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IN THE

Supreme Court of Arkansas

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JAMES V. JOHNSON
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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

DENTON *v.* STATE.

Opinion delivered October 22, 1917.

CRIMINAL LAW—DEFENDANT AS WITNESS—INSTRUCTION TO JURY.—In a criminal prosecution the defendant testified in his own behalf; the trial court instructed the jury on that particular point, as follows: "* * * His credibility and the weight to be given to his testimony are matters exclusively for the jury. In weighing the testimony of the defendant in this case you have the right to take into consideration his manner of testifying, the reasonableness or unreasonableness of his account of the transaction, and his interest in the result of your verdict, as affecting his credibility. You are not required to blindly receive his testimony as true, but are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction." *Held* the giving of this instruction did not constitute error.

Appeal from Randolph Circuit Court; *J. B. Baker,* Judge; affirmed.

S. A. D. Eaton, for appellant.

1. It was error to give instruction No. 3. It charges the jury with regard to matters of fact. The case of 58 Ark. 353 is not the law, and should be overruled. 46 Ark. 151; 37 *Id.* 592; 45 *Id.* 173; 49 *Id.* 448; 43 *Id.* 289; 55 *Id.* 244; 53 *Id.* 381; 58 *Id.* 108; 16 S. W. 483; 183 *Id.* 1059, 1067; 191 *Id.* 1002; 192 *Id.* 469; 6 Okla. Cr. 356; 93 N. E. 790; 99 *Id.* 702; 71 *Id.* 405; 107 *Id.* 179; 2 Thompson on

Trials, 2421; 2 Bishop, New Cr. Law, 1182; 154 Pac. 1008; 100 N. W. 305; 62 Miss. 705; 59 So. 8; 48 Ga. 192; 49 Am. Rep. 185; 106 Pac. 556; 64 So. 1007; 19 S. W. 915, and many others.

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

1. Instruction No. 3 is an exact copy of one approved by this court. 58 Ark. 353; 61 *Id.* 88; 62 *Id.* 543; 78 *Id.* 36. The weight of authority supports the ruling by our court. 62 Ark. 543; 60 Mich. 123; 16 Nev. 310; 34 Cal. 191; 60 *Id.* 142; 99 N. Y. 422; 67 Cal. 378; 110 Ill. 11; 101 *Id.* 568; 71 Ia. 386; 13 Pac. 8; Thompson on Trials, § 2445.

WOOD, J. Appellant was convicted on an indictment charging him with the offense of selling intoxicating liquor, sentenced to one year imprisonment in the penitentiary, and this appeal is from that judgment.

Among others the court gave the following instruction:

"3. You are instructed that under the law the defendant has the right to testify in his own behalf; but his credibility and the weight to be given to his testimony are matters exclusively for the jury. In weighing the testimony of the defendant in this case, you have the right to take into consideration his manner of testifying, the reasonableness or unreasonableness of his account of the transaction, and his interest in the result of your verdict, as affecting his credibility. You are not required to blindly receive his testimony as true, but are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction."

The only question presented on this appeal is whether or not the court erred in giving the above instruction.

In *Vaughan* v. *State,* 58 Ark. 353, Vaughan had appealed from a judgment convicting him of murder in the first degree, and one of his assignments of error was that the court erred in giving an instruction identical with the instruction above set out. The court also, in the same case, in an instruction following the above, told the jury

that, "nowhere in these instructions does the court mean that you are to disregard the testimony given by any witness in this case. That is a matter solely with the jury, and it is not within the province of the court to tell the jury what weight you should give to the testimony of any witness." There was also the usual general charge as to the credibility of witnesses.

In refusing to reverse for the alleged error in giving the above instruction, the court said: "The instruction, when standing alone, can not be reasonably and fairly construed as tending to discredit the defendant's testimony before the jury. But, when taken in connection with the one following it, every possible or imaginary objection is removed. The law, as announced in this instruction, has been approved by the Supreme Courts of other States." And many authorities are cited.

The Vaughan case was carefully considered by us and the authorities for and against the ruling in giving the above instruction in existence at that time, so far as we had them before us, were thoroughly examined and we deliberately reached the conclusion that there was no error in granting the instruction, in connection with the other instructions on the question of the credibility of witnesses in that case. We said: "It is proper for the jury, in considering the weight to be given to the testimony of the defendant, to consider the interest he has in the result of the suit. Nor should they receive it blindly as true, but consider whether it is true and made in good faith," etc.

We added this cautionary suggestion, however, for the benefit of trial courts in the future: "Because of the difficulty, however, in so framing an instruction, where the defendant's name is mentioned at all, as not to give his testimony undue prominence, either for or against him, it would be better for trial judges to let him pass, with all the other witnesses, under the purview of a general charge as to the credibility of all the witnesses, leaving to the attorneys in argument to call the attention of the jury to any peculiar facts applicable to any particular

witness." Trial judges, however, have not always followed the suggestion there made as to the better practice in regard to mentioning specifically the name of the defendant, and consequently the instruction in the above form has reached us in several cases since the Vaughan case was decided. For instance, *Jones* v. *State,* 61 Ark. 88, and *Hamilton* v. *State,* 62 Ark. 543, both convictions for murder in the first degree, and *Weatherford* v. *State,* 78 Ark. 36, a conviction of murder in the second degree. In these cases this court adhered to the doctrine announced in *Vaughan* v. *State, supra,* and refused to reverse for alleged error in granting instructions identical with the one above quoted.

In *Hamilton* v. *State, supra,* Judge RIDDICK, speaking for the court, answering the argument of appellant's counsel that an instruction in the above form was prejudicial to the appellant because of the fact that it singled him out from the rest of the witnesses, said: "We think that this contention is not tenable. In the first place, a defendant on trial is already singled out by the indictment, and the fact that he is on trial and directly interested in the result. His position in the trial has already singled him out, and for this very reason it may be necessary in some cases to give an instruction on this point." Then after illustrating, the learned justice continues: "The defendant has the right to testify, and the jury should give his testimony the same impartial consideration that they accord to the testimony of other witnesses. They should not arbitrarily disregard what he testifies, simply because he is the defendant, nor, on the other hand, are they required blindly to receive a fact as true because he says it is true; but they are to consider his testimony in connection with the other facts in proof, in order to determine whether his statements are true and made in good faith, or made only to avoid conviction. The jury are the exclusive judges of the weight of such testimony. In considering the degree of credit to be given it, they may take into consideration his appearance and manner while testifying, the reasonableness or unreason-

ableness of his statements, and his interest in the result of the verdict. After a due consideration of his testimony, in connection with the other evidence in the case, they should give it such weight as they may deem it entitled to receive, their sole object being to ascertain the truth. We do not see that an instruction on this point would prejudice either the State or the defendant, but, as jurors are not always highly intelligent, it might in some cases avoid confusion in their minds, and tend to promote the ends of justice."

Learned counsel for the appellant strongly insists that the court is in error in its former opinions and that these should be overruled and the instruction condemned as reversible error because in conflict with that clause of the Constitution which provides: "Judges shall not charge juries with regard to matters of fact, but shall declare the law." Counsel manifests much zeal on behalf of his client in earnestly urging the court to reconsider the question long since put at rest by our numerous former opinions, and to declare the opposite view from that expressed in those cases to be the law in this. Counsel also has displayed considerable industry, when judged by the array of authorities which he has cited in his brief as supporting his contention; he has presented nothing new, however.

We are aware that there is a contrariety of view as to the correctness and propriety of the above instruction, as evidenced by decisions in various American courts of last resort, but, having already carefully gone over the subject in several cases and deliberately decided the matter contrary to the contention of counsel, we must respectfully decline to enter further upon a review of these authorities and adhere to our former decisions as being consonant with the better reason, and also, we believe, with the weight of authority upon the subject.

In at least one of the cases strongly relied upon by counsel for appellant, the opinion was by a divided court, the majority opinion condemning the above instruction as reversible error, being concurred in by three of the five

justices taking part in the decision of the case. *State* v. *Evans,* 183 S. W. (Mo.) 1059. One of the judges, dissenting from the view of the majority in condemning the instruction in the above form as reversible error, said: "Such an instruction is comparatively innocuous, since it but tells the jury that they may do the identical thing which they would do without being told." Thus repeating, in part, almost the identical language used by Judge RIDDICK in delivering the opinion of the court in *Hamilton* v. *State, supra,* holding that the giving of such instruction was not reversible error. The unanswerable reasoning in that case of one of the greatest judges that ever adorned this bench should settle forever the question in this State.

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

COOPER v. KELLY.

Opinion delivered October 22, 1917.

1. TRIAL—PERSONAL INJURY ACTION—EXAMINATION OF VENIREMEN ON VOIR DIRE—CONNECTION WITH INSURANCE COMPANY.—It is within the province of an atttorney representing a plaintiff to question veniremen concerning their relation to any casualty company, whom the attorney might know or might honestly believe to have insured the defendant against loss from the injury which the plaintiff had sustained at the hands of the defendant.
2. TRIAL—EXAMINATION OF VENIREMEN.—Counsel will be permitted to ask veniremen questions intended to elicit bias or prejudice, which would influence their verdict one way or another, and the discretion of the trial court in permitting such questions will not be disturbed on appeal unless the court has manifestly abused its discretion.
3. NEGLIGENCE—PERSONAL INJURIES—DUTY TO USE ORDINARY CARE.—Plaintiff was injured by being struck by a team driven by an employee of defendant. *Held,* instructions were proper which told the jury that it was the duty of the driver to use ordinary care to avoid injuring plaintiff, and that it was also his duty to use ordinary care to observe persons crossing the street, and to use such care to avoid injuring them.

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

Buzbee, Pugh & Harrison, for appellant; *E. V. Mitchell,* of counsel.

1. The court erred in permitting counsel for plaintiff to question the jurors on their *voir dire* in reference to casualty and indemnity companies, and in permitting him to make statements to the effect that such companies insure against damages, etc.; which line of questioning and remarks were improper and prejudicial. 104 Ark. 1; 114 *Id.* 542.

2. The instructions given on plaintiff's theory were erroneous and prejudicial. Nos. 1 and 2 were abstract. 111 Ark. 134; 116 *Id.* 284, 291; 101 *Id.* 537.

3. The court erred in refusing instructions asked by defendants. 96 Ark. 206; 82 *Id.* 499; 97 *Id.* 469. No negligence was proven and the verdict is excessive.

Rector & Sawyer, for appellee.

1. There was no error in permitting the *voir dire* questions to jurors. The cases in 104 Ark. 1 and 114 *Id.* 542 do not apply here. The facts are different. The questions asked were proper and no abuse of discretion by the court was shown.

2. There is no error in the instructions; the verdict is sustained by the evidence and is not excessive. 29 Cyc. 570.

WOOD, J. This suit was instituted by the appellee against appellants to recover damages for personal injuries which she alleged she sustained in January, 1914, while walking across Central avenue, a public highway, in the city of Hot Springs. She alleged that the appellants were doing a livery business under the name of Cooper Brothers in the city of Hot Springs, and were the owners of a vehicle and horses which were being driven along Central avenue by the servant of appellant; that such servant so carelessly and negligently drove and managed the horses that the horses and vehicle struck the appellee, throwing her to the ground and breaking her arm and inflicting other severe injuries, for which she asked damages in the sum of $5,000.

The appellants denied the material allegations of the complaint, and set up the defense of contributory negligence.

When the selection of the jury was begun counsel for appellee called counsel for appellant before the court, out of the hearing of the jury, and announced that he was informed and believed that appellants' counsel represented an indemnifying company which was interested in the result of the suit and wanted to know the name thereof so he could properly examine the jury on *voir dire*. Appellants' counsel refused to give the name. The court refused to compel counsel to disclose the name, but, at appellee's request, announced that it would permit counsel to examine the jurors as to their relationship with indemnifying companies so as to determine the jurors' interest. Whereupon counsel for the appellee, over the objection of the appellants, asked one juror on his *voir dire* whether or not he represented any accident or casualty insurance company, to which question the juror answered, "No." And appellee's counsel asked another juror whether or not he was under any obligation to any accident insurance company or was the agent of any such company. The juror answered, "No." And other jurors were asked, "Do you know of any accident company or any agent of such company that has any influence or control over you in the city of Hot Springs?" to which they answered, "No." And another juror was asked whether he knew that parties in public business were insured against accidents that occurred, and the juror answered, "Yes." Then the juror was asked, "Do you know of any insurance company or casualty company or any agent of such company, in Hot Springs or anywhere else, to whom you are under obligations?" and the juror answered "No," Still another juror was asked, "Do you know any of these accident casualty companies?" and the answer was, "Know all of them, I suppose." Question, "They haven't any hold on you?" Answer, "None that I know of, nobody else."

