad property made by the State Tax Commission; and a judgment giving a command to those officials with respect to the assessment of that kind of property is not binding on a taxpayer in a collateral suit to recover the amount illegally exacted.

3. TAXATION—UNIFORMITY.—Assessing officers can not be compelled to adopt a rate of assessment in a given county not in conformity with the rate of valuation fixed generally throughout the State.
4. TAXATION—RAILROAD PROPERTY—BOARD TO ASSESS.—The Act creating the State Tax Commission, *held* valid, in its provision for the assessment of railway property by the commission.
5. TAXATION—PAYMENT OF TAX ILLEGALLY ASSESSED—RECOVERY.—Where the county assessor and board of equalization raised the assessment of a railway company's property in the county for taxation, over that fixed by the State Tax Commission, the railway company may recover back the illegal tax paid under protest.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; reversed.

T. S. Buzbee, H. T. Harrison and C. L. Johnson, for appellant.

1. This suit was instituted in the proper forum. It is different from 30 Ark. 275 and 113 *Id.* 138. It is in the nature of a suit for money had and received.

2. The action of the county court in raising the assessment certified out by the State Tax Commission was illegal and void. Const., art. 16, § 5, Act 257, Acts 1909, Act 251, Acts 1911. The legislative will is supreme. The county board of equalization was without authority of law to raise the valuation certified by the Tax Commission. The power to assess railroad property is conferred upon the State Tax Commission, and it alone has the power. 127 Ark. 349.

Gibson Witt, for appellee.

1. This is merely a collateral attack upon the judgment of the United States District Court.

2. Under article 7, section 46, Constitution, only the assessor can assess property for taxation. Other agencies may be constituted by the Legislature to aid the assessor, but the assessor makes the assessment. Kirby's Digest, § 6970; 1 *Desty on Taxation*, p. 581; 49 Ark. 526; 92 *Id.* 493; 64 *Id.* 436.

2. When the Tax Commission certifies its findings of value to the assessor, its authority ends. Only the assessor can assess. The tax must be uniform and coexten-

sive with the territory to which it applies. 11 Enc. U. S. Sup. Ct. Rep. 382; 101 U. S. 153.

3. The case in 192 S. W. 202 is not parallel. The United States District Court had jurisdiction, and it can not be questioned. Only void judgments can be impeached collaterally. 46 Ark. 502. If appellant was entitled to any relief he should have gone to the Federal court. 11 A. & E. Ann. Cas. 744. The State court had no jurisdiction. 32 Ark. 676.

McCULLOCH, C. J. This is an action instituted by the receiver of the Chicago, Rock Island & Pacific Railway Company against the tax collector of Garland County to recover taxes alleged to have been assessed in excess of the amount legally authorized, which were paid to the collector under protest. The cause was heard upon an agreed statement of facts, and the court rendered judgment in favor of the defendant, from which the plaintiff has prosecuted an appeal.

The facts, as recited in the agreement, are that the State Tax Commission assessed the property of the railroad for the taxes of 1916 and certified to the assessor of Garland County the apportionment to that county of its part of the aggregate value of the railroad and the assessor of Garland County entered the same upon the tax books, but subsequently the board of equalization raised the assessment for county purposes and road and bridge purposes 50 per cent. of the value as certified by the State Tax Commission. In other words, the State Tax Commission apportioned to Garland County the value of the railroad property amounting to \$189,957, which was entered on the tax books by the assessor, but the board of equalization raised the value to \$284,953, and the taxes were extended on the last mentioned valuation fixed by the board of equalization. The receiver of the company applied to the collector to pay the taxes according to the valuation made and apportioned by the State Tax Commission, but the collector refused to accept the amount and the receiver paid the full amount demanded under

protest, and brings this suit to recover the amount paid in excess of the amount extended according to the value fixed by the State Tax Commission.

(1) It is agreed that the money was in the hands of the tax collector at the time of the commencement of the suit and was retained by him to await the final decision in the cause, so, if it be found that the amount demanded by the collector was in excess of the legal amount of taxes due on the property, the plaintiff is entitled to recover. *Sanders v. Simmons*, 30 Ark. 275; *First National Bank of Fort Smith v. Norris*, 113 Ark. 138.

(2) The validity of the increase of the assessment is sought to be sustained under authority of a judgment of the United States District Court for the Western Division of the Eastern District of Arkansas in an action instituted by one of the creditors of Garland County against the assessor and board of equalization of that county, commanding those officers to assess all property in the county at its true value in money. The judgment of the Federal court was rendered by consent of the parties thereto. The members of the State Tax Commission were not parties to that action. Conceding, without deciding, that a judgment of that kind against the assessor and board of equalization of the county was binding on taxpayers as to the validity of the assessment made pursuant to the judgment, it certainly did not bind railroad property which is, under the statute, assessable only by the State Tax Commission. The statutes of this State (Acts of 1911, page 235) provide that the property of railroad, express, sleeping car, telegraph, telephone and pipe line companies shall be assessed by the State Tax Commission and that the value shall be apportioned by that commission to the several counties in the State. This is the only authority for the assessment of that kind of property, and the statute does not confer authority upon the county boards of equalization to raise or lower the values of the property thus assessed. Both the assessor and the board of equalization being without power to alter the assessments of railroad property made by the

State Tax Commission, it necessarily follows that a judgment giving a command to those officials with respect to the assessment of that kind of property is not binding on a taxpayer in a collateral suit to recover the amount illegally exacted.

(3) We have already decided that assessing officers can not be compelled to adopt a rate of assessment in a given county not in conformity with the rate of valuation fixed generally throughout the State. *Nelson v. Meek, Assessor*, 127 Ark. 349, 192 S. W. 202.

It is contended, however, that the statute authorizing assessments of railroad property by the State Tax Commission is unconstitutional for the reason that there is a provision in the Constitution for the election of a county assessor, and that it is necessarily implied from that provision that the Legislature can not authorize an assessment made by any other officers. Formerly the assessment of railroad property was made by the State Board of Railroad Assessors, composed of the Governor and certain other State officials, and in the case of *Little Rock & Fort Smith Ry. v. Worthen*, 46 Ark. 312, the constitutionality of that statute was assailed on the ground that it provided for a different method of assessing that character of property from that authorized for the assessment of property generally. This court sustained the method of assessment and in effect held that the Legislature had the power to create a State board to assess that kind of property. The question was again raised in *St. L., I. M. & S. Ry. Co. v. Worthen*, 52 Ark. 529, where the court again declared the constitutionality of that method of assessing railroad property. The subject was again discussed in the case of *Railway v. Williams*, 53 Ark. 58, and the other cases were referred to as upholding that method of assessment of railroads on the ground that such property should be assessed as a unit. It does not appear that in any of those cases it was insisted, as in the present case, that the provision of the Constitution with reference to the election of a county assessor was the exclusive method of assessing property of all kinds.

(4-5) We must, however, treat the question as settled that the statute authorizing the assessment of this kind of property by a State board created for that purpose is not in conflict with the Constitution. The increase of valuation by the board of equalization was, therefore, unauthorized and illegal, and plaintiff, having paid the amount under protest, it follows that he is entitled to recover from the collector, who still has the funds in his hands. The judgment of the circuit court is, therefore, reversed and the cause is remanded with directions to enter a judgment in favor of the plaintiff for the amount illegally exacted as set forth in the complaint.

MINNEQUA COOPERAGE COMPANY v. HENDRICKS, JUDGE.

Opinion delivered June 25, 1917.

CONSTITUTIONAL LAW—JURY TRIAL—VERDICT BY NINE JURORS.—The act of the Legislature of 1917, authorizing a verdict by less than the whole number of jurors in a case, is invalid, and in violation of the Constitution of 1874.

Mandamus to Pulaski Circuit Court; *G. W. Hendricks*, Judge; affirmed.

J. A. Comer, for petitioner.

1. It was the duty of the court to receive the verdict and enter judgment thereon. Even if Act 52 is in conflict with the Constitution, no objection was made, and the right to a unanimous verdict of twelve jurors was waived. It was the duty of the court to receive the verdict and enter judgment thereon. Kirby & Castle's Digest, § 7343, 7682, 7687; 44 Ark. 202; 79 Mo. App. 627; 19 Ohio Cir. Ct. Rep. 425.

W. H. Rector, for respondent.

1. Act 52, Acts 1917, is unconstitutional and void. A jury is twelve men and the verdict must be unanimous. The Legislature can not abridge the number. Art. 11, Sec. 7, Const. 1874; 32 Ark. 17; 16 *Id.* 384; 8 *Id.* 436; 47 *Id.* 568; 8 *Id.* 372; 2 Reeves' History Common Law, 270; 2 Hale's Pleas of the Crown, 161; 2 Blackstone's Comm. 349;

Chitty, Cr. Law, 505; 7 Amend. Const. U. S.; 166 U. S. 464; *Ib.* 707; 241 *Id.* 211; 174 *Id.* 1; 170 *Id.* 323; 33 L. R. A. 441.

All the States having provisions similar to ours, have held the necessity for a unanimous verdict of a jury of twelve. 186 Mo. 269; 85 S. W. 378; 171 Mo. 84; 70 S. W. 891; 1 Mont. 118; 41 N. H. 550; 110 Pa. St. 387; 2 Atl. 531; 9 Wyo. 157; 51 Pac. 466; 24 Cyc. 185; 126 Ind. 508; 2 J. J. Marsh (Ky.) 40; 12 Md. 514; 11 Pick. (Mass.) 501; 70 Miss. 247; 9 Heisk. (Tenn.) 248; 56 Tex. 331; 14 Gratt. (Va.) 630; 6 Wis. 205.

2. The parties did not waive a jury trial. 114 Wis. 516; 68 N. Y. Supp. 806; 58 N. E. 576; 45 *Id.* 145; 163 Ill. 652; 78 Miss. 525; 84 Me. 304; 172 N. Y. 482.

HART, J. C. E. Shiffer brought suit in the Pulaski Circuit Court against the Minnequa Cooperage Company for false imprisonment. The case went to trial before a jury of twelve duly qualified electors of Pulaski County. At the conclusion of the trial the cause was submitted to the jury and it retired to consider of its verdict. After deliberating for some time, the jury returned into court and reported that it was unable to agree upon a unanimous verdict. Whereupon the court called the attention of the jury to an act of the Legislature for the year 1917, empowering nine or more jurors to return a verdict in civil cases. The jury again retired to consider of its verdict and returned into court with a verdict signed by ten jurors. The court declined to accept the verdict on the ground that the act in question is unconstitutional. The so-called verdict was in favor of the defendant and the Minnequa Cooperage Company filed a petition in which the foregoing facts are set forth and asks this court to make an order requiring the circuit judge to accept said verdict and render judgment upon it.

The parties might have waived a jury in this case or they might have agreed that a less number than the whole might render a verdict in the case, but they did not do so. This is so because the court never permitted the verdict

to be returned and judgment to be rendered upon it. So it can not be said that the plaintiff in the case waived a unanimous verdict, or that his conduct amounted to an agreement that a less number than the whole might return a verdict. If the court had accepted the verdict and he had made no objections, it might be said that he could not speculate on the verdict by allowing it to be returned without objection, and then when he found that it was against him, object to it. Here, however, the court refused to receive the verdict.

This brings us to the question of whether the Legislature has the power to provide that a number of the petit jury less than the whole may render a verdict in a case where the Constitution gives to the party a right to a trial by jury. This was a common law action and the right of a trial by jury is guaranteed by our Constitution. *Govan v. Jackson*, 32 Ark. 553, and *State v. Churchill*, 48 Ark. 426.

Section 7 of the Declaration of Rights of our Constitution reads as follows:

"The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law."

This court, in construing a similar provision of an earlier Constitution of this State, said that the trial by jury is a great constitutional right, and when the convention incorporated the provision into the Constitution of this State, it must unquestionably have had reference to the jury trial as known and recognized by the common law. The court further held that the word, "jury," at common law, means twelve men, and that the Legislature can not abridge the number. *Larillian v. Lane*, 8 Ark. 372; *State v. Cox*, 8 Ark. 436; *Cairo & Fulton Railroad Co. v. Trout*, 32 Ark. 17.

These decisions settle beyond controversy that the words "trial by jury," as used in the section of the Constitution under consideration, must be given their common-law meaning. At common law the essential elements

of a trial by jury are and always have been, number, impartiality and unanimity. On this question the great English commentator said:

"Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases. But this we must refer to the ensuing book of these commentaries; only observing for the present that it is the most transcendent privilege which any subject can enjoy, or wish for, that he can not be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors, and equals." Lewis' Blackstone, Book 3, page 379, vol. 2, page 1340.

Mr. Proffatt, the well known author on Jury Trial, recognizes that the unanimity of the twelve members constituting the jury is an essential attribute of a trial by jury. Proffatt on Jury Trial, sec. 76, *et seq.* The author goes on to give the reasons for and against the requirement, but we are not concerned with that, for, as already seen, our Constitution has used the word in its common-law sense.

In *Lommen v. Minneapolis Gas Light Co.*, 60 A. S. R. 450, the Supreme Court of the State of Minnesota held that a statute providing for struck jurors does not infringe a constitutional mandate that, "the right of trial by jury shall remain inviolate." The learned judge in that case, however, in discussing the question of what is a trial by jury within the meaning of the Constitution, said:

"The expression 'trial by jury' is as old as *Magna Charta*, and has obtained a definite historical meaning, which is well understood by all English-speaking peoples; and, for that reason, no American Constitution had ever assumed to define it. We are, therefore, relegated to the history of the common law to ascertain its meaning.

"The essential and substantive attributes or elements of jury trial are and always have been, number, impartiality and unanimity. The jury must consist of

twelve; they must be impartial and indifferent between the parties; and their verdict must be unanimous." The decision in the case was based on the ground that the statute did not affect either of these three essential attributes of a trial by jury. The cases cited below are express authority for the proposition that unanimity was one of the essential features of a trial by jury at the common law. They also hold, in construing a similar provision of their Constitutions that the expression 'trial by jury' takes its common-law meaning, and that statutes adopting less than a unanimous verdict are unconstitutional. *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671; Opinion of the Justices, 41 N. H. 550; *Jacksonville, etc., R. Co. v. Adams* (Fla.), 24 L. R. A. 272, and case note; *City of Denver v. Hyatt* (Colo.), 63 Pac. 403; *Carroll v. Byres* (Ariz.), 36 Pac. 499; *Lawrence v. Stearns*, 11 Pick. (Mass.) 501; *American Publishing Co. v. Fisher*, 166 U. S. 464; *Klein-schmidt v. Dunphy*, 1 Mont. 118; *First National Bank of Rock Springs v. Foster* (Wyo.), 54 L. R. A. 549; *Bradford v. Territory* (Okla.), 34 Pac. 66, and 16 R. C. L., p. 181.

The Seventh Amendment to the Constitution of the United States provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

In *Springville v. Thomas*, 166 U. S. 707, the Supreme Court of the United States, in construing an act of Congress authorizing the territorial Legislature of Utah to provide for verdicts in civil cases by less than the whole number of jurors, held that the act was clearly prohibited by the Seventh Amendment to the Constitution of the United States. Chief Justice Fuller, in reviewing the construction placed upon the act by the territorial court of Utah, said:

"In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases, and the act of Congress could not impart the power to change the constitu-

tional role, and could not be treated as attempting to do so."

In *M. & St. L. R. R. Co. v. Bombolis*, 241 U. S. 211, Chief Justice WHITE said:

"It has been so long and so conclusively settled that the Seventh Amendment exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict (citing cases), that it is not now open in the slightest question that if the requirements of that amendment applied to the action of the State of Minnesota in adopting the statute concerning a less than unanimous verdict, * * * both the statute and the action of the court were void because of repugnancy to the Constitution of the United States."

In that case, the court held that the requirement of the Seventh Amendment did not control the State courts, even when enforcing rights under a Federal statute like the Employer's Liability Act. By the Constitution of Minnesota in civil causes, after a case has been under submission to a jury for twelve hours without a unanimous verdict, five-sixths of the jury are authorized to reach a verdict, which is entitled to the legal effect of a unanimous verdict at common law. In several of the States majority verdicts may be rendered in civil cases, but this is the result of express constitutional authority. In construing sections of the Constitution similar to the one under consideration the courts have uniformly held that any legislation authorizing a verdict by less than the whole number of jurors in any case where a jury trial is a matter of right is unconstitutional, unless such legislation is expressly authorized by a constitutional provision.

On this point in addition to the authorities cited above, see 24 Cyc., p. 186, and cases cited. The reason is that the words "trial by jury" were used by the framers of the Constitutions of the various States in their common-law sense.

It follows that the act of the Legislature under consideration is unconstitutional and the prayer of the petition will be denied.

McCULLOCH, C. J., (dissenting). The Declaration of Rights embodied in the Constitution merely provides that "the right of trial by jury shall remain inviolate." It does not specify what number of men shall constitute a jury, nor how the verdict shall be rendered. That is left, by the silence of the Constitution on the subject, to legislative regulations. The purpose of the framers of the Constitution was to preserve, in this State, the principle of trial by jury, and not to prescribe any particular form by which the remedy shall be applied. There is no magic in particular numbers, and it is difficult for me to believe that those who inserted the declaration of principles into our organic law intended to hamper the Legislature in reforming legal procedure from time to time so as to keep pace with advanced thought. Any other view constitutes the worship of mere form instead of preserving a principle.

The principle of trial by jury found expression in some form or other long before it was declared or moulded into modern shape under the common law of England. The history of its origin and growth is an interesting study, but has little bearing, I think, on the interpretation of the language of our constitutional guaranty on the subject. The fact, which must be conceded, that as created under the common law, a jury trial was understood to mean the unanimous verdict of a jury of twelve impartial men, does not necessarily imply that the framers of the Constitution intended to perpetuate that mode of trial in the particular form then in vogue. That kind of trial was a growth, and to hold that the language of the Constitution fastened itself on the particular formula, is to say that all further progress on the subject was intended to be stopped. Why should we say that in the enlightened age in which our Constitution was adopted, it was intended to hinder further progress in the form of a remedy, of which the history of our jurisprudence bears witness to so much wholesome growth? From a small and uncertain beginning, the principle of trial by jury had, in course of centuries, taken practical form,

which was well understood, but there is now little, if any, disagreement in the opinions of thoughtful men that the common-law requirement of unanimity of a jury verdict is a serious impediment to rational enforcement of the laws, both civil and criminal. Did the framers of the Constitution mean to prohibit the Legislature from regulating jury trials by providing for a greater or less number of jurors than twelve and for a verdict of less than the whole of the jury? I think not.

Constitutions are usually mere declarations of principles and not specifications of details. This is particularly true of the provision now under consideration, for it appears in the Declaration of Rights where enumerations of principles are found in general terms.

I am, of course, aware of the fact that nearly all of the courts which have passed on the question, held that a constitutional guaranty of the right of trial by jury means a trial by a jury of twelve, and a unanimous verdict, according to the practice at common law. But I think the decisions are wrong. They follow each other blindly, and it seems to me to be the time to stop. Decisions on that subject do not become rules of property, and there is no obligation to follow them when found to be wrong.

The Supreme Court of the United States has, in perhaps stronger terms than any other court adhered to the view that "trial by jury" necessarily means the unanimous verdict of a jury of twelve men, but its position on that subject seems to me to be inconsistent with the forceful and wholesome doctrine announced as follows by that court in the case of *Hurtado v. California*, 110 U. S. 516: "It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also

against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they would be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty and property. Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and while in every instance, laws that violated express and specific injunctions and prohibitions, might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent, and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment."

My conclusion is that the statute of this State providing for the rendition of verdicts in civil cases by three-fourths of the jury is not in conflict with the Declaration of Rights in the Constitution.

STATE v. CROWE.

Opinion delivered June 4, 1917.

1. STATUTES—VALIDITY OF ENACTMENT—AYE AND NAY VOTE.—The provision of the Constitution to the effect that "no bill shall become a law unless on its final passage the vote be taken by ayes and nays" does not apply to a vote of the House which originated the bill when concurring in amendments of the other house.
2. STATUTES—ENACTMENT—ERROR IN ENGROSSING.—A bill was passed by the House, and passed by the Senate with amendments; the House then concurred in the amendments. *Held*, a mistake made by a committee in the engrossment of the bill will not affect its validity, and may be corrected at any time before the bill is finally signed by the presiding officer and approved by the Governor as enrolled.

3. WORK AND LABOR—HOURS OF WORK AND MINIMUM WAGES FOR FEMALES.—The act of 1915, page 781, entitled "An Act to regulate the hours of labor, safeguard the health and establish a minimum wage for females in the State of Arkansas," held valid.

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

Wallace Davis, Attorney General, *John P. Streepey*, Assistant, and *Covington & Grant*, for appellant.

1. The act was legally passed. It was enrolled, signed by the President of the Senate, the Speaker of the House, approved by the Governor and filed with the Secretary of State. 34 Ark. 283; 110 *Id.* 273.

2. The act does not violate section 2, article 2, Constitution of Arkansas. 58 Ark. 414. It does not deprive the employer of any constitutional right. Under the police power of the State, the act is valid. 58 Ark. 414; 94 U. S. 113; 143 *Id.* 517; 125 *Id.* 680; 49 Ark. 325; 3 Ala. (N. S.) 140; 110 U. S. 347; 68 Ala. 58; 76 *Id.* 60; 200 U. S. 561; 204 *Id.* 311; 85 Ark. 464.

3. It does not violate the Fourteenth amendment to the Constitution of the United States. 97 U. S. 501; 21 *Id.* 79; 85 Ark. 464; 139 Pac. 743; 208 U. S. 418; 223 *Id.* 59.

Hill, Brizzolara & Fitzhugh, for appellee.

1. The act was not legally adopted. The ayes and noes were not recorded on the journal and the word "mercantile" was not in the bill as finally passed by the Senate. The two houses did not pass the same bill. 72 Ark. 565; 90 *Id.* 174; 29 So. 700; 50 Miss. 68; 1 Lewis' Sutherland Stat. Const., § 52; Const., art. 6, § 15.

2. The act violates section 2, article 2, Constitution of Arkansas, and the Fourteenth amendment to Constitution of United States. 191 U. S. 207; 198 *Id.* 45; 69 Wash. 578; 137 Pac. 469; 102 *Id.* 804; 142 N. Y. 102; 166 *Id.* 1; 5 Ohio N. P. 183; 167 Pa. St. 47; 160 Ind. 338. These "minimum wages" statutes as applied to *private* employment violate constitutional provisions. Cases *supra*; 139 Pac. 473; 208 U. S. 418.

3. Women are citizens and have power to contract. The statute infringes their rights. 165 U. S. 578; 208 *Id.* 161; 58 Pac. 1072; 155 Ill. 886; 115 Mo. 1; 239 *Id.* 352; 111 U. S. 757; 233 U. S. 630; 236 *Id.* 1.

4. The act can not be justified even under the *police power* of the State. This power does not reach to the wage scale. 123 U. S. 623; 152 *Id.* 137; 198 *Id.* 57; 113 Pa. St. 431.

5. The act unconstitutionally discriminates against individuals employing four or more women. 154 Mo. 375; 183 U. S. 79; 61 Kan. 174.

6. The State has no power to enact labor or wage laws as to *private* employment. 2 Labatt on Master & Servant, § 846; Cooley, Const. Laws (7 ed.) 870; Tiedeman, Lim. Police Power, § 178; Freund on Police Power, § 318; 6 R. C. L. 270-1. The Arkansas cases recognize the right of parties engaged in private enterprises to make such contracts as they deem necessary free from State interference. 58 Ark. 407, 436. The act is obnoxious to our form of government. 208 U. S., *Muller v. Ogden*.

Wallace Davis, Jno. P. Streepey and Covington & Grant, in reply, for appellant.

1. No yea and nay vote was required to concur in an amendment. 110 Ark. 269; 61 *Id.* 226. The omission of the word "mercantile" was a mere oversight and was properly inserted. The bill, as it now appears in the office of the Secretary of State, establishes *prima facie* that it was legally passed. 72 Ark. 567; 40 *Id.* 200; 90 *Id.* 174; 95 *Id.* 412; 44 *Id.* 536; 110 *Id.* 269.

2. The act is not unconstitutional. It is a valid exercise of the police power of the State. 208 U. S. 412; 120 Mass. 383; 65 Neb. 394; 29 Wash. 602; 97 N. E. 194; 131 Pac. 452; 163 Mich. 419; 139 Pac. 743; 141 *Id.* 158.

3. There is no discrimination, as the act only applies to classes. 86 Ark. 412; 219 U. S. 291; 183 *Id.* 79; 49 Ark. 325; 81 *Id.* 310; 125 U. S. 680; 69 Ark. 521; 86 *Id.* 428; 32 L. R. A. 857. See also 197 U. S. 11.

HART, J. There is drawn in controversy in this case the validity of Act No. 191 of the General Assembly of 1915 (page 781) entitled, "An Act to regulate the hours of labor, safeguard the health and establish a minimum wage for females in the State of Arkansas."

The controversy arises only as to the validity of that part of the statute which relates to the fixing of minimum wages. It is contended, in the first place, that the statute was not legally enacted in that when the final vote was taken in the Senate the ayes and nays were not recorded on the journal, as required by section 21, article 5, of the Constitution.

The first section of the statute, as appears from the enrolled bill, signed by the presiding officer of each house and the Governor, specifies, among the employers of female labor to be regulated "any manufacturing, mechanical or mercantile establishment." Section 7 refers to employers specified in section 1, and prescribes a minimum wage of female workers in the establishments mentioned.

The bill as originally introduced in the Senate contained the language quoted above, which was never changed in the passage of the bill through the two houses, although there were numerous amendments. The Senate passed the bill on February 25, 1915, and transmitted it to the House, where several amendments were adopted, and the House passed the bill as amended on March 10, 1915, and sent it back to the Senate. On receipt of the bill the Senate, according to the recitals of the journal, read each amendment twice and concurred in the same, and ordered the bill engrossed as amended, and made a special order for the next day. None of the votes by which amendments were concurred in were taken by the ayes and nays recorded on the journal, but on the next day (March 11, 1915) a vote by ayes and nays was taken on the engrossed bill and the names of those voting were spread upon the journal, it appearing therefrom that a large majority voted in the affirmative. In the engrossment of the bill the word "mercantile" was omitted, and

that word was not contained in the engrossed copy which was before the Senate when the vote by ayes and nays was taken. It is clear that the omission of the word was merely an inadvertence, for, as before stated, the bill had never been changed so far as concerns the use of that word. The bill was enrolled with the word "mercantile" in it, and in that form was duly signed by the presiding officers of the two houses and the Governor.

(1) The contention of those attacking the validity of the statute is that a final vote on the passage of the bill in the Senate after the concurrence in the amendments was necessary to the enactment of the statute, and that since the word "mercantile" was omitted from the copy which the Senate finally voted on, it was not the bill which had been passed by the house. This contention, we think, is unsound. The word "mercantile" was in the bill when the Senate concurred in the House amendments and the vote concurring in those amendments completed the passage of the bill. The provision of the Constitution to the effect that "no bill shall become a law unless on its final passage the vote be taken by yeas and nays" does not apply to a vote of the house which originated the bill when concurring in amendments of the other house. *State v. Corbett*, 61 Ark. 227; *The Mechanics Building & Loan Association v. Coffman*, 110 Ark. 269; *Hull v. Miller*, 4 Neb. 503; *McCulloch v. State*, 11 Ind. 424.

The case of *Hull v. Miller*, *supra*, was referred to with approval by this court in the *Corbett* case, and it is identical in this respect with the case now before us, and was decided under a similar provision in the State Constitution. The only difference in the cases is that in the Nebraska case the journal of the Senate (the bill having originated in the Senate) showed nothing further after the return of the bill from the House except that the amendments of the House to the bill were adopted showing by what majority or in what manner the vote was taken. The Supreme Court of Nebraska held that that was sufficient, and that the bill had been legally passed, notwithstanding the fact that the concurrence of the Senate in

the House amendments had not been obtained by a yeas and nays vote.

(2) It was proper and orderly for the amendments concurred in to be formally incorporated in the bill by engrossment under the supervision of the committee of the Senate and in accordance with the rules, but the additional vote thereafter was supererogatory, for the simple reason that the concurrence in the amendments completed the passage of the bill. A mistake made by the committee in the engrossment of the bill did not affect its validity and could be corrected at any time before the bill was finally signed by the presiding officer and approved by the Governor as enrolled.

The conclusion reached by the court is that the statute was duly enacted and that no constitutional requirement was omitted during its passage through the two Houses.

This case was submitted in October, 1915. We were advised that a similar statute enacted by the Legislature of the State of Oregon and upheld by the Supreme Court of that State, *Stettler v. O'Hara*, reported in 139 Pac. 743, Ann. Cas. 1916, A-217, was then under consideration on writ of error by the Supreme Court of the United States. We decided to await the decision of that court in that case. It has only been recently decided and the decision of the Supreme Court of Oregon was affirmed without a written opinion of the court because one member of the court was disqualified and the others were evenly divided on the question.

(3) The constitutionality of the statute is attacked on the ground that the act violates the Fourteenth amendment of the Constitution of the United States by interfering with the right of contract of both employer and employee. As early as 1876, the Supreme Court of the State of Massachusetts upheld the validity of a law prohibiting the employment of minors under the age of eighteen years and women in manufacturing establishments more than a certain number of hours per day or week. There, as here, the validity of the act was attacked on the ground that it

interfered with the liberty of contract of both employer and employee. *Commonwealth v. Hamilton Manufacturing Co.*, 120 Mass. 383. Since then statutes regulating and limiting the hours of labor of women and discriminating in their favor in that regard have been passed in twenty-seven States and have been generally sustained by the State courts of last resort and by the Supreme Court of the United States. *Ritchie & Co. v. Wayman*, 244 Ill. 509, 91 N. E. 695, 27 L. R. A. (N. S.) 994; *People v. Elerding*, 254 Ill. 579, 98 N. E. 982, 40 L. R. A. (N. S.) 893; *Muller v. Oregon*, 208 U. S. 412; *Withey v. Bloem*, 163 Mich. 419, 128 N. W. 913, and case note. In that case reference to the earlier case notes on the question are made. *Ex parte Wong Wing* (Cal.), 51 L. R. A. (N. S.) 361, and note; *State v. Bunting*, 71 Ore. 259, 139 Pac. 731, Ann. Cas. 1916 C-1003 and case note, in which earlier case notes are referred to. Among them is the case of *Riley v. Commonwealth of Massachusetts*, 232 U. S. 671, in which the Supreme Court of the United States affirmed a decision of the Supreme Court of the State of Massachusetts to the effect that a State statute limiting the hours of labor in factories for women, if otherwise valid, is not unconstitutional as depriving the employer and the employee of property without due process of law by limiting the right to buy and sell labor and infringing the liberty of contract in that respect.

In *People v. Charles Schwänder Press*, 214 N. Y. 395, 108 N. E. 639, Ann. Cas. 1916, D-1059, the New York Court of Appeals upheld a statute prohibiting women from working at night in factories and held that the statute was constitutional as a police regulation in the interest of public health and the general welfare of the people. The court said: "Protection of the health of women is a subject of special concern to the State. However confident a great number of people may be that in many spheres of activity, including that of the administration of government, woman is the full equal of man, no one doubts that as regards bodily strength and endurance she is inferior and that her health in the field of physical

labor must be specially guarded by the State if it is to be preserved, and if she is to continue successfully and healthfully to discharge the duties which nature has imposed upon her. This proposition is fully recognized and stated in *Muller v. Oregon*, 208 U. S. 412, 421, 28 S. Ct. 324, 52 U. S. (L. ed.) 551, 13 Ann. Cas. 957, where it was said: "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race. * * * Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained." In *People v. Case*, 153 Mich. 98, 116 N. W. 558, 18 L. R. A. (N. S.) 657, it was held that a municipal ordinance prohibiting keepers of saloons where intoxicating liquors are sold from permitting women to be in or about their places of business and from selling intoxicants to them is not an unconstitutional discrimination against women, nor does it deprive them of their equal rights, privileges and immunities under the Constitution.

In the case note it was recognized that the power to exclude women from saloons or employment therein is but one phase of the broader question of the constitutionality of discrimination against women in police regulations and it was said that the constitutionality of the statutes excluding women from employment in saloons or other places where intoxicating liquors are sold has been almost universally sustained. Judge Cooley says:

"Some employments * * * may be admissible for males and improper for females, and regulations recog-

nizing the impropriety and forbidding women engaging in them would be open to no reasonable objection." Cooley on Constitutional Limitation (7 ed.), p. 889. (Note—See 50 Am. Rep. 636, for page and edition.)

Statutes similar to the one under consideration have been enacted in at least nine other States. It is true that it has been often held by the Supreme Court of the United States that the general right to contract is protected by the Fourteenth Amendment to the Constitution; yet is equally well settled that that this liberty is not absolute, but that a State may in the exercise of its police power prevent the individual from making certain kinds of contracts. In *Williams v. State*, 85 Ark. 464, this court, admitting that the police power of the State is incapable of precise definition after quoting from two decisions of the Supreme Court of the United States on the question, said: "These cases are cited to show that the exercise of the police power is not limited to regulations to promote the public health, morals or safety, and that it may be so extended to such regulations as will promote the public convenience and general prosperity." In *Chicago v. Bowman Dairy Co.*, 234 Ill. 294, 14 A. & E. Ann. Cas. 700, 17 L. R. A. (N. S.) 684, it was said: "The police power is said to be an attribute of sovereignty, and to exist without any reservation in the Constitution, and to be founded upon the duty of the State to protect its citizens and to provide the safety and good order of society."

In *Otis v. Parker*, 187 U. S. 606, Mr. Justice Holmes said: "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a Constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English speaking communities, would become the partisan of a particular set of

ethical or economical opinions which by no means are held *semper ubique et ab omnibus.*”

It is a matter of common knowledge of which we take judicial notice that conditions have arisen with reference to the employment of women which has made it necessary for many of the States to appoint commissions to make a detailed investigation of the subject of women's work and their wages. Many voluntary societies have made this question the subject of careful investigation. Medical societies and scientists have studied the subject and have collected carefully prepared data upon which they have prepared written opinions. It has been the concensus of opinion of all these societies, medical and other scientific experts that inadequate wages tend to impair the health of women in all cases and in some cases to injuriously affect their morals. Indeed, it is a matter of common knowledge that if women are paid inadequate wages so that they are not able to purchase sufficient food to properly nourish their bodies, this will as certainly impair their health as overwork. It is certain that if their wages are not sufficient to purchase proper nourishment for their bodies, the deficiency must be supplied by some one else or by the public, if they are to keep their normal strength and health. The investigations above referred to show that it has become absolutely necessary for many women to work to sustain themselves and that they have no one to assist them. The strength, intelligence and virtue of each generation depends to a great extent upon the mothers. Therefore, the health and morals of the women are a matter of grave concern to the public and consequently to the State itself.

The members of the Legislature come from every county in the State. The presumption is that it passed the statute to meet a condition which it found to exist and to remedy the evil caused thereby. On this question, Judge Cooley says:

“Whether a statute is constitutional or not is always a question of power; that is, a question whether the Legislature in the particular case, in respect to the subject

matter of the act, the manner in which its object is to be accomplished and the mode of enacting it has kept within the constitutional limits and observed the constitutional conditions. In any case, in which this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised. Cooley, Const. Lim. (7 ed.), p. 257.

As said in *Stettler v. O'Hara*, *supra*, we believe that every argument put forward to sustain the maximum hours law or the restriction of places where women work applies equally in favor of the minimum wage law as also being within the police power of the State and as a regulation tending to guard the public morals and the public health.

Of course, the Legislature could not fix an unreasonable or arbitrary minimum wage but it must be fair and reasonable. It has been said that as to what is fair and reasonable there is no standard more appropriate than "the normal needs of the average employee, regarded as a human being living in a civilized community."

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

McCULLOCH, C. J., (dissenting). The majority seem to rest their conclusions, in sustaining the validity of the Women's Minimum Wage Statute, upon the authority of two classes of cases, one class holding minimum hours of labor laws to be valid, and the other holding that a statute forbidding the employment of women in saloons constitutes a proper exercise of the police power. There can scarcely remain a doubt as to the correctness of those cases—at least none exists in my mind.

Society is interested in the protection of the health of women, and laws regulating their hours of labor and the kind of labor in which they may engage, are valid because such regulations tend to the protection of health, not only of the women whose habits of labor are regulated, but the whole of humanity. The same may be said

of child labor laws. The hours of labor of men in extra hazardous or arduous employments may be regulated by law because society at large is interested in the preservation of men's safety and health.

Laws prohibiting the employment of women in or about drinking saloons are valid for such obvious reasons that no discussion is necessary.

To these classes of legislation in the exercise of the police power may be added another class which regulates not only the hours of labor, but also the wages of persons engaged in public or *quasi*-public service, and such laws are generally held to be valid exercises of power. Consideration for the efficiency of the public service justify such laws and bring them within the rule that the sovereign power of the State may be called into action for the promotion of the public health, morals or safety, and even of the public convenience. They are justified, not because they especially benefit a class of individuals, but in spite of it, if the interests of the public call for the given regulation.

"To justify the State in thus imposing its authority in behalf of the public," said the Supreme Court of the United States in *Lawton v. Steele*, 152 U. S. 137, "it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."

The statute now under consideration does not, in my opinion, stand the test prescribed by the highest court in this country in the above quotation. Nor do the authorities cited in the opinion of the majority sustain it.

Statutes prescribing hours of labor for either women or men are valid, when reasonable, but it is quite a different thing to say that the lawmakers may invade the right of contract by fixing wages for men or women engaged in private service. There is no basis for such governmental interference. The Supreme Court of the United States said:

"If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Mugler v. Kansas*, 123 U. S. 623. And the same learned court in a recent case used the following language very pertinent to the question now under discussion:

"The right of a person to sell his labor upon such terms as he sees proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it." *Coppage v. Kansas*, 236 U. S. 1.

Mr. Freund, in his work on Police Power (section 318), says: "The power to regulate the rate of wages, while freely exercised in former times, has not been claimed by any American State. * * * In principle it would make no difference whether the rate fixed by law were intended to be a minimum or maximum rate. Consideration of health and safety which complicate the question of hours of labor do not enter into the question of rate. The regulation would be purely of an economic character. It would be closely analogous to the regulation of the price of other commodities or services."

I challenge the correctness of the assertion that there exists a discernible relation between the wages of women and their health or morals. It may be truly said in a larger sense that the contentment which financial ease sometimes brings is conducive to health and morality, but, if so, that effect is not confined to either of the sexes.

It is almost axiomatic that society would be better off if everybody received greater remuneration and in more equal proportion—in other words, if there were no poor—and the attainment of that ideal is the hope of those who search for ways for the improvement of social conditions. To that end men willingly impose governmental restraint upon themselves. But unless the American conception of legal regulation of personal liberty has

changed, and accepted theories of constitutional government are to be abandoned, it will scarcely be urged that the price of labor generally can or should be regulated by law. The right to sell or buy labor on his own terms is among the things that the individual has not, under our scheme, surrendered to government. And women possess that right to the same unrestricted extent as men. They stand, in that respect, in no class to themselves.

Wealth, at least to the extent that it affords ease and comfort, is the goal of all mankind, regardless of sex, and failure of its attainment often brings discontent and unhappiness, but I am unwilling to say that woman's health or virtue is dependent upon financial circumstances so as to justify the State in attempting to regulate her wages. Her virtue is without price, in gold. She may become the victim of her misplaced affections and yield her virtue, but sell it for money—no. When she falls so low as that it is only from the isolated helplessness of her shame and degradation.

Nor is the health of women, as a class, affected more by poverty, if at all, than that of men. If it is, then men who are charged with the duty of supporting wives and daughters should have their wages regulated by law too when we enter upon the exercise of that governmental function. If affluence is essential to the health of women and we determine to bring it about by legal regulation of wages, then there should be no distinction made between the wages of the women themselves, and of the men who are called on to support them. I maintain that neither the one nor the other is a proper subject for governmental interference, but that the ills and inconvenience of poverty to which all mankind, without distinction of class, is heir, must be corrected by other means and through other influences and channels. There are ills which will never be entirely eliminated, for they are among the human imperfections which will survive to some extent as long as earthly time lasts.

The Supreme Court of the United States has repeatedly held that the unrestricted right of an individual to

sell or buy labor, unless there are circumstances which involve the public interest, is a part of the liberty of the citizen protected by the Federal Constitution. *Butchers Union, etc., Co. v. Crescent City Co.*, 111 U. S. 746; *Alleyer v. Louisiana*, 165 U. S. 578; *Adair v. U. S.*, 208 U. S. 161; *Smith v. Texas*, 233 U. S. 630; *Coppage v. Kansas*, *supra*.

Until that court, in a decision which constitutes a precedent, changes that rule, or holds that minimum wage laws do not fall within it, I am not disposed to yield my deliberately formed convictions on the subject and uphold a statute which it seems to me is a clear invasion of personal liberty of action.

The case of *Stettler v. O'Hara*, which went up to the Supreme Court of the United States was decided by an equally divided court and without a written opinion. Under the practice of that court, as I understand it, such a decision does not become a precedent and it is without persuasive force. We should not assume that, merely because the nonparticipating justice who otherwise would have broken the tie had been of counsel in the case on the side which sought to uphold the validity of the statute, when the same question is again presented the decision will be the same as that which resulted from the accident of an equally divided court. We can not foresee when nor how nor under what circumstances the question will again come before that court for decision and the State courts are under no obligation to consider the decision as a precedent until that court so treats it.

I have discussed only such questions concerning the validity of the statute as are presented in the briefs of counsel and discussed in the majority opinion, and I express no opinion on other questions which a further analysis of the statute might suggest.

WOOD, J. I concur in the reasoning of the opinion by the Chief Justice. The statute clearly invades the Constitution of the United States and of our own State, but the decision of the Supreme Court of the United States construing a similar statute is controlling on the issue be-

fore us. The litigants are entitled to the benefits of the law as declared by that court on the subject until it holds otherwise. Therefore I concur in the judgment.

THE CONTINENTAL SUPPLY COMPANY v. THOMAS.

Opinion delivered July 2, 1917.

1. CHATTEL MORTGAGES—SUBSTANTIAL COMPLIANCE WITH THE STATUTE.—A substantial compliance with the statute is all that is required in order to create a lien good as against strangers, on the personal property described in a chattel mortgage.
2. CHATTEL MORTGAGES—VALIDITY.—In order to create and maintain a lien good as against strangers, a chattel mortgage must either be filed with the clerk for record or must be an endorsement signed by the mortgagee, his agent or attorney, of the import as required by the statute; and unless the instrument bears such an endorsement in substance, signed by the mortgagee, no lien can exist on the chattels described in the mortgage as against the rights or liens of strangers.

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

Abe Collins, for appellant.

1. A substantial compliance with Kirby's Digest, section 5407, is sufficient. 40 Ark. 431; 60 *Id.* 112; 28 *Id.* 244; 5 R. C. L. 410, 24 U. S. (Law ed.) 544; 88 Tex. 26; 33 L. R. A. 163; 16 L. R. A. (N. S.) 703.

2. The letter to the clerk, with the mortgage, was a substantial compliance with the statute. 1 Fed. Cas. 112, 114; 7 Words & Phrases, 6742; 43 Ark. 144; 5 R. C. L. 409, § 35; 30 N. J. L. 259; 83 Ill. App. 267; 106 Col. 208; 84 Ind. 248; 39 Barb. (N. Y.) 42; 11 Minn. 331; 60 Vt. 595; 15 Atl. 188.

3. Failure of the clerk to perform his duty could not prejudice appellant's rights. 28 Ark. 244.

E. K. Edwards and *B. E. Isbell*, for appellees.

There was not even a substantial compliance with the statute. The letter was no part of the mortgage, there was no *endorsement* on the mortgage at all. The letter

was not even attached to nor pasted on it. The endorsement can not be on a separate piece of paper; the direction must be "endorsed" on the instrument. Kirby's Dig., § 5407; 71 Ark. 322; 69 *Id.* 593; 37 *Id.* 507; 52 *Id.* 164; 83 *Id.* 109; 121 *Id.* 346; 64 *Id.* 369. The statute is mandatory.

HUMPHREYS, J. Appellant instituted suit against appellees in replevin on the 14th day of December, 1916, in the circuit court of Sevier County to recover the possession of a lot of personal property covered by a certain mortgage executed by the Oil Well Drilling Company to it to secure two promissory notes for the sum of \$1,030.96 each, due in sixty and ninety days after date, bearing interest at the rate of 8 per cent. per annum from date until paid.

Appellant had foreclosed its mortgage and purchased the property under the foreclosure sale. On the 16th day of May, 1916, the chattel mortgage in question had been mailed to the circuit clerk of Sevier County, Arkansas, in the same envelope with the following letter:

"Shreveport, La., May 16, 1916.

"Circuit Clerk, Sevier County, De Queen, Ark.:

"Sir: We are enclosing herewith chattel mortgage executed May 11, by the Oil Well Drilling Company, to the Continental Supply Company, amounting to \$2,161.92 with notes payable in sixty and ninety days at 8 per cent. covering a drilling rig which the Oil Well Drilling Company are shipping to Lockesburg in your county.

"We are also enclosing herewith 25 cents in postage as we understand this to be the fee charged for the filing of this record, and we will thank you for your prompt attention in this matter.

"Yours truly,

"The Continental Supply Company,

"John T. Harrington,

"Local Manager."

Appellees had possession and claimed title to said property, as attaching and judgment creditors of the Oil Well Drilling Company.

The cause was tried upon the pleadings, exhibits thereto and an agreed statement of facts before the court sitting as a jury. From the finding and judgment of the court adverse to appellant, an appeal has been prosecuted to this court.

The only error assigned by appellant for a reversal of the judgment is the declaration of law made by the trial court to the effect that the letter enclosing the mortgage to the clerk was not a sufficient endorsement by the mortgagee to meet the requisites of section 5407 of Kirby's Digest in order to preserve a lien against strangers upon the property described in the mortgage. Section 5407 of Kirby's Digest, is as follows:

"Whenever any mortgage or conveyance intended to operate as a mortgage of personal property, or any deed of trust upon personal property, shall be filed with any recorder in this State, upon which is endorsed the following words, 'This instrument is to be filed, but not recorded,' and which endorsement is signed by the mortgagee, his agent or attorney, the said instrument when so received shall be marked 'filed' by the recorder, with the time of the filing upon the back of said instrument; and he shall file the same in his office, and it shall be a lien upon the property therein described from the time of filing, and the same shall be kept there for the inspection of all persons interested; and such instrument shall thenceforth be notice to all the world of the contents thereof without further record."

(1) This court has held that a substantial compliance with the statute is all that is required in order to create a lien good as against strangers, on the personal property described in a chattel mortgage. *State of Arkansas v. Smith*, 40 Ark. 431; *Price v. Skillern*, 60 Ark. 112.

The agreed statement of facts discloses that the mortgagee did not actually endorse the following words, in substance or in part, on the mortgage: "This instrument is to be filed, but not recorded," and sign same. It is contended that the direction in the letter signed by the mortgagee enclosed with the mortgage in the envelope directed

to the clerk, constituted an endorsement of the required words in substance upon the instrument, and a signing of same by the mortgagee.

There is no warrant in the statute for endorsing the words or their substance upon a separate piece of paper. The letter was no part of the instrument. The statute requires the endorsement to be upon the instrument. If the letter had been pasted on, or securely fastened to the mortgage, it might then be argued with some semblance of reason that the endorsement was on the instrument. *Carrier v. Comstock*, 108 Ark. 515. To hold, however, that the substance of the words written upon a separate sheet of paper and signed by the mortgagee is tantamount to an endorsement on the instrument itself, would amount to an arbitrary ruling, or a ruling unsupported by reason.

(2) In order to create and maintain a lien good as against strangers, a chattel mortgage must either be filed with the clerk for record or must bear an endorsement signed by the mortgagee, his agent or attorney, of import required by the statute. Unless the instrument bears such an endorsement in substance, signed by the mortgagee, no lien can exist on the chattels described in the mortgage as against the rights or liens of strangers. *Bowen, Trustee, v. Fassett*, 37 Ark. 507; *Case & Co. v. Hargadine*, 43 Ark. 144; *Dedman v. Earle*, 52 Ark. 164; *First National Bank v. Bedingfield*, 83 Ark. 109; *Nix v. Watts*, 121 Ark. 346.

Under this construction of the statute, the title to the property constituting the subject-matter of this litigation is in appellees.

The judgment is, therefore, affirmed.

MUNN v. SHULTS.

Opinion delivered July 9, 1917.

1. FERRIES—ABANDONMENT OF RIGHT.—The right to operate a public ferry may be abandoned after payment of the license fee, by a failure to provide necessary facilities and to exercise the right.
2. FERRIES—CONTINUATION OF RIGHT.—When the right to operate a public ferry is once established by proper franchise, the right continues until revoked by the county court.
3. FERRIES—LICENSE.—The license fee for the operation of a public ferry must be paid annually, and this duty can not be waived by the derelictions of county officials.
4. FERRIES—IMPROPER OPERATION.—Appellant *held* to have abandoned his right to operate a public ferry, and to be liable for penalties denounced by law for the improper operation of the same.

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

Henry Moore, Jr., and *D. W. McMillan*, for appellant.

1. When this cause was here before (124 Ark. 415) the only question was the interpretation of Kirby's Digest, § 3570.

A ferry privilege once granted may be revoked by proper order. 95 Ark. 344. But until revoked the privilege continues, and it is the duty of the ferryman to pay the tax each year. Kirby's Digest, §§ 3558-3561 to 3582.

2. It is shown that during 1913 the county court levied a \$25 tax on ferry privileges, Kirby's Dig., § 3570, but the clerk did not immediately issue the license to Munn as required by law, *Ib.*, § 3571, nor did the sheriff present the license within twenty days. *Ib.*, § 3572. Defendant should not have been mulcted in damages, for a failure to pay when the failure was caused by officials failing to perform their duty.

3. The franchise is for the benefit of the public, and carries the burden of operating the ferry until relieved by order of court. The license is also a tax for the benefit of the public, and the failure to pay such tax does not relieve the grantee from the burden of operating the ferry.

Kirby's Digest, § § 561-566; 44 Ark. 188. The ferryman's duty is to pay the annual tax on presentation by the sheriff. 20 Ark. 563, 579.

4. The privilege is not to be procured annually, but remains valid until revoked; the only duty being to pay the fee. *Ib.* 580. See also 25 Ark. 27; 95 *Id.* 344, 353.

5. No abandonment was shown. 116 Ark. 103. See 105 *Id.* 316; 119 *Id.* 240.

6. The statute is highly penal and must be strictly construed. 70 Ark. 331; 79 *Id.* 521; 118 *Id.* 273.

Defendant complied with the law and was not liable to the penalties. *Supra.*

7. Douglas' and Shults' testimony was incompetent. Exhibit "A" was not the original record and inadmissible.

Will Steel, for appellee.

1. Appellant waived all objections to the introduction of exhibit "A," to the testimony of T. D. Douglas. The ruling of the court is not set up as a ground for new trial. 70 Ark. 429; 86 *Id.* 486; 117 *Id.* 208; 92 *Id.* 599. But it was admissible was a contemporaneous record and was as such an original as the memoranda. 14 Wall. 375; 81 U. S. 894.

Kirby's Digest, section 3582, provides for the penalties to be collected. The proper foundation was laid and the record was read to refresh the witness' memory. 2 Wigmore on Ev., § 1560; 14 Wall. 375; 81 U. S. 894; 63 Ark. 204; 65 *Id.* 321; 57 *Id.* 415; 60 *Id.* 342; 17 Cyc. 377, 384, 386, 395, 400; 16 *Id.* 946.

2. Appellant waived his objection to the testimony of J. B. Shults for the same reason. 70 Ark. 429; 86 *Id.* 486; 117 *Id.* 208; 17 Cyc. 474.

3. The presumption is that the court only considered competent testimony. 76 Ark. 156; 78 *Id.* 209.

4. The conclusions of the lower court can not be reviewed here. There were no exceptions to the findings of fact or law. 70 Ark. 420; 60 *Id.* 258.

5. Defendant was plainly liable under the law. Kirby's Digest, § § 3582, 5558, 3566-70-71-2, 3579.

6. The contention that the clerk forgot to issue the license, is an afterthought. Munn would never have paid a license for 1913 but for the institution of this suit. No request was made for one. Munn had no boat in 1912 and paid no license; he did not use the ferry privilege during its life. On January 6, 1913, there was no boat at Buzzard's Bluff; Munn was not exercising his ferry privilege there, and there was no road leading to the ferry. Kirby's Digest, § 3570; 95 Ark. 354.

The evidence shows Munn had abandoned his ferry privilege and failed to pay the tax for 1913 and 1914. 25 Ark. 29; 20 *Id.* 561; 95 *Id.* 354; 20 *Id.* 573; 94 *Id.* 190. A ferry privilege is not perpetual. 23 Ark. 514. See also 116 Ark. 102.

A license must be procured before a ferry can be kept. Kirby's Digest, § § 3582, 3558. The operation of a ferry in the years 1913 and 1914 was a violation of law by Munn and he is liable.

STATEMENT BY THE COURT.

The appellee, plaintiff below, instituted this suit against the appellant, the defendant. Plaintiff alleged that from the 31st of December, 1912, until the 31st of December, 1914, he was duly licensed by the county court of Miller County, Arkansas, to operate a ferry across Red river between Miller County and Fulton in Hempstead County; that he complied with all requirements of the law, and under a license duly obtained operated the ferry during the time mentioned; that during said time the defendant Munn unlawfully and wrongfully, without license, operated a ferry across Red river in Miller county from a point known as Buzzard's Bluff, seven miles south of Fulton and during that time ferried across Red river 959 persons, wagons and articles contrary to law, for which he charged and collected money; that the defendant Munn, under the provisions of section 3582 of Kirby's Digest, upon which plaintiff predicated his suit,

was due plaintiff the penalties incurred under that section, amounting in the aggregate to the sum of \$4,295.00, for which he prayed judgment.

The defendant admitted that the plaintiff had complied with the requirements of the law authorizing him to operate a ferry between Miller County and Fulton in Hempstead County. He denied all the other material allegations of the complaint, and alleged that he had paid to the sheriff of Miller County the license required by Miller County for the years 1913, 1914 and 1915, and prayed that the plaintiff take nothing and that defendant have a judgment for his costs.

The cause was, by consent of the parties, tried by the court sitting as a jury.

The court made written findings of the fact as follows: "That during the years 1913 and 1914 the plaintiff, J. B. Shults, had been licensed by the county court of Miller County, Arkansas, to establish and operate a public ferry across Red river in said county opposite Fulton and had paid license fee required therefor, and had during said year operated his said ferry.

"That during the years 1913 and 1914, beginning the first week in February, 1913, up to and including April 24, 1914, the defendant M. J. Munn owned and operated in the county over the same navigable stream, Red river, his public ferry without complying with the provisions of law in relation to obtaining license, and that during said time he ferried over said river at said point persons for whom he charged money in the number exceeding eight hundred and fifty-nine, and that during said time he ferried over said river at said point wagons for which he charged money in a number of five hundred and eighty-two, and that during said time he ferried over said ferry mules, horses and cattle for which he made separate charges, in a number exceeding twelve hundred, and that the said J. B. Shults, on that account, is entitled to judgment, as provided in section 3582 of Kirby's Digest, for penalties in the amount of \$4,295.00; that in October, 1912, M. J. Munn, upon application to the county court of

Miller County, Arkansas, obtained a license to operate a public ferry at Buzzard's Bluff, in Miller county, Arkansas, across Red river, which order granting said privilege expired on the 31st day of December, 1912; and that said Munn, in October, 1912, obtained a license to operate said ferry from the county clerk of said county, and paid the license fees required by law, said license expiring on the 31st day of December, 1912; that during the year 1912, and up to the first week in February, 1913, the said M. J. Munn did not own and operate a ferry at said point on said river, and during said time did not use said ferry privileges, and that up until the latter part of January, 1913, that there was no public road leading from the county road down to the point of the landing of said ferry, nor up until said time was there a public road crossing said river at said point in Miller County, Arkansas."

The court further found that "Munn did not after October, 1912, in any way apply for the privilege of operating said ferry, nor did the county court of Miller County, Arkansas, grant him at any time thereafter the privilege of operating said ferry at said point in Miller County, nor did the said county court assess any tax against a ferry privilege of M. J. Munn after October, 1912, nor did said county clerk issue a license to M. J. Munn as ferryman after October, 1912, until October 17, 1914. That October 17, 1914, after suit had been brought by J. B. Shults against M. J. Munn to collect said ferry penalties, which suit was then pending, the said M. J. Munn, through his attorneys, orally requested the county clerk of Miller County, Arkansas, to issue to the said M. J. Munn ferry licenses, authorizing him to operate said ferry for the years 1913 and 1914, and that after a delay the clerk did issue said license but that no orders of the county court were made during said years granting to the said M. J. Munn the privilege of operating said ferry, nor was said ferry privilege assessed by said court during said years as a basis therefor; that on October 17, 1914,

the said M. J. Munn paid to the collector of Miller County, Arkansas, the license fees for the years 1913 and 1914."

Upon these facts the court declared the law to be that it was the duty of Munn, during the year 1913, and during the year 1914, and prior to April 25th thereof to apply for and obtain an annual license authorizing him to operate the ferry, and having failed to do so he incurred the penalties prescribed under section 3582 of Kirby's Digest, and that J. B. Shults was entitled to judgment in the amount prayed for in his complaint; that by reason of the failure of Munn to procure a ferry boat, or in any way use his ferry privilege granted him in 1912, and prior to February, 1913, he abandoned such privilege and also abandoned said privilege by failing to obtain the annual license prescribed by the statute for the year 1913, and the year 1914 prior to April 25th thereof, the time when his agent, Douglas, ceased operating the ferry, and that under the facts the licenses for the years 1913 and 1914 issued to M. J. Munn in October, 1914, could not avail Munn as a defense.

The court thereupon rendered judgment in favor of the plaintiff against the defendant in the sum of \$4,295.00, from which this appeal has been duly prosecuted. Other facts stated in the opinion.

WOOD, J., (after stating the facts). Appellant objected to the introduction of a book kept by T. O. Douglas, showing the names, dates and amounts collected from various persons and articles while he was operating the ferry for Munn; and also objected to the testimony of the appellee J. B. Shults based upon the entries in the book kept by Douglas which was introduced in evidence. It does not appear that these objections were carried into the motion for a new trial. They were therefore waived in the court below and can not be considered here. *Choctaw & Memphis R. Co. v. Goset*, 70 Ark. 429; *Mitchell v. State*, 86 Ark. 486; *King v. Black*, 92 Ark. 598; *Railways Ice Co. v. Howell*, 117 Ark. 198, 208.

Appellant concedes that the "facts are practically undisputed." It will be seen from the above findings of

fact by the court that the county court of Miller County, in October, 1912, granted Munn the privilege of operating a ferry across Red river at the point designated, which privilege, under the order granting the same, expired on the 31st of December, 1912; that the license which Munn was required to pay for exercising the privilege during that time was paid. But the court also found that Munn did not own and operate a ferry during the year 1912 and up to the first week in February, 1913, did not use his ferry privilege; that up until the latter part of January, 1913, there was no public road leading from the county road down to the point of the landing of the ferry; nor until said time was there any public road crossing the river at said point in Miller County, Arkansas. The court further found that Munn did not, after October, 1912, in any way apply for the privilege of operating a ferry, nor was he after that time granted the privilege of operating the ferry at the designated point.

These findings of fact by the court are sustained by the evidence. It thus appears that the ferry was never established under any order of the county court granting the privilege to establish the ferry at the point designated. Appellant allowed the privilege and the license to expire without establishing the ferry in accordance with such order of the county court granting same and never thereafter sought, nor was he granted by the county court, the privilege of operating a public ferry at Buzzard's Bluff, in Miller County, Arkansas.

(1) Ferry privileges are granted because of the public convenience subserved thereby. A ferry is not established merely by applying for and obtaining a license for operating the same. To establish a ferry one must go further and provide the facilities and operate the same for the public before it can be said that the ferry is established. So here, although the findings of the court show that Munn had applied for and had been granted the privilege and had obtained his license for operating a ferry for the year 1912, the findings of the court nevertheless show that he did not establish the ferry by provid-

ing the necessary facilities and operating the same until the period had expired for which his license was granted. Therefore, the order of the county court levying a tax on the 6th of January, 1913, of \$25.00 for the privilege of operating ferries in the county of Miller did not apply to Munn and he was not at that time, under the law, subject to the payment of the tax, for the law expressly declares that "no ferry at which the public county road does not cross shall be subject to the tax herein provided." And the findings of the court show that on January 6, 1913, when the tax was levied there was no public road leading from the county road down to the point of the landing of said ferry, nor was there a public road crossing the river at that point.

If a ferry could be established simply by obtaining the order of the county court granting the privilege and by obtaining the license, but without actually providing the facilities and putting them in operation for the use of the public, then the purpose of the law, which is to promote the public convenience, would be wholly frustrated, for after the privilege is granted and the ferry established the county court is expressly prohibited from permitting any ferry to be established within one mile above or below any ferry previously established.

In *Murray v. Menefee*, 20 Ark. 561, 563, it is said: "When the license has been so granted, and the ferry once established, it is made the duty of the county court to levy a tax on the privilege annually thereafter, whether application for renewal of the license be made or not; and the duty of the clerk to issue, annually, a license, and deliver it to the sheriff for the person to whom the privilege was granted, who, on presentation of the license, is bound to pay for it." And in *Lindsay v. Lindley*, Id. 573, 581, it is said: "Because, after the appellee's ferry was once established, the question of public convenience was no longer an open one between him and the appellant, subject to investigation on the occasion of each annual grant of license thereafter; nor, in such case, does the statute require the owner of a ferry privilege to make a further

application. It is made the duty of the court to levy a tax on the privilege, annually, whether the owner makes application or not; the clerk is required to issue the license, deliver it to the sheriff, and the owner is bound to pay for it."

Now since no ferry was established by appellant under the order of the county court granting him the privilege and under the license obtained for exercising such privilege, he cannot invoke in his defense the statute, and the above decisions based thereon, requiring the county court to levy a tax, and the clerk to issue the license, and the sheriff to present the same to him, regardless of whether or not he renewed his application for the ferry privilege and license. These duties are exacted of the county officials named only when the license has been so granted and the ferry once established. *Independence County v. Duffey*, 95 Ark. 354.

Here, as we have seen, while the license was granted in 1912, the ferry was never established under it, and it was not being maintained and operated as a ferry when the county court, on the 6th of January, 1913, made a general order levying a tax of \$25.00 for ferry privileges.

(2-3) It seems to be the doctrine of our cases that when a ferry franchise is once granted and the ferry is established under it, the privilege continues subject to the power of the county court to discontinue the same when the public interests demand it. Before one can exercise the privilege the right must be extended to him by the proper authority—the county court. See *Murray v. Menefee*, *supra*; *Bell v. Clegg*, 25 Ark. 26. Therefore, even though appellant had established the ferry under the franchise granted by the county court, he could not after his annual license expired continue to exercise the privilege "without complying with the provisions of law in relation to obtaining license." The derelictions of county officials in failing to issue the annual license and to levy and collect the tax therefor, can not exonerate the holder of a ferry franchise for a failure to pay the annual license

fee or tax, nor exempt him from the penalties denounced by section 3582, *supra*, for such failure.

(4) Although the franchise may be granted and the provisions of the law in regard to obtaining license complied with, the privilege is one that may thereafter be lost by a failure to establish the ferry and exercise the privilege, or it may be abandoned by failure to procure the license prescribed by the statute. In *Finley v. Shemwell*, 94 Ark. 190, we announced the law as follows:

“It is settled by the decisions of this court that, while ownership of lands on one or both sides of a navigable stream entitles the owner to the privilege of keeping a public ferry, the right can not be exercised without procuring a license from the county court. It has also been decided by this court that when the county court has once granted the privilege of keeping a public ferry the privilege is exclusive within the distance, so long as it is exercised under the annual grant of license provided for. There may, however, be an abandonment of the ferry privilege by failure to procure the license prescribed by statute; or the county court may, by proper order, discontinue a ferry once established.” Citing all former cases.

Now, under the doctrine of these cases, and the facts of this record as found by the trial court, which are sustained by the evidence and is practically undisputed, the court was correct in his conclusion of law that Munn, by reason of his failure to procure a ferry boat and use the ferry privilege granted him in 1912, and by failing to obtain the annual license prescribed by the statute for the years 1913 and 1914, had abandoned his ferry privilege, and that the license issued in October, 1914, for the years 1913 and 1914 could not avail him as a defense to this action.

Appellant, by keeping the ferry and charging persons for same without complying with the provisions of the law relating to obtaining license, incurred the penalties

denounced by the section *supra*, upon which this suit was grounded.

The judgment is therefore correct, and it is in all things affirmed.

BRANSTETTER v. BRANSTETTER.

Opinion delivered July 9, 1917.

1. PARTITION—DISPUTED TITLE—EQUITY JURISDICTION.—A bill in equity will not lie to partition lands, the title to which is in dispute.
2. EQUITY JURISDICTION—PARTITION.—When a court of equity has possession of a case on some ground of equity jurisdiction wholly distinct from partition, although the cause is brought for partition, the cause will be retained for the other purpose.
3. PARTITION—EQUITY JURISDICTION—OTHER GROUNDS.—An action was brought to determine the rights of the parties in certain lands. *Held*, the court, having jurisdiction under the pleadings, could determine the rights of the parties and partition the lands, and a decree to that effect was final and could be appealed from.
4. EQUITY JURISDICTION — APPOINTMENT OF COMMISSIONER — MINISTERIAL ACTS.—After the court has appointed a commissioner and given him directions to partition certain lands, its further acts are ministerial, rather than judicial.
5. EQUITY JURISDICTION—ACTS OF COMMISSIONER.—The functions of a commissioner in carrying out the court's judgment are analogous to those of a master in chancery who is appointed to state an account in accordance with the findings and decree of the court.
6. JUDGMENTS—FINALITY.—Where a judgment which finally settles the rights, title and interests of the parties under the issues raised by the pleadings, is in such form as to be complete and final, giving the right to have the same put into execution, the same is final and may be appealed from.
7. BILL OF REVIEW—PROOF OF ERROR.—Where a decree is reviewed on a bill of review, to which the appellee filed an answer and demurrer, the burden is upon the appellant to show error as a matter of law upon the face of the decree.

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

W. N. Carpenter and *Sam Frauenthal*, for appellant.

1. The evidence shows conclusively that appellant M. S. Branstetter was the owner of an undivided one-half interest in the land by virtue of a deed from P. A. Douglas, and in addition is entitled to whatsoever interest was devised to him by the will of his father.

2. The original will was duly executed and attested. If a codicil was added it was never attested, and did not revoke nor change the original will. Kirby's Digest, § 8012; 85 Ark. 363.