The rulings of the court in permitting these questions and answers are assigned as error, and to sustain their contention that these rulings are erroneous, counsel for appellants rely upon the cases of *Pekin Stave & Mfg. Co.* v. *Ramey,* 104 Ark. 1, and *Williams* v. *Cantwell,* 114 Ark. 542.

In the first mentioned case, after both parties had announced ready for trial, and while several members of the petit jury were in the box, counsel for the plaintiff asked one of the attorneys for the defendant if he represented an insurance company in the case. The attorney questioned answered that he represented the defendant. The court announced that that was not an answer to the question, and upon the attorney declining to answer further the court stated that he should not appear in the case, whereupon the attorney withdrew from the case. Upon the above facts the court held that the authority of an attorney to appear for a client whom the attorney stated that he represented could not be challenged in the above manner and the attorney denied the right to appear for the client whom he professed to represent.

In the above case the attorney for the plaintiff contended that he propounded the questions to the defendant for the purpose of ascertaining who were the interested parties in order that he might use the information to test the qualification of the jurors on their *voir dire.* In commenting upon this contention, the court said: "If counsel for plaintiff honestly and in good faith thinks that any of the veniremen is in any way connected with a casualty company insuring the defendant against loss for the injury complained of in the case, he can ask the jurors on their *voir dire* relative to this. If, however, his real purpose is to call unnecessarily the attention of the jury to the fact of the insurance, and thereby to prejudice them against the defendant's rights, then this would be clearly an abuse of this privilege, and should be promptly stopped by the trial judge. In case it appears that prejudice to the rights of the defendant does result therefrom, it would call for a new trial or a reversal of the judgment

on appeal. In an action by a servant against his master for damages growing out of a personal injury, it is improper for the jury to take into consideration the fact that the defendant is indemnified against accident to his employees. Evidence of such fact could throw no light upon the issue involved in the case, and would be wholly incompetent. The endeavor, therefore, by any character of practice, to press unnecessarily upon the jury's attention the fact that a defendant is indemnified against loss for the injury which is the subject-matter of the suit could only have for its purpose the arousal of sympathy for the one party or prejudice against the other. Such action or practice is therefore improper, and, if successful in its desired effect, should call for a new trial."

In *Williams* v. *Cantwell, supra,* the attorney for the plaintiff, not in the presence and hearing of any of the veniremen, asked the attorney for the defendant if he was not the attorney for and representing the Home Life and Accident Insurance Company, and upon the attorney for the defendant declining to answer, the attorney for the plaintiff addressed the court, in the presence and hearing of the veniremen, and said: "Your Honor, this gentleman here (indicating the attorney for defendant), in my opinion and information, does not represent the defendant, but represents an insurance company for him, and for the purpose of inquiring from the gentleman, and for that purpose only, as to whether he is representing the insurance company, I am asking, in good faith, who his client is, and I ask you, as you did for me, and as the Supreme Court upheld you in doing, to require him to state who he represents." In questioning the veniremen as to their qualifications as jurors the attorney for plaintiff asked each of them if he was in the employ of the Home Life and Accident Insurance Company, and upon his answering said question in the negative the court permitted the attorney to ask each of them "if they or either of them expected to be employed by the Home Life and Accident Insurance Company, and if they were in the employ of any accident insurance company."

In commenting upon the above facts we said: "It is, of course, true that the trial judge must be clothed with much discretion in determining what questions may be asked veniremen by an attorney or veniremen on their *voir dire* as a basis for challenging them. But that discretion is subject to review, and if it appears that the attorney's real purpose is to call unnecessarily the attention of the jury to the fact that a party to the litigation is insured against liability, such action should be promptly stopped by the trial judge, and, where it appears that prejudice to the rights of the defendant results therefrom, the judgment must be reversed on appeal. * * * It will be observed that the appellee's attorney appears to have known not only that appellant's attorney did represent an insurance company, but to have known the particular company which he represented, and his speech before the court, as well as his questions to the jurors, appears to us to have unnecessarily advised the jurors of the fact that appellant was insured against liability and that he would not be required to pay any verdict which they might render against him. Information as to any juror's connection with any insurance company could have been obtained in a less dramatic manner by asking each of the jurors if he represented or was connected with any casualty company insuring employers against liability, or if he was connected with any insurance company, or any other proper question which might have tended to disclose whether any juror had any bias or prejudice likely to influence his verdict one way or the other."

(1) It will be observed that the facts in the above cases clearly differentiate them from the case in hand. In those cases it was manifest that the conduct of the attorney representing the successful party and the rulings of the court were well calculated to impress on the minds of the jury that the attorney ostensibly appearing for the defendants in the respective cases was not really their attorney but was an attorney for an indemnity insurance company that had insured the defendants against any loss that they might sustain on account of such accidents as

were therein complained of, and that the defense was really being made for the benefit of such indemnity company or companies. In both of those cases it is expressly recognized that it is within the province of an attorney representing a plaintiff to question veniremen concerning their relation to any casualty company whom the attorney might know or might honestly believe to have insured the defendant against loss for the injury which the plaintiff had sustained at the hands of the defendant.

(2) Trial courts must necessarily have a wide discretion in permitting questions that are intended to test the competency of a venireman from which the jury must be empaneled to try the cause. Questions that are intended to elicit any possible bias or prejudice that the veniremen might have "likely to influence his verdict one way or the other" are always proper, and the rulings of the trial court in permitting such questions will never be disturbed unless there is a manifest abuse of its discretion. The questions propounded to the veniremen in the instant case in and of themselves were not objectionable, and the record does not disclose anything in the conduct of the attorney in the manner of propounding the questions, or other conduct on his part aside from this, that was calculated to cause the jury to believe that the defense was actually being conducted in the interest of some casualty insurance company instead of those who were named and who appeared as defendants at the trial.

Had nothing more occurred in the above cases, relied upon by the appellants, than the mere asking of the questions therein propounded, doubtless this court would not have condemned as erroneous and prejudicial the rulings of the trial court in permitting such questions. Doubtless counsel for appellees in the instant case were permitted a broad scope of inquiry concerning the veniremen's connection with any casualty insurance company in Hot Springs or elsewhere by reason of the conduct of the appellant's counsel in refusing to discover whether or not he represented any casualty company, and, if so, in refusing to divulge the name of such company. Had such informa-

tion been given to appellee's counsel, we may assume that the court would have restricted the inquiry accordingly.

While it was improper, as held in *Pekin Stave & Mfg. Co.* v. *Ramey, supra,* to interrogate counsel in the presence of the veniremen as to whether he represented a casualty company, and upon the attorney giving a negative answer to refuse to permit him to appear for the defendant, nothing of that kind occurred at the trial of this cause. Although a similar question was asked the attorney, which he refused to answer, this did not occur in the presence of the veniremen, and hence their minds could not have been prejudiced thereby.

(3) The court instructed the jury, over the objection of the appellants, as follows:

"1. It was the duty of the driver of the hack to use ordinary care to avoid injuring the plaintiff, and if you believe from the preponderance of the evidence that he failed in this duty and plaintiff was injured by such failure your verdict should be in plaintiff's favor." And told them that, "ordinary care is such care as an ordinarily prudent and careful driver would have used under the circumstances of the case."

"2. It was the duty of the driver to use ordinary care to observe persons crossing the street and to use ordinary care to prevent injury to such persons, and if you believe from a preponderance of the evidence that he did not use such care and the plaintiff was injured as a result of his failure to use such care, then you should find for the plaintiff."

Appellants contend that these instructions were abstract, because they were aside from the issue defined by the pleadings and the evidence.

The issue as to the alleged negligence of the appellants is raised by the allegations in the complaint that the servant of the defendants "so carelessly and negligently drove and managed the horses and vehicle" as to strike the plaintiff and cause the injuries of which she complains and by appellants' answer denying such allegations.

Appellants contend that inasmuch as the uncontradicted proof showed that the driver of the vehicle saw the plaintiff when she ran into the street, the only issue for the jury to pass upon was whether the driver was negligent in handling his team after the plaintiff ran into the street. This may be conceded and still the instructions complained of did not permit the jury to wander "in a vague and boundless region of abstract," as asserted by counsel. On the contrary, the instruction limited the jury to the consideration of the conduct of appellants' hack driver with reference to the direct and proximate result of such conduct as it affected appellee on the occasion when she was crossing the public street, and when he, at the same time and place, was driving appellants' hack upon such street. The allegation, in short, was that appellants' driver on that occasion so negligently drove and managed the horses that he struck and injured the plaintiff. The instruction very correctly told the jury that it was the duty of the driver to use ordinary care to observe persons crossing the street to prevent injury to such persons.

It certainly constituted negligent driving if appellants' hackman failed to exercise ordinary care to observe appellee while she was crossing the street, if by reason of such failure he ran upon and injured her. It would also constitute negligence, even though the hackman exercised ordinary care to discover the appellee, if, after discovering her, he had failed to exercise ordinary care in managing his team and vehicle so as to avoid the injury to her.

The issues of negligence and contributory negligence were submitted to the jury under instructions which declared the law.

Appellants contend that there was no evidence to sustain the verdict. It could serve no useful purpose to set out and discuss in detail the evidence. After carefully examining it, we have reached the conclusion that the issues of negligence and contributory negligence were, under the evidence, questions for the jury, and as the jury

were properly instructed upon these issues, the verdict in favor of the appellee here is conclusive.

Affirmed.

E. A. LANGE MEDICAL COMPANY v. JOHNSON.

Opinion delivered October 22, 1917.

VENDOR AND PURCHASE—CONTRACT FOR SALE OF MEDICAL SUPPLIES TO BE RESOLD.—Contract between appellant and appellee held to constitute a sale of medical supplies to be resold by the appellee, and not to create the relation of principal and agent, and that appellee was liable for a failure to pay appellant for the goods delivered to him.

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

A. L. Barber and *Silas W. Rogers,* for appellant.

1. The contract was unambiguous and the goods were *sold* to Johnson outright. The evidence is conclusive of a sale. 168 S. W. 290; 182 Mo. App. 140; 180 S. W. 21; 163 *Id.* 662; 115 Ark. 166; 124 *Id.* 539; 166 S. W. 162; 126 Ark. 597.

2. The court erred in its instructions to the jury. Cases *supra.*

Troy W. Lewis, for appellees.

1. The jury found that the contract was one of agency, and the evidence supports the verdict. 187 S. W. 653. The contract was ambiguous. 4 Mass. 205.

2. There is no error in the instructions. No objections were made to any of the evidence. There was only a question of fact, and the verdict settles it. 19 Fed. 405; 35 *Id.* 711; 36 *Id.* 657; 23 Ark. 50; 18 S. W. 172; 157 Fed. 656; 90 Ark. 23; 124 U. S. 510; 11 S. W. 518. The verdict is conclusive on appeal. 17 Ark. 478, 385; 19 *Id.* 117; 51 *Id.* 495; 55 *Id.* 31; 89 *Id.* 534, and many others.

H. C. Locklar, for appellee Mitchell adopts the brief of appellees by *Troy W. Lewis.*

SMITH, J. This litigation arose out of a bond executed by appellees to guarantee the performance of the following contract:

"This agreement, made this 22d day of November, A. D. 1913, at De Pere, Wisconsin.

"Witnesseth, that whereas, James C. Johnson of Little Rock, Arkansas, desires to purchase of the A. E. Lange Medical Company of De Pere, Wisconsin, on credit and at salesman's wholesale prices, to sell again on his own account to consumers in the following territory, excepting the incorporated municipalities located therein, Pulaski County, State of Arkansas, its medicines, extracts, spices, soaps, toilet articles, perfumes, stock and poultry preparations and other articles furnished by it, paying his account for such goods in installments as hereafter provided.

"Therefore, he hereby agrees to sell no other articles than those sold him by said company and to have no other business or employment.

"He further agrees to pay said company for all articles purchased under this contract the current wholesale prices of such articles by remitting in cash each week to said company an amount equal to at least the wholesale prices of such goods as sold for cash and collected for by him, in accordance with the provisions of the weekly report blank of said company, and for that purpose as evidence of good faith he shall submit to said company complete itemized weekly reports of his business, provided, however, if he pays this account in full on or before the 15th day of said month he shall be allowed a discount of six per cent. (6%) from current wholesale prices.

"At its option the company shall also sell him on credit a wagon selected from its current catalogue of Lange's wagons and charge same to his account, less any cash payment he may make, at the regular time price quoted in catalogue, for which he agrees to pay within a reasonable time by making special remittance on his account.

"When the sale or purchase of articles under this contract shall be permanently discontinued for any reason or upon notice given by either party it is therefore terminated, and he further agrees to settle in cash within a reasonable time for balance due said company on account.

"The company further agrees to repurchase from him at termination of this contract and at salesman's wholesale prices then current, such of its articles as he has on hand and returned to them by freight prepaid to De Pere, Wisconsin, in as good salable condition as when originally sold him. Unless prevented by strikes, fires, accidents or causes beyond its control, said company agrees to fill and deliver on board cars at De Pere, Wisconsin, his reasonable orders, provided his account is in satisfactory condition, and to charge all articles sold him under this contract to his account at current salesman's wholesale prices, also to notify him promptly of any change in wholesale prices.

"The company further agrees to exchange new goods for all of its articles used to the trial mark only, also such other of its articles as said company may hereafter authorize, in writing to be placed on trial, same to be returned to them in compliance with such written authority, and by freight prepaid to De Pere, Wisconsin.

"The company further agrees to allow credit for all freight charges on its shipments going into the States of Wisconsin, Minnesota, Iowa, Illinois, Indiana, Michigan and Ohio, and to allow credit equal to one-half the freight charges on its shipments going into all other States, unless otherwise specified by said company, provided, that no shipment shall weigh less than one hundred pounds.

"The company also agrees to give salesman credit for all mail orders going from them into the said salesman's territory after first deducting salesman's wholesale price and expenses of delivering.

"Said company further agrees to furnish him free of charge at De Pere, Wisconsin, report blanks, order blanks, advance cards, printed return envelopes for his

use, also to furnish him free of charge after he has ordered goods, our monthly sales letter, selling suggestions and such other booklets and letters as they may issue from time to time as to the best methods of selling to consumers, such goods as purchased by him, but it is expressly agreed that nothing contained in such letters, books or suggestions and advice shall be construed as in any way modifying the terms of this contract.

"This contract is subject to acceptance at the home office of the company and is to continue in force as long as his account and the amount of his purchases remain satisfactory to said company, or until terminated as provided above; provided, however, that said James C. Johnson, or his guarantors, may be released from this contract at any time by paying in cash the balance due said company on account.

"E. A. Lange Medical Company,
"By R. C. French,
"President and Manager.
"James C. Johnson.
"Salesman sign here in ink or indelible pencil."

Pursuant to this contract, goods were shipped to Johnson, which have not been paid for, the amount of which is not questioned.

It was contended by appellant in the trial of the cause in the court below that the contract sued on was one for the sale of goods, while it was contended by appellees that the contract is so ambiguous that its true meaning could not be ascertained except when it is interpreted by the conduct of the parties in the performance of its provisions.

It was shown at the trial that the appellant company had from two hundred to seven hundred representatives throughout the country, and that appellee Johnson was required to make regular reports of the progress of his sales. One of these reports covered cash sales, another report was made on collections, and another of goods sold on credit, while a monthly report was made of the goods

on hand; and that the goods were sold at a price fixed by appellant; and that Johnson made duplicate slips of every sale, one of which was given to the purchaser, and the other was kept by himself for use in making up his reports; and he was allowed to sell his goods only in the rural parts of Pulaski County, another salesman having the exclusive right to sell in the cities of Little Rock and Argenta; and that Johnson was encouraged to sell his goods on credit, and that he did so, and was unable to make collections, and that this failure to collect caused him to fall behind in his accounts. The literature sent out by appellant to Johnson promised him credit for all mail orders received in his territory; but there appears to have been no such orders. Johnson was furnished with a book containing 109 pages of printed matter, consisting principally of price lists. There was stamped on the flyleaf of the book this statement: "This book sold only to Lange's salesmen. The price $5 charged will be credited upon return of this book to us, regardless of its condition, when the salesman discontinues as a Lange's agent." All of this matter was introduced over the objection and exception of appellant. There was some other evidence, but we have stated substantially the evidence which appellees say show the relation between the parties to have been that of principal and agent.

It was shown, and not denied, that appellant was a foreign corporation, and had not complied with the laws of this State permitting such corporations to do business in this State.

The court submitted to the jury the question whether the contract between appellant and Johnson was one creating the relation of vendor and vendee, or that of principal and agent.

The jury returned a verdict reciting a finding that Johnson was the agent of appellant and that on that account they had found for appellees (defendants).

We have been called upon recently to construe several contracts more or less similar to the one set out above, and we have recognized each of these cases as pre-

senting a close question as to whether or not there was any such ambiguity as made it proper for the court to submit its interpretation to the jury. The first of these cases was that of *Clark* v. *Watkins Medical Co.*, 115 Ark. 166, where we held that the record presented a question for the jury, and reversed the judgment of the court directing a verdict for the medicine company upon the theory that the contract was one of bargain and sale, and not one creating the relation of principal and agent. We had the same contract before us in the case of *Watkins Medical Co.* v. *Williams,* 124 Ark. 539, and reaffirmed our opinion in the earlier case. We had a somewhat similar contract before us in the case of *Rawleigh Medical Co.* v. *Holcomb,* 126 Ark. 597, and we set out in the opinion in that case the conduct of the parties in the execution of its provisions, and announced our conclusion to be that the contract was one of bargain and sale, and not one creating the relation of principal and agent.

It appears from this record that Johnson, and other similar representatives, were sometimes designated in appellant's printed matter as agent, while at other times he was referred to as salesman; but we said in the opinions in the cases above cited that the mere designation of one as an agent did not make him such, and that one might sell his goods to whom he pleased, and might prescribe exactions in regard to the price to be charged and the manner of reselling without changing the character of the transaction as a sale.

We find in this record no evidence tending to show that the intention of the parties to the contract set out above was to create the relation of principal and agent which did not appear in the case of *Medicine Co.* v. *Holcombe, supra,* and this case must, therefore, be ruled by that rather than by the earlier cases cited above, and we hold, therefore, that the evidence set out above, though all of it be competent, does not create the relation of principal and agent when considered in connection with the written contract into which the parties had entered.

There was evidence on the part of one of the sureties that he had been induced to sign the bond by reason of fraudulent representations in regard to the character of the obligation he was assuming. This fraudulent representation is said to consist in the statement contained in a letter from the appellant company to Johnson, to the effect that the bond merely guaranteed Johnson's honesty and good faith. But the contention can not be sustained for two reasons. The first is, that the terms of the bond are plain and unambiguous, and no contention is made that the surety was prevented from reading the bond, or that he did not know what its provisions were when he signed it. The contention of the surety can not be sustained for the second reason that the alleged false representation is not, in fact, false. The sureties undertook to "guarantee, jointly and severally, the honest and faithful performance of the said contract." And it was not a faithful performance of the contract for Johnson to sell the goods to persons who would not pay for them. If the contract was one of bargain and sale—and we so hold—then Johnson had the right to sell the goods for cash or on credit, as the contract contained no stipulation to the contrary, but he alone could exercise a discretion as to whom credit should be extended, and it would not have been a faithful performance of the contract for Johnson to sell to any one who would not pay, for the purpose of increasing his profits if, perchance, the purchaser should pay, while, by so selling his wares, he was imposing upon the company the risk of loss if payment were not made.

We conclude, therefore, that the sureties are not exonerated from liability under the bond, and the judgment of the court below will be reversed and judgment will be entered here for $633.23, and interest, the amount sued for.

SMITH v. BOYNTON LAND & LUMBER COMPANY.

Opinion delivered October 22, 1917.

1. COVENANTS—QUIET ENJOYMENT—BREACH—EVICTION.—A breach of a covenant of warranty of quiet enjoyment does not occur until eviction.
2. ADVERSE POSSESSION—PAYMENT OF TAXES FOR SEVEN YEARS.—The payment of taxes for seven years, continuously, upon wild land amounts to possession (Kirby's Digest, § 5057), and where a grantor holds land in that manner, a covenant of quiet enjoyment to his grantee is not broken until the actual eviction of the grantee.
3. COVENANTS OF WARRANTY—CONSTRUCTIVE POSSESSION—EVICTION.—One who holds land by virtue of the payment of taxes under section 5057 of Kirby's Digest, is evicted, when a court of competent jurisdiction declares another title paramount to his.
4. COVENANT OF WARRANTY—BREACH—DAMAGES.—Where the grantee has been evicted, and has purchased the outstanding title, under a covenant of warranty he may recover from his grantor what it cost him to buy in the outstanding title, not exceeding the purchase price, but he can not recover court costs and attorney's fees unless he notified his covenantor of the adverse claim, in order that the covenantor might come in and defend.

Appeal from Greene Circuit Court; *R. H. Dudley*, Judge; reversed.

L. C. Going and *Block & Kirsch*, for appellant.

1. There is but a single question involved. Where wild and unimproved lands, on which the grantor has paid taxes under color of title, are, after the passage of the seven years' tax payment statute (Kirby's Digest, § 5057) conveyed by deed containing the statutory covenants of warranty, is the breach, if there be a paramount outstanding title, instantaneous, or is it postponed until that title is asserted? In other words, does the statute of limitations in such case date from delivery of the deed, or from the hostile assertion of a paramount claim? Our contention is the latter.

Under Kirby's Digest, § 731, the words "grant, bargain and sell" import seizin in fee, good right and power to convey, premises free from incumbrance and quiet enjoyment. 98 Ark. 503; 15 *Id.* 289. The first three are

personal and do not run with the land and are broken, if at all, as soon as made. 1 Ark. 313; 90 *Id.* 363. The covenant of quiet enjoyment runs with the land and is transferable to an assignee. 1 Ark. 313. It is, in effect, a covenant of general warranty. 98 Ark. 504; Tiedeman, Real Property (3 ed.), § 618. It is broken by a disturbance of possession, or expulsion or eviction by one having paramount title. It concerns the possession, not the title. 7 R. C. L. 1145, 1159; 2 Am. Rep. 456. Appellee, to sustain its contention that the breach was immediate and that the statute of limitations started from the date of the deed in May, 1906, relies on 74 Ark. 348 and 98 *Id.* 367.

But here the deed was executed July 12, 1898, before the passage of the seven years statute of tax payment. Even if applicable by reason of retroactive provisions, the opinion nowhere indicates that it was ever called to the attention of the court. These cases do not apply. 7 R. C. L. 1151; 59 Ark. 626; 19 Kan. 539; 33 Ark. 593; Tiedeman, Real Prop. (3 ed.), § 619. One who pays taxes on wild land, under color of title, is deemed in possession thereof, and seven years' payment successively amounts to an investiture of title. 74 Ark. 302; 83 *Id.* 154; 109 *Id.* 281.

Here no eviction occurred until 1914, and the suit is not barred. 7 R. C. L. 1150.

2. The measure of damages is settled in 53 Am. St. 120. Appellant paid $1,600 and litigated, after due notice, in good faith incurring an expense of $300 for attorney's fees and $64 costs. He bought in the land for $1,459.89 and should have judgment therefor plus attorney's fees and costs. *Supra.*

Jones, Hocker, Sullivan & Angert, of St. Louis, for appellee.

1. The only question is as to the covenant of quiet enjoyment and when did the right of action accrue thereon? Kirby's Digest, § 731; 74 Ark. 350; 98 *Id.* 369. The action accrued on the making of the deed and the action is barred. 16 Ark. 154; 31 *Id.* 364; 47 *Id.* 170; 94 *Id.* 438; 85 *Id.* 484.

2. Attorney's fees can not be recovered unless the covenantor is given due notice. 20 Ark. 250; 132 N. C. 268; 61 L. R. A. 772. None was given.

3. The bar was complete when the action was commenced and no recovery can be had. Cases *supra.*

HUMPHREYS, J. Appellant brought suit on the 12th day of March, 1917, in the Greene Circuit Court to recover damages in the sum of $1,824.79 on account of an alleged broken statutory covenant for quiet enjoyment, implied in a certain deed of "grant, bargain and sell," of date May 22, 1906, executed by appellee to appellant, conveying the following wild and unimproved land in Cross County, Arkansas, towit: The southwest quarter, section 27, township 9 north, range 5 east.

Appellee interposed the five-year statute of limitations as a defense to the cause of action.