3. But if the codicil is a part of the will, the court erred in the construction of it and the will considered as one instrument. 6 Peters, 68; 151 U. S. 112. The language of the will itself controls in arriving at the intention of the testator. 90 Ark. 152; 23 *Id.* 378; 3 L. R. A. (N. S.). 847; Jarman on Wills, 711-726.

It is clearly expressed in the original will that it was the intent to give M. S. Branstetter a half interest in the estate. 5 L. R. A. 223; 27 L. R. A. (N. S.) 1092; 40 Cyc. 1415, note 31.

4. The original order was erroneous on its face and should be corrected. The court has power on Bill of Review to correct a palpable error on the face of the record. 104 Ark. 562; 59 *Id.* 441; 32 *Id.* 753; 21 *Id.* 528.

5. The first order was not final, but merely interlocutory. 123 Ark. 620; Freeman on Cotenancy & Partition (2 ed.), 516; Knapp on Partition, 497; 103 U. S. 518; 70 Fed. 529; 48 Fla. 226; 111 Am. St. 77; 30 Cyc. 326; 41 Ind. 398; 204 N. Y. 238.

Botts & O'Daniel, for appellees.

1. The appeal should be dismissed. The decree in the original case, February, 1915, was final. 123 Ark. 620; Kirby's Digest, § § 1198, 5776-7-8-9, etc., 6228; 34 Ark. 130; 34 *Id.* 130; 80 *Id.* 515; 106 *Id.* 207, 213; 138 Ind. 628; 148 Ill. 321; 145 *Id.* 500; 62 Iowa; 740-7; 49 Ohio, 374; Black on Judgments, § 39; 122 Ark. 255.

2. The Bill of Review is a separate and distinct suit from the original and was properly dismissed. 31 Ark.

103; 68 *Id.* 288; 26 *Id.* 603; 104 *Id.* 568; 59 *Id.* 445; 25 *Id.* 603.

3. The original decree was correct. 114 Ark. 154; 40 Cyc. 1098.

STATEMENT BY THE COURT.

This is a suit for partition. The complaint alleged that S. M. Branstetter and M. S. Branstetter, one of the appellants herein, were the owners as tenants in common of the land involved, which they obtained by deed executed to them jointly by one P. A. Douglas; that thereafter S. M. Branstetter died, leaving a will by which he devised one-half of his estate to his son, M. S. Branstetter, and the other half to the heirs of another son, S. F. Branstetter, whose heirs are made parties to the suit. It was further alleged that the appellees, Roberta and Alice Branstetter, were the sole heirs of A. O. Branstetter, who had no right or claim to any of the land involved in the suit, but, as appellants were informed, were claiming some interest therein.

The complaint then alleged that M. S. Branstetter had expended \$1,244.65 in making permanent improvements on the land and S. M. Branstetter had expended the sum of \$619.56 in making permanent improvements; that M. S. Branstetter and the heirs of S. F. Branstetter own each a one-half interest in the land.

The complaint further alleged as follows: "Plaintiffs say that they are entitled to have the property rights of all of the legatees under said will of S. M. Branstetter in and to the above described property adjusted and declared; that the property is not susceptible of division in the kind between the said several parties in interest, and that after the exact rights and interest of each party hereto has been declared by the court that said property should be sold by the decree of this court and the proceeds to be applied to the various claims and interests of the various parties hereto. * * * Wherefore, plaintiffs pray that a decree of this court be rendered declaring and de-

fining the rights of all the parties in and to the aforedescribed lands."

Appellees Alice and Roberta Branstetter answered, in which they denied that the appellants were the sole owners of the land. They alleged that S. M. Branstetter died leaving a will in which he made provision that the appellees were to receive a certain judgment which he held against the estate of their father in the sum of \$617.36; that thereafter the said S. M. Branstetter and the guardian of the appellees entered into an agreement by which the said S. M. Branstetter accepted a small sum for said judgment, and that thereafter the same S. M. Branstetter made an alteration in his will by executing a codicil thereto as follows:

"DeWitt, Ark., Nov. 3, 1905.

"I, S. M. Branstetter, as Lizzie Roberta and Sabina Alice has settled the judgment that I hold against the estate of A. O. Branstetter, I will them an equal share with S. F. Branstetter heirs according as the will directs."

They alleged that the will, with the codicil, was duly probated.

Appellees prayed that "their rights be determined and decreed by this court in the property above mentioned, and to all other relief to which they are entitled."

The will, with the purported codicil, was attached and made an exhibit to the answer.

The appellants replied, in which they denied that the above purported codicil to the will of S. M. Branstetter constituted any part thereof, and alleged that it was merely a leaf pinned to the will and was of no force or effect, and denied that the appellees had any rights in the lands by reason thereof.

The will, with the purported codicil, was duly presented to the probate court, and there was a contest concerning the codicil to the will, and the court, after hearing evidence, admitted the will, together with the purported codicil, as the last will and testament of S. M. Branstetter, deceased. An appeal was taken to the circuit court from this order of the probate court, and the circuit court ap-

proved the finding and judgment of the probate court, and its judgment was certified down and a final judgment was entered by the probate court admitting the will, with the purported codicil, as the last will and testament of S. M. Branstetter.

The deposition of M. S. Branstetter was heard and a deed from Douglas to S. M. and M. S. Branstetter was introduced, and the court, after hearing the testimony, found, that M. S. Branstetter is the owner of one-third of the land involved in the suit; that the heirs of S. F. Branstetter, deceased, who are specifically named in the decree, are the owners of one-third interest in the land, and that the appellees, as the children and heirs of A. O. Branstetter, are the owners of one-third of the estate of S. M. Branstetter, deceased. The court further found that the parties to the suit were entitled to have the lands divided according to their respective interests, and entered a decree that the five acres (describing it) be partitioned and divided, giving to M. S. Branstetter a one-third thereof in severalty; to Nettie Branstetter, widow of L. N. Branstetter, a one-ninth interest for her life; to the children and heirs of S. F. Branstetter (naming them) a one-third interest (dividing the same in severalty between them); and to the children and heirs of A. O. Branstetter (appellees here) the remaining one-third.

The court then appointed commissioners to make partition according to the decree and directed them to report their acts to the court. This decree, as appears by *nunc pro tunc* entry, was rendered on February 1, 1915. An appeal was prayed from this decree, and on appellee's motion such appeal was dismissed by this court on the ground that if the decree was final, the time for appeal had expired, the transcript not having been lodged with the clerk of this court within six months from the rendition of the decree; and, if not, the appeal was premature.

On September 25, 1916, the commissioners appointed to make partition having reported that the land was not susceptible of division, the court entered a decree ap-

proving said report of the commissioners and directing that the lands be sold for the purpose of the partition, and directing that the proceeds of the sale should be distributed pro rata according to the respective interests of the parties as set forth in the original decree. From this decree, directing the sale of the lands for partition, this appeal has been duly prosecuted.

On January 13, 1917, the appellants filed what they designated as a "Bill of Review," in which they asked the court to review and correct its original decree, on the ground that on the face of the record it appeared that the title to the land had been acquired from Douglas by appellant M. S. Branstetter and his father, S. M. Branstetter; that the appellant, in his own right, owned a one-half interest in the whole land, and that the appellees, who only claimed title through the father of M. S. Branstetter, could only have had an interest in one-half, so that on the face of the record it appeared that there was a palpable error in giving the appellant M. S. Branstetter only a one-third interest in the entire land.

The chancellor dismissed the bill of review, from which appellants also prosecute an appeal.

Appellants' counsel, in their brief, state that both appeals are prosecuted for one purpose, which is to correct an alleged error on the part of the chancellor in declaring what were the respective interests of the parties in the land and the proceedings thereon.

WOOD, J., (after stating the facts). Appellees demurred to the complaint on the ground that the court did not have jurisdiction, and the demurrer was overruled and they excepted to the ruling, but they did not stand on the demurrer, and afterwards answered and have not urged in their brief that the court erred in taking jurisdiction of the case. While the complaint does not state expressly that the appellants, or any of them, are in possession of the land, it does set up that improvements were made, and taking the complaint all together, it should be treated as one where the appellants, or some of them,

were in possession of the lands in controversy, holding the same for the others, who are appellants, and who were tenants in common. But the suit, so far as the appellees are concerned, can not be treated as a suit merely in partition, because appellants, in their complaint, alleged that the appellees had no right or claim to any of the land, and in their response to appellees' answer they denied that appellees "acquired or had any rights in said land."

(1) Therefore, while the complaint could be treated as one for partition so far as the tenants in common were concerned, whose interests or title were not disputed, so far as the appellees are concerned, it is more in the nature of a suit on the part of the appellants to quiet the title as against them, and it must be so treated in order to give the court jurisdiction. It is well settled by numerous decisions of this court that a bill in equity will not lie to partition lands the title to which is in dispute. *Cannon v. Stevens*, 88 Ark. 610.

(2) In *Maupin v. Gaines*, 125 Ark. 181, 185, we said: "Unless a tenant in common is in possession, or his title is admitted, he can not maintain a bill in equity for the partition thereof. But it is equally as well settled that when a court of chancery has possession of a case on some ground of equity jurisdiction wholly distinct from partition, the cause will be retained for that purpose."

(3) Under the allegations of the complaint that appellants were the owners of the land, and treating the allegations as sufficient to show that they were in possession, and that the appellees were asserting a claim of title to which they had no right, and praying that a decree be rendered declaring and defining the rights of all the parties to the action, the court had jurisdiction of the cause on a ground wholly distinct from that of partition, and could therefore retain the cause for the purpose of partitioning the land among the owners after the rights of all parties were settled and determined by the decree. Such being the issues raised by the pleadings, the decree rendered February 1, 1915, was a final decree from which an appeal could have been prosecuted. That decree set-

tled the issues raised by the pleadings and finally determined the titles and interests and declared the rights of the parties to the lands in controversy.

"A decree which determines the issues set forth in the pleadings, and directs a partition of the property accordingly and in accordance with the rights of the parties as determined by such decree, is regarded as final, for such decree leaves nothing to be done but execute the directions therein contained." Knapp on Partition, p. 497. See also Black on Judgments, section 39.

Under our statute for partition and sale of land, Kirby's Dig., chap. 120, it is provided that the court "shall declare the rights, titles and interests of all the parties to such proceedings, * * * and shall determine the rights of the parties in such lands and tenements, and give judgment that partition be made between such of them as shall have any right therein, in accordance with such right thus ascertained." Section 5776.

(4-5) After the court had rendered this judgment, its functions, under the statute, in appointing commissioners and giving them directions to make the partition so adjudged, and the duties of the commissioners to make partition according to the judgment of the court, or to ascertain and report that the partition could not be made without great prejudice to the owners, and other duties as defined by the statute are all of a ministerial, rather than a judicial, character. Kirby's Digest, § 5777, *et seq.* 5782, inclusive. The functions of the commissioners in carrying out the judgment are analogous to those of a master in chancery who is appointed to state an account in accordance with the findings and decree of the court. In *Young v. Rose*, 80 Ark. 513, there was a decree which adjudged the rights of the parties and a master was appointed and directed to state an account in accordance with the decree. The master performed his duties and made a report, which followed the decree. The judgment in the case was rendered over a year before the appeal was taken, and the question was whether the judgment declaring and fixing the rights of the parties was final, or

whether it was subject to review on appeal from the subsequent decree confirming the report of the master. The court said: "A decree which settles the rights of the parties and leaves nothing to the master but a statement of an account fixed by the decree is a final judgment. As no appeal was taken from this judgment within the time allowed by statute it must be treated on this appeal as the law of the case, and that being so, the subsequent decree confirming the report of the master made in obedience to the first decree can not be questioned."

In *Clark v. Lesser*, 106 Ark. 207, Lesser brought suit against Clark and others to quiet title and for partition of certain land. A decree was rendered against appellants quieting title in the appellee and ordering a partition of the land, from which decree an appeal was prosecuted. The appellants contended that the appeal was premature, and we said (p. 213): "The decree of the chancery court was a final decree as to the title to the land in controversy and the appeal was therefore not premature." See also *Bradley Lumber Co. v. Hamilton*, 109 Ark. 598.

In *Davie v. Davie*, 52 Ark. 224, we held: "Where a decree determines the right to property, and directs it to be delivered up, or directs its sale, and the plaintiff is entitled to have the decree carried into immediate execution, it is to that extent final and may be appealed from, although a further decree may be necessary to adjust an account between the parties."

(6) Whatever may be the rule in other jurisdictions, the facts of this record bring it strictly within the rule of our cases which hold that where a judgment or decree which finally settles the rights, title and interests of the parties under the issues raised by the pleadings, and is in such form as to be complete and final, giving the right to have the same put into execution, that such judgment or decree is final and may be appealed from. We are of the opinion, however, that the weight of authority in other jurisdictions is in harmony with the view we here express. See cases cited in brief of counsel for appellees.

There is another line of cases which hold that where the judgment on its face shows that it is interlocutory and not complete, but leaves open issues for further judicial determination, that such judgment is not final and no appeal can be taken from it. *Hargus v. Hayes*, 83 Ark. 186; *Brown v. Norvell*, 88 Ark. 590; *Sennett v. Walker*, 92 Ark. 607.

It follows that since no appeal was prosecuted within the time prescribed by law from the original judgment adjudicating the rights of the parties and directing partition, that the present appeal from the order confirming the report of the commissioners, by which the original judgment is sought to be reviewed, must be dismissed.

The proceedings on the bill of review were really in the nature of an independent suit. The bill, in substance, alleged that the appellants were the owners of certain lands by reason of an alleged deed from P. A. Douglas; that M. S. Branstetter is the owner of an undivided one-half interest; that by survivorship appellants were owners of all of it; that the action was to construe the will of S. M. Branstetter, and to have the interests of the parties determined; that the court, in rendering its decree, overlooked the deed of Douglas to S. M. Branstetter and M. S. Branstetter; that S. M. Branstetter owned one-half of said land, and the other half was in M. S. Branstetter; that the court erred in determining what was the will and what were the interests of the parties to the suit; that the estate was divided under the terms of the will erroneously, and prayed that the decree be vacated, the errors corrected in a new decree drawn in accordance with the facts and the law of the case.

(7) The appellees demurred and answered. The decree on this bill of review shows that the same was heard on the bill of review, the answer and demurrer of the defendants, and that the court dismissed the same. In this state of the pleadings the burden was upon the appellants to show error as a matter of law upon the face of the decree. The bill, on its face, shows an effort to have the chancery court reconsider its original decree in parti-

tion, and to review the evidence and change its conclusions. This can not be done on a bill of review.

In *Long v. Long*, 104 Ark. 562, 568, we said: "Where a former decree is attacked upon the ground that errors of law are apparent on the face of the record, the court is confined to the pleadings, proceedings and decree in the case in which the decree was rendered. It can not look into the evidence to see whether or not the decree is based on a correct finding of facts."

In *Wood v. Wood*, 59 Ark. 441, 445, Judge Battle, speaking for the court, used this language: "In an attack upon a decree by a bill of review for errors of law, a court can not look into the evidence to see whether the decree is based upon a correct finding of facts. That is the proper office of a court of competent jurisdiction upon an appeal. But, assuming that the facts upon which the decree rests have been properly found, it is the sole duty of a court to inquire whether the record, exclusive of the evidence, contains any substantial error of law pointed out by the bill of review."

We can not therefore enter upon a consideration of the evidence upon which the original decree was grounded, even if appellants had brought the same into their record on the bill of review, which they have not done.

Assuming that the facts upon which the original decree rests have been properly found, which we must do, certainly there is no error of law appearing in the record of the original proceedings upon which that decree was based which would warrant this court in setting aside the decree. We must assume that, notwithstanding the exhibit of the Douglas deed, the court, in determining the rights of the parties, ascertained and found facts which justified it in rendering the decree in favor of the appellees. The court might have found that what appellants allege and refer to as the *codicil* to the will of S. M. Branstetter was not a codicil at all, but was a provision in the will itself, and that it had been so found and adjudicated by the probate court.

It can readily be seen that facts showing the correctness of the original decree might have been proved. If such facts were not proved, they were matters to be reviewed on appeal from the original decree, and not by bill of review.

There were no errors of law appearing on the face of the record pointed out in this bill of review. The alleged errors which it seeks to have corrected are errors in the conclusions of the court upon the evidence, and in the construction that it placed upon the evidence. If there were such errors these could and should have been corrected on appeal. The decree of the court was therefore correct in dismissing the bill of review.

Finding no error in the record, the decree is in all things affirmed.

NEVADA COUNTY BANK v. GEE.

Opinion delivered July 9, 1917.

1. DEEDS—ACKNOWLEDGMENT, LACK OF—PROOF.—It is admissible to show that a grantor in a deed or mortgage never actually appeared before the officer purporting to have taken his acknowledgment, and that the grantor made no acknowledgment at all.
2. ACKNOWLEDGMENTS—PRESUMPTION AS TO ACTS OF OFFICER.—Great weight is given to the official act of a notary public or other officer who certifies to the acknowledgment of an instrument; and the impeachment of his certificate involves a charge of criminal violation of duty on the part of the certifying officer.
3. ACKNOWLEDGMENT—IMPEACHMENT OF CERTIFICATE.—*Held*, under the evidence that an acknowledgment to a mortgage was valid, although the wife of the mortgagor denied that she had acknowledged her signature.

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

H. E. Rouse, for appellant.

1. A notary public is a public officer authorized to take acknowledgments which are received as evidence of the facts stated, and are *prima facie* true. Kirby's Di-

gest, § 7155; 107 Ark. 272; 62 *Id.* 265. A strong presumption exists in favor of the truth where the certificate is regular. 1 Corp. Jur. 893-4, § § 275, 277. Gordon testifies that he took Mrs. Gee's acknowledgment as he certified to it. 96 Ark. 566; 104 *Id.* 226; 107 *Id.* 16.

2. If taken over the telephone it was valid. 13 Am. St. Rep. 156.

3. The testimony shows that Mrs. Gee acknowledged the instrument personally. The acknowledgment will relate back to the date of the deed. 1 Corp. Jur., § § 133, 160.

4. In order to impeach the certificate of acknowledgment the evidence must be clear, cogent and convincing beyond reasonable certainty. 27 App. Cases 401; 103 U. S. 544; 109 *Id.* 573; 117 Ark. 321; 96 *Id.* 564; 104 *Id.* 226; 174 Ill. App. 581; 136 Ky. 281; 149 N. Y. 71; 96 Ark. 566; 174 S. W. 562. There is no proof of fraud. 1 Corp. Jur. 894-5, § 278. The burden of proof was on the married woman to show positively that she did not acknowledge it. 117 Ark. 321; 174 S. W. 562.

5. Children are interested witnesses. 55 N. E. 349; 69 Ill. 666. Intimate social or blood relationship often deprives testimony of its conclusive effect. 92 Hun. (N. Y.) 37; 58 *Id.* 121; 12 Misc. (N. Y.) 81. See also 55 Ala. 339; 96 Ark. 566; 103 U. S. 544; 109 *Id.* 577; 55 N. E. 349.

6. The wife is estopped. 83 N. W. 433; 114 Minn. 146; 56 Ark. 217; 86 *Id.* 575; 74 *Id.* 136, etc.

7. Gordon, the notary, was not a stockholder in the bank, nor disqualified by a financial interest therein. 1 Corp. Jur. 894-5, § § 277, 279; 129 N. Y. S. 238; 130 *Id.* 62; 41 S. W. 932; 149 N. W. 758; 97 Ark. 374; 114 *Id.* 344. But if he was the owner of stock, that would not invalidate the acknowledgment. 170 S. W. 99; 181 Ala. 272; 139 Pac. 1066; 181 S. W. 961; 108 Pac. 1003; 94 Ark. 241; 56 *Id.* 484; 117 Ark. 321, and many others.

John N. Cook, for appellees.

1. All the evidence except his own shows that Gordon never took Mrs. Gee's acknowledgment. Kirby &

Castle's Digest, § 840. No court in any State with laws similar to ours has ever held an acknowledgment over a telephone to be good. 30 L. R. A. (N. S.) 358; 83 S. W. 431; 1 C. J., § 144, p. 819.

2. The doctrine of estoppel does not apply. 63 Ark. 289; 96 *Id.* 609; 97 *Id.* 43.

3. A deed to a homestead not joined in, and acknowledged by the wife is void. Kirby & Castle's Digest, § 4311; 97 Ark. 43.

4. A certificate of acknowledgment is not conclusive, but may be rebutted. Kirby & Castle's Digest, § 850; 114 Ark. 435; 117 *Id.* 327; 81 Kans. 76.

5. Appellees have met the burden of proof squarely, and all the evidence and circumstances prove she did not acknowledge the instrument, except Gordon's own testimony. He was a stockholder in the bank and interested.

6. Relatives are not disqualified and usually they are the only ones who know the facts. 1 R. C. L., § 88, p. 297. The finding of the chancellor is not clearly against the preponderance of the evidence. 4 Crawford's Digest, p. 75, par. 102a.

STATEMENT BY THE COURT.

William Gee and N. T. Gee, his wife, instituted this action in the chancery court against the Nevada County Bank to cancel and set aside as a cloud upon their title a mortgage on their homestead in the town of Prescott on the ground that the wife never appeared before the notary and acknowledged the mortgage. The bank filed an answer in which it denied the allegations of the complaint and also filed a cross-complaint asking for a foreclosure of its mortgage.

During and prior to 1912, William Gee and J. C. White and H. J. Wilson, his sons-in-law, were engaged in the general mercantile business at Prescott, Arkansas, under the firm name of H. J. Wilson & Co. They transacted their banking business with the Nevada County Bank. In January, 1913, the firm owed the bank notes aggregating \$2,500.00. Subsequently the firm's name

was changed to W. H. Gee & Co., but the partners remained the same. They wished to borrow an additional \$1,000 from the bank. In order to do this, William Gee offered to mortgage his homestead to secure this sum as well as the amounts already owed the bank. A deed which was understood between the parties to be a mortgage was prepared and turned over to William Gee to be signed. Several days thereafter, William Gee returned the deed to O. B. Gordon, cashier of the bank. It bore the signatures of William Gee and N. T. Gee, his wife. Gordon took the acknowledgment of William Gee to the deed or mortgage, and at the request of William Gee, called up N. T. Gee to take her acknowledgment over the telephone. Some person at the home of William Gee answered and acknowledged the deed as N. T. Gee. The deed and acknowledgment was dated April 2, 1913. Gordon then took the deed to the attorney of the bank and told him about having taken the acknowledgment of Mrs. Gee over the telephone. The attorney told him that he was afraid of an acknowledgment taken over the telephone and requested Gordon to have the deed acknowledged by Mrs. Gee in his presence. Gordon said that he went to the home of Mr. and Mrs. Gee in the town of Prescott on that evening or the next morning and took the acknowledgment of Mrs. Gee.

Mrs. Gee testified that she did not appear before Gordon and acknowledge the deed. She admitted that she signed it when presented to her by her husband, but stated that she did this under the compulsion of her husband. She stated that she was made to sign the deed by her husband; that he told her he would leave her and take his life if she did not sign it; that she was sick with rheumatism and unable to get out and do anything at the time; that she knew O. B. Gordon when she saw him, but never talked with him in her life; that she had not seen him for over two years; that the consideration for the deed was an overdraft at the bank, but she does not know whether money was to be advanced in the future. On cross-examination she stated that at the time she was

signing the deed, she and Mr. Gee did not talk about her acknowledging it, but that she told him later that she had not acknowledged it; that her husband told her that Gordon would be up to take her acknowledgment, but that she said she was not going to sign it.

Inez E. White, a daughter of Mr. and Mrs. Gee, and the wife of John C. White, a partner in the firm, testified that she was present the day the deed was signed. She stated that her father made her mother sign the deed under threats to break up their home, but she does not state the language that was used.

William Gee testified that the land in question was his homestead and that the bank pressed him on account of the overdrafts of the firm, and wanted him to give a mortgage on his home to secure it; that he told Gordon that he would have to have some more money if he did that, and Gordon agreed to let him have it; that the firm got more money after the mortgage was executed and the notes were renewed from time to time. On cross-examination he stated that his wife signed the deed in his presence; that he told his wife that Gordon would take her acknowledgment over the telephone, and that she told him she would not acknowledge it; that he first found out that his wife had not acknowledged the deed about a month afterward, but never said anything to the officers of the bank about it.

W. W. Rice, a physician who married a relation of the Gees, testified that about the first of April he was called to treat Mrs. Gee; that she was very nervous, was suffering with rheumatism and a kind of neurasthenia; that she was in bed when he went to see her; that he does not remember how long she was sick, but that her husband came down to his office and paid him \$3.00, either on the 4th or 5th of April, 1913.

John C. White testified that Mr. Gordon gave Mr. Gee the deed in question and asked him to have Mrs. Gee sign it; that Mr. Gee carried it home and brought it back later to the store, and kept it there several days; that Mr. Gordon came by there one day and Mr. Gee gave him the

deed; that Mr. Gordon stated he would call Mrs. Gee over the telephone and take her acknowledgment; that later he came back and said that he had gotten her over the telephone; he further stated that Mrs. Gee was sick in bed for several days about the first of April, and that he carried his wife by there in the morning and came back for her after business hours were over.

Inez White, his wife, testified that her mother took sick on April 2, 1913; that she went there to say with her every day while she was sick, and that she was sick for several days; that she would get there in the morning after she had gotten breakfast and attended to her children, and would remain at her mother's home throughout the day; that her mother never acknowledged the deed while she was there; and that she lived in another part of the town.

Jewel Wilson, another daughter, testified that she lived near her mother; that her mother spent the day with her on April 1, 1913; she wasn't well on that day, and on the next day became so sick that she had to have the services of a physician and was confined to her bed for several days; that she stayed with her mother most of the time during the day while she was sick, and that her mother never acknowledged the deed while she was there.

O. B. Gordon testified that he knew Mrs. Gee well; that they had both lived in the town of Prescott for many years; that he first called her up over the telephone and took her acknowledgment; that when he informed the attorney for the bank that he had taken the acknowledgment by telephone, that the attorney said that he was afraid of an acknowledgment taken that way, and insisted that she acknowledge it in the presence of Gordon; that he on that day or the next morning went to the home of Mrs. Gee and took her acknowledgment in person; that she did not seem excited and acknowledged the deed voluntarily; that her husband was not present at the time; that he was at the time a duly qualified and acting notary public; that he thinks he took the acknowledgment on the evening of April 2, 1913, or the next morning.

It was also shown in proof on the part of the bank that the firm went into bankruptcy in August, 1914, and at that time filed a statement admitting the execution of the mortgage on the homestead of William Gee, and that they owed the bank over \$3,500, which was secured by the mortgage on the homestead.

The record of the transfer of the stock as the same appeared in the county clerk's office was introduced and one part of it shows that in the annual statement filed January 28, 1913, it is recited that O. B. Gordon had forty shares of stock in the bank. This record also shows the following: "Transfer of stock in said Nevada County Bank filed October 6, 1915, upon A. A. Gordon, O. B. Gordon (40 shares), under date of January 16, 1913."

The shares of stock were of the par value of \$25 each. O. B. Gordon first testified that he owned shares of stock in the bank in 1913, but subsequently qualified that statement by saying that he did not own any shares of stock, but his brother had deposited with him forty shares of stock as collateral security for a debt he owed the bank, and on which, he, O. B. Gordon, was surety.

The chancellor found the issues in favor of the plaintiff and the decree was accordingly entered canceling the deed or mortgage as a cloud upon the title of the plaintiff. The defendant has appealed.

HART, J., (after stating the facts). (1) This court has recognized that there is a difference between a case where a party admits the acknowledgment of a deed or mortgage, and claims that such acknowledgment was procured by fraud or duress and a case where the grantor denies that he or she ever acknowledged the instrument. It is always admissible to show that a grantor in a deed or mortgage never actually appeared before the officer purporting to have taken his acknowledgment, and that the grantor made no acknowledgment at all. *Polk v. Brown*, 117 Ark. 321. In that case the court said that where there is a claim that the grantor did not make any acknowledgment whatever before the officer, the weight of the evidence should not be affected by any particular rule peculiar to the subject, but that the court should be

left to determine from all the circumstances disclosed whether the certificate of acknowledgment is true or false. The court said:

"In our opinion, the weight of the evidence should not be affected by any particular rule peculiar to the subject, but rather the court should be left to determine from all the circumstances disclosed whether the certificate of acknowledgment is true or false. This much may be said, however, under chapter 29 of Kirby's Digest, a proper acknowledgment is an essential part of the execution of a conveyance. The acknowledgment is an official act done under an official oath and is protected under the presumption the law necessarily indulges in favor of the acts of its own officers. Under our statute, one of the means of evidence upon which a deed can be admitted to record is a certificate of proof or acknowledgment of an officer authorized by our statute to take such proof or acknowledgment. The burden of proof undoubtedly rests upon the person denying the falsity of the certificate which carries with it the usual presumption that the officer making it has certified to the truth, and has not been guilty of a wrongful or criminal action."

(2) The notary or other officer before whom an acknowledgment is taken performs a very important duty when he takes and certifies an acknowledgment of a deed or any instrument affecting the title to real estate. For that reason great weight is given to his official act in certifying to the validity of such instruments. The impeachment of his certificate involves a charge of criminal violation of duty on the part of the certifying officer. This brings us to a consideration of the evidence on the facts in the case. Notice may be first taken of the fact that it is contended that Gordon, the certifying officer, was a stockholder in the bank, and on this account, under the rule announced in *Davis v. Hale*, 114 Ark. 426, his certificate does not import the same verity as the certificate of an officer who was not a stockholder in the corporation affected. In response to this argument, we are of the opinion that a preponderance of the evidence does not show that Gordon

was a stockholder of the bank at the time he took the acknowledgment. It is true that at one place, the record recites that he was a stockholder at that time, and that he admitted such to be the fact when he first testified. After refreshing his memory, however, he testified that while he had been cashier of the bank for many years and had formerly owned stock in it, that at the date of the acknowledgment he was not a stockholder in the bank. He said that he disposed of his stock and only held forty shares of stock belonging to his brother as collateral security for a debt which his brother owed the bank, and for which he was surety for his brother to the bank. At the time he testified, Gordon was not in any way connected with the bank, but was the receiver of the United States Land Office located at Camden, Arkansas. His explanation of the matter was reasonable and consistent, and there is nothing in the record which in our minds contradicts his explanation. Therefore, we are of the opinion that he was not a stockholder in the bank at the time he took the acknowledgment, and that his certificate of acknowledgment is entitled to the same verity as would be attached to the certificate of any disinterested officer.

From the testimony set out in the statement of facts, we think it is fairly deducible that Gordon prepared the deed and delivered it to Gee on the second day of April; that Gee carried it home and after some words with his wife, procured her signature to it; that she became nervous after signing the deed, and was confined to her bed for several days, and that the acknowledgment to it was not taken for several days after she had signed it; and that she acknowledged it of her own free will.

(3) It will be noted that it appears from the testimony of Gee and White, both members of the firm, and of Gordon, the cashier of the bank, that the deed was prepared by Gordon and delivered to Gee on the second day of April, 1913. White said that Gee took the deed home with him and brought it back to the store and kept it for several days before it was delivered to Gordon to take the acknowledgment; that Mrs. Gee was sick for several days

following the first day of April. The physician who attended her at that time also stated that she was in a very nervous condition. It is fairly inferable from all the circumstances that Mrs. Gee became very nervous when her husband first informed her that it was necessary to mortgage their home to secure the overdrafts at the bank. She admits that she knew the mortgage was given for that purpose. After signing the deed she became prostrated and was confined to her bed for a few days on account of her nervous condition. Her daughters think she was confined to her bed for perhaps a week and say that they were constantly with her during that time, and she did not sign the deed. They were doubtless mistaken as to the length of time their mother was sick. The physician who attended her stated that her husband paid him \$3.00 on account of attending her on the 4th or 5th of April, 1913. It is not likely that this payment was made until her husband at least thought that she no longer needed the services of a physician and the amount indicates that not more than one or two visits were made by the physician. So it may be said that she was not confined to her bed after the 4th, or, at the furthest, the 5th, of April. This fact is corroborated by the testimony of both Gee and White. They both testified that Gordon said that he would take Mrs. Gee's acknowledgment over the telephone. White testified that the deed was kept in the store several days after it was first delivered to Gee before this conversation occurred. It is not at all probable that they would have acquiesced in Gordon's calling her up over the telephone to take her acknowledgment if she had been confined to her bed or was sick. While Gordon states that his recollection is that he took the acknowledgment on the evening of the 2d, or the morning of the 3d, of April, it is fairly deducible from the circumstances before stated that he was mistaken in this regard. It is very likely that he filled in the date of the deed when he prepared it, thinking that it would be acknowledged at the time it was signed. As above stated, the deed was kept at the store by Gee for several days after it was signed before it was given back

to Gordon for him to take the acknowledgment. Gordon then doubtless signed the acknowledgment leaving the date which had already been put in there when the deed had been prepared and delivered to Gee. It must be remembered that all the witnesses who testified to impeach the acknowledgment were directly interested in the result. When all the facts and circumstances in evidence are considered in the light of each other, we think the learned chancellor erred in holding that the certificate of acknowledgment was impeached and that Mrs. Gee did not acknowledge the deed.

It follows that the decree must be reversed and the cause will be remanded with directions to dismiss the complaint for want of equity and to decree a foreclosure of the mortgage in conformity with the prayer of the cross-complaint.

DEAN v. STATE.

Opinion delivered July 9, 1917.

1. LIQUOR—ILLEGAL SALE—ALLEGATION AS TO PURCHASER.—The State is not required to allege in the indictment the name of the person to whom the sale was made.
2. LIQUOR—ILLEGAL SALE—PROOF OF MORE THAN ONE SALE.—Each separate sale of liquor constitutes a separate offense, and the State may offer proof of more than one sale to secure a single conviction. *Seemle*, the effect of offering such proof is a bar to a subsequent prosecution for the making of any of the sales offered in proof upon which the State relied to secure a conviction.
3. WITNESSES—IMPEACHMENT.—The veracity of a witness can be impeached only by proof of his general reputation.
4. LIQUOR—ILLEGAL SALE—SUFFICIENCY OF THE EVIDENCE.—A conviction for the illegal sale of liquor *held* warranted by the proof.

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

G. C. & Joe Hardin, and *Ben Cravens*, for appellant.

1. It was error to admit the testimony of Joe Limberg; also to refuse evidence tending to impeach him as a witness.

2. The statement of the court in reference to the evidence of Watrous, was prejudicial and an error. Watrous' testimony as to the raid and finding whiskey in somebody else's room was prejudicial error.

3. It was error to refuse to permit Julius Richmond's testimony.

4. Proof of the commission of other crimes is not admissible. 92 Ark. 555; 84 *Id.* 16. The instructions are erroneous.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. Evidence of other crimes is admissible where the question of motive or intent is involved. *Mason v. State*, 127 Ark. 299; 72 Ark. 419; 48 *Id.* 34; 43 *Id.* 68; 72 *Id.* 586; 75 *Id.* 427.

2. The question asked the witnesses to impeach Joe Limberg were not in proper form. Kirby's Digest, § 3138; 59 Ark. 50.

3. Watrous' testimony was admissible as a circumstance to show guilt. *Springer v. State*, 129 Ark. 107. The remarks of the court were not prejudicial. The method attempted to impeach Joe Limberg is not tolerated by the law. 67 Ark. 117.

4. Instruction No. 7, given correctly, states the law. 105 Ark. 462; *Williams v. State*, 129 Ark. 348.

SMITH, J. Appellant seeks by this appeal to reverse the judgment of the court below sentencing him to the penitentiary for the period of one year for an alleged illegal sale of intoxicating liquor. Appellant was twice indicted, the cases against him being numbered, respectively, 5756 and 5757, and the name of George Whybark was endorsed upon the back of the first indictment as the witness for the State, and the name of Joe Limberg was endorsed on the back of the second indictment as the

State's witness. Appellant was tried upon the indictment upon which the name of Whybark was endorsed as a witness, but, at the trial, both Whybark and Limberg were permitted to testify in regard to a sale made to each of them at a different time and place. This action of the court in permitting evidence of a sale to Limberg to be introduced is assigned as error.

The evidence of the witness Limberg was especially damaging; but there was evidence tending to impeach his veracity. It was shown that he was himself a bootlegger, and had committed numerous violations of the law. Impeaching witnesses were asked, "I will ask you, from what you know of him, and from his general reputation in this community, if you would believe him on oath?" The court held this opinion should be predicated upon the general reputation of Limberg, and not upon the personal knowledge of the impeaching witness, and this ruling is assigned as error.

The court permitted a witness named Watrous, who had been a deputy prosecuting attorney during the year 1916, to testify that he had participated in a raid made upon the house in which appellant roomed at the time, and had there found a suitcase and a grip containing forty pints of whiskey, and that later on appellant asked witness what he had done with his suit case. The raid occurred about December 1, 1916, and the testimony tended to show the sale of liquor to have been made some time after the first of January, 1917. This action of the court is also assigned as error.

The court refused to permit witnesses to testify that they had bought whisky illegally from Limberg. No attempt was made to show that it was Limberg, and not appellant, who made the sales in question, and the court also refused to permit a witness named Richmond to testify that he had overheard a conversation between appellant and Whybark, in which Whybark asked appellant to get him some whiskey, and that appellant had later asked witness if he (the witness) knew where any liquor could be obtained. It is also insisted that the evidence is insuffi-

cient to sustain the conviction, and that error was committed in the giving of instructions.

(1-2) The proof of the sale to Limberg was not incompetent. The State was not required to allege the name of the person to whom the sale was made. Each separate sale constitutes a separate offense, yet the State may, if it so elects, offer proof of more than one sale to secure a single conviction. The effect of such action is, of course, to bar a subsequent prosecution for the making of any of the sales offered in proof upon which the State relied to secure a conviction.

(3) The court properly excluded the opinion of witnesses touching the veracity of Limberg based upon their own knowledge. There must be some uniform standard with which compliance must be had to permit witnesses to express an opinion concerning another witness' veracity, and that standard is the general reputation of the witness sought to be impeached. If witnesses were permitted to use their own personal knowledge as the basis of their opinion, this knowledge would become highly relevant, for otherwise the jury would not know how to value the evidence of the impeaching witness, and an indefinite number of collateral issues would become material. To avoid this confusion, the law requires that this opinion be based upon general reputation, and not the witness' own personal knowledge. Section 3138 of Kirby's Digest; *Cole v. State*, 59 Ark. 50.

(4) The evidence of the witness Watrous was admissible, although no attempt was made to show that the liquor found at the time of the raid was the liquor alleged to have been sold. Appellant's connection with that liquor is indicated by the question he asked in regard to the suitcase in which the liquor was found, and the quantity of the pint bottles indicated the purpose for which it had been put in the suitcase and grip, and the time of the raid was not so far removed from the day of the alleged sale that we can say that the testimony has no probative value in showing what appellant's business was at about that time. *Springer v. State*, 129 Ark. 107.

The witness Limberg admitted, upon his cross-examination, that he had made many sales of liquor illegally, although he denied that he was a wholesale dealer in the illegal sale of liquor. Proof of a few specific sales could have added nothing to the record of crime to which the witness confessed. Moreover, the impeaching evidence should have related to general reputation, and not to specific instances of bad conduct. *St. Louis, I. M. & S. Ry. Co. v. Stroud*, 67 Ark. 115. Proof of the inquiry made by appellant to Richmond as to where liquor might be procured would have been mere self-serving declarations, and are incompetent as such.

Over appellant's objection, the court charged the jury as follows:

"7. I charge you further that if the prosecuting witness, Whybark, was the man for whom he bought the whiskey, and further find that the defendant acted for both the seller and the buyer, and was the intermediary through which the sale was made, and said sale would not have been made except for the aid that the defendant rendered in the transaction, then in this event you should convict the defendant."

But the court also gave the following charge:

"8. I charge you further, that if you find the defendant in this case purchased liquor from some third party for Whybark, solely as a matter of accommodation to Whybark, and that this was a *bona fide* transaction, and not a subterfuge on the part of the defendant to evade the liquor laws, and you further find that the defendant did not furnish the liquor in controversy himself, and did not sell it, or was not interested in the sale of it, then in this event you should acquit the defendant."

The court also told the jury that the instructions were to be considered as a whole, and that the instructions, as a whole, declared the law of the case.

These instructions correctly declare the law as announced by us in the recent case of *Williams v. State*, 129 Ark. 348, and cases there cited.

There can be no question of the sufficiency of the evidence if the witnesses on behalf of the prosecution are to be believed. But this question of veracity is one solely for the jury, and we can only say that this evidence is legally sufficient to support the verdict if accepted by the jury.

Other questions are discussed in the brief, but we do not regard them as of sufficient importance to discuss here.

Finding no prejudicial error, the judgment is affirmed.

WEAVER v. STATE.

Opinion delivered September 24, 1917.

CRIMINAL LAW—NEW TRIAL—FORMER JEOPARDY.—Where the court has granted the defendant a new trial, he can not thereafter at a subsequent trial plead former jeopardy.

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

I. J. Matheny, for appellant.

1. The plea of former jeopardy should have been sustained. 43 Ark. 271; Kirby & Castle's Digest, § 2515; 81 Ark. 41.

2. The evidence does not warrant a conviction. Appellant took the hog in good faith, believing it was his own.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The plea of former jeopardy was properly overruled. 26 Ark. 260; 29 *Id.* 31; 32 *Id.* 231; 13 *Id.* 722.

2. The evidence sustains the verdict and there is no error.

MCCULLOCH, C. J. Defendant appealed from the judgment of conviction upon the charge of grand larceny. There was a former trial of the cause, which resulted in defendant's conviction, but the court granted a new trial on the ground that one of the jurors had become ill dur-

ing the progress of the trial and was discharged from the jury. The record of the former trial recites an agreement entered into between the defendant and the prosecuting attorney for the discharge of the juror on account of the illness of the latter and an agreement to proceed with the trial before the jury composed of eleven jurors. When the case was called for the second trial defendant pleaded former jeopardy in bar of further prosecution. The ruling of the court in failing to sustain the plea is the principal ground urged for the reversal of the judgment rendered pursuant to the conviction in the last trial.

The ruling of the trial court was correct, for the granting of a new trial removed the jeopardy and authorized a retrial of the issue. This court once said that "it is rather a merciful interposition of the court, than any invasion of his rights, to set aside the conviction upon his own application in order to afford him the opportunity of another trial." *Johnson v. State*, 29 Ark. 31. It is immaterial whether the ruling of the court in granting a new trial was correct or erroneous, for the effect of the ruling was to wipe out the former proceeding and place the cause back where it was before the trial began. The court could have rightfully discharged the jury when the juror became ill (*Lee v. State*, 26 Ark. 260), and doubtless would have done so but for the express agreement of the parties that the trial should proceed before eleven jurors. But it is, as before stated, unimportant to inquire whether or not the court was correct in granting a new trial, as the fact remains that the new trial was granted upon the defendant's own request and for his benefit, and he can not claim that he was twice put in jeopardy of his liberty.

It is insisted that the evidence is insufficient to sustain the verdict, but our conclusion is that the evidence was abundant. Defendant was convicted of stealing a hog, the property of V. D. McAdams. He admits that he took the hog out of the range, and that it was the property of McAdams, but he contends that he did so by mistake, supposing that the hog was his own property and was in his brother's mark. There was a slight degree of simi-

larity between the two marks, but not enough to deceive a person practiced in observing the ear marks of animals. The stolen hog was marked with a swallow-fork and underbit in the right ear and an underbit in the left, and defendant testified that his brother's mark was a sloping-fork in the right and an underbit in the left. The jury might well have found that the difference in the mark was sufficient to put defendant upon inquiry and that he knew when he took the hog that it was not in his brother's mark. In addition to that, the stolen hog had a metal tag attached to one of its ears with the name of McAdams stamped thereon. This afforded abundant evidence of the fact that defendant's plea of mistake in taking the wrong hog was groundless. Besides that, the circumstances under which the hog was found by the owner in defendant's possession, were very suspicious, indicating an entire absence of mistake on defendant's part in taking the hog.

Judgment affirmed.

PORTER v. IVY.

Opinion delivered September 24, 1917.

1. TAXES—LEVY—COUNTY TAXES—PROCEDURE.—Kirby's Digest, § 1498, providing for the manner of levying certain taxes applies only to county taxes.
2. TAXES—METHOD OF LEVYING.—The levying court *held* to have proceeded properly under the statute in levying certain county taxes.

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

Gustave Jones, for appellant.

The tax sale was void. The law was not complied with. Art. 7, § 3, Const.; Kirby's Digest, §§ 1496-8; 100 Ark. 488; 22 Mich. 104; 103 Ark. 579.

The record does not show that a vote was taken, but only recites that it was unanimously ordered, not voted, and does not show that a quorum was present.

Hillhouse & Boyce, for appellee.

The sale was not void. All necessary steps were taken according to law as the record shows. 81 Ark. 73-79; 71 *Id.* 222; 107 *Id.* 374-380.

Every presumption is in favor of the legality of the proceedings. 3 Cyc. 275; 31 Ark. 193; 2 *Id.* 14; 87 *Id.* 406; 66 *Id.* 183; 68 *Id.* 340. The records show that the taxes were properly levied.

McCULLOCH, C. J. This case involves the question of the validity of a tax sale of land in Jackson County, which is assailed on the ground that the record of the county court fails to show the levy of taxes in accordance with the requirements of the statute. The contention in support of the attack upon the validity of the sale is that the record of the levying court fails to show in detail the affirmative and negative votes on the proposition or motion to levy the taxes as provided by statute, which reads as follows:

"The clerk of the circuit court in person, or by deputy in his capacity as clerk of the county court, shall attend the sitting of said court and keep in the county court record a fair written record of the proceedings of said court, and the names of those members of the court voting in the affirmative and of those voting in the negative on all propositions or motions to levy a tax or appropriate any money shall be entered at large on said record." Kirby's Digest, § 1498.

This statute applies, it is claimed, to the levying of State taxes and school taxes. The record of the county court, introduced in evidence in this case, recites in the opening order the presence of the county judge and certain of the justices of the peace, naming them, and then follows the recital of the levy of the State taxes in the following language:

"On this day it was unanimously ordered by the court that a State tax of six and eighty-seven and one-half mills on the dollar be, and the same is hereby, levied on all taxable property, both real and personal, in Jackson

County as follows, towit" (here follows the items composing the levy of the different State funds). There is also a recital in the following language of the levy of the school taxes: "On this day it was unanimously ordered by the court that the following tax be, and the same is hereby, levied on all taxable property, both real and personal, within the various school districts of Jackson County, Arkansas, as and for the purposes voted for by the electors of said school districts at an election held in the said Jackson County, Arkansas, on the third Saturday in May, 1911, as certified to this court by the judges and clerks of said election in said school districts as follows, towit. (Then follows the amount of taxes voted and levied in each school district.) "And a vote was taken upon each of said amounts so levied as above set out, separately as they were certified to this court by the judges and clerks of said election held in said several school districts, and each and every justice of the peace voted 'yes' on each of said several levies as above set out."

There is no contention in the case with reference to levy of taxes for county purposes. It is erroneous to assume that the statute concerning the method of levying taxes by the county levying court applies to State taxes, for it is obvious that the statute is intended to apply only to county taxes. In fact, the statute, in express terms, limits its own operation to the levy of "county, municipal and school taxes for the current year." Kirby's Digest, § 1499, subdivision 8. State taxes are levied by the Legislature and the clerk of the county court is required by statute to extend upon the tax books the taxes levied for State purposes as certified by the Auditor of State. Kirby's Digest, § 7020. The Auditor is required by statute to "give notice to such clerks of the county court of the rates per centum required by the General Assembly to be levied" for State purposes, and that the rates so certified "shall be by the county clerks levied upon the taxable property contained in the tax books of their respective counties." Kirby's Digest, § 7033.

It is contended that the constitutional provision (art. 7, § 30) for the levying of county taxes by the court composed of the justices of the peace of each county sitting with the county judge applies to State taxes levied in the county. In other words, the contention is, as we understand it, that the words "county taxes" include all taxes to be imposed in the county for both State and county purposes. This is not, however, the correct interpretation of the language of the Constitution. It is intended to provide a method of levying taxes for county purposes. The language of the Constitution clearly contemplates that State taxes are to be levied by the Legislature, for there is contained in that instrument an express limitation upon the power of the Legislature as to the amount of taxes to be levied. Art. 16, § 8. But, even if the statute applied to the levy of State taxes, the record shows sufficient compliance with respect to those taxes, as well as the levy of school taxes. The record recites the names of the justices of the peace who were present and the court will take judicial knowledge of the fact that those present constituted a quorum. It is not essential to the validity of the record that it must contain an affirmative recital of the fact that a majority of the justices of the peace were present. And the recital in the record that the levy of the taxes was "unanimously ordered" is, in connection with the preceding recital of those present, tantamount to a specification of the names of those who voted on the question. *Hilliard v. Bunker*, 68 Ark. 340; *Morris v. Levy Lumber Co.*, 103 Ark. 579.

The statute provides that the county court must levy school taxes (Kirby's Digest, § 7595), but, as before stated, the record shows a compliance with the statute in the manner of levying those taxes. The attack upon the validity of the sale is, therefore, unfounded and the chancellor was correct in so deciding.

Decree affirmed.

DAUGHERTY *v.* STATE.

Opinion delivered September 24, 1917.

LARCENY—HORSE—AMOUNT OF PUNISHMENT.—Appellant was indicted for the larceny of a buggy of the value of \$40, a set of harness of the value of \$10, and a horse. The jury found defendant guilty and fixed his punishment at 10 years in the penitentiary. The court instructed the jury that they could convict and punish either for the larceny of the horse or of the buggy and harness. *Held*, under this instruction the conviction was manifestly for the larceny of the horse, and that therefore, under the statute, the punishment fixed was not excessive.

Appeal from Jefferson Circuit Court; *W. B. Sorrells*, Judge; affirmed.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The verdict is not cruel nor excessive. Kirby's Digest, § 1828; 45 L. R. A. (note) 136; 113 Ark. 454-464; 68 N. W. 636; 69 *Id.* 953; 78 Pac. 897; 102 Fed. 473.

2. The evidence fully sustains the verdict.

WOOD, J. Appellant was convicted on an indictment charging him with "feloniously taking, stealing and carrying away one buggy of the value of forty dollars, and one set of harness of the value of ten dollars, and one horse, all the property of L. F. Boston," etc. The jury fixed the punishment at ten years in the State penitentiary, and from the judgment of sentence the appellant prosecutes this appeal.

The only specific ground in the motion for a new trial is because the verdict of the jury "assesses his punishment for grand larceny of property that the proof shows was not over forty dollars in value at ten years in the penitentiary, which is cruel and excessive."

The statute provides that "whoever shall be convicted of stealing any horse," etc., shall be imprisoned in the State penitentiary not less than one nor more than fifteen years. The punishment in cases of grand larceny, under the general statute, is not less than one nor more than five years.

The trial court instructed the jury that if they found the appellant guilty they could only fix his punishment for the larceny of either the horse or the buggy and harness. The jury, under this instruction, manifestly fixed the punishment of the appellant as for the larceny of the horse. The statute authorizes the punishment thus adjudged, and the verdict did not exceed the maximum penalty prescribed by the statute for the larceny of a horse. Therefore, no unusual, cruel or excessive punishment was imposed. See *In re Wm. W. Taylor*, 45 L. R. A. 136, and note.

No specific assignment of error in the giving of instructions is set up in the motion for a new trial. The motion for a new trial contains only a general assignment, "that the verdict is contrary to the law." We find no error in the instructions.

The only other ground of the motion for a new trial is that the verdict was contrary to the evidence. It could serve no useful purpose to set out in detail and discuss the evidence. It was amply sufficient to sustain the verdict.

The judgment is, therefore, in all things correct, and it is affirmed.

CITY OF ARGENTA v. KEATH.

Opinion delivered September 24, 1917.

MUNICIPAL CORPORATIONS—LICENSING AUTOMOBILES—DOING BUSINESS BETWEEN CITY AND A POINT OUTSIDE.—Under Acts 134, p. 94, Acts 1911, providing for the registration of motor driven vehicles and the control of the same, a municipal corporation is without authority to exact a license fee from the owner of a motor driven vehicle hauling passengers from a point outside the city, through the city, and to a point beyond the limits of said city.

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

J. F. Wills and *Rose, Hemingway, Cantrell, Loughborough & Miles*, for appellant.

120 Ark. 226 is not conclusive of this case. The ordinances are differently worded and seek to accomplish different objects. It is the duty of the courts to give effect to the intention of the Legislature and not defeat it. 40 Ark. 431; 58 *Id.* 116; 83 *Id.* 116; 104 *Id.* 593; 109 *Id.* 564; 112 *Id.* 123; 114 *Id.* 260; 121 *Id.* 349. Less regard is to be paid to the words used than to the policy which dictated the act. 28 Ark. 200.

The ordinance is legal, and should be upheld. 83 Atl. 770. See 85 S. E. 781; 153 Pac. 1194; 178 S. W. 6; 153 Pac. 93; 182 S. W. 685; 121 Ark. 606; 34 *Id.* 263; 35 *Id.* 60; 37 *Id.* 493; 58 *Id.* 113; 94 *Id.* 422; 106 *Id.* 517; 109 *Id.* 556; 56 *Id.* 370; 117 Pac. 93; 68 So. 926.

Gus Fulk and *W. A. Boyd*, for appellee.

120 Ark. 226 virtually settles this case. Municipal corporations can only exercise such powers as are specially given them by statute. The language of the motor vehicle act 1911 is unambiguous, and only applies to vehicles used *within* the city limits, and not to those merely passing through. 11 Ark. 45; 46 *Id.* 159; 35 *Id.* 56; 48 *Id.* 305. As to the intent of the Legislature, see 27 Ark. 419; 36 *Id.* 56. The power must be expressly delegated. 26 Mich. 474; 80 Ohio, 367; 64 S. E. 944; 49 N. J. 110; 54 Ill. 87. 56 Ark. 350 is not in point. "Within" means "in the interior of" and not over or across.

STATEMENT OF FACTS.

Argenta is a city of the first class. Its council passed an ordinance which provides as follows:

"Section 1. Every person, firm or corporation owning, operating or controlling any automobile or any other horseless vehicle propelled by motor power generated by the use of gasoline, electricity or steam, other than those operated upon rails or tracks, for public service, and using the streets of Argenta for the operation and running of such motor propelled vehicles, shall pay to the city collector a license fee, quarterly in advance, as follows." (Then follows the classification of vehicles and fees to be charged.)

"Section 2. Any motor propelled vehicle carrying passengers beyond its seating capacity shall be liable for license for any quarter up to the maximum number of passengers carried at that time.

"Section 3. That the license herein provided shall be paid to the city collector in advance, said license to be paid quarterly, and the city collector shall register the name of the owner, and the capacity and make of such motor propelled vehicle, and shall issue to such applicant a certificate and license tag; such license tag shall be kept displayed in a conspicuous place on said vehicle, so that same can be seen by reflection from the rear light so as to be easily read at night, and shall be used only on the machine or vehicle for which such license is issued."

This suit was instituted by the appellee, who set up in his complaint that he was operating an automobile for hire between the city of Little Rock and Fort Roots, passing through the city of Argenta *en route*; that by reason of military activities there was considerable passenger traffic over said route which was being taken care of by appellee and by others similarly engaged; that appellee brought this suit in behalf of himself and other automobile operators who had paid the State license fee required by law. The complaint set up the ordinance above set forth, and alleged that neither the appellee nor any other complainant undertook to transport passengers from place to place within the limits of the city of Argenta, and that they, therefore, were not subject to the terms of the ordinance; that the city of Argenta, through its police officers, was interfering with the appellee and other automobile operators by refusing to allow them to enter Argenta as a terminus, or to pass through, or to take on or discharge interurban passengers until they paid the license fee required by the above ordinance; that said action on the part of the city was an attempt to extend its jurisdiction beyond its territorial limits; that there was no statute authorizing the city to pass and enforce said ordinance. Wherefore, he prayed for a writ of injunction

restraining the city from the enforcement of said ordinance.

The answer denied the allegations of the complaint, and set up that the ordinance was passed solely for the regulation of the jitney business being conducted solely over its streets and within its limits, and for the protection of the lives and property of its citizens. There was also attached to the answer a general demurrer to the complaint.

The cause was heard upon the pleadings and oral testimony, which is duly authenticated and made a part of the record, and upon an agreement of counsel, which it is unnecessary to set forth in detail. The cause may be tried here as if it had been disposed of on the demurrer. The manifest purpose of the litigation is to challenge the validity of the ordinance as it affects the appellee's business.

The court entered a decree granting the prayer of appellee's complaint, in effect holding that the ordinance was invalid as to those who were engaged in transporting passengers for hire from points within the limits of the city of Argenta to points without said city limits, and from points without the said city limits to points within said city limits, and from points without said city limits to points without said city limits, but over and across the streets of the city of Argenta; that the ordinance was valid only as to those who were engaged in transporting passengers from points within the limits of the city of Argenta to points within said limits.

The appellant brings this appeal.

WOOD, J., (after stating the facts). A municipal corporation has no powers except those expressly conferred by the Legislature, and those necessarily or fairly implied as incident to or essential for the attainment of the purposes expressly declared. *Willis v. City of Fort Smith*, 121 Ark. 606; *Bain v. Fort Smith Light & Traction Co.*, 116 Ark. 125, 134; *Morrilton Waterworks Imp. Dist. v. Earl*, 71 Ark. 4.

In *Willis v. City of Fort Smith, supra*, we said: "The State has the right to regulate and control the use of motor vehicles except as it has granted such right to other governmental agencies, and it expressly recognizes in the motor vehicle law the exclusive right of municipal corporations to make and enforce rules and regulations for motor vehicles used for public hire."

The motor vehicle law referred to is act 134 of the acts of the General Assembly of 1911, page 94. The purpose of the act, as expressed in its title, is "to provide for the registration of motor vehicles, and uniform rules regulating the use of automobiles and other horseless conveyances upon the public streets, roads and highways of the State of Arkansas." Section 13 of the act provides as follows: "No owner of a motor vehicle who shall have **obtained a certificate from the Secretary of State**, as hereinbefore provided, shall be required to obtain any other license or permits to use and operate the same, nor shall such owner be * * * excluded, or prohibited, or limited in the free use of his said motor vehicle, nor limited as to speed upon any public street, * * * nor be required to comply with other provisions or conditions as to the use of said motor vehicle except as in this act provided." Then follows a provision that nothing in the section shall be construed to apply to or include any speedway created and maintained by the local authority or any municipal corporation within the State. And a further provision that the local authorities having jurisdiction over public parks and boulevards connecting or pertaining thereto shall not be prohibited from enforcing ordinances concerning the speed at which motor vehicles may be operated "within or upon such parks, highways or boulevards." Then follows a provision conferring the power upon the local authorities having jurisdiction over cemeteries to exclude motor vehicles therefrom; and a further provision restricting the power of municipalities to limit the speed of motor vehicles except in the manner provided for in the act. And the section concludes as follows: "*Provided*, that nothing in this act shall be construed to affect

the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor vehicles which are used within their limits for public hire.”

Counsel for appellant contend that the last paragraph above quoted confers upon appellant power to pass the ordinance under review. But when the whole act is considered, and especially the context of the above paragraph, as found in section 13, it is plain that the Legislature intended that municipal corporations should have the power to make and enforce ordinances, rules and regulations affecting motor vehicles which are used for public hire exclusively within the territorial limits of such corporations. It is equally plain, from the language of the whole section, taken in connection with the language of the last paragraph, that the Legislature did not intend by the language of the last paragraph to delegate to municipal corporations the power to make and enforce ordinances, rules and regulations affecting motor vehicles which are used only for traffic from points within the city to points without, and *vice versa*, or to and from points without the city limits, but passing through the city *en route*, and which are not at any time used for traffic between points within the city. Such is the effect of the holding of this court in *McDonald v. City of Paragould*, 120 Ark. 226, and the present case, in principle, is ruled by the decision in that case. In that case the city of Paragould enacted an ordinance requiring every person owning an automobile “for the transportation of passengers for hire within the limits of the city of Paragould” to procure a license. McDonald resided in the city and kept an automobile upon which he had paid the State license and which he used in carrying passengers for hire from points within the city limits to points outside of the city. He at no time carried persons for hire from one point to another within the city limits.

He was convicted for the refusal to pay the license required by the ordinance. In that case we said: “The ordinance, properly construed, means only to require the owner or keeper of an automobile for the transportation

of passengers for hire within the limits of the city to pay the license fee, and, since the appellant did not keep or operate his automobile for the transportation of persons for hire from and to points within the city, he was not using it for the transportation of passengers for hire within the limits of the city, in violation of the ordinance. The terms of the ordinance are satisfied by holding that license taxes are to be imposed only by that municipality in which the business or occupation is carried on or conducted. Appellant's business not being conducted within the city limits, a refusal to pay the license did not constitute a violation of the ordinance."

The words "within the limits of the city" in the ordinance in that case followed the language of the statute. If we were correct in our construction of the ordinance in that case it necessarily follows that we are also correct in our construction of the statute in this case. The authority of municipal corporations to exercise powers beyond their territorial limits must be derived from some statute, either expressly conferring such powers or granting them by necessary implication. *City of Coldwater v. Tucker*, 36 Mich. 474; *Pegg v. Columbus*, 80 Ohio, 367; *White Oak Coal Co. v. City of Manchester*, 64 S. E. 944.

Since the appellant had no authority to enact an ordinance broader than the terms of the statute, it follows that the ordinance requiring appellant to pay a license fee for the business conducted by him, as shown by the pleadings and proof was invalid.

Appellant relies upon *Willis v. City of Fort Smith*, *supra*, and upon *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 350. In *Willis v. City of Fort Smith*, an attack was made upon the ordinance generally. The specific question as to whether the ordinance was invalid as to those operating motor vehicles both within and without the city limits was not raised nor decided. In *Arkadelphia Lumber Co. v. Arkadelphia* the court held that: "The right to operate a ferry over a stream (one of whose banks was situated in the town of Arkadelphia) was incident to and dependent upon the ownership of the banks

on which the landing is made, and not on the possession or jurisdiction of the waters of the stream. The holding is predicated upon the fact that the western bank of Ouachita river, one of the landings was within the corporate limits of the city, and the right to levy the license tax was placed solely upon the power of the city under the statute to regulate ferries "within its boundaries." The case is not in conflict, but in harmony with the present holding. Here the attempt is to construe the ordinance so as to give the city of Argenta the right to regulate motor vehicles for hire not exclusively within its boundaries.

In addition to the cases cited in *McDonald v. City of Paragould*, *supra*, the following case, cited in appellee's brief, to wit, *City of Cairo v. Adams Express Co.*, 54 Ill. App. 87, is in point, all of which cases show that our construction of the ordinance and the statute upon which it is based is sustained by excellent authority.

The decree is therefore correct, and it is affirmed.

CONDIT v. STATE.

Opinion delivered September 24, 1917.

1. LIQUOR—ILLEGAL SALE—SUFFICIENT PROOF.—The testimony of a detective, *held* sufficient to warrant the conviction of the defendant of the illegal sale of liquor.
2. LIQUOR—ILLEGAL SALE—ACT OF INTERMEDIARY.—One who acts as intermediary between the purchaser and seller, may be convicted of the crime of illegally selling intoxicating liquor.
3. LIQUOR—ILLEGAL SALE—INSTRUCTION.—An instruction telling the jury that they should convict, if they find the facts to be true, as detailed by the prosecuting witness, beyond a reasonable doubt, is not improper.

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

Edwin Hiner, for appellant.

1. The testimony fails to show a sale of liquor by defendant.

2. The court erred in giving instruction No. 3 and in refusing 1 and 2. 90 Ark. 579.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The testimony shows a sale of liquor, but appellant was guilty as an intermediary. 125 Ark. 232; 105 *Id.* 462; 56 A. L. R. No. 5, 348.

2. There is no error in the instructions given or refused. 90 Ark. 579.

HART, J. The grand jury returned two indictments against Pete Condit for selling intoxicating liquors. Each indictment charged him with the sale of intoxicating liquors on the 28th day of May, 1917. By agreement between the defendant and the prosecuting attorney, the two cases were consolidated and tried together. The jury returned a verdict of guilty in each case. From the judgment of conviction the defendant has duly prosecuted an appeal to this court. It is agreed that the circuit court granted a new trial in one of the cases and that alleged errors in only one of the cases are involved in this appeal.

(1) A detective was employed by the city of Fort Smith for the purpose of catching those who sold liquor there in May, 1917. This detective, the defendant, and another person drank some liquor together in an office building in the city of Fort Smith in Sebastian County, Arkansas. The defendant told the detective that they could purchase more liquor at a rooming house kept by Amy Cline in the city of Fort Smith. They went to her house and the defendant was given two dollars by the detective for the purpose of buying whiskey. The detective said the defendant was gone possibly two minutes and came back with a pint of whiskey which he set on the table; that he, the defendant, and the rooming house keeper all drank pretty freely out of it. Both the defendant and Amy Cline, the rooming house keeper, denied that the defendant sold or delivered to the detective any quantity of whiskey at her rooming house. They said that the detective was very drunk when he arrived at her

house and that finally the rooming house keeper threatened him with the police before she could get him to leave. The testimony of the detective, if believed by the jury, was sufficient to warrant a conviction. *Bobo v. State*, 105 Ark. 462, and *Williams v. State*, 129 Ark. 344.

(2) It is also contended by the defendant that the court erred in refusing to give the following instruction:

"2. Before the jury would be authorized to find the defendant guilty they must be satisfied from the evidence, beyond a reasonable doubt, that the defendant either sold the liquor himself or was in some way either directly or indirectly interested in the sale, if you find a sale was made."

There was no error in refusing to give this instruction. It had a tendency to confuse and mislead the jury. Where the intermediary between the purchaser and the seller is a necessary factor without whose assistance the sale could not have been consummated, he is interested in the sale in the sense of the law, whether he has any pecuniary interest or not. *Bobo v. State*, 105 Ark. 462; *Williams v. State*, 129 Ark. 344, and *Wilson v. State*, 130 Ark. 204.

The instruction under consideration was misleading in this respect. The jury might have gathered from it that they should not find the defendant guilty unless he was pecuniarily interested in the sale of the liquor. The court instructed the jury fully on the question of the interest of the defendant necessary to be proved to convict him in accordance with the principles of law laid down in the cases just cited.

(3) Again it is contended that the court erred in giving instruction No. 3. The instruction is as follows:

"3. On the sale that is alleged to have been made at Amy Cline's place, I charge you that if you find from the evidence in this case, beyond a reasonable doubt, that the prosecuting witness gave the defendant \$2, and that the defendant took the same and left the prosecuting witness for a few minutes and then returned and delivered

to him a pint of whiskey, or any other amount, then in this event you should convict the defendant."