In the spring of 1914, Elizabeth Brinkley Currier recovered the land from appellant's grantee on a paramount title to the title passed by the deed from appellee to appellant of date May 22, 1906. On June 1 thereafter, appellee's grantee, Northern Ohio Cooperage & Lumber Company, purchased the outstanding paramount title for $1,459.89. Appellant was vouched to defend the suit brought by Mrs. Currier which he did at an expense of $64.39 costs and $300 attorneys' fees, and these amounts, together with the amount expended for Mrs. Currier's paramount title, constitute the basis of this action. The cause was heard by the court sitting as a jury, upon the complaint, answer and agreed statement of facts, upon which judgment was rendered dismissing appellant's complaint. From the judgment of dismissal an appeal has been prosecuted to this court.

The sole question presented by this appeal is, Did appellant's right of action for breach of covenant accrue on the date of the execution of the deed from appellee to appellant, or on the date Mrs. Currier recovered judgment for the land against appellant's grantee, Northern Ohio Cooperage & Lumber Company?

(1-3) It was agreed that C. O. Boynton, in appellee's chain of title, paid taxes on said real estate for the years 1896 to 1905, both inclusive, and that appellant's grantee, the Northern Ohio Cooperage & Lumber Company paid taxes for the years 1906 to 1914, both inclusive. In other words, the taxes on the land in question were continuously paid under color of title by parties in the chain of appellee's title for the years 1896 to 1914, both inclusive. Appellee purchased from the heirs of C. O. Boynton, who paid the taxes on said real estate for more than seven years next before the conveyance from appellee to appellant of date May 22, 1906. The payment of the taxes on this wild land for more than seven years under color of title by C. O. Boynton, invested him with a title by adverse possession, good as against every one not laboring under legal disability. C. O. Boynton's heirs succeeded to all his rights by inheritance; and their grantee, who is appellant here, acquired their title and right of possession under deed of date May 22, 1906. Had not appellant's grantors continuously paid the taxes on said land for seven years under color of title immediately preceding the date of the conveyance, then it could not be said that appellee was in possession when the deed was delivered, and, in that event, the covenant for quiet enjoyment would have been broken *eo instanti;* but appellee's predecessor in title having paid more than seven years' taxes on said land under color of title next preceding the date of the deed executed by appellee to appellant, the possession of said real estate rested in appellee as completely as if he had been in seven years' actual, adverse possession; hence, the covenant for quiet enjoyment was not broken until appellant's possession was disturbed. This announcement of the law is clearly sustained by the ruling in the case of *Brasher* v. *Taylor,* 109 Ark. 281. The issues involved in the case just referred to called for a construction of the act of March 18, 1899 (§ 5057, Kirby's Digest). In construing the statute, this court held that seven years' payment of taxes on wild land under color of title by a party, or those under whom he claimed, con-

stituted a possession equal to seven years' adverse, pedal possession; and that one claiming by paramount title could bring ejectment against him.

Appellant's possession was not disturbed until judgment was rendered in the Federal court in favor of the true owner, Mrs. Elizabeth Brinkley Currier. That judgment was rendered in the spring of 1914, hence the right of action did not accrue on the statutory warranty for quiet enjoyment until that date. This suit was instituted on the 12th day of March, 1917, less than five years after eviction, hence not barred.

It is insisted that this view of the law is in conflict with the rule laid down in the case of *Seldon* v. *Dudley E. Jones Co.*, 74 Ark. 348, and approved in *Arnold* v. *Chas. T. Abeles & Co.*, 98 Ark. 367. In the case of *Seldon* v. *Dudley E. Jones Co., supra,* Mr. Chief Justice HILL, in rendering the opinion, said: "The general rule is that to charge a person on a warranty eviction must be alleged. But where the land is wild and unimproved, as in this case, actual eviction is not necessary. The possession follows the legal title, and a paramount title carries possession with it, amounting to constructive eviction." The distinguishing feature between the Seldon case and the case at bar is that the complaint in the Seldon case contained no allegation that the holder of the inferior title, or those under whom he claimed, had paid the taxes on the land continuously for seven years under color of title next before the conveyance containing the warranty was made. The rule announced in the Seldon case, as applicable to the issue presented, was eminently correct, for as between the holder of a paramount and inferior title to wild lands the constructive possession necessarily follows the paramount title. The rule announced in the Seldon case was adhered to in the case of *Arnold* v. *Chas. T. Abeles & Co. supra,* and is still adhered to, but it has no application where it appears that the holder of the inferior title has continuously paid the taxes under color for seven years.

The case at bar is ruled by *Brasher* v. *Taylor, supra.* The rule announced in the Brasher case and in this case in no way conflict with the rule announced in the Seldon and Arnold cases.

The learned chancellor erred in holding under the facts of this case that the right of action upon the warranty for quiet enjoyment accrued immediately upon the execution of the deed of date May 22, 1906. The right of action did not accrue until the possession was disturbed by actual eviction, which was within five years before the commencement of this action.

(4) The only remaining question is to determine the amount of damages appellant should recover on account of the broken warranty. Appellee paid appellant $1,600 for the land. Appellant purchased the paramount outstanding title on the 1st day of June, 1914, for $1,459.89. When vouched to defend his own warranty to the Northern Ohio Cooperage & Lumber Company, appellant expended $300 as attorneys' fees and $64.39 costs in an unsuccessful attempt to defend his title. The total amount expended by him was less than the purchase price and interest thereon. In the case of *Dillahunty* v. *Railway Co.,* 59 Ark. 629, this court announced the rule to be that, "Where the covenantee has extinguished the adverse title, his recovery will be limited to the amount necessarily paid by him for that purpose, including the incidental expenses and reasonable compensation for his trouble, not exceeding in all the purchase price and interest." Under the rule laid down in the Dillahunty case, appellant is clearly entitled to the amount he expended to procure the outstanding title with interest from the 1st day of June, 1914, at 6 per cent. per annum, that being the date he purchased the paramount outstanding title. This court also held, in *Beach* v. *Nordman,* 90 Ark. 59, that where the covenantor had been notified of the pendency of an adverse suit and to defend same, the covenantee would be entitled to recover necessary expenses, including a reasonable attorney's fee expended in a *bona fide* but ineffectual effort to uphold the title which he had acquired

from his covenantor. In the case at bar, appellee received no notice to come in and defend the possession when Mrs. Elizabeth Brinkley Currier brought suit to recover the land. On the question of the necessity of notice with reference to adverse claims and suits before any liability for expenses and attorneys' fees can be claimed against the covenantor by the covenantee, Mr. Rawle on Covenants for Title (5 ed.), § 200, deduces the following rule from conflicting authority: "A consideration of these rather conflicting cases would seem to suggest as a rule to be deduced from them that the plaintiff's right to recover counsel fees as part of his costs should, in general be limited to cases where he has properly notified the party bound by the covenant to come in and defend the title. * * *" We adopt the rule as laid down, and decline to allow appellant any expenses on account of court costs and attorneys' fees.

There being no dispute as to the amount expended to procure the outstanding title and the date thereof, the judgment is reversed and judgment is entered here in favor of appellant for $1,459.89, with interest at the rate of 6 per cent. per annum from the 1st day of June, 1914, until paid.

JACOBS v. CITY OF PARIS.

Opinion delivered October 29, 1917.

1. LOCAL IMPROVEMENT—CREATION OF DISTRICT—CONSENT OF MAJORITY.—The consent of a majority in value of the property holders owning property within local improvement districts in towns and cities is jurisdictional, and without such consent all proceedings therefor are void.
2. LOCAL IMPROVEMENT—CREATION OF DISTRICT—CONSENT OF MAJORITY—DETERMINATION OF TIME OF HEARING.—In the formation of a local improvement district the Legislature may delegate to the city council authority to determine whether the petition has been signed by a majority of the property holders; and thirty days is a reasonable time to fix, during which objections may be made.

Appeal from Logan Chancery Court, Northern District; *Wm. A. Falconer,* Chancellor; affirmed.

Anthony Hall, for appellant.

1. The power to assess real property for local improvements depends upon the assent of a majority in value of the owners. Without such assent the proceedings are void. Art. 19, § 27, Const.; 50 Ark. 116; 59 *Id.* 344; 67 *Id.* 30; 84 *Id.* 395; 99 *Id.* 508; 116 *Id.* 167; 123 *Id.* 327. See also 99 *Id.* 508; 127 Ark. 418. The decision of the council is not conclusive.

2. The limitation of thirty days in the act only applies to irregularities and objections to proper parties to sign petitions and deeds, etc. It does not cut off objections to the validity of the establishment of the district. 67 Ark. 30; 69 *Id.* 68; 71 *Id.* 555. A majority in value is jurisdictional. 99 Ark. 508; 123 *Id.* 327; 84 *Id.* 395. It was error to sustain the demurrer.

Robert J. White, for appellees, commissioners.

1. The city council found and declared that the petitions constituted a majority in value of the owners of real property. That is final unless a petition showing ground is filed within thirty days. Here the petition was filed too late and the demurrer was properly sustained. Const., art. 19, § 27; Acts 1913, p. 527; 78 Ark. 439; 132 S. W. 450; 123 Ark. 327; 116 *Id.* 167; 84 *Id.* 391, 395-6; 185 S. W. 442; 78 Ark. 439.

2. Appellants are barred. Acts 1913, § 1, p. 527; 127 Fed. 820; 101 U. S. 567; 67 C. C. A. 386; 87 Ark. 65-70; 192 S. W. 909, etc.

Sid White, for appellee, City of Paris.

1. Appellants are barred. The power to limit the time is well settled, and thirty days was a reasonable time. 127 Ark. 418; 110 Ark. 548; 16 *Id.* 628; 110 *Id.* 514; 116 *Id.* 776; 130 S. W. 513; 84 *Id.* 257; 86 *Id.* 1; 96 *Id.* 424; 123 *Id.* 331; 71 *Id.* 4; 90 *Id.* 38, 39.

WOOD, J. This suit was instituted by the appellants against the appellees, the city of Paris and commis-

sioners of certain local improvement districts in that city. The complaint set up, in substance, that ten resident owners of real estate in each of the respective districts had petitioned for the formation of the district, and that the ordinance was duly passed by the town council laying off the districts; that petitions were presented by the real estate owners within the districts praying for the improvements to be made, and the city council, by resolution, fixed a day for the hearing of these petitions, notice of which was duly published; that committees were appointed to ascertain whether the signers in these petitions constituted a majority in value of the real property in the district; that the committees in their reports showed that the signers did constitute a majority in value, and the council, by resolution, adopted the reports and declared that the petitions were signed by a majority in value of the owners of real property within the districts, and the districts were created and commissioners duly appointed, etc., and that such commissioners, unless enjoined, would proceed to let contracts for making the improvements contemplated; that the organization of such districts was wholly void because a majority of the owners of real property within the districts did not sign the petition.

The complaint shows on its face that it was filed more than thirty days after the adjudication by the city council that the petitions were signed by a majority in value of the owners of real property in the districts.

The appellees demurred to the complaint and moved to dismiss the same, the grounds of the motion and demurrer being that the action was not brought within thirty days after the action of the city council finding and declaring that the petitions for the creation of the improvement districts constituted a majority in value of the owners of real property in such district. The court sustained the demurrer and dismissed the complaint, and from that judgment this appeal comes.

Section 27 of article 19 of the Constitution provides: "Nothing in this Constitution shall be so construed as to prohibit the General Assembly from authorizing assess-

ments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected; but such assessments shall be *ad valorem* and uniform."

On March 3, 1913, an act of the General Assembly was approved, providing the plan for establishing local improvement districts in cities and towns, under which the districts here challenged were created. The first section of the act provides: "If within three months after the publication of any such ordinance, persons claiming to be a majority in value of the owners of real property within such district adjoining the locality to be affected shall present to the council a petition praying that such improvement be made, which petition shall designate the nature of the improvements to be undertaken, and that the cost thereof be assessed and charged upon the real property situated within such district, the city clerk or town recorder, by order of the city or town council, shall give notice by publication once a week for two weeks in some newspaper published in the county in which such city or town may lie, advising the property owners within the district that on a day therein named the council will hear the petition and determine whether those signing the same constitute a majority in value of such owners of real property. At the meeting named in the notice, the owners of real property within shall be heard before the council which shall determine whether the signers of said petition constitute a majority in value, and the finding of the council shall be conclusive unless within thirty days thereafter suit is brought to review its action in the chancery court of the county where such city or town lies. In determining whether those signing the petition constitute a majority in value of the owners of real property within the district, the council and the chancery court shall be guided by the record of deeds in the office of the recorder of the county, and shall not consider any unrecorded instruments."