The defendant contended that in this instruction the court invaded the province of the jury by expressing an opinion on the facts. We do not agree with counsel in this contention. The issue of fact in this case was simple and the instruction is hypothetical in form. It contains a statement of the facts testified to by the prosecuting witness and tells the jury if they find such facts to be true from the evidence in the case beyond a reasonable doubt, they should convict the defendant. This was not equivalent to directing a verdict nor was it a comment on the facts by the trial court. *Parker v. State*, 130 Ark. 234.

The judgment will be affirmed.

TONGS v. STATE.

Opinion delivered September 24, 1917.

1. FORGERY—SUFFICIENCY OF EVIDENCE.—The evidence held sufficient to warrant a conviction of uttering a forged instrument.
2. CONFESSIONS—IMPROPER INFLUENCE.—When improper influences have been used to obtain a confession, the presumption arises that a subsequent confession of the same crime flows from that influence; however, such presumption may be overcome by positive evidence that the subsequent confession was given free from undue influences.
3. CONFESSIONS—VALIDITY—TEST.—In determining whether a confession was voluntarily made, the trial court will look to the whole situation and surroundings of the accused, and its finding that the confession was free from taint of official inducement will be upheld where there is evidence to support it.
4. APPEAL AND ERROR—CONTINUANCE—DILIGENCE—ABSENT WITNESS.—A new trial will not be granted on the ground of new evidence, where the defendant does not show the exercise of proper diligence.
5. APPEAL AND ERROR—MULTIPLICATION OF INSTRUCTIONS.—The court is not required to multiply instructions on the same point.
6. FORGERY—PERMISSION TO SIGN NAME.—Defendant was charged with uttering a forged check signed "T. J. Smith," and signed by one Joe Smith, who was the son of T. J. Smith. It appeared that

T. J. Smith had permitted his son to sign his name, but had withdrawn the authority and so notified the bank. *Held*, under the facts that defendant was guilty as charged.

Appeal from Hempstead Circuit Court; *George R. Haynie*, Judge; affirmed.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The motion for continuance was properly overruled. Kirby's Digest, § 6173; 100 Ark. 132.

2. The indictment is sufficient. Kirby's Digest, § 2228.

3. The so-called confession was admissible in evidence. 102 Ark. 525; 1 Ruling Case Law, 551; 18 L. R. A. (N. S.) 771, note; 73 Kan. 688; 101 Ga. 9; 29 S. E. 309. The confession was voluntary. 28 Ark. 121; 50 *Id.* 305; 63 *Id.* 527; 74 *Id.* 399.

4. There is no error in the instructions.

HART, J. Jasper Tongs, alias J. W. Clark, was convicted of uttering a forged instrument, and his punishment was fixed by the jury at two years in the State penitentiary. The defendant has duly prosecuted an appeal from the judgment of conviction, but he has not filed a brief in the case. The Attorney General, however, has fairly abstracted the testimony and has carefully discussed the grounds for reversal alleged by the defendant in his motion for a new trial.

The first ground of the defendant's motion for a new trial is that the testimony is not sufficient to warrant the verdict. The check charged to have been forged is as follows:

"Hope, Arkansas, 1-3-1917.

"No. Citizens National Bank, 81-110.

"Pay to the order of J. W. Clark \$60.00, sixty dollars.

"T. J. Smith."

(Endorsed on back, "J. W. Clark.")

The bookkeeper of the Citizens National Bank, a corporation, testified that when the check was first presented, it purported to have been signed by J. T. Smith instead

of T. J. Smith, and that he would not pay it that way and that the defendant told him the check had been signed by T. J. Smith; that he had been working for T. J. Smith and had sold him a horse and that the check had been given him in payment therefor; that he was on his way to Texas, and for that reason wanted to cash the check at once; that he went out and came back with the check changed so as to show that it was signed by T. J. Smith; that T. J. Smith was about sixty years of age and had an account with the bank; that his son, Joe Smith, had no account with the bank; that there had been some trouble about Joe Smith signing T. J. Smith's name to checks and presenting them to the bank for payment; that the bank had been notified by T. J. Smith not to pay any more checks where his son Joe had signed his name to them; that he would not have cashed the check in question unless he had thought it had been signed by T. J. Smith.

(1) T. J. Smith testified that he did not sign the check in question and that the defendant had not sold him a horse. It was also shown in evidence that the signature to the check resembled that of T. J. Smith. A written confession signed by the defendant and dated "Hope, Arkansas, March 12, 1917," was read in evidence to the jury. The confession detailed the wanderings of Joe Smith and the defendant from the time they escaped from jail in the State of Oklahoma until they came to the residence of T. J. Smith in Hempstead County, Arkansas. In it the defendant specifically admitted that he knew Joe Smith had signed T. J. Smith's name to the check and that he, after endorsing the check, presented it to the bank at Hope in Hempstead County, Arkansas, for payment; that the cashier stated that the initials of T. J. Smith as they appeared on the check had been reversed and asked the defendant if T. J. Smith had signed the check; that the defendant was then requested to get T. J. Smith to sign the check with his initials in their proper order; that the defendant went out for that purpose and later on in the day presented the check purported to have been signed by T. J. Smith and the bank then cashed it.

The defendant denied that he knew that Joe Smith had forged T. J. Smith's name to the check. He testified that Joe Smith had given him the check in payment of a debt he owed him and that he thought the signature to it was genuine.

It will be readily apparent from the above statement of facts that the testimony was sufficient to warrant the verdict.

Another ground for defendant's motion for a new trial was that the confession was improperly read to the jury. The defendant testified that he was arrested at his home in Texas, and that he did not make the statements contained in the confession as read to the jury. He stated that when he was arrested he was told that if he would sign the written statement that he would be released and that he signed the statement because he thought he was going to be released that night; that a portion of the statement is true and that some of it he did not state at all. On the other hand, the mayor of Hope stated that after the defendant was arrested he was brought to his office and that the confession was written out there by the detective who had him under arrest; that the confession was voluntary and freely made; that no hope of reward or promise of immunity was made to the defendant.

(2) It is true that when improper influences have been used to obtain a confession from a defendant, the presumption arises that a subsequent confession of the same crime flows from that influence. It is equally well settled, however, that such presumption may be overcome by positive evidence that the subsequent confession was given free from undue influence. *Turner v. State*, 109 Ark. 332, and *Smith v. State*, 74 Ark. 397.

(3) From the testimony of the mayor of the city of Hope the court might have found that the confession was made in the mayor's office and was freely and voluntarily made. In determining whether a confession was voluntarily made, the court must look to the whole situation and surroundings of the accused and its finding that the confession was free from taint of official inducement will

be upheld where there is evidence to support it. *Dewain v. State*, 114 Ark. 472, and *Greenwood v. State*, 107 Ark. 568.

(4) Another ground of defendant's motion for a new trial was that the circuit court erred in overruling his motion for a continuance. The defendant and Joe Smith were confined in jail in the State of Oklahoma. They escaped therefrom and finally went to the home of Joe Smith's father in Hempstead County, Arkansas, where the forgery charged in the indictment is alleged to have been committed. It was the theory of the defendant that the check in question was given him by Joe Smith in payment of his services in helping to get Smith to his home in Hempstead County, Arkansas. He stated in his motion for a continuance that he could prove this fact by W. H. Tongs and that he is informed and believes that W. H. Tongs is in Little River County, Arkansas; that a subpoena for him was issued and sent to the sheriff of Little River County, Arkansas, on the 7th day of April, 1917; that the subpoena has not been returned and that the defendant does not know whether or not it has been served. The record shows that the defendant was brought back to Hope on March 12, 1917, charged with the commission of the forgery and that an indictment was returned against him on the 5th day of April, 1917. In his motion he states that the matter to be proved by W. H. Tongs was a conversation between the defendant and Joe Smith which occurred at W. H. Tongs' residence in Little River County, Arkansas. It will be observed that the defendant did not attempt in any way to notify the sheriff in what part of the county W. H. Tongs lived, but relied wholly upon the issuance of a subpoena for him. He knew that his case had been set for trial for the 12th day of April, 1917, and that it was necessary that the subpoena should be served at an early date. Hence we do not think that the defendant used due diligence, and it can not be said that the court abused its discretion in refusing a continuance to procure the attendance of W. H. Tongs.

In his motion for a continuance the defendant also states that he has five witnesses who live in Bowie County, Texas, four of whom are character witnesses, and one who would testify that the detective who arrested the defendant held out inducements to him in order to get him to confess the alleged forgery. The defendant does not even set out the names of these witnesses, and we do not think the court erred in refusing to continue the case to allow the defendant to procure their voluntary attendance or to take their depositions.

(5) Another ground of the defendant's motion for a new trial is that the court erred in refusing an instruction asked by him on the subject of reasonable doubt. We do not deem it necessary to set out the instruction, for if it can be said that the instruction is good in form, other instructions on the same subject were given both for the State and the defendant. They fully cover the subject, and we have repeatedly held that the court is not required to multiply instructions on the same point.

(6) Again in his motion for a new trial the defendant alleges that the court erred in refusing to instruct the jury that if it should find from the evidence that prior to the giving of the check in question the defendant had received checks on the Citizens National Bank from Joe Smith signed T. J. Smith, and that said checks were honored by the bank and paid by T. J. Smith and that T. J. Smith in paying the checks had acted in a way to lead the defendant to believe that Joe Smith had authority to sign his name to the checks, that it should find the defendant not guilty. On the part of the State it was shown that T. J. Smith had paid checks to which his name had been signed by his son, Joe Smith, but he had directed the bank not to pay any more of them. According to the testimony of the defendant the bank had cashed two or three checks where T. J. Smith's name had been signed by Joe Smith. This fact, however, would not warrant the jury in returning a verdict of not guilty. The fact that T. J. Smith had in a few instances paid checks where his son had wrongfully signed his name thereto, would not warrant

the jury in finding that he meant thereby to give his son such authority in the future. He might have forgiven his son and paid those checks but this was not testimony from which a jury would be warranted in finding that he intended to give his son authority to sign his name to checks in the future.

It follows that the judgment must be affirmed.

COOLEY v. NORTH, EXECUTOR.

Opinion delivered September 24, 1917.

1. DOWER—ELECTION BY WIDOW TO TAKE UNDER THE WILL.—A verbal declaration by the widow accepting the provisions of her deceased husband's will in her favor when unaccompanied by the actual receipt or possession of the property, does not constitute an election on her part to take under the will; such expression will be construed as an intention to make an election, and is revocable until acted upon.
2. DOWER—ELECTION TO TAKE UNDER WILL.—In order to bind the widow to take under her deceased husband's will, she must do some decisive act, with knowledge of her situation and rights, and a mere expression of intention is insufficient.

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

Cul L. Pearce, for appellant.

Dower is a freehold estate, growing out of marriage, seizin and the death of the husband. 5 Ark. 608; 8 *Id.* 9; 19 *Id.* 424; 31 *Id.* 576-9. It is a favorite of the courts. 11 Ark. 82; 11 *Id.* 103. It can only be released by some instrument of writing. 21 Ark. 62; Kirby & Castle's Digest, § § 2916, 3982, 3984.

2. There never was an election to take under the will. Kirby & Castle's Digest, § 2913; 117 Ark. 144; 52 Ark. 193; 55 *Id.* 222; 56 *Id.* 532; 29 *Id.* 418; 64 *Id.* 1; 117 *Id.* 144; 3 N. J. Eq. 597; 17 N. M. 597; 131 Pac. 1004; 49 L. R. A. (N. S.) 1072; L. R. 10 Chy. 239; 21 Pa. St. 407; 91 Ia. 316; 59 N. W. 33; 72 Iowa 123; 52 *Id.* 583; 126 Ia. 447; 102 N. W. 157; 11 A. & E. Enc. Law (2 ed.), 81 to 96;

9 R. C. L. 601; 40 Cyc. 1982; 14 *Id.* 87; 2 Underhill on Wills, 1024; 2 Schouler on Wills (5 ed.), § § 1528, 1572.

3. The burden of proving an election was upon the party affirming same. 11 A. & E. Enc. Law (2 ed.), 97; 14 Cyc. 88 and notes.

There is no evidence that the widow had knowledge of her rights. 56 Ark. 532; 3 N. J. Eq. 597; 49 L. R. A. (N. S.) 1072 and notes. The evidence falls short of making a case of implied election.

Brundidge & Neelly, for appellee.

Mrs. Cooley clearly made an election to take under the will. 56 Ark. 507; Kirby's Digest, § § 2697-8.

STATEMENT BY THE COURT.

Appellant instituted this action in the probate court against appellee to have her interest in the estate of her deceased husband declared, and to have her dower in the same allotted to her. The executor defended on the ground that she had elected to take under the will and was not entitled to dower. Upon appeal to the circuit court, there was an agreed statement of facts as follows:

J. H. Scarborough died on the 6th day of May, 1915, leaving a will by which he made disposition of all his property which consisted of both personal and real estate. Provision was made in the will for his widow in lieu of dower. After his death, W. C. North, who was named as executor in the will qualified as such executor. There was a meeting between the executor and all the beneficiaries under the will. The executor asked each of them whether it was his desire to abide by the will or not. All of them, including the widow, said they would abide by the terms of the will. Thereupon the executor probated the will, and under proper orders of the court sold the personal property for the payment of the debts of the estate. Seven months after the death of her husband, the widow married again and instituted this action for the purpose of renouncing the provisions in her favor under the will and for having dower allotted to her.

The court found that appellant had elected to take under the will and dismissed her complaint. The case is here on appeal.

HART, J., (after stating the facts). In most States the statutes point out the manner in which the widow shall declare her election between the provisions in her favor contained in her husband's will and her dower under the law. In this State when the husband devises lands to his wife and also bequeaths her personal property, she may make her election between the testamentary provision and dower, and by a deed of release executed to the heirs, renounce the benefits of the will, at any time within eighteen months. *Pumphry v. Pumphry*, 52 Ark. 193.

(1) The present suit was instituted by the widow within the time prescribed by the statute for making her election. Soon after her husband's death the executor informed her of the provisions of her husband's will in her favor. There was a verbal acceptance by her of the provisions in the will in lieu of dower, but none of the property was actually received by her. All of the property belonging to her husband's estate remained in the hands of the executor and none of it was delivered to her. Her verbal declaration to accept the provisions of the will in her favor unaccompanied by actual receipt or possession of the property did not constitute an election on her part to take under the will. It amounted to no more than an intention to make an election and was revocable until acted upon. In *English v. English*, 3 N. J. Eq. 504, the court held that to constitute an election by a widow to accept a legacy bequeathed to her in lieu of dower, there must be more than a mere intention or determination to elect. The court said:

(2) "But in a case of dower, there must be something more than a mere intention to elect. The right to dower is a legal right. Upon the death of the husband, the widow is seized at law of a freehold estate, and that estate can not be divested by an intention or determination to take something else in lieu of it, no matter how

often the intention may have been made known or communicated. Loose conversations with third persons to that effect, are of no account; and the making known of such determination, even to those who may be interested, will not of itself constitute an election in law. There must be some decisive act of the party, with knowledge of her situation and rights, to determine the election; or there must be an intentional acquiescence in such acts of others as are not only inconsistent with her claim of dower, but render it impossible for her to assert her claim without prejudice to the rights of innocent persons.

"We have already remarked, that in this case no injury can accrue to third persons; and the question is to be settled upon the acts of the complainant."

We are of the opinion that under the facts of this case there was no election by the widow to take under the will in lieu of her dower, and that there was no waiver of her right of dower.

It follows that the court erred in dismissing her complaint and for that error the decree will be reversed and the cause remanded for further proceedings according to law.

MURPHY *alias* CARAWAY v. STATE.

Opinion delivered September 24, 1917.

1. CRIMINAL LAW—CONVICTION UPON TESTIMONY OF ACCOMPLICE.—Defendant was charged with the crime of larceny, and it appeared that he had delivered certain of the goods stolen to one C. *Held*, it was the duty of the court to tell the jury that if C. received the goods with knowledge that they were stolen, that she was an accomplice, and that a conviction could not be had unless C.'s testimony was corroborated by that of other witnesses.
2. CRIMINAL LAW—RECEIVER OF STOLEN GOODS—ACCOMPLICE.—The receiver of stolen goods and the thief from whom he received them are accomplices within the meaning of Kirby's Digest, § 2384, which provides that a conviction for a felony can not be had upon the testimony of an accomplice, without other corroborating evidence.

Appeal from Pulaski Circuit Court, First Division;
Robert J. Lea, Judge; reversed.

Fred A. Isgrig and *Phil McNemer*, for appellant.

1. Evidence of other larcenies was inadmissible. 37 Ark. 264; 39 *Id.* 278; 1 Wigmore on Evidence 426, par. 346; 52 Ark. 309; 54 *Id.* 626; 91 *Id.* 559; 117 *Id.* 296; 110 *Id.* 226; 120 *Id.* 157; 87 *Id.* 17; 85 Atl. 731; 167 Mich. 53; 132 N. W. 470; 1 Jones on Evidence (1913 ed.), 720; 62 L. R. A. 193, note; 25 Cyc. 107, notes 23, 30, etc.; 97 N. Y. Supp. 917; 125 *Id.* 976; 134 N. W. 807; 117 S. W. 148.

2. Cynthia Carmichael was an accomplice and there was no corroboration of her testimony. Kirby & Castle's Digest, § § 1643-4-5; 36 Ark. 126; 111 *Id.* 299; 194 S. W. 863.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. Evidence of other larcenies was admissible to prove a general scheme and felonious intent. 32 Ark. 238; 13 *Id.* 168; 60 *Id.*; 75 *Id.* 433; 81 *Id.* 173.

2. Cynthia Carmichael was not an accomplice. Kirby's Digest, § 1562; 90 Ark. 460; 53 S. W. 416; 66 Pac. 372; 44 S. E. 850; 58 N. E. 81; 91 Ark. 506. But, if so, her testimony was amply corroborated.

SMITH, J. Appellant was employed as stockman in the ladies' ready-to-wear department of the Gus Blass Company, in the city of Little Rock, and several indictments were returned against him which alleged that he had stolen various articles of merchandise during his employment. The proof tended to show that one Cynthia Carmichael aided appellant in the disposition of these goods, and certain of the stolen articles were found in her possession. It was shown that, when she learned that appellant had been accused of larceny and that search was being made for the goods which he had stolen, she hid certain articles of this stolen merchandise, and when they were found in her possession she admitted that she had obtained them from appellant, but stated that she sold goods for appellant at very cheap prices, he having rep-

resented to her that through his employment he was able to obtain goods at the wholesale price. Appellant denied that Cynthia Carmichael had obtained the goods from him.

Several indictments were returned against appellant, and proof was admitted that Cynthia Carmichael had received from appellant other goods besides those described in the indictments in this case. Exceptions were saved to the admission of this evidence.

Instructions were asked which told the jury that, if Cynthia Carmichael knew, when she received the goods, that they were stolen, she was an accomplice, and that a conviction could not be had upon her testimony unless it was corroborated by other evidence tending to show that appellant had committed the crime charged.

Under the circumstances of this case, we think the evidence of the other larcenies was competent. It is, of course, well established that the State can not show the commission of one crime as a circumstance from which to infer guilt of another crime. But, in admitting this evidence, the court specifically limited it, and told the jury that it should be considered for a single purpose, and that was as bearing upon the contention made by the State that appellant had a plan or scheme for stealing these goods and of disposing of them, and that the goods in question were stolen pursuant to this plan. For this purpose the evidence was competent, and no error was committed in view of the limitation placed upon it at the time of its admission. *Davis and Thomas v. State*, 117 Ark. 296.

We think, however, that the instruction upon the corroboration of an accomplice should have been given. It is true that appellant denied selling Cynthia Carmichael the goods, and it is also true that she testified that she purchased them from him in good faith, believing he had the right to sell them to her. But the jury probably did not believe either of them entirely. The jury certainly did not believe appellant when he denied delivering the goods to Cynthia, and may also have disregarded that

portion of her testimony in which she said she did not know they were stolen.

This court has never decided whether the receiver of stolen goods is an accomplice of the thief who stole them. The question was raised in the case of *Atchison v. State*, 90 Ark. 460, but the decision of that question was pretermitted, as it was found unnecessary to decide the question to dispose of that case. After stating that the courts had reached divergent conclusions on this subject, the opinion quoted the definition of an accomplice contained in the case of *Polk v. State*, 36 Ark. 126, where it was said: "An accomplice in the full and generally accepted legal signification of the word is one who in any manner participates in the criminality of an act, whether he is considered in strict legal propriety as a principal in the first or second degree or merely as an accessory before or after the fact."

The courts are not all agreed as to whether an accessory after the fact is an accomplice; yet we have expressly so held in the case of *Stevens v. State*, 111 Ark. 299.

The Texas Court of Criminal Appeals, in the case of *Street v. State*, 39 Tex. Crim. Rep. 134, held that under their statute the mere receiver of stolen goods could not be convicted as an accessory to the theft thereof, and cited cases from California and Georgia to the same effect.

In the case of *People v. Kraker*, 72 Cal. 459, 1 Am. St. Rep. 65, the Supreme Court of California said:

"An accomplice includes all persons who have been concerned in the commission of an offense, and the grade of guilt of the witness is not important," and held that the receiver of stolen goods could not be convicted upon the uncorroborated evidence of the thief who had stolen them, because of a statute of that State substantially identical with our own prohibiting a conviction upon the uncorroborated testimony of an accomplice.

The case of *State v. Moxley*, 103 Pac. 655, is annotated in 20 A. & E. Cas. 593, and the cases there cited indicate a contrariety of views on the part of the courts upon this subject and the note concludes with the state-

ment that, while the Texas Court of Criminal Appeals held that the receiver of stolen goods is not an accessory, yet that court asserts that such receiver is an accomplice of the thief within the rules of evidence relating to the testimony of accomplices. Among the Texas cases cited in the note is the case of *Walker v. State*, 37 S. W. 427, where it was held that one who accepts meat which he knows is from a cow stolen by the giver is an accomplice in the theft within the rule requiring corroboration of an accomplice's testimony. Another Texas case cited in this note is that of *Crawford v. State*, 34 S. W. 927, the syllabus of which is as follows: "On trial for theft, where there was evidence that a witness had received the stolen property with knowledge of the theft, it was error to refuse to charge that evidence, to be corroborative of the testimony of such accomplice, 'must not only be criminative of defendant's connection with the theft, * * * but the criminative facts * * * must be shown by the testimony of some other witness than the accomplice.' "

The opinions on this subject are more or less abstruse and deal with learning more or less ancient, but without attempting to review all these cases, we announce our conclusion to be that the receiver of stolen goods and the thief from whom he received them are accomplices within the meaning of section 2384 of Kirby's Digest, which provides that a conviction can not be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. This view comports with the definition of an accomplice given in the case of *Polk v. State*, *supra*, and approvingly quoted in the case of *Atchison v. State*, *supra*. We think, too, that this view conforms to the spirit and reason which led to the rule of evidence enacted in this State by what is now section 2384 of Kirby's Digest. One who steals, or who knowingly receives stolen goods, is a felon, and would have the quite human desire of sharing his guilt with another, if he were so far unable to exculpate himself as that he must confess his own guilt. Men are prone to take to themselves full

credit for their successes and to charge to others responsibility for their failures. So one charged with crime will likely excuse himself and escape punishment, if possible, or, if this be impossible, he will be tempted to have some one share with him the censure and condemnation attendant upon detection. To protect the innocent against such frailty of human nature, it is provided by statute that one who confesses his own guilt can not condemn another, unless his statement is corroborated by other evidence tending to connect the person so accused with the commission of the offense confessed, and that this corroboration shall not be held sufficient if it merely shows the commission of the crime charged and the circumstances thereof.

There was evidence besides that of Cynthia Carmichael tending to connect appellant with the commission of the crime charged, but both the truth of this evidence and its weight and sufficiency were questions for the jury, and appellant was entitled to have the jury told that, if Cynthia had received the goods, knowing them to be stolen, a conviction could not be had upon her testimony alone, as the jury might have found that the other evidence credited and accepted by them was not sufficient to meet the requirements of the law.

For the error indicated, the judgment of the court below will be reversed and the cause remanded for a new trial.

MONK v. STATE.

Opinion delivered September 24, 1917.

1. LARCENY—ACTS CONSTITUTING—STEALING AND KILLING HOGS.—Hogs were stolen, killed and carried to market and sold by G. and R. Appellant previously consented to the caption and asportation of the hogs, and participated in dressing and carrying the same to market; *held*, appellant could properly be indicted and convicted as a principal for the larceny of the hogs.
2. EVIDENCE—CRIMINAL INTENT—EVIDENCE PROVING COMMISSION OF OTHER CRIMES.—Evidence which tends to show guilty intent in the

commission of a crime charged is competent, even though such evidence also tends to prove the commission of a crime other than the one charged in the indictment.

3. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT—PRESUMPTION OF INNOCENCE.—Where the trial court told the jury to acquit, if they entertained a reasonable doubt of defendant's guilt, it is not prejudicial error to refuse to instruct on the presumption of the defendant's innocence, which continues until guilt is established beyond a reasonable doubt.
4. CRIMINAL LAW—REVERSAL OF CONVICTION—HARMLESS ERROR.—A judgment of conviction will not be reversed, unless prejudicial error was committed by the trial court.

Appeal from Jefferson Circuit Court; *W. B. Sorrells*, Judge; affirmed.

S. J. Hunt and *Rowell & Alexander*, for appellant.

1. The evidence does not support the verdict. The court should have given the instruction asked as to the presumption of innocence. 1 Greenleaf on Ev., par. 34.

2. It was error also to refuse to give No. 4 as to reasonable doubt. May's Cr. Law, par. 277; 25 Cyc. 18; 179 S. W. 568.

3. To constitute larceny there must be a felonious intent, and the court erred in refusing instruction No. 6 asked. 60 Ark. 5.

4. Robinson was an accomplice and his testimony is not corroborated. 109 Ark. 498; 108 *Id.* 447.

If appellant believed the hogs belonged to Ed Robinson, he was not guilty of larceny. 96 Ark. 149; 70 *Id.* 204; 72 *Id.* 640.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. On the whole the evidence is ample to sustain the conviction. Ed Robinson's testimony was corroborated. 64 Ark. 247.

2. There is no error in the instructions. The trial court is not required to duplicate instructions as to reasonable doubt, innocence, etc. 72 Ark. 384; 74 *Id.* 33.

3. Instruction No. 4 was properly refused; it was not the law. Larceny consists of two elements—the tak-

ing and carrying away. If appellant was present, aiding and abetting, he was guilty. 32 Ark. 727, 733.

4. There is no error in the other instructions given or refused.

5. Oscar Parnels' testimony was competent. 72 Ark. 586; 75 *Id.* 427.

SMITH, J. Appellant was convicted of grand larceny, alleged to have been committed by stealing two hogs, the property of W. H. Robinson. Under the allegations of the indictment, he stood charged as principal offender, and by this appeal he questions both the sufficiency of the evidence and the correctness of the instructions under which the case was submitted to the jury, and also the action of the court in admitting, over his objection, certain evidence.

The evidence on the part of the State may be summarized as follows: One Ed Robinson testified that, on the morning when the hogs in question were killed, appellant, at witness' request, killed one of his hogs and dressed it. Thereafter, appellant and his son, a seventeen-year-old boy named Garland, hunted in the woods for other hogs to kill as the property of witness. They failed to find the hogs, and appellant left for Jeff Springs to sell some beef there. Garland Monk, the boy, continued the search, and found and killed the hogs in question. After killing them, the mark was altered, and the hogs were dragged into the woods. Witness and Garland Monk then went to appellant's home to get appellant's wagon and team to haul the hogs to an old out-house to dress them. Appellant was at home, and knew what they were doing, and, although he was not present when witness and Garland commenced cleaning the hogs, appellant arrived on the scene before that operation was completed and assisted in its performance. These hogs did not belong to witness, and appellant knew that fact. The hog which did belong to witness was carried to appellant's house and cleaned there by appellant himself. All the hogs were loaded into appellant's wagon after they were

dressed for market, and that night appellant left home with these hogs between 12 and 1 o'clock, and carried them to Pine Bluff, where he sold them to a butcher for \$35. W. H. Robinson, the owner of the hogs, missed them, and made search for them, and found a puddle of blood where the hogs had been killed. He found tracks which he thought were made by three different people. The owner of the hogs tracked the wagon through a snow which had recently fallen to appellant's house, and was told by appellant, when inquiry was made in regard to the hogs, that no hogs had been hauled in his wagon for two years. W. H. Robinson went to Pine Bluff, and found the butcher who had purchased the hogs, one of which had not been sold and was still on hand, and recognized his mark on the hog notwithstanding the hog's ear had been mutilated to some extent.

Appellant admitted having killed one of Ed Robinson's hogs, and his search that morning for other hogs, and admits hauling the hogs alleged to have been stolen to Pine Bluff and selling them there. But he says he did this for Robinson, and did not suspect that he was being duped into disposing of stolen property. He contends, also, that the proof does not show that he was present when the hogs were killed, and that, therefore, if guilty at all, it could only be as an accessory after the fact, and, as such, he could not be convicted under an indictment charging him with the crime of larceny as a principal offender. Appellant explained his midnight departure with the hogs by saying that it was necessary to do this to arrive at Pine Bluff early in the morning, which was the most favorable time for selling fresh meat. He denied being present when the hogs were killed, and offered explanations of the various incriminating circumstances against him, his explanations being sufficient to relieve his acts of their criminality had they been accepted by the jury.

There was other evidence which tended to contradict, and also to corroborate, the testimony recited.

(1) In the case of *Friend v. State*, 109 Ark. 498, it was held that one not present when an offense is committed, can not properly be indicted as a principal, but, if indicted at all, must be indicted as an accessory. And in the case of *Hughey v. State*, 109 Ark. 389, it was held that, when a defendant was charged with the larceny of a cow, but was not present aiding, abetting and assisting in stealing the animal, but merely encouraged another to steal cattle generally, the defendant was, at most, an accessory before the fact of the larceny, and could not be convicted of larceny as a principal. These cases cite a number of other opinions of this court to the same effect. Appellant invokes the doctrine of these cases to sustain his contention that he can not be convicted under the indictment in this case, for the reason that the proof shows that he was not present when the hogs were killed, and that, consequently, no guilty knowledge beforehand, or subsequent participation thereafter, could make him guilty as a principal offender. But, as appears from the testimony recited above, there was evidence to support the finding that appellant was a party to the conspiracy to steal the hogs, and, although there was such asportation of the hogs before appellant appeared on the scene as would have been sufficient to sustain a conviction of larceny against both Ed Robinson and Garland Monk, still the asportation was not fully completed until appellant did appear and participate in the consummation of the crime. If there was a corrupt understanding between the parties at all, it went, not merely to killing the hogs, but extended to their final sale. Dressing and cleaning the hogs, and carrying them to Pine Bluff, was a continuation of the asportation, and appellant personally participated in the performance of these essentials.

In the case of *Ridgel v. State*, 110 Ark. 606, the following quotation from 2 Wharton's Criminal Law, section 1165, was approved: "In larceny a party can not be convicted as a principal unless he were actually or constructively present at the taking or carrying away of the goods. His previous consent to or procurement of the caption and

asportation will not, at common law, make him a principal." And it was also there said that, to constitute larceny, there must be a felonious asportation of the goods as well as a felonious taking.

The record in the present case shows, not merely a previous consent to or procurement of the caption and asportation, but an actual personal participation in one of the essential elements of the crime, and we hold, therefore, that appellant was properly indicted.

(2) Exceptions were saved to the action of the court in permitting a witness, Oscar Parnell, to testify that shortly before the larceny of the hogs in question, W. H. Robinson lost four other hogs, and the witness testified that he had bought, in Pine Bluff, from appellant, three hogs corresponding to the description of three of the four hogs which Robinson had lost. It must be admitted that this testimony tended to show that appellant had also stolen those hogs, thereby committing a separate offense. He admitted taking the hogs, here alleged to have been stolen, to Pine Bluff, and selling them, but he says he did so under the honest belief that Ed Robinson, for whom he carried the hogs, was, in fact, their true owner. It is well established by numerous decisions of this court, that evidence which tends to show guilty intent in the commission of a crime charged is competent even though such evidence also tends to prove the commission of a crime other than the one charged in the indictment. *Howard v. State*, 72 Ark. 586.

(3) Appellant requested the court to give the following instruction: "The law presumes the defendant to be innocent, and this presumption continues with him in the progress of the trial, and protects him from conviction until it is overcome by evidence which establishes guilt beyond a reasonable doubt."

This instruction was not given; but the court gave a correct instruction on the subject of reasonable doubt, and the jury was told to acquit the defendant if a reasonable doubt was entertained as to his guilt. Was error

committed in failing to charge upon the subject of presumption of innocence?

In Blashfield's Instructions to Juries, vol. 1 (2 ed.), page 583, it is said: "There is a want of unanimity of judicial opinion as to whether the failure to instruct that a defendant is presumed innocent until his guilt is established will constitute reversible error in and of itself, where the court properly and fully instructs the jury on reasonable doubt. It has been so held by the Supreme Court of the United States, and the weight of authority is to the effect that instructions on the question of reasonable doubt, though correctly given, can not be regarded as covering the subject of the presumption of innocence, and that it is error to refuse a separate instruction on the latter subject."

As supporting this text and as constituting the weight of authority, cases are cited from Michigan (*People v. Macard*, 73 Mich. 15); Texas (*McCullen v. State*, 5 Tex. App. 577, and *Black v. State*, 1 Tex. App. 368); Virginia (*Vaughan v. Com.*, 85 Va. 671); and the Federal courts (*Cochran v. United States*, 157 U. S. 286, 39 L. Ed. 704, and *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481).

Cases are cited, however, to support the view that it is not error to refuse to charge as to the presumption of innocence where the court correctly instructs the jury on the doctrine of reasonable doubt.

(4) We do not stop to determine the correctness of the view that the weight of authority requires the giving of separate instructions on the subjects of presumption of innocence and reasonable doubt. We only announce our conclusion to be that the better rule is otherwise, and in consonance with the policy of this court not to reverse a judgment of conviction unless prejudicial error was committed in the trial leading thereto.

Instructions are given upon both subjects upon the same theory and for the same purpose, *i. e.*, that the jury should base its verdict upon the testimony alone, and should not convict unless that testimony convinced the

jury of the guilt of the accused beyond a reasonable doubt. Section 2387, Kirby's Digest. The courts which accept the view we adopt, do so upon the theory that the accused is given the benefit of the presumption of innocence when the jury is told that a conviction can not be had only when the evidence in the case establishes guilt beyond a reasonable doubt.

The Supreme Court of South Dakota, in the case of *State v. Cline*, 27 S. D. 573, reviews the cases on the subject, and says that, in Alabama and in California, the presumption of innocence and reasonable doubt are seemingly treated as synonymous. But whether they are synonymous or not, we think it must be true, as said by the Supreme Court of Kentucky, in the case of *Stevens v. Commonwealth*, 45 S. W. 76, that any juror competent to sit upon a trial would know that there was a presumption of innocence if he were told that he could not return a verdict of guilty unless the testimony in the case convinced him beyond a reasonable doubt of the guilt of the accused. As supporting this view, see the cases cited in the South Dakota case above referred to, and see, also, *State v. Kennedy*, 55 S. W. (Mo.) 293; *Morehead v. State*, 34 Ohio St. 212; *Stevens v. Commonwealth*, 45 S. W. (Ky.) 76, cited in the note found on page 1695 of Brickwoods Sackett's Instructions to Juries, vol. 2.

Finding no prejudicial error, the judgment of the court below is affirmed.

FOWLER v. STATE.

Opinion delivered September 24, 1917.

1. APPEAL AND ERROR—REFUSAL TO ADMIT TESTIMONY—PRACTICE.—Where a party wishes to save an exception to the ruling of the trial court refusing the admission of certain testimony, it is his duty to state to the court the substance of the evidence offered at the time it is offered.
2. HOMICIDE—CHARACTER OF DECEASED.—In a prosecution for homicide the violent and turbulent character of the deceased can not be shown by proof of particular acts of violence.

3. HOMICIDE—SELF-DEFENSE—OPINION OF DEFENDANT.—The statement of the defendant, that at the time he shot deceased, that he had reasonable grounds for apprehending great bodily harm at the hands of deceased, is inadmissible.
4. HOMICIDE—SPECIFIC CONDUCT OF DECEASED.—In a prosecution for homicide, evidence of specific instances of violence on the part of deceased are inadmissible as tending to establish his dangerous character.
5. EVIDENCE—REPETITION.—It is not error to refuse to permit a witness to be re-examined on a point already covered by his testimony.
6. APPEAL AND ERROR—NEW TRIAL—DILIGENCE.—A new trial will not be granted for newly discovered evidence, where the appellant does not show diligence in the discovery of the same.
7. APPEAL AND ERROR—INSTRUCTION—SINGLING OUT PARTICULAR EVIDENCE.—It is not error to refuse an instruction which singles out a particular class of testimony in the case, and directs the jury to consider it in connection with the other facts.

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

C. B. & Cooper Thweatt, for appellant.

1. The court erred in excluding the evidence of J. Umsted. 103 Ark. 27; 108 *Id.* 129. Also the evidence of L. Hall. 72 Ark. 432. It was also error to exclude evidence of deceased's reputation. Also in excluding defendant's evidence and that of O. P. Nall.

2. It was error to refuse defendant's requests for instructions and because of newly discovered evidence a new trial should have been granted.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The evidence of J. Umsted was properly excluded. The threat was too remote. 52 Ark. 303.

2. There was no error in excluding the testimony of L. Hall. 38 Ark. 498; 88 *Id.* 562; 73 *Id.* 410; 1 Thompson on Trials, § 703-4.

3. No exceptions were saved to the exclusion of evidence as to deceased's reputation. 77 Ark. 418; 70 *Id.* 337; 75 *Id.* 181; 63 *Id.* 443.

4. O. P. Nall's testimony was properly excluded. 88 Ark. 562. Reputation can not be proven by isolated acts of misconduct. 100 Ark. 561; 38 *Id.* 498; 67 *Id.* 117; 100 Ark. 651.

5. There is no error in the instructions. 101 Ark. 569; 72 *Id.* 384; 74 *Id.* 33; 73 *Id.* 183; 95 *Id.* 48; 103 *Id.* 21; 105 *Id.* 467; 75 *Id.* 76.

6. The new trial was properly refused. No abuse of discretion is shown. 96 Ark. 400; 95 *Id.* 321; 97 *Id.* 92. The newly discovered evidence was cumulative merely. 91 Ark. 492; 97 *Id.* 92; 99 *Id.* 407; 17 *Id.* 404; 2 *Id.* 133; 5 *Id.* 256. Nor was due diligence shown. 104 Ark. 212; 85 *Id.* 179; 99 *Id.* 121.

HUMPHREYS, J. Appellant was convicted of manslaughter in the Southern District of Prairie County for killing Munny Snow, and has appealed the case to this court. The indictment was for murder in the second degree. The evidence of the State tends to show that on the evening of April 29, 1916, appellant entered the drug store of Elijah Odom, his brother-in-law, situated in the town of Biscoe, and killed Munny Snow by shooting him seven times with a rapid-firing automatic pistol. Two of the shots, presumably the first two, entered his back; one entered his side, the others entered various parts of his body from the front. Snow was not armed, and, according to the State's witnesses, said nothing to nor made any demonstration toward appellant. The evidence on the part of appellant disclosed that Snow had severely abused and threatened to kill him a few days before the tragedy occurred; and tended to show that as appellant entered the store, Snow renewed the abuse, and with his left hand upraised and right hand to his pocket, advanced upon appellant before appellant began to fire.

Appellant insists upon seven assignments of error for reversal. Five of them relate to the exclusion of evidence by the court.

It is sought to establish by J. Umsted that Munny Snow had stated to him several months before the killing that appellant should never serve as postmaster, because

he had beat him out of three hundred dollars; also that Snow had changed his family physician from Fowler to another. In answer to a question by the court as to when the statement was made, Umsted said, "It was made year before last." The threat, if threat at all, was both ambiguous and remote. The court properly excluded the testimony. *Billings v. State*, 52 Ark. 303.

(1) During the examination of L. Hall, attorney for plaintiff asked witness if he made a statement to the appellant about deceased carrying a pistol. Objection by the State to the question was sustained by the court, and appellant was granted permission to state to the stenographer what he desired to prove, in order that it might be incorporated in the record. Appellant failed to state what he expected to prove by the witness. The evidence was afterwards reduced to affidavit form and filed in support of a motion for new trial. The substance of the evidence offered should have been stated to the court at the time offered, in order that the court might pass upon its competency. 1 Thompson on Trials, § § 703-4; *Meisenheimer v. State*, 73 Ark. 407; *Boland v. Stanley*, 88 Ark. 562.

(2) An attempt was made to prove that Munny Snow had killed several men and committed various turbulent acts. This evidence was clearly inadmissible under the rule laid down in *Campbell v. State*, 38 Ark. 498, and *Coulter v. State*, 100 Ark. 561, to the effect that in prosecutions for homicide the violent and turbulent character of deceased can not be shown by proof of particular acts of violence. But it is insisted that the court erred in refusing to permit appellant to prove that Munny Snow was *very dangerous*; that he would kill on slight provocation. The record discloses that witness O. P. Nall was permitted to testify that Munny Snow was considered a *very dangerous* man; and that his reputation for peace and quietude in the community was *very bad*. The testimony admitted seems to fulfill every requirement of the law.

In the course of the examination of O. P. Nall, appellant asked him the question, "Did you cite to him any instances of the acts of Munny Snow?" The question was excluded by the court. The exception to this ruling can not be urged here for reversal, because it was appellant's further duty, in order to save the exception, to state to the trial court what he expected to prove by the witness. This he failed to do. The evidence expected to be established by this witness was set out in affidavit form in the motion for new trial, and we think the court properly excluded that part of the evidence relating to the statements of particular instances of violence.

(3-4) It is insisted that the court erred in refusing to permit appellant to state whether he had reasonable grounds to believe that Munny Snow would carry out threats he had made to kill him. It is true the good faith of appellant was an issue in the case. It was all-important to determine whether appellant had reasonable grounds to fear violence and to believe Snow was about to shoot him when he killed Snow; and this was a question to be determined by the jury from all the facts and circumstances leading up to and involved in the killing. Appellant's abstract statement that at the time of firing the fatal shots he had reasonable grounds for apprehending great bodily harm at the hands of deceased might have been an opinion or conclusion based wholly on unreasonable grounds. Such a ruling would invite every defendant to hold such opinions and to draw such conclusions. Neither did the trial court commit error in declining to permit appellant to relate specific instances of violence within his own knowledge or which had been communicated to him tending to establish the dangerous character of deceased, nor was error committed in refusing to permit appellant to testify to specific acts of violence related to appellant by deceased several years before the killing. This court said in *Coulter v. State, supra*, that "it is not competent to prove that the decedent said he had been sentenced to the penitentiary or that he was a desperate 'nigger.'"

Appellant gave testimony to the effect that A. E. Walker informed him that Munny Snow was unfriendly to him. He was then asked what Walker told him and the question was excluded by the court. It is insisted that the court erred in this regard. The information given by Walker was not disclosed to the trial court, therefore it is not before this court for consideration.

(5) Appellant testified fully and particularly on direct examination as to his whereabouts and movements on the afternoon prior to the killing in the evening. He stated positively that he was inside the postoffice building from 3 o'clock in the afternoon until about 7 o'clock in the evening; and just as positive that he did not follow Snow to Odom's store or know Snow was there when he went to the store to buy mucilage. After witnesses in rebuttal for the State testified that he was on the front porch of the postoffice building and had seen Snow go to the store and in a short time followed him there, appellant sought to deny the testimony of these witnesses. It is insisted that the court committed error in excluding his testimony. The question propounded involved appellant's whereabouts and movements at a particular time already fully and positively covered in his direct testimony. It was not error to exclude a mere repetition of testimony.

(6) Appellant sought a new trial on account of alleged newly discovered evidence in corroboration of his own testimony touching the necessity for killing Munny Snow in order to protect his life. The witnesses claimed they were present, in conversation with Munny Snow, when the difficulty began. If this is true, there is no reason why appellant could not have seen them at the time. No other person was standing near him. While the witnesses claim to have left the town immediately after the tragedy for their home in Woodruff County, they returned and were living near Biscoe four months prior to the trial. No diligence in securing them as witnesses is shown. No satisfactory explanation was made by appellant as to why he did not discover their presence on the scene of the difficulty. He certainly had the opportunity

to know they were there. Having such opportunity, it was his duty to take steps to procure them as witnesses before the trial.

(7) It is insisted that prejudicial error was committed in refusing to give the sixth, seventh and eighth instructions requested by appellant. Appellant's sixth request is embodied in substance in the instructions given by the court. The seventh and eighth requests single out and emphasize the previous good character of appellant as evidence to create a reasonable doubt. This court has held in a number of cases that it is not error to refuse an instruction which singles out a particular class of testimony in the case and directs the jury to consider it in connection with the other facts. *Jenkins v. Quick*, 105 Ark. 467, and cases cited therein.

No error appearing in the record, the judgment is affirmed.

YOUNG, ADMINISTRATOR, *v.* WYATT.

Opinion delivered September 24, 1917.

1. LIENS—LANDLORD'S LIEN—RENTS IN HANDS OF UNDER-TENANT.—An equitable lien exists in favor of the landlord, or original lessor, on the rent money in the hands of an under-tenant in case the lessee becomes insolvent.
2. APPEAL AND ERROR—FINDINGS OF CHANCELLOR.—It is not necessary for a chancellor to set out all his findings of fact in a decree; it will be presumed that the chancellor found facts sufficient to support the decree if the pleadings and proof warranted him in so doing.

Appeal from Sebastian Chancery Court, Fort Smith District; *W. A. Falconer*, Chancellor; affirmed.

John H. Vaughn, for appellant.

1. The court erred in making appellee a preferred creditor. There was no finding that the estate of D. J. Young was insolvent.

Warner & Warner, for appellee.

1. The general finding for plaintiff included the special finding that the estate was insolvent. 53 Ark. 537; 65 *Id.* 14. The undisputed evidence was that the estate was insolvent and it must be assumed that the court did not disregard this undisputed evidence. 102 Ark. 72.

2. Where the evidence supports the decree this court will not reverse. 72 Ark. 67; 95 *Id.* 482.

3. Where a lessee is insolvent, the rents accruing on a sublease are not subject to distribution among creditors until the claim of the original landlord for rent is extinguished. 1 Story, Eq. Jur., § 687; 2 Taylor, Landl. & Ten., § 659; 24 Cyc. 1176; 114 N. Y. 13; 15 Abb. Pr. (N. Y.) 388; 86 Tex. 647; 26 S. W. 481; 18 A. & E. Enc. Law, 430; 1 Vern. 27; 24 Cyc. 1176; 93 S. W. 342; 16 R. C. L. 880; 25 Cyc. 666; 73 Mo. App. 424.

HUMPHREYS, J. This suit was instituted in the chancery court for the Western District of Sebastian County by appellee against appellant, Win Harper and Eugene Bates, to enforce an alleged equitable lien on certain rent money due appellant by Win Harper and Eugene Bates upon judgments procured in the Sebastian Circuit Court for the Western District thereof.

Appellant denied the existence of an equitable lien upon said rent moneys in favor of appellee.

The cause was heard upon the pleadings and an agreed statement of facts, from which the chancellor found and decreed that appellee was entitled to recover from appellant the sum of \$1,876.97, together with interest thereon from the 26th day of June, 1915, at the rate of 10 per cent. per annum until paid, and decreed same as a first preferred charge and lien upon the sum of \$1,148.60 due upon judgment from Win Harper to appellant, and \$750 with interest due upon judgment from Eugene Bates to appellant.

To question the correctness of this decree, an appeal has been prosecuted to this court. The agreed statement of facts disclosed:

"That D. J. Young leased buildings numbered 121 and 123 on Garrison Avenue, in the city of Fort Smith, from R. B. Wyatt, appellee herein, and sublet one of the buildings to Win Harper and the other to Eugene Bates. D. J. Young defaulted in the payment of rent for the months of September, October, November and December, 1914, and, during those months, both Harper and Bates failed to pay the rents thereon to D. J. Young. In February, 1915, R. B. Wyatt brought suit for the rents in the circuit court for the Western District of Sebastian County against D. J. Young, and later recovered judgment for \$1,876.97 against J. Ross Young, administrator of the estate of D. J. Young, deceased, in whose name the suit had been revived upon the death of D. J. Young. At the same time, D. J. Young brought suits for the rents in the circuit court for the Western District of Sebastian County against Win Harper and Eugene Bates, and, later, J. Ross Young, administrator of the estate of D. J. Young, deceased, in whose name the suits had been revived upon the death of D. J. Young, recovered a judgment from Win Harper for \$1,148.60 and against Eugene Bates for \$750.

"That Angie E. Young, widow of D. J. Young, deceased, does not claim or assert a dower right in and to the judgments recovered by J. Ross Young, administrator, against Win Harper and Eugene Bates.

"That the real estate and personal property, comprising the estate of D. J. Young, is not sufficient to pay the claims allowed against the estate.

"That the facts and circumstances were substantially and to all intents and purposes the same as if the said D. J. Young, at the time of renting said building, was acting as agent of the said Harper and Bates in renting the same, notwithstanding the transaction was put in the form of an original lease to the said D. J. Young and sub-leased to the said Harper and Bates."

(1) It is contended by appellant that the only remedy open to the appellee, after obtaining judgment in the circuit court for the rents against the estate of D. J. Young, deceased, was to file a claim in the fourth class

against the estate of D. J. Young; and that the chancellor committed error in giving appellee, R. B. Wyatt, the original lessor, preference on the rent money due by the under-tenants, Win Harper and Eugene Bates. Appellant has favored us with no authorities in support of his contention. The authorities seem to be uniform in holding that an equitable lien exists in favor of the landlord, or original lessor, on the rent money in the hands of an under-tenant in case the lessee becomes insolvent. 16 R. C. L. 880; 24 Cyc. 1176; 18 A. & E. Enc. of Law (2 ed.) 430.

(2) But it is said that the chancellor made no finding that the estate of D. J. Young was insolvent. The pleadings presented an issue of insolvency and the agreed statement of facts showed the estate to be insolvent. It is unnecessary for a chancellor to set out all his findings of fact in a decree. It will be presumed the chancellor found facts sufficient to support the decree if the pleadings and proof warranted him in so doing.

Finding no error, the decree is affirmed.

SPADRA CREEK COAL COMPANY v. HARGER.

Opinion delivered October 1, 1917.

1. APPEAL AND ERROR—WEIGHT OF EVIDENCE—FINDING OF TRIAL COURT—DUTY TO GRANT NEW TRIAL.—Where the trial court finds that the verdict of the jury is against the preponderance of the evidence it is its duty to grant a new trial.
2. APPEAL AND ERROR—PREPONDERANCE OF THE EVIDENCE—FINDING OF TRIAL COURT—NEW TRIAL.—In an action for personal injury the trial court in overruling the motion for a new trial recited the following language: "My opinion is that the plaintiff probably did not prove the liability of the defendant by a preponderance of the evidence; and I think the evidence probably does not justify the amount of damages returned. But these questions were submitted to the jury and I do not feel disposed to interfere with the verdict." *Held*, after making such finding it is the duty of the trial court to grant the motion for a new trial.

Appeal from Johnson Circuit Court; *A. B. Priddy*, Judge; reversed.

W. E. Atkinson, for appellant.

1. The verdict is contrary to the evidence. 70 Ark. 386.
2. The opinion of the circuit judge entitled defendant to a new trial. 126 Ark. 427; 112 Tenn. 463; 85 *Id.* 387; 102 *Id.* 702; 113 Ga. 453.
3. The court erred in its instructions. *Cooley on Torts*, 70, 71 (1879 ed.); 66 Ark. 68; 3 Am. & E. Ann. Cases, 57.
4. Defendant was entitled to a new trial for newly discovered evidence.
5. The damages were excessive.

Patterson & McKennon, for appellee.

1. Arbaugh was negligent. This was a question of fact. So was Callahan negligent.
2. An appellate court can not look to the opinion of the lower court in determining a question for review as such opinions are no part of the record. 3 Cyc. 181; 6 Ark. 431; 10 *Id.* 442; 86 *Id.* 74; 13 *Id.* 337; 26 *Id.* 654.
3. The objections to the instructions are not tenable. The doctrine of intermediate cause does not arise where the injury is alleged to have been caused by the negligence of either one or both of two servants of the same master. The master is liable for the negligence of either or both. 112 Mo. 238.
4. The new testimony adds nothing and the damages are not excessive.

McCULLOCH, C. J. This is an action instituted by the plaintiff, Harger, against the Spadra Creek Coal Company to recover damages on account of personal injuries received by plaintiff while working for defendant in its coal mines in Johnson County, Arkansas. Plaintiff was employed as a driver, and alleges that while working in the mine he was injured as a result of the negligence of two other employees of the defendant company. The answer contained denials of the charge of negligence and the cause was tried before a jury upon the issues involved, and there was a verdict and judgment in favor of

plaintiff for the recovery of damages; and defendant has appealed.

Defendant's motion for new trial contained numerous assignments, among which was one that the verdict was against the preponderance of the evidence. The bill of exceptions recites a finding by the court in overruling the motion for new trial in the following language:

"My opinion is that the plaintiff probably did not prove the liability of the defendant by a preponderance of the evidence; and I think the evidence probably does not justify the amount of damages returned. But these questions were submitted to the jury and I do not feel disposed to interfere with the verdict."

It is contended by defendant's counsel that the above statement of the court constituted a finding that the verdict of the jury was against the preponderance of the evidence, and that it therefore became the duty of the court to sustain the motion and grant a new trial. We think that the contention of counsel is correct and that the court erred in refusing to grant a new trial upon its finding that the verdict was not supported by the preponderance of the evidence. The case is controlled by the decision of this court in the case of *Spadra Creek Coal Co. v. Callahan*, 196 S. W. 477, 129 Ark. 448. The language of the court in reciting its finding in each case is identical, except in the present case the word "probably" was inserted so as to recite that "the plaintiff probably did not prove the liability of the defendant by a preponderance of the evidence." The use of the word "probably" did not lessen the effect of the language used as constituting a finding that the verdict was against the preponderance of the evidence. The words used clearly indicate a belief or conclusion on the part of the court that the verdict was contrary to the preponderance of the evidence, and under those circumstances it was the duty of the court to grant a new trial. The word "probably" is defined as "likely as far as the evidence shows," and "having more evidence for than against," or "apparently true, yet possibly false." The difference in the precise language used,

therefore, does not put the case outside the operation of the rule announced by this court in the Callahan case, *supra*. The judgment is, therefore, reversed and the cause remanded with directions to grant a new trial.

HART, J., (dissenting). Judge Wood and myself dissent from the opinion in this case because we think it is an unwarranted extension of the rule laid down in *Twist v. Mullinix*, 126 Ark. 427, and is contrary to the reasoning of that case. In that case, the court said:

"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."

After discussing the questions at length the court concludes the discussion as follows:

"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."

Thus we see the decision in that case was based on the ground that the language used by the trial court amounted to an affirmative finding on its part that the verdict was against the weight of the evidence, and it was, therefore, the duty of the trial court to set aside the verdict. The word "probable" as defined by the Century Dictionary means "having more evidence for than against, or evidence which inclines the mind to belief, but leaves some room for doubt; likely." We think the language used by the circuit judge in the instant case falls short of being an affirmative finding that the verdict was against the weight of the evidence, and that, therefore, he did not err in refusing to set aside the verdict.

LUSK ET AL., RECEIVERS ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. BLEVINS.

Opinion delivered October 1, 1917.

RAILROADS—KILLING STOCK—NOTICE TO STATION AGENT.—Under Act of 1907, p. 144, and Act of 1909, p. 778, notice of the killing of stock by a railroad train and presentation of the claim, may be made to a station agent.

Appeal from Crawford Circuit Court; *James Cochran*, Judge; affirmed.

W. F. Evans and *B. R. Davidson*, for appellant.

1. A constant lookout was kept. The injury was unavoidable and the verdict is contrary to all principles of justice. 39 Ark. 413; 40 *Id.* 336; 41 *Id.* 161; 53 *Id.* 96; 67 *Id.* 514.

2. No foundation was laid for the introduction of the letter. 94 Ark. 158-165; 93 *Id.* 179; 57 *Id.* 402; 23 *Id.* 131.

3. No claim was ever presented. Acts 1909, 779, 4; 104 Ark. 500; 233 U. S. 325.

4. The act of 1907 is unconstitutional. 234 U. S. 354; 233 *Id.* 325.

5. There was no proof as to a reasonable attorney's fee, nor that the mules were killed in Crawford County. The venue was not proven and this is jurisdictional. 67 Ark. 512; 72 *Id.* 376; 70 *Id.* 346; 55 *Id.* 281; 38 *Id.* 205.

6. The instructions were erroneous. 62 Ark. 182; 64 *Id.* 236; 93 *Id.* 24-27; 48 *Id.* 366-370.

Starbird & Starbird, for appellee.

1. The railroad was clearly liable. 75 Ark. 560.

2. All objections were waived as to testimony except as to competency and relevancy by a general objection. 116 Ark. 307; 113 *Id.* 296; 60 *Id.* 333; *Ib.* 550.

3. There is no error in the instructions. 80 Ark. 284; 75 *Id.* 61; 37 *Id.* 562; 41 *Id.* 161.

McCULLOCH, C. J. The plaintiff, N. E. Blevins, sued the receivers of the St. Louis & San Francisco Railroad Company to recover double damages and attorneys'

fees on account of the killing of two mules, the property of plaintiff, run over by a passenger train operated by the receivers. The value of the mules is alleged to be the sum of \$225, and it is also alleged in the complaint that plaintiff demanded the payment of that sum and that payment was refused. On the trial of the cause the jury returned a verdict in favor of plaintiff for the sum of \$450, double damages, and \$50 attorneys' fee.

The killing of the stock occurred at night near the station of Mountainburg, in Crawford County, Arkansas. Plaintiff owned the land through which the railroad runs and cultivated a corn crop in the field. He also had a wooded pasture adjoining the field of corn, but on the night in question the gate between the two fields was left open and the mules strayed into the corn field through which the railroad runs. When the passenger train came along the mules ran out of the corn field, which extended up to the edge of the right-of-way, and went upon the track. The evidence adduced by the plaintiff tended to show that the mules ran down the track ahead of the approaching train a considerable distance, a part of the way running along what the witness termed the "shoulder" of the dump, and the balance of the way along the track, before being struck by the engine and killed. The engineer and fireman testified that the mules were struck by the engine as soon as they came on the track—that they saw the mules running out of the corn field toward the track and gave the signal, but that it was impossible for them to stop the train after the mules came on the track. There was, therefore, a conflict in the testimony concerning the circumstances under which the mules were killed and it was a question for the jury to determine whether or not the evidence was sufficient to overcome the presumption of negligence. We think the evidence was sufficient to sustain the verdict. The evidence was likewise sufficient to sustain the verdict as to the amount of damages.

It is insisted that the judgment should be reversed for the reason that there is no proof of the venue so as

to establish the jurisdiction of the court. The complaint contained an allegation that the killing of the mules occurred in Crawford County, and there was no denial of that allegation in the answer. Therefore, the question of insufficiency of the evidence on that issue is not raised.

It is also insisted that there was no proof of the amount demanded in advance of suit so as to entitle plaintiff to recover double damages under the statute, but we find that there was an allegation in the complaint as to the amount demanded and there was no denial in the answer. The answer contains a denial as to the allegation that a demand was made, but there is no denial as to the sum demanded, and the proof of plaintiff is sufficient to show that there was a demand made for payment, although it is not stated in the testimony what the actual sum demanded was. Plaintiff testified that he lodged his claim with the station agent at Mountainburg; that the agent promised to forward the same and thereafter the claim agent came along and took his statement concerning the claim and the circumstances attending the killing of his mules. It is argued that the station agent was not the proper person to whom a notice of an injury should have been given and that the court erred in allowing the plaintiff, over the objection of defendant, to testify concerning the delivery of the notice of claim to the station agent. The statute of this State under which double damages for killing of stock is recoverable merely provides that the failure of a railway company to pay "after notice is served on such railroad by such owner" shall entitle the owner to recover double damages and a reasonable attorneys' fee, without specifying the manner in which the notice shall be given. Acts of 1907, page 144. A later statute provides that "persons, firms or corporations operating any railroad within this State shall be required to employ one or more claim agents, whose duty it shall be to visit all regular stations upon their said lines where notice has been given to the agent of said company at said station, that any kind of stock has been killed by the operation of said road, as often as once every thirty days, at

which time and place said claim agent shall take up the matter of settlement for the killing of any stock with the owner thereof, with a view to making final settlement for said stock and paying for same." Acts of 1909, page 778.

When the two statutes are read together it is clear that the station agent is constituted the agent of the railroad company for the purpose of receiving notice from the owner of the killed or injured stock and transmitting the same to the claim agent. It was, therefore, proper for the court to admit evidence offered by the plaintiff to the effect that the claim or notice had been presented to the station agent. The evidence shows that pursuant to that notice the claim agent appeared and entered into negotiations with plaintiff for a settlement.

Counsel for defendants attack the validity of the statute authorizing a recovery of double damages and attorneys' fees, but this court has upheld the validity of the statute. *Kansas City So. Ry. Co. v. Anderson*, 104 Ark. 500. This court construed the statute to allow such recovery only in case the sum originally demanded is not in excess of the sum awarded by the jury, and the Supreme Court of the United States sustained the validity of the statute upon that interpretation of it. *Kansas City So. Ry. Co. v. Anderson*, 233 U. S. 325.

There are other assignments of error which are not considered of sufficient importance to discuss. The case went to the jury upon correct instructions and the evidence was sufficient to sustain the verdict.

Judgment affirmed.

AMERICAN CAN COMPANY v. WHITE.

Opinion delivered October 1, 1917.

1. CONTRACTS—CONSTRUCTION— PARTICULAR WORDS.—A contract will be construed as a whole, and the intention of the parties gathered from the language used as a whole, rather than from some particular word or words, without reference to the context in which those words are used.

2. CONTRACTS—USE OF WORD “LEASE”—SALE.—Contract construed to be for the sale of a chattel, although the language of the contract recited, “I, W., do hereby agree to lease. * * *”
3. SALES—SALE OR LEASE.—Whether a contract is for the sale or lease of a chattel, is to be determined from the intention of parties, as gathered from the entire contract.
4. SALES—CHATTEL.—Appellant and appellee agreed that appellant could retake possession of a certain chattel delivered by it to appellee, if the latter failed to make certain payments specified in the contract, or appellant could affirm the contract and sue for damages. The appellant elected to do the latter. *Held*, the contract was one of sale, although the word *lease* was used in the written agreement.

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

Ira J. Mack, for appellant.

1. The contract was one of conditional sale. The word “lease” used therein does not change the legal effect of the instrument. Williston on Sales, 526, § 336; 120 Fed. 64; 58 Am. Dec. 767; 89 Am. Dec. 124; 95 Am. Dec. 455; 79 Am. St. 41; Mechem on Sales, § § 569, 570; Tiffany on Sales (2 ed.), 134.

2. Upon default in the payments appellant had the right either to bring replevin for the property, or to affirm the sale and sue for the purchase money. 88 Ark. 99; 100 Ark. 403; 175 S. W. 516. Having elected to sue for the purchase money, thereby waiving title to the property, appellant had the right under the statute to have the property impounded, and a lien declared thereon for the purchase money. Kirby’s Dig., § § 4966 *et seq.*; 52 Ark. 450.

Appellee, pro se.

This was a contract of lease, the consideration being the use of the machine. Plain and unambiguous, it must be construed as made. 105 Ark. 213. And having been drafted by the appellant, it should be construed more strongly against it. 74 Ark. 41.

Before appellant could maintain its action, there must have been a sale and delivery with intention to pass

title to the purchaser. The right to a vendor's lien exists only when there is a sale and purchase. Kirby's Dig., § § 4966-4969; 52 Ark. 450.

See also 30 Ark. 402; 47 Ark. 363; 53 Miss. 596.

STATEMENT OF FACTS.

This suit was instituted by the appellant against the appellee for the purchase price of an adding machine sold by the appellant to the appellee under a contract which provides as follows:

"I, P. S. White, do hereby agree to lease from American Can Company one American adding machine No....., on which I have this day paid \$8 and on account of which I further agree to pay \$7 on the 15th day of each and every succeeding month thereafter, beginning May 15, 1916, until the total sum of \$88 shall have been paid.

"It is understood and agreed that the title to said adding machine shall remain in said company until final payment in full shall have been made; that said adding machine shall not be removed from his place of business in the city of Newport, State of Arkansas, without said company's written consent; that, in default of any of said payments, said company or its representative is hereby authorized to enter his premises and take and remove said adding machine without legal process or at its option may leave machine in possession of the lessee and declare all unpaid balance as due and payable. The lessee assumes the responsibility for the loss of our damage by fire or otherwise to the above described machine, and agrees to pay for any damage which may occur to it, or to pay for the machine itself, if destroyed, or if for any other reason it shall not be returned to the owners. It is understood and agreed that this order is subject to the approval of the American Can Company."

The appellant also, in connection with his suit, asked that a vendor's lien be created and enforced under chapter 101 of Kirby's Digest.

The appellant introduced its contract and called appellee as a witness, who testified that he made the contract

with appellant, and when the machine came he wrote appellant that he did not want the machine. Appellant replied that he could not cancel the contract. Appellee took advantage of that clause in the contract where it says that if he failed to pay then they could take the machine without legal process. The appellee neglected to pay and appellant drew on appellee and he refused to pay the draft. Appellant sent its representative to see the appellee and appellee told appellant's agent to take the machine. They refused to do so and sued the appellee. The appellee construed the contract as a lease, requiring payments on the installment plan. The penalty for failure to pay was the taking of the machine. Appellee did not own the machine and appellant came and took it. Appellee was not liable to them for a cent. Appellee received a letter advising him that appellant had exercised its option and after that the suit was filed. If appellant had not given appellee notice that it had exercised its option appellant could not have come and gotten the machine. Appellant took the machine before the last note—last payment under the contract—was due.

The court found the facts as follows: "Prior to the institution of the suit in the justice court the plaintiff notified the defendant that, default having been made in the payments under the contract, that it had exercised its option in the contract to and did declare all the unpaid balance of the contract price of the adding machine as due and payable; that defendant has paid on the purchase price \$8, leaving a balance of \$80, and none of this balance has ever been paid by the defendant. An affidavit was filed by plaintiff as a vendor to create and enforce a lien, under the statute, against said adding machine, setting up that it was in the possession of the vendee, and asking that it be taken by the officer of the court and held subject to the orders of the court. The adding machine was taken from the possession of the defendant under a writ of attachment issued on this affidavit and held by the constable. Under the terms of the contract of lease the plaintiff could not claim the benefit of both options expressed in said con-

tract, of 'taking and removing said adding machine,' or 'may leave machine in possession of lessee and declare all unpaid balance due and payable.' "

The court thereupon rendered judgment in favor of the appellee, and appellant brings this appeal.

WOOD, J., (after stating the facts). (1-2) The court erred in construing the contract as a lease. Although the contract recites, "I, P. S. White, do hereby agree to lease," etc., and although the appellee is designated in the body of the contract as the "lessee," nevertheless the language which states the reciprocal duties and obligations and the respective rights of the parties shows that it was their intention to enter into a contract to sell on certain conditions, but not to lease. The contract must be construed as a whole and the intention of the parties gathered from the use of the language as a whole rather than from some particular word or words, without reference to the context in which those words are used.

When the words "lease" and "lessee" are considered in connection with their context, it is clear that they were not used in the narrow technical sense, and to so construe them would destroy the evident meaning of the other language of the contract and not give effect to the intention of the parties as manifested by the language of the contract when taken in its entirety.

The appellee, in his testimony, designated the contract as "simply a lease, the same as any installment plan," and he seeks here to have that construction placed upon it.

(3) Mr. Tiffany, in his work on Sales, at page 134, says: "The character of the transaction depends upon the intention of the parties, which is evidenced in most cases by a written contract, and which is not determined by the name which the parties have given to the instrument, but is to be gathered from all its terms. Thus instruments in the form of leases, and so designated, and providing that the so-called lessee shall become the owner of the thing leased upon payment of stipulated installments

of rent, usually equivalent to the value of the thing, which the lessee agrees to pay, and reserving the right on the part of the lessor upon default in payment to resume possession, have often been held to be conditional sales." Citing numerous cases in note.

And Professor Mechem says: "The mere fact that the parties declare that their agreement shall not amount to a sale, or shall not be construed in any other manner, is not conclusive. They can not, by their agreement, control the operation of the rules of construction. In very many of the cases the instrument in question has been called a lease, and much of the language used has been such as would be appropriate to a lease. It is, of course, entirely competent for parties to make leases of chattels, but the instrument will not be deemed a lease where its contents and evident purpose shows that some other construction is demanded. Hence the cases are numerous in which instruments called leases have been held to be conditional contracts to sell, that is, agreements to sell with payments made a condition precedent to the passing of the title, notwithstanding that the parties have expressly stipulated that no such construction should be put upon their contract." 1 Mechem on Sales, § § 568, 569, p. 468, and numerous cases cited in note.

(4) In the case in hand appellant, under contract, delivered the possession of the machine to the appellee and was not entitled to take possession of the same from the appellee except in default of some one or all of the installments. The appellee had the possession and use of the machine and agreed to pay for the same on the installment plan, and when the payments were made as designated appellee was to have title to the machine. Until such installments were paid according to the contract the title to the machine remained in the appellant. Appellant had the option, under the contract, upon the failure of the appellee to pay any one or all of the installments, to take possession of the machine or to leave the machine in the possession of the appellee and to declare all the unpaid balance due and to sue for the same. These pro-

visions, as we construe the contract, constituted it one for a sale and not a lease. See *Miller v. Steen*, 30 Cal. 402, 89 Am. Dec. 124; *Murch v. Wright*, 95 Am. Dec. 455; *Lundy Furniture Co. v. White*, 79 Am. St. Rep. 41, and other authorities cited in appellant's brief.

As we understand the undisputed evidence, upon the failure of the appellee to make the payments the appellant did not exercise the option it had under the contract to take possession of the property and rescind the contract, but, on the contrary, it affirmed the contract and permitted appellee to retain possession of the machine and sued for the purchase money. This, appellant, had the right to do. See *Bowser Fur. Co. v. Johnson*, 117 Ark. 496; *Hollenberg Music Co. v. Barron*, 100 Ark. 403; *Bell v. Old*, 88 Ark. 99.

Appellee still having possession of the property, and the purchase price thereof being payable in money, appellant also had the right, in connection with its suit for the purchase money, to have the property impounded and a lien created and enforced on the same to pay the balance of the purchase money under the provisions of section 4966 *et seq.* (chap. 101), Kirby's Digest; *Fox v. Ark. Industrial Co.*, 52 Ark. 450; *Stephens v. Shannon*, 43 Ark. 464.

The judgment is therefore reversed, and the cause will be remanded with directions to enter judgment in favor of the appellant and for further proceedings according to law.

HOUSE, RECEIVER FOR PLANTERS FIRE INSURANCE COMPANY
v. DAVIS.

Opinion delivered October 1, 1917.

1. INSURANCE—BINDING CONTRACT COMPLETED, WHEN.—Where an insurance company accepts an application for insurance, and issues the policy, there being nothing further for the insurance company to do, the policy becomes binding upon the parties when the insurance company mails it to the applicant.
2. INSURANCE—BINDING CONTRACT OF.—An insurance company issued a policy in pursuance of an application and mailed it to

the applicant. The company requested the applicant to notify it if the policy was not received within fifteen days. *Held*, where he gave no notice to the company the applicant would thereafter be estopped to deny the issuance of the policy.

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

Joe Joiner, for appellant.

The court's instructions 1 and 2 were misleading. Actual receipt of the policy by the insured was not necessary to fix the liability. Where nothing remains to be done by the insurer, the mailing of the policy duly executed to the insured, constitutes delivery. 97 Ark. 229; 65 Ark. 581; 96 N. W. 954; 98 Ark. 388; 19 Cyc. 603. Manual delivery is not essential to render a policy binding. 9 Ky. Law Rep. 932; 28 Me. 51; 48 Am. Dec. 474; 87 U. S. 560; 64 N. H. 137; 26 N. J. Law 268; 23 Wend. 18; 12 So. 25; 54 N. E. 914; 19 Cyc. 609; 85 Ark. 169.

The verdict was contrary to the evidence and to the law as declared by the court in instruction 5. The court should have directed a verdict for the appellant. 97 Ark. 438; 89 Ark. 24; 110 Ark. 571; 114 Ark. 574; 116 Ark. 284.

Stevens & Stevens, for appellees.

1. On the whole record the appellant has not made out a case. The note was not the entire contract, but that in connection with the application, the agent's receipt for the application and the policy, constituted the contract of insurance.

The policy could not become binding on appellee until delivery to him. He was entitled to see it to ascertain if it was the policy contracted for, and to a reasonable time in which to return it if it did not comply with the contract. 86 Ark. 284; 102 Ark. 146. If the policy was not delivered there was no contract of insurance, and the verdict should not be disturbed. 97 Ark. 231.

2. Instructions 1 and 2 given at appellee's request were correct, under the evidence. Decisions cited by appellant do not support his contention, while 98 Ark. 388 cited, favors appellee on point that the presumption of

delivery of a letter properly addressed may be rebutted by evidence that it was not in fact received by the addressee.

Joe Joiner, for appellant, in reply.

The burden was on appellee. The note was the basis of the action, the execution of which appellee admitted and pleaded want of consideration. 82 Ark. 331.

STATEMENT BY THE COURT.

This suit was instituted by the appellant on a promissory note executed by the appellee in payment of the cash premium on a fire insurance policy for which the appellee had applied in the Planters Fire Insurance Company. On the back of the note was stamped, "Policy No. 47,213."

The appellee admitted the execution of the note, but denied liability on same, alleging that the insurance company had not executed and delivered to him a policy of insurance in accordance with his application; that said Fire Insurance Company was insolvent and no longer able to carry out its contract of insurance.

The testimony on behalf of the appellant tended to show that the appellee made application for insurance and executed the note in suit for the cash premium; that appellee's application was accepted by the insurance company and a policy of insurance was issued and mailed to the appellee; that appellee never notified the company that he had not received his policy and had not asked the company to issue him a new one or to return his note; that demand for the payment of the note had been made and same refused. Record Book No. 3 of the insurance company, in which the policy holders in the Planters Fire Insurance Company were recorded, shows that a policy was issued to Joe Davis (appellee) and numbered 47,213, corresponding to the number stamped on the note. The insurance company had become insolvent after the issuance of the policy and had been placed in the hands of appellant as receiver.

The receiver testified that appellee was carried as a policy holder and stock holder on the books of the company; that if he had suffered a loss of his property during the life of his policy his loss would have been paid, and if there had been any profits during that time he would have received his part. He executed power of attorney and proxy to certain officers of the company to act for him in stockholders' meetings, which was exercised by him through the secretary of the company. The receiver stated that he, as receiver, had no connection with the company in 1913 except as a policy holder, and that his evidence is drawn from the records of the company.

The appellee testified that he signed the note in suit and signed it on condition that the company would issue him a policy. He introduced a copy of the application which was signed by him and which, among other things, contained the following recital: "And should this application be accepted and a contract of insurance issued thereunder, I do hereby exercise and deliver this power of attorney and proxy and constitute and appoint M. H. Johnson, president, or T. T. Cotnam, vice-president, severally and not jointly, or their successors duly authorized, my sole, true and lawful attorney and agent for me and in my name, place and stead, to vote as my agent, attorney," etc. "This power of attorney and proxy shall be valid and effectual and shall continue in full force during the existence of this contract."

The company issued a receipt to the appellee for his application, showing that the application had been received and note for the cash premium executed, and contained this recital: "All of which to be returned if a contract be not issued. Contract to be sent by mail. Should you not receive your contract within fifteen days write to the company and give name of the solicitor and date of this receipt."

The appellee testified that he never got a policy, but that a week or two after the agent had gone he got a letter informing him that his application had been accepted. He did not know whether they had mailed the policy or not.

He received the receipt containing the recitals above set out. He never wrote them concerning the policy. Never asked them to return his note and never informed the company that he had not received the policy until after the suit was brought. After the company wrote him that they would send him the policy he never paid any more attention to it; just thought that he had been insured. It was about three and a half years after the application was made until this suit was brought.

Over the objection of appellant the court gave the following instructions:

"1. The court instructs the jury that if they find from the evidence that the policy was not issued in accordance to the application of the defendant and received by him in pursuance of said application then you will find for the defendant.

"2. The court instructs the jury that if you find from the evidence that a policy was issued under the application and mailed to the defendant, this raises the presumption that the defendant received this policy, but this presumption may be rebutted by evidence that the policy was not received."

And the court, among other instructions, at the instance of appellant, gave the following:

"5. If you find from the evidence that the plaintiff company issued defendant a receipt at the time his application for insurance was accepted and said receipt recited that his contract of insurance would be sent by mail, and further stated that if the contract was not received within fifteen days to write to the company, and if the defendant did not notify the plaintiff that he had not received his policy, and did not request the issuance of a new policy or the return of the premium note within a reasonable time, and that when plaintiff requested payment on defendant's note he did not ask for the return of his note or the issuance of the policy, you will find the defendant is estopped from denying the issuance of the policy, and you should find for the plaintiff."

The jury returned a verdict in favor of the appellee, and from a judgment entered in appellee's favor this appeal has been duly prosecuted.

WOOD, J., (after stating the facts). Under the undisputed evidence the contract of insurance was complete when the company accepted appellee's application, issued the policy and mailed the same to appellee. When this was done nothing remained for the insurance company to do.

In *DuPriest v. American Central Life Ins. Co.*, 97 Ark. 229, we said: "It is very well settled that where nothing remains to be done by the insurer, the mailing of the policy, duly executed, to the insured constitutes a delivery."

The authorities generally hold that "Where an application is made for a policy of insurance which is accepted and the insured notified thereof, the contract is consummated without actual delivery of the policy in the absence of a provision in the application requiring delivery." 14 R. C. L., § 75, page 897. And on page 898, §. 76, of the same volume, it is said: "It is the intention of the parties, and not the manual possession of the policy, which determines whether there has been a delivery thereof."

In volume 19 Cyc., page 603, it is said: "Where a policy has been duly executed in compliance with an application on the part of the insured, so that the minds of the parties have fully met as to the terms and conditions of the contract, a manual delivery of the policy to the insured is not essential to render it binding on the company."

Here the undisputed evidence shows that a manual delivery of the policy was not contemplated. All that the company had to do was to send the policy by mail, which it did. There was no provision in the application or the receipt showing that the parties contemplated that the contract was not to be complete until the appellee had received the same, but all that the company had to do was to issue the policy and send it through the mail.

The instructions, therefore, numbered 1 and 2, given at the instance of the appellee, under the undisputed evidence, raised abstract issues before the jury which were prejudicial to the appellant.

Appellee himself testified that the company wrote him that his application had been accepted and that it would send the policy. And he further testified that he wanted the insurance and would have paid for it if he had received the policy, but that it was never received. The testimony of the receiver shows that appellee had executed a power of attorney and proxy to officers of the company to act for him in stockholders' meetings, which these officers had exercised in his behalf.

These facts are sufficient to constitute a meeting of the minds so as to render the contract of insurance complete, and if appellee had suffered a loss during the life of the policy there is no doubt but what, under the circumstances, he would have been entitled to recover against the company. Moreover, under the undisputed evidence, the verdict of the jury was contrary to the law as given by the court in instruction No. 5. The appellee accepted from the appellant a receipt in which it was stated that the policy was to be sent by mail, and if the appellee did not receive the policy in fifteen days he was to write the company and give the name of the solicitor and date of the receipt, and the company was to return the cash premium note if the contract was not issued.

The court properly instructed the jury, under this evidence, that if the defendant did not notify plaintiff that he had not received his policy, and did not request the issuance of a new policy or the return of the premium note within a reasonable time that he was estopped from denying the issuance of the policy, and that their verdict should be for the plaintiff. The verdict of the jury was therefore contrary to the law as given by the court, and the court erred in refusing to set aside a judgment based upon such verdict and in overruling the appellant's motion for a new trial.

For the errors indicated the judgment is reversed, and judgment will be entered here in favor of the appellant.

JOHNSON v. HINTON, ADMINISTRATOR.

Opinion delivered October 1, 1917.

WILLS—NECESSITY FOR TWO SUBSCRIBING WITNESSES.—A will can not be admitted to probate where the signature of the testator is attested by only one witness.

Appeal from Arkansas Circuit Court; *Thomas C. Trimble*, Judge; affirmed.

Carpenter & Bowers and *W. N. Carpenter*, for appellants.

The will was sufficiently proven to admit it to probate. The intention of the testator was clearly proven. 13 Ark. 475, 483. A will may be proven by testimony other than that of the attesting witnesses. *Ib.* 473, 31 *Id.* 588. The law was substantially complied with and the will should be probated.

HART, J. Richmond Franklin died in Arkansas County in this State owning property. J. W. Hinton was appointed administrator of his estate. J. H. Johnson and Eliza Edwards filed a petition in the probate court for the probate of a written instrument which they alleged to be the last will and testament of Richard Franklin, deceased. J. W. Hinton, as administrator, contested the probate of the will. The probate court refused to admit the instrument to probate as the last will and testament of Richard Franklin, deceased, and an appeal was taken to the circuit court. The circuit court sustained the judgment of the probate court in refusing the will to be probated and directed that a copy of its judgment be certified to the probate court. The case is here on appeal. The facts are as follows:

Dr. S. F. Baker was one of the attending physicians of Richmond Franklin during his last illness. Richmond

Franklin asked Dr. Baker if he would get well, and he said that the reason he wanted to know was that he had a little property and wanted to dispose of it before he died. Dr. Baker replied that he could dispose of his property by will. Franklin asked Dr. Baker to write his will for him and told him that he wished to give his property to Jas. H. Johnson and Eliza Edwards. Dr. Baker wrote out the will for him. Franklin signed it and Dr. Baker signed it as an attesting witness. He told Franklin that the law required that there should be two attesting witnesses. Franklin died without having procured another attesting witness. It was also shown in evidence that Richmond Franklin had frequently stated to different persons that he wanted J. H. Johnson and Eliza Edwards to have his property after he died. The probate of the will in common form was refused solely on the ground that there was but one attesting witness to it.

Under our statutes property may be disposed of by will, but at least two attesting witnesses are required. Kirby's Digest, § § 8010 and 8012.

There was only one attesting witness to the will and the court was right in refusing to allow it to be admitted to probate because the statute had not been complied with in regard to its attestation. *Rogers v. Diamond*, 13 Ark. 487; *Janes v. Williams*, 31 Ark. 175, and *Payne v. Payne*, 54 Ark. 415.

It is also contended that the court should have admitted the instrument to probate as a will because such was the intention of Richmond Franklin. The answer to this contention is clearly stated in *Albright v. North*, Admr., 146 Cal. 455, 2 A. & E. Ann. Cases, 726. In that case the court said:

"The right to make a testamentary disposition of one's property is purely of statutory creation, and is available only upon a compliance with the requirements of the statute. The formalities which the Legislature has prescribed for the execution of a will are essential to its validity and can not be disregarded. The mode so prescribed is the measure for the exercise of the right, and

the heir can be deprived of his inheritance only by a compliance with this mode. For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose the court can consider only the intention of the legislature, as expressed in the language of the statute, and whether the will as presented shows a compliance with the statute. *Walker's Estate*, 110 Cal. 387."

It follows that the judgment must be affirmed.

COLLIN COUNTY NATIONAL BANK v. LASER GRAIN COMPANY.

Opinion delivered October 1, 1917.

1. SALES—ASSIGNMENT OF DRAFT AND BILL OF LADING—TITLE TO DRAFT.—One B. sold grain to appellee, drawing on appellee for the purchase price, which appellee paid to the C. bank. The grain proving to be inferior, appellee sued B. for damages, and attached the funds in the C. bank. Appellant interpleaded, claiming the funds, as the purchaser of the draft from B. *Held*, under the evidence it was a question for the jury, whether appellant was the owner of the draft at the time the attachment was issued.
2. TRIAL—INTERPLEA—BURDEN OF PROOF—RIGHT TO OPEN AND CLOSE.—Under the facts as set out above, the attachment suit and interplea were tried together. *Held*, the burden of proof was on the interpleader, and that it was entitled, at the trial, to the opening and closing argument.

Appeal from Johnson Circuit Court; *A. B. Priddy*, Judge; reversed.

W. E. Atkinson, for appellant.

1. The burden was on the bank and it had the right to open and close the case. 39 Ark. 102; 95 *Id.* 593; 29 *Id.* 151; 32 *Id.* 593, 597; 59 *Id.* 143.
2. A verdict should have been directed for appellant. The bank purchased the draft and paid for it before it was sent for collection. 57 Ark. 468; 97 *Id.* 442; 90 *Id.* 443.

3. It was error to refuse the instruction asked by appellant. The assignment of the bill of lading transferred the title to the bank. 90 Ark. 439; 70 Ark. 386.

4. The court erred in admitting the evidence of Seeton, Denman and Laser.

Sellers & Sellers, for appellee.

1. The burden was on the plaintiff on the whole case and it had the right to open and close the argument. 98 Ark. 132; 95 *Id.* 595; 39 *Id.* 102.

2. There was no error in refusing to direct a verdict. The testimony was conflicting.

3. There was no error in refusing the instruction asked by appellant. It was improper and there was no prejudice. 90 Ark. 439.

4. The testimony of Seeton, Denman and Laser was properly admitted.

HART, J. Laser Grain Company, a corporation organized under the laws of the State of Arkansas, and doing business at Clarksville, in said State, entered into a contract with the Brown Grain Company, a corporation organized and doing business at McKinney, Texas, whereby the former purchased from the latter five carloads of seed oats which were to be of the quality and character of the sample furnished. A part of the oats shipped were of a quality inferior to the sample. There was also a shortage in the quantity of oats purchased. The Laser Grain Company instituted a suit against the Brown Grain Company to recover damages. A writ of attachment was prayed for on the ground that the defendant was a non-resident and a writ of garnishment was issued against the Bank of Clarksville, the plaintiff alleging that the bank had in its hands money belonging to the defendant, to wit: The money which had been paid for the oats.

The Collin County National Bank, a banking corporation doing business at McKinney, Texas, interpleaded in the action and alleged that the Brown Grain Company had assigned to it the draft which had been given it by the

Laser Grain Company in payment of the oats and that it had sent said draft to the Bank of Clarksville for collection. There was a verdict and judgment against the interpleader and the case is here on appeal.

It is earnestly insisted by counsel for the Collin County National Bank, the appellant, that the evidence is not sufficient to warrant a verdict against it, and that the court erred in not directing a verdict in its favor.

The cashier of the Collin County National Bank and the manager of the Brown Grain Company both testified that the Collin County National Bank and the Brown Grain Company had no connection with each other except that the grain company was a customer of the bank. They said that the Brown Grain Company received a draft for \$557.50 from the Laser Grain Company in payment of oats sold by the former to the latter and that the Brown Grain Company sold and transferred this draft to the Collin County National Bank for its face value, less exchange of \$1.50. They testified that the bank purchased this draft outright and owned it at the time the garnishment in this case was issued. They insisted that this testimony was uncontradicted and in support of their contention cited the case of *Collin County National Bank v. Harris*, 90 Ark. 439. Counsel point out that in that case the court held a similar state of facts to be undisputed. That is true and if nothing more appeared in the record in this case we would hold that the facts were undisputed. There are other facts and circumstances in the record however, which we think tend to show that the testimony above referred to is not undisputed or at least that the testimony of the witness is not consistent in itself.

The draft in question contained the following:

"To Laser Grain Company, Clarksville, Arkansas. Bill of lading attached. Brown Grain Company, collect through Bank of Clarksville bank, collection No. 11,958, Collin County National Bank, McKinney, Texas." Endorsement on the back: "Pay to the order of any banker, March 4, 1916. Collin County National Bank, McKinney, Texas."

(1) The cashier of the Bank of Clarksville testified that his bank received it for collection for the Collin County National Bank and that the stamp on the face of it, just referred to above, seemed to be the Collin County National Bank's collection number. He stated that the words stamped on the draft, towit: "Collin County National Bank, collection No. 11,958, McKinney, Texas," indicated that the Collin County National Bank held the draft for collection. He also testified that it was not the custom of banks to purchase drafts outright from their customers and that in a case a purchase was made of a draft or note, ten per cent. of the face value thereof was the discount charged by the bank; that one dollar and a half would be about the exchange on a draft of \$557.50. His testimony was corroborated by that of the cashier of another bank in the town of Clarksville. The facts and circumstances just recited tend to contradict the testimony of the interpleader and made it a question for the jury to determine whether or not the Collin County National Bank was the owner of the draft at the time of the writ of garnishment herein.

It is next insisted that the court erred in refusing to give at the instance of appellant the following instruction:

"The court instructs the jury that by the transfer of the bill of lading for the car of oats to the interpleader by the Brown Grain Company all of the title, right of the Brown Grain Company to said car of oats was transferred to said interpleader and remained in it until accompanying draft was paid by the Laser Grain Company."

The sole contention of appellant was that it had purchased the draft in question and owned it at the time of the issuance of the garnishment herein. The court had so instructed the jury in other instructions to which appellant made no complaint on that ground.

The only objection made by the appellant to the instructions given by the court was that the undisputed testimony in the case was that the interpleader bought the draft in controversy and was the owner thereof.

Therefore the instructions in question would have tended to confuse and mislead the jury by bringing into the case an issue that the interpleader did not rely upon for a recovery.

It is next contended that the court erred in admitting the testimony of witnesses on the attachment branch of the case. When the record is considered in its entirety we think it shows an agreement upon the part of the parties to try both the attachment and interplea together. The evidence was competent against the defendant to sustain the attachment and it was not error to admit it because the parties had consented to try the attachment and interplea together. *Carl & Tobey Co. v. Beal & Fletcher Co.*, 64 Ark. 373.

(2) Counsel for appellant asked the court to permit it to open and close the argument in the case, which request the court refused.

Counsel for appellee rely on the case of *Metropolitan Life Insurance Co. v. Shane*, 98 Ark. 132, to sustain the ruling of the court. In that case the insurance company had issued a life policy to L. V. Shane in which Louisiana Shane was named as the beneficiary. L. V. Shane died and his administrator instituted a suit against the insurance company and against the administrator of the estate of Louisiana Shane alleging that she had forfeited all rights under the policy because she had unlawfully killed the insured. The administrator filed an answer and intervention in which he admitted that his decedent had killed the insured but alleged that at the time she was insane and not responsible for her acts. He asked for judgment against the insurance company because she was the beneficiary named in the policy. The insurance company denied all liability on the policy, on the ground that it had issued the same by reason of certain false warranties made by the insured which avoided the policy. The court held that against the insurance company the original plaintiff and the intervener were equally plaintiffs and each was a defendant against the other as to their rival claims for recovery against the insurance

company. Under these circumstances the court held that it was within the sound discretion of the trial court to determine the order of the argument. This was so because each plaintiff would be entitled to begin and close the argument equally with the other in their actions against the insurance company. No such case is presented here. It is true that by consent of the parties the attachment and interplea were tried together. The principal contention, however, was between the plaintiff in the attachment case and the interpleader. According to the rule laid down in *Jones v. Seymour*, 95 Ark. 593, the burden of proof was on the interpleader and he was therefore entitled to the opening and conclusion of the argument. This holding is in accord with our earlier decisions on the question. *Bergman v. Sells*, 39 Ark. 97, and *Excelsior Mfg. Co. v. Owens*, 58 Ark. 556.

The parties here seemed to have gone to trial mainly upon the general issue on the interplea and the burden was upon the appellant as interpleader to prove that he acquired by valid sale and transfer, title to the draft in question.

For the error in not so ruling the judgment must be reversed and the cause remanded for a new trial.

HIXSON v. COOK.

Opinion delivered October 1, 1917.

1. SALES—SALE OF UNWHOLESOME MEAT—REFUND OF PURCHASE PRICE.—One who sells unwholesome meat to a butcher may be compelled to refund the purchase price to the butcher, although the butcher was not required by his customers to refund.
2. SALES—UNWHOLESOME MEAT—PUNITIVE DAMAGES.—If one sells diseased meat without making that fact known to his vendee, and does so maliciously, or with knowledge or reason to believe that the sale of the meat would cause injury, and, so knowing, or having reason to so believe, sells the meat with a conscious indifference to consequences, he may be required to respond in punitive damages.

Appeal from Logan Circuit Court, Northern District; *James Cochran*, Judge; affirmed.

Robert J. White, for appellant.

1. The court erred in its instructions to the jury. None of the meat was lost or thrown away, but was all sold and the purchasers were satisfied. Plaintiff sustained no loss nor injury. The verdict is against the evidence. There is no evidence that defendant knew or had reasonable grounds to believe the hog was diseased. There is an entire failure of proof. 68 S. W. 277; 111 N. E. 785; 100 *Id.* 1078; 8 S. W. 667; Kirby's Digest § 1701.

2. The definition of diseased given by the court is not correct. 68 S. W. 277; 113 N. W. 566; 139 Iowa 140; 101 N. W. 61; 17 L. R. A. a 260.

3. The testimony of plaintiff was too remote and uncertain as to loss and damages. 124 Ark. 206; 111 N. E. 785; 100 N. E. 1078. Negligence must be proven. 45 N. E. 253.

4. The judgment is contrary to the instructions, as there was no proof that defendant sold any hog to plaintiff or that he knowingly sold him a diseased hog.

D. E. Johnson and *Sid White*, for appellee.

1. There is no error in the instructions. Actual loss was unnecessary as the sale was illegal, prohibited by law. 91 Ark. 72; 47 *Id.* 381; 42 *Id.* 208; Kirby's Digest, § 1701.

2. The law was correctly stated in Nos. 2, 4 and 7. Hale on Torts, 220.

3. Nos. 4, 5 and 8 are correct. 104 Ark. 89, 93; 90 *Id.* 462.

4. The court properly allowed compensation and punitive damages. Hale on Torts, 205; Field on Damages (Rev. Ed.) 65; 3 Ark. 227.

5. Appellant knew the hog was diseased. The jury settled the question. 104 Ark. 162. There was an implied warranty of health and soundness. 76 Ark. 352; 14 *Id.* 301; 19 *Id.* 194.

6. There was no defect of parties; if so, it was waived. 75 Ark. 288; 66 *Id.* 560.

7. All errors of law in refusing instructions, if any, were cured by others given. 92 Ark. 71, 94; *Id.* 511; 87 *Id.* 308. See also 76 Ark. 4; 81 *Id.* 16; 98 *Id.* 83; 92 *Id.* 534. The judgment is right on the whole case and should be affirmed.

SMITH, J. Appellee ran a butcher shop in the town of Paris, and on November 11, 1916, bought from appellant a hog, to be butchered and sold to his customers. He now says that the hog was sick and diseased, and that he bought it without knowledge of that fact, and sold the meat to his customers, and that he learned its condition only when some of his customers, who had been made sick, complained to him about the meat. He sued for damages, both compensatory and punitive, and recovered compensatory damages in the sum of \$23, which was the amount paid for the hog, and punitive damages in the sum of \$100.

There was evidence that the hog was not in condition, and appellant says the hog was choked. He applied to a Doctor Weisly for advice, and was told to kill the hog, that if there was only a choke the meat would be all right and that he would find the object which was choking the hog, but that if there was some other trouble he would find the lungs black or spotted, in which event the hog should be burned or destroyed. The man who butchered the hog testified that he found the knuckle of a bone, about the size of a pea, in the windpipe, and that he found spots, the size of a pea, on the lungs. The county health officer testified that the spots found indicated a diseased condition. Appellant undertook to sell the hog to several persons whom he told that it had choked, but none would buy, when finally he sold it to appellee without mentioning the circumstances under which it was killed.

It was shown that appellant killed only the hog in question on the 11th, and that pork bought at appellee's shop the next day had an offensive odor while being

cooked, and four members of one family who ate portions of it became ill. Appellant testified that the hog was not diseased except that it was choked, but that if it was, in fact, diseased, he was unaware of that fact when he sold it to appellee.

(1) The appellant requested an instruction which told the jury that, if appellee had sold the hog for more than he paid for it, and had not refunded the money so received, there could be no recovery of the purchase price of the hog. This instruction was properly refused. By section 1701 of Kirby's Digest, it is made a misdemeanor to knowingly sell unwholesome meat. But, whether knowingly sold or not, if it was, in fact, unwholesome, the sale was without consideration, and there was a breach of the implied warranty that the meat was fit for food, as it had been sold for that purpose. Appellant could not, therefore, refuse to refund the price of the hog because appellee's customers did not also require appellee to refund.

Over appellant's objection, the court gave the following instruction on the subject of punitive damages:

"No. 4. If you find from the evidence fairly preponderating that defendant sold to plaintiff the diseased meat of a certain diseased hog, without making fully known to plaintiff said diseased condition and the fact that it was so diseased, and further find from the evidence fairly preponderating that said sale was made by defendant maliciously or that defendant at the time knew or had reason to believe that his act in so selling said meat and said hog to plaintiff was about to and would cause plaintiff injury, and so knowing or having reason to believe continued to and did sell the same to plaintiff with a conscious indifference to the consequences, then in that event plaintiff must have a verdict for punitive damages."

(2) It is insisted that this instruction is not the law, and that it is abstract. We think, however, that it correctly declares the law, and that it is not open to the objection of being abstract. Certainly, if one sells diseased meat without making that fact known to his vendee, and does so maliciously, or with knowledge or reason to be-

lieve that the sale of the meat would cause injury, and, so knowing, or having reason to so believe, sells the meat with a conscious indifference to the consequences, he should pay some damages as punishment for such conduct. The instruction set out imposed these requirements, and if the jury found the facts to be as there hypothetically stated, the verdict returned was one against which appellant has no right to complain.

The instruction does not appear to be abstract, because the testimony shows that appellant failed to sell the hog to persons to whom he stated that the hog had choked, and that the hog was sold to appellee without any disclosure of facts concerning its condition. It was shown that appellee sustained a loss of customers in his business by the report which gained currency that he had sold diseased meat to his customers. Nothing was found in the hog's throat which was apparently sufficient to choke it. Appellant himself stated that the object found in the hog's throat was not apparently sufficient to choke it. And spots were found on the lungs which appellant had been told would indicate disease. These were questions of fact for the jury, which have been resolved against appellant.

It is insisted that the testimony shows that the hog was sold to appellee and one Pearson, who were at the time of its purchase associated together in the butcher business, and inasmuch as Pearson was not made a party to this suit, there was a defect of parties plaintiff. But no such question was raised by the pleadings, or in the trial below, and it can not, therefore, be raised here for the first time. *Jones v. Seymour*, 95 Ark. 593.

The instructions given submitted the case to the jury in accordance with the views here expressed, and, as we find no prejudicial error in the record, the judgment is affirmed.

RUSS v. STRICKLAND.

Opinion delivered October 1, 1917.

1. AUTOMOBILES—DUTY OF CARE—FRIGHTENED ANIMAL.—The driver of an automobile must exercise ordinary care, in the operation of his car, to avoid the infliction of damages or injury to the person or property of another. He has the right to use the highways, but he must so use them as not to interfere with the rights of others who lawfully use the highways. A duty rests upon the driver of animals upon public highways also to use due care, and no recovery can be had against the driver of an automobile for injuries received due to the frightening of a horse driven by the plaintiff to his buggy, where plaintiff's own negligence proximately contributed to his injury.
2. AUTOMOBILES—FRIGHTENING ANIMAL DRIVEN TO BUGGY—DUTY OF DRIVER OF AUTOMOBILE.—Under section 12 of Act 134, p. 94, Acts 1911, it is the duty of the driver of an automobile upon a public highway to stop, when he sees, or when, had he been in the exercise of due care he would have seen that a horse ridden or driven by another person was frightened, or was about to be frightened.
3. AUTOMOBILES—DUTY OF DRIVER UPON SEEING FRIGHTENED ANIMAL.—Under section 12, Act 134, Acts 1911, the driver of an automobile must stop his car when he sees that a horse ridden or driven by another is about to become frightened, although he thinks it safer to proceed, and his failure to stop under these circumstances is negligence and renders him liable for any injury of which such failure is the proximate cause, provided the party injured is not, himself, guilty of negligence contributing to his injury.

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

Rachels & Yarnell, for appellant.

1. There is reversible error in the refusal to give the instructions asked. Act 134, Acts 1911, § 12; Kirby & Castle's Digest, § 6437; 122 Ark. 28; 116 *Id.* 26; 102 *Id.* 351. A motorist must stop his car if he sees, or by exercise of ordinary care could see, the frightened condition of the horse. Section 12, act 134, Acts 1911, etc.

2. There is error in the court's charge. 122 Ark. 32. The giving of an instruction from which the jury might infer that there was evidence on a point on which

there was in fact none, is prejudicial and error. 80 Ark. 260; 105 *Id.* 278; 95 *Id.* 597.

3. It was error to modify the plaintiff's request No. 2. 102 Ark. 351. The verdict is contrary to the law and the evidence.

Brundidge & Neelly, for appellee.

There is no error in the instructions. They follow the law as laid down in the recent decisions of this court. 122 Ark. 28; 102 *Id.* 351; 116 *Id.* 26.

SMITH, J. Appellant Russ sustained serious injuries by being thrown from his buggy when the horse which he was driving became frightened at appellee Strickland's automobile and ran away. Appellant testified that he saw the automobile when it rounded a curve in the road, a distance of 150 yards away, and that the occupants of the car could have seen the buggy at the same distance. That the horse was afraid of automobiles, and became frightened as soon as it saw the car. That appellant motioned his hand to Strickland to stop the car, and that Strickland threw up his hand, but the car continued its approach at a slow speed, when a Mr. Hubbard, who was riding with Russ, got out of the buggy and took hold of the horse's bit, but, by this time, the horse was frantic and unmanageable. The automobile approached to within twenty-five or thirty yards of the horse, when it stopped. By this time the horse was rearing on its hind legs when the rein broke and the horse whirled around and overturned the buggy. Russ and Hubbard testified that Strickland got out of his car, and, when he came up to where Russ was lying on the ground, stated that he did not stop his car sooner because he thought it safer to drive slowly by the buggy. Strickland denied making this statement, and testified that he was driving in low gear on account of a depression in the road which he had just crossed when he saw the horse, and that the car was moving at a speed of not more than ten miles per hour, and that the car stopped as soon as he and his son, who

was driving the car, observed that the horse was frightened.

A number of instructions were given on the subject of due care and contributory negligence, while a still larger number which were requested were refused. The plaintiff requested instructions which, in effect, told the jury to find for the plaintiff if the injury was caused by defendant's failure to stop his car. An instruction to this effect was given with the following amendment or modification:

"And on the other hand, gentlemen of the jury, if you find from the evidence that, at the time the defendants discovered the frightened condition of the horse, they stopped their automobile and did all they could to prevent the accident, then you will find for the defendant."

Other instructions were given which embodied the view of the law contained in the amendment set out above, and for this reason the cause must be reversed. We will not set out or discuss all the instructions in this cause, but will state the law applicable to the issues joined between the parties.

The driver of an automobile must exercise ordinary care, in the operation of his car, to avoid the infliction of damages or injury to the person or property of another. He has the right to use the public highways, but his rights there are reciprocal, that is, these rights must be so used as not to interfere with the rights of others to lawfully use the highways. A similar reciprocal duty rests on those others. They must, themselves, exercise care, not only to avoid injuring others, but also for their own protection. They can not be guilty of negligence which proximately contributes to their injury, and yet recover damages to compensate this injury.

The court gave instructions correctly defining the common law rights and duties of the parties in this respect. But we think the court misconstrued the meaning of section 12 of act 134 of the Acts of 1911, page 94, regulating the use and speed of automobiles and other horse-

less conveyances upon the public streets, roads and highways of this State. This section reads as follows:

"Section 12. Whenever it shall appear that any horse, ridden or driven by any person upon any of said streets, roads and highways, is about to become frightened by the approach of any such motor vehicle, it shall be the duty of the person driving or conducting such motor vehicle to cause the same to come to a full stop until such horse or horses shall have passed, and, if necessary, assist in preventing accident. Any person convicted of violating this section shall be fined in any sum not to exceed two hundred dollars."

(1) The court told the jury to find for the defendant if defendant stopped the car when he discovered the frightened condition of the horse and did all he could to prevent the injury. Under this instruction, it only became the duty of defendant to stop his car when he discovered the frightened condition of the horse. But this was not the full measure of his duty. His duty was not limited by what he actually saw, but is governed by what he would have seen had he been in the exercise of ordinary care.

The section of the act set out above is so similar to the law of Illinois as to suggest that our statute was borrowed from that State. See Session Laws of Illinois, 1903, page 301. Section 2 of that act is substantially identical with the section of our statute set out above, except that our statute has added to it, after the words, "shall have passed," the phrase, "and, if necessary, assist in preventing accident."

The meaning of this statutory requirement is discussed in *Berry on Automobiles* (2 ed.), § 348. It is there said: "A statutory requirement that the driver of an automobile shall bring his vehicle to a stop whenever it shall appear that any horse ridden or driven by any person is about to become frightened, has been construed to mean that, whenever it might by the exercise of reasonable care and diligence on the part of the driver of the automobile, so appear to him that such horse is about to

become frightened, then he is charged with such knowledge."

In support of the text, the case of *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, is cited, and an examination of that case discloses that it gives full support to the text quoted. We are inclined to give special weight to that decision, because it was rendered before our statute was enacted, and if our statute was not borrowed from that State, we have, at least, modeled ours very closely after it. This Illinois case is found annotated in 1 L. R. A. (N. S.) 215. See, also, Babbitt's Law of Motor Vehicles (2 ed.), § 1120.

(2-3) The court should, therefore, have told the jury that it was defendant's duty to stop his car when he saw, or when, had he been in the exercise of due care he would have seen, that the horse was frightened, or was about to be frightened. Since the enactment of this statute, the driver of a car can not determine for himself whether it is as safe or safer to proceed than it is to stop. The law has decreed that he must stop his car, and he is under the duty to do so, although, in his opinion, some other course may be safer. His failure to stop the car under these circumstances is, therefore, negligence, and renders him liable for any injury of which it is the proximate cause, provided the party injured is not, himself, guilty of negligence contributing to his injury.

For the failure of the court to charge the jury in accordance with the law as here announced, the judgment of the court below is reversed and the cause remanded for a new trial.

ROAD IMPROVEMENT DISTRICT NO. 1 OF GRANT COUNTY v.
TOLER.

Opinion delivered October 1, 1917.

1. IMPROVEMENT DISTRICTS—SPECIAL ACT—POWERS AND DUTIES OF COMMISSIONERS.—Commissioners of an improvement district created by special act have only such powers, and can discharge only such duties as are given by the express terms of the act, or which are necessarily to be implied from its provisions.

2. IMPROVEMENT DISTRICT—ROADS—CHANGE IN PLANS—WOODEN AND STEEL BRIDGES.—Under Act No. 48, p. 136, Acts of 1915, creating a road improvement district, the commissioners adopted a plan for wooden bridges in the district; *held*, the commissioners had the discretion to change the character of the bridges to steel and concrete, subject to the approval of the county court.
3. IMPROVEMENT DISTRICTS—CHANGE OF PLAN—REASSESSMENT—ROADS.—The commissioners, acting under Act 48, p. 136, Acts 1915, adopted a plan providing for wooden bridges in the district. *Held*, under the act that they had the authority to change the plan from wooden to steel and concrete bridges, and to require the assessors to so revise their assessment as to take into account the increased value of the property resulting from the changes made.
4. IMPROVEMENT DISTRICT—INVALID ASSESSMENT.—A reassessment of benefits not based upon the benefits due to the superior quality of the improvement made, may be defeated upon a showing to that effect.
5. IMPROVEMENT DISTRICTS—CHANGE IN PLAN.—The commissioners have no power to create a condition, of their own volition, making an assessment necessary, regardless of the necessity for the change. Commissioners can make only such changes in the assessments as are required to make the assessment on any particular piece of land conform to the benefits received by that piece of land.
6. IMPROVEMENT DISTRICTS—COST OF THE IMPROVEMENT.—The cost of the improvement shall never exceed the benefit to be derived by the properties upon which the cost is imposed.

Appeal from Grant Chancery Court, *J. P. Henderson*, Chancellor; reversed.

Waddell & Nall and *Rose Hemingway, Cantrell, Loughborough & Miles*, for appellant.

1. The reassessment was properly made. 121 Ark. 110.

2. The notice of assessment was sufficient. Act 1915, p. 143, § 10; 103 Ark. 462-3.

3. The presumption is in favor of the assessment. The assessment of benefits is presumed to be correct and the burden is upon the plaintiffs to set it aside. 80 Ark. 462; 84 *Id.* 262; 91 *Id.* 381; 99 *Id.* 523; 199 U. S. 203.

4. A reassessment was properly ordered. Acts 1915, p. 144.

5. The board had the right to substitute steel and concrete bridges for wooden ones and the assessments were properly raised. 55 Ark. 154; 90 *Id.* 37; 97 *Id.* 339; 105 *Id.* 68. The widest discretion is granted by the act. Act. 308, Acts 1917; Acts 1915, p. 39, etc.; 97 Ark. 339.

Mehaffy, Reid & Mehaffy, for appellee.

1. Deviations from and additions to the original plans were unauthorized and void. 52 N. E. 479; 70 *Id.* 801; 64 N. W. 581; Acts 1915, p. 141; 50 Ark. 116; 26 So. 70; Black Int. Laws 115-119, 282-3; Cooley Taxation, p. 419; 61 N. W. 1112.

2. The assessment for additional improvement was void. 62 Atl. 173.

3. Reassessment of benefits under original plan void even if authority existed. 125 Ark. 572; 119 Ark. 196; 83 *Id.* 54; 86 *Id.* 1. There must be a proportionate increase of benefits. 68 Ark. 376; 60 Ill. 19; 48 N. E. 155; 109 *Id.* 823; 69 So. 486; 147 N. W. 808, and others.

SMITH, J. This cause was heard upon an agreed statement of facts, the material portions of which are as follows: Road District No. 1 of Grant County, was created by Act No. 48 of the Acts of 1915, p. 136, and soon after its passage, the commissioners therein named met, organized and formed the necessary plans for the construction of the improvement contemplated in said act, and after deciding to make the improvement, they appointed the assessors, and after furnishing them the estimated cost of said improvement, caused said assessors to make the required assessment of benefits to accrue to the several pieces of property within the district provided for in said act. The estimated cost was fixed at about \$163,000, to cover the cost of construction and incidental expenses, and upon this basis the benefits were fixed at \$319,324, upon which bonds were issued amounting to \$175,000, and sold for approximately \$163,000 cash. In 1917 the commissioners ordered the assessors to reassess

said lands, and the assessors met and adjusted some assessments of individuals and also raised the entire assessment, making about \$64,000 additional increase. This assessment was turned over to the chairman of the board, who gave the notice thereof, the sufficiency of which was questioned in the court below but which does not appear to be questioned here.

The benefits first assessed against said lands amounted to \$319,324, and bonds were issued, which, with the interest thereon, will amount to approximately \$300,000. The original estimate of the cost of the construction of the road prior to the letting of the contract, and upon which the first assessment of benefits was based, was \$148,000. The contract was let upon unit prices, so much for each item, and totaled \$150,555.43, based upon the estimated quantities. The plans were subsequently changed to provide for steel and concrete bridges, in place of wooden bridges, at an increased cost of \$25,700. The amount of earth taken exceeded the original estimate \$4,652. The cost of gravel was reduced \$8,614, and the cost of culverts greater by \$600. The original contract for the road complete was let for \$154,749, but this contract was for wooden bridges, and not for steel and concrete. The amount paid or to be paid for all engineering charges is 5 per cent. of the cost of construction, or about \$8,250, and about \$3,000 have been spent in court costs and attorney's fees in suits brought against the district and \$2,500 have been paid for demurrage on cars of gravel. The benefits as originally assessed amounted to about \$2.65 per acre, and the reassessment will make this average \$3.20.

The actual cost of the steel bridges, as constructed, in place of wooden bridges, as originally specified, was \$39,200.80. The construction of the road has already cost \$156,778.76, and, when completed, will cost approximately \$165,150, exclusive of engineering, legal and contingent expenses.

An additional agreed statement of facts was entered into, in which it was recited that the assessors assessed

the benefits of the lands in said district in 1915, upon which taxes have been collected for two years, and on said lands bonds have been issued in the sum of \$175,000. "That in 1917, the said commissioners ordered the assessors to reassess said lands, and the assessors did meet and adjusted some assessments of individuals, and raised the entire assessment, making about \$64,000 additional. * * * It is also agreed that bonds issued in the sum of \$175,000 run for twenty years, at 6 per cent. interest per annum, and that the total benefits first assessed against said land equal about \$319,000, and that the bonds as issued, together with the interest thereon, will equal approximately \$300,000."

Appellee sought, and obtained, an injunction against the increased assessments, and this appeal has been prosecuted to review that action of the court below.

A number of questions are discussed in the briefs, but they are all answered when we answer the questions asked by one of the appellees in his brief. These questions are:

"One. Does Act No. 48, of 1915, provide specifically for a reassessment of additional benefits in any sum for any purpose, after the first general assessment has been made and bonds thereon have been issued and sold?

"Two. Is the said reassessment based upon benefits due to the superior quality of the improvements made or is it not for the purpose of raising money to supply deficiencies caused from bad management in the course of construction and maintenance of said road?

"Three. Is it not true that if said commissioners have power to make the present attempted reassessment, they could create a condition at their own volition, any time, for another assessment regardless of actual necessity for it?

"Four. Would not the attempted reassessment be confiscatory if same exceeds the benefits to properties in the district?"

It is apparent that the first question is at once the important one and the difficult one.

(1) This is a proceeding under a special act which gives the commissioners there constituted certain powers and imposes upon them certain duties. Necessarily, said commissioners have only such powers as are there granted, and can discharge only such duties as are there enjoined by the express terms of the act, or by necessary implication from its provisions. The Legislature might have prescribed the plans for this improvement, and, had it done so, no discretion would have abided in the commissioners. These plans could have been executed, and no other. A wide discretion, however, was vested in the commissioners, subject only to the approval of the county court of Grant County, and we must assume, in the absence of any stipulation to the contrary, that this approval has been duly obtained. Section 2 of the act recites that the district is organized for the purpose of improving that part of the Pine Bluff, Sheridan and Hot Springs road, lying in Grant County. The termini of the road in Grant County are fixed, and also its approximate course and direction. It is then provided in section 2 that "said highway is to be constructed of macadam or of such other material as the commissioners may deem best, and they are authorized to build such bridges and culverts as they may find desirable. Any bridges built shall be built as approved by the said county court."

Section 10 of the act provides that "The said assessors shall make their assessment at such times as they may be directed to do so by the board of commissioners, and shall place in the hands of the president of the board of commissioners their report of said assessment, thereupon the president of the board shall cause a notice to be published * * *; that, after said notice shall have been given, the assessors shall meet at the place named in said notice on the day mentioned therein, and shall hear any complaint of landowners and persons interested and adjust any errors or wrongful assessment and their assessments as adjusted shall be the assessment of said road improvement district until the next assessment shall have been ordered by the board of commissioners."

It is provided in section 11 of the act that "The commissioners may require the assessors to revise their assessment not oftener than once per annum, increasing or diminishing the assessment against particular pieces of property as justice requires; *provided*, that the total amount of benefits shall not be diminished if the district shall have borrowed money or incurred indebtedness. Notice of the revised assessment shall be given, as in case of the original assessment, and it shall be equalized in the same manner."

It is provided in the act that the commissioners shall make their plans, and submit them to the county court for its approval, and, when this approval has been obtained, that they shall cause the assessors to assess the benefits.

(2) It must necessarily be true that the making and approval of the plans must precede the assessment of benefits, because the assessors must have in mind the improvement which the property owners will get when the improvement has been constructed. Plans were made, and were approved, and benefits assessed, and a portion thereof collected, before the improvement was entirely completed. Before its completion the commissioners decided to change the plans of the uncompleted part, calling for wooden bridges, to concrete and steel bridges, and we think they had the right so to do. Certainly, in the first instance, the commissioners could have adopted plans calling for concrete and steel bridges, rather than for wooden ones. The act unquestionably gave them this discretion, subject, of course, to the approval of the county court. They adopted one kind, and changed to another, but they made this change before the execution of their first plan.

(3) We do not have here the question of the right of commissioners to execute one plan, and to thereafter enter upon the execution of another plan. Once their plans had been executed, their power has been exhausted. But we see nothing in the act which is designed or intended to require the commissioners to execute, without change, a plan once adopted. Indeed, as we construe the

act, the legislative intent is against this construction. The right and duty of the commissioners to require the assessors to change and revise their assessments contemplates the possibility of changes in the plan which will work a change in the betterments received by the individual land owners. To hold otherwise would be to deprive the commissioners of any benefit derived from the experience obtained by them in the prosecution of their duties. The wisdom of the change is not questioned, and we are concerned only with the question of authority. It must necessarily be true that the more permanent the improvement, the greater the benefit to be derived from its construction, and it is a matter of common knowledge that steel and concrete bridges will be more durable than wooden bridges, and if this is true, greater benefits will be derived from the construction of the more durable improvement than would be derived from the one less durable. Before these bridges were constructed, the plan for their construction was changed, and the assessment here questioned was made after this revision of the plans, and having changed these plans, it was right and proper that the commissioners should, pursuant to the portion of section 11 quoted above, require the assessors to so revise their assessment as to take into account the increased value of the property resulting from the changes made. The act provides for appeals on the part of property owners who are dissatisfied with the assessment of their benefits, and we must assume, under the state of the record here, that these benefits were properly assessed if the authority for making the change exists in the act.

(4) Question Two asked by appellee is one which was properly cognizable by the assessors in making the assessment. If said reassessment was not, in fact, based upon the benefits due to the superior quality of the improvements made, the assessment could have been defeated upon a showing to that effect without reference to the question of the authority of the commissioners to order the reassessment made.

(5) In answer to the third question, it may be said that the commissioners have no power to create a condition, of their own volition, at any time, which makes an assessment necessary, regardless of the necessity for it. They can only make such changes in the assessments as are required to make the assessment on any particular piece of land conform to the benefits received by that piece of land.

(6) As an abstract proposition of law, the fourth question must be answered in the affirmative, for there is written into all proceedings of this character the limitation that the cost of the improvement shall never exceed the benefit to be derived by the properties upon which that cost is imposed. But the question asked is an abstract one as applied to the facts of this record. The assessors have found, and have reported, that the change of plans will result in an increased betterment to the property and in a sum which exceeds by a very safe margin the total cost of the improvement when made in conformity with the altered plans.

It follows, from what we have said, that the commissioners had the authority to make the change in the plans which they have made, and to direct the assessors to make an assessment conforming thereto and that there are betterments assessed which exceed the cost of the improvements, and it follows, therefore, that the court below should not have granted the injunction prayed for restraining the change made in the plans of the assessment.

The decree of the court below to that effect is, therefore, reversed and the cause will be remanded to the court below with directions to dissolve the injunction.

HART, J., dissents.

MISSOURI STATE LIFE INSURANCE COMPANY v. FRY.

Opinion delivered October 1, 1917.

LIFE INSURANCE—LAPSE OF POLICY.—A policy of life insurance held forfeited for failure to pay premiums, and not to be kept alive by a provision for automatic extension.

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

L. Hunter and Pettit & Pettit, for appellant.

1. The policy lapsed on March 2, 1916. Deceased had borrowed its entire loan value in September, 1915.

2. Premium notes for entire amount could not be accepted.

3. There was no automatically continued term insurance.

4. The policy was not continued in force by its paragraphs styled "Cash Loans" and "Table of Loan Values." The insured was in default. 62 Oh. St. 385. See also, 122 Ark. 223.

5. The case in 125 Ark. 372 is not analogous. The policy was abandoned. 109 Ark. 17; 96 Fed. 796; 4 L. R. A. (N. S.) 870; 178 U. S. 345.

6. The policy was forfeited. 112 Ark. 171; 104 *Id.* 288.

W. E. Spence, for appellee.

There was no indebtedness on February 2, 1916. The policy had a cash value of \$104. Under the cash value on loan value classes the policy was still in force. See 139 S. W. 151, 2 Bacon on Life & Acc. Ins. 481. There was a reserve sufficient to pay the premium and the judgment is right.

HUMPHREYS, J.—Appellee instituted suit in the Eastern District of Clay County against appellant, seeking to recover \$1,000, 20 per cent. penalty and a reasonable attorney's fee on a life insurance policy issued by appellant to her husband, R. M. Fry, on the 12th day of April, 1909, in which she was named as beneficiary. Ap-

pellant denied liability under the terms of the policy. The cause was tried by the court sitting as a jury upon the pleadings and an agreed statement of facts. Appellee recovered judgment for \$1,000 and interest, less \$104 and interest for money loaned by appellant to her husband on the policy; a statutory penalty of \$120 and an attorney's fee of \$100 and costs. The cause is here on appeal.

The only question presented by the appeal is whether under the terms of the policy there was an equity or reserve fund due the policy holder, R. M. Fry, on the 2d day of February, 1916, subject to the payment of the premium then due, so as to prevent a forfeiture of the policy. The premium was not paid by Fry either at that time or during the period of grace, and under the forfeiture clause, appellant canceled the policy. R. M. Fry died a short time after the policy was declared forfeited and had never availed himself of the opportunity to reinstate it. The clauses in the policy bearing upon the issue involved are as follows:

"No. 39482. Missouri State Life Insurance Company agrees to pay one thousand dollars immediately upon proof of death of George W. Fry, the insured, to Martha A. Fry, wife of the insured, and beneficiary
* * *"

"This insurance is granted in consideration of the application herefor, which is hereby made a part of this contract, and of the payment in advance of thirty-one and 85-100 dollars, being the premium for term insurance for the first policy year ending on the 2d day of February, 1910. After the first policy year, the insurance will be continued as whole life insurance upon the payment of the annual premium of thirty-one and 85-100 dollars on or before the second day of February in every year during the continuance of this policy."

"Premiums may be paid annually, semi-annually or quarterly, in advance, in accordance with the company's table of rates applicable hereto, and the company will allow a change from one to another of such modes of payment upon the insured's written request therefor on

the company's form; should the insured not survive to complete premium payments for the current policy year, the amount necessary for such completion will be deducted from the amount payable at death."

"All premiums are payable in advance, either at the home office of the company in St. Louis, Missouri, or to an agent of the company, upon delivery of a receipt signed by the president or secretary and countersigned by the authorized agent. If any premium is not paid on the date when due, this policy shall cease and determine, except as hereinafter provided."

"This policy is nonforfeitable from date of issue, as follows:

"If any premium after the first is not paid on the date when due, the insurance will continue in force from such due date for the term of one month, which is the period of grace allowed hereunder, without interest charge, in the payment of any such premium and after the first policy year, if a premium is not paid within the period of grace, insurance will automatically continue as term insurance for the face amount hereof for a further term, the total term of continued insurance, including the period of grace, granted at completion of any policy year being specified in the table below."

"The aforesaid automatic term insurance shall be without participation in profits, cash or loan values or further payment of premiums. The aforesaid paid-up life policy shall be without participation in profits."

TABLE OF NONFORFEITURE VALUES.

At completion of policy year the	Term of continued insurance Yrs. Mos.		Paid-up Life Policy	Cash Value
1st	0	2	\$ *	\$ *
*	*	*	*	85.
6th	7	10	169.	104.
7th	9	0	201.	
*	*	*	*	

"The foregoing table and provisions pertaining thereto are based upon the assumption that there is no indebtedness to the company on this policy. If there is such indebtedness, the cash value will be diminished thereby, the amount of paid-up life policy reduced in the ratio of the indebtedness to the cash value, and the term of continued insurance changed, without endorsement hereon, to that term for which the cash value less the indebtedness will carry the face amount hereof at net single premium term rates, by the standard herein named, for the attained age of the insured; but the insurance shall, in any event, continue in force for the period of grace herein above provided."

"If any premium is not paid on the date when due, or within the period of grace, and this policy has not been surrendered, the company will reinstate the policy as of said due date at any time thereafter, upon evidence of insurability satisfactory to the company and payment of all arrears of premiums with interest, together with the payment, or reinstatement, of any indebtedness on this policy on said due date, with interest."

"At any time after the first policy year and while this policy is in full force, the insured can borrow from the company on the sole security of this policy, properly assigned to and deposited with the company, any sum within the loan value specified in the table below, from which loan value any indebtedness hereon and any unpaid premiums for the current policy year will first be deducted. The company shall furnish the form for the assignment required hereunder and upon completion of the loan will issue its official certificate of deposit of the policy. Such assignment and deposit of the policy will be waived, if the loan be endorsed hereon by the company and a proper certificate of loan furnished by the insured, form for which the company shall provide. Interest, at a rate not to exceed 6 per cent. per annum, will be collected out of the amount of the loan to the end of the current policy year, and thereafter be payable annually in advance. Failure to repay any such loan, or to pay

interest thereon, shall not avoid this policy, unless the total indebtedness hereon to the company shall equal or exceed the reserve on this policy at the time of such failure, nor until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee, if any."

TABLE OF LOAN VALUES.

After expiration of policy year the	Loan Value
1st	\$16
*	* *
6th	104
7th	122
*	* *

"This policy is issued with the express understanding that the insured may, without the consent of the beneficiary, receive every benefit, exercise every right and enjoy every privilege conferred on the insured by this policy."

The judgment below was rendered upon the theory that on February 2, 1916, there was an \$18 loan value on the policy in favor of the policy holder, which should have been applied to the payment of interest on the loan and a quarterly payment on the premium, which would have extended the policy beyond April 17, the date R. M. Fry died. Fry had paid the premium annually in the past. He had never availed himself of the privilege to pay the premiums either quarterly or semi-annually. He had borrowed the entire loan value of his policy on September 24, 1915, which absorbed the entire cash value of the policy until February 2, 1916. On that date, there was no cash value in the policy subject to the payment of all or a part of the premium for the current year. Neither was there any available loan value because the increased value for the current year was contingent upon the payment of the annual dues, original loan and interest for the current year. Fry made an application to borrow enough money

on his policy to pay the entire premium for the current year. He was unwilling to borrow less, and rather than accept less, elected to surrender his policy which lapsed on March 2, 1916. It seems to us there is no warrant in the contract for the claim that the policy automatically continued for at least three months when it is evident that the full cash value of the policy on February 2, 1916, had been absorbed by a loan of an equal amount from the company to Fry. The phrase, *cash value*, and not *loan value*, is used in the contract with reference to *Automatic Continued Term Insurance*. But even if *loan value* had application to automatic continued term insurance in the contract, it must necessarily have reference to the available *loan value*. The increased *loan value* would not have been available until the policy holder, Fry, had paid the premium on February 2, 1916, for the current year. This he never did. The increased loan value, had it been available, was only sufficient in amount to pay the interest on the loan and to pay three months' premium. Fry never made application to borrow this amount, nor had he made application in accordance with the terms of the contract to pay the premium quarterly instead of annually. His failure in these respects clearly prevented his beneficiary from claiming an automatic extension or continuation of the policy beyond the period of grace provided in the contract.

Under our construction of the contract, it was error to render judgment for appellee. The judgment is therefore reversed and the cause dismissed.

NEWMAN v. LYBRAND.

Opinion delivered October 8, 1917.

1. CLOUD ON TITLE—ACTION TO REMOVE—VALIDITY OF TAX DEED.—In an action to cancel a tax deed as a cloud on title, the burden is upon the plaintiff to show that the tax deed is void.
2. CLOUD ON TITLE—ACTION TO REMOVE—SUFFICIENCY OF EVIDENCE.—The evidence held insufficient to warrant the cancellation of a tax deed, as a cloud on appellant's title.
3. CLOUD ON TITLE—CERTIFICATE OF SHERIFF AND COLLECTOR—VALIDITY OF TAX DEED.—In an action to cancel a tax deed as a cloud on

title, a certificate of the sheriff and collector, that taxes had been paid on the lands the year of the alleged forfeiture, is incompetent, when not taken as a deposition, nor witnesses brought in to sustain it, nor any copy of the records offered in evidence.

Appeal from Grant Chancery Court; *J. P. Henderson*, Chancellor; affirmed.

T. N. Nall, for appellant; *D. E. Waddell*, of counsel.

1. The taxes had been paid and the tax sale and deed were void. 32 Ark. 386; 15 *Id.* 331, 336; 21 *Id.* 578; 37 *Id.* 100; 23 *Id.* 375; 97 *Id.* 369; 22 *Id.* 118.

2. The land was not properly described nor advertised. 15 Ark. 363; 21 *Id.* 578; 59 *Id.* 46; 27 S. W. 970; 112 Ark. 159; Black on Tax Titles, 37-8; 36 L. R. A. (N. S.) 1063.

The sale was unauthorized and void. Appellee acquired no title.

E. H. Vance, for appellee.

1. There was no competent evidence to show that the taxes had been paid or the sale void. The best evidence is required, the record evidence, or a duly signed tax receipt. Here there was nothing but the certificate of the collector as to what the records showed. 4 Ark. 129; 11 *Id.* 349; 2 *Id.* 315.

2. The burden was on plaintiff and he failed to show any title. 76 Ark. 447; 96 *Id.* 251.

STATEMENT BY THE COURT.

This suit was instituted by the appellant against the appellee to quiet title to the east one-half of the southwest one-quarter of section 22, township 6 south, range 13 west, situated in Grant County, Arkansas.

Appellant deraigned title through a sale of the land upon a foreclosure proceeding of a certain deed of trust had in the United States District Court for the Eastern District of Arkansas, in which the lands in controversy, among others, were sold by Durand Whipple, the standing master in chancery, under the orders of the court. A deed was executed by Durand Whipple, to the purchaser at the sale, which deed was duly confirmed and approved by the court.

The appellant alleged that the appellee had a clerk's tax deed to the lands, executed on the 27th day of October, 1913, which was regular on its face and showed that the lands were forfeited and sold for non-payment of the taxes for the year 1910; that the deed erroneously embraced the lands in controversy; that the taxes on these lands for the year 1910 were paid, and that therefore the alleged forfeiture and sale of the lands for these taxes were void, and that the clerk's deed based upon such forfeiture and sale was therefore a cloud upon the appellant's title. He prayed that such deed be canceled and set aside in order that his title might be cleared of such cloud.

The appellee answered, denying appellant's allegations as to the ownership of the land, and set up title in himself by virtue of his purchase at a tax sale had on June 13, 1911, based on a forfeiture for the non-payment of the taxes for the year 1910, and the clerk's tax deed duly executed to him under the law in pursuance of such sale and purchase, which deed had been duly recorded and which he exhibited to his answer.

The chancellor found that there was no competent evidence to prove that the tax deed under which appellee claimed title was void, and dismissed the appellant's complaint for want of equity. Appellant prosecutes this appeal.

WOOD, J., (after stating the facts). It may be conceded for the purposes of this opinion that if the appellee's tax deed is void for the reasons alleged in appellant's complaint that appellant is the owner of the land and entitled to the relief prayed. But the chancellor was correct in holding that there was no competent evidence in the record to show that the appellee's tax deed was void. The tax deed was regular on its face.

In *Senter v. Greer*, 101 Ark. 301, 302, we said: "The deed of the clerk of the county court, executed substantially as the statute requires, was *prima facie* evidence of title (Kirby's Digest, § 7104), and was sufficient, in the absence of evidence showing that the tax sale was

void, to warrant a court in confirming the title in appellee."

(1) While this was said in a suit to confirm a tax title, the same rule applies where it is sought to cancel a deed regular on its face as a cloud on title. Before appellant could have the affirmative relief of cancellation of appellee's tax title, prayed for in his complaint, the burden was upon him to show that the tax deed of the appellee was void.

(2) Appellant contended in the court below, and contends here, that the tax deed is void for the reason that the taxes on the land in controversy for the year 1910 were paid. This he undertakes to prove in the following manner:

O. L. Nall testified, by deposition, that he was the county clerk of Grant County, and as such was custodian of the records of the county. The records showed that the taxes for the year 1910 were paid. There is a forfeiture indication on the real estate book of the east one-half southwest quarter section 23-6-13, in the name of Fannie Lybrand. He had examined the record of tax receipts for the year 1910, and it showed at page 223 that the taxes on the east one-half of the southwest quarter of section 22-6-13 had been paid for the year 1910 by the Mercantile Trust Company. He had examined the delinquent land record for that year to see whether or not the land in controversy was listed there for the non-payment of taxes and found that the east one-half of the southwest quarter of either 22 or 23 was sold for the taxes for the year 1910. He was asked whether the figures "22" or "23," whichever it might have been, had been changed since the book was made, and answered, "It had been written with a pen section '23' and changed to section '22' by making a lead pencil '2' over the '3.'" Witness did not know whether the change was made before or after the sale. The delinquent record shows that the deed was executed to Lybrand October 27, 1913.