The complaint shows that the above act was complied with by the town council and the appellants only challenge the finding and declaration of the council that the petitions for the improvement districts each contained a majority in value of the real estate within the limits of the districts.

Appellants contend that a petition signed by a majority in value of the property owners in the proposed district giving their consent to the improvement is a jurisdictional prerequisite to the validity of ordinances creating such districts, and that the determination of the council that the petitions are signed by a majority in value of the owners of real property in such district, although ascertained and determined in the manner provided by the statute, is not conclusive, as declared therein, unless within thirty days thereafter suit is brought to review its action in the chancery court of the county in which such city or town lies.

(1) This court has held in several cases that a consent of a majority in value of the property holders owning property within local improvement districts in towns and cities is jurisdictional, and without such consent all proceedings therefor are void. See among the number of the latest cases, *Imp. Dist. No.* 1 *of Clarendon* v. *St. L. S. W. Ry. Co.,* 99 Ark. 508; *Waters* v. *Whitcomb,* 110 Ark. 511; *Bell* v. *Phillips,* 116 Ark. 167; *Hamilton* v. *Board of Imp. Light & Water Dist. No.* 2 *of Wynne,* 123 Ark. 327.

(2) This court has never held that the Legislature could not constitute the city council a tribunal for the purpose of determining whether or not the petitions for local improvement districts within the city were signed by a majority in value of the owners of real property within the districts; nor that it was beyond the power of the Legislature to make the findings of such board, when ascertained in the manner directed by the statute, conclusive unless their action was appealed from within a reasonable time. As to whether the Legislature has such power is the real and only issue presented on this appeal, and that exact question was decided in *Waters* v. *Whit-*

comb, supra, contrary to appellants' contention here. In that case we said: "Appellant alleges in his complaint that the petition was not, in fact, signed by a majority in value of the property owners, and contends that the statute is unconstitutional in so far as it attempts to make the determination of the city council on that question conclusive. * * * The Constitution does, in unmistakable terms, make the right to levy assessments for local improvements in cities and towns depend upon the consent of a majority in value of the owners of adjoining real property as evidenced by their signatures to the petition therefor. But it does not limit the power of the Legislature to provide a tribunal for the ascertainment of that fact. *Shibley* v. *Fort Smith & Van Buren District,* 96 Ark. 410; *Board of Directors of Jefferson County Bridge District* v. *Collier,* 104 Ark. 425. * * * The Legislature has, in the statute under consideration" (the act under review here) "erected a tribunal for the ascertainment of the consent of the majority. This is done upon notice, and the right of the property owners to apply within a limited time to courts for correction of an unfounded decision is preserved. The statute is, we think, a valid exercise of legislative power."

In view of the limited areas of local improvement districts within towns and cities it could hardly be said that thirty days is so short a time that it practically denies property owners the right to be heard. The time, though short, we believe was sufficient to enable property owners who are affected by the improvement to appear and to be heard, and thus their constitutional right of due process is preserved.

It follows that the judgment of the court sustaining the demurrer and dismissing the appellants' complaint is correct, and the same is affirmed.

WEST v. WEST.

Opinion delivered November 5, 1917.

CROPS—OWNERSHIP.—M. and J., having been married, were divorced, and certain land was decreed to belong to J. *Held,* crops grown on said land belonged to J.

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

John D. DeBois, for appellant.

1. In 120 Ark. 500 this court reversed the case of *West* v. *West,* and decreed that J. A. West *et al.* owned the lands. The hay, corn and cotton was the rent of the lands and appellants had the right to them.

Where a case is reversed, on appeal the rights of the parties stand as if no action had ever taken place. 29 Ark. 85; 95 *Id.* 308; 70 *Id.* 196; 68 *Id.* 90.

Appellee had no right, title or interest to the rent, and it was error to render judgment in her favor. The judgment is against the law and the evidence.

HART, J. Mary C. West sued J. A. West in the circuit court for the alleged conversion of sixty-five bushels of corn, worth $50, two tons of hay worth $25 and one bale of cotton of the value of $65, making a total of $140. The facts are as follows:

J. L. West was originally the owner of the land on which the corn, hay and cotton in controversy was grown. He married Mary C. West and subsequently a decree of divorce was granted to her. In the divorce suit commissioners were appointed to allot to Mary C. West one-third of certain lands which were decreed to belong to J. L. West. The lands in controversy were embraced in the decree. Prior to the time J. L. West married Mary C. West he conveyed the lands in controversy to J. A. West and other children by his first wife. They instituted a suit in the chancery court against Mary C. West to quiet their title to the land, and asked that the claim of Mary C. West be set aside as a cloud upon their title. Mary C. West defended the action on the ground that the deed

from J. L. West to his children was in fraud of her marital rights and by way of cross-complaint asked that it be canceled.

The chancellor found in her favor, and a decree was entered accordingly. This court held that the chancellor erred in holding that the conveyance of J. L. West to his children was in fraud of the marital rights of Mary C. West. It was ordered that the decree of the chancellor be reversed and the cause be remanded with directions to grant the prayer of the complaint. The opinion will be found in 120 Ark. 500, under the style of *West* v. *West*.

The chancery court entered a decree in obedience to the mandate of the Supreme Court. After the decision by the Supreme Court, J. A. West, for himself and the other owners of the land, notified Mary C. West of the decision, and told her that he would take charge of the lands and the rents therefrom for himself and the other tenants in common. At that time she had collected the corn and hay rents from the land for the year 1915, but had not collected the rents from the cotton.

The opinion of the Supreme Court in the case just referred to was delivered on November 1, 1915. It was a few days after this that J. A. West went to see Mary C. West about the rents. J. A. West, for himself and co-owners, collected the rent cotton from the tenants on the land.

J. A. West testified that Mary C. West pointed out the corn and hay to him and told him that she wished he would get it out of her way at once; that she had other uses for the barn, and that he did so.

Mary C. West admitted that the corn, hay and cotton grew on the land which was decreed to J. A. West and others in the chancery suit against herself. She stated that just after the decision of the Supreme Court J. A. West came and told her that the Supreme Court had given them the land and demanded the rents. She said that she told him he had better know what he was doing before he took the rent corn and cotton away. The cot-

ton, corn and hay in question is the rent from the land just referred to.

The circuit court found in favor of the plaintiff, and judgment was rendered in her favor for the value of the corn, hay and cotton involved in this action. The case is here on appeal.

We are not favored with a brief on the part of counsel for Mary C. West, and are at loss to know on what ground the court below found in her favor. The land on which the crops in question were grown was decreed to belong to J. A. West and others, and it follows that they would be entitled to collect the rents therefrom. It is admitted that the property involved in this suit was the rent from that land.

Therefore, the court should have rendered judgment in favor of the defendant. For the error in not doing so, the judgment will be reversed and the cause remanded for a new trial.

HALL, ADMINISTRATOR, v. CHESS & WYMOND COMPANY OF ARKANSAS.

Opinion delivered November 5, 1917.

NON-SUIT—MAY BE TAKEN, WHEN.—In a personal injury action, after the testimony was all in, and the attorneys had presented their prayers for instructions to the court, the plaintiff may take a non-suit before the court has instructed the jury.

Appeal from Stone Circuit Court; *Dene H. Coleman*, Judge; reversed.

W. O. Edmonson and *Ira J. Mack*, for appellant.

1. The court erred in instructing a verdict for defendant. All the material allegations of the complaint were sustained by the proof. Defendant does deny that its negligence was the direct and proximate cause of the injury, and that it was its duty to warn deceased of the injury, but these are more questions of law than fact. The proof shows the foreman ordered deceased to work under the tree and knew of the danger and gave no warn-

ing. 3 Labatt, Master & Servant (2 ed.), § 1050; 20 Am. & E. Enc. L. (2 ed.), 96; 26 Cyc. 1172; 56 Ark. 192, 197; 46 *Id.* 388. The danger was hidden and unknown to the servant, and he did not assume the risk.

2. Plaintiffs motion for a non-suit should have been granted. Kirby's Digest, § 6167; 76 Ark. 400; 25 S. W. 1; 120 Ark. 389; 10 Ia. 196; 80 N. W. 307. There was no final submission of the case to the jury. 272 Ill. 350; 112 N. E. 61; 80 N. W. 307.

Williamson & Williamson and *Samuel M. Casey,* for appellee.

1. The court did not err in directing a verdict. Plaintiff failed to make a case. He was barred by assumed risk and contributory negligence. 90 Ark. 387, 392; 56 *Id.* 210; 46 *Id.* 555; 48 *Id.* 346; 89 *Id.* 425.

If the danger was not caused by the negligence of the master, the servant assumes the risk. 46 Ark. 388; 89 *Id.* 425; 122 *Id.* 233; 77 *Id.* 458; 92 *Id.* 102; 107 *Id.* 512; 95 *Id.* 562; 1 Labatt, M. & S., § 239, note 3; 118 Ark. 304.

2. There was no duty on the master to warn the servant. He was experienced and mature. The danger was visible and not hidden. 82 Ark. 537; 57 *Id.* 503; 121 *Id.* 556; 76 *Id.* 69; 73 *Id.* 55; 77 *Id.* 374; 2 L. R. A. (N. S.) 840; 133 Ala. 580; 31 So. 848; 20 Ann. Cas. 248. See also 76 Ark. 72; 65 Fed. 48; 67 *Id.* 507.

3. The court properly refused the non-suit. Kirby's Digest, § 6167. It was a matter within the sound discretion of the court. 69 Ark. 431; 217 Fed. 835; 4 Am. Cas. 508.

SMITH, J. This was a suit for damages to compensate an injury sustained by the plaintiff, of a nature so serious that he has died from its effects since the trial of the cause in the court below. The plaintiff was engaged in cutting down a tree against which a dead tree had fallen, and, in the argument over the instructions, in the absence of the jury, the court took the view that the danger was obvious and the risk assumed, and announced that the request for a directed verdict in favor of the de-

fendant would be granted. After the jury was in the box, and before the verdict was returned by the jury, and before the court had instructed the jury to return a verdict, the plaintiff asked to be permitted to take a non-suit without prejudice, but the request was refused, and the court directed the jury to find for defendant, which was done, and this appeal has been prosecuted to reverse the judgment pronounced thereon.

Without reviewing the evidence, it may be said that, under the abstract of the evidence furnished by appellant, it appears that the injury sustained resulted from an assumed risk and that no liability against the defendant was shown. We can not anticipate what additional evidence might be produced to make a case for the jury. We need, therefore, only now consider appellant's right to take a non-suit. The statute on the subject reads as follows:

"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. * * *" § 6167, Kirby's Digest.

This statute was construed in the case of *Carpenter* v. *Dressler,* 76 Ark. 403, where it was said that "A case is not finally submitted until the agreement (argument) is closed, and a plaintiff has a statutory right to a non-suit until final submission. Kirby's Digest, § 6167." See, also, *St. Louis Southwestern Ry. Co.* v. *White Sewing Machine Co.,* 69 Ark. 431.

Section 6167 of Kirby's Digest was borrowed from Kentucky, where it is found as section 371 of the Civil Code of that State. This section was construed by the Supreme Court of that State in the case of *Vertrees* v. *Newport News & M. V. Ry. Co.,* 25 S. W. 1, where it was said: "Now, the bill of exception which we have quoted shows that, although the court had sustained plaintiff's motion for the peremptory instruction, there had not been any submission of the case, final or otherwise, to the jury, before plaintiff moved to dismiss the case, for it is stated that the jury was not actually instructed to find for defendant until after the motion of plaintiff to dismiss was

made. Strictly and properly, there can be no final submission of a case to the jury until all questions of law have been disposed of by the court, instructions and papers pertaining to the case have been actually delivered to the jury, and they are authorized, without further interposition or control of the court, to proceed to a judicial examination of the issue of fact submitted to them. In our opinion, plaintiff had the right to dismiss his action without prejudice at the time he made the motion, and the court erred in overruling it, wherefore the judgment is reversed, and cause remanded, that the motion may be sustained."

We are cited to the case of *Whitted* v. *Southwestern Tel. & Tel. Co.*, 217 Fed. 835, as being opposed to this view. But we think the cases are distinguishable on the facts. There the court had not only announced that the request for the peremptory instruction would be granted, but had directed the clerk to submit to the jury the verdict to be signed by one of the jurors. The request for leave to dismiss the case without prejudice was then made before the verdict had been actually signed by the jury. The opinion pointed out that the signing of the verdict was a mere ministerial or ceremonial act, and that the direction to the jury constituted the final submission of the cause. Here there had been no final submission, for the direction to return a verdict had not been given to the jury.