On cross-examination, the witness stated that he had access to the original notice of land sales for delinquent

taxes for the year 1910, and it showed that the land in controversy was published as delinquent for the taxes for the year 1910; that the record of sales had been recorded with pen and ink; that the number of the section had been changed with pencil, but he did not know at what date. The figure "3" was made with a pen and the figure "2" with a pencil. Witness had a record of the tax receipts to correspond with the real estate tax books for each corresponding year. The receipt for the taxes paid for the year 1910 was recorded in receipt record for 1910 on page 223. No date recorded. It was recorded on the record "northwest southwest 22-6-13, 320 acres \$560.00." It is a matter of fact from the records that the land in controversy appears upon the records as having been assessed other than the southwest quarter. It is assessed separately. The record of sales conforms, as it now shows, with the notice of sale of delinquent land for the year 1910; but the record might not have conformed with such notice at the date of the recording of the delinquent list. If the record of delinquent lands for the year 1910 had been kept according to the published notice of the land sales for said year the original entry upon the sales book would have shown east one-half southwest quarter 22-6-13, but the record is not kept from the published notice. It is made up from the list returned by the sheriff for non-payment of taxes. The record of delinquent land for the year 1910, from which the witness testified, witness supposes is a copy from the record of the collector, made and filed with the clerk, but witness does not know. If it was correctly kept it would be a true copy, and the notice of sale made by the clerk would also be a true copy. Witness had not made a diligent search through his office for the original delinquent list of lands for non-payment of taxes for the year 1910, made by John B. Gean, the collector of Grant County. Witness was deputy clerk at that time, but did not remember seeing the delinquent list. He must have seen it, however, as he wrote the delinquent record. A majority of the records of lands re-

turned delinquent for the year 1910, if not all, is in witness' handwriting.

John B. Gean testified, also by deposition, that he was sheriff and collector of Grant county in the year 1911. The real estate tax record for the year 1911 shows the east one-half of the southwest quarter section 22, township 6 south, range 13 west, in the name of V. V. Stockton, as having been paid for that year. On the real estate book it is marked "paid" and shows the date paid and the page the receipt was recorded on. If the taxes were not paid on any tract that was indicated by a small circle, thus "O." "If the records are like I left them, then if the land in controversy is marked by figures indicating the page upon which the receipt was recorded and the date of payment of the taxes such is a good indication that such piece of land did not forfeit." As collector of Grant county, when the owner of a piece of land paid the taxes, witness always marked the tract paid on the tax book and gave the owner a receipt for the same. If the owner did not pay in the time required by law witness returned the tract delinquent, and it was advertised by the clerk as such and witness, as collector, sold it at public outcry at the courthouse, as provided by law. And when a tract of land was sold by him for the delinquent taxes he executed to the purchaser a certificate to such tract. It was not his custom to receive taxes twice on the same tract of land for the same year. Witness had occasion to examine the sale record of lands sold for non-payment of taxes for the year 1910, in which it appears that the land in controversy was sold to John W. Lybrand, and in which it appears that the numbers of the land in controversy are correct, and that the record seems to have been tampered with. Since the sale of the lands for the delinquent taxes of the year 1910 witness had seen his advertisement of such lands and the east one-half of the southwest quarter of section 22, township 6 south, range 13 west, was advertised as delinquent. Since the sale of the lands in controversy the sale records seem to have been tampered with,

but witness did not remember whether it was changed from 22 to 23 or 23 to 22. Witness' recollection is that in making a return of the tract in controversy he made it as section 22-6-13. The delinquent list witness filed with the clerk is correct. Witness does not know what it is. Witness was asked this question: "If the real estate records of 1910 show the east one-half of the southwest quarter of section 22-6-13 as having been paid on as required by law and the east one-half of the southwest quarter of section 23-6-13 is returned delinquent on said record then your recollection as to it being east one-half southwest quarter section 22, is wrong is it not?" and answered, "I will just say that the delinquent list I filed with the clerk is correct. I do not know what it is."

Now if the taxes were paid on the land in controversy for the year 1910, the above testimony shows that there was an original tax receipt issued showing such payment and a record made of this receipt, and the appellant does not show that the original tax receipt was lost or destroyed or that it was beyond his power to produce same in evidence. There is copied into the transcript what purports to be a tax receipt for the taxes of the year 1910, showing payment by the Mercantile Trust Company, but this purported receipt is not signed by the collector and is nowhere in the testimony identified as the original tax receipt or as a correct copy thereof. In fact, this purported tax receipt, for the purposes of proof, is of no more probative force than a blank piece of paper, and cannot be considered.

Neither the tax records nor any authenticated copies thereof were filed and brought into the record as a part of the evidence of the witnesses who testified about them.

(3) The only other evidence in regard to the payment of the taxes found in the record is a certificate of the sheriff and collector to the effect that he had examined the tax records in his office for the years 1903 to 1910, inclusive, and that they showed that the taxes on the lands in controversy were regularly paid for each of said years, and that the lands were not returned delinquent

for the non-payment of taxes for the year 1910, and were not marked delinquent on the real estate record. But the chancellor found that the witnesses were not brought into court; that the certificate was not taken as a deposition; that no notice was given to the defendant when it was made; that it was not sworn to, and that in such certificate he made no profert of the record itself or presented any certified copies of the record about which he testified. The chancellor correctly held, upon these findings, that the certificate was incompetent to be considered as evidence in the cause.

All this testimony of the clerk and sheriff was duly objected to when it was offered as being incompetent and the court correctly ruled that, in the form presented, it was incompetent.

There being no competent evidence in the record to warrant the cancellation of appellee's deed it follows that the trial court was correct in so holding and its decree is therefore affirmed.

RAND v. WALTON.

Opinion delivered October 8, 1917.

LABORER'S LIENS—WORK IN MAKING CROP — ABANDONMENT. — One W. agreed to make a crop for appellant, and W.'s wife, appellee, rendered him assistance in making the crop. In midseason W. and appellee fell into a quarrel, and without fault on appellant's part abandoned the crop. Appellee sought to fix a laborer's lien upon the crop. *Held*, under Kirby's Digest, § 5028, appellee could not maintain her claim for a lien.

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

Phil McNemer, for appellant.

1. Abandonment by a share-cropper causes him to lose all interest in the crop. 87 Ark. 328; 8 R. C. L. 373, par. 19; 25 Ark. 327; 34 *Id.* 182; 39 *Id.* 286; 48 *Id.* 266; 79 *Id.* 427.

Abandonment of crop is forfeiture of interest. 24 Cyc. 1472 (f); 8 R. C. L. 365, par. 10, n. 6; 77 S. E. 933; 93 N. C. 47; 28 N. W. 121; 57 Ala. 581; 50 Oregon 81; Tiedeman on Real Prop. 206, par. 160; 12 Cyc. 981; 77 S. E. 933; Kirby's Digest, § 5028; Kirby & Castle's Digest, § 5958; 87 Ark. 330.

Trimble & Williams, for appellees.

1. The burden was on appellants to show that Walton left the crop without good cause. Appellee and her children left under duress. Kirby's Digest, § 5028.

Appellee complied with the laborers' lien statute. 71 Ark. 337. There was no forfeiture by abandonment. 34 Ark. 182 is not applicable. The decree is right.

HART, J. On the 8th day of August, 1916, Mary Walton instituted this action in the chancery court against J. C. Rand and O. Moreland. She alleged in her bill that her husband, herself and their children had planted and worked a crop on the land of the defendant, Rand, until July 17, 1916, and asked that an accounting be had of her interest in said crop. On the day the cause came on for hearing she filed an amendment to her complaint in which she asked that she be entitled to a laborers' lien on the crop referred to in her original complaint. The facts are as follows:

O. Moreland was overseer for J. C. Rand on his farm in Lonoke County, Arkansas. He made a contract with Robert Walton whereby Rand agreed to furnish Walton with land, team, implements, etc., and Walton agreed to cultivate the land for one-half of the crop. Pursuant to this contract Walton planted the crop on the farm of Rand and worked it until about the middle of July, 1916. At this time he had a quarrel with his wife and one of their daughters. The wife and daughters first left the place and then Robert Walton also left. He has not been back since that time.

Mary Walton, his wife, and one of their children testified that they had performed services in planting and growing the crop and that Robert Walton had promised

them a part of the crop for their services. After these parties left, Rand hired hands to work out the crop and gather it. There was a surplus left after paying these expenses. It was the contention of Rand that Walton and his wife forfeited all interest in the crop by voluntarily abandoning it. On the other hand, it is the contention of Mary Walton that the crop became so advanced by the labor of her husband and herself that their labor had been a material value to the landlord and that they did not forfeit their share of the crop.

The court found in favor of Mary Walton and the case is here on appeal.

This court has decided that when a land owner agrees to furnish a laborer with land, teams, implements, etc., and the laborer agrees to cultivate the land for one-half of the crop, this establishes the method whereby the laborer is to be paid—that his wages are to be paid in part of the crop instead of money. *Gardenhire v. Smith*, 39 Ark. 280; *Hammock v. Creekmore*, 48 Ark. 266, and *Bourland v. McKnight*, 79 Ark. 427.

In 8 R. C. L., page 377, Sec. 24, it is said that the general rule is that a share-cropper forfeits all interest in the crop by voluntarily abandoning it without reasonable cause, but that a different rule would apply if the abandonment was due to some just cause. This rule is based on the fact that the contract is an entire contract and if the laborer has performed a part of it, and without legal excuse and against the consent of the land owner, has refused to perform the remaining part, he cannot recover anything for the part performed. On the other hand, it is contended by counsel for appellee that where the laborer has finished or nearly finished the work of growing the crop that he does not forfeit all his share of the crop, but he only submits to such deduction from his share as would compensate the landlord for the injury inflicted by the breach.

We need not consider which of these contentions is correct, for we have a statute governing cases of this kind. Section 5027 of Kirby's Digest provides that if

any employer shall, without good cause, dismiss a laborer prior to the expiration of his contract, he shall be liable to such laborer for the full amount that would have been due him at the expiration of the contract.

Section 5028 provides that the laborer shall forfeit his wages if he abandons his employer without good cause. It reads as follows:

“If any laborer shall, without good cause, abandon his employer before the expiration of his contract, he shall be liable to such employer to the full amount of any account that he may owe him, and shall forfeit to his employer all wages or share of crop due him, or which might become due him from his employer.”

Robert Walton voluntarily abandoned his crop without any just cause or excuse therefor. Therefore he would not have been entitled to recover had he been a party to the suit.

Mary Walton and one of her children testified that Robert Walton, her husband, agreed to give them an interest in the crop if they would help him work it. They said that they did so and only left the crop in July when the quarrel came up. They voluntarily left the place before the expiration of the contract. So under the provisions of the statute, Mary Walton would not be entitled to a laborer's lien as claimed by her. If it be conceded that she was entitled to a laborer's lien by virtue of her contract with her husband, it will be readily seen that she forfeited all her rights by voluntarily leaving the place before the crop was completed without any just cause therefor and thereby forfeited all wages which might become due her.

It follows that the decree must be reversed and the cause will be remanded with directions to render a decree in accordance with the opinion.

STERLING ANTHRACITE COAL COMPANY v. STROPE.

Opinion delivered October 8, 1917.

1. APPEAL AND ERROR—PERSONAL INJURY ACTION—SUFFICIENCY OF THE EVIDENCE—FINDING OF JURY.—In an action for damages for personal injuries, the finding of the jury in favor of the plaintiff will not be disturbed on appeal, where the verdict is based upon evidence of a substantial character.
2. NEGLIGENCE—PERSONAL INJURIES—CONCURRING CAUSES.—Deceased, a coal miner sustained serious burns, due to defendant's negligence, and while lying in bed as a result of such burns, contracted pneumonia and died. *Held*, an instruction was proper which told the jury that defendant was liable for the death of deceased who died from pneumonia, which disease was wholly or in part caused or superinduced by the burns.
3. APPEAL AND ERROR—REPEATING INSTRUCTIONS—PERSONAL INJURIES.—It is not error for the court to refuse a correct instruction, where the points involved therein are covered by other instructions given by the court.

Appeal from Johnson Circuit Court; *A. B. Priddy*, Judge; affirmed.

Sellers & Sellers, for appellant.

1. It was error to admit proof of other acts of negligence by the fire boss. 6 Thompson on Negl., § 7785; 25 Atl. 426; 32 Pac. 1020, 11 S. E. 776; 44 Am. Rep. 693; 115 Mass. 240; 58 Ark. 468; 81 *Id.* 591; 91 Atl. 202; 29 Cyc. 611.

2. The testimony fails to show that the burns were the proximate cause of death. 149 Pac., *Antler v. Cox*, 32 Cyc. 745; 177 S. W. 705; 116 Ark. 59; 3 Bailey on Personal Injury, 2136; 79 Ark. 437; 119 *Id.* 357; 69 *Id.* 405; 89 *Id.* 58; 97 *Id.* 576, 584; 104 *Id.* 59; 75 *Id.* 472; 66 *Id.* 68. See also 90 Ark. 210; 92 *Id.* 138; 104 *Id.* 506; 91 *Id.* 260; 66 *Id.* 68; 88 *Id.* 289; 87 *Id.* 579.

Where a new cause intervenes the original negligence is too remote. 97 Ark. 160; 29 Cyc. 493, and cases *supra*.

3. The court erred in its instructions. 119 Ark. 349; 75 S. W. 868. Negligence is never presumed. 4 Labatt, M. & S., § 1600; 96 Ark. 206; *Ib.* 500; 74 *Id.* 22; 46 *Id.* 567; 44 *Id.* 529.

See also 113 Ark. 64; 87 *Id.* 243.

George O. Patterson and J. H. Evans, for appellee.

1. The proof shows that death was the result of the burns, caused by the negligence of the fire boss. Proof of other acts of negligence was admissible. 54 Ark. 30; 87 *Id.* 257.

2. There is no error in the instructions. They state the law of the case. 97 Ark. 585; 4 Am. & E. Ann. Cases, 150; 127 Iowa, 844; 6 Thompson on Negl., § 7006; 28 Ark. 159; 50 *Id.* 549; 73 *Id.* 570; 100 *Id.* 269; 101 *Id.* 424; 108 *Id.* 425; 100 *Id.* 199.

HART, J. This is a suit instituted by Lottie Strobe, administratrix of the estate of Fred Strobe, deceased, against the Sterling Anthracite Coal Company for damages to the estate of Fred Strobe, deceased, and to his widow and children for his death, alleged to have been caused by the negligence of the coal company. The facts are as follows:

In February, 1916, the Sterling Anthracite Coal Company was operating a coal mine near Clarksville, Arkansas, and Fred Strobe was one of its employees engaged in mining coal. According to the testimony of the plaintiff, on the morning of the 18th day of February, 1916, the fire boss of the company went down into the mine and inspected the working places for gas. After finishing his inspection he came back to the entry of the mine and marked the working places O. K., which meant that they were free from gas and safe for the miners to commence work. It was the duty of the fire boss to make this inspection and mark the results upon the board. If the working places are found to contain gas so as to be unsafe it was the duty of the fire boss so to mark them on the board in order to warn the miners not to go to work there. On the morning in question, Fred Strobe came to the entry of the mine to go to work as usual. The board was marked O. K. and he proceeded down into the mine to go to work. When he got near the face of his working place he lighted his lamp and placed it on his cap. This caused an explosion of the gas and he was severely in-

jured and died in eleven days thereafter. A more particular description of his injuries will be stated later.

On the part of the defendant company it was shown that on the morning in question the fire boss made an inspection of the mine as usual and found the working place of Fred Strobe to contain gas. Before the miners came to work he went to the entry of the mine and made his report on the board which was there for that purpose. He made a report that the working place of Fred Strobe contained gas and was unsafe. This was done in the usual manner and served as a notification to the miners not to go to work at their usual working place.

The jury returned a verdict for the plaintiff and the defendant company has appealed.

(1) The ground of negligence relied upon for a recovery by the plaintiff was the negligence of the company in marking the working place of Fred Strobe safe on the morning in question when in fact it was unsafe. We have only attempted to give the substance of the evidence on this phase of the case and it is not necessary to set it out in detail or to determine where the preponderance of the evidence lies. This question has been settled by the jury in favor of the plaintiff and under the settled rules of this court we can not disturb its verdict, there being evidence of a substantial character upon which to base it.

(2) At the request of the plaintiff the court gave the following instruction:

“If Strobe died from pneumonia and the pneumonia was wholly or in part caused or superinduced by the burns then Strobe’s death was in law caused by the burns. In such case if you find for the plaintiff you should find for her for both the suffering and death of Strobe.”

It is contended first by counsel for the defendant that there is no testimony to warrant the jury in finding that the pneumonia was caused by the burns, and, second, that if the pneumonia was caused by the burns, the burns were only a remote and not the proximate cause of Strobe’s death

It was shown that Strobe was thirty-one years of age at the time he was injured and was an exceedingly stout and healthy man, never having been addicted to any kind of dissipation. After he was burned Dr. Earl Hunt examined him and attended him until his death which occurred eleven days later.

Doctor Hunt testified that Strobe was suffering intensely when he went to see him; that he was burned on both arms and across the chest and neck and all of his face and back of the neck and on his back lower than the shoulder blades; that further down there were two or three spots as large as a man's hand on the small of his back; that all of the skin on both arms came off; that his whole face and ears were burned and his hair singed; that his finger tips were charred a little, that he saw that Strobe was a big, strong fellow and was not dissipated; that he told Strobe's wife that he thought he had a chance to recover from the burns; that Strobe had to lie on his back and couldn't turn over; that on the day he died he developed hypostatic pneumonia; that this was a secondary condition which might develop after any serious injury that necessitates a patient staying in bed; that it is a secondary pneumonia which comes after injuries which necessitates a patient staying in bed. He was asked, "What did that pneumonia result from in this particular instance?" He answered, "Well, I should say it resulted from the fact that he was lying in bed and was in a burnt condition." He stated further that if persons are burned over the chest they are more likely to have pneumonia; if over the bowels they are more likely to have a very violent diarrhoea, and if they are burned over the kidneys they are likely to have inflammation of the kidneys; that Strobe was burned over the chest, arm and face and that he attributed the pneumonia to these burns and to the necessary recumbent position.

Again he stated that hypostatic pneumonia is necessarily secondary pneumonia following something that has preceded it; that the burns and the necessary recumbent position caused the pneumonia.

This testimony brings the case clearly within the rule laid down in the case of *St. Louis, Iron Mountain & Southern Railway Company v. Steel*, 129 Ark. 520. In that case the court held (from syllabus) :

"Where two concurring causes produce an injury which would not have resulted in the absence of either, the party responsible for either cause is liable for the consequent injury. A railway will be liable for the death of its servant whom it negligently injured, where both the injury and typhoid fever contributed to cause his death." Therefore the court did not err in giving this instruction.

(3) It is next insisted that the court erred in refusing to give instruction number two, asked by the defendant. The instruction is as follows:

"Negligence is not presumed, but the burden is upon the plaintiff to make out her case by a preponderance of the evidence. The fact that deceased was injured in the mine, if you find that he was so injured, and later died, raises no presumption whatever that the defendant was negligent."

At the request of the defendant, however, the court did give instruction number eleven, which is as follows:

"Proof that the mine, rooms and entries were in the condition alleged in the complaint would not justify a verdict for the plaintiff without proof that such condition was caused by defendant's negligence as charged. You cannot presume or infer negligence alone from the condition or the accident or both."

Besides this the instructions given by the court at the request of the plaintiff bases the right of the plaintiff to recover upon proof by her of the acts of negligence alleged in her complaint. In one of the instructions given, the court, after stating the assignments of negligence, said:

"Now, if any one or more of these assignments of negligence are proven and you believe that such negligence so proven caused the injuries to Strobe, and as a

result of such injuries he died, your verdict will be for the plaintiff."

So it will be seen that the instruction in question was covered by the instructions given by the court.

It is next insisted that the court erred in refusing to give instruction number eight, asked by the defendant. It reads as follows:

"You are instructed that the plaintiff can recover only upon proof of the negligent acts complained of, that such acts were negligent, that they were a cause of the injury to the deceased, that such injuries directly caused his death. Proof of other acts, although negligent, would not justify a recovery by plaintiff."

The court gave instruction number three, asked by the defendant. It reads as follows:

"The plaintiff alleges that the deceased was injured in a mine by the explosion of gas; that he lived for a period of eleven days thereafter and then died from the effects of the injuries received in the explosion. In order to justify you in finding for the plaintiff you must find from a preponderance of the evidence that the death of the deceased was the direct or proximate result of the injuries received, and you must further find that the injuries alleged to have been received in the explosion were caused by the negligence of the defendant as set out in the complaint."

In this instruction the jury was substantially told that the negligence warranting a recovery is the negligence charged in the complaint. In the instructions given for the plaintiff the plaintiff's right of recovery was based upon the allegations of negligence alleged in the complaint and the allegations of the complaint are substantially referred to and stated to the jury. Thus it will be seen that there could have been no mistake on the part of the jury as to upon what acts of negligence it must base its findings against the defendant.

It is also insisted that the court erred in refusing to give instruction number twelve, as requested by the defendant. The instruction reads as follows:

"The defendant was not required to use every possible precaution to avoid injury to the deceased, but was only required to use such reasonable precaution to avoid accidents as would have been adopted by prudent persons prior to the accident; and before you could find for the plaintiff the proof would have to show that defendant failed to use such care and that such failure was a cause of the injury alleged and that such injury resulted directly in the death of the deceased."

At the request of the plaintiff the court gave instruction number six. It is as follows:

"The defendant was not an insurer of the safety of Strobe, but it owed him the duty to exercise ordinary care to provide him a safe place in which to perform his duties and this includes the entry ways in its mine to his place of work and to keep same free from dangerous accumulations of gas. This duty to use ordinary care to provide Strobe a safe place to perform the duties of his employment included the duty of reasonable inspection of the mine, its entries, rooms and working places, and of using such means as ordinary prudence dictates as proper to safeguard the lives and limbs of its employees. If defendant, its agents, servants or employees failed to perform such duty, then such failure was negligence."

The court also gave instruction number five. It reads as follows:

"Before you can find for the plaintiff the proof must show not only the acts complained of and that they were negligent as defined in these instructions, but the proof must further show that such negligence directly caused the injury and that such injury resulted directly in the death of deceased and unless you have such proof you should find for defendant."

Thus it will be seen that the duty of the defendant to the plaintiff was fully explained to the jury in these instructions.

No further grounds for a reversal of the judgment are set out in the defendant's motion for a new trial.

It follows that the judgment must be affirmed.

MARTIN v. STATE.

Opinion delivered October 8, 1917.

TRIAL—IMPROPER CONDUCT OF COURT—ORDERING WITNESS TO JAIL FOR COMMISSION OF CRIME.—Appellant was on trial for the illegal sale of liquor; at the conclusion of the testimony of a certain witness, the court, in the presence of the jury, ordered the witness into custody for the violation of the law against giving away intoxicating liquor, he having disclosed those facts in his testimony. *Held*, the conduct of the court constituted prejudicial error in the trial of appellant's case.

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

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

1. The court erred in ordering the witness, Campbell, to be held in bond in the presence of the jury. 38 Cyc. 1316, 1320; 40 *Id.* 2603; 34 Ark. 257; 43 *Id.* 99; 46 *Id.* 141; 56 *Id.* 7; 58 *Id.* 478; 60 *Id.* 450.

The conduct of the judge in causing the arrest of the witness was highly prejudicial. 42 S. W. 384; 36 S. W. 477.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The action of the court was proper and not prejudicial. Acts 1915, § 2, Act 30; 40 Cyc. 2603; 84 Ark. 81; 104 S. W. 693; 8 S. E. 342; 19 Am. & E. Ann. Cases 423; 24 N. Y. Supp. 200.

SMITH, J. Appellant was convicted for selling intoxicating liquors to one Tobe Taft, and at his trial evidence was offered which was legally sufficient to sustain the verdict. A witness named Campbell testified at the trial that he was present when the incident occurred which counsel for appellant says was the time and place of the occurrence of the alleged sale. According to this witness, no sale took place, but witness, at the request of appellant, gave Taft's wife some whisky, the liquor being poured from a quart bottle in which it was contained into a pint bottle. The effect of this testimony being that, instead of appellant having made a sale, the witness had given away the liquor. When the witness, Tom Campbell,

had finished his testimony and was leaving the stand, the court in the presence and hearing of the jury ordered the sheriff to take charge of the witness and hold him to bail in the sum of five hundred dollars to answer the charge of giving away whiskey in Little River County, to which actions and remarks of the court the defendant at the time excepted, and asked that his exceptions be noted of record, which was accordingly done.

This action of the court was assigned as error.

There is no intimation that the witness was guilty of any contumacious or contemptuous conduct, nor is it contended that it was necessary to order the witness into custody in the presence of the jury in order to effect his arrest, or to prevent the possibility of his escape, and under this state of the record we think the action of the court was both erroneous and prejudicial. The necessary effect of the action of the court was to call to the attention of the jury, and in the most impressive manner, the fact that the witness had given testimony which in the opinion of the court made him a violator of the law. It could not have been shown, by way of impeachment upon his cross-examination, that he had been accused of a crime or indicted for its commission; yet the action of the court said to the jury that the witness was a violator of the law and in connection with the felony under investigation for the commission of which the witness was not upon trial. We cannot say what construction the jury may have placed upon this action of the court. It may have lessened—even though it did not wholly destroy—the faith of the jury in the credibility of the witness, and as no reason, in the orderly course of the administration of justice, appears for the peremptory order of the court, we must assume that the order of the court had a tendency to impair the credit of the witness.

In the note to the case of *State v. Swink*, 19 A. & E. Cases, 422, it is said that the general rule is that the commitment of a witness for perjury during the trial, and in the presence of the jury, is prejudicial error; although it has been held in some jurisdictions that this action, in

itself, is not sufficient cause for reversal. In Mississippi there is a statute which provides that, whenever it shall appear to any court that a witness has testified in such a manner as to induce a reasonable presumption that he has wilfully and corruptly testified falsely to some material point or matter, the court may, immediately, commit said witness by an order or process for that purpose, or to take bond or recognizance, with sureties, for his appearing and answering to an indictment for perjury. In reversing the action of a trial court in ordering the arrest of a witness pursuant to this statute, the Supreme Court of Mississippi said:

“The action of the circuit judge in ordering Addie Nelson into custody to await the action of the grand jury, as to a bill for perjury, was eminently proper; but that order should have been executed in such wise as not to apprise the jury of the fact. Section 1384, Code of 1892, is a most wholesome statute, intended to put a stop to the flagrant commission of perjury—a damning blot in the course of numerous trials—but not to prejudice the defendant on trial by having the suspected perjurer ordered into custody in the presence and hearing of the jury. It is very easy to order such witness into custody, and to do it ‘immediately,’ without the knowledge of the jury. The testimony in this case is exceedingly unsatisfactory, and, in view of this fact, this action of the court may well have weighed heavily with the jury against the defendant. For this error the judgment is reversed, and the cause remanded.” *Golden v. State*, 75 Miss. 130.

This decision was reaffirmed in the case of *Brandon v. State*, on page 904 of the same report. See, also, 12 Cyc. and cases cited in the note at pages 541, 542.

The theory of the court, in ordering a reversal in the cases there cited, is that the verdict of the jury should be made up in every case from the testimony of the witnesses alone, uninfluenced by any act or opinion of the trial judge reflecting his estimate of the weight and credibility of any testimony.

And for the error stated, the judgment will be reversed and the cause remanded for a new trial.

LOVE v. COWGER.

Opinion delivered October 8, 1917.

1. **APPEAL AND ERROR—ABSENCE OF MOTION FOR NEW TRIAL.**—Where the motion for a new trial does not appear in the abstract filed by appellant, this court will not consider assignments of **error** with reference to the admission of testimony on account of incompetency and irrelevancy.
2. **EJECTMENT—BURDEN OF PROOF—ADVERSE POSSESSION.**—In ejectment the burden is upon the plaintiff to establish his title and right of possession incident thereto, but where the defendant pleads adverse possession, the burden is upon him to show it.

Appeal from Yell Circuit Court, Dardanelle District;
A. B. Priddy, Judge; affirmed.

J. B. Crownover, for appellant.

1. The court erred in continuing the cause.
2. Illegal evidence was admitted, copies of unauthenticated maps. Kirby & Castle's Digest, § § 3369, 3376.
3. The verdict is directly in the teeth of the evidence.
4. The court erred in its instruction as to the burden of proof. Kirby & Castle's Digest, § § 3418, 3447.
5. Argue other points not decided by the court nor mentioned in the opinion.

U. L. Meade and *Jno. M. Parker*, for appellee.

1. No proper bill of exceptions has been filed and all the evidence is not set forth in this abstract. No exceptions were saved to the instructions. 88 Ark. 505. There is no motion for a new trial in the bill of exceptions. 109 Ark. 543; 61 *Id.* 157; 111 *Id.* 509.
2. The instructions of the court are correct.

HUMPHREYS, J. On August 4, 1915, appellee brought ejectment against appellant in the Dardanelle District of Yell Circuit Court to recover a strip of land 65 links wide across the north side of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, Sec. 4, T. 5 N., R. 19 W., alleging that she owned the strip of land and that appellant was in the wrongful

possession thereof and had collected rent thereon without right for three years next before the commencement of the action.

Appellant answered denying the material allegations of the complaint, and by way of further defense, claimed title by limitation.

The cause was heard by a jury upon the pleadings, oral evidence and instructions of the court, and a verdict returned in favor of appellee for the land and \$50.00 for rent. An appeal has been lodged in this court from the judgment rendered thereon.

(1) A motion for new trial does not appear in the abstract filed by appellant. This court is therefore precluded from considering assignments of error with reference to the admission of testimony on account of incompetency or irrelevancy. As originally abstracted no objections were made or exceptions saved to the instructions given on the court's own motion, nor to his refusal to give instructions asked by appellant. Appellant was permitted to bring objections and exceptions to said instructions into the record by writ of certiorari. The record as amended discloses that the objections and exceptions were in gross except as to a certain unnumbered instruction given by the court. Separate objections were made and exceptions saved to that instruction. The instruction referred to is as follows:

"The burden of proof is usually and always upon the plaintiff to establish his case by a preponderance of the testimony and the burden is on the plaintiff in this case in the whole to establish the correctness of the survey, and I think there is no question about the ownership of the land, but on the question of adverse possession the burden shifts to the defendant and the burden is then on the defendant alone to show his title by adverse possession according to these instructions."

(2) It is contended that this instruction is erroneous because it violates the well established rule that the burden of the whole case rests upon the plaintiff. The rule cannot be gainsaid, but it does not enforce upon the

plaintiff the necessity of proving a negative. In ejectment the burden is upon the plaintiff to establish his title and right of possession incident thereto. In the instant case, appellee was relieved from making proof of her title papers by the following agreement: "It is agreed by all parties that Miss Annie Cowger is the owner of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Sec. 4, T. 5 N., R. 19 W., and Mr. Love is the owner of the S. W. $\frac{1}{4}$, Sec. 33, T. 6 N., R. 19 W." It then became necessary for her to prove by a preponderance of the evidence the exact location of her boundary line. When this burden was discharged she could well afford to rest her case. Another issue, however, was injected into the case by answer of appellant. In substance he said: Notwithstanding you own the strip in question by your title papers and survey, yet I claim it by seven years' adverse possession. It follows, as night follows day, that it was incumbent upon appellant to establish his possessory title by the burden of proof. This court has frequently said that the burden is on the defendant to sustain his plea of adverse possession. *Brown v. Bocquin*, 57 Ark. 97; *McConnell v. Day*, 61 Ark. 464; *Calhoun v. Moore*, 79 Ark. 109; *St. L., I. M. & S. R. Co. v. Berry*, 86 Ark. 309.

We think the instruction as given clearly stated the law. In effect, the instruction placed the burden of the whole case upon appellee, but shifted the burden to appellant to establish his plea of seven years' adverse possession. The following clause in the instruction—"and I think there is no question about the ownership of the land" manifestly referred to the agreement of parties set out above with reference to the ownership of the respective tracts of land, and was not an expression of opinion by the court upon the merits of the case.

No error appearing in the record of which this court can take cognizance under its rule, the judgment is affirmed.

WALDEN v. BLASSINGAME.

Opinion delivered October 8, 1917.

1. EVIDENCE—TRANSACTIONS WITH DECEASED—TESTIMONY OF CO-DEFENDANT.—One B. was joined as a defendant with the estate of one D., deceased, in an action to cancel a deed for fraud. *Held*, B. was competent to testify to transactions had with the deceased.
2. ACKNOWLEDGMENTS—FORGED INSTRUMENT.—Where it is sought to be shown that the grantor in an instrument did not acknowledge it at all, no rule as to the amount of evidence required obtains, but the court is to determine from all the circumstances disclosed whether the certificate of acknowledgment is true or false.
3. LIMITATIONS—FORGED DEED.—The statute of limitations will not run in favor of parties to a forged deed, until a discovery of the forgery by the true owners of the land.

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

John D. DeBois and *R. S. Coffman*, for appellants.

1. The evidence shows that the deed from John R. Walden to his wife, Julia, was a forgery and a fraud, and hence appellants must prevail.

2. This suit is not barred, as it was brought within apt time after the fraud or forgery was discovered. Kirby's Digest, § 5077; 61 Ark. 527; 92 *Id.* 618-621; 108 *Id.* 342.

3. It is competent for witnesses to testify as to what a deceased person may have said, they being third persons, not parties to the suit. 70 Ark. 542; 46 *Id.* 306. The testimony of David A. Blassingame was admissible.

4. The forged deed should be canceled and appellants should recover.

Brundidge & Neelly, for appellees.

1. It is not proven that the deed from John R. Walden to his wife was a forgery, and the chancellor so found and his findings are supported by the evidence.

2. Blassingame's testimony was incompetent. Kirby's Digest, § 3093.

3. The burden of proving the fraud was upon appellants and the evidence must be clear, cogent and convincing. 117 Ark. 326; 96 *Id.* 564.

4. The suit is barred by limitation.

HUMPHREYS, J. Appellants, collateral heirs of John R. Walden, deceased, brought suit in the White Chancery Court to recover the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of Sec. 14; S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ of Sec. 13; and an undivided one-half interest in the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, Sec. 13, T. 6 N., R. 10 W., in White County, Arkansas, from appellees. The vital issue presented by the pleadings and evidence to be determined by this court on *de novo* trial is whether the deed of date June 22, 1893, of John R. Walden to Julia Walden, his wife, is a genuine or forged instrument. Appellants claim title to said land by inheritance from John R. Walden, deceased. Appellees claim title through mesne conveyances from the common source, John R. Walden. If the deed in question from John R. Walden to Julia Walden, of date June 22, 1893, is a forgery, appellants must prevail. If said deed is genuine, appellees must prevail.

(1) John R. Walden died in October, 1894. His only child died in infancy a few months thereafter. His wife afterwards married W. W. Duncan, and died in the early part of the year 1909. Prior to her death she and her husband, W. W. Duncan, who were residing upon the lands in question, conveyed same to David A. Blassingame on the 3d day of August, 1899. On January 13, 1908, David A. Blassingame and wife executed a deed of trust on said real estate to David M. Doyle to secure the sum of \$975.38. After Blassingame purchased said real estate from Julia Walden and her husband, W. W. Duncan, he entered into negotiations with appellants to purchase their remainder interest in said lands as heirs of John R. Walden, deceased, and agreed to pay them \$400 for a quitclaim deed to said real estate. The deed was executed and, by agreement, a draft for \$400 was attached thereto and same was deposited in the Peoples

Bank in the city of Searcy in escrow, with instructions that the deed should be delivered to Blassingame when the \$400 draft was paid. Blassingame failed to pay the money and the deed was never delivered to him. Upon investigation, appellants discovered that the alleged forged deed from John R. Walden, deceased, to Julia Walden, of date June 22, 1893, had been placed of record. They were advised by an attorney that the deed in question precluded them from successfully maintaining a suit for the lands. Appellants then dropped the matter until the month of March, 1916, when they obtained information from Blassingame to the effect that the deed from John R. Walden for said real estate to his wife, Julia Walden was a forgery. Within a reasonable time thereafter, appellants brought this suit against appellees to cancel the alleged forged deed and the mortgage executed by the Blassingames to David M. Doyle of date January 13, 1908, and to quiet the title to said real estate in said appellants as against appellees. Prior to the institution of the suit, David M. Doyle had died, and appellee, H. D. Russell, had been appointed executor in succession of the estate of D. M. Doyle, deceased, when this suit was commenced. The executor had brought suit to foreclose the mortgage on said real estate against the Blassingames, and when Blassingame determined he could not liquidate or extend the mortgage, he divulged the alleged forgery of the deed in question to J. M. Walden, one of the appellants herein. He exacted a one-half interest in the real estate from Walden on account of improvements he had made upon the property for divulging the information, and at first Walden agreed to give him a one-half interest therein, but after Blassingame made the disclosure that he was a party to the fraud and after consultation with an attorney, he declined to enter into such an arrangement and brought suit against both Blassingame and the Doyle estate to cancel the deed and mortgage aforesaid. Blassingame testified positively that D. M. Doyle had agreed to advance him \$400.00 to purchase the interest of appellants in said lands, and

when he asked Doyle for it, Doyle told him he had a better plan and turned the deed in question over to him and suggested that he place same of record, which he did. The deed, including the acknowledgment and signature of the magistrate, is shown to be in the handwriting of Doyle. The justice of the peace who was supposed to have acknowledged the alleged forged instrument died prior to the institution of this suit. David M. Doyle told B. R. Picard that he had fixed up the deed, and Blassingame showed him where they had torn the name "McClain" out of the J. P. docket, in order to imitate the name, and stated that was the way they kept from paying the \$400.00 to appellant. Other witnesses testified to like statements and admissions by both Doyle and Blassingame. It is true that the cross-examination of some of the witnesses developed inaccuracies and conflicts, but after a careful reading of all the testimony, we believe the finding of the chancellor is contrary to a clear preponderance of the evidence. It is insisted that Blassingame is an active plaintiff, and, therefore, precluded from giving testimony as to any transactions with or statements of the intestate, David M. Doyle. Blassingame was made a defendant and filed answer denying all the material allegations in the complaint. He does not appear as a voluntary witness. It is affirmatively shown that before this suit was brought, and since, appellants positively declined to give or contract him any interest in the lands. He has no interest in the result of the suit. He is not pursuing the executor and is a co-defendant, hence, the provision of Sec. 3093 of Kirby's Digest has no application to him and does not render his testimony incompetent.

But it is contended that the evidence necessary to impeach a certificate of acknowledgment must be clear, cogent and convincing beyond reasonable controversy. The issue here is whether or not the officer ever certified the acknowledgment. It is not an attempt to impeach an acknowledgment duly certified. The question is—was the deed, acknowledgment and certificate forged? In the

recent case of *Nevada County Bank v. Wm. Gee and N. T. Gee*, 130 Ark. 312, this court in construing the case of *Polk v. Brown*, 117 Ark. 321, cited by appellant, said that "where there is a claim that the grantor did not make any acknowledgment whatever before the officer, the weight of the evidence should not be affected by any particular rule peculiar to the subject, but that the court should be left to determine from all the circumstances disclosed whether the certificate of acknowledgment is true or false." We do not think the clear, cogent rule of evidence contended for is applicable to the issues involved in this case, but the rule laid down in *Polk v. Brown*, and *Nevada County Bank v. Gee, supra*, obtains.

It is insisted that one of the appellants, Walden, and Blassingame entered into a conspiracy to defeat the Doyle estate in the collection of its indebtedness secured by the mortgage in question; and not being in court with clean hands, the bill should be dismissed. The record is not sufficient to warrant a finding that such a conspiracy exists.

(3) Our attention is called to the fact that Blassingame was holding under a deed from Julia Duncan and her husband, W. W. Duncan, and that he held open and adverse possession thereof for more than seven years. The evidence clearly showed that Blassingame claimed a life estate only under the Duncan deed from date thereof, until June 22, 1893, a less period than seven years. During that period, he recognized the interests of appellants by contracting to buy the fee from them. On and after June 22, 1893, Blassingame relied upon the forged instrument as the source and foundation of his title. Appellants were induced not to bring suit for the recovery of their land on account of the forged deed being placed of record. Neither Blassingame nor Doyle were innocent purchasers, both having participated in the forgery of the deed in question, and for this reason the statute of limitations would not begin to run in their favor against appellants until the discovery of the fraud.

This suit was instituted as soon as the fraud was discovered.

The cause is therefore reversed and remanded with instructions to enter a decree canceling the deed from J. R. Walden, deceased, to Julia Walden, of date June 22, 1893; also the mortgage from David A. Blassingame and wife to David M. Doyle of date January 13, 1908; and to quiet and confirm the title to said real estate in appellants as against appellees.

CAZORT v. STATE.

Opinion delivered October 1, 1917.

1. CATTLE TICK ERADICATION—POWER OF BOARD OF CONTROL—PROTECTION OF CATTLE ALREADY DIPPED.—The Board of Control of the Agricultural Experiment Station has authority under Act 86, p. 338, Acts of 1915, to make rules for the protection of cattle already dipped by preventing reinfestation from other cattle brought into a district, and to prevent such other cattle being transported from one county to another.
2. CATTLE TICK ERADICATION—PROMULGATION OF ORDERS BY BOARD OF CONTROL.—Under Act 86, p. 338, Acts of 1915, the courts and all persons must take notice of public act of the Board of Control of agricultural institutions, proclaiming or declaring the existence of any regulations in a manner calculated to afford information to the public.

Appeal from Johnson Circuit Court; *A. B. Priddy*, Judge; affirmed.

Sam R. Chew, for appellant.

1. The demurrer should have been sustained. The information charged no offense. Kirby's Digest, § § 7907, 7912; Acts 1907, 266; Kirby's Digest, § § 7913-16.

2. The indictment must conclude against the peace and dignity of the State of Arkansas. 47 Ark. 230.

3. The State should have been required to elect. 82 Ark. 203; 37 *Id.* 408; 37 *Id.* 412.

4. The rule or order was never promulgated. 18 N. Y. Supp. 768; 165 Fed. 936. No one is bound by a rule

of which he has no knowledge, or where the rule has not been publicly enforced long enough to justify or authorize an inference that he who is to be bound by the rule had knowledge of the existence of such rule. 88 Ark. 114; *Ib.* 24, 48; 99 *Id.* 265.

4. The court erroneously instructed the jury and the conviction is wrong.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The demurrer was properly overruled. Kirby's Digest, § 2495; 126 Ark. 501; 91 *Id.* 207; 86 *Id.* 436; 45 *Id.* 536.

2. The motion to require the State to elect was properly denied.

3. There is no error in the instructions.

McCULLOCH, C. J. This prosecution originated before a justice of the peace upon information filed by the deputy prosecuting attorney of Johnson County, and the charge therein against the defendant is in substance that he removed cattle from Crawford County, within the quarantine area, into Johnson County, in the special quarantine district where systematic dipping of cattle for tick eradication was being carried on.

It is earnestly contended by counsel for defendant that the circuit court should have sustained the demurrer to the information filed in the case for the reason that there is no law of the State declaring to be unlawful the thing alleged to have been done by defendant, and that, even if there is any law on the subject, the information is not sufficiently specific to constitute a charge of violating such law. The State relies, in order to sustain conviction, upon the statute enacted by the General Assembly of 1915 (Act No. 86, page 338), and the regulations promulgated pursuant thereto by the Board of Control of the Agricultural Experiment Station. The statute in question created a district, or area, for the eradication of cattle ticks, and the area includes the counties of Crawford and Johnson, as well as Franklin County, which

lies between the two other counties named. Section 2 of the Act declares its purpose to be that of eradicating cattle ticks from the infested portion of the district and for the protection from reinfestation of the counties in the district already cleansed. Section 6 of the Act reads as follows:

“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 of 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 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.”

The case of *Davis v. State*, 126 Ark. 260, is conclusive of the question that the statute makes it unlawful to violate the rules and regulations of the Board of Control of the Agricultural Experiment Station with respect to the eradication of cattle ticks. In that case the defendant was charged with violation of the regulation of the board, which required all persons owning cattle exposed to or infested with ticks to have them dipped at a regular disinfecting station, and this court held that it constituted a violation of law for the defendant to refuse to comply with the regulation. If the board had power under the statute to require the dipping of cattle, it necessarily follows that the power also exists to prohibit by regulation the removal of cattle from other infested territory into the special area in which the work of tick eradication is being prosecuted. In other words, the protection of cattle already dipped by preventing reinfestation from other cattle brought in is as essential to the prevention of disease as is the dipping itself, and the power to make rules on both subjects necessarily follows from the language of the statute. While there is no specific provision in the statute declaring it to be unlawful to disobey the rules prescribed by the board, it is

clear from the language used that such was the intention of the law-makers, for the statute expressly declares its purpose in the creation of the district and authorizes the Board of Control to promulgate rules and regulations to carry out that purpose and to enforce obedience thereto. One of the regulations prescribed by the Board of Control (if treated as a part of the record in this case) relates to the movement of cattle between points within the quarantine area, and provides that cattle may be moved into cleansed area or special quarantine area where the process of disinfection is being carried on only after being dipped in accordance with the regulations. The evidence shows that in violation of this regulation the defendant removed a bull from Crawford County, which is infected territory inside the quarantine district, into Johnson County, which is a special quarantine district where disinfection work is being prosecuted.

Again, it is insisted by counsel that the regulation in question was not proved by competent evidence and that public notice thereof was not given sufficient to put the regulation into operation.

This court held in the case of *Kansas City So. Ry. Co. v. State*, 90 Ark. 343, that the courts of the State must take judicial notice of the quarantine regulations promulgated by the Board of Control of the Agricultural Experiment Station. Counsel seek to distinguish that case from the case at bar on the ground that it is not shown that the regulation now under consideration was published so as to constitute a promulgation. The statute conferring authority on the board to make the regulation does not require publication in any particular way. It merely provides that the board shall have full power and authority to promulgate the necessary rules and regulations. Since no particular form is prescribed for the promulgation of regulations, and the courts and all persons must take notice of them, any public act of the board proclaiming or declaring the existence of the regulations in a manner calculated to afford information to the public is sufficient. *Dickinson, Auditor, v. Page*, 120 Ark. 377.

The attack on the sufficiency of the information filed against defendant is fully answered by the decision of this court in *Rider v. State*, 126 Ark. 501.

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

SPEER v. STATE.

Opinion delivered October 1, 1917.

1. CRIMINAL LAW—INDICTMENTS—IMPROPER CONDUCT OF COURT.—Errors committed by a trial court in instructing grand juries do not constitute grounds for quashing indictments returned by them.
2. CHANGE OF VENUE—DISCRETION OF COURT.—Unless the trial court has abused its discretion in overruling a motion for change of venue, the order is conclusive on appeal.
3. CRIMINAL LAW—PROSECUTION OF CRIMINALS—DUTY OF STATE'S ATTORNEY.—An indictment against a prosecuting attorney for the crime of proceeding against certain persons operating gambling houses for committing misdemeanors, when they were in fact guilty of having committed felonies, is valid.
4. CRIMINAL LAW—USE OF IMPROPER NAME OF CRIME IN INDICTMENT.—The name of a crime is controlled by the specific acts charged, and an erroneous name of the charge does not vitiate the indictment.
5. CRIMINAL LAW—EXAMINATION OF VENIREMEN ON VOIR DIRE.—It is improper, in a prosecution of a prosecuting attorney for official misconduct, for defendant's attorney to ask veniremen on *voir dire* whether they opposed or supported appellant in his race for office.
6. CRIMINAL LAW—EVIDENCE OF SIMILAR ACTS—OFFICIAL MISCONDUCT.—In a prosecution of a prosecuting attorney for official misconduct, and the question of good or bad faith in the performance or non-performance of an official duty is involved, evidence of similar acts of commission or omission occurring about the same time, tending to prove the issue, is admissible.
7. CRIMINAL LAW—PROSECUTIONS FOR CRIME—DISCRETION OF STATE'S ATTORNEY.—The discretion of a prosecuting attorney as to whether he will prosecute alleged criminals must be exercised in good faith, and he may be himself prosecuted for a failure to so act.
8. PROSECUTING ATTORNEYS—MISCONDUCT IN OFFICE.—A judgment of conviction against the prosecuting attorney of Garland County

for failing to prosecute the proprietors of certain gambling houses, upheld.

9. TRIAL—IMPROPER CONDUCT OF JURY—QUOTIENT VERDICT.—Verdicts of juries cannot be impeached by evidence of the jurors, except where the verdict was reached by lottery. A quotient verdict is not the result of a lottery.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; affirmed.

Rector & Sawyer and *Calvin T. Cotham*, for appellant.

1. This case is easily distinguished from the Bledsoe case, 197 S. W. 17, and is not governed by it.

2. The indictment should have been quashed on account of the conduct of the judge. No public offense is charged. Kirby & Castle's Digest, § 7837; 85 N. E. 728.

3. The venue should have been changed on the showing made.

4. The court erred in its charge to the grand jury.

5. The court erred in refusing to permit appellant to examine the veniremen on their *voir dire* as to political bias or prejudice. 1 Thompson on Trials, par. 103.

6. The court erred in admitting testimony as to gambling at other clubs than the Ohio Club.

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

8. The verdict was decided by lot. 66 Ark. 264; 50 S. W. 517; 34 Am. Rep. 808, and note; Thompson on Trials, par. 2602.

9. The testimony is insufficient to support the verdict. No corrupt intent was shown.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The Bledsoe case is identical with this, and settles the disqualification of the judge question. 57 Ark. L. R. 1222.

2. The motion to quash was properly overruled. Kirby's Digest, § 2279. Error in charging a grand jury is no ground to quash an indictment. 37 La. Ann. 172.

3. The motion for change of venue was properly overruled. Kirby's Digest, § 2318; 54 Ark. 243. The court did not abuse its discretion. 98 Ark. 139; 100 *Id.* 301; 95 *Id.* 239.

4. The indictment states a public offense. Wharton, Cr. Law, No. 1572; 2 Mo. 23; 24 Minn. 158; 15 Wendell, 277; Kirby's Digest, § § 6395, 6398; 102 Ark. 651.

5. There was no error in the ruling as to the examination of the veniremen. But if so, it was harmless, as the challenges had not been exhausted. 91 Ark. 576; *Ib.* 582; 90 *Id.* 586; 93 *Id.* 168; 99 *Id.* 462; 102 *Id.* 180; 100 *Id.* 437; 96 *Id.* 627; 50 *Id.* 492.

6. The testimony as to other gambling houses was properly admitted. 75 Ark. 427; 72 *Id.* 586.

7. There is no error in the instructions. 105 Ark. 598; 77 *Id.* 31; 71 *Id.* 86; 92 *Id.* 71; 94 *Id.* 511; 97 *Id.* 180; 77 *Id.* 531; 73 *Id.* 455.

8. The verdict was not by lot. 91 Ark. 497; 66 *Id.* 264.

9. The verdict is supported by the evidence.

HUMPHREYS, J. Appellant, prosecuting attorney of the Nineteenth Judicial Circuit, was indicted, tried and convicted in the Garland Circuit Court of prosecuting W. S. Jacobs, Porter Austeel, Butch Wright and George Ryan, operators of a gambling house at 336½ Central Avenue, in the city of Hot Springs, for misdemeanors instead of felonies. The indictment charged in substance that appellant filed information against said parties for misdemeanors for gaming, instead of prosecuting them for felonies for operating a gambling house, in order to encourage said parties in the commission of the offenses. A fine of \$400.00 was imposed by the verdict. Judgment for the fine and costs was rendered against the appellant, the validity of which is questioned by appeal to this court.

The first assignment of error insisted upon for reversal is the overruling of appellant's motion suggesting the trial court's disqualification and requesting him to

certify such disqualification. The identical question was recently decided adversely to the contention of appellant by this court. We think our conclusions were correct and adhere to the principles announced in the case of *Bledsoe, Sheriff v. State*, 130 Ark. 122.

Appellant filed a motion to quash the indictment and insists that the court erred in overruling it. This is a second indictment against appellant for malfeasance in office. The first indictment was quashed by the trial court on motion of appellant, presumably for the reason that the court had conducted the examination of the witnesses before the grand jury, upon whose testimony the original indictment was returned. After quashing the first indictment, the question of gambling and whether such offenses had been countenanced and encouraged by certain officers was referred by the court to another grand jury. On request of appellant, Mr. Wootton, a member of the Hot Springs bar, was selected to assist the grand jury in the investigation of the gambling situation. It was held by this court in the case of *Bledsoe, Sheriff v. State, supra*, that the participation of the trial court in the examination of witnesses in a former investigation before the grand jury, did not constitute him either an attorney or counsel in the case within the meaning of Section 20, Article 7, of the Constitution of Arkansas. We also held that the trial court's participation in a former investigation of the same question before a grand jury could not be urged as cause for quashing an indictment returned by a different grand jury upon a subsequent investigation in which he did not participate.

(1) But it is now urged that the instructions given the grand jury that returned the present indictment were of an inflammatory nature, and that the purport of the charge indicated that the trial judge desired that the grand jury return an indictment against appellant. Errors committed by a trial court in instructing grand juries do not constitute grounds for quashing indictments returned by them. Section 2279 of Kirby's Digest points out only three grounds upon which an indictment can be

set aside on motion. The reasons insisted upon for setting aside the indictments in the instant case do not come within the authorized grounds under said section of the digest.

(2) Appellant's motion for a change of venue specified that the minds of the inhabitants of Garland County were so prejudiced against him that he could not obtain a fair and impartial trial therein. Twelve citizens of the county subscribed to an affidavit supporting the motion. They were brought before the court and thoroughly examined as to the extent of their knowledge concerning the matters set forth in the motion. One of them was related by marriage to appellant; others wavered on the proposition of whether it was not possible for appellant to get a fair and impartial trial, and most of them confined their knowledge to the feeling of inhabitants residing in a particular locality in the county. The statute contemplates that the subscribing witnesses shall have fairly accurate information concerning the state of mind of the inhabitants of the entire county toward the defendant. The subscribing witnesses in the instant case failed to meet the requirement of the statute in this respect. This court has uniformly held that unless the trial court has abused its discretion in overruling a motion for change of venue, the order is conclusive on appeal. *Bryant v. State*, 95 Ark. 239, and cases cited. *Ford v. State*, 98 Ark. 139; *McElroy v. State*, 100 Ark. 301.

After a careful reading of the testimony of these witnesses, we cannot say the court abused its discretion in overruling the motion for change of venue.

(3) The sufficiency of the indictment is questioned. The indictment, in effect, charges that appellant fostered the crime of running gambling houses by proceeding against the operators thereof severally for gaming, a misdemeanor under the statute; instead of proceeding against them for feloniously operating a gambling house, a felony under the statute. It is said no such crime is known to the law. We differ from learned counsel in this contention. It is the duty of the prosecuting attorney

to initiate proceedings against parties whom he knows, or has reason to believe, have committed crimes. Kirby's Digest, Secs. 6398-6400.

(4) The fact that his duties rise to the dignity of exercising discretion cannot excuse neglect of duty on his part. Section 6395 of Kirby's Digest imposes a penalty of not less than \$50.00 nor more than \$1,000.00 on the prosecuting attorney for neglect of duty. If the indictment sufficiently charges a neglect of duty, which this indictment does, it cannot avail to say that a demurrer should be sustained to it because the indictment charges *malfeasance* in office. "The name of the crime is controlled by the specific acts charged, and an erroneous name of the charge does not vitiate the indictment." *Lacefield v. State*, 34 Ark. 275; *State v. Culbreath*, 71 Ark. 80; *Harrington v. State*, 77 Ark. 480; *Kelley v. State*, 102 Ark. 651.

(5) Another assignment of error insisted upon for reversal was the court's refusal to permit appellant to ask veniremen on *voir dire* examination whether they opposed or supported appellant in his election to the office of prosecuting attorney. Electors are not supposed to cast their ballots for or against aspirants for office on account of bias or prejudice. The qualification of the candidate is the true criterion. Again, the secrecy of the ballot is accorded electors in this State and questions of this character would be a clear invasion of their right.

(6) Again, it is urged that the court erred in admitting evidence tending to show the existence of other gambling houses in Hot Springs than the one mentioned in the indictment. The charge in the indictment challenged the good faith of the prosecuting attorney for not prosecuting operators of a certain gambling house under the anti-gambling act. His intention and motive was drawn in question. When a question of good or bad faith in the performance or non-performance of an official duty is involved, similar acts of commission or omission occurring about the same time, tending to prove the issue, are admissible. *Howard v. State*, 72 Ark. 586;

Johnson v. State, 75 Ark. 427; *Davis & Thomas v. State*, 117 Ark. 296; *Bledsoe v. State*, 197 S. W. Rep. 17, 130 Ark. 122.

(7) In support of reversal, appellant challenges the correctness of the instructions given by the court, for the same reasons urged against the sufficiency of the indictment. Having upheld the indictment, it is unnecessary to reiterate the conclusions of the court in these particulars. The contention made by the appellant is to the effect that because a wide discretion is vested in the prosecuting attorney with reference to the prosecution of parties for crime, that the right of discretion must necessarily shield him from indictment or prosecution for omission to perform his duties. This court takes a contrary view of the law. It is the duty of the prosecuting attorney, under the statute, though endowed with discretion in the performance of his duties, to exercise his discretionary powers in good faith. The jury was fairly instructed on this theory of the law, and after a careful reading of the instructions, we find nothing contained in any of them conflicting with this theory.

Instructions A, B, C and D, requested by appellant, were peremptory in nature and presented the opposite theory. We think they were properly refused.

(8) But it is contended that even under the State's theory, reflected by the instructions given by the court, the verdict is not warranted by the evidence. It is not within the province of this court to pass upon the weakness or strength of the evidence. If there is any legal evidence to support the verdict, the rule prevails that on appeal the verdict must stand. The record discloses that gambling houses were being operated openly in many places in Hot Springs in the months of December, 1916, and January, 1917. Not only so, but the very parties against whom the prosecuting attorney proceeded for gambling were operators of a gambling house during a portion of that time. The sum total of the evidence discloses that with little effort the gambling houses could have been discovered. We think from the prosecuting at-

torney's own statement he obtained sufficient information from witness Young to warrant him in thoroughly investigating the gambling situation in Hot Springs. An ordinary investigation would have discovered the location of gambling houses in many parts of the city, and the paraphernalia and devices used therein. There was no lack of participants in the games, so witnesses were abundant. While the law does not impose the duties of a detective upon a prosecuting attorney, it does impose upon him ordinary diligence in discovering and abating crime.

(9) Lastly, it is urged that the verdict of the jury was determined by lot. Lot involves an element of chance. The quotient verdict is not the result of a lottery. It is a certain result ascertained by adding twelve separate amounts together and dividing the sum total by twelve. Only one result can be reached. It would be a lottery if twelve different amounts were placed on separate slips of paper and one slip then drawn out, which by agreement should become the verdict. The case of *Williams v. State*, 129 Ark. 344, cited by appellant in support of his contention, is not authority that a quotient verdict is a lottery. The quotient method of arriving at a verdict is condemned in the *Williams* case. The effect of fixing the punishment in that manner would compel a reduction of the punishment to the minimum fine under the rule laid down in the case of *Williams v. State, supra*. Verdicts of juries cannot be impeached by the evidence of jurors except where the verdict was reached by lottery. This kind of misconduct cannot be established by jurors. Thompson on Trials (2d Ed.), Sec. 2603.

Our attention is called to the case of *Walker v. State*, 91 Ark. 497, as holding contrary to the view herein expressed. In that case, the record showed the term of imprisonment was fixed by lot and on that account the attorney general confessed error. In the case at bar, the record does not show that the amount of the fine was ascertained by lot.

No other evidence except the evidence of jurors being offered to establish the manner of arriving at the verdict in the instant case, and the method adopted not being a lottery, reversible error is not established by competent evidence. The judgment is therefore affirmed.

SMITH, J., dissents.

LEACH v. SMITH.

Opinion delivered October 8, 1917.

1. APPEAL AND ERROR—REVIEW OF JUDGMENT AT LAW.—In a case at law on appeal for review for errors, this court is not a trier of facts. It is for the judge and jury in the trial court to weigh the evidence, and a judgment will not be set aside on appeal where the result attained below is supported by any evidence legally sufficient to support the finding on the issues of fact.
2. APPEAL AND ERROR—CHANCERY APPEAL.—On appeal, chancery causes are tried *de novo*, and the findings of fact by the chancery court are allowed to stand unless they are clearly against the preponderance of the evidence.

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

Carmichael, Brooks & Rector, for appellant.

1. The evidence is not sufficient to overcome the written contract, or that it was abrogated and a new one made. The findings of the chancellor are clearly against the preponderance of the evidence. 105 Ark. 233; 98 *Id.* 459; 102 *Id.* 658, 663; 102 *Id.* 382; 92 *Id.* 359; 104 *Id.* 488; 84 *Id.* 349; 83 *Id.* 340.

2. The finding and decree are against the preponderance of the competent evidence. 78 Ark. 209; 97 *Id.* 135; 95 *Id.* 6. Leaving out the incompetent evidence admitted, there was no evidence to support the findings.

James B. Gray, for appellees.

1. This court will not disturb the chancellor's findings on questions of fact where not clearly against the preponderance of the evidence. Only a question of fact is involved here. Here the findings are all clearly sustained by the evidence.

WOOD, J. In January, 1916, Charley Smith entered into the following written contract with Marion Leach, to wit:

“Wampoo, Ark., January 4, 1916.

“On or before November 15, 1916, I promise to pay to M. L. Leach 12 bales of cotton, each weighing 500 pounds each, for rent on 77 acres of land, all west of Plum Bayou.”

Appellant instituted this suit against Smith and J. B. Duncan, setting up the contract above set forth, and alleging that Smith had disposed of or was about to dispose of the crop on which the appellant had a landlord's lien for the unpaid rent for the year 1916. He alleged that eight bales of cotton grown on the land were in the possession of J. B. Duncan. He prayed for an injunction against the appellees to restrain them from disposing of the cotton or appropriating it to their own use.

The appellee, Charley Smith, admitted the contract set up in the complaint, but alleged that after the execution of this contract he was unable to secure supplies to make the crop; that thereafter he informed Leach that he could not get a merchant to furnish him under such contract, and that by mutual agreement on or before February 1, 1916, the written contract was abrogated and a new contract entered into whereby Smith agreed to pay Leach the sum of \$8.00 per acre for such land as he worked in corn and one-fourth of the cotton and cotton seed grown on the land planted in cotton as rent for the land.

Duncan answered, setting up that he knew nothing of the alleged written contract set up in the complaint, and alleged that on February 17, 1916, Charley Smith made arrangements with him for supplies for the year 1916, and told him that his contract with Leach was to pay \$8.00 per acre for all the land planted in corn and one-fourth of the cotton and cotton seed grown upon the land; that upon such representation Charley Smith executed a mortgage to Duncan & Company conveying his entire interest in the crop to be raised, and alleging that

he claimed an interest in the cotton in controversy under such mortgage. Both the appellees alleged in their answers that they were ready and willing to comply with the terms of the alleged verbal agreement between Smith, the tenant, and Leach, the landlord.

The appellant relied upon the written contract, the execution of which the appellees did not deny. But the appellees contend that the written contract of lease was abrogated by a verbal contract. The issue is purely one of fact, and it could serve no useful purpose, and would unnecessarily lengthen the opinion to set out and discuss the facts in detail.

The testimony on behalf of the appellees tended to show that Smith, for the year 1916, was the tenant of Marion Leach, having rented his land under the following circumstances: He first entered into the written contract of lease set up by the appellant. After entering into this contract he interviewed the mercantile firm of Morris & High, with whom he had been trading, and with whom he already had an account of \$115.00, to see if they would furnish him supplies during the year 1916, and exhibited his contract of lease with appellant. The merchants refused and requested him to pay them the balance due. Smith informed the appellant that he could not get any merchant to supply him, in view of his written contract with appellant to pay the first twelve bales of cotton as rent. He gave appellant this information some time between the 1st and 5th of February. Appellant thereupon agreed to let appellee, Smith, hold the land for one-fourth of the cotton produced thereon for the year 1916 and \$8.00 per acre for the land that was planted to corn, and told Smith to so inform J. B. Duncan & Company. He did so, and thereupon Duncan & Company agreed to furnish him supplies, and he executed to Duncan & Company a mortgage on his crop, which recites as follows: "80 acres crop rented from Marion Leach land, one-fourth cotton rent, \$8.00 per acre for corn land."

Appellee Smith himself testified to the above facts concerning the verbal contract, and he was corroborated by four witnesses who testified that they heard a conversation between appellant and Smith in the early part of February, 1916, in which appellant agreed to rent Smith the land on which the cotton in controversy was grown according to the terms as testified to by Smith. Duncan corroborated Smith as to the conversation that took place between them when the mortgage to J. B. Duncan & Company was executed. And witness, High, of the mercantile firm of Morris & High, with whom Smith traded during the year 1915, also corroborated the testimony of Smith to the effect that they would not furnish him in view of the written contract he had entered into with appellant to pay the first twelve bales of cotton for rent.

The appellant, in his own behalf, testified, denying that he entered into the verbal contract, denying that there was any other contract than the written contract, and stating that this contract was never in any manner abrogated; and his testimony is corroborated by several witnesses who testified that they heard Smith say on different occasions during the year 1916 that he had agreed to pay Leach twelve bales of cotton and money rent for the land. Other witnesses testified that they heard Smith say that he would turn over the twelve bales of cotton to Leach, but that Duncan would not let him.

All the testimony was taken *ore tenus* before the chancellor and was properly authenticated and has been brought into the record.

The chancery court found that the contract attached to the complaint, dated January 4, 1916, "was subsequently abrogated by the parties and a new contract entered into whereby, as shown by the testimony, the defendant, Charles Smith, was to pay \$8.00 per acre for the land he worked in corn and one-fourth of all cotton and cotton seed as rent for the land worked in cotton."

Counsel for the appellee contends, in effect, that since the chancellor heard the testimony *ore tenus* and thus

had an opportunity to see and hear the witnesses, the same weight should be given to his findings of fact as is given in trials at law to the findings of fact by a jury or the trial court sitting as a jury. But this contention grows out of a failure to observe the distinction, under our judicial system, between the rules of procedure in this court in cases at law and cases in chancery.

On appeal in law cases this court does not try the issues of fact anew at all, but only reviews for errors of law. The court only looks to the facts to determine whether the law is correctly applied, and only reviews the evidence when it is insisted that it is not sufficient to sustain a verdict; then it becomes a question of law to determine whether there is any evidence legally sufficient to sustain the verdict, and the court looks to the evidence for that purpose only.

(1) In law cases the jury, in the first instance, are triers of fact, and the trial judge, on a motion for a new trial, may review the evidence to determine whether the verdict is against the preponderance thereof. This court, on appeal, in law cases, leaves the jury and the presiding judge to weigh the evidence and decide as to its preponderance. This is peculiarly their function, and we do not set aside the results thus attained where there is any evidence at all of a substantial character; that is, legally sufficient, to sustain the finding on the issues of fact. In other words, in law cases this court, on appeal for review for errors is not a trier of facts.

But in chancery causes the procedure is entirely different. When chancery causes reach this court on appeal they are taken up for trial *de novo* on the record made up in the lower court, that is, on the same record, but the law and the facts are examined the same as if there had been no decision at *nisi prius*. In determining the issues of fact by this court in chancery causes, no weight is given to the findings of fact by the trial court unless the evidence is so conflicting as to leave the minds of this court in doubt as to where the preponderance lies. Where the evidence is evenly poised, or so nearly

so that we are unable to determine in whose favor the preponderance lies, then the findings of fact by the chancellor are persuasive. But the issues of fact, as well as law, are tried by this court anew.

(2) The rule was early announced and has been consistently adhered to that the findings of the chancellor will not be set aside by this court unless they are clearly against the preponderance of the evidence. This simply means that on a trial anew of the issues of fact in a chancery cause on the record as presented to this court on appeal, unless it is clear to our minds, that is, unless we are fully convinced as to which of the parties litigant is entitled to the decision, we accept and adopt the findings of the chancellor as our own and treat them as conclusive. The meaning of the rule may be shown by this simple illustration: When chancery causes are taken up for determination by this court, the judicial balance, so to speak, stands at perfect equipoise. One side of the scales is labeled "appellant," the other "appellee." The testimony in the record is examined and all that is incompetent is discarded. That which remains for appellant is put on his side, and that for the appellee on his side, and if the scales are evenly balanced, or so nearly so as to leave the judges in doubt as to where lies the greater weight, then the decision of the court below is persuasive and is allowed to stand as the correct result.

While the rule has been stated in different form and in somewhat different language in various decisions of this court, the above we believe correctly states and illustrates the rule that chancery causes are tried *de novo* in this court and that the findings of fact by the chancery court are allowed to stand unless they are clearly against the preponderance of the evidence. *State Bank v. Conway*, 13 Ark. 350; *Ringgold v. Patterson*, 15 Ark. 209; *Woodruff v. Core*, 23 Ark. 341; *Gerson v. Pool*, 31 Ark. 85; *Chapman v. Liggett*, 41 Ark. 292; *Gist v. Barrow*, 42 Ark. 521, and other cases collated in 1 Crawford's Dig. of Ark. Reports, p. 75; *Brown v. Wyandotte, etc.*,

Ry. Co., 68 Ark. 134; *Mooney v. Tyler*, 68 Ark. 314; *Norman v. Pugh*, 75 Ark. 52; *Goerke v. Rodgers*, 75 Ark. 72, and other cases cited in III Crawford's Dig. Ark. Reports, p. 36; *Carr v. Fair*, 92 Ark. 359; *Wait v. Stanton*, 104 Ark. 9, and other cases cited in IV Crawford's Dig. Ark. Reps., pp. 75-76. See also West's Consolidated Index Ark. Cases, Sec. 1009, App. and Error; 2 Standard Enc. Procedure, pp. 434-435. But seemingly contra, see *Branch v. Mitchell*, 24 Ark. 431.

In the case at bar the evidence is conflicting and so evenly poised that we are in doubt as to who is entitled to the preponderance, and we are not convinced that the findings of the chancellor are clearly against the weight of the evidence. We therefore adopt the findings of the chancery court as correct, and affirm the decree.

MEADORS v. STATE.

Opinion delivered October 15, 1917.

1. **TIMBER—UNLAWFUL CUTTING.**—Sections 1901 and 1902 of Kirby's Digest, providing a penalty for cutting and destroying timber, the one denouncing the crime as a misdemeanor and the other as a felony, *held* not inconsistent.
2. **CRIMINAL LAW—MISDEMEANOR—FAILURE TO SWEAR JURY.**—After verdict it is too late to object for the first time that the jurors were not sworn in accordance with the statute.
3. **EVIDENCE—CUTTING AND DESTROYING TIMBER.**—Defendant was charged with the crime of cutting and destroying timber. A witness was permitted to testify that he saw defendant peeling some locust posts at a certain place, but did not know whether it was on the land mentioned in the indictment. Other witnesses testified that they saw defendant peeling trees on the land mentioned in the indictment. *Held*, this testimony was competent.

Appeal from Crawford Circuit Court; *James Cochran*, Judge; affirmed.

J. E. London, for appellant.

1. This was a felony, and the record fails to show that defendant pleaded to the indictment or that the jury were sworn. 37 Ark. 61.

2. The evidence fails to warrant a conviction. Incompetent testimony was also admitted.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. No objections were made to the case proceeding to trial. The objection comes too late on appeal. 79 Ark. 293; 51 *Id.* 126; 56 *Id.* 488; *Ib.* 4. It is too late after verdict. 40 Ark. 511; 44 *Id.* 122; 36 La. Ann. 804; 19 Ia. 169; 86 Ark. 360; 55 *Id.* 342; 51 *Id.* 130.

2. There is no valid bill of exceptions. 55 Ark. Law Rep. 322; 103 *Id.* 44; 96 *Id.* 175.

3. The evidence sustains the verdict, but a judgment will not be reversed for insufficiency of the evidence where the evidence has not been brought to this court by a valid bill of exceptions. 105 Ark. 121.

McCULLOCH, C. J. The defendant was indicted for the offense of cutting down and destroying growing timber, of the value of \$100.00, on certain lands of another, which constituted a felony under the statute providing that if any one shall, without lawful authority, etc., enter upon land belonging to the State, or any corporation or person "and shall cut down or destroy, or cause to be cut down or destroyed, any tree or trees standing or growing thereon, of the value of more than ten dollars * * * shall be deemed guilty of a felony." Kirby's Digest, Sec. 1902.

(1) The trial jury returned a verdict finding the defendant guilty of a misdemeanor and assessed his fine at the sum of \$50.00. The statute under which the conviction was had is a part of the Revised Statutes, and is found in Kirby's Digest as Sec. 1901, and provides that every person who shall wilfully commit any trespass "by cutting down or destroying any kind of wood or timber * * * shall upon conviction be adjudged guilty of a misdemeanor and be fined in any sum not less than fifty dollars." This court held in *State v. Malone*, 46 Ark. 140, that the Act of 1883 (Kirby's Digest, Sec. 1902, referred to above) did not repeal the former statute, and

that there was no inconsistency between the two statutes. The defendant was, therefore, properly convicted of a misdemeanor under this indictment.

(2) It is insisted that the judgment should be reversed for the reason that the record fails to show affirmatively that the jurors were specially sworn as provided by statute. Kirby's Digest, Sec. 2373. The record is entirely silent as to any oath being administered to the jurors, or as to any objections or requests of the defendant on that subject, and the motion for new trial does not contain any assignment of error in that respect. The question is raised here for the first time in the case. This court held in *Ruble v. State*, 51 Ark. 126, that in a prosecution for misdemeanor it is too late after verdict to object for the first time that the jurors were not sworn in accordance with the statute. It was held that the defendant under those circumstances is deemed to have waived his objections to the failure of the court to have the oath administered to the jurors. The present case is ruled by that decision, for the verdict of the jury eliminated the felony charge and brings the case within the rule governing trials of misdemeanor cases. We are not called upon to decide whether or not this would constitute a waiver in a felony case.

(3) It is next insisted that the court erred in one of its rulings on the question of admissibility of certain testimony. One of the witnesses introduced by the State testified that he saw the defendant peeling some locust posts at a certain place, but he did not know whether it was on the land mentioned in the indictment. Two other witnesses were permitted to testify that the other witness, Norris by name, pointed out to them the spot where he said that he saw the defendant peeling the trees, and those witnesses testified that the spot so designated by Norris was on the land described in the indictment. This did not constitute hearsay testimony within the meaning of the law, for it tended to identify the particular place where the offense was alleged to have been committed. The testimony of Norris showed that the timber was cut,

and his designation of the particular place in connection with the testimony of the other two witnesses completed the identification. *Smith v. State*, 90 Ark. 435.

It is also contended that the evidence is not sufficient to sustain the verdict, but the testimony above referred to was, we think, sufficient to make out the case if accepted by the jury as true.

Judgment affirmed.

TODD v. TOLL.

Opinion delivered October 15, 1917.

SALES—COMPLETED TRANSACTION—TITLE—EXCHANGE OF CHATTELS.—A. agreed to sell an automobile to B. in exchange for a certain quantity of hay. The hay was stored in a barn on A.'s property. A. delivered the automobile to B., inspected the hay, and approved it as to quality. *Held*, under the agreement, that title to the hay passed to A., B. merely holding as bailee, and that A. could maintain against B. an action for the possession of the hay.

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

C. B. & Cooper Thweatt, for appellant.

The demurrer should have been sustained to the complaint, because the complaint and contract do not show title in appellant. No delivery of the hay is alleged or shown. The sale was not completed and title did not pass. 66 Ark. 138; 102 *Id.* 532; 31 *Id.* 137; 102 *Id.* 349; 35 *Id.* 304. The hay was never actually delivered, nor was there a constructive delivery. 35 Ark. 304; 63 *Id.* 232; 90 *Id.* 438; 102 *Id.* 25.

Eugene Lankford, for appellee.

1. No bill of exceptions was filed, and all defects in the complaint were cured by the evidence. 124 Ark. 389. The complaint alleged title and right to possession. 73 Ark. 593; 35 *Id.* 169.

2. There was delivery. 102 Ark. 532; 100 U. S. 124; 70 Ark. 105. The demurrer was properly overruled.

HART, J. The plaintiff, W. A. Toll, instituted this action against R. B. Todd to recover possession of sixty-four tons of prairie hay which was agreed to be worth \$14.00 per ton, amounting in the aggregate to \$896.00. The facts are as follows:

Toll and Todd entered into a written contract whereby the former exchanged with the latter an automobile for one hundred tons of good prairie hay. The agreement, among other things, contains the following:

"The said hay is now stored in the south end of the barn on southwest quarter, section 10, township 1 north, range 5 west, what is known as the F. T. Toll place; and now in case of any accident to the said hay by fire, lightning, or whatsoever cause, the said R. B. Todd hereby agrees to furnish and deliver the said amount of hay due on this contract or sale, from any other hay he may have—or cause to be put up until the one hundred tons has been delivered as above, which hay is to be good merchantable hay—all of which is to be delivered on cars at Tollville without any cost to the said W. A. Toll.

"The said W. A. Toll has inspected the hay now stored in the barn and do approve of same for quality."

The automobile was delivered to Todd. Todd let Toll have thirty-six tons of the hay and refused to let him have the balance; hence this suit. The case was tried before the court sitting as a jury and the judgment recites that it was submitted to the court upon the pleadings in the case, the contract and the oral agreement of the parties that the value of the hay was \$896.00.

The court found for the plaintiff for the possession of the hay or its value in the sum of \$896.00. The defendant has appealed.

The sole reliance of the defendant for a reversal of the judgment is that the court was not warranted in finding that there was a delivery of the hay by Todd to Toll and hence the latter was not entitled to maintain this suit. There were no rights of third persons in the action. The contract recites that the hay was stored in

the south end of a barn in the possession of Todd on F. T. Toll's place and that Toll had inspected the hay and approved it for quality. The agreement shows that it was understood by both parties that the title to the property should pass from Todd to Toll and that the former should hold it as bailee for the latter. The agreement contemplated that Todd should load it on the cars on or before May 1, 1916, at the request of Toll. The hay was exchanged for an automobile which had been delivered by Toll to Todd.

Under such circumstances we are of the opinion that the court was warranted in finding from the contract that there was a legal delivery of the hay and that the actual possession thereof was only retained by Todd as bailee for Toll. Hence the sale was completed and the title to the property passed to Toll.

In *Chalmers & Son v. Bowen*, 112 Ark. 63, Chalmers & Son brought replevin against Bowen for thirty tons of mussel shells. On the part of the defendant it was shown that they went with the agent of the plaintiffs to the place on the river bank where the shells were piled and agreed to buy them delivered at that place for a stipulated price; that they began to weigh out the shells, but quit because there was so much mud mixed with them. They finally agreed that the shells should belong to the defendants, but that the plaintiffs should weigh them out when they got dry. The court held that under this testimony the jury might have found that the shells were delivered to the defendant. So here the court was warranted in finding under the contract that there was a delivery of the hay to the plaintiffs. See also *Elgin v. Barker*, 106 Ark. 482.

The judgment must be affirmed.

VENABLE *v.* TOWN OF PLUMMERVILLE.

Opinion delivered October 15, 1917.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT OF STREETS—WHO CAN BIND CITY.—Neither the mayor nor street committee of the city council has authority to contract for the improvement of city streets. The city council alone can contract as provided in the statute.
2. MUNICIPAL CORPORATIONS—INVALID ACTS OF OFFICIALS—RATIFICATION BY COUNCIL.—In order for the unauthorized act of the mayor or council committee to be ratified by the council, the proper officers must take some affirmative or negative action, which amounts to an approval of the matter in question.
3. MUNICIPAL CORPORATIONS—RATIFICATION OF INVALID ACT.—Mere knowledge by the council cannot amount to a ratification of an unauthorized act of the mayor or members of the council.

Appeal from Conway Circuit Court; *A. B. Priddy*, Judge; affirmed.

Edward Gordon, for appellant.

1. The work was done acceptably under the contract, and the town paid a part of the price. The improvements were necessary and valuable, and appellant was entitled to recover such amount as his services were worth. It was the duty of the town to keep its streets in repair. Kirby & Castle's Digest, § 6483; Act March 9, 1875; 61 Ark. 397; Beach on Publ. Corp., § 217; 47 Ark. 269; 58 *Id.* 348; 98 *Id.* 38; 124 *Id.* 6-9; 28 Cyc. 1044; 36 Cent. Dig., § 880.

The town received the benefits of labor and money expended for its benefit and is liable.

Sellers & Sellers, for appellee.

1. The complaint stated no cause of action. No ordinance was passed nor contract made with the city council. Dillon, Mun. Corp., § 89; Kirby's Digest, § 5473; 40 Ark. 107.

2. No contract was ever made. 61 Ark. 397. Nor was the work ever accepted by the town. There can be no estoppel. 2 Dillon, Mun. Corp., § 777; 58 Ark. 270. Nor was there any ratification. 61 Ark. 402.

3. The act of the council disallowing the claim is binding. Kirby's Digest, § 1315; 62 Ark. 196, 201; 109 *Id.* 100; 6 Cyc. 550, note 60, p. 753; 29 Ark. 448; 23 Cyc. 1118; 52 S. W. 1078; 62 N. E. 447; 48 U. S. L. Ed. 195; 45 N. Y. S. 836; 97 N. W. 454; 52 S. E. 300; 4 Enc. Pl. & Pr. 38, 58, 74, 84.

STATEMENT BY THE COURT.

Luther Venable sued the town of Plummerville to recover a balance of \$271.50 alleged to be due him by the town for work done on its streets. The facts are as follows:

Luther Venable was employed by Conway County to work its roads and had in his possession the county road machinery. D. E. Thomas, the mayor of the town of Plummerville, wished to employ him to improve the streets of that town. It was agreed between them that Venable would do the work for a stipulated sum if the county judge would allow him to use the road machinery. The county judge agreed to this and the mayor had Venable enter into an oral agreement whereby the latter was to do certain work upon the streets of Plummerville. Venable did work to the amount of \$421.50. His work was satisfactory and done in accordance with his contract with the mayor. The county judge allowed him \$150.00 out of certain funds which belonged to the town of Plummerville. This amount was paid Venable, but the city declined to pay him any further sum for the work done by him.

The testimony shows that the mayor and the members of the council, who are also members of the street committee, knew that Venable was doing the work. They said they did not make any objection to it. The three members of the street committee admitted that they knew the work was being done, but stated that they understood the county was going to pay for it. They also testified that the work was needed and that it was done in a satisfactory manner. The mayor admitted making the contract, but stated that it was understood at the

time that the county judge should pay \$250.00, and that he later refused to make Venable an allowance for this sum. It is also shown by another member of the council and the recorder that they knew the work was being done, but they said that they had been informed that the county would pay for it.

The case was tried before the court sitting as a jury. The court found for the defendant and judgment was entered accordingly. The plaintiff has appealed.

HART, J., (after stating the facts).

Section 5473 of Kirby's Digest, among other things, provides:

"On the passage of every by-law or ordinance, resolution or order, to enter into a contract, by any council of any municipal corporation, the yeas and nays shall be called and recorded; and to pass any by-law or ordinance, resolution or order, a concurrence of a majority of a whole number of members elected to the council shall be required."

(1) Section 5456 provides that they (municipal corporations) shall have power to improve and repair their streets and alleys. Neither the mayor of the town of Plummerville nor the street committee of the council had the authority to make the contract with Venable for the improvement of the streets of the town. The town council alone could make the contract in the manner provided by the statute. *City of Mena v. Tomlinson Bros.*, 118 Ark. 166, and *Cutler v. Town of Russellville*, 40 Ark. 105.

(2-3) It is not shown by the record that the town council by ordinance or resolution made any contract with Venable to work the streets nor does the record show that the town council authorized either the mayor or the members of the street committee to make such contract. It is claimed, however, that the contract, as made by the mayor, was ratified. Reliance is placed upon *Frick v. Brinkley*, 61 Ark. 397, and *Forrest City v. Orgill*, 87 Ark. 389. We do not think, however, that

either one of those cases is authority for the position taken by counsel. In the first mentioned case there was a sale of piping to the town by one of its aldermen. Such contract was contrary to the statute. The town kept the piping and a recovery on a *quantum valebat* was allowed. So, too, in the last mentioned case the city officers purchased some water works machinery and the contract was not authorized by any ordinance, resolution, or order of the council in the manner provided by the statute, but the water works machinery was kept and used by the city. On this account a recovery as upon *quantum valebat* was allowed.

In the present case there was no ratification of the contract whatever by the town council. Knowledge by individual members of the council by conversations on the street could not be considered as a ratification by the council as a body. There was no action taken by the council in the matter at all. There was nothing to indicate that it accepted the work. Besides the members of the council and the mayor testified that they understood that the county was to pay for the work except the amount which had already been paid by the town. In order for the ratification to become effective there must be some affirmative action by the proper officers, or some negative action which of itself would amount to an approval of the matter in question. *Texarkana v. Friedell*, 82 Ark. 531.

It follows the court was warranted in finding for the defendant, and under the settled rules of this court the findings of fact made by the court sitting as a jury are as binding upon appeal as the verdict of a jury.

Therefore, the judgment will be affirmed.

McLEOD v. McLEOD.

Opinion delivered October 15, 1917.

HOMESTEAD GIFT.—A husband and father cannot make a gift of a portion of his homestead without his wife joining in the same.

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

J. R. Wilson, for appellants.

1. There was no real contract between father and son, no meeting of minds of these two parties, and there was no such contract as could be enforced. W. A. McLeod was a minor.

The land was a part of the homestead, and was so impressed. The wife never joined in any deed nor relinquished her dower. 126 Ark. 182; 56 Ark. 146; 71 *Id.* 283; 108 *Id.* 53; 95 Am. St. Rep. 928; 113 Am. St. Rep. 802; 39 Cyc. 1217; 33 Ark. 399; 29 *Id.* 280; 123 Ark. 200; 113 Ark. 134.

2. The contract was not enforceable by specific performance, as it was part of the homestead. Mrs. McLeod was not bound as she was not a party to any such contract.

J. S. McKnight and *C. L. Poole*, for appellee.

No further contract than the gift to the son was necessary. The burden was on appellants to show that the land was part of the homestead. The widow can not create a homestead right after the death of her husband. He must have impressed the homestead character upon it during his life. 33 Ark. 399; 31 *Id.* 145; 29 *Id.* 280; 41 *Id.* 94.

The land was given to the son and he took possession, cultivated and improved it long before his father's death. The chancellor was right in his findings.

STATEMENT BY THE COURT.

Mrs. M. J. McLeod for herself and for John McLeod and Frank McLeod, her minor children, instituted this action in the chancery court against W. A. McLeod to

restrain him from entering upon or otherwise interfering with their possession of a certain forty acres of land which she claims to be a part of the homestead.

The defendant answered, denying that the land was a part of the homestead of his mother and her minor children and setting up title in himself by gift from his father in his lifetime. The facts are substantially as follows:

D. W. McLeod owned nine forty-acre tracts of land situated in a body in Bradley County, Arkansas. His dwelling house and outhouses were situated on a forty-acre tract adjoining the one in controversy and just east of it. There was a large field near the dwelling house and about ten acres of this field was on the land in controversy. D. W. McLeod died June 20, 1915, and had lived on the land about twenty years prior to his death. He left surviving him his widow, Mrs. M. J. McLeod, and two minor children, viz.: Frank, fifteen years of age, and John, fourteen years of age, and several adult children. The defendant was one of his adult children.

According to the testimony of the plaintiff, the land in controversy was a part of the homestead. A detailed statement of the testimony on this point will be stated in the opinion.

According to the testimony of the defendant he cultivated a part of the land in question in the year 1911. During the summer his father gave him the land and he said his mother acquiesced in the gift. He further testified that he remained in possession of the land from that time until his father's death; that for the two years prior to his father's death, he did not cultivate the land and permitted his father to collect the rents therefrom; that no conditions were attached to the gift of the land.

Several other witnesses testified that D. W. McLeod in his lifetime told them that he had given the land in controversy to the defendant, his son, and that he did not speak of any conditions being attached to the gift. The defendant cleared up about three acres of the land and this was worth \$10.00 per acre. According to his

testimony he also placed nine rolls of wire in a fence around the land and the improvements made by him on it were worth \$150.00. He said the rental value of the land was \$2.00 per acre. Ten acres of the land was in cultivation and according to the testimony of two of his brothers, its rental value was four or five dollars per acre. One of his brothers also put the value of the fence at less than one-half of what he estimated it to be. The defendant placed about two thousand feet of lumber on the land and five hundred feet of it was used by his foster brother and the remaining fifteen hundred feet by his father. No deed was ever executed to the defendant for the land. During his father's last illness the defendant tried to get his mother to have his father execute a deed to him to the land, but she refused to do so. The request worried his father a great deal and he refused to make the deed, saying that the land was his homestead and that he had in the first instance given the land to the defendant on condition that he would establish himself a home there; that the defendant had failed to build a home on the land, but on the contrary had abandoned it and had forfeited all his rights thereto.

Other testimony will be stated or referred to in the opinion. The chancellor found that the land had never constituted a part of the homestead of D. W. McLeod; that he had given the land to the defendant in his lifetime and put him in possession of it and the title to the tract of land was quieted and confirmed in the defendant. The case is here on appeal.

HART, J., (after stating the facts).

Section 3901 of Kirby's Digest being an act of March 18, 1887, provides in effect that no conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity unless his wife joins in the execution of such instrument and acknowledges the same. Under this statute we have always held that a deed purporting to convey the homestead of a married man is a nullity if his wife fails to join in the

execution of the deed. *Pipkin v. Williams*, 57 Ark. 242; *Oliver v. Routh*, 123 Ark. 189, and cases cited, and *Waters v. Hanley*, 120 Ark. 465.

In the last mentioned case we held that a husband cannot make a contract to convey the homestead which will be binding upon his wife. The court said:

“It is clear that if the husband cannot make a conveyance of the homestead without the concurrence of his wife, he cannot make a contract to convey the homestead which will be obligatory upon his wife. If he could make a contract to convey the homestead which would be obligatory upon his wife the statute could be easily evaded and would be of no force.”

The defendant testified that his father gave him the forty-acre tract in controversy and put him in possession of it. He said that his mother acquiesced in the gift, but does not claim that she participated in the transaction.

On the other hand, his mother testified that she did not in any way participate in the gift and that the land in question was a part of their homestead.

It is insisted by the defendant that the land was not a part of his father's homestead; that his father did not attempt to impress it with the homestead character until just before his death in June, 1915, and that he had given the land to him in August, 1911, and that he continued in possession of it up to the time of his father's death. In support of this contention, counsel point to the testimony of the plaintiff herself. On cross-examination after answering that the land was all in a solid body, she was asked the following: “Now, at what time did you make a selection of the forties involved in this suit as your homestead and dedicate it as such? A. Well, of course, I made the selection—when my husband knew he was going to die he made the selection and that has been my selection all the while there.”

When her testimony is considered as a whole, we do not think that it is susceptible of the construction that she and her husband had not intended to impress the

land in controversy with the homestead character until after the husband had given it to the defendant and had placed him in possession of it. The forty acres in controversy and the forty acres on which their dwelling house stood were adjoining forties. They had been purchased at about the same time. McLeod had lived on one of these forties for over twenty years prior to his death. There was a field which extended in part over both forties and this was the main field in cultivation on the lands. At another place in her testimony the plaintiff said that the forty-acre tract in controversy had been considered a part of their homestead by them ever since they had established their residence on the adjoining forty. Two of the other brothers said that the land in controversy had always been considered a part of the homestead.

Under these circumstances we think a preponderance of the evidence establishes the fact that the land in controversy had been impressed with the homestead character before McLeod ever attempted to give the land to his son, and the learned chancellor erred in holding otherwise.

It follows under the authorities above cited that the attempted gift by McLeod to his son was of no validity because his wife did not join therein.

There were certain improvements made on the land by the defendant, but according to his own testimony these were not worth more than \$150.00. According to the testimony of his brothers they were worth much less. The three acres of land cleared by him amounted to thirty dollars, ten dollars per acre being the price fixed for clearing land by all the witnesses. According to the testimony of one of his brothers the nine rolls of wire purchased by him were not worth more than that. Two of his brothers also testified that the rental value of the ten acres of land which were cleared was worth four dollars per acre. This would amount to one hundred and twenty dollars for three years, and in our judgment the rents would about offset the improvements.

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

ARNOLD v. DONIPHAN LUMBER COMPANY.

Opinion delivered October 15, 1917.

1. MASTER AND SERVANT—INJURY TO SERVANT—USE OF SIMPLE TOOLS.—A master does not owe his servant the duty of inspecting tools given to the latter with which to work where the tool furnished is one which requires no special skill or training for its safe use, and when the defect in the tool, if any, is as obvious to the servant as it is to the master, or when the defect arises from the use of the tool, and the servant would naturally be the first person to discover the existence of the defect.
2. MASTER AND SERVANT—"SIMPLE TOOLS"—DUTY TO SERVANT.—Where a master places simple tools in the hands of a servant for use by him, the master is under a duty to inspect them and instruct as to their use, when the circumstances of the employment are such that reasonable care and prudence would suggest that this be done; but the master owes no such duty when the necessity therefor is not reasonably apparent.
3. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE HATCHET.—A complaint alleged an injury by a servant sustained by a defective hatchet. *Held*, a demurrer to the complaint was properly sustained.

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

Rachels & Yarnell, for appellant.

1. The allegations of the complaint must be taken as true upon demurrer. 101 Ark. 350.

2. The master is liable if, while in his employ, the servant is injured by the master's negligence. Act 175, Acts 1913, p. 734.

It is the duty of the master to exercise ordinary care in furnishing to his servant tools that are reasonably safe to perform the work for which the servant is engaged. 3 Labatt, Master & Servant, 2462-2465; Sherman & Redfield on Negligence, § 194 *et seq.*; 105 Ark. 392; 117 *Id.* 524; 99 *Id.* 265; 121 *Id.* 511; 81 *Id.* 598; 82 *Id.* 82; 48

Id. 347; 87 *Id.* 399; 56 *Id.* 206; 14 Am. & Eng. Ry. Cas. 209; 11 Lea (Tenn.) 372.

The tools were defective and improper and unsuited to the work to which they were put.

The master knew, or should have known, this; the servant did not, hence he was liable.

Brundidge & Neelly, for appellee.

1. A hatchet is a simple tool, and any defect was as obvious to appellant as to appellee, and any risk or damage in the use of same was assumed by the appellant; the defect, if any, was apparent. The rule of the cases cited by appellant does not apply. 57 Ark. 503; 7 Am. & Eng. Ann. Cas. 339, and cases cited.

2. Another qualification of the master's liability indulged in case of such simple tools and appliances is exemption from duty to inspect. 98 Me. 353; 57 Atl. 85; 118 Mich. 275; 76 N. W. 497; 126 N. Y. 568; 76 N. W. E. Rep. 952; 110 Wis. 85; N. W. Rep. 960, and notes; 7 A. & E. Ann. Cas., p. 342; 98 Mo. App. 555; 72 S. W. 710; 138 Ind. 290; 37 N. E. 722; 46 Am. St. 384. See also 68 N. E. 936; 93 N. E. 1083; 104 N. W. 577.

SMITH, J. Appellant sued to recover damages to compensate a personal injury sustained by him, and alleged substantially the following facts as constituting his cause of action. He was directed by his foreman to tear down a certain wire fence and replace it with a plank fence. For the purpose of drawing out the staples fastening the wire to the posts, he was furnished two hatchets, one of which he was directed to place against the point or edge of the staples and to drive the hatchet for a sufficient distance under the staple to force it from the post. That the hatchets were cheap and of poor construction and unfit for the use and purpose to which plaintiff was instructed and expected to put them, "in that the heads or parts of said hatchets that struck together were so tempered and hardened that they were liable to break off, splinter and sliver when struck against each other," and that the defendant knew, or should have

known, of the condition of the hatchets, whereas plaintiff did not know that the hatchets were unsafe and improper tools, as he was unaccustomed to do such work, and relied upon the defendant to furnish him safe and proper tools.

A demurrer was interposed and sustained, and this appeal has been prosecuted to reverse that action.

To sustain the action of the court below, attorneys for appellee invoke what they call, and what is commonly called, the "simple tool" doctrine. This doctrine, as such, has never had recognition by this court; yet the principles upon which that doctrine is based have been recognized in a number of decisions of this court. That is, the simplicity of a tool, and the skill or lack of it required in its use, have been treated as questions to be considered in determining the degree of care to be used by the master in the selection of such tools for the purposes of his servant, and of the directions and instruction which should be given the servant in its use. Two recent cases discuss the principles upon which the simple tool doctrine is predicated. These are *C., R. I. & P. Ry. Co. v. Smith*, 107 Ark. 512, and *Fordyce Lumber Co. v. Lynn*, 108 Ark. 377. Both of these cases were exhaustively briefed, as appears from the official report thereof.

In the first of these cases we said that there is no hard and fast rule that may be laid down as governing the liability of the employer for a defect in common tools and that we should not undertake to lay down any general rule determining what state of facts the rule of liability should embrace and what state of facts it should not embrace. In that case the undisputed evidence showed that the hammer with which the servant was injured was an eight-pound sledge hammer, which had an imperfect striking face, and was in a defective condition when considered with reference to the uses for which it was intended, and we said that, under the evidence of that case, the jury was warranted in finding that the master was negligent in furnishing this tool to the servant who used it, the injured servant not having been

permitted to make his own selection of the tools to be used by himself alone.

In the case of *Fordyce Lumber Co. v. Lynn, supra*, the injury to the servant was occasioned by the breaking of a stick in the use of which the servant was employed at the time of his injury. In holding that there was no liability under the facts of that case, we quoted with approval from the case of *Gulf C. & S. F. R. Co. v. Larkin*, 82 S. W. (Tex.) 1026, the following statement of the law:

“It is not the duty of a railroad company to inspect every implement or tool that it furnishes to its employees, but that duty arises whenever the machinery or implement is of such character that a man of ordinary prudence would, under the same circumstances, inspect the machinery or implement as a precaution against injury to the servant. * * * A master is not required to inspect the common tools and appliances which are committed to the custody of a servant who has the capacity to understand their character and uses. * * * If this requirement were sustained, then every farmer or housekeeper who furnishes an ax to his servant with which to cut wood for use upon the premises, or for other purposes, must use that care which would here be required with regard to the lantern by an inspection to discover the condition of the ax before he purchased it, and, during the use of it by the servant, he must keep up a course of inspection in order to insure safety.”

And we also quoted with approval from the case of *Longpre v. Big Blackfoot Milling Co.*, 99 Pac. (Mont.) 131, a statement of the law to the effect that it is not the duty of the master to inspect, much less test, every tool or appliance put in the hands of an employee, but that this duty arises only when the appliance is of such a character that a man of ordinary prudence would, under the same circumstances, make an inspection as a precaution against injury to his servant, and that the master was not required to inspect simple appliances, the character and use of which are understood by all alike.

(1-2) An innumerable number of cases define the duty of the master in furnishing the servant safe tools with which to work, and the duty of inspecting those tools, but there are circumstances under which the master owes the servant no such duty. He does not owe this duty where the tool furnished is one which requires no special skill or training for its safe use, and when the defect, if any, is as obvious to the servant as it is to the master, or when the defect arises from the use of the tool and the servant would naturally be the first person to discover the existence of the defect. The concurrence of these conditions give rise to what is called the "simple tool" doctrine, which is another way of saying that the master must inspect and instruct when the circumstances of the employment are such that reasonable care and prudence would suggest that this be done; but that he owes no such duty when the necessity therefor is not reasonably apparent.

If the master is not to be held as an insurer of the servant's safety against any injury sustained in the course of his employment, and if the principles of law upon which the doctrine sometimes called the "simple tool" doctrine is based are to be given effect, we think this a case in which they should be applied.

(3) We take the allegations of the complaint as true when they are considered on demurrer, but we do not extend them by implication to cover allegations not there contained. We have here the allegation that the hatchet was an improper tool and was cheap and defective "in that the heads or parts of said hatchets that struck together were so tempered and hardened that they were liable to break off, splinter and splinter when struck against each other." Few tools could be simpler in their construction and use than a hatchet, and the defect which occasioned the injury was developed by its use by the servant himself; and we must, therefore, hold that the trial court properly sustained the demurrer to the complaint.

Judgment affirmed.

PUGSLEY v. TYLER.

Opinion delivered October 15, 1917.

1. EVIDENCE—PERSONAL INJURIES—PREVIOUS NEGLIGENT ACTS.—In an action in tort, where the sole issue is one of negligence or non-negligence of a person on a particular occasion, evidence of previous acts of negligence is inadmissible.
2. AUTOMOBILES—NEGLIGENCE—PREVIOUS NEGLIGENT ACTS.—In an action for damages caused by frightening plaintiff's horse, evidence of defendant's previous acts of negligence is inadmissible.
3. APPEAL AND ERROR—INSTRUCTION AS TO INCOMPETENT EVIDENCE.—It is improper to instruct the jury to consider incompetent testimony, which has been admitted, for any purpose.

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

T. J. Crowder, for appellant.

1. The verdict is not supported by the evidence. No negligence is proven. If appellant used such care as an ordinarily prudent person would have used under similar circumstances, he was not liable. He had the right to pass appellee using ordinary care.

The overwhelming preponderance of the evidence shows that appellee's mules did not run away until the car passed. The only negligence charged is the blowing of the horn, unreasonable speed and refusing to stop the car.

2. The court erred in giving instruction No. 10. It is erroneous and inconsistent. Evidence of a previous negligent act was not admissible. 8 Enc. of Ev. 939; 58 Ark. 454; 29 N. E. 869; 69 Pac. 356; 86 N. W. 272.

T. W. Campbell and *W. L. Pope*, for appellee.

1. The verdict is supported by the evidence. It was for the jury to say whether under all the circumstances the driver of the automobile was guilty of negligence. 122 Ark. 28.

Due care must be used. 116 Ark. 26; 102 *Id.* 354. The testimony shows negligence. 74 Ark. 478.

2. No objection was made to the evidence as to other acts of negligence except in one instance. The ad-

mission of incompetent evidence is harmless where the same facts had already been testified to as here, without objection. 103 Ark. 315; *Crawford v. State*, ms. op. No objection was made as to the evidence otherwise admitted and can not complain. 54 Ark. 185; 78 *Id.* 284; 39 *Id.* 221. But the evidence was competent. There is no better evidence of negligence than the frequency of accidents. 10 R. C. L. 940; 16 S. W. 480; 16 L. R. A. 209; 25 *Id.* 175; 91 U. S. 454; 9 L. R. A. (N. S.) 349; 23 *Id.* 204; 20 Col. 107; 16 Ky. L. Rep. 446; 61 N. H. 416; 52 *Id.* 528; 68 *Id.* 247.

On cross-examination a witness may be asked any questions which test his accuracy, veracity or credibility. 53 Ark. 387; 75 *Id.* 548; 99 *Id.* 616; 68 Ark. 606.

3. There was no prejudicial error in instruction No. 10. Only a general objection was made. 105 Ark. 575; 102 *Id.* 640; 97 *Id.* 358; 94 *Id.* 169; 96 *Id.* 531, etc.

HUMPHREYS, J. Appellee brought suit against appellant in the Western District of the Clay Circuit Court to recover damages for injuries received through the alleged negligent driving of an automobile by appellant along a public highway so as to frighten the team and overthrow the wagon in which she, her children and husband were traveling. The alleged negligence consisted in dashing up behind them at an unreasonable rate of speed and loudly and repeatedly sounding his horn and refusing to stop his automobile. Appellant filed answer, denying the alleged acts of negligence. The cause was tried before a jury upon the pleadings, oral evidence adduced by both appellee and appellant, and the instructions of the court. A verdict was returned in favor of appellee for \$600 and a judgment rendered in accordance therewith, from which an appeal has been prosecuted to this court.

Three alleged errors committed by the trial court are insisted upon here for reversal of the judgment. The first is that the verdict is not supported by the evidence. As this case must be reversed for another reason, we refrain from discussing the evidence further than to say

that under the rule of this court on appeal, there is sufficient legal evidence to support the verdict. The rule is that if there is some legal, competent evidence to support the verdict, the judgment will not be disturbed on appeal. *Robinson v. Swearingen*, 55 Ark. 55; *Gazola v. Savage*, 80 Ark. 249; *Harris v. Ray*, 107 Ark. 281. Therefore, we have not examined the record with a view of ascertaining where the weight or preponderance lies, but simply for the purpose of ascertaining whether the verdict is supported by sufficient competent legal evidence.

(1-2) The second alleged error consisted in admitting evidence of a previous negligent act by appellant in driving his automobile. On cross-examination appellant was required to testify that he had run by George Brown's team in the night time, without any headlight on his automobile, and caused it to run away. Appellant objected to the question and answer and properly saved his exception. This court has adopted the rule, where the sole issue is one of negligence or non-negligence on the part of a person on a particular occasion, that previous acts of negligence are not admissible. *Railway Company v. Harrell*, 58 Ark. 454, and cases therein cited on this particular point. But it is said that appellant answered questions of similar import without objections and exceptions, and for that reason no prejudice could result to him on account of this particular question and answer. Upon examination of the other questions and answers, we find that appellant was able to exculpate himself from negligence. The answer to this particular question tended to show negligence on appellant's part. He was forced to admit that he had driven by a team on another occasion in the night time without a headlight on his automobile. This one previous negligent act may have influenced the jury in finding that the appellant was guilty of negligence on the particular occasion. At least, we cannot say the jury was uninfluenced by it. But it is further said that even if this character of evidence were inadmissible, no prejudice could result for the reason that the alleged negligence was established by other evi-

dence in the case. The rule contended for by appellant is only applicable where the alleged negligence is established by competent, undisputed evidence. *Farrell v. State*, 111 Ark. 180; *Carter v. Younger*, 123 Ark. 266, and cases cited therein on this particular point.

In the instant case, there is a sharp conflict in the evidence as to whether appellant was guilty of negligence in the manner alleged in the complaint. The court should have excluded this character of evidence when properly objected to.

The third and last alleged error consisted in giving Instruction No. 10, which is as follows: "You are instructed that the evidence with the respect to other teams becoming frightened at the automobile of the defendant will not be considered by you in the connection of the alleged negligence at the time of the alleged injury here. You will consider same only as it tends to affect the credibility of the defendant as a witness in this case, and the care ordinarily exercised by defendant in operating an automobile."

(3) It was improper to instruct the jury to the effect that they should consider this character of evidence for any purpose. Not being competent evidence to establish the issue joined, it was clearly error for the court to instruct the jury to consider the evidence as affecting the credibility of appellant, or tending to establish the care ordinarily exercised by appellant in operating an automobile.

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

LASER GRAIN COMPANY v. TENNESSEE FIBER COMPANY.

Opinion delivered October 15, 1917.

1. PLEADING AND PRACTICE—PARAGRAPHING COMPLAINT.—It is only where the complaint alleges separate causes of action that plaintiff can be required to paragraph his complaint.
2. SALES—BREACH OF CONTRACT TO PURCHASE—DAMAGES.—For breach of a contract to accept merchandise purchased, the measure of

damages is the difference between the contract price for the goods, and the market price, at the time the contract was broken.

Appeal from Johnson Circuit Court; *A. B. Priddy*, Judge; reversed.

Sellers & Sellers, for appellant.

1. Each of the two orders was a separate contract. As a matter of fact there were three separate contracts entered into, one of which was for the purchase of one car of the same character of feed for immediate use, and which was fully executed. One of them, No. 7, contained the contract for the exclusive sale of the products in certain territory, subject to confirmation. Either of these contracts could have been enforced independent of and without regard to the other, or canceled and the validity of the others not affected.

If Young's testimony as to the execution of the two orders was competent and admissible for the purpose of sustaining the allegations of one contract, then plaintiff should have been required to paragraph its complaint and set out each cause of action. Kirby's Digest, § 6092.

There was a variance between the allegations and proof and a verdict should have been directed for defendant. 13 N. W. 386.

2. The court erred in refusing instruction No. 5 and in giving No. 1 for plaintiff. Instruction No. 2 was improper and prejudicial. The true test of the measure of damages was not given by the court.

3. Improper argument of counsel was allowed. 70 Ark. 305.

4. There was no proof offered as to the time defendant broke the contract, and therefore the damages could not be fixed.

5. There was no proof as to the market price of the feed on the day defendant broke the contract, and therefore the damages could not be fixed.

6. The instruction given by the court and the one asked by plaintiff fixing the measure of damages are in direct conflict, and the verdict is excessive.

7. No. 5, asked by defendant, should have been given.

8. The instruction given by the court on its own motion was erroneous.

Patterson & McKennon, for appellee.

1. No points of law are involved in this case. The case was properly presented to the jury and the verdict is sustained by the evidence. There was only one contract and one sale. Where the parties have given a contract a particular construction, such construction will be given so as to give effect to its provisions and the subsequent acts of the parties. 9 Cyc. 588.

2. Where two or more written instruments are executed the same day, relate to the same subject matter and one refers to the other, the presumption is that they evidence but a single contract. 9 Cyc. 580.

There is nothing in the record indicating that two separate causes of action existed which required paragraphing under section 6092, Kirby's Digest.

2. Defendant was not justified in breaking the contract because of the shipment of one car to Elliott. This was properly submitted to the jury and they found against defendant on proper instructions.

3. Two cars were shipped in accordance with the contract and defendant refused to accept them and honor the drafts. The time of the breach was established and the measure of damages fixed properly.

4. The remarks of counsel were harmless—no prejudice is shown.

5. There is no error in the court's charge. Under the law and evidence plaintiff was entitled to recover, and the verdict is not excessive.

HUMPHREYS, J. Appellee brought suit on April 8, 1916, against appellant in the Johnson Circuit Court to recover \$500 damages on account of an alleged breach

of contract in refusing to accept 145 tons of Cremo cotton seed meal purchased by appellant from appellee on the 12th day of January, 1916. Appellee alleged that 45 tons were to be delivered on February 1, and 100 tons on March 15 thereafter; that in fulfillment of the contract, appellee shipped two cars of the feed to appellant at Clarksville; that appellant refused to accept same and notified appellee it had no intention of carrying out the contract.

On December 7, by leave of court, appellant filed a substituted answer, denying the material allegations of the complaint.

The cause was tried upon the pleadings, oral evidence and instructions of the court. The jury returned a verdict for \$412.50. Judgment was rendered in accordance therewith and an appeal has been prosecuted to this court.

On January 12, 1916, T. B. Young, salesman of appellee, called on Tom Laser, secretary and manager of appellant, and sold appellant one car of Cremo cotton seed meal for immediate delivery and took order No. 7 for 45 tons for delivery on February 1, and order No. 8 for 100 tons for delivery on March 15. Young had no authority to sell for future delivery, so the orders were telephoned over long distance to appellee and by it accepted. Thereupon, appellant wrote appellee as follows:

“Clarksville, Ark., Jan. 12, 1916.

“Tennessee Fiber Company, Memphis, Tenn.

“Gentlemen: We gave your Mr. Young an order today for ten cars cotton seed feed meal, like sample, at \$24.00 per ton f. o. b. Memphis, shipment within sixty days.

“Will you please rush one car, containing three hundred sacks, to us here immediately, making arrival draft through Bank of Clarksville? Please rush this car without tags as we will tag the sacks here, and in the future,

we shall send our tags to be placed on at your plant, as we will want this feed under our own brand.

“Very truly yours,

“Laser Grain Company, By Thos. D. Laser.”

“Please send 5-pound sample by parcel post. We want to remail small samples from here.”

In further confirmation, appellee wired appellant as follows:

“Memphis, Tenn., 10:45 a. m., 1-13-16.

“Laser Grain Co., Clarksville, Ark.

“Confirm three cars of Cremo 24 dollars Memphis shipment Feb. first also one hundred tons same price shipment March fifteen sale by Mr. Young.

“Tenn. Fiber Co. 11:35 a.”

As an inducement for making such a large purchase, appellant was given the exclusive sale of said product from Russellville to Ozark, inclusive of both places. The evidence adduced by appellant tended to show that the order taken from Homer Elliott on the same date for one car of the same product was not effective and would not be shipped; that adduced by appellee tended to show that the Elliott shipment depended on whether appellee approved the terms contained in the Elliott order. Appellee confirmed the Elliott order and shipped a car of the product to him. Subsequently, two cars were shipped to appellant and declined because appellee had shipped a car to Elliott, claiming this act an infringement upon its exclusive right of sale between Russellville and Ozark. Salesman Young was sent to interview appellant, and, being unable to prevail on it to take the cars, disposed of one of them in Little Rock for \$22.00 per ton. The other was shipped to Van Buren. On February 29 appellee notified appellant that it would not accept the cars on track nor any future shipments, and that the contract was closed for the reason that it had shipped a car to Elliott. The evidence is conflicting as to the market value of the meal on that date or on the dates provided in the contract for shipment. Young, who was in daily touch with the market, testified that the price had depreciated from

\$24 to \$22 per ton. Appellant's testimony tended to show that it was then worth \$24 per ton.

(1) It is insisted that the two causes of action were embraced in the contract, or that the two orders constituted two separate contracts, and hence a fatal variance between the single contract alleged and the contract or contracts proved; and also insisted that if the two orders constituted separate causes of action, the court erred in overruling appellant's motion to require appellee to paragraph its complaint under Sec. 6092 of Kirby's Digest. We think the facts, circumstances and conduct of the parties point unerringly to the conclusion that the transaction constituted one contract. The contract was for 145 tons of cotton seed meal to be delivered in two shipments, 45 tons thereof on February 1, and 100 tons on March 15. The letter and telegram pertaining thereto so indicate. Appellant itself treated the alleged breach as a breach of the entire contract. There was no variance between the alleged contract and proof thereof. It was admissible to introduce both order sheets in evidence. Being one cause of action for damages for breach of the entire contract, Sec. 6092 of Kirby's Digest did not apply. It is only where the complaint alleged separate causes of action that plaintiff can be required to paragraph his complaint.

It is insisted that the court erred in refusing to tell the jury that a confirmation of the Elliott order and shipment to him of a car of the meal after the confirmation of appellee's order constituted a breach of the contract on the part of appellee. It is admitted that appellant was given the exclusive sale of the meal from Ozark to Russellville and that after this provision was incorporated in the contract appellee shipped a car of the product to Elliott. There is a conflict in the evidence as to whether the Elliott sale was excepted from the provision of exclusive sale in the contract between appellant and appellee. If excepted from the provision, then the shipping of the car would not constitute a breach of the contract. This was an issue to be determined by the

jury and the issue was properly submitted to the jury by the court. The court did not err in refusing to give Instruction No. 5, asked by appellee, touching this point.

(2) The court gave an instruction on its own motion as to the measure of damages and also gave one at the request of appellee upon the same subject. The one given by the court on its own motion is as follows: "If you find for the plaintiff, you will assess his damages at the difference between the market price paid for the meal and the market price of the meal at the time the contract was breached, if you find it was breached by the Laser Grain Company, together with any freight which the Tennessee Fiber Company was required to pay by reason of the breach of the contract."

The one requested by appellee and given by the court is as follows: "If you find for the plaintiff, the measure of damages would be the difference between what the defendant agreed to pay for the article sold and the price at which plaintiff sold the same, together with such freight charges or bills as the plaintiff was caused to pay by reason of the defendant's failure to accept said product."

There is a direct conflict between the measure of damages fixed in these instructions. The instruction given by the court on its own motion is inaccurate and misleading. The words "contract price" should be substituted for "the market price paid for the meal." The instruction should also limit the damages for freight to the freight paid by appellant on the cars actually shipped to Clarksville and the additional freight necessary to reship the product to a market. With the modifications suggested, the instruction will correctly define the measure of damages. There is a conflict in the evidence as to the market value of the meal at the time of the alleged breach of contract. This being the case, the giving of conflicting instructions was prejudicial to the rights of appellant.

As the case must be reversed and remanded, we deem it unnecessary to pass upon the remarks of counsel suggested by appellant as grounds for reversal.

We presume upon new trial the attorney will not repeat the remarks.

On account of the error pointed out, the judgment is reversed and the cause remanded for a new trial.

RAYBURN v. HOPKINS.

Opinion delivered October 22, 1917.

CONTRACTS—DISAFFIRMANCE—INCAPACITY.—Appellee sought to rescind a contract of sale according to its terms, and also sought to disaffirm because of his incapacity, due to minority. *Held*, the two theories of defense were not inconsistent.

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

G. B. Oliver, for appellant.

1. The complaint merely states that defendant is due plaintiff \$50. It does not state whether the amount is due from breach of warranty or from the fact that he was a minor and the contract void. He could not rely on both grounds. The two contentions are inconsistent. 1 Pl. & Pr. 183 (b), and notes 2 and 3.

Where one count is an affirmance and the other a disaffirmance of the contract they are inconsistent and can not be relied upon in the same action. 1 C. J. 1069, § 215. A plaintiff can not recover upon two inconsistent counts, although they arise out of the same transaction and connected with the same subject-matter. 23 Cyc. 396 (II); *Ib.* 404 (c); 1 P. & P. 166; 1 C. J. 1075, § 226; 13 Ark. 448, 461; 64 *Id.* 212-15; 70 *Id.* 319; 49 *Id.* 94.

2. Hence the court erred in giving instructions No. 1 and in modifying No. 2, asked by appellant. 15 Cyc. 253, II (b).

C. T. Bloodworth, for appellee.

1. The two grounds of recovery rest upon the proposition of the right to rescind the sale and return the property and demand the money paid. He was a minor and had the right to rescind and recover the money paid; and there was a breach of warranty. 35 Cyc. 135. There is no inconsistency in asserting the two theories.

2. The evidence sustains the judgment and there is no error in the instructions.

McCULLOCH, C. J. This is an action instituted by the appellee suing as an infant by next friend to recover the sum of \$50, alleged to be due him from appellant. The case was instituted before a justice of the peace and was tried in the circuit court on appeal, resulting in a judgment in favor of appellee for the amount claimed. No written pleadings were filed, appellee merely filing an account setting forth that appellant was indebted to him in the sum of \$50.

It appears from the evidence adduced that in January, 1916, appellee purchased a team of horses from appellant and paid the sum of \$50 on the purchase price, the remainder to be paid in monthly installments. Appellee testified that he was under the age of majority at that time, and is now. There was a conflict in the testimony as to the age of appellee, but that issue was properly submitted to the jury and must be treated as settled by the verdict. The agreement between the parties concerning the purchase was that if the team did not prove satisfactory to appellee in the logging operations which he was prosecuting at the time, appellant would rescind the sale and take the team back. The contention of appellee is that the horses were not satisfactory and that he offered to return them to appellant. Appellee sued on two theories; one that he is entitled to recover the sum demanded because he offered to return the horses, and the other theory that he was an infant and is entitled to disaffirm the contract and recover the amount paid. Both of those theories were submitted to the jury in the instructions of the

court and the jury has found in favor of appellee on each of them.

The sole contention of counsel for appellant now is that appellee in asserting the two theories for the recovery of the money is occupying an inconsistent position, and that by suing on the contract for the return of the money he has elected to treat the contract as being in force, and has thereby waived the right to disaffirm it. Counsel is in error in treating this as a suit for damages on breach of warranty. If such were the state of the case, there might be something in the argument, but the suit is not one for breach of warranty. Appellee sues to recover the amount of money paid as a part of the price of the purchased article, and he puts forward two reasons why he is entitled to recover, and the two are not inconsistent, for they both relate to the same thing. The fact that one theory is based upon the rescission of the contract according to its terms, and the other upon a disaffirmance because of the incapacity of one of the parties, does not make the two theories inconsistent.

The authorities cited by appellant's counsel in support of his contention are, therefore, not applicable to the present case.

Judgment affirmed.

DESHA-DREW ROAD IMPROVEMENT DISTRICT No. 1 v. TAYLOR.

Opinion delivered October 22, 1917.

1. STATUTES—VALIDITY OF PASSAGE.—In determining whether a statute was legally enacted, it is the duty of the court to look at all the records in the office of the Secretary of State.
2. STATUTES—VALIDITY OF ENACTMENT—OMISSION OF WORD.—The original bill as passed by both legislative houses read: "Beginning at the point where the Monticello and Tillar road crosses the military road in section 7," etc. As enrolled and signed by the Governor the word "road" before the word "military" was omitted. *Held*, the omission did not constitute a material discrepancy, and did not invalidate the enactment of the statute.
3. STATUTES—VALIDITY.—A statute is valid although some confusion arises from its terms, where its meaning can be easily determined from a reading thereof.

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

Williamson & Williamson, for appellant.

1. The act is valid. It was legally passed. 19 Ark. 250; 32 *Id.* 496; 33 *Id.* 17; 40 *Id.* 200; 90 *Id.* 174. The presumption is that it was legally passed. 90 Ark. 174; *Ib.* 600; 51 *Id.* 559; 33 *Id.* 17. Mere clerical errors in the journal will not invalidate. 40 Ark. 215. The error is immaterial. 103 *Id.* 109. The omission of the word "road" was immaterial. 80 Ark. 150; 93 *Id.* 168; 94 *Id.* 422. All doubts must be resolved in favor of the act. 95 Ark. 412; 94 *Id.* 422; 104 *Id.* 261; 95 *Id.* 327. The act was legally passed.

2. All other objections have been disposed of in 120 Ark. 277. It is *res judicata*.

3. The Legislature may create a district covering a portion of two counties and provide for its maintenance. 104 Ark. 427.

4. The courts have nothing to do with the policy or expediency of legislation and the fact of war and high prices are not material. 102 Ark. 411; 70 *Id.* 549, 557; 72 *Id.* 195.

5. There is no repeal of the act. The intention to repeal must be clear. 92 Ark. 600. The two districts are empowered to improve an identical part of two different roads.

6. Really all the questions raised were settled in 120 Ark. 277. *Bennett v. Johnson*, 130 Ark. 507. The act is not unlimited as to benefits. 120 Ark. 284. The county courts of the respective counties may take over the completed roads for maintenance if so desired. 104 Ark. 428, 431. Appellee's point that there is no provision for including in the district other property that would be benefited is settled in 102 Ark. 561; 54 Ark. 645.

(7) The act does not take the control of the road from the county courts. 95 Ark. 575; 93 *Id.* 612, 621.

MCCULLOCH, C. J. This appeal involves an attack on the validity of a special statute enacted by the General Assembly of 1917, Act 465, p. 2130, creating the "Desha-Drew Road Improvement District No. 1" for the improvement of certain public roads in Desha and Drew counties. There are several of the roads constituting a group which do not run parallel, nor do they converge to a common center, but they intersect each other at certain points. The appellees are owners of property in the district, and secured a favorable decree from the chancellor holding that the statute is invalid, but we are not favored with a brief in their behalf and must look to the allegations of the complaint for specification of the grounds of attack. Only those which appear to be important will be discussed.

The questions whether or not the improvement of several roads and the size of the district constituted a single local improvement, and as to the validity of a district comprising parts of two counties, are controlled by the decisions of this court in *Bennett v. Johnson*, 130 Ark. 507, and that point of attack made by appellees is thus disposed of against them.

(1) Another point of attack is that the statute was not legally passed by both houses of the Legislature, for the reason that the journals of the Senate fail to show a vote on the bill under the proper title. The statute originated as a Senate bill, being Senate Bill No. 262, introduced by Senator Collins, and entitled "An Act Creating the Desha-Drew Road Improvement District No. 1, in Drew and Desha Counties, Arkansas." The only entry on the journals of the Senate in regard to the final passage of the bill of that number refers to it as "S. B. No. 262 (Collins), entitled a bill for an act to be entitled 'An Act authorizing Guardians, Curators and Wards to extend and renew Notes, Bonds, Deeds of Trust and Mortgages of real estate.'" This was obviously a clerical error as shown by all of the records in the office of the Secretary of State, to which it is our duty to look in determining whether or not a bill has been legally passed.

Butler v. Kavanaugh, 103 Ark. 109; *The Mechanics Building & Loan Association v. Coffman*, 110 Ark. 269.

(2) The next contention is that the whole act is void because, as enrolled and signed by the Governor it omits a word essential to the meaning of the section. Section 2 of the original bill as passed by both houses in describing the roads, reads as follows:

"Beginning at the point where the Monticello and Tillar road crossed the military road in section 7," etc. The enrolled bill omitted the word "road" after the word military so as to read: "Beginning at the point where the Monticello and Tillar road crosses the military in section 7," etc. This, too, is an obvious misprision, and the meaning of the lawmakers can be interpreted, even with the word "road" omitted. It does not constitute a material discrepancy between the bill which was enacted and the one which was enrolled and signed by the Governor.

(3) Another defect in the enactment of the statute is that section 16, which relates to the method of enforcing payment of delinquent assessments, contains a portion of section 17, which relates to the same subject. Reading the two sections as they appear in the statute leads to considerable confusion, but with the proper understanding of the subject dealt with the errors are perfectly obvious, and there is no difficulty in finding the proper place for the improperly transposed sentences. The confusion arising from the mistake is not so great as renders it impossible to extract from the two sections an orderly provision for the enforcement of collection of the assessments by suits in chancery court.

One of the public roads to be constructed is the one between the towns of Winchester and Tillar, running parallel with the lines of railroad of the St. Louis, Iron Mountain & Southern Railway Company, and authority was also given in the act creating the Arkansas-Louisiana district to build this road if the plans for its improvement were not filed by the Desha-Drew District before August 1, 1917. The present statute was approved and became effective a week later than the statute creating

the Arkansas-Louisiana district, and as it contains no restrictions in regard to the time when the plans must be made by this district, it must be treated as having eliminated the specification of time in the other statute. This feature of the two statutes is referred to in the opinion of *Bennett v. Johnson*. The power of this district to construct that road is not limited in point of time to the date specified in the other statute.

Concluding that none of the attacks upon the validity of the statute are well founded and that the chancellor erred in his decree declaring it invalid, the decree is reversed and remanded with directions to dismiss the complaint.

HART, J., dissents.

BENNETT v. JOHNSON.

Opinion delivered October 22, 1917.

1. ROADS—LANDS IN SEVERAL COUNTIES—CREATION OF DISTRICT.—The Legislature has authority to create a road improvement district embracing land in more than one county, to improve a defined, and already existent public road, situated in more than one county.
2. ROADS—THROUGH INCORPORATED TOWNS.—The Legislature may create a road district, and authorize the commissioners to improve the road through an incorporated town.
3. ROADS—SEVERAL COUNTIES—COMMISSIONERS.—Act 265, page 1366, Acts 1917, created a road improvement district, the road running through several counties, and the district embracing land in several counties; *held*, the Legislature had authority to appoint commissioners to do the work of making the improvement from residents of the various counties, where each locality comprising the district is represented on the board.
4. LOCAL IMPROVEMENT—TEST—ROAD IN SEVERAL COUNTIES.—In order for an improvement to be treated as a local one, there must be peculiar benefits derived from its construction in excess of those enjoyed by the public; the size of the district is not decisive. The road improvement district created by Act 265, page 1366, Acts 1917, comprising lands in several counties, *held* to constitute a single local improvement, resulting in special benefits to the lands to be taxed, justifying the taxation of those lands to pay for the construction of the improvement.

5. ROADS—CREATION OF DISTRICT—DUPLICATING DESCRIPTION OF CERTAIN LANDS.—Act 265, Acts 1917, is not invalid, because, in describing the lands composing the district, it duplicates the description of certain tracts.
6. ROADS—IMPROVEMENT OF LANDS EMBRACED IN ANOTHER DISTRICT.—Section 36, Act 265, Acts 1917, creating a road improvement district, permits another road improvement district to improve a part of the roads to be improved under Act 265, *held*, such fact did not invalidate Act 265.

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

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

1. The Legislature can do anything not prohibited by the Constitution, and all presumptions are in favor of the validity of an act.

The Legislature can create an improvement district embracing lands in more than one county. 89 Ark. 513; 92 *Id.* 93; 102 *Id.* 560; 104 *Id.* 429; 120 *Id.* 277; 125 *Id.* 329; 96 *Id.* 410.

2. It can provide for the appointment of commissioners who are not residents of the county where a part of the road is to be improved. The Legislature is supreme and the Constitution does not prohibit it. 96 Ark. 410.

3. It can authorize road commissioners to improve that part of the road that passes through the towns. 120 Ark. 277; 118 *Id.* 119, etc.

4. The fact that the act, in describing the lands composing the district, duplicates the description of some tracts, does not invalidate it. Mere clerical or typographical errors are immaterial.

5. Section 36, which permits another road district to improve a part of the roads, does not affect the validity of the act. 113 Ark. 369; 121 *Id.* 16; 90 *Id.* 29; 97 *Id.* 334; 125 *Id.* 329.

6. The district is a local improvement district within the meaning of the Constitution, due process of law clause. 172 U. S. 269; 181 *Id.* 324, 341; 164 *Id.* 112; 170

Id. 304; 170 *Id.* 45; 59 Ark. 513; 72 *Id.* 119; 81 *Id.* 564; 70 *Id.* 451; 96 *Id.* 410, 416-17; 104 *Id.* 425; 98 *Id.* 113, 117.

7. The territory of the district is adjacent, compact, contiguous and continuous. 90 Ark. 29; 118 *Id.* 119; 122 *Id.* 191; 116 *Id.* 167. See, also, 120 Ark. 230; 105 *Id.* 380; 126 Ark. 416.

E. E. Hopson, for appellees.

1. The act is unconstitutional and void, because in direct violation of article 7, section 28, Constitution of Arkansas. 89 Ark. 513; 92 *Id.* 93; 118 *Id.* 294.

2. A local improvement district must be composed of adjacent, compact, contiguous and continuous territory. 118 Ark. 119; 126 Ark. 416; 122 Ark. 419; 116 *Id.* 167; 120 *Id.* 230; 105 *Id.* 380.

3. The fact that the act duplicates the description of some of the lands invalidates it, because it can not be said what the intention of the Legislature was in this double description.

McCULLOCH, C. J. The General Assembly of 1917 enacted a special statute creating the "Arkansas-Louisiana Highway Improvement District,"* for the purpose, as the name implies, of improving certain public highways running through the counties of Lincoln, Desha, Drew, Chicot and Ashley to the Louisiana State line, and appellees, who own real estate within the boundaries of said district, challenged the validity of said statute and instituted this action to enjoin the commissioners from proceeding under its terms. The chancery court sustained the contention of appellees as to the unconstitutionality of the statute and rendered a decree in their favor restraining the commissioners from proceeding under the statute, and an appeal has been prosecuted to this court from that decree.

The lands included in said district consist of more than 600,000 acres lying contiguous to the roads to be constructed, and composing parts of each of the counties specified above. The roads to be constructed are in the

*Act 265, p. 1366, Acts of 1917. (Rep.)

aggregate approximately 150 miles in length, and run through each of the counties named. The main stem, if that term may be used in describing the road, runs from a point near Varner in Lincoln County to a point near McGehee in Desha County, following the line of the railroad of the St. Louis, Iron Mountain & Southern Railway Company, passing through the towns of Varner, Dumas, Winchester and other towns along the route. The road then forks at McGehee, and one prong runs southwesterly, substantially parallel with the line of road of the said St. Louis, Iron Mountain & Southern Railway Company, through the towns of Blissville, Morrell, Portland, Parkdale, Wilmot, and other towns, ending at the southern boundary line of the State, near the town of Cypress; and the other prong runs southeasterly from McGehee, substantially parallel with the line of road of the Memphis, Helena & Louisiana Railway Company, through the towns of Trippe, Halley, Lake Village, Eudora, and other towns, and ends at the southern boundary line of the State near the town of Arkla. Another road runs east from Trippe to Arkansas City, the county site of Desha County, and another runs east from the town of Dermott on the line of the St. Louis, Iron Mountain & Southern Railway Company to the town of Halley on the Memphis, Helena & Louisiana Railway. All of these roads are described in said statute as being public roads as now established by the county courts of the respective counties, or as they may be changed by the said county courts for the purpose of straightening the roads before the construction of the improvement. The lands in the district are accurately described in the statute by sections, but there is an error in the statute in that a number of sections are duplicated in the description. The statute provides, in substance, that there shall be ten commissioners of the district; two of them to be appointed by the county court, or the judge in vacation, of each of said counties; that the board of commissioners shall form plans for the construction of the roads, said plans first to be submitted to and approved by the State Highway Department, and then to

be submitted to and approved by the county courts of each of said counties, so far as concerns the roads in each of the respective counties; and that when the plans have been so approved and adopted, and the cost of the improvement ascertained, there shall be an assessment of benefits to the lands included in the district, and that the cost of constructing the improvement shall be assessed against said lands in proportion to the benefits to be derived. There is also a provision in the statute to the effect that if it is ascertained that other lands not embraced in the district are found to be specially benefited by the improvement, the county court of the respective counties in which said lands lie may, upon petition of the board, and after due notice is published, make orders including such lands in the district. There is the usual provision for the issuance of bonds and for the enforcement of assessments against the lands in the district.

Counsel in the case agree that the attack upon the validity of the statute involves a consideration of the following points:

First. Can the Legislature create a road improvement district embracing land in more than one county to improve a defined public road situated in more than one county?

Second. Can the Legislature authorize the commissioners to improve the road through towns?

Third. Can the Legislature appoint commissioners who are not residents of the county where a part of the road is to be improved, and give them authority to improve the road in that county according to plans approved by the county court of that county?

Fourth. Does the project constitute a single, local improvement, and result in special benefit to the lands to be taxed, so as to justify taxation of those lands to pay for construction of the improvement?

Fifth. Does the fact that the act, in describing the land composing the district, duplicates the description of some tracts, invalidate the act?

Sixth. Does the fact that section 36 of the act permits another road improvement district to improve a part of the roads to be improved under this act affect the validity of the act?

The points will be discussed and determined in the order stated by counsel.