We approve the conclusion of the Kentucky court upon a state of facts identical with the facts in this record, and make the same order made by that court under identical circumstances. Judgment reversed and non-suit entered here.

STATE EX REL. THE ATTORNEY GENERAL v. FORT SMITH LUMBER COMPANY.

Opinion delivered October 15, 1917.

TAXATION—CORPORATIONS—SURPLUS INVESTED IN STOCK IN OTHER CORPORATIONS.—A domestic corporation, in returning its capital stock for taxation, can not deduct investments of its surplus in shares of stock in other corporations in this State.

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

John D. Arbuckle, Attorney General, *T. W. Campbell,* Assistant, and *George Vaughan, Frank Pace* and *T. M. Seawel,* Special Counsel, for appellant.

1. The case in 97 Ark. 254 is conclusive of this case. *Ib.,* 259, 260. The rule laid down there harmonizes with the case. 87 Ark. 484. See also 41 Ark. 509; 11 Peters, 543. All property is subject to taxation, and no exemptions are permitted by law. See also 92 Ark. 335; 73 *Id.* 515; *State* v. *Bodcaw Lumber Co.*

Analogous cases, see 204 Pa. 36; 53 Atl. 517; 60 W. Va. 357; 55 S. E. 398; 155 N. C. 53; 70 S. E. 1079; L. R. A. 1915 C, 380-5; 99 Ala. 1; 42 Am. St. 17.

Hill, Fitzhugh & Brizzolara, for appellee.

1. The company made true and proper returns of its property for taxation as required by Kirby's Digest, § 6936, and the amendatory act; Kirby & Castle's Digest, § 8549.

To prevent double taxation, a domestic corporation may deduct investments of its surplus in shares of stock in other corporations in the State. 128 Ark. 505; 73 Ark. 515.

2. Corporate stock is tangible property, but if an intangible asset, it was properly deducted. 131 Fed. 282; Kirby's Digest, § 6937; Kirby & Castle's Digest, § 8461; 8552-3, 8577; 84 Kan. 508; 34 L. R. A. (N. S.) 1221.

3. The lumber company was authorized to acquire capital stock. Reviews the Arkansas cases and contends that deduction should be allowed where stock in other cor-

porations which is taxed is held by a corporation. 92 Ark. 335; 73 *Id.* 515. The case in 97 Ark. 254 does not settle the question. 87 *Id.* 484.

4. Should the State's contention be upheld, this construction would be in conflict with the rights guaranteed by the Federal Constitution and amount to double taxation. 188 U. S. 385; 198 *Id.* 341; 117 Ark. 606; Judson on Taxation, § § 308, 310-315, etc.

McCULLOCH, C. J. This suit was instituted in the name of the State, *ex rel.* the Attorney General, against the Ft. Smith Lumber Company, a domestic corporation, to recover taxes which escaped adequate assessment for former years. It is alleged in the complaint that the said corporation failed to assess the whole of its capital stock for taxation, as required by statute, and deducted from the value of the capital stock, as assessed, amounts invested in shares of stock in certain other domestic corporations.

The allegations are that the defendant owned shares of stock in the Central Railway Company, an Arkansas corporation, of the value of $260,000, and also owned shares of stock in the Choctaw Investment Company, another domestic corporation, of the value of $104,000, and that in assessing its property for taxation it deducted the value of all those shares of stock from its capital stock.

The defendant denied in the answer that any of its property had escaped taxes for former years, but admitted that it owned shares of stock in the other corporations named, and alleged that those shares of stock were purchased with proceeds of the earnings of the corporation, not with the original capital stock, and that it has regularly assessed for taxation its original capital stock at par value, as well as its other property, except the shares of stock in the other corporations. It is admitted in the answer that the value of the shares of stock in other corporations are not assessed, but is deducted from the valuation of the capital stock of the corporation other than its original capital stock.

The pleadings in the case, therefore, present the question whether a domestic corporation, in returning its capital stock for taxation, may deduct investments of its surplus in shares of stock in other corporations in the State. The right to make such deduction is asserted under authority of the statute which provides that "no person shall be required to include in his statement, as a part of the personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise which (he) is required to list, any share or portion of the stock or property of any company or corporation which is required to list or return its capital and property for taxation in this State." Kirby's Dig., § 6902.

The question involved seems to have been fully decided against defendant's contention in the case of *Dallas County* v. *Home Fire Insurance Company,* 97 Ark. 254, where it was said: "So, if one corporation purchases shares of stock in another corporation, it does not pay taxes on the shares so purchased, for the corporation which issued the shares must pay the taxes on its own property; but it does not follow that the first corporation is not required to assess and pay taxes on its own capital stock because it has invested all or a part of it in the stock of another corporation. In such case the corporation differs from an individual, in that it has capital stock on which it must pay taxes and an individual has not. To hold otherwise would be to exempt the property of the first corporation from taxation, which it can not be presumed that the Legislature intended to do, and which it has no power to do."

It is insisted that the decision just referred to applies only to assessments of the original capital stock of a corporation, and that the words "capital stock" as used in that decision meant only the par value of the aggregate shares of stock, not including earned surplus.

In the recent case of *State ex rel.* v. *Bodcaw Lumber Company,* 128 Ark. 505, we defined the term "capital stock" as used in the statute to mean "the aggregate value of the shares of stock in the hands of the share-

holders," which would, of course, include the value augmented by the earned surplus. The two decisions must be considered together, and when that is done, it is plain that they lead irresistibly to the conclusion that defendant is wrong in its assertion of the right to deduct from its assessment of capital stock the value of the shares of stock in the other corporations.

We are unable to discover any reason for a distinction between allowing this deduction from the earned surplus and from the par value of the capital stock, for our statute makes no provision for separate assessment of the par value of capital stock. The aggregate value is assessed and the value of tangible property in which the capital is invested is deducted, but the amount thus obtained is not reducible by the value of investments in non-assessable property. That was decided by this court in the Bodcaw Lumber Company case, *supra,* and the same principle was announced in *First National Bank of Batesville* v. *Board of Equalization of Independence County,* 92 Ark. 335.

Nor does this construction of the statute operate as a discrimination against a corporation and in favor of individual owners of shares of stock. The capital stock of a corporation has its own value. It is assessable as such for taxation, and the failure to deduct investments in shares of stock of other corporations does not constitute double taxation. The two elements of value are separate and distinct, for the shares of stock themselves are not assessed for taxes.

Of course, it would constitute double taxation, as was said in the Dallas County case, to tax the shares of stock in other corporations held by this corporation and also its capital stock, but the failure to deduct the value of such shares of stock from the capital stock is not tantamount to assessing the shares of stock in the other corporations.

An individual is not required to return in his assessment the value of the shares of stock in a corporation,

and his investment in such shares of stock is, therefore, not directly taxed, but, as pointed out in the Dallas County case, a corporation has a separate assessable valuation in its capital stock which is not possessed by an individual, and it constitutes no discrimination against a corporation to fail to deduct the value of such shares of stock held in other corporations from the assessment of its capital stock.

The question of the right of corporations to hold shares in another corporation has been zealously argued by counsel on both sides, but we think it is unnecessary to pass upon that question, in view of our conclusion that it is the aggregate value of the capital stock of the corporation which is assessable, and it is unimportant whether it has been rightfully or wrongfully invested in shares of stock in other corporations.

We are of the opinion, therefore, that the learned chancellor erred in overruling the demurrer to the answer, and the decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

McCULLOCH, C. J., (on rehearing). Counsel for appellee now disclaim any intention of asserting a distinction between the right of a corporation to deduct from its assessment of original capital stock the value of shares of stock in another corporation, and the right to make such deduction from accumulated surplus, and they take the broader position that a corporation has the right to such deduction either from the original capital stock or from accumulated surplus. That contention is answered by the decision of this court in the case of *Dallas County* v. *Home Fire Insurance Company,* 97 Ark. 254, as shown in the former opinion in the present case. The force of that decision was not impaired by the recent case of *State ex rel.* v. *Bodcaw Lumber Company,* 128 Ark. 505. On the contrary, we think that the two decisions are in harmony.

We do not decide that a corporation holding shares of stock in another corporation must assess the same separately in addition to its own capital stock, but we do hold

that such corporation can not deduct the value of such shares of stock from the assessment of its own capital stock, which includes accumulated surplus.

HART, J., (dissenting). Judge WOOD and myself dissent from the opinion of the majority in this case because we believe it is in direct conflict with the principles announced in *State* v. *Bodcaw Lumber Company,* 12 Ark. 505.

The opinion of the majority relies for its support upon the case of *Dallas County* v. *Home Fire Insurance Co.,* 97 Ark. 254. In the first place, it may be said that we do not think that case is susceptible of the construction now placed upon it by the majority. In that case the court was considering the subject of taxation of an insurance company where practically all of the original capital stock was invested in certificates of stock of other domestic and foreign insurance companies. The court reached the conclusion that the shares of stock in the other insurance companies were not taxable in the hands of the Home Fire Insurance Company, but that the original capital stock of the insurance company was subject to taxation.

In the first mentioned case the words "capital stock" were used to denote the money which the shareholders paid into the corporation when it was organized. In the Bodcaw Lumber case the words "capital stock" were used in a much broader sense and the court adopted an entirely different system of valuing the capital stock of a corporation for taxation. The court said that the words "capital stock" mean shares of a corporation in their aggregate, and not the capital of the corporation as represented by its tangible assets. The meaning thus given to the words "capital stock" does change their meaning as used in the Dallas County case. When that case is considered the words must still be considered to mean what the court intended them to mean in that case. But it would be useless to stop here and discuss the soundness or unsoundness of the opinion in the Dallas County case. If the construction now placed upon it by the majority is to obtain,

it is manifest that it is in conflict with the majority opinion in *State* v. *Bodcaw Lumber Co.*, 128 Ark. 505, and to the extent that it conflicts with that opinion it is modified or overruled.

Inasmuch as two of the judges dissented in the Bodcaw Lumber Company case, the opinions of the Chief Justice and Judge WOOD must be read together to determine the opinion of the majority. Judge WOOD attempted to sum up the opinion of the majority and clearly stated the principles adopted by them as follows: "The tangible property of the corporation outside of the State is not taxed here at all, and could not be, for that is taxed in the jurisdiction where it is located. But such property is only considered in so far as it contributes to give value to the shares of stock which the State has a right to tax, at their source, that is, the domicile of the corporation. But the rule is different as to tangible property within this State. This State has the right to tax the value of the shares of capital stock once, as ascertained by the method indicated, and, inasmuch as the tangible assets within the State have been considered once in making up this value, the rule adopted by this court to prevent double taxation is to deduct the tangible property taxed here as such, from the aggregate value of the shares of stock taxed as capital stock, because that has to be considered and is embraced in the calculation making up the total value of the shares of stock. Not to deduct the local tangible assets, taxed as such, would be equivalent to taxing the value of such assets twice. But all of this is clearly set forth and argued in the opinion of the Chief Justice."

The opinion of the Chief Justice is too long to quote from at length, but excerpts therefrom show that he had the same view of the law as Judge WOOD. He said: "The words 'capital stock' used in the statute, mean the aggregate value of the shares of stock in the hands of the shareholders, though the value of the shares of stock themselves do not constitute the limit of taxation. The purpose of the lawmakers was to merge the separate valuation of the shares of stock into the aggregate valuations

of the whole, and thus constitute the compound as a basis for fixing the valuation for taxation purposes, after deducting the value of the tangible property which is to be specifically assessed separately. In this way the lawmakers have provided a scheme for taxation of all of the elements of value of this property one time, and only once, and the tax is levied at the source and paid there without any assessment being levied against the individual shareholders. The scheme absolutely excludes any idea of double taxation, but it does provide an adequate means of including all the elements of value contained in the shares of stock and the tangible property of the corporation itself, merged into a composite whole. The assessment of the property is in name only against the corporation, for it includes the elements that go to make up the value of the shares of stock themselves."

Thus it will be seen in the Bodcaw Lumber Company case, the court proceeded upon the theory that the combining of the shares of the capital stock of a corporation and its corporate principal for the purpose of taxation whereby all are taxed as a unit could not be considered as double taxation. The theory of the court was that the principle against double taxation had no application because that is confined in operation to such taxation in the same jurisdiction. The writer recognized in that case that in strict legal theory double taxation does not exist unless the double tax is levied upon the same property in the same jurisdiction; but he dissented from the opinion on the ground that whatever the strict legal theory is the practical effect of the decision was to tax substantially the same property twice, and this he believed was against our whole system of taxation, as heretofore established and construed by the court.