1. The first point involves little difficulty, for county and other municipal lines are not taken into account in the formation of local improvement districts, the question being whether or not the project constitutes a single local improvement, regardless of its particular relation to such boundary lines. There is no express limitation in the Constitution upon the creation of improvement districts, except as to those situated wholly within cities and towns, and we have held that the constitutional provision has no application to districts situated partly inside and partly outside of cities and towns. *Butler v. Fourche Drainage Dist.*, 99 Ark. 100. The power to include parts of two counties in an improvement district seems to have been definitely settled by this court in the case of *Shibley v. Fort Smith & Van Buren District*, 96 Ark. 410, where we upheld the validity of a district organized to construct a bridge across the Arkansas river where it forms the boundary line between Sebastian and Crawford counties, and which included lands in both of those counties. Counsel for appellees argue that there is a distinction between that case and the present one in that the former involved the erection of one bridge which connected the two counties, and that the lands in each county were assessed according to benefits, to pay its part on the bridge, whereas in the present case the roads run through different counties, and the effect is to tax the lands in one county to construct the road in another. We do not, however, think that the distinction sought to be made by counsel is to be found in the two cases, for the construction of all the roads constitutes a single improvement; at least, they must be so treated if the statute is to be upheld at all, and the taxes are levied on the lands in the several counties for the purpose of contributing to the expense as a whole,

and not to any particular part of the road. The statute in question does not invade the jurisdiction of the county court by taking from that court the control of the roads of the county, or by compelling the county court to accept as a public road one improved by the district, as in *Road Improvement District No. 1 v. Glover*, 89 Ark. 513; for the statute under consideration only provides for improvement of public roads already established and subject to change by the county court, and we have held that the creation of improvement districts for such purposes does not invade the jurisdiction of the county court. *Parkview Land Co. v. Road Imp. Dist. No. 1*, 92 Ark. 93; *Road Imp. Dist. No. 2 v. Winkler*, 102 Ark. 560. Nor is the statute open to the objection found to exist in the district dealt with by this court in the case of *Sweepston v. Avery*, 118 Ark. 294, where substantially the whole of a county was placed in a road district with authority conferred upon the commissioners to improve any of the roads and to assess the cost on the lands of the county in equal proportion. Here the assessments are to be levied upon actual benefits ascertained by the assessors appointed for that purpose, and the land owners are given an opportunity to be heard on the question of the amount of the assessment. The statute is, therefore, not open to the objection stated in the above inquiry.

2. Nor is there any valid objection on the ground that the plan is to improve roads passing through incorporated towns. This objection has been answered by the court in other decisions. *Cox v. Road Improvement Dist. No. 8 of Lonoke*, 118 Ark. 119; *Nall v. Kelley*, 120 Ark. 277. The improvement under those circumstances does not constitute an invasion of the authority of the municipalities, nor does it offend against the constitutional provision with respect to improvements in cities and towns. See *Butler v. Fourche Drainage District*, *supra*.

3. We can discover no valid reason for holding the statute to be objectionable on the ground that roads in one county are to be constructed under the supervision of commissioners, some of whom are residents of other coun-

ties. The Constitution does not, as before stated, contain any regulation concerning improvement districts outside of cities and towns, nor in cities and towns as to the particular mode of constructing the improvement, except that where the district lies wholly within a municipality the consent of the majority of the property owners in value must be obtained. *Craig v. Russellville Waterworks Improvement Dist.*, 84 Ark. 390. The district is treated as an entirety regardless of intersecting county lines and the board of commissioners represent the district, and not any particular portion of it. Therefore, it can not be truly said that the commissioners are nonresidents of the county in which the work is to be done because they all represent the whole district. It is within the power of the Legislature to distribute the appointments so as to give each locality representation on the board. This attack on the validity of the statute is, therefore, unfounded.

4. The question whether the proposed improvement constitutes a single one, and is local in its nature, so as to justify special taxation, is a matter of serious concern, for this court has never had to deal with an improvement district covering a project of such magnitude. However, there are applicable principles well settled by the decisions of this court. We have said that a legislative determination on this question in creating an improvement district is conclusive unless that determination is found to be arbitrary and without foundation in reason. *St. L. S. W. Ry. Co. v. Grayson*, 72 Ark. 119; *St. L. S. W. Ry. Co. v. Board of Directors*, 81 Ark. 564; *Moore v. Bd. Dir. of Long Prairie Levee Dist.*, 98 Ark. 113; *Shibley v. Ft. Smith & Van Buren Dist.*, *supra*; *Board of Directors v. Collier*, 104 Ark. 425. The Supreme Court of the United States has in its decisions accorded the same degree of conclusiveness to a legislative determination in creating improvement districts. *French v. Barber Asphalt Paving Co.*, 181 U. S. 324. We have held, too, that the fact that the public at large enjoys benefit from an improvement is no reason why it may not constitute a local improvement within the legal meaning of that term if the

property in the locality receives peculiar benefits in excess of that enjoyed by the public. We applied that principle to the construction of a bridge in the Shibley case, *supra*, where we said: "A bridge for the use of the public, like a street in a city or a highway in the country, is undoubtedly of great benefit and convenience to the traveling public; nevertheless, it may be also of special benefit to adjoining lands and a fit subject for construction from the proceeds of local assessments. * * * The benefits need not be exclusive. The general public may also derive benefits in more remote degree, yet if there is a special and peculiar benefit inuring to the adjoining property, local assessments are justified." This court, in giving a definition of the phrase "local improvement" in the case of *Crane v. Siloam Springs*, 67 Ark. 30, said that it meant "a public improvement, which, although it may incidentally benefit the public at large, is made primarily for the accommodation and convenience of the inhabitants of a particular locality, and which is of such a nature as to confer a special benefit upon the real property adjoining or near the locality of the improvement." It is difficult to lay down a test on this subject which may have invarying application to any state of facts, but one of the controlling principles is that in order for the improvement to be treated as a local one, there must be peculiar benefits derived from its construction in excess of those enjoyed by the public. The magnitude of the project or the extensiveness of the area involved, can have no decisive bearing on the question if the included area is to derive a special benefit apart from that enjoyed by the whole public. In other words, the size of the district presents only a question of degree in the enjoyment of the special benefits and is not necessarily decisive that the benefit is general in its results. We have here, it is true, a district comprising a large area covering a considerable portion of five counties, but those parts are grouped together into a solid area which may be peculiarly affected, and receive special benefits from the improvement. At least, we can not say as a matter of law that with that state of facts the

legislative determination is unreasonable and should be disregarded. Nor should we say that because the improvement consists of more than one road it can not be treated as a single improvement so as to be constructed under one organization and assessment of benefits. That is also a matter of legislative determination, and we must accept as conclusive the finding of the Legislature that this system of roads constitutes a single improvement, unless that finding is obviously and demonstrably erroneous. The decision in the case of *Conway v. Miller County Highway & Bridge District*, 125 Ark. 329, has direct bearing on this question, for we held there that the construction of several roads diverging from a common point might be treated as a single improvement. In *Wilson v. Blanks*, 95 Ark. 497, we said that after indulging the proper presumption with respect to the validity of the acts of a city council in creating an improvement district, it could not be said that the construction of waterworks and an electric light plant under one organization constitutes separate and independent improvements so as to invalidate the organization. So we hold in the present case that the conditions are not such as would justify us in disregarding the determination of the Legislature to the effect that the roads grouped together in this organization constitutes a single improvement of a local nature.

5. The fact that an error was made in framing the statute whereby some of the land descriptions were duplicated can not in any view of the matter affect the validity of the statute. It is an obvious error which should be entirely disregarded in testing the validity of the statute. It can not be construed as an effort to tax the lands twice, and it does not operate as an exclusion of lands which ought to be taxed, or the inclusion of lands which ought not to be taxed. In other words, the duplication has no effect either upon the size of the district or the construction of the improvement, and, therefore, must be treated as immaterial.

6. Section 35 of the statute provides that if any part of the roads named should be improved, by or through

any other agency, before this district can proceed with the work of improvement, then it shall be the duty of the commissioners to credit the assessment of benefits against any of said land with such amounts as represent the amount that said benefits are reduced because of said improvements in any part of the said road made by other agencies than the district and accepted by the district as complying with their plans; and in section 36 of the statute it is provided that if the Drew-Desha District, another district created by the Legislature, shall let a contract prior to August 1, 1917, for the construction of a part of the roads embraced in the terms of this statute, credit should be given on the assessment of benefits the same as provided in the preceding section. Otherwise, that that part of the improvement be done through the present agency, that is to say, by the district created under this statute. This whole matter fell within the power of the lawmakers, and it was not beyond that power to determine which of the agencies should construct the roads and under what circumstances. The Legislature had the power, in other words, to provide that the Drew-Desha district should improve a given portion of the road, if done by a certain time, otherwise that it should be embraced in the improvement contemplated by the statute now under consideration. The act does not by any means contemplate double assessment for the same improvement, nor does the construction of the improvement by either one of those agencies nullify the power of the other to proceed with the balance of the authorized improvement. *Boles v. Kelley*, 90 Ark. 29; *McDonnell v. Improvement Dist. No. 145*, Little Rock, 97 Ark. 334; *Fellows v. McHaney*, 113 Ark. 369; *Keystone Drainage Dist. v. Drainage Dist. No. 16*, 121 Ark. 16.

The statute enacting the Drew-Desha district was approved and went into effect seven days later than the statute under consideration, and contained no limitation with respect to time for letting contract for construction of this portion of the road. We construe this later statute as an elimination of the period of time specified for let-

ting the contract as to the part of the road referred to, but this does not affect the powers of this district to proceed with the construction if the other district should for any reason fail to do so.

The various questions presented in this case are not free from difficulty, but after mature consideration we are of the opinion that the Legislature has not transcended its power in the creation of this improvement district, and that there are no grounds for holding that the statute is invalid. The learned chancellor erred, therefore, in the decree, and the same is reversed with directions to dismiss the complaint for want of equity.

HART, J., (dissenting). Public roads are constructed to afford the general public a means of transportation between different towns or between farms located on or near them and such towns. In most cases such public roads are paid for by taxation and there has been a conflict in the decisions as to whether abutting land owners can be made to pay for them by local assessments levied upon their farms.

In *Road Improvement District No. 1 v. Glover*, 89 Ark. 513, and in subsequent decisions, this court has held that a local improvement district may be formed for the purpose of constructing and repairing public roads in the county.

In the first mentioned case the court said that such districts are sustainable only upon the theory that the local assessments levied to sustain them are imposed upon the property of persons who are specially and peculiarly benefited in the enhancement of the value of their property by the expenditure of the money collected on the assessment. The term of "local improvements" is generally employed as signifying improvements made in a particular locality by which the real property adjoining or near such locality is specially benefited. In the case just cited the court said:

"According to this theory, the district should not extend beyond the limits of the benefits of the improvement

made in pursuance of the object of its organization, and should not be so extended by many and independent improvements as to include territory in no wise affected by all the improvements. It is obvious the State can not be organized into a district to construct or maintain improvements to be paid for with money derived from local assessments. So counties can not be organized into districts for the building, repairing and maintaining roads without usurping the exclusive jurisdiction of roads vested in county courts by the Constitution. Its roads and need for roads are too numerous, diverse and independent and some too remote from each other to be embraced in one district and sustained by local assessments. In such a case the board of directors of the road district would become a partial substitute for the county court vested with its jurisdiction over roads. We do not mean to apply what we have said to improvement districts including cities and towns. That subject is not presented for consideration in this case, but has been considered in another case. *Crane v. Siloam Springs*, 67 Ark. 30."

In the case of *Hammett v. The City of Philadelphia*, 65 Penn. St. 155, Mr. Justice Sharswood said:

"Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the parties assessed, and to the extent of those benefits. They can not be imposed when the improvement is either expressed, or appears to be, for the general benefit."

Tested by these well known principles of law, I do not think the improvement under consideration is a local improvement. The court will take judicial notice of the boundary lines of counties and of the size and importance of the towns located within their boundaries as well as the general topography of the country. When these facts are considered, together with the size and magnitude of the district as described in the act creating it, I think the majority opinion is violative of the principles of law above announced and compels certain land owners to pay for the improvement of public roads in which their in-

terests are no greater and, as to some of them, not so great as that of many others who pay nothing. In my opinion, the rule laid down by the majority in its application to the country and to the farm lands of this State will lead to great inequality in placing the burdens of taxation and is palpably unreasonable and unjust. It is so obviously unfair that I could not but stop and enter a short but earnest protest against what I consider to be an unwarranted encroachment upon a well known and salutary principle of law, which if properly administered would be of great benefit to the people of this State.

TANCRED v. FIRST NATIONAL BANK OF FORT SMITH.

Opinion delivered October 22, 1917.

VOLUNTARY PAYMENTS—CAN NOT BE RECOVERED.—When a person without a mistake of fact, or fraud, duress or coercion, pays money on a demand which is not enforceable against him, the payment is deemed voluntary, and can not be recovered.

Appeal from Sebastian Chancery Court, Fort Smith District; *Wm. A. Falconer*, Chancellor; affirmed.

J. Sam Wood and *Read & McDonough*, for appellant.

1. The decision of this court on the former appeal is conclusive as to the \$200 interest paid. 124 Ark. 154; 118 *Id.* 558; 94 *Id.* 183; *Ib.* 329; 117 *Id.* 560; 120 *Id.* 61.

2. Appellant's complaint entitled him to judgment for the \$200. The prayer for general relief was sufficient. 4 Ark. 302; 17 *Id.* 113; 15 *Id.* 555; 19 *Id.* 62; 39 *Id.* 531; 20 *Id.* 322; 74 *Id.* 93; *Jones on Mortg.*, § 71; 66 Ark. 374; 4 Johns. Chy. 123.

3. It was the duty of the bank to preserve the security placed in its hands for the benefit of the surety. 50 Ark. 229; 6 S. W. 906; 13 Ark. 214, 219; 48 *Id.* 442.

H. C. Mechem, for appellee.

1. The decision on the former appeal does not settle this case. It only released him from the \$5,000 note. 180 Ill. 259; 49 Ia. 664; 34 Mech. 129; 32 S. E. 732; 50 Pac. 123; 24 S. W. 837; 1 Dec. Dig., § 755.

2. If Tancred had specifically demanded judgment originally for the \$200 he was not entitled to it on the record and would have been denied it by the trial court. He paid the \$200 voluntarily. 23 Ark. 530; 57 *Id.* 544; 20 N. Y. 306.

HART, J. This is the second appeal in this case. The opinion on the first appeal will be found in 124 Ark., page 154, under the style of *Tancred v. First National Bank of Fort Smith*. The firm of Harper & Wilson was indebted to the First National Bank in a large sum of money which was secured by a mortgage on real estate. Harper died and M. T. Tancred, who is Mrs. Harper's brother, became indebted to the bank in the sum of \$5,000. It was the contention of the bank that Tancred borrowed the money from it and then loaned it to his sister, Mrs. Harper, and Wilson, the surviving partner of Harper & Wilson. It was the contention of Tancred that he was only a surety on the note to the bank and a mortgage was taken by him from his sister to secure himself. Harper & Wilson had already given a mortgage on the same property to the bank. The bank instituted an action in the chancery court to foreclose its mortgage and Tancred was made a party to that suit. He filed an answer and cross-bill in which he sought to have the \$5,000 note canceled on the ground that he had become released therefrom as surety by the action of the bank in releasing Mrs. Harper as principal. Mrs. Harper had been released from certain portions of the debts secured by the mortgage to the bank in consideration that she would not renounce the will of her deceased husband and claim dower in his estate.

In the opinion on the former appeal the court held that under the circumstances of the case the release of Mrs. Harper operated as a discharge of Tancred from

liability on the \$5,000 note, whether he be treated as a surety according to the real purport of the transaction, or whether he be treated as a joint maker of the note according to the face thereof. The decree was reversed with directions to the chancery court to enter a decree in favor of Tancred. Upon the remand of the case Tancred asked judgment for \$200, which he had formerly paid as interest on the \$5,000 note. The court denied the relief sought by Tancred and he has again appealed to this court.

The court was right in refusing a recovery against the bank in favor of Tancred for the \$200 interest paid by him. The bank claimed that Tancred was a principal on the \$5,000 note, and if so, he owed the bank the interest on the note. It does not make any difference that the court afterwards held that he was discharged from all liability on the note by the release of Mrs. Harper. He made the payment of the interest with the knowledge of all the facts. The rule is well settled that when a person, without mistake of fact, or fraud, duress or coercion, pays money on a demand which is not enforceable against him, the payment is deemed voluntary, and can not be recovered. *Ritchie v. Bluff City Lumber Co.*, 86 Ark. 175; *Banks v. Walters*, 95 Ark. 501, and *Blackburn v. Texarkana Gas & Electric Co.*, 102 Ark. 155.

It follows that the decree will be affirmed.

BUSH, RECEIVER ST. LOUIS, IRON MOUNTAIN & SOUTHERN
RAILWAY COMPANY v. TAYLOR.

Opinion delivered October 22, 1917.

1. RAILROADS—DAMAGE BY FIRE—SPARKS FROM LOCOMOTIVE—PROOF OF OTHER FIRES.—In an action for damages caused by a fire alleged to have been set out by defendant's locomotive engine, evidence is admissible showing that other fires had been set out by railroad engines in the vicinity of the fire involved in this litigation.
2. DAMAGES—LOSS OF PROPERTY BY FIRE—SPARK FROM ENGINE.—A sawmill was destroyed by fire, together with the building that housed it, together with certain lumber and personal property; it

was alleged that the fire was caused by a spark from an engine. In determining the measure of damages, the following rule is to be applied: If the value of the property destroyed depends upon its connection with the soil, the measure of damages is the difference in value of the land before and after the fire; if the property destroyed can be replaced in substantially the condition in which it existed before the fire, then the measure of damages is the cost of so replacing it.

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

Daniel Upthegrove, J. R. Tubney and Hawthorne & Hawthorne, for St. Louis Southwestern Railway Company.

Troy Pace and Gordon Frierson, for Bush, Receiver.

1. The court erred in permitting witnesses to testify as to the occurrence of other fires at different times. 52 C. C. A. 95; 114 Fed. 133; 27 Fla. 1; 15 S. E. 828; 78 N. E. 838; 53 N. E. 1078; 98 Penn. 316; 60 Atl. 581; 70 S. W. 999; 42 N. H. 97; 12 N. Y. Supp. 1046; 76 *Id.* 171; 67 Hun (N. Y.) 179; 48 S. E. 521; 17 N. W. 132; 78 Pac. 828; 56 *Id.* 286; 52 Ark. 105.

2. The court erred in instructing the jury that the measure of damages was the difference in the value of the land immediately before and after the fire. 59 Ark. 105; 8 R. C. L., § 46, p. 484; 33 Cyc. 1389; 65 N. E. 249; 61 E. C. L. 250; 48 Am. Dec. 401; 44 S. W. 802; 33 S. W. 615; 97 *Id.* 727; 20 S. E. 129; 77 N. W. 517; 47 N. W. 146; 41 Pac. 1051; 31 N. E. 997.

L. Hunter and Holifield & Harrison, for appellee.

1. Evidence of other fires occurring was admissible. 59 Ark. 105; Act 141, Acts 1907; 121 Mo. 340; 25 S. W. 936; 42 Am. St. 530; 25 L. R. A. 175; 10 Enc. of Ev. 551, and note; 91 U. S. 47a; 23 L. Ed. 362; 14 N. Y. 223; 67 Am. Dec. 155; 10 Jur. 571; 3 Mann & Gr. 515; 32 N. Y. 339; 49 *Id.* 421; 10 Am. Rep. 389; 63 N. H. 25; 3 C. C. A. 264; 52 Fed. 711; 10 U. S. App. 375; 85 Me. 509.

2. The court properly instructed the jury as to the measure of damages. 8 R. C. L., § 46, p. 484; 119 Ark.

143; 59 Ark. 105; 36 *Id.* 205; 67 *Id.* 371; 16 S. W. 998; 35 *Id.* 662.

SMITH, J. The Iron Mountain Railway Company ran certain of its freight trains over the tracks of the Cotton Belt Railway Company through the town of Rector, one of which, according to the contention of appellee, set fire to his mill and destroyed it. On appellee's part there was proof of the absence of any cause for the fire except from sparks thrown out by a passing engine. It was shown that a heavy train, of seventy or eighty cars, stopped at a tank, at a distance of twenty or thirty car lengths from the mill, to take water, and that fifteen or twenty minutes thereafter the mill was discovered afire, and that at the nearest point the track was only eighty feet from the mill, and that a strong wind was blowing at the time in the direction to carry the sparks from the engine to the mill.

Over appellant's objection, evidence was admitted showing that other fires had been set out by railroad engines in the vicinity of the fire involved in this suit. But there was no evidence that the particular engine, or any engine of the Iron Mountain Railway Company, had previously set out a fire. Nor was there any evidence that this engine was equipped with a spark-arrester differing in any manner from those used by other engines on either the Iron Mountain or the Cotton Belt railway.

The complaint itemized the property destroyed by fire, and alleged its value, and witnesses testified as to the value of the various articles so destroyed. Among other property destroyed was seven or eight thousand laths, some gum logs, two thousand feet of gum box boards, two thousand feet of cypress, and fifteen hundred feet of poplar lumber, together with various kinds of saws, and the engine, boiler and other fixtures, together with the building under which these things were housed. Other witnesses were permitted to testify to the difference in the value of the land before the fire and afterwards.

Over appellant's objection, an instruction was given which told the jury that the measure of damages was the difference in value of the land immediately before and immediately after the fire, whereas appellant asked the court to charge the jury on that subject as follows: "The plaintiff is limited in his recovery in this action to the reasonable market value of the property entirely destroyed, and to the difference between the reasonable market value of the property destroyed immediately before the fire and the sum it would cost to restore the damaged property to its original condition and the value of the use of property until it could be restored with ordinary care."

We presume that the last part of this instruction refers to property partially destroyed.

(1) In the case of *Railway Co. v. Jones*, 59 Ark. 105, it was said: "And it was inadmissible to show that other engines had set fire to materials on or near the right-of-way, as a circumstance to show that the engine which caused the fire on this occasion, or its appliances, were defective or in bad condition. For such purpose the proof would have to be confined to fires caused by the engine that is said to have caused the fire that burned the appellant's meadow."

The language of that opinion must be read, however, in connection with the issue there being considered. It was there sought to be shown that the railway company had negligently set out a fire, and in that connection it was said that it could not be shown that other engines had set out a fire as a circumstance to show that the engine which caused the fire in question was equipped with defective appliances, but that for such purposes the proof would have to be confined to fires caused by the engine which set out the fire in question. In this opinion, however, it was said:

"The evidence that other fires had occurred on the line of the railroad than the one which destroyed the plaintiff's meadow was improperly admitted, as it was not shown that these fires were caused by the engines of

the railroad, or that they occurred from the operation of its trains. If this had been shown, it might have been admissible as a circumstance tending to show that the condition of the right-of-way of the railroad was such that a fire might have occurred from sparks escaping from its engines, and igniting the dry grass and inflammable material on its right-of-way. But the fact that other fires had occurred, without proof that they were caused by the railroad, was inadmissible."

The question of negligence is not involved in this case, and the jury was required only to find the origin of the fire, and if that responsibility was placed on the railroad company, liability for the damage resulting attached without regard to the question of negligence. Act 141 of the Acts of 1907, page 336.

This evidence was offered "as a circumstance tending to show * * * that a fire might have occurred from sparks escaping from the engine" which passed the mill shortly before the fire occurred. Of course, there must be such substantial similarity of conditions in the proof of other fires as to make it reasonable and probable that the same cause existed to produce the same result. This similarity of condition existed here, as the testimony objected to related to a fire set out in grass near the mill "within a morning or two of the fire which destroyed the mill." And no attempt was made to show that any difference existed in the equipment of the engines to arrest the emission of sparks.

The identical question here raised was considered and decided by the Supreme Court of Missouri in the case of *Campbell v. Missouri Pacific Ry. Co.*, 25 L. R. A. 175, 25 S. W. 936, 121 Mo. 340. There the testimony objected to was that other fires, both before and subsequent to the one in question, at different places on the line of defendant's railroad, had been started by sparks from some of defendant's engines. Here we have a much closer similarity of conditions as a predicate for the admission of the questioned testimony, for here both fires were set out in the same lot and within a day or two of

each other. But, under the facts stated, the Supreme Court of Missouri, upon a review of the authorities, held the evidence admissible. Among other cases cited and quoted from was the case of *Grank Trunk R. Co. v. Richardson*, 91 U. S. 470, 23 L. Ed. 362, as follows:

“Mr. Justice Strong, who wrote the opinion of the court, says: ‘The question has often been considered by the courts of this country and in England, and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and consequent probability, that some locomotive caused the fire.’ He follows this statement of the law by a number of citations, both English and American, including the case of *Sheldon v. Hudson River R. Co.*, 14 N. Y. 223, 67 Am. Dec. 155. Further on in the same opinion the judge says: ‘The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire along their passage.’ To the same effect are the following cases: *Smith v. Boston & M. Rd.*, 63 N. H. 25; *Chicago, St. P. M. & O. R. Co. v. Gilbert*, 3 C. C. A. 264, 52 Fed. Rep. 711, 10 U. S. App. 375; *Thatcher v. Maine Central R. Co.*, 85 Me. 509.”

The Supreme Court of Missouri concluded its review of the authorities cited with the following statement: “We think the evidence tended to prove the possibility, and consequent probability, that the fire was communicated to plaintiff’s property from one of defendant’s engines, and that the evidence was admissible, and its probative force was for the determination of the jury. If the issue had been of negligence in the construction or management of the engine only, and the engine which could only have caused the damage had been clearly identified, evidence that other engines emitted sparks and set fires would have been inadmissible under the decisions of this court. *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227;

Patton v. St. L. & S. F. Rd. Co., 87 Mo. 117, 56 Am. Rep. 446. But, in case the fact whether the fire originated from the engine was alone in issue, and there was no direct proof of the fact, it seems very clear that such evidence would have some tendency to prove that issue. The evidence was all circumstantial, and the facts testified to were circumstances, though slight they may have been, bearing upon the issues." See also *Railway Company v. Harrell*, 58 Ark. 455.

We concur in the reasoning of that court as applied to the facts of this case, and hold that no error was committed in the admission of the testimony objected to.

We think the court should have instructed the jury on the question of the measure of damages in accordance with the contention of appellant. Here a portion of the property destroyed was lumber and logs and laths, and certain other personal property, the value of which and the damage to which was in nowise dependent upon the value of the land or the damage to it.

It is true this court held, in the case of *K. C. S. R. Co. v. Wilson*, 119 Ark. 143, where a fire set out in a pasture burned the grasses and grain growing thereon and the fence enclosing it, that the measure of damages was the difference in the value of the pasture before the fire and after the fire. And the same measure of damages was approved in the case of *Mo. & N. Ark. Rd. Co. v. Phillips*, 97 Ark. 54, where the property destroyed was an orchard. But these cases must, of course, be read in the light of the facts there recited, and we must have in mind the character of the property there destroyed.

In the case of *St. L., I. M. & S. R. Co. v. Ayres*, 67 Ark. 371, it was said that the measure of damages for the destruction of trees on the land by fire was the difference between the value of the land with the trees unburned and with the trees burned. After announcing this measure of damages, the court gave, as a reason therefor, that the trees were a part of the freehold and could not be replaced in a short time and only at considerable expense, and that

“the destruction of the trees was a depreciation in the value of the land, of which they were a part.”

In 8 Ruling Case Law, page 484, the measure of damages for the destruction of property attached to the realty is discussed. It is there said: “Section 46. Property Attached to Realty.—In cases of injury to real estate the courts recognize two elements of damage; first, the value after separation from the freehold, if any, of the thing taken, injured or destroyed; and, second, the damage to the realty, if any, occasioned by the severance. The measure of damages in such cases depends to some extent on the character of the property taken or destroyed—a distinction being often made between property whose chief value consists in its connection with the soil and its incidental enhancement of the value of the land, and those improvements which may be replaced at will, and whose value may readily be determined, apart from the ground on which they rest. Thus, if the property destroyed or injured is so closely connected with the real estate on which it stands or to which it is attached that it has no value separate from and independent of the real estate, or if the injury is to the soil itself, the measure of damages is the difference in value between the real estate before the injury and after it. On the other hand, the value of the property destroyed, or the cost of restoring or replacing such property, is the proper measure of damages for the destruction of buildings, fences and other improvements, which may at once be replaced, where the exact cost of restoring the property destroyed is capable of definite ascertainment, and where there is no damage to the realty itself. Added to this, the right is generally given to recover for the loss of the use of the property. Some courts hold that where property attached to the realty is destroyed, the owner has his election to sue either for the value of the thing destroyed or for the injury to the freehold, or, in other words, he may seek to recover the value of the destroyed property in its detached form or its value as a part of the realty. If recovery is sought for the value of the property destroyed in

its detached form, the measure of damages is its market value when so detached; but if recovery is sought for the injury to the freehold by reason of the taking or destruction of property attached thereto, the measure of damages is the difference between the value of the land before and after the injury. There is considerable conflict of authority in the application of the foregoing rules to cases where a recovery is sought for the destruction of growing crops. In some cases it is held that the proper measure of damages is the value of the crop at the time and place and in the condition it was in when it was destroyed, and in others that it is the difference in the value of the land on which the crop is growing. A similar conflict exists in the case of trees, some courts holding that the measure of damages is the difference in the value of the land before and after the injury; while others hold that the value of the trees destroyed is the proper measure of damages. It has been held that damages caused by the destruction of fruit trees may be measured by estimating either their value as a distinct part of the land, or the difference in value of the land before and after their destruction; and that where both methods are resorted to in the same case, the damages must be ascertained by the jury from all the evidence."

In the note to the text quoted many cases are cited bearing upon this subject, several of which are annotated cases.

In a suit for damages for the destruction of a house by fire, the Supreme Court of Iowa, in holding that the measure of damages was the value of the house, said: "The fundamental principle in all actions for damages is that just compensation be made to him who has suffered injury from another in his person or property, and, in order to give satisfaction, measured in money, such rules are formulated as are thought best adapted to accomplish this purpose. A distinction has, for this reason, been made between growing crops, shrubs, and trees, whose chief value is because of their connection with the soil and their incidental enhancement of the value of the

land, and those improvements which may be replaced at will, and whose value may be readily determined, apart from the ground on which they rest." *McMahon v. Dubuque*, 77 N. W. (Iowa) 517.

In 33 Cyc., pages 1389, 1390 and 1391, many cases are cited which deal with the measure of damages for property destroyed by fire, and in the text of this article it is said:

"Where buildings are injured or destroyed it is ordinarily held that they are capable of a separate valuation and that the measure of damages is the value of the property at the time of its destruction."

All of the cases cited in the note to this text supported it, and none approved a different measure of damages.

(2) We think our own cases, when construed in connection with the facts to which the principles there announced were applied, result in the following statement of the law. That, if the value of the property destroyed depends upon its connection with the soil, the measure of the damages is the difference in the value of the land before and after the fire. But, if the property destroyed could be replaced in substantially the condition in which it existed before the fire, then the measure of the damages is the cost of so replacing it.

The case of *Dodd v. Read*, 81 Ark. 13, is not in conflict with this view, but is in harmony with it. That was a suit for damages for the value of a building, and it was there said that the true inquiry was as to the cash market value of the building, and the opinion recites the evidence of the carpenter who was the only witness for the plaintiff on the subject of value and who testified that the house was worth only two hundred dollars, and a remittitur was ordered of the part of the judgment in excess of that sum. See, also, *St. L. & S. F. Rd. Co. v. Shore*, 89 Ark. 418; *K. C. So. Ry. Co. v. Boles*, 88 Ark. 533; *Dwight v. Elmira, etc. R. R. Co.*, 15 L. R. A. 612.

The facts of this case show, not only the wisdom and justice, but the necessity, for the rule we now approve.

Much of the property destroyed was not even fixtures, and under the measure of damages given by the court, the jury could not properly have allowed compensation for its destruction. No contention was made that the land itself had sustained any damage; but the property destroyed was a sawmill with the building which housed it and the numerous articles of purely personal property used in connection therewith, the value of which was testified to by the witnesses, and which included, among other things, some lumber which had been manufactured on the very day of the fire. The plaintiff was entitled to compensation for this property, although the measure of damages given would not have warranted its assessment; yet, according to appellant, these damages were allowed, together with damages which exceeded the value of the property destroyed when estimated under the rule here approved; and, as we can not affirmatively say that such is not the case, we must reverse the judgment and remand the cause for a new trial.

BRADFORD v. WHITE.

Opinion delivered October 22, 1917.

WRIT OF ERROR CORAM NOBIS—CHANCERY JURISDICTION.—A writ of *error coram nobis* has no place in chancery proceedings, and is strictly a common law writ.

Appeal from Jefferson Chancery Court; *John M. Elliott*, Chancellor; affirmed.

S. A. Miller and *Geo. F. Jones*, for appellant.

1. The chancery court had jurisdiction. 13 Ark. 419; 14 *Id.* 209; 9 *Id.* 188; 40 *Id.* 229; 35 *Id.* 529; 4 *Ia.* 420; 2 R. C. L. 260.

2. The relief prayed should have been granted.

Coleman & Gantt, for appellees.

1. The writ of *error coram nobis* is a common law writ. A chancery court has no jurisdiction. 2 R. C. L.

306-7; 54 Am. Dec. 120; 60 L. R. A. 572; 205 U. S. 141; 19 L. R. A. 762.

2. The petition is not sufficient to bring the case within our statutory provisions for vacating judgments. Kirby's Digest, § § 4431, 4433-4. Nor can it be treated as a bill of review. 26 Ark. 600; 47 *Id.* 17; 21 *Id.* 528, 531; 95 *Id.* 517; 104 *Id.* 562.

3. No cause of equitable relief is stated nor cause for vacating the judgment. 95 Ark. 517; 104 *Id.* 562; 89 Ark. 160; 52 *Id.* 316; 39 *Id.* 107, 110.

To entitle one to relief from the consequences of unavoidable casualty or misfortune preventing him from appearing or defending he must show that he was free from negligence. 122 Ark. 74; 114 *Id.* 493; 43 *Id.* 107; 93 *Id.* 462; 97 *Id.* 117; 66 *Id.* 183; 104 *Id.* 45. No diligence is shown. 97 Ark. 314; 43 *Id.* 107.

HUMPHREYS, J. Appellant brought suit on the 24th day of February, 1916, against appellees in the Jefferson Chancery Court praying for a writ of *error coram nobis* for the purpose of reversing a judgment rendered on the 15th day of May, 1913, in an action wherein Mollie L. Bradford was plaintiff and Marcus L. Bradford, Crawford & Hooker, J. C. Bradford and Onie Bradford, his wife, were parties defendant, in so far as it affected the title to the northeast quarter of the northwest quarter of section 14, township 6 south, range 10 west, in Jefferson County, Arkansas. He alleged ownership of said estate by purchase from Marcus L. Bradford on the 13th day of March, 1913, also want of knowledge that the title to his land was involved in the suit of *Mollie L. Bradford v. Marcus L. Bradford et al.*, assigning as a reason his inability to read and write. Excerpts from the judgment were incorporated in his petition but he did not make the entire judgment a part thereof. From the excerpts of the judgment set out in the petition, it appears that Mollie L. Bradford brought a suit against Marcus L. Bradford, her husband, for divorce, and alleged that he was the owner of the land in question. The court found that

Marcus L. Bradford was the owner thereof; that on April 11, 1911, Marcus L. Bradford had executed a mortgage to Crawford & Hooker on said real estate; that on March 21, 1913, he had conveyed said real estate to J. C. Bradford by quitclaim deed for a consideration of \$1 and the assumption of the Crawford & Hooker mortgage; that J. C. Bradford accepted the quitclaim deed with full knowledge of the claim of Mollie L. Bradford for alimony and that his title was subject to the interest and rights of Mollie L. Bradford and of the mortgage lien of Crawford & Hooker. The court rendered a decree in favor of Mollie L. Bradford for an undivided one-third interest in said real estate during her natural life, and in favor of Crawford & Hooker on their mortgage claim; that the land was not susceptible of division in kind and ordered same sold to satisfy the mortgage lien and to pay Mollie L. Bradford her interest therein. It also appears from the decree that the lands were sold by a commissioner for \$700 to F. G. Smart and S. E. Wilhoit, which sale was approved and confirmed by the court.

A demurrer was filed to the petition predicated upon the theory that a chancery court has no jurisdiction to issue a writ of *error coram nobis*; and that the petition failed to state any cause of action. The court sustained the demurrer to the petition and dismissed same, from which an appeal has been prosecuted to this court. Appellant contends that chancery courts have jurisdiction to issue writs of *error coram nobis*, and cites in support of his position, *Mitchell v. Conley*, 13 Ark. 414; *Rawdon, Wright & Hatch v. Rapley*, 14 Ark. 203; *King & Houston v. State Bank*, 9 Ark. 185; *Bobo v. State, use, etc.*, 40 Ark. 224; *Adler v. State*, 35 Ark. 517.

We have examined the cases and find nothing in them to sustain the position assumed by appellant. All of them, except *Adler v. State*, treat of the right of a court to amend a decree after term time either by motion or by *nunc pro tunc* order to make the decree or judgment speak the truth. The writ of *error coram nobis* was invoked in *Adler v. State, supra*, to reverse a judgment of conviction

in a criminal case where the defendant was insane when tried but that fact not made known at the time of the trial.

It seems to be settled that a writ of *error coram nobis* has no place in chancery proceedings and is strictly a common law writ. 2 R. C. L. 305-06; *Reid's, Admr. v. Strider's Admr.*, 54 Am. Dec. 120.

Appellant does not insist that the allegations in his petition are sufficient to bring him within the statutory provisions for vacating judgments, nor that it contains the necessary allegations for a bill of review.

No error appearing, the decree sustaining the demurrer and dismissing the petition is affirmed.

GORDON HOLLOW BLAST GRATE COMPANY v. ZEARING,
RECEIVER.

Opinion delivered October 22, 1917.

1. VENDOR AND PURCHASER—RESERVATION OF TITLE—SALE BY RECEIVER—RIGHTS OF VENDOR.—A vendor of personal property, who reserves title in himself until payment of the purchase money, waives any right to follow and reclaim the property by bringing a separate suit for the price and recovering a judgment thereon.
2. VENDOR AND PURCHASER—RESERVATION OF TITLE—WAIVER.—An election to recover the purchase price by a vendor is a waiver of its reservation of title.
3. VENDOR AND PURCHASER—LIEN FOR UNPAID PURCHASE PRICE.—No lien is created by statute in favor of a vendor of personal property for the unpaid purchase money; it is too late for a vendor to obtain a lien by seizure after the property of an insolvent corporation has passed into the hands of a receiver.

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

J. M. McClintock and *Manning & Emerson*, for appellant.

1. The court erred in disallowing the notes as a preferred claim. The legal title was retained to the property in the contract and there was no waiver by presenting the claim to the receiver for allowance. 107 Ark. 337; 74 Atl. 362; 116 Ark. 246; 185 Fed. 179; 163 *Id.* 943;

221 *Id.* 128; 12 How. 225; 50 Pac. 941; 91 N. E. 154; 103 N. W. 710; 23 S. E. 90; 142 N. W. 652; 79 Pac. 564; 35 S. W. 396.

2. Appellant had a lien on the proceeds of the sale of the machinery in the hands of the receiver. The filing of the notes with the receiver was no waiver of the lien. See cases *supra*.

C. B. & Cooper Thweatt, for appellee.

1. Having elected to claim the debt, there was a waiver of the reservation of title. The filing of the claim with the receiver and getting same allowed is a clear election to claim the debt and waiver of the reservation of title. 67 Ark. 206; 78 *Id.* 573; 100 *Id.* 407.

2. Appellant had no vendor's lien. 88 Ark. 105; 45 *Id.* 136; 52 *Id.* 450; 43 *Id.* 464. Certainly none after the property was sold. 64 Ark. 135. By filing its claim appellant elected to look to the assets of the company generally. It is bound by its election. 91 Ark. 319; 107 *Id.* 337; 67 *Id.* 208. See also 52 Ark. 166; 48 *Id.* 160.

HUMPHREYS, J. Appellant, in the year 1907, sold the Stoneman-Zearing Lumber Company a trimmer and edger for \$656.25, and retained the title in said machinery "until the purchase price, including all paper that may be given to apply on same, has been fully paid in cash." Not having paid the purchase price, the Stoneman-Zearing Lumber Company delivered to appellant, in evidence thereof, two notes, one being due November 10, and the other November 20, 1909. On January 7, 1910, the Stoneman-Zearing Lumber Company was placed in the hands of a receiver by order of the Prairie Chancery Court. Appellant filed the notes with the receiver for allowance, which were allowed by the receiver and also allowed by the court on November 17, 1910. The machinery in question was sold by the receiver under an order of the court in settlement of the general claims of the company. After the court had allowed appellant's claim and the machinery had been sold, appellant appeared in court and filed the original contract with a petition in

which they asked that their claim be made a preferred claim. The court disallowed the claim as a preferred claim but allowed it as a general claim. From this order, an appeal has been prosecuted to this court.

(1-2) The contention of appellant is that it did not waive its right to follow the property by presenting its claim to the receiver and court for allowance. This court has held that a vendor of personal property, who reserved title in himself until payment of the purchase money, waives any right to follow and reclaim the property by bringing a separate suit for the price and recovering a judgment thereon. An election to recover the purchase price by a vendor is a waiver of its reservation of title. *Cox v. Harris*, 64 Ark. 213; *Davis v. Jones*, 67 Ark. 122; *Neal v. Cone*, 76 Ark. 273; *Hendrickson Lumber Co. v. Pretorious*, 82 Ark. 347; *Nashville Lbr. Co. v. Robinson*, 91 Ark. 319; *Hollenberg Music Co. v. Bankston*, 107 Ark. 337.

In *Hendrickson Lumber Co. v. Pretorious*, *supra*, a vendor, who had reserved title in himself until the purchase money was paid, was permitted to intervene and claim the property after it had passed into the hands of a receiver. In that case, the vendor had not obtained an allowance or judgment on his claim before intervening.

(3) It is insisted, however, that appellant should have a lien for the purchase money on the proceeds of the sale of machinery in the hands of the receiver. It is well settled that our statute does not create a lien in favor of a vendor of personal property for the unpaid purchase money; and that it is too late for a vendor to obtain a lien by seizure after the property of an insolvent corporation has passed into the hands of a receiver. *Halpern v. Clarendon Hardwood Lumber Co.*, 64 Ark. 132.

The decree is affirmed.

DAVIS, ADMINISTRATOR, v. McCANDLESS.

Opinion delivered October 8, 1917.

1. APPEAL AND ERROR—ERROR ON FACE OF RECORD.—Where an error appears upon the face of the record, no motion for a new trial nor a bill of exceptions is necessary.
2. DOWER—SALE OF LANDS—PROCEEDS.—Where lands belonging to deceased, were sold by his administrator to satisfy a debt, the widow is entitled to one-third interest in the proceeds remaining in the administrator's hands, and takes the same as dower, and not absolutely.

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

Brundidge & Neelly, for appellant.

1. No motion for new trial, nor bill of exceptions is necessary, as the error appears upon the face of the record. 11 Ark. 474; 125 *Id.* 308; 66 *Id.* 180.

2. The court erred in granting the widow dower absolutely in one-third of the proceeds of the sale of the lands. She should only have been endowed for life. 87 Ark. 505; 2 Woerner on Adm., 481.

Eugene Cypert, for appellee.

1. There was no motion for new trial nor bill of exceptions.

2. The widow was entitled to dower in the surplus remaining after a sale of the lands to satisfy the vendor's lien. Jones on Mortgages, § 1693; 9 Am. & E. Dec. in Eq. 147; 40 Oh. St. 391; 46 *Id.* 407; 52 *Id.* 624; 55 Ark. 225; 11 Ballard, Real Prop., § 71.

STATEMENT BY THE COURT.

On June 24, 1911, J. A. Greer sold to one J. A. McCandless certain lands in White County. Part of the consideration was paid and a vendor's lien was retained for the balance. In February, 1914, McCandless died. Appellee filed in the probate court the following petition:

"Comes M. J. McCandless, as the widow of J. A. McCandless, and says: That she is entitled to a dower interest in the proceeds of the sale of certain lands belong-

ing to the estate of her husband; that one B. F. Davis has been appointed administrator of his estate and has sold land belonging to the same for the sum of \$2,400, and that she is entitled to a portion of the purchase money thereof. Wherefore, she asks that she be assigned dower and that said administrator be required to pay her whatever she may be entitled to and for all other relief."

Whereupon the court made the following order:

"On this day is presented the petition of M. J. McCandless, widow of J. A. McCandless, praying an allotment of dower to funds in the hands of B. F. Davis, administrator, and it appearing that there is the sum of \$1,732.35 in his hands from the commissioner of the White Chancery Court and that his widow is entitled to one-third of the same. It is therefore by the court considered, ordered and adjudged that said administrator, B. F. Davis, be, and he is hereby ordered to pay over to the said M. J. McCandless the sum of \$577.45, the receipt for which will be proper voucher in his settlement as such administrator."

The administrator filed an affidavit for appeal, as follows:

"Now on this day comes B. F. Davis, administrator, and prays an appeal from the order of the White Probate Court in the above entitled cause, allowing and setting aside to M. J. McCandless the sum of \$577.45 as her dower interest in the sale of certain lands made by the administrator. Your affiant states that the appeal taken by him in this cause is not taken for the purpose of delay, but that justice may be done."

The appeal was granted by the probate court. The circuit court, on appeal, entered the following judgment:

"On this day comes the plaintiff, M. J. McCandless, by her attorney, Eugene Cypert, and comes the defendant, by Brundidge & Neelly, his attorneys, and this cause is submitted to the court upon the pleadings and testimony of witnesses, and the court having heard the same and being advised as to the law and the testimony, doth find that the said administrator has in his hands the sum

of \$1,732.35. It is therefore considered, ordered and adjudged that the judgment of the probate court of White County in allotting dower to the plaintiff, M. J. McCandless, be, and the same is affirmed, and the administrator, B. F. Davis, as administrator of the estate of J. A. McCandless, be and he is hereby directed to pay over to the plaintiff, M. J. McCandless, the sum of \$577.45 and take credit on his settlement of the same with the probate court of White County, and that the said plaintiff, M. J. McCandless, do have and recover of and from the defendant, B. F. Davis, as administrator, the sum of \$577.45 and all costs in this suit expended."

Appellant filed no motion for a new trial, and no bill of exceptions, but prosecutes this appeal from errors which he contends appear on the face of the record.

WOOD, J., (after stating the facts). The petition for dower alleged that the administrator has sold land belonging to the estate of J. A. McCandless, and that appellee as the widow was entitled to one-third of the proceeds of such sale.

The affidavit for appeal set up that the appeal was prayed "from the order of the White Probate Court, allowing and setting aside to Mrs. M. J. McCandless the sum of \$577.45 as her dower interest in the sale of certain lands made by the administrator.

The order of the probate court shows that the case was heard upon "the petition of M. J. McCandless, as widow of J. A. McCandless, praying an allotment of dower to funds in the hands of B. F. Davis, administrator," and that the sum in his hands was \$1,732.35, the proceeds of the sale of lands "belonging to the estate of her husband."

The judgment of the circuit court shows that the cause was "submitted to the court upon the pleadings and the testimony of witnesses." And the circuit court found that there was \$1,732.35 in the hands of the administrator, and affirmed the judgment of the probate court allowing appellee \$577.45 as dower.

(1) The court erred in granting to appellee the absolute title to one-third of the amount of the proceeds from the sale of these lands, and this error appears on the face of the record. It was, therefore, unnecessary for the appellant to have filed a motion for a new trial and to have presented a bill of exceptions in order to have this court review the error on appeal. Where an error appears upon the face of the record no motion for a new trial and bill of exceptions is necessary. *Anthony v. Sills*, 111 Ark. 468, 474, and cases cited; *Baucum v. Waters*, 125 Ark. 305, 308, and cases cited.

(2) Mr. Woerner says: "The surplus of the proceeds of a sale (of real estate) ordered for the payment of debts remaining after the debts and expenses of administration have been discharged retains the character of real estate for the purpose of determining who is entitled to receive it, and goes to the persons to whom the real estate would have gone but for the conversion." 2 Woerner on Administration, p. 481.

In *Kitchens v. Jones*, 87 Ark. 502, we held (quoting syllabus): "Where decedent left real property subject to a mortgage, which was subsequently foreclosed by order of court, the surplus of the proceeds of the foreclosure sale retained the character of real estate for the purpose of determining who was entitled to receive it."

The Chief Justice, after reviewing the authorities, concludes his opinion as follows: "In this case his equity of redemption descended, at his death, to his widow and children, according to the statute of descent and distribution, as realty. Its subsequent conversion to pay the debts against it does not let them in to share in it as personal property, for the only purpose of the conversion was to pay the mortgage debt, and not to change the status of the property."

The doctrine announced in that case rules this. It follows that the appellee was entitled to her dower in the surplus proceeds of the sale of the lands belonging to the estate of her deceased husband, but the court, by appropriate order, should have assigned her dower interest as

in realty, and not absolutely as in personalty. The court should have ascertained the amount of her dower interest in the proceeds and should have awarded to her such interest for her use and benefit during her life.

Appellee contends that the court below may have found from the evidence that the funds in the hands of the administrator was the result of the collection of land notes in the possession of the administrator, or that the sale was made by the commissioner of the chancery court under an agreement that the widow should have one-third of the proceeds of the sale. The answer to this is, that this court can not assume that evidence was adduced beyond the scope of the issues set forth in the pleadings. The petition, as we have seen, shows that appellee sought dower out of the proceeds of the sale of lands belonging to the estate of her husband. The administrator had no right to sell the lands except for the payment of debts, and her dower in any surplus went to her, as real estate and not personalty.

It appears on the face of the judgment that it was not responsive to the issues raised by the pleadings, and the judgment will therefore be reversed and the cause remanded with directions for further proceedings according to law and not inconsistent with this opinion.

NEWPORT MANUFACTURING COMPANY v. ALTON.

Opinion delivered October 8, 1917.

1. MASTER AND SERVANT—INJURY TO SERVANT—USE OF DEFECTIVE TOOL—KNOWLEDGE.—A servant may continue, in the exercise of due care, to use a tool or defective piece of machinery for a reasonable time, upon the employer's promise to repair it, unless the defect renders the tool or machinery so obviously dangerous that a reasonably prudent person would not use it at all.
2. EVIDENCE—EXPERT WITNESSES—QUALIFICATIONS.—A witness may testify as an expert where experience and observation in the special calling of the witness gives him knowledge of the subject in question, beyond that of persons of common knowledge.

3. EVIDENCE—HYPOTHETICAL QUESTION.—It is necessary to include in a hypothetical question to be propounded to a witness, the undisputed facts, and the facts assumed to have been established by the party propounding the question, if within the issues.

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

Gustave Jones and *John W. Newman*, for appellant.

1. Alton assumed the risk. He was experienced and knew of the defects. 95 Wis. 6; 60 Am. St. 66, 68; 188 S. W. 549, 551. The danger was obvious.

2. The witnesses who testified as experts were either incompetent, or, if competent, proved Alton to be more of an expert than they and bound him to a full appreciation of the danger. The testimony was not expert but simple speculation. It was incompetent and prejudicial. 56 Ark. 612; 78 *Id.* 55; 85 *Id.* 488; Note, 51 L. R. A. (N. S.) 566.

3. The hypothetical questions were unfair and misleading and no negligence of defendant was proven.

4. The verdict is excessive.

Ira J. Mack, for appellee.

1. Appellee did not assume the risk, as he reported the defects to the master and was promised that a new saw would be provided. 86 Ark. 507; 88 *Id.* 28, 34; 90 *Id.* 565; 95 Wis. 6; 4 Labatt on Mast. & S. (2 ed.), § 1376.

2. The hypothetical questions were not unfair and misleading. Their testimony was that of experts. 56 Ark. 440; 95 *Id.* 284; 108 *Id.* 591.

3. Negligence was proven. 108 Ark. 591; 107 *Id.* 129; 103 *Id.* 65.

4. The verdict is not excessive. 79 Ark. 53. It is fully sustained by the evidence.

HUMPHREYS, J. Appellee instituted suit against appellant in the Jackson Circuit Court to recover \$2,900 for an injury to his hand received on the 31st day of May, 1916, while operating a cut-off saw in appellant's handle factory located at Newport. The gist of the complaint was that the injury occurred on account of the negligence

of appellant in furnishing a saw with two teeth out, which rendered the saw unsafe and dangerous. Appellant answered that appellee was guilty of contributory negligence, and had assumed all risk incident to the employment. The cause was heard upon the pleadings, oral evidence and instructions of the court. The jury rendered a verdict in favor of appellee for \$2,500. From the judgment rendered thereon, an appeal has been prosecuted to this court.

The saw was circular, containing eighty teeth, and so arranged that material was fed to it by means of a sliding table on the right. The trimmings from the handles and block-saws were put into bundles, laid upon the table, then pushed by the operator so as to bring the material in contact with the saw. In this way, the bundles were sawed into stove wood which fell into a chute on the left of the saw. Appellee was engaged in sawing one of these bundles into stove wood at the time the injury occurred. He sawed one end of the bundle off and turned it to saw the other end off. The bundle was laid upon the table and with his hands resting upon the bundle he pushed it and the sliding table toward the saw. Instead of sawing the bundle in two, the saw hung and pressed the left end of the bundle downward and the right end upward; and in the upward movement his left hand was thrown against the saw. Appellee had worked twenty-two months, during a period of four years, in and about the handle factory. During that time he had operated the cut-off saw about four months. When operating the saw, he filed and shaped the teeth. Two teeth, quite a little distance apart, were broken out of the saw. When appellee discovered one tooth missing, he consulted the superintendent with reference to the danger, and was informed the broken tooth made no difference and advised to continue work. When he discovered the second missing tooth, he again consulted the superintendent who reiterated his former statement, and promised to replace the saw as soon as the new one arrived. A new one had been ordered. Relying upon this promise, appellee continued to operate the

saw until the next morning when the injury occurred. In response to hypothetical questions, the opinions of three witnesses, experienced in the use of a cut-off saw, were admitted as evidence in the case over the objection of appellant. Many other facts pertaining to the injury and extent thereof appear in the record, but we content ourselves with reciting only such facts as we deem necessary in passing upon the vital questions in the case.

It is insisted that the undisputed facts bind appellee as a matter of law to the assumption of the risks connected with the operation of the saw. It is true appellee was skilled in the use of the saw, had complete control of same when operating it, knew how to file and shape the teeth and had knowledge that two teeth were broken; but he informed appellant of the condition of the saw and sought advice from appellant's superintendent. He continued work at the insistence of appellant, and upon the distinct promise that appellant would replace the saw with a new one which had already been ordered. These facts differentiate the instant case from *Erdman v. Illinois Steel Company*, 95 Wis. 6, cited by learned counsel for appellant, and harmonizes the case with the rule laid down in the following Arkansas cases: *St. L., I. M. & S. Ry. Co. v. Mangan*, 86 Ark. 507; *Marcum v. Three States Lumber Co.*, 88 Ark. 28; *St. L., I. M. & S. Ry. Co. v. Holman*, 90 Ark. 555.

(1) The cases last cited clearly announce the rule that an employee may continue, in the exercise of due care, to use a tool or defective piece of machinery for a reasonable time, upon promise of an employer to repair it, unless the defect renders the tool or machinery so obviously dangerous that a reasonably prudent person would not use it at all. This rule as applied to the facts also disposes of appellant's contention that the physical facts and evidence fail to establish negligence on the part of appellant.

(2) It is also insisted that the three witnesses who gave expert testimony were not sufficiently qualified. T. E.

Gillard, the first expert witness, had worked around mills for seventeen years, and had four years' actual experience in operating circular saws. D. F. Woodruff, the second expert witness, had about twelve years' experience in working around mills, and during ten years of that time operated saws of different kinds, and operated a saw of this particular kind a year and one-half. J. A. Falana, the third expert witness, had operated saws of all kinds for forty years. This court has laid down the rule in cases where expert evidence is applicable, that the opinion of a witness is admissible in evidence—"Where experience and observation in the special calling of the witness gives him knowledge of the subject in question beyond that of persons of common knowledge." *Dardanelle, P. B. & T. Co. v. Croom*, 95 Ark. 284, and cases cited therein on this point.

The matter in issue was not within the knowledge and experience of the ordinary juror, so we think it that character of case in which expert evidence is admissible. The case last cited is also authority upon this point.

(3) Lastly, it is insisted that the court erred in approving the hypothetical questions propounded to the expert witnesses. It is necessary to include in hypothetical questions the undisputed facts, and the facts assumed to have been established by the party propounding the question may be included, if within the issues. The allegation here was that appellant failed to furnish a safe appliance with which to work, the installed saw being dangerous by reason of the teeth being out. The hypothetical question contained a suggestion of danger on account of the teeth being filed and shaped with a hook in them instead of being filed and shaped straight out. The breadth and scope of the questions not only covered the saw as described with reference to the teeth being out, but with reference to any other defect. It also covered dangers generally on account of installation. Specific objections were made to the questions at the time on account of their unwarranted breadth and scope. We think the dangers suggested on account of installation and operation were not included

in the pleadings, and the questions and answers thereto prejudicial to the rights of appellant. The questions should have been limited to the defect alleged.

As the case must be reversed, we deem it inappropriate to discuss the question of whether the verdict was excessive.

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

WARREN STAVE COMPANY v. HARDY.

Opinion delivered October 22, 1917.

TRESPASS—TITLE TO LAND—CUTTING TIMBER.—One T. claimed to own certain land, upon which was valuable timber. One J. purchased the right to cut the timber, and having cut the same sold it to the W. Co., who manufactured it into stave bolts. Appellees in fact owned the land and timber thereon, and brought an action against J. and W. Co. for the value of the manufactured product. *Held*, under the facts, that J. was a trespasser, without right to cut the timber, and was liable for his acts, in that he had cut appellee's timber without making a proper investigation as to its ownership. *Held* also, that the W. Co., having purchased from a trespasser, was liable to appellees for the value of the timber after it was manufactured into stave bolts.

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

B. L. Herring, for appellant.

1. The proof shows that Jolly believed in good faith that he was the owner of the timber and appellant was an innocent purchaser of the stave bolts. It was, therefore, only liable for the timber value of the bolts. 65 Ark. 448; 451; 123 *Id.* 127; 124 *Id.* 574; 127 Ark. 129.

J. R. Wilson, for appellees.

Jolly had no title. He was a trespasser. Appellant was liable for the value of the staves without deduction on account of the increased value by work and labor done on them. 65 Ark. 449; Schouler on Pers. Prop (2 ed.)

37; 38 Cyc. 1130, note 46; 109 Ark. 229; 126 *Id.* 344. The judgment really is too small.

STATEMENT BY THE COURT.

The appellees instituted suit in the Bradley Chancery Court against various parties to quiet title to certain tracts of land, one of the tracts being the northwest quarter of the northeast quarter of section 11, township 13 south, range 9 west. As the cause progressed it was discovered that one J. E. Jolly had cut the oak timber standing on the above tract and sold the same to the appellant. Jolly and the appellant were made parties defendant to the suit and by amendments to the complaint it was set up that Jolly had cut and removed the oak timber from the land and sold and delivered the finished product of the same to appellant, and that the same was worth about \$800, for which they prayed judgment.

Jolly and the appellant filed separate answers, in which they denied generally the allegations of the complaint as to them, but did not challenge the title of the appellees to the land in controversy, and the appellant set up that if it had bought any timber cut from the land that it was only liable for the value of the timber in the trees, and not for the value of the finished product, and alleged that if it bought any timber from the land in controversy that it did not know it.

The court entered a decree quieting title to the above described tract of land in the appellees, and referred to a master to report as to the timber cut and removed from the land above described. Testimony was heard and the master reported that the Warren Stave Company bought from appellant thirty-two cords of stave bolts, worth \$12 per cord.

The court, on final hearing of the issues between the appellant and the appellees, after hearing testimony and the master's report, confirmed the report of the master and entered a decree in favor of the appellees against appellant in the sum of \$384, which the appellant here seeks to reverse.

WOOD, J., (after stating the facts). The appellant contends that the proof shows that Jolly believed in good faith that he was the owner of the timber which he had cut and manufactured into stave bolts from the appellees' land, and that appellant was an innocent purchaser thereof from him; that appellant, at most, would be only liable for the value of the timber per cord in its original form, and not for the market value per cord of the stave bolts at appellant's plant. We can not sustain this contention, for a preponderance of the evidence justifies a finding that J. E. Jolly was a wilful trespasser in cutting and removing the timber from the land of the appellees. He testified that he cut the oak timber on the land in controversy; that in reference to the timber he dealt with Henly S. Turner. He did not know whether Turner had a deed or not, but Turner told witness that it was his timber, and he went to working it up. He told the Warren Stave Company that he bought the timber from Turner.

Turner testified that he sold the oak timber on the tract of land to J. E. Jolly. He stated that he purchased it, but refused to reveal the name of the one from whom he claimed to have purchased. He stated that he paid for the timber on the land.

The manager of the appellant testified that his company bought thirty-two cords of stave bolts from J. E. Jolly. He did not know what land the bolts came from. Jolly told him where he got the bolts. He understood from his statement that Jolly had title to the land from which the stave bolts were made. He valued the oak at \$2.50 to \$3 per cord. The value of the finished product of the stave bolts in 1912 would bring in the market listed and dried from \$25 to \$30 for oil staves. The wine staves, which were a small proportion, would bring \$45 or \$50 per thousand pieces.

The testimony of Jolly shows clearly that when he bought this timber from Turner he did not know and made no effort to ascertain whether Turner had any title to it. He simply purchased it on Turner's statement that it was his timber. He did not know whether Turner had a deed

to it or not. While Turner testified that he purchased the timber, he refused to disclose the name of the person from whom he purchased.

One who converts to his own use the timber of another without making any other or further investigation as to the ownership than that discovered by this evidence must be held to be a wilful trespasser. There is no basis in the evidence for an honest belief on the part of Jolly that he was the owner of this timber and had the right to convey the title to the same. Neither he nor Turner had any color of title or shadow of right. Since Turner was unwilling to disclose the source of his title, we must assume that he did so for the reason that he knew that he had no title. If Jolly had exercised any diligence to find out who was the owner of the lands from which he cut and removed the timber he could easily have ascertained that Turner, from whom he claimed to have purchased, had no title. It was at least incumbent upon him to put forth some honest endeavor in that direction before he went upon and cut valuable timber from the lands belonging to the appellees. Under the circumstances Jolly would not be heard to say that he went upon the lands in good faith and was innocent of any wrong doing.

Since Jolly was a wilful trespasser, he acquired no right or interest in the timber cut and removed by him from the lands of the appellees, and, although the appellant may have innocently purchased the timber from Jolly, it acquired no greater right or title than Jolly had. Jolly having no right or title, conveyed none to the appellant. *Griffith v. Ayer-Lord Tie Co.*, 109 Ark. 223. See, also, *Foreman v. Holloway & Son*, 122 Ark. 341; 2 Cooley on Torts, p. 866.

Jolly being a wilful trespasser in cutting and removing the timber from appellees' lands, if the suit had been against him he would not have been entitled to any deduction from the market value of the stave bolts on account of labor and expenses in reducing the timber from its original to its present form. He would have had to pay for the value of the timber in the form in which it was

found in his hands; and, although appellant innocently assisted him in converting the timber to his own use, it stands in his shoes so far as liability to the appellees is concerned. *McKinnis v. Little Rock, Miss. River & Texas Ry. Co.*, 44 Ark. 210; *Central Coal & Coke Co. v. John Henry Shoe Co.*, 69 Ark. 302; *U. S. v. Flint Lumber Co.*, 87 Ark. 80; *Nashville Lumber Co. v. Barefield*, 93 Ark. 353.

Without discussing the evidence in detail, it suffices to say that a preponderance thereof sustains the finding of the chancellor to the effect that stave bolts of the character of those in controversy, at the time of the purchase, were worth \$12 per cord, and even more, on the market at Warren where appellant's plant was located, after deducting the cost of transporting the same to such market.

The decree is therefore correct, and it is, in all things, affirmed.

HORNOR v. NEW SOUTH OIL MILL.

Opinion delivered October 22, 1917.

1. CORPORATIONS—DUTY OF DIRECTORS.—A corporation can only act by its agents, and its directors are the governing body of the corporation; they stand in a fiduciary relation to it and its stockholders; they owe the duty of the utmost good faith towards the corporation and stockholders.
2. CORPORATIONS—INSOLVENCY—PURCHASE OF CLAIMS BY DIRECTOR.—A director of an insolvent corporation can not purchase outstanding claims against it for his own benefit, and hold the same for their full value; such a purchase will be deemed to have been made for the benefit of the corporation.
3. FRAUD—PROOF.—Where fraud is alleged, it is the duty of the court to carefully look into every circumstance connected with the transaction.

Appeal from Jefferson Chancery Court; *John M. Elliott*, Chancellor; affirmed.

Coleman & Gantt and *Bevens & Mundt*, for appellants.

1. The evidence shows that E. S. Ready was interested in the New South Oil Mill; that he was at the same time director and special committeeman for the stockholders of the Valley Oil Company, a trustee for the Valley Oil Company and its stockholders—and that as such trustee he is forbidden by law to speculate with the trust property in the name of a partnership in which he was interested, or in his own name. 83 S. W. 599; 14 Pac. 545; 40 N. E. 362; 84 N. Y. 190; 121 N. Y. 107; 24 N. E. 13; 42 Pac. 439; Cook on Stock & Corp. Law, § 660; 63 Pac. 1011; 77 *Id.* 613.

Directors are not only trustees in relation to the corporate entity and property but in many respects trustees of the corporate shareholders. 48 Kan. 672; 29 Pac. 1063; 42 N. J. Eq. 431; 7 Atl. 842; 69 Kan. 498; 105 Am. St. 178; 66 L. R. A. 261; 5 *Id.* 361; 145 Fed. 103; 118 Ga. 362; 21 Wall. (U. S.) 616; 2 Thomp. on Corp., § 1218; 2 Pom. Eq., § 1090; 109 Ark. 590; 2 Thomp. on Corp., § § 1216, 1221, 1238, 1244-6; 2 Grant's Cases, 125; 10 Cyc. 799, 791.

2. Third persons dealing with trust property, with notice are bound by the rule. 39 Cyc. 548, 550-2; 30 Ark. 249; 91 *Id.* 147; 109 *Id.* 590; 107 *Id.* 424; 111 *Id.* 62; 35 *Id.* 314.

3. The claims should have been allowed at their cost price only, and this court should so order.

Bridges, Wooldridge & Wooldridge, for appellee.

1. Ready did not purchase for himself nor was he financially interested in the New South Oil Mill. He only acted as the messenger for the latter, who were the real purchasers.

2. He acted in good faith and violated no duty he owed the Valley Oil Company. The authorities cited do not apply. Ready did not benefit personally by the purchase. Appellants have failed to show lack of good faith or fraud on the part of Ready or the New South Oil Company. 99 Ark. 45; 108 *Id.* 415.

3. The claims purchased were not "trust property." 59 Ark. 562; 107 *Id.* 118.

4. The findings of the chancellor should be sustained. 112 Ark. 607.

HART, J. On July 10, 1916, E. S. Ready instituted this action in the chancery court against the Valley Oil Company, alleging that it was an insolvent corporation and praying for its dissolution and the settlement of its affairs. A receiver was appointed and its property was sold for enough to pay its debts in full.

Among the claims presented to the court for allowance was a claim for \$29,700 filed by the New South Oil Mill, a copartnership.

E. C. Hornor, S. S. Faulkner and T. H. Faulkner, stockholders in the Valley Oil Company, filed exceptions to the allowance of the claim, and for grounds stated that E. S. Ready was an officer and stockholder in the Valley Oil Company and that he had purchased the claims of four creditors aggregating \$29,700, at thirty-three and one-third cents on the dollar and that they were transferred to the New South Oil Mill for himself. Their contention was that said claims should only be allowed for the price actually paid the creditors for them.

The chancery court allowed the claims in full with interest and Hornor and others have prosecuted this appeal from that decree.

The facts upon which the decree was based are as follows:

The Valley Oil Company was a domestic corporation doing business at Pine Bluff, Arkansas, with an authorized capital stock of \$83,000, which was divided into 830 shares of the par value of \$100 each. The stockholders and the amount of stock owned by them in the company are as follows:

E. C. Hornor.....	\$19,000
Geo. W. Willey.....	13,000
A. H. D. Perkins.....	10,000
W. A. Short.....	10,000

T. H. Faulkner.....	\$ 4,000
S. S. Faulkner.....	4,000
Leon Berton	3,000
John Meyers	1,000
E. S. Ready	19,000

Perkins, Ready, Hornor and S. S. Faulkner, were directors of the corporation. Perkins was president and manager and Ready was vice president of the corporation. In 1915 the corporation owed debts to the amount of between fifty-seven and fifty-eight thousand dollars. Of these debts twenty-nine thousand seven hundred dollars were owed to creditors who were not secured. Hornor, Perkins and Willey endorsed the notes of the corporation for the balance of its indebtedness. In 1915 all these endorsers were insolvent except Ready. The officers and stockholders of the corporation regarded it as being in an insolvent condition, and in the fall of 1915, held a meeting at which the creditors of the corporation were present. An effort was made to get the unsecured creditors to take hold of the oil mill and run it until they had made sufficient profit to pay themselves. The creditors declined to do this. An offer was then made to buy the claims of the unsecured creditors at a discount but the creditors refused to take less than seventy-five cents on the dollar. This offer was refused by the stockholders of the corporation. In 1916 a committee, of which Ready was a member, was appointed to formulate a letter and send to the unsecured creditors offering thirty-three and one-third cents on a dollar for their claims. The draft of this letter was prepared by Ready and submitted to Perkins, the president of the corporation. Perkins sent the letter to the creditors and they replied by refusing the offer. Perkins was asked to resign because the company was insolvent and unable to pay him any salary. Perkins sent in his resignation, which was accepted on July 6, 1916.

As above stated, the present suit was filed on July 10, 1916. About the middle of June, 1916, the New South Oil Mill, a partnership composed of R. T. Doughtie and

Mrs. Ready, the wife of E. S. Ready, began negotiations looking to the purchase of these unsecured claims. E. S. Ready acted as agent of the firm and secured the assignment of the claims of four creditors aggregating in amount twenty-nine thousand and seven hundred dollars to the New South Oil Mill. The creditors were paid by a check of the firm signed by R. T. Doughtie and countersigned by E. S. Ready. Ready met the creditors in the city of New York in June, 1916, and there made the contract for the purchase of the claims at thirty-three and one-third cents on the dollar, cash. When he returned home the checks were sent in to the creditors at once. The New South Oil Mill was the successor of the South Oil Mill Company, which was a corporation. It had a capital stock of \$50,000, divided into two thousand shares of stock, of which Ready owned eleven hundred and sixty-four. In the fall of 1912, the corporation was dissolved and its assets turned over to the New South Oil Mill, a partnership composed of R. T. Doughtie and Mrs. E. S. Ready. Ready gave to his wife his interest in the corporation. He was solvent at the time and has continued solvent ever since. He was a director in a bank in the city of Helena at that time. The bank became insolvent in 1913, and Ready was appointed receiver and wound up its affairs.

It may here be stated that it is the contention of the stockholders of the Valley Oil Company that Ready purchased the claims in question for himself and that their transfer to the New South Oil Mill was colorable merely. On this point Doughtie, being called by the appellants, testified that he and Mrs. E. S. Ready composed the firm of the New South Oil Mill, which operated an oil mill at Helena, Arkansas; that E. S. Ready had no interest in said firm; that Ready was paid the sum of \$300 per month by the firm to act in an advisory capacity merely, but that he, Doughtie, was the active manager of the firm; that all the checks of the firm were signed by himself and countersigned by E. S. Ready or by Mrs. E. S. Ready; that the Valley Oil Mill Company became indebted to his firm in

the sum of \$10,000 and in this way he became interested in the affairs of that corporation; that the corporation began to be regarded as insolvent in the spring of 1915; that differences had arisen between its stockholders and that he had been called in to help adjust these differences and in this way became perfectly familiar with the affairs of this corporation; that he knew a committee had been appointed to buy in the claims of the unsecured creditors at a discount and that their negotiations had been unsuccessful; that about the middle of June, 1916, he first conceived the idea of buying these claims for his firm and in this way help to protect his firm in its own claim; that he mentioned the matter to Mr. Ready and got him to undertake the negotiations for his firm; that pursuant to his directions, Mr. Ready went to New York City and met the representatives of the four unsecured creditors whose claims aggregated the sum of \$29,700; that after some discussion of the matter, they agreed to take thirty-three and one-third cents on the dollar for their claims if they should be paid at once in cash. Ready agreed to this offer for the New South Oil Mill, and as soon as he returned to Helena, checks were sent to the various creditors signed by R. T. Doughtie for the New South Oil Mill and countersigned by E. S. Ready as had been the custom. Doughtie stated positively that he first formed the design of buying these claims at a discount for his firm and so stated to Ready. He stated in positive language that the money was paid by his firm and that Ready had no interest whatever in the transaction except to act as agent for the firm.

E. S. Ready was also called as a witness by the appellants and in every respect corroborated the testimony of R. T. Doughtie.

It was agreed that at the sale of the property of the Valley Oil Company there were three persons bidding—E. C. Hornor of Helena, Mr. R. T. Doughtie, representing the New South Oil Mill, and Mr. Leo M. Andrews of Pine Bluff. All three bidders engaged in bidding until the sum of \$50,000 was bid, but Mr. E. C. Hornor there-

after dropped out and bidding was thereafter increased from time to time by the other two bidders until the New South Oil Mill bid \$66,450. Thereupon Leo M. Andrews bid \$66,500, which was the last and best bid, and the property was struck off and sold to him for that amount.

E. S. Hornor and T. H. Faulkner testified that they were on the committee to purchase the creditors' claims at a discount and stated that after the committee had quit acting as a committee that they were endeavoring to buy in the unsecured claims for forty cents on the dollar; that they intended to pay the money themselves and buy in the claims for the corporation.

As above stated, the court found the issues in favor of the New South Oil Mill. The issue was the fraudulent conduct of Ready in the purchase of the claims of the unsecured creditors.

(1) A corporation can only act by agents and the directors are the governing body of the corporation. They stand in a fiduciary relation to the corporation and its stockholders. They owe the duty of the utmost good faith toward the corporation and toward the shareholders who elect them. *Nedry v. Vaile*, 109 Ark. 584.

(2) Ready was a director of the Valley Oil Company, and when it was thought to be in an insolvent condition he was appointed on a committee to compromise its debts and buy in the claims against it at a discount if possible. Under these circumstances he owed to the corporation and to the shareholders the duty of acting in their interest and for their benefit. He could not buy up its outstanding debts for his own benefit, knowing the corporation to be insolvent, and hold the debts so purchased for their full amount.

In 10 Cyc. 798, it is said that beyond question a director of an insolvent corporation will not be allowed to buy up its debts at a discount, and prove them against the corporation as a creditor for their face value.

In Thompson on Corporations, Vol. 2 (2 ed.), par. 1238, the rule is stated as follows:

“It may be stated as a general rule that a director will not be permitted to purchase claims against the corporation, either when he owes to it the duty of acting in its interests and for its benefit, or when, knowing the corporation to be insolvent, he buys such claims for his own benefit, intending thereby to get an advantage over the other creditors and hold the claims thus purchased against the corporation for their full amount. In all such cases it may be said that the director will have no claim against the corporation beyond the amount actually expended by him. Thus a director acting as a special committee to settle certain claims against the corporation, can not claim for himself the benefit of reductions secured by him in the adjustment and compromise of claims, though purchased by him with his own funds.”

So it may be said that if Ready purchased the claims of the creditors of the Valley Oil Company for himself, or if he was a member of the firm in whose name the claims were purchased, or if he was financially interested in such firm, under the principles of law above cited, neither he nor his firm could reap any profit from the transaction, but the purchase would be considered to be made for the benefit of the Valley Oil Company and its stockholders.

(3) In testing this issue of fraud, we should, of course, thoroughly sift the transaction and consider it in its true light. All the attending circumstances which in any wise tend to shed light upon the transaction should be closely scrutinized and the entire field explored to determine whether or not the purchase was fraudulent within the meaning of the rule just announced. At the outset it may be well to remember that both Doughtie and Ready were called as witnesses by the appellants. They detailed the whole transaction without any hesitancy whatever, and there was no material discrepancy in their testimony. Ready organized the New South Oil Mill Company and was its principal stockholder. Doughtie was also interested in that corporation. They both were men of considerable experience in the oil mill business.

In the fall of 1912, all the property of that corporation was turned over to the New South Oil Mill, a partnership formed for that purpose. Doughtie and Mrs. Ready were members of the firm. Mrs. Ready acquired her interest by gift from her husband. Mr. Ready was solvent at the time he gave the property to her and has been solvent ever since. There is a suggestion that he was director in a bank, in the city of Helena, which failed in 1913, and that he gave this property to his wife in order to escape liability as such director. Ready was appointed receiver of the bank when it failed and there is nothing whatever in the record to show that his conduct as director of that bank had been such as to cause him to fear that he might become personally liable for the debts of the bank. So it may be said that he had a perfect right to give his wife an interest in the firm of the New South Oil Mill. It is true that he was afterwards paid a salary to act in an advisory capacity to the firm, but this the parties had a right to do. Doughtie was the active manager of the firm and checks given by the firm were signed by Doughtie and countersigned by Mr. Ready or his wife. In this way both members of the firm could keep a check on each other as to the firm's business.

Under these circumstances, we think the New South Oil Mill had a perfect right to purchase the claims of the creditors of the Valley Oil Company, and the fact that they employed Ready to conduct the transaction for them in no wise made the transaction fraudulent as far as the New South Oil Mill was concerned. We are not concerned in this opinion as to what the duty of Mr. Ready towards the shareholders in the Valley Oil Company should have been. If the New South Oil Mill had the legal right to purchase these claims, that right could not be defeated because the firm used for that purpose the services of a director of the Valley Oil Company corporation. This was not the case of a contract between corporations with interlocking directors or with a corporation where the director acted for it and also as agent for

the other contracting party. The creditors acted for themselves and Ready acted for the New South Oil Mill.

The question in the case which has given us the most concern is as to whether or not Ready in reality purchased the claims for himself in the name of the New South Oil Mill. If Ready was the real purchaser of the claims and the New South Oil Mill was merely used by him to conceal his interest in the transaction, such course was fraudulent within the rule above stated because of the confidential relation which existed by reason of Ready being director in the Valley Oil Company or which was created by him becoming a member of the committee appointed by the stockholders to purchase the claims of creditors for their benefit. Upon this issue we may consider any circumstances from which an inference of fraud was natural.

Counsel for appellant point to the fact that the Valley Oil Company was thought to be in an insolvent condition and Ready was one of its directors and actively participated in the management of its affairs; that he had been appointed on a committee for the purpose of compromising the debts of the corporation or buying in the claims of creditors at a discount; that he without notice to the other creditors or to any of the shareholders of the company went to the city of New York for the purpose of buying in these claims at a heavy discount ostensibly for a firm in which his wife owned a one-half interest. These were all cogent circumstances tending to show the want of good faith in Ready towards his fellow-shareholders, but the legal inferences of fraud which might be drawn therefrom were overcome by the positive testimony of Doughtie and Ready.

Doughtie testified that his firm was a creditor of the Valley Oil Company; that differences had arisen between the shareholders of that company and that he had been called in to adjust these differences; that in this way he became perfectly familiar with the affairs of the company; that he was the active manager of his firm and first formed the design of buying in these claims for his firm.

He stated positively that he asked Mr. Ready to act for his firm in the transaction; that Ready did act for the firm, that the amount paid, viz., thirty-three and one-third cents on the dollar, was actually paid by his firm. He further stated that Ready had no financial interest whatever in the transaction.

Ready was also called to the stand by appellants, and in every respect corroborated the testimony of Doughtie. They both had been men of recognized good standing in the business world, and there is nothing to impeach their testimony except the circumstances under which the purchase in question was made. The record shows that Doughtie was an active bidder when the assets of the corporation were sold and that his activity in that regard was the cause of the assets being sold for an amount sufficient to pay all the claims against the corporation.

The issue of fraud thus raised by the conflicting evidence was determined by the chancellor in favor of the New South Oil Mill, and after a careful consideration of the whole record, we are of the opinion that his finding is not against the preponderance of the evidence. Therefore, under the settled rules of this court, the decree will be affirmed.

PETERS v. PRINCE.

Opinion delivered October 22, 1917.

RESCISSION OF CONTRACTS—FRAUD AND FALSE REPRESENTATIONS.—Appellant was indebted to appellee on an open account and gave his note therefor. Later appellant represented himself to appellee, as insolvent, and induced appellee to exchange his (appellant's) note for other notes, which appellant indorsed without recourse. It appeared that these latter notes were worthless; the testimony was conflicting as to whether appellant was insolvent at the time of the exchange, but, *held*, the judgment of the chancellor, setting aside the exchange of notes, and rendering judgment against appellant, would not be disturbed on appeal.

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

Edwin Hiner, for appellant.

1. The findings of the court are not supported by the evidence. Appellant acted at all times in good faith. He attempted to tell the true condition of affairs. His statements to be fraudulent must have been made with the knowledge that same were fraudulent. 31 Ark. 170.

Geo. G. Stockard, for appellee.

1. Appellant's statements were false and the court so found. The findings are sustained by the evidence. 87 Ark. 593; 99 *Id.* 428; 83 *Id.* 524; 98 *Id.* 328; 97 *Id.* 438.

2. Peters' testimony as to his insolvency was false. 4 Words & Phr. 3647. The facts were peculiarly within appellant's knowledge.

HART, J. F. E. Prince instituted this action in the chancery court against G. W. Peters for the purpose of annulling and setting aside a certain contract made by him with the defendant which he alleged was procured by the false and fraudulent representations of the defendant.

During the years 1914 and 1915, F. E. Prince was a manufacturer of crates and baskets at Pittsburg, Texas, and G. W. Peters was a merchant at Mountainburg, Arkansas. On September 15, 1914, Peters was indebted to Prince for merchandise on open account in the sum of \$733.45 and executed his note therefor payable on the 15th day of March, 1915.

On March 5, 1915, Prince wrote Peters reminding him that his note would be due on the 15th inst., and asking him if he would be able to pay it. On March 8, 1915, Peters answered this letter, and wrote Prince that he would be unable to pay the note when it became due. The letter gives in detail his reasons for being unable to pay the note, but on account of its length it would unduly extend this statement of facts to set it out in full. In substance Peters wrote Prince that there was no chance on earth for him to pay his note; that his stock of goods was about out and that all of his property, except some notes and accounts for some merchandise, was tied up for all that it was worth; that he owed other debts for merchan-

dise that were not secured but that he wanted to give Prince the first chance. He proposed that he would turn over to Prince \$800 in amount of notes taken from his customers, all dated January 1, 1915, and due November 1, 1915. He stated that the makers of these notes were all living in the county and that the notes were good live paper; that he further stated that these were the best notes that he had and that he wanted to give Prince first choice of his customers' notes on hand. Prince replied that he thought Peters was taking too gloomy a view of the situation, that he would soon get on his feet again. He reminded him that the past year had been a hard one on all kinds of business. He suggested that the notes be sent to a bank at Pittsburg, Texas, and that the bank would endeavor to collect the notes and remit the balance, after paying Prince's debt to Peters. On March 12, 1915, Peters answered this letter. He reaffirmed what he had stated in his first letter, and declined to send the notes on the terms stated in Prince's letter of the 8th inst. He reminded Prince that others were offering to take the notes but that he wanted to pay Prince first. He offered to endorse the notes in question without recourse and exchange them for his own note. Prince then accepted this offer and notes to the amount of \$800.83 principal, with the accrued interest, were endorsed by Peters to Prince without recourse and forwarded to the latter. Prince in return sent Peters' note to him. Prince was not personally acquainted with either Peters or the makers of the notes which Peters endorsed to him. When the notes became due Prince sent them to Mountainburg for collection and ascertained that all the makers were insolvent and that nothing could be collected on the notes.

L. L. Stokes testified that he was cashier of the bank at Mountainburg in March and April, 1915, and that it was a part of his duties to inform himself as to the financial standing of the people in and around Mountainburg; that he had known G. W. Peters about twenty years; that he personally considered Peters solvent during the whole of the year 1915, and since that time; that he owned prop-

erty at Mountainburg worth five or six thousand dollars and that he had several farms near Mountainburg and Lancaster in 1915. He was asked about the solvency of the makers of the notes which Peters had transferred to Prince and testified that each of them was insolvent on the 1st day of January, 1915, and had remained so ever since.

E. Morris, who succeeded Stokes as cashier of the bank at Mountainburg, testified that he knew personally the makers of these notes, and that each of them was insolvent prior to 1915, and had remained insolvent during 1915, and ever since that time; that Peters was solvent during the whole of 1915, and had continued to be solvent ever since.

Prince testified that he was unacquainted with Peters and with the parties whose notes he received from Peters; that he had never been to Mountainburg and relied wholly upon the representations made by Peters in exchanging Peters' note for the notes of his customers; that he believed from the statements contained in Peters' letters that he was absolutely insolvent and that he must act quickly if he wished to make the exchange; that he was not acquainted with any one in Mountainburg to whom he might have made inquiries as to the truth of the representations made by Peters and felt from his prior dealings with Peters he could rely upon the statements made by him.

On the other hand, it was shown by two witnesses that Peters was generally regarded to be in an insolvent condition in 1915. Peters himself testified that he regarded himself to be in an insolvent condition and thought the notes he had transferred to Prince were as collectable as his own paper could be. He denied that he had misrepresented his condition in any way to Prince.

The chancellor found that Prince was induced by the fraudulent misrepresentations of Peters to exchange the latter's note for \$773.45, for the notes of customers to the amount of \$800.83, and the accrued interest; that Peters was solvent at the time of the exchange of the notes and

the makers of the notes exchanged by him for his own notes were insolvent. Judgment was rendered in favor of Prince against Peters for the amount of \$773.45 and the accrued interest. Peters has appealed.

It is now strongly insisted that the findings of facts made by the chancellor are against the preponderance of the evidence, but we do not agree with counsel in this contention. It will be remembered that Prince had never been to Mountainburg and was not personally acquainted with any one there. The solvency of Peters and the insolvency of his customers from whom he had secured notes for the amounts which they owed him were facts peculiarly within his own knowledge and under the circumstances of this case Prince had a right to rely upon his statements in this regard. He knew whether he was solvent or not and should be bound by the representations he made to Prince in that regard. He also knew about the financial condition of his customers and is bound by the statements he made concerning their solvency. Prince lived several hundred miles away and was unacquainted with any of the parties and had been selling Peters merchandise for the past two years. Their business dealings had been satisfactory and Prince had a right to rely upon his statements in the matter. It appears from the testimony of the two men that had been cashiers of the Bank of Mountainburg that Peters was solvent at the time he made the representations to Prince and had so continued ever since. It is clearly apparent from their testimony that the customers' notes could not be realized upon and that Peters knew this fact when he traded the notes to Prince. It is true the above testimony was contradicted by Peters and to a slight extent by two witnesses for him, but a careful consideration of the whole testimony leads us to the conclusion that the chancellor did not err in finding in favor of the plaintiff. It can not be said that his finding is against the preponderance of the evidence.

Therefore, the decree will be affirmed.

DOAN v. BUSH, RECEIVER ST. LOUIS, IRON MOUNTAIN &
SOUTHERN RAILWAY COMPANY.

Opinion delivered October 29, 1917.

RES ADJUDICATA—DISMISSAL BY CONSENT.—A judgment dismissing an action, and entered upon the records, pursuant to an agreement of the parties, that the cause be dismissed, has the legal effect of an adjustment of the merits of the controversy, and will constitute a bar to a subsequent action.

Appeal from Pope Circuit Court; *A. B. Priddy*, Judge; affirmed.

U. L. Meade, for appellant.

1. A dismissal of a case, other than upon its merits, is in effect a dismissal without prejudice to a future action. Kirby & Castle's Digest, § § 7606, 6011; 121 Ark. 454; 69 *Id.* 431; 47 *Id.* 120, 125; 35 *Id.* 62; 36 *Id.* 389; 47 *Id.* 387; 140 Fed. 385; 5 Am. & E. Ann. Cas. 314; 46 Wash. 79; 13 A. & E. Ann. Cas. 653; 9 *Id.* 341. It was error to sustain the plea of former adjudication.

Thos. B. Pryor and *W. P. Strait*, for appellee.

The dismissal of the former suit is a complete bar and a final disposition of the case. Kirby's Digest, § 6167; 2 Black on Judgm., § 706; 2 Dana (Ky.) 395; 10 B. Mon. (Ky.) 257; 52 Am. Dec. 541; 47 Cal. 542; 14 Col. 291; 23 Pac. 322; 28 Ia. 388; 9 R. C. L. 209, 211; 50 Ark. 162; 45 L. R. A. (N. S.) 266; 79 Va. 333; 120 U. S. 89; 49 W. Va. 520; 78 Va. 602; 9 R. C. L. 210; 17 L. R. A. (N. S.) 280; 23 Cyc. 729, 1133-5, 1145; 80 Ark. 85; 107 *Id.* 41; 44 *Id.* 317.

MCCULLOCH, C. J. Appellant instituted this action in the circuit court of Pope County against the receiver of the St. Louis, Iron Mountain & Southern Railway Company to recover damages on account of personal injuries alleged to have been inflicted by the negligence of appellee's servants. There was a plea of former adjudication based upon a judgment of the circuit court of Garland County in a case involving the same cause of action, which said judgment is in the following language:

"Now on this day this cause comes on to be heard, comes the plaintiff in her own proper person and by her attorney, U. L. Meade, Esq., comes the defendant by its attorney, W. R. Donham, Esq., and by consent of the parties and leave of the court this cause is dismissed at the cost of defendant.

"It is therefore ordered and adjudged by the court that the plaintiff, Sarah E. Doan, do have and recover of and from the defendant, St. Louis, Iron Mountain & Southern Railway Company, all her costs in this suit by her laid out and expended."

The statutes of this State contain the following provisions with reference to the dismissal of an action without prejudice:

"An action may be dismissed without prejudice to a future action:

First. By the plaintiff before the final submission of the case to the jury, or to the court, where the trial is by the court.

Second. By the court where the plaintiff fails to appear on the trial." Kirby's Digest, § 6167.

There is a conflict in the authorities as to the effect of the dismissal of an action by agreement, but the rule seems to us to be established by the weight of authority that "a judgment of dismissal entered in pursuance of an agreement of the parties has the legal effect of an adjustment of the merits of the controversy, which constitutes a bar to a subsequent action." 9 R. C. L. 211. The leading case on that side of the question is *The Bank v. Hopkins*, 2 Dana 395, where the court said:

"It has been frequently decided by this court, that the legal deduction from a judgment dismissing a suit 'agreed,' is, that the parties had, by their agreement, adjusted the subject-matter of controversy in that suit; and the legal effect of such a judgment is, therefore, that it will operate as a bar to any other suit between the same parties, on the identical cause of action thus adjusted by the parties, and merged in the judgment thereon rendered, at their instance, and in consequence of their agree-

ment. If, in such a case, the original cause of action has not been actually extinguished by payment, or other actual satisfaction, but was only transformed, by the agreement of the parties, into a new cause of action, the remedy must be on the latter, and can not be maintained on the former and extinguished cause of action."

The same court in the later case of *Jarboe v. Smith*, 10 B. Mon. 257, said: "The legal effect of an order dismissing a suit agreed is, to bar any other suit between the same parties, on the original cause of action thus adjusted by them."

The Virginia Court of Appeals, speaking on the same subject, said: "The court is of the opinion that the judgment of a court of competent jurisdiction, dismissing a suit agreed, upon the ground that it had been agreed by the parties, is a final determination, as to those parties, of the matters litigated in that suit. It is virtually an acknowledgment by the plaintiff in open court, as in *re traxit*, that the plaintiff has no cause of action, or rather no further cause of action. It is not merely an abandonment of his suit by the plaintiff, as in a nonsuit; it is the concurrent action of both parties. It is a representation by the plaintiff to the court that the suit has been agreed, which is assented to by the defendant; and thereupon the suit is dismissed agreed by the judgment of the court, without costs to either party. To say that a suit is agreed by the parties is, in effect, to say that the cause of the suit has been agreed. It is a declaration of record sanctioned by the judgment of the court, that the cause of action has been adjusted by the parties themselves, in their own way, and that the suit is dismissed agreed." *Hoover v. Mitchell*, 25 Grat. 387. To the same effect see *Merritt v. Campbell*, 47 Cal. 542; *Ford v. Roberts*, 14 Col. 291; *Phillpotts v. Blasdel*, 10 Nev. 19. Mr. Black in his *Work on Judgments*, also states that to be the sound rule. 2 Black on Judgments, § 706.

There are, however, well considered opinions to the contrary, notably the opinion of Chief Justice Winslow in *Bishop v. McGillis*, 82 Wis. 120, and also the opinion of

the Supreme Court of the United States in the case of *Haldeman v. United States*, 91 U. S. 584. See also *State Medical Board v. Stewart*, 46 Wash. 79, 89 Pac. 475; *St. Joseph & Elkhart Power Co. v. Graham*, 165 Ind. 16.

We believe it is sounder to say that where parties agree to a dismissal of a cause, such an agreement entered upon the record as the judgment of the court ought to be treated as a final disposition of the cause of action. A judgment of that kind does not fall within the terms of our statute which provides that the dismissal of an action either by the plaintiff or by the court shall be without prejudice to a future action. Any other view of the matter would give no effect whatever to the agreement of the parties and would treat the judgment of dismissal merely as a voluntary act of the plaintiff.

We are of the opinion, therefore, that the trial court was correct in sustaining the plea of former adjudication. Affirmed.

BUSH, RECEIVER ST. LOUIS, IRON MOUNTAIN & SOUTHERN
RAILWAY COMPANY v. BEASON.

Opinion delivered October 29, 1917.

CARRIERS—DAMAGE TO FREIGHT—DEAD HEAD FREIGHT.—A carrier is liable in damages for ordinary negligence causing an injury to a mule shipped by an employee, dead head, the mule to be used by the employee in doing work for the carrier.

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

E. B. Kinsworthy and *W. R. Donham*, for appellant.

1. The verdict is contrary to the law and the evidence and the court erred in not directing a verdict for defendant.

The appellant is not liable, because (1) the carriage was gratuitous, (2) the injury was due to the inherent vices and propensities of the animals shipped, and (3) appellee could not abandon the mule and require appel-

lant to pay for it. The court erred in its instructions. 5 Cyc. 183, 186; 11 Ark. 189; 23 *Id.* 61; 101 *Id.* 75; 103 *Id.* 12; 22 Cyc. 1081-2; 46 Ark. 236; 83 *Id.* 87; 10 C. J. 122-3.

2. The carriage was gratuitous, the transportation free. 16 Mo. 216; 2 Story (U. S.) 16; 36 Am. Rep. 501; 6 Cyc. 365; 46 Am. Dec. 393; 14 Ala. 249; 48 Am. Dec. 97; 67 Barb. (N. Y.) 513; 10 C. J. 39, 45; 6 Bush, 572.

3. Where one is damaged, it is his duty to arrest and reduce the loss. 67 Ark. 112; *Ib.* 371; 93 *Id.* 537; 13 Cyc. 71-5.

J. C. Ross, for appellee.

1. The transportation was for the mutual benefit of both parties. Ordinary and not merely slight care was required. 61 Ark. 302, 307; 98 *Id.* 259.

2. Gross negligence was proven. 2 Hutch. on Car. (3 ed.) 707.

There is no error in the instructions and the judgment should be affirmed.

McCULLOCH, C. J. The plaintiff, Johnson Beason, instituted this action against the receiver of the St. Louis, Iron Mountain & Southern Railway Company to recover the value of a mule shipped over the railroad from Malvern to Dumas while the road was being operated by the receiver.

It is alleged in the complaint that plaintiff was employed by a foreman of the receiver to do repair work on the railroad, and that the mules were transported by rail to the place where the work was to be done, and that by reason of the negligence of defendant the mule was injured so that it became worthless. The testimony adduced by plaintiff tended to show that he was engaged with a lot of teams in doing railroad work; that he was employed by a foreman to go to Dumas, or near that place, with his teams for the purpose of working on the railroad, and that his teams were shipped to Dumas for that purpose. In other words, that his teams were shipped free of charge, or "dead-headed," as expressed by one of the witnesses, in consideration of the fact that

he was under contract to perform repair work on the railroad. Other stock was shipped at the same time, some of it the property of plaintiff, and some of it the property of other employees who were going to the same place to work, and the evidence also tended to show that the shipment of stock was handled very roughly by the trainmen, and that this mule was injured by reason of such rough handling.

The law applicable to the case has been stated by this court in the case of *St. L. S. W. Railway Co. v. Henson*, 61 Ark. 302, as follows:

"If the property of plaintiff was carried solely for the carrier's benefit, then the carrier was liable for slight negligence. If the plaintiff and the defendant derived a reciprocal benefit from the carriage, the defendant carrier was liable for ordinary negligence; if the transportation was exclusively for the benefit of the plaintiff, then the defendant was liable for gross negligence."

The second rule stated above is the one applicable to the present case, for the testimony shows that the shipment was for the reciprocal benefit of both parties to the contract of carriage, and the carrier, therefore, should be held to ordinary care and diligence in transporting the stock. The instructions given by the court were too favorable to the defendant, for they told the jury that the defendant was only under duty to exercise "slight care to avoid injuring the mule," and would not be liable unless the plaintiff paid a consideration for the transportation. Notwithstanding the erroneous instructions, the jury found in favor of the plaintiff, and defendant is in no position to complain. The evidence is sufficient to sustain the finding of the jury both as to the negligence and the extent of the damages. Witnesses testified that the train was very roughly handled and that this mule and others in the car were thrown down by reason of the sudden and unusual jerks and jars of the train. The mule in question was found to be seriously injured when unloaded from the train. One of the witnesses said that its leg was broken, and others said that the leg was bruised and

sprained. Several of the witnesses testified that the mule was absolutely worthless when taken from the train. The value of the mule was proved to be \$200, and the jury returned a verdict in favor of plaintiff, assessing the damages at \$150.

Judgment affirmed.

LABAT *v.* DUGAN PIANO COMPANY.

Opinion delivered October 29, 1917.

1. INTERPLEA—POSSESSION OF PROPERTY—SUMMARY JUDGMENT ON BOND.—Appellee sued one L. for the purchase price of a piano, under a contract of sale, and the court ordered that the sheriff take same into custody. Appellant, the wife of L., interpleaded, giving a bond, conditioned upon obeying the judgment of the court. Judgment was rendered for appellee against L. for the purchase price, and the same fixed as a lien upon the piano, but, *held*, the court was without power to render summary judgment against appellant and her sureties on her bond.
2. APPEAL AND ERROR—VOID JUDGMENT—EXCEPTIONS.—It is not necessary to except to the rendering of a judgment, void on its face.

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

D. L. King, for appellants.

1. The judgment against M. H. Labat was void for want of notice. He was not a party. Kirby & Castle's Digest, § 5153.

2. The judgment is not responsive to the issue. 83 Ark. 205; 128 Ark. 25; *Id.* 229.

3. It was error to render judgment against the interpleader and bondsmen for the debt. 99 Ark. 97; 100 *Id.* 515.

4. No motion for new trial, nor exceptions were necessary; the judgment was unauthorized. 5 Ark. 700; 62 *Id.* 421.

R. L. Montgomery, for appellee.

1. The appeal should be dismissed. No exceptions were saved and no bill of exceptions filed. All objections were waived. 73 Ark. 407; 43 *Id.* 391; 44 *Id.* 411.

2. Appellant was properly a party. 75 Ark. 571.

3. The judgment was responsive to the issue. But no motion for new trial was filed and no objections made, nor exceptions saved. Appellant waived all supposed errors. 26 Ark. 536; 27 *Id.* 506; 34 *Id.* 684; 61 *Id.* 33; 43 *Id.* 391; 45 *Id.* 524.

4. There was no error in rendering judgment on the bond. It had jurisdiction and the presumption is that the judgment is correct. No objection was made nor exceptions saved and the question is raised here for the first time. It is too late.

McCULLOCH, C. J. Appellee instituted this action before a justice of the peace against M. H. Labat, the husband of appellant Alice J. Labat, to recover the price of a piano, and at the commencement of the action an order was issued to the sheriff requiring him to take and hold the piano subject to the further orders of the court, in accordance with the statute which provides that in any action "for the recovery of money contracted for property in possession of the vendee" the court or clerk shall issue, on petition of the plaintiff, an order "directing the sheriff or other officer to take the property described in the petition and hold the same subject to the order of the court." Kirby's Digest, § § 4966, 4967. Appellant interpleaded in the action, claiming ownership of the piano taken under the attachment, and after judgment against her before the justice of the peace she took an appeal to the circuit court and gave a bond, with sureties, in the form prescribed by statute in cases of interpleader. Kirby's Digest, § § 425 and 426. The conditions stated in the bond are as follows:

"Now, if the interpleader shall prosecute her appeal to the Lafayette Circuit Court, without delay, her interplea for the property claimed by her, towit: one Kohler piano, and if said property shall, on the trial of such in-

terpleader, in the Lafayette Circuit Court, be found to be the property of said plaintiff, and said plaintiff shall recover judgment against said interpleader for the said piano, that said Alice J. Labat will deliver said property to the sheriff, W. S. A. Jackson, or his successor in office, whenever demand by said sheriff after execution or writ for its delivery comes to his hands to be levied thereon."

It is seen by comparison that the conditions are in accordance with the terms of the statute. On the trial of the cause in the circuit court the jury returned a verdict in the following form:

"We, the jury, find for the plaintiff in the sum of \$220, bearing interest from September 22, 1915, till paid, and we further find the piano owned and in possession of M. H. Labat."

The court thereupon rendered judgment in favor of appellee against M. H. Labat for the recovery of the sum named in the verdict, and declared the same to be a lien on the piano, and, on motion of appellee, also rendered personal judgment against appellant Alice J. Labat and the sureties on her bond as interpleader. A motion for new trial was filed and overruled, but the motion did not contain any reference to the action of the court in rendering a personal judgment against appellant and the sureties on the bond. Certain other alleged errors of the court were assigned in the motion, but as they are not pressed here as grounds for reversal, they need not be mentioned in this opinion.

There was no appeal prosecuted to the circuit court by M. H. Labat, therefore it was unnecessary to render any further judgment against him. Of this, however, appellant can not complain, as she is not interested in the judgment against her husband. The verdict of the jury settles against appellant her claim for ownership and possession of the piano in controversy and the judgment of the court is correct upon the verdict so far as it adjudicates that question.

(1) It was beyond the power of the court to render judgment against appellant and her sureties on the bond.

The statute does not authorize a summary judgment on such a bond. The statute provides that if the property levied on be not delivered according to the terms of the bond "said bond shall have the force and effect of a judgment for the amount of the appraised value of such property and the costs of the interplea, if such appraised value be less than the amount of the judgment rendered in the original case, and, if more, for the amount of said judgment and costs, on which judgment execution against all the obligors may issue." Kirby's Digest, § 426. The appraisal of the property is the foundation of the statutory proceedings against the obligors on the bond, and the judgment against the sureties arises upon the return of the officer showing the failure to deliver the property according to the terms of the bond. *Turner v. Collier*, 37 Ark. 528.

(2) It is urged by counsel for appellee that this ruling of the court can not be reviewed here for the reason that no exception was saved at the time and embraced in the motion for new trial. The judgment is to that extent void on its face, because it is unwarranted. Therefore, no exceptions were necessary. *Tunstall v. Means*, 5 Ark. 700. It may be likened to a judgment by default upon pleadings which do not state a cause of action, and the error of the court, therefore, appears on the face of the record. The erroneous action of the court in rendering this judgment was not one of the things which occurred during the progress of the trial to which exceptions must have been saved in order to call for a review in this court. It was, therefore, unnecessary to note exceptions at the time or to embody the objections in a motion for new trial.

The portion of the judgment against appellant and the sureties on her bond for the recovery of money is reversed and stricken out. The other portion of the judgment concerning the ownership of the piano is affirmed.

FIREMEN'S INSURANCE COMPANY v. DAVIS.

Opinion delivered October 29, 1917.

1. FIRE INSURANCE—LOSS—ARBITRATION.—A clause in a fire insurance policy, requiring the submission to arbitration of a question of law, is void; but a clause which requires arbitration to determine the amount of loss, is valid, because it only involves an agreement to submit to the arbitrators a question of fact.
2. FIRE INSURANCE—POLICE REGULATION.—The fire insurance business is a proper subject for the exercise of the police power of the State.

Appeal from Garland Circuit court; *Scott Wood*, Judge; affirmed.

J. A. Watkins, for appellant.

1. The conditions of the policy as to an appraisement were not complied with and there can be no recovery. 15 L. R. A. (N. S.) 1055, 1061-2-3, 1069; 50 N. E. 805; 73 N. W. 594; 94 *Id.* 458; 76 *Id.* 72; 50 Atl. 282; 61 N. W. 67; 50 N. E. 943; 69 Mo. App. 232; 61 S. W. 787.

2. The clause in the policy as to appraisement is not contrary to Kirby's Digest, § 4382, nor void. 107 N. W. 59. Such stipulations are valid. 5 H. S. Cases, 811; 136 U. S. 242; 50 N. Y. 250; 62 N. W. 422; 28 L. R. A. 405; 5 Pac. 232; 42 Minn. 315; 44 N. W. 252.

3. The complaint is defective because it does not allege that the amount of loss had been determined either by agreement or appraisement. Plaintiff must show *prima facie* an obligation and default. 20 Minn. 370; 28 Ind. App. 418; 44 Cal. 264; 50 Minn. 297; 51 Wis. 605; 67 Fed. 483; 61 L. R. A. 137, 140.

The suit was prematurely brought and the verdict is excessive.

George P. Whittington, for appellees.

1. The clause in the policy is contrary to Kirby's Digest, § 4382. It deprives the insured of the right to trial by jury of a question of fact. It is a valid exercise of the police power of the State. 86 Ark. 115, 121-5, etc. See also 94 Ark. 599-610.

2. No demand for appraisal was made by appellant. 19 Cyc. 876; 64 Ill. 265; 10 Mont. 368; 25 Pac. 953; 60 Oh. St. 513; 50 L. R. A. 555, etc.

3. The verdict is sustained by the evidence and is not excessive.

HART, J. S. J. and M. A. Davis sued the Firemen's Insurance Company of Newark, New Jersey, to recover on a policy of fire insurance. On the 20th day of August, 1914, the defendant issued a policy of fire insurance to the plaintiffs, insuring their piano situated in a certain dwelling in the city of Hot Springs, Arkansas, against loss by fire in the sum of \$400 for the period of one year. On the 18th day of March, 1915, the building in which the piano was situated was destroyed by fire and the piano was greatly damaged by the fire.

The defense of the company was that the plaintiffs had failed to comply with certain provisions of the policy, as follows: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment, or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy, shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy."

"* * * No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within two years next after the fire."

The only issue of fact raised by the pleadings in this case was as to the amount of the loss suffered by the plaintiffs. It was the contention of the defendant that it was not liable because the plaintiffs had not complied with the conditions of the policy in regard to arbitration under the clause of the policy above stated and referred to.

It is contended by counsel for the defendant that the clause in the policy in regard to appraisalment is a condition precedent to plaintiff's right of recovery.

On the other hand, it is the contention of counsel for the plaintiffs that this clause of the policy is contrary to section 4382 of Kirby's Digest and is therefore void. The section is as follows: "No policy of insurance shall contain any condition, provision or agreement which shall directly or indirectly deprive the insured or beneficiary of the right to trial by jury on any question of fact arising under such policy, and all such provisions, conditions or agreements shall be void."

(1) It has been held that a general covenant in a fire insurance policy to arbitrate all matters in dispute is invalid as ousting the courts of their jurisdiction, but that such a clause is a reasonable method of estimating and ascertaining the amount of loss or damage in case of disagreement as to such loss or damage and that such a clause may be made a condition precedent to the commencement of a suit upon the policy. See the case note to 15 L. R. A. (N. S.) 1055. The effect of the holding of the courts in this regard is that a clause which requires an arbitration to submit to the arbitrators a question of law is void because it ousts the courts of their jurisdiction; but that a clause which requires arbitration to determine the amount of loss is not invalid because it only involves an agreement to submit a question of fact. It would seem that the members of the Legislature had this principle of law in view when the act under consideration was passed and that the object of the statute was to prevent insurance companies from inserting conditions like the one in question in their policies. In other

words, they recognized that a failure to agree as to the amount of loss or damage raised an issue of fact and that the company might insert in its policies a clause providing for an appraisal in case of disagreement as to such an amount and make this a condition precedent to the insured's rights of action on the policy. The statute in question was enacted to prevent insurance companies from doing this and to enable policy holders to go before a jury on questions of fact as well as questions of law.

(2) It is not contended that insurance companies are not subject to police regulations. It is too well settled to require a citation of authority that the business of fire insurance, as it is carried on in this State by corporations licensed and regulated by the State, is a proper subject for the exercise of the police power of the State.

It is also contended that the testimony does not warrant the verdict of the jury. The jury returned a verdict for \$400, and it is true, according to the testimony of the witnesses for the insurance company, the piano was not worth that amount before it was injured by fire and that it could have been repaired for a sum not exceeding \$55, but this testimony is contradicted by the evidence adduced in favor of the plaintiffs.

According to the testimony of the plaintiffs, the piano cost \$550, and there was a piano player attached to it worth \$250. The piano had been in the possession of the plaintiffs five or six years, but it had been used very little and had been well taken care of.

A piano dealer, who had been in the business for many years and who was also an expert piano tuner, testified that he was familiar with the mechanism and construction of pianos. The piano was carried to his place of business after it was injured by fire and he examined it and testified that the piano was of no practical value since its injury by the fire. He gave in detail his reasons therefor, and described minutely the condition of the piano when it was brought to his place of business after the fire. According to the testimony of the plaintiffs the piano was worth more than \$400 at the time it was in-

jured by the fire. This evidence, if believed by the jury, was sufficient to warrant a verdict in favor of the plaintiffs. The jury so found, and under the well settled rules of this court its verdict will not be disturbed on appeal.

The judgment will therefore be affirmed.

LEE v. HELENA, PARKIN & NORTHERN RAILWAY COMPANY.

Opinion delivered October 29, 1917.

RAILROADS—INJURY TO TRESPASSER ON TRAIN.—A railway does not owe to a trespasser on its train the highest degree of care to avoid injuring him.

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

J. C. Brookfield, for appellant.

1. Plaintiff was a passenger, and entitled to the same degree of care. He was an employee of the Lansing Wheelbarrow Company. 98 Ark. 514; 56 *Id.* 594; 79 Fed. 561.

2. Proof of injury makes a *prima facie* case of negligence, and the presumption was not overcome. 83 Ark. 217; 88 *Id.* 12; 87 *Id.* 308.

3. The facts should have been submitted to a jury upon an instruction of discovered peril. Kirby's Digest, § 6607; Kirby & Castle's Digest, § 8131; 56 Ark. L. Rep. 67; 88 *Id.* 490; 102 *Id.* 419.

Appellee, pro se.

Plaintiff was a mere trespasser. This was a timber road and did not carry passengers for hire. There was no evidence of what caused the wreck and no negligence was proven. 45 Ark. 246. See also 94 Ark. 566; 90 *Id.* 278; 107 *Id.* 93; 103 *Id.* 226; 101 *Id.* 532.

2. There is no evidence to support the theory of discovered peril. 107 Ark. 431.

HUMPHREYS, J. George Lee, appellant, brought suit against the Helena, Parkin & Northern Railway Company, appellee, in the Cross County Circuit Court to recover damages on account of personal injuries received by him when thrown to the track from a wrecked car in a moving log train being operated by appellee from Parkin to Neeley's Lake in said county. The material allegation in the complaint is that the track gave way under the train through the carelessness and negligence of appellee, thereby causing the wreck of the car upon which appellant was riding as a passenger.

Appellee denied that appellant was a passenger on its train or that the injury was the result of its carelessness or negligence.

The undisputed evidence disclosed that the train in question was not equipped to carry passengers for hire; that it was engaged exclusively in hauling freight; that its employees and those of the Lansing Wheelbarrow Company, for whom it hauled timbers, were permitted to ride in the cab to and from their work; that appellant was working for Captain Sisk, who told him that he was a foreman for the Lansing people; that Captain Sisk told him to ride to his work on the morning of April 27, 1916, on the train in question, so when it passed his house running about five miles an hour, he boarded the front car and rode there from a quarter to three-quarters of a mile when the wreck occurred, from which the injury resulted; that the train was being backed and the front end car, upon which appellant was riding, was the twelfth car from the engine; that while so riding, the brakeman boarded the same car but soon thereafter went forward and seated himself on the rear end of the coal tank for the purpose of sanding the track; that two of the employees of the Lansing Wheelbarrow Company saw appellant when he boarded the moving train; that when the wreck occurred, the engineer exclaimed that Bob Dixon, his brakeman, had been injured and directed the men to go back and get him; that it was against the rule of the company for any one to ride on the log cars except the

employees of the two companies aforesaid, who were permitted to ride in the cab; but that the employees of said companies were frequently seen by appellant riding on the cars; that there appeared on many, if not all the cars, a notice to keep off.

There are other facts and circumstances in the case not necessary to detail in passing upon the points argued by appellant in his brief. It may be well to state that no evidence was adduced tending to show any negligence on the part of appellee in the operation of its train or that any defects existed in the track or cars.

A demurrer to the sufficiency of the evidence was sustained by the court, and an instructed verdict was returned in favor of appellee, upon which judgment was rendered dismissing the complaint. An appeal has been prosecuted to this court.

Appellant contends, first, that he was a passenger by permit when injured and entitled to the same degree of care as a passenger for hire; second, that proof of the injury established a *prima facie* case of negligence against appellee; third, that he is entitled to recover under the doctrine of discovered peril.

Appellant insists that he was entitled to ride the train by virtue of authority obtained from his foreman, Captain Sisk. It nowhere appears in the evidence that Captain Sisk had any authority to direct appellant or any one else to ride on the train. He was not an employee of appellee. If an employee of the Lansing Wheelbarrow Company, it was only established by hearsay evidence. No one was permitted to ride except employees of appellee and the Lansing Wheelbarrow Company. We do not think appellant sufficiently connected himself with either company to claim the right of a passenger; in other words, the undisputed evidence clearly places him in the category of trespassers.

Not being a passenger, it follows that appellee did not owe appellant the highest degree of care consistent with the practical operation of the train. In the recent case of *St. Louis Southwestern Railway Company v. Mc-*

Laughlin, 129 Ark. 377, in passing upon the duty which a railroad company owed a trespasser, this court said: “* * * And the servants of the company owed him no duty, save the exercise of ordinary care to avoid injuring him after discovering his perilous situation.” The same rule was announced in the case of *St. Louis S. W. Ry. Co. v. Bryant*, 81 Ark. 368. In the instant case, the evidence does not show that the servants of appellee failed to exercise ordinary care in the operation of the train after discovering appellant on the car. On the contrary, the train was being operated at a low rate of speed. No one who testified knew what caused the wreck. It seems to have been an accident pure and simple. Appellant assumed the risks incident to the ordinary operation of the train.

No error appearing, the judgment is affirmed.

TYLER, ADMINISTRATRIX, v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Opinion delivered October 29, 1917.

RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE—FAILURE TO SOUND WARNING.—A railway company will not be liable for the killing of a section hand, who was struck by a moving train, although it did not sound any warning of its approach, where all of the section hands with whom deceased was working, saw the approaching train, and the evidence showed that deceased also saw it, but neglected to step off the track.

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

D. D. Glover, for appellant.

1. Appellants were guilty of negligence in failing to whistle at the whistling post, and in failing to properly warn deceased of the approach of the train. It was error to take the case from the jury. If there was contributory negligence it was a question for the jury. 99 Ark. 377; 81 *Id.* 591; 82 *Id.* 640; 90 *Id.* 223; 98 *Id.* 227; 95 *Id.* 291;

91 *Id.* 337; 88 *Id.* 548; 79 *Id.* 53; 78 *Id.* 100; 89 *Id.* 522; 92 *Id.* 502; 95 *Id.* 560; 70 *Id.* 100; 61 *Id.* 341.

Under the law and testimony this was a case for a jury. The foreman failed in his duty to properly warn and the engineer failed to blow his whistle. He was seen in a position of danger and negligence was shown. 2 Bailey on Personal Injury, 1476; 61 Ark. 341; 118 Ia. 387; 1 Bailey, Pers. Injury, 780, 798, 840.

It is negligence *per se* to violate a rule of the company. Appellants were liable under the State and Federal laws. 98 Ark. 240, 257; 38 L. R. A. (N. S.) 56.

E. B. Kinsworthy, W. R. Donham and W. G. Riddick, for appellees.

1. Appellant failed to establish a cause of action. Roberts, Injuries to Interstate Employees, § 36. The burden was on appellant to prove negligence. *Railway Co. v. Steel*, ms. op., July 9, 1917. The evidence fails to show any negligence on part of appellees. 106 Ark. 31; 107 *Id.* 202; 175 S. W. 518.

2. The deceased assumed the risk. 107 Ark. 202; 106 *Id.* 31; 228 Fed. 322; 3 Labatt, Master & Servant, § 1173, note 1 B and 1 C.

3. The court properly directed a verdict. There was no liability under the State or Federal law.

HUMPHREYS, J. Appellant, administratrix of the estate of J. E. Tyler, deceased, instituted this suit in the circuit court of Hot Spring County for the benefit of herself, as widow, and his two children, as heirs, against appellees, to recover damages on account of the alleged negligent killing of J. E. Tyler, deceased, on the 11th day of October, 1916, about 1,224 feet south of the Twenty-sixth street railroad crossing in Little Rock, Arkansas. The negligence charged and insisted upon for reversal consisted, first, in the alleged failure of appellee to whistle at the whistling post immediately north of where deceased was killed; second, in failing to properly warn him of the approach of the train.

Appellee denied both allegations of negligence and invoked the Federal Employers' Liability Act in order to place the burden of proving the alleged negligence upon appellant; and, by way of further defense, pleaded both contributory negligence and assumed risk on the part of deceased.

The cause was heard upon the pleadings and evidence adduced. At the conclusion of the evidence, a verdict was instructed for appellee and judgment rendered in accordance therewith, from which an appeal has been prosecuted to this court.

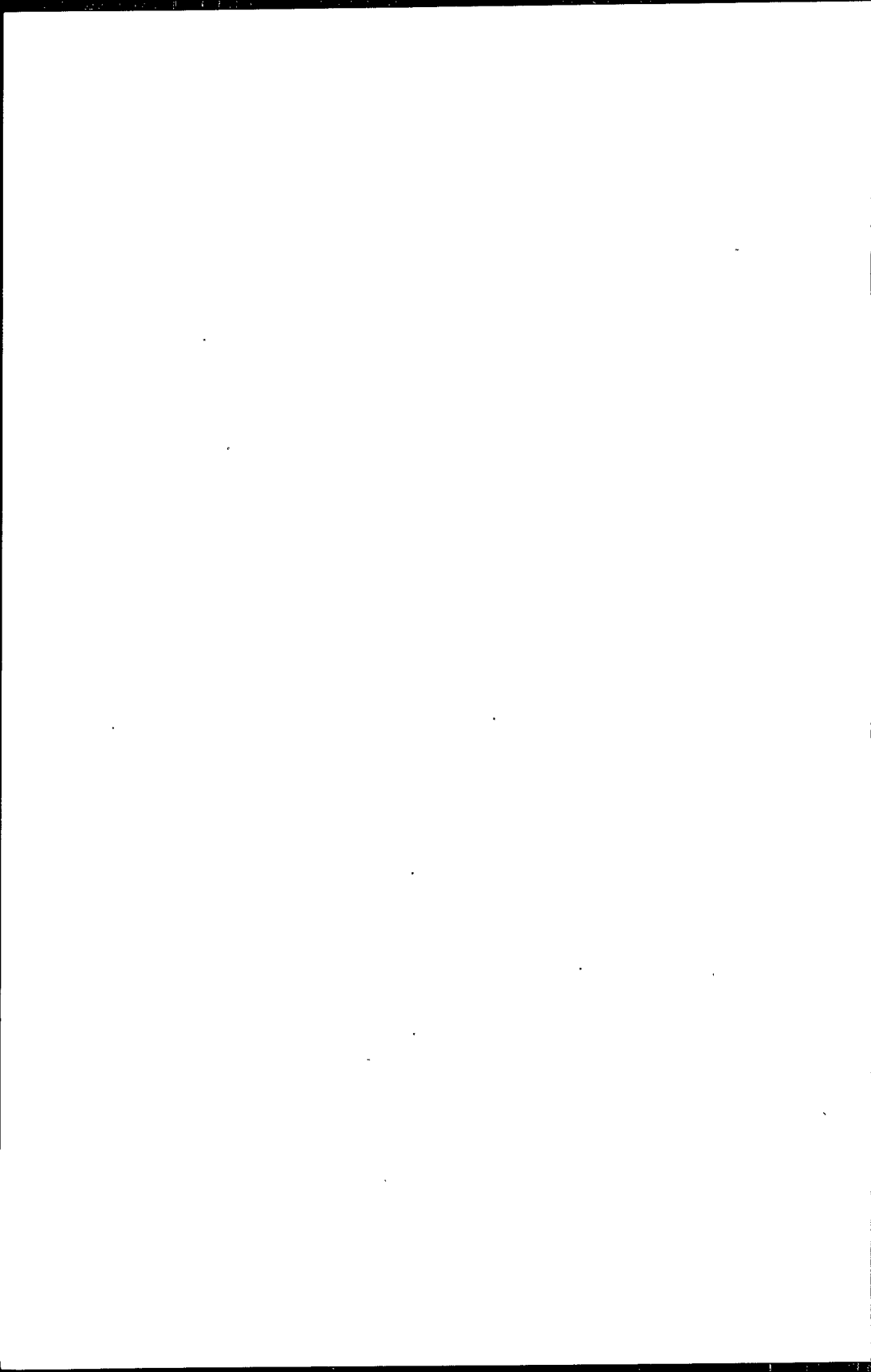
J. E. Tyler was killed at 1:15 o'clock on the 11th day of October, 1916, by appellees' fast mail train No. 7. He was one of a section force consisting of five workmen and the foreman. The train whistled for the Twenty-sixth street crossing, at which time the attention of the foreman and workmen who testified was attracted. The men were working on the north main track and between the north and south main tracks, J. E. Tyler being engaged at the time midway between the two tracks aforesaid, picking gravel on a cross track owned by the Dickinson company. This placed him, when standing erect in the clear of the southbound train, which was approaching at the rate of fifty or sixty miles an hour. The foreman was standing about five feet from Tyler when the train reached the Twenty-sixth street crossing and he gave warning to him by saying, "Watch him, boys," and in a louder tone warned the other men who were working over a space of about thirty feet. The other men understood the meaning of the words, and either straightened up or moved out of the way. It was not known whether Tyler understood the expression used by the foreman to be a warning. It was his first day's work for this particular foreman, but he had worked as a section hand before. At that particular time Tyler, who was facing the approaching train, raised up and looked at it. The train was then 1,224 feet from him. The foreman started away but discovered that Tyler had returned to his work, and in a firm voice said, "Come out of there." The foreman then

went to the north track. When Tyler was next seen he was crossing the south track in front of the moving train. All agreed that the approaching train was only 212 feet from him when he started across the south track. He was struck by the pilot beam on the east side of the south track and killed. The facts as thus far stated are undisputed. There was material conflict in the evidence as to whether the whistle was blown as the train approached the whistling post a short distance north of where the killing occurred. The evidence is conflicting in other particulars, but it is unnecessary to a determination of this question now before us to set out or discuss the conflicting evidence. An instructed verdict can not be sustained unless the undisputed evidence warranted the trial court in saying, as a matter of law, the injury and death resulted directly from the negligence of the deceased. If the undisputed evidence revealed the fact that the negligence of deceased was the proximate cause of his injury and death, it is immaterial whether appellees were negligent in failing to blow the whistle, or in failing to notify him more definitely, through the foreman, of the approach of the train. The theory upon which appellant contends for reversal is, that deceased had a right to concentrate his mind upon his duties, and to rely for protection upon proper warnings from his foreman of approaching danger, and upon danger signals provided by law and the rules of the company. This theory in law is sound, but applicable only when the injured servant is unaware of the approaching danger. If aware of the danger, notice by word of mouth or signal could avail him nothing. This court has said, quoting the syllabus, "The railroad company is not liable for the accidental killing of a person upon its track because those in charge of the train did not give signals to apprise deceased of the approach of the train if he knew that the train was approaching." *St. Louis & S. F. Rd. Co. v. Ferrell*, 84 Ark. 270. The same rule would apply in case a foreman failed to correctly or distinctly notify a section hand of the approach of a train, if the servant knew the train was coming.

Then the whole question here is dependent upon whether the deceased saw the train coming at the Twenty-sixth street crossing. His co-laborers heard the whistle and saw the approaching train even before it reached the Twenty-sixth street crossing, and easily found a place of safety. Tyler quit work and looked at the approaching train. He was of mature age and was an experienced section hand. It is true he was standing further south in the curve than the other men, but the distance between them was not very great. All were working within a thirty-foot space. The foreman was standing only five feet from him and heard and saw the approaching train. A discussion arose amongst the men as to what train was coming. No contention was made that Tyler's sense of sight or hearing was impaired. It was not shown that his view of the train was obstructed, or that it was more difficult for him than the other men to see and hear it. The only natural conclusion from the undisputed facts is that after hearing and seeing the train, Tyler concluded he could strike a few more licks and then avoid injury. The court correctly held that, as a matter of law, Tyler was guilty of contributory negligence under the undisputed facts in the case, and committed no error in instructing the verdict.

Under this view of the case, it is wholly immaterial whether the facts bring the case within the Federal employers' liability act, for no liability exists either under that act or the State law.

The judgment is affirmed.



APPENDIX.

I.

ARKANSAS SUPREME COURT. RULES PROMULGATED JUNE 18, 1917, EFFECTIVE JULY 10, 1917.

For the purpose of making effective the provisions of an act entitled, "An Act to Amend Section 444 of Kirby's Digest of 1904; to Repeal Laws in Conflict Therewith, and for other purposes," the following rules and regulations are promulgated:

I.

A board of examiners is hereby constituted for each judicial circuit in the State, to consist of three members each, who shall serve for the term of one, two and three years, respectively, in the order in which they are named in the list of examiners hereto attached. The person first named shall be ex-officio chairman of his board, and shall serve as such until the last Monday in June, 1918. The member of the board whose name appears in the second place shall serve until the last Monday in June, 1919, and shall be the chairman of the board for the year ending at that time. The member whose name appears in the third place shall serve until the last Monday in June, 1920, and shall be the chairman of the board for the year ending at that time. Appointments will be made annually by the Supreme Court to fill the vacancies which will occur in said boards each year, and each of the persons so appointed shall serve for the period of three years and until his successor is appointed and qualifies, and shall be the chairman of the board during the third year of his service. Any vacancy occurring from a cause other than expiration of the term of office shall be filled by the Supreme Court when such vacancy occurs, and the person so appointed shall serve the remainder of the term, with the same duties he would have had had he been appointed in the first instance for a full term.

II.

The said boards of examiners shall meet semi-annually on the first Monday in January and the last Monday of June of each year at the county seat of the counties in which the chairman of the respective boards reside, for the purpose of examining applicants for license to practice law in this State. *Provided*, said boards may appoint some other place for their meeting.

III.

In addition to the district boards here provided for, there is hereby constituted a central board, which shall consist of the six members named in the list of examiners hereto attached. The first two named

shall serve for the period of one year; the second two named shall serve for the period of two years; and the third two named shall serve for the period of three years; and vacancies shall be filled as in the case of district boards. *Provided*, said central board shall elect its own chairman, and a secretary. *Provided, further*, said central board shall serve as the examining committee for the Sixth Circuit. Said central board shall meet semi-annually on the first Monday in January and the last Monday of June in each year, at the State Capitol in Little Rock.

IV.

It is hereby made the duty of the central board to prepare, for its own use, and for the use of all other boards, a list of questions to be used in the examination of all applicants for license to practice law, and said boards shall use these questions and no other. Each applicant shall furnish at his own expense such stationery as his examining committee may require.

V.

Applicants shall be examined in the district in which they reside. *Provided*, any applicant may take the examination before the central board at Little Rock.

VI.

All examinations shall be in writing, and shall cover the following subjects: Bailments, Equity, Torts, Negotiable Instruments, Suretyship, Real Property, Partnership, Contracts, Agency, Constitutional Law, Wills, Domestic Relations, Appeal and Error, Criminal Law, Pleadings, Evidence, Corporations, and Personal Property. Applicants must make an average in all subjects of 75 per cent. in order to pass. All examination papers shall be graded by a member of the examining board, but the average grade shall be ascertained by the board and certified to by the chairman thereof. Said board shall immediately examine said papers, and shall prepare and transmit to the clerk of the Supreme Court a certificate, giving the name and address of any applicant who shall have successfully passed said examination, and in this certificate they shall also certify that they have examined into the character of the applicant and have found him to be of good moral character before making any recommendation for the enrollment of such applicant. Upon receipt by the clerk of the Supreme Court of the reports of the different boards, showing the applicants examined by the boards, the clerk of the Supreme Court shall notify each successful applicant that he has been recommended for enrollment, and shall send to such person to be enrolled a blank oath of office, which shall be sworn to by the applicant before an officer author-

ized by law to administer official oaths, and returned to the clerk of the Supreme Court, and said applicant shall thereupon be enrolled as an attorney-at-law, with all the privileges incident to such enrollment, and a certificate of such enrollment shall be furnished by the clerk of the Supreme Court to each person so enrolled, upon the payment of the fee provided therefor by law.

VII.

Attorneys of good moral character, three years at the bar of the highest appellate court of another State, where the requirements for admission to the bar are substantially equivalent to the requirements of this State, and who have removed to this State and intend to practice law here, may be recommended by any of the examining boards at any regular meeting, for admission without examination, upon showing the foregoing facts to the satisfaction of any of such boards.

VIII.

For the period of two years from and after July 1, 1917, members of the bars of the several inferior courts of record in this State, who have not been admitted to the bar of the Supreme Court, may be admitted upon recommendation of the Central Board of Examiners, after the examination of such applicant by said board, which examination may be oral, and held at Little Rock on the last Saturday in each month except the months of July and August.

IX.

These rules shall take effect and be in force from and after July 10, 1917.

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OPINIONS NOT REPORTED.

Stell v. Stell; appeal from Conway Chancery Court; Jordan Sellers, Chancellor; affirmed June 25, 1917, *per* Smith, J.

The Ingle System Co. v. Hunt; appeal from Cleburne Circuit Court; John I. Worthington, Judge; affirmed July 2, 1917, *per* McCulloch, C. J.

Morton v. Linton & Plant; appeal from White Circuit Court; J. M. Jackson, Judge; affirmed July 9, 1917, *per* Humphreys, J.

Wolf & Hughes v. State; appeal from Pope Circuit Court; A. B. Priddy, Judge; affirmed July 9, 1917, *per* Humphreys, J.

Houston v. State; appeal from Craighead Circuit Court; W. J. Driver, Judge; affirmed September 24, 1917, *per* McCulloch, C. J.

Mangrum *v.* State; appeal from Craighead Circuit Court, Lake City District; W. J. Driver, Judge; affirmed September 24, 1917, *per* Wood, J.

Thompson *v.* Sides; appeal from Clay Circuit Court, Eastern District; W. J. Driver, Judge; affirmed October 1, 1917, *per* Humphreys, J.

Jackson *v.* State; appeal from Jefferson Circuit Court; W. B. Sorrells, Judge; affirmed October 8, 1917, *per* Wood, J.

Burk Bros. *v.* McNerry; appeal from Sebastian Circuit Court, Fort Smith District; W. A. Falconer, Chancellor; reversed October 8, 1917, *per* Smith, J.

Rowe *v.* Zimmerman; appeal from Lonoke Circuit Court; Thomas C. Trimble, Judge; reversed October 15, 1917, *per* Smith, J.

Sims *v.* State; appeal from Jefferson Circuit Court; W. B. Sorrells, Judge; affirmed October 15, 1917, *per* Humphreys, J.

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Tom Spain and Julia Spain *v.* City of Paragould; Greene Chancery Court; C. D. Frierson, Chancellor; appeal dismissed July 9, 1917, for failure to lodge transcript in Supreme Court within the time limited by the statute; *per curiam*.

Missouri Pacific Railway Company, T. M. Neal and Lewis Ragsdale *v.* W. J. Chambers, Sheriff, and Hays & Ward; Pope Circuit Court; A. B. Priddy, Judge; petition for *certiorari* and for restraining order, heard and overruled September 17, 1917; *per curiam*.

W. J. Phillips *v.* The State of Arkansas; Jefferson Circuit Court; W. B. Sorrells, Judge; appeal dismissed on appellee's motion for failure to perfect appeal within the time limited by statute, September 24, 1917; *per curiam*.

George Eickhoff *v.* City of Argenta; Pulaski Chancery Court; John E. Martineau, Chancellor; appeal dismissed on appellant's motion October 1, 1917, the controversy having been compromised and settled; *per curiam*.

L. M. Warmack and Edward S. Ellis *v.* M. B. Morgan; Little River Chancery Court; James D. Shaver, Chancellor; appeal dismissed on appellants' motion October 8, 1917, the controversy having been compromised and settled; *per curiam*.

O. H. Sumpter, administrator of the estate of Zada Starbuck, Deceased, *v.* Beall Sisters; Garland Circuit Court; Scott Wood, Judge; settled and appeal dismissed on appellant's motion October 8, 1917; *per curiam*.

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