If the question in the present case had been an issue in the case, it is evident that the property would have been deducted from the aggregate value of the shares of stock taxed as capital stock. We think the only logical result of the decision in that case is that when a corporation invests part of its assets in property of any kind situated

in or out of the State, that property is to be considered in estimating the value of the shares of stock of the corporation for taxation in this State, and that where such property is situated outside of the State it is not to be deducted from the total valuation, but that where it is situated within the State it is to be deducted from the total value, when the corporation assesses its property for taxation. This is so because where the property is situated outside of the State, there can be no double taxation in legal theory because the tax upon substantially the same property is not levied by the same jurisdiction. But in case the property is situated within the State, substantially the same property would be twice taxed if it was not deducted from the total valuation of the shares of stock. To illustrate, let us suppose a corporation is formed with capital stock of $400,000, divided into 4,000 shares of a par value of $100 each. At the outset we will assume that both the shares of stock and the capital stock are worth $400,000. A part of the assets of the corporation may then be invested in the shares of stock of other corporations and in real estate situated in this State and a part of its assets may be invested in real estate situated in another State. These may be fortunate investments and add greatly to the value of the shares of stock of the corporation and all are to be taken into consideration in estimating the value of the shares of stock. According to the rule laid down in the Bodcaw Lumber Company case, there will be no deduction on account of the real estate situated in another State because, although it may be taxed in that other State, it is only taxed once in this State.

On the other hand, it is admitted that real estate situated in this State is to be deducted, for otherwise substantially the same property would be twice taxed in the same jurisdiction. The same reasoning holds good in the case where the corporation has purchased shares of stock in another domestic corporation; for that corporation pays taxes on its own shares of stock, and to require the corporation purchasing its shares of stock to also pay

taxes on them would be to tax substantially the same property twice in the same jurisdiction, and that according to the trend of all our decisions, is double taxation and is contrary to the letter and spirit of our Constitution. If by any refinement of reasoning or otherwise it may be said that the case of *Dallas County* v. *Home Fire Insurance Company, supra,* is against this conclusion, it is manifest from the excerpts we have quoted from in the Bodcaw Lumber Company case that the opinion in the former case in so far as it is contrary to the views we have just expressed, is modified or overruled by the opinion in the Bodcaw Lumber Company case. Indeed, one ground of dissent by the writer was that the principles of law in the two cases were in necessary conflict in the respect herein stated.

WOOD, J., concurs in the dissent.

KAHN v. CHERRY.

Opinion delivered October 29, 1917.

1. EASEMENTS—WALL BETWEEN ADJACENT LOTS—CONVEYANCE BY ONE OWNING BOTH LOTS.—C. owned two adjacent city lots upon which were two brick buildings; the joists supporting the roof of the building on one lot rested in the wall on the other lot, which was necessary for such support. C. first deeded the one lot to S., and later deeded the other lot to K. with covenants against encumbrances in both deeds. *Held,* by the deed to S., C. by implication, conveyed to S. an easement in the wall of the building on the lot deeded to K.
2. COVENANTS—AGAINST ENCUMBRANCES—BREACH.—Where land burdened with an easement is conveyed by warranty deed, with a covenant against encumbrances, the covenant is broken as soon as it is made.
3. COVENANTS—ENCUMBRANCES—KNOWLEDGE OF PARTIES.—Where one conveys land to another burdened with an easement or servitude which affects the physical condition of the property only, and of which easement the grantor and grantee knew at the time of the conveyance, or which was in such plain view that the parties must be presumed to have known and contracted with special reference thereto, then such easement does not constitute a breach of the general covenant of warranty against en-

cumbrances, and such cases should be treated as not coming within the general rule as to breach of covenants affecting the title.

4. COVENANTS—ENCUMBRANCES—KNOWLEDGE OF GRANTEE.—Appellee deeded a city lot to appellant, the north wall upon said lot being charged with an easement in favor of the adjacent lot; *held,* whether the grantee had knowledge of the said encumbrance at the time of the purchase, is a question for the jury.

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

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

1. It was error to direct a verdict. At the date of the conveyance by Cherry to Kahn the north wall was charged with an easement in Mrs. Stone. The proper rule is laid down in 89 Ark. 309, 316. This rule is sustained by the authorities. 10 A. & E. Enc. Law, 420; 27 N. E. 344; 25 Am. St. 421; 49 L. R. A. 417; 81 Am. St. 749; 6 Am. Rep. 300; 53 *Id.* 550; 38 Me. 429; 27 Gratt. 77; 52 Am. Rep. 271; 4 Duer. 53; 5 *Id.* 553; 55 N. Y. Supp. 806; 77 N. E. 1126; 18 *Id.* 828. The lot was granted with the appurtenances, an express grant. See 117 Ill. 643; 7 N. E. 111; 60 N. J. Eq. 589; 10 A. & E. Enc. Law, 427; 26 N. E. 766; 49 L. R. A. 417; 81 Am. St. 749; 21 N. Y. 505; 27 App. D. C. 550; 2 Hill (N. Y.) 145; 52 Atl. 786; 32 Pac. 679; 25 Col. 67; 71 Am. St. 109; 39 N. J. Eq. 396; 119 Pa. St. 390; 4 Am. St. 654.

2. A jury should have been allowed to take the case and determine whether Mrs. Stone had an easement in the north wall and to award damages. 89 Me. 470; 36 Atl. 986; 78 S. E. 378; 7 Ky. Law Rep. 766; 80 N. Y. Supp. 552.

3. And the issue as to whether Kahn's knowledge of the easement at the date of the conveyance and whether such knowledge precluded him from recovery on the warranty, would then have been before the court and a jury. See 14 Am. Dig. Cent. Ed., § § 39, 40; 6 *Id.*, p. 16, § 39; 115 Tenn. 1; 88 S. W. 933; 4 L. R. A. (N. S.) 309, note; 62 N. E. 645; 30 S. E. 656; 52 N. E. 969; *Ib.* 49; 68 *Id.* 694; 75 Mo. App. 364; 35 Atl. 635; 69 L. R. A. 790; 74 Pac. 798; 32 S. E. 114; 49 *Id.* 722; 8 Ind. 171; 7 S. W. 886; 59

Atl. 1034; 64 *Id.* 326, etc. See also 22 Ark. 277, 285; 59 *Id.* 629, 636; 99 *Id.* 260. The judgment should be reversed.

Clifton W. Gray, for appellees.

1. No eviction is shown. 19 Ark. 447; 52 *Id.* 322; 65 *Id.* 495; 7 R. C. L. 1150.

2. There was no easement in Mrs. Stone. Easements by implied grant must be necessary, continuous, open and apparent. 9 R. C. L. 757.

While there is a conflict among the authorities as to whether the physical condition of the property should be strictly or only reasonably so for the enjoyment of the same, the better rule is the one that holds to the strict necessity. 9 R. C. L. 754; 65 Conn. 366; 66 *Id.* 337; 126 Ga. 210; 8 L. R. A. (N. S.) 327, and note; 125 Mass. 287; 37 Am. Dec. 85; 10 Allen, 366; 150 Mass. 267; 68 Me. 173; 89 Ark. 309.

3. If there was an easement there was no breach of covenant. It would have been improper to have submitted this case to a jury, for if there was an easement, appellant had knowledge of it at the time he bought. The law recognizes two kinds of encumbrances, one that affects title, the other the physical condition of the property. 32 L. R. A. (N. S.) 737; 22 Wis. 628; 6 Am. Rep. 300; 112 Pa. 315; 36 L. R. A. (N. S.) 1004. The parties, in the absence of anything to the contrary, are presumed to have contracted with reference to the existing state and condition of the property; and if the easement be open and visible and continuous the purchaser is supposed to take the property subject to the burden. 9 R. C. L. 737.

Whether appellant had knowledge should not have been submitted to a jury, for (1) he knew he was buying the whole dividing wall, and (2) because he contended there was an easement by implied grant and is precluded from denying that the physical condition creating the easement was open and apparent.

The court was correct in giving the peremptory instruction.

Morris M. & Louis M. Cohn, in reply.

1. An easement is an encumbrance, and no eviction is required. Rawle, Covenants for Title, § 79; 23 Ark. 590; 25 *Id.* 452; 33 *Id.* 640; 65 *Id.* 103; 74 *Id.* 348; 89 *Id.* 234; 84 *Id.* 415. It certainly interfered with the quiet enjoyment of the property.

2. Knowledge does not preclude a recovery. 11 Cyc. Pl. & Pr. 1066, etc.; 98 Ark. 1; 94 U. S. 343; L. R. A. 1916-C, 164, etc.

STATEMENT OF FACTS.

On the 16th day of November, 1912, the appellees did "grant, bargain, sell and convey" unto the appellant parts of certain lots in block 5, city of Little Rock. The habendum clause was as follows: "To have and to hold the same unto the said Herman Kahn, his heirs and assigns, forever, with all the appurtenances thereunto belonging," and the deed contained this covenant: "We hereby covenant with the said Herman Kahn that we will forever warrant and defend the title to the said lands against all claims whatever."

There was a three-story building, fronting on Main street, situated on part of the property conveyed, the south wall of such building not being on the parcel of land described in the deed, but the north wall of such building was located on the land.

After his purchase Kahn concluded to erect a new building on the site, and notified one Mrs. Stone, the owner of the adjoining property on the north, of his purpose. On Mrs. Stone's property there was also a brick building, and she claimed that the joists of her building were resting on Kahn's wall, and objected to his taking it down. Mrs. Stone turned over the matter of the protection of her interests to a well known firm of lawyers in the city. Kahn investigated the matter and found that it was true that the joists of Mrs. Stone's building rested in his north wall.

One Palez occupied the store owned by Mrs. Stone. Kahn notified Palez that he was going to tear down the

wall on the south side of the property occupied by him and Palez protested. Kahn, in order to enable him to proceed, agreed with Palez to pay him $500 for his damages, and he was put also to an expense of from three to four hundred dollars in putting in a false wall to protect Palez's store while the building was being erected. Palez would not permit the contractors to enter his store, which was necessary in order to erect the new wall so that the old could be torn down.

Previous to the conveyance from Cherry to Kahn Mrs. Stone had acquired title to the lot and brick building occupied by her tenant, Palez, through mesne conveyances from Cherry, and when she purchased, the joists of her building were resting in the north wall of the building situated on the parcel of ground which Cherry afterwards sold to Kahn.

Kahn made demand upon Cherry for compensation for the damages which he claimed to have sustained, and upon Cherry's refusal to pay, appellant instituted this suit against the appellees, setting up substantially the above facts and alleging that because of the easement created in favor of the grantees of Cherry in the property conveyed by Cherry to appellant that he was damaged in the sum of $2,500, for which he prayed judgment.

The appellees answered, admitting the conveyance by warranty deed of the property to Kahn; denied that the property was subject to an easement in favor of the previous grantees of Cherry, and alleged that if the adjacent owner enjoyed the use of the wall conveyed by Cherry to Kahn in any way that said use or privilege was so apparent that same was known to Kahn and same was taken into consideration by him when he purchased the property. Denied that such privilege or use was an encumbrance; and denied any liability to Kahn on their covenant of warranty.

After the above facts, in substance, were developed the court instructed the jury as follows: "That the plaintiff can not recover in this action. In order for plaintiff to recover from the defendants for breach of

warranty, it must appear that some encumbrance existed upon the land for which the plaintiff would be entitled to damages. After looking into the matter, I have reached the conclusion that Mrs. Stone, the owner of the property adjoining Mr. Kahn's on the north, did not have an easement in the north wall of Mr. Kahn's property. You will therefore bring in a verdict for the defendants."

Appellant duly excepted to the ruling of the court, and from a judgment in favor of the appellees has duly prosecuted this appeal.

WOOD, J., (after stating the facts). (1) The court erred in directing a verdict in favor of appellees, and in deciding that Mrs. Stone, the owner of the property adjoining on the north, did not have an easement in the north wall of the building on the lot conveyed by Cherry to Kahn. The undisputed evidence shows that L. W. Cherry at one time owned the lot which he conveyed to Kahn and also the adjacent lot north, which, at the time of the institution of this suit, was owned by Mrs. Stone, and which we will hereafter designate as the "Stone lot." Before the conveyance to Kahn, Cherry had sold the Stone lot, with the appurtenances thereunto belonging, under a warranty deed. At the time of this conveyance there was situated on the Stone lot a brick building, the joists of which rested in the north wall of the brick building on the lot sold by Cherry to Kahn, which lot, for convenience, we will hereafter designate as the "Kahn lot." The mesne conveyances from Cherry to Mrs. Stone were warranty deeds with the same habendum clause. These mesne conveyances from Cherry to Mrs. Stone vested in her the dominant estate in the Stone lot, with the appurtenances thereto, which consisted of the brick building thereon. When Cherry conveyed this lot with its appurtenances he granted everything necessary to its enjoyment, and, therefore, he, by implication, conveyed to his grantee the easement in the north wall of the building on the Kahn lot which he also at that time owned, for without such easement it would have been impossible for the

grantee of the Stone lot to enjoy the use and benefit of the premises with the appurtenances that were conveyed to him.

The rule of law is very clearly and cogently stated in *Hancock Mut. Life Ins. Co.* v. *Patterson,* 103 Ind. 582, 586, as follows:

"Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case, the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made." The same principle is announced in *Cherry* v. *Brizzolara,* 89 Ark. 309, 316.

"The principle," says the Supreme Court of New York, in *Lampman* v. *Milks,* 21 N. Y. 505, "is that where the owner of two tenements sells one of them or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may at any time rearrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale." See also numerous authorities on this point cited in appellant's brief.

Therefore, when Cherry sold the Kahn lot the estate purchased by Kahn was burdened with a servitude in favor of the Stone lot, in that, one end of the joists of the building on the Stone lot rested in the north wall of the building on the Kahn lot. The use of the north wall of the building on the Kahn lot was absolutely essential to the enjoyment of the grant which Cherry had previously made of the Stone lot, with its appurtenances.

(2) The appellees contend that the judgment was right, even though the Kahn lot was subjected to an easement in favor of the Stone lot, for they urge that there was no eviction and that the easement was a physical encumbrance that was so obvious and notorious that it could not constitute a breach of covenant against encumbrances. These contentions under the evidence are not tenable.

Under section 731 of Kirby's Digest, the words "grant, bargain and sell" are an express covenant "to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, free from encumbrance done or suffered from the grantor." Also, "for the quiet enjoyment thereof against the grantor, his heirs and assigns, and from the claim or demand of all other persons whatsoever, unless limited by express words in such deed."

Now Kahn could not tear down the north wall of the building on his lot, nor use it in any other manner inconsistent with the easement. He could not convey it untrammeled by this easement. The easement therefore in favor of the owner of the Stone lot was certainly an encumbrance on the Kahn lot. *Seldon* v. *Dudley E. Jones Co.*, 89 Ark. 234; *Crawford* v. *McDonald,* 84 Ark. 415; *Seldon* v. *Dudley E. Jones Co.*, 74 Ark. 348; Rawle on Covenants for Title, section 79, p. 97.

"A covenant against encumbrances in a deed is one *in presenti.* If an encumbrance exists the covenant is broken as soon as made. The breach of such covenant is single, entire and perfect in the first instance and the right of action accrues at once." *William Farrell Lumber*

Co. v. *Deshon,* 61 Ark. 103; *Benton County* v. *Rutherford,* 33 Ark. 640; *Brooks* v. *Moody,* 25 Ark. 452.

In order for appellant to maintain his suit against the appellees for breach of covenants in their deed it was not necessary for Kahn to prove an eviction.

The above is undoubtedly the rule that obtains in this State with reference to a breach of covenant against encumbrances that affect title. But a distinction is drawn in some jurisdictions between encumbrances that affect title and such as affect only the physical condition of the property. This court has not heretofore been called upon to recognize the distinction. It appears to us that there is a well grounded reason for the distinction, and that in order to effectuate the intention of the parties to a contract, which is always the true rule for their interpretation, such distinction should be made.

Where encumbrances that affect the title, such as leases, mortgages, liens for taxes, or other liens or claims are outstanding at the time a conveyance containing the general covenant of warranty against encumbrances is made, such covenant is broken the instant it is made. Such encumbrances affecting title may exist without the knowledge of the grantee. The very purpose of the usual general covenant against encumbrances is to protect the vendee against such encumbrances. But where there is an easement imposed upon the land which affects the physical condition, but not the title, and of which the grantor and the grantee have knowledge, or which is so open and notorious that they must be presumed to have had knowledge thereof, and to have contracted with special reference thereto, then the existence of such an easement or servitude does not constitute a breach of the general covenant of warranty against encumbrances. *Memmert* v. *McKeen,* 112 Pa. St. 315, 320; *Henry S. Ireton* v. *R. M. Thomas* 84 Kan. 70, 113 Pac. 306; *Kutz* v. *McCune,* 22 Wis. 628; *Goodman* v. *Heilig et al.,* 72 S. E. (N. C.) 866, 36 L. R. A. (N. S.) 1004; *Janes* v. *Jenkins,* 34 Md. 1; 9 R. C. L. section 4, p. 736, 737, cited in appellees' brief.

The doctrine is well expressed in the case of *Henry S. Ireton* v. *Thomas, supra,* as follows: "It is not to be presumed that a seller of land would make a conveyance of land and warrant against an encumbrance which is plainly visible upon the land and which, from its very nature, can not be removed, with the understanding that he must pay such damage as its continuance may occasion the purchaser. Neither is it to be presumed that a purchaser would make his purchase upon the assumption that the grantor was to remove the encumbrance which, under the law, known to each, the grantor has no right to remove or which is incapable of being removed. In other words, it is not to be presumed that two contracting parties would make a contract of sale and purchase of land which is broken the instant it is completed, and the only possibly remedy of which is the payment of damages by the grantor to the grantee, in effect that the grantor should immediately repay a part of the whole of the purchase price. It is more reasonable to presume that both the grantor and the grantee, in fixing the purchase price, would consider the damages necessarily and inevitably following from the continuing of the encumbrance, and contract with reference to such physical fact."

(3) We therefore conclude that where one conveys land to another burdened with an easement or servitude which affects the physical condition of the property only, and of which easement the grantor and grantee knew at the time of the conveyance, or which was in such plain view that the parties must be presumed to have known and contracted with special reference thereto, that such easement does not constitute a breach of the general covenant of warranty against encumbrances, and such cases should be treated as not coming within the general rule as to breach of covenants affecting the title. See *Geren* v. *Caldarera,* 99 Ark. 260.

(4) This brings us to a consideration of the question as to whether Kahn had knowledge of the existence of the easement or whether the easement was of such a character that he must be presumed in law to have had knowledge

thereof under the above rule. These were questions of fact, under the evidence, for the jury to determine.

Kahn testified that he did not see any joists of Mrs. Stone that rested in the wall at the time he bought the property; that there was no way of noticing this. He did not go inside the store; he only looked at the front of Mrs. Stone's entrance. There was a wall there of about 6 or 8 inches, and he presumed that the thing went clean through; did not go in to investigate. He could not tell from examining the property on his side of the wall, and there was no way of telling from the outside of the building that her joists were in the wall. He was not permitted to state whether he would have been able to see it even upon a closer examination.

This testimony made it a question of fact for the jury as to whether Kahn had knowledge of the easement at the time of his purchase. It can not be said as a matter of law that an easement of the character of that disclosed by the evidence in this record was such that the grantee must be conclusively presumed to have had knowledge thereof. The court erred therefore in taking this question from the jury and directing a verdict in favor of the appellees. For this error the judgment is reversed and the cause will be remanded for a new trial.

MULLINS v. CITY OF LITTLE ROCK.

Opinion delivered October 29, 1917.

1. LOCAL IMPROVEMENTS—CONSTITUTIONAL LIMITATION UPON.—The only constitutional limitation upon the legislative power with respect to the creation of local improvement districts, is that the taxation of property in districts situated wholly within cities and towns must rest in the consent, actually ascertained, of a majority in value of the owners of real property, within the district. There is a further limitation however, that the amount of the tax must not exceed the special benefit derived, and also that the imposition of the tax must be uniform and free from unjust discrimination.
2. LOCAL IMPROVEMENTS—DISTRICT INSIDE CITY, IMPROVEMENT OUTSIDE.—The Legislature has authority to create an improvement

district lying wholly within a city, to construct an improvement situated outside the city limits.

3. LOCAL IMPROVEMENT—ENJOYMENT BY PUBLIC.—An improvement may be a local one so as to justify local assessments where there is a special and peculiar benefit inuring to the adjoining property, even though the general public enjoys a degree of benefit from the improvement.

4. LOCAL IMPROVEMENT—LEGISLATIVE DETERMINATION.—The legislative determination of the character of an improvement as a local one, is conclusive, unless arbitrary and unfounded in reason.

5. LOCAL IMPROVEMENT—OUTSIDE AID.—The Legislature may create a local improvement, and provide for financial assistance to be rendered it in the construction of the improvement, by the county.

6. LOCAL IMPROVEMENT—BOUNDARIES.—The action of the city council in fixing the boundary of a local improvement district is conclusive, unless obviously erroneous and arbitrary.

7. LOCAL IMPROVEMENT—BRIDGE ACROSS RIVER—VALIDITY OF STATUTE CREATING.—Act of 1915, p. 1346, authorizing the organization of improvement districts in Pulaski County for the purpose of raising money to aid the county to build, repair, reconstruct, strengthen, alter or widen bridges across the Arkansas River between the cities of Little Rock and Argenta, *held* valid.

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

R. E. Wiley and *Marvin Harris,* for appellant.

1. The act violates Art. 19, § 27, Constitution of Arkansas. The Legislature can not authorize the organization of a district in a city to make an improvement outside of the city. 50 Ark. 116, 125; Kirby's Digest, § 5674; 103 Ark. 269; 67 Ark. 30, 37, 39; 246 Ill. 43, etc.

2. The bridge is not a local improvement, therefore special assessments can not be levied because contrary to § 5, art. 16, Constitution. 9 Heisk. 349; 24 Am. Rep. 308, 34 L. R. A. 725; 149 Ill. 310, 24 L. R. A. 412; 92 N. E. 586; 102 Ill. App. 18; 22 Minn. 444; 84 Ark. 257; 104 *Id.* 425; 70 *Id.* 451; 181 U. S. 324; 67 Ark. 30, 39, 40.

3. Special assessments can not be imposed to pay for the general improvement of the city. 50 Ark. 116, 57 *Id.* 554. If this bridge is not primarily for a county purpose, the county court has no right to expend the county's

money on it, and if primarily for a county purpose then it is a general improvement for the benefit of the entire county, and its cost can not be specially assessed against a part only of the county's territory. 65 Penn. St. 146; 3 Am. St. Rep. 615; 69 Penn. St. 352; 8 Am. St. Rep. 255; 49 L. R. A. 757; 11 La. Ann. 338; Farnum on Waters, 746; 170 Ill. 436; 48 N. E. 922; 11 S. W. 84, 467.

4. The assessments will be unequal and not uniform because no part of Argenta is included. 48 Ark. 370; 57 Ark. L. Rep. 70.

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

1. Act 330, Acts 1915, supplies all necessary statutory authority lacking and all objections and defects pointed out in 113 Ark. 590 and 114 *Id.* 324 were removed. The proceedings under the Act are not opposed to the provision of the Constitution authorizing districts in cities and towns to be formed only on the consent of a majority of the property owners. It is not violative of Art. 19, § 27. 103 Ark. 269; 87 *Id.* 346; 118 *Id.* 127.

2. It is a local improvement conferring special benefits. 96 Ark. 410; 106 *Id.* 115; 113 *Id.* 193; 170 U. S. 304; 56 N. W. 41; 23 *Id.* 222; 39 Barb. 266; 38 Ore. 432. The cases cited by appellant arose under the peculiar statutes of those States. The decisions of this State sustaining special assessments on an *ad valorem* basis to improve roads and build bridges are sustained by the great weight of authority in other States. 76 N. E. 620; 34 La. Ann. 342; 181 Mass. 463; 68 N. J. 118; 158 N. Y. 438; 22 Wash. 106; 40 Wis. 315 and others. See also, 170 U. S. 304; 56 N. W. 41; 63 Pac. 2; 39 Barb. 266, as to bridges on streets of cities.

3. The assessment of benefits is not necessarily unequal and uniform, as the property in Argenta would necessarily be specially benefited and is not assessed. The district does not pay the entire cost of the bridge, but is to aid the county to defray the cost. In nearly all districts there is a zone of property beyond the limits of the dis-

trict that is benefited. 188 S. W. 822; 48 Ark. 370; 57 A. L. R. 70.

Moore, Smith, Moore & Trieber, Amici Curiae.

1. The bridge is a local improvement. 67 Ark. 30; 113 *Id.* 193; 96 *Id.* 410; 89 *Id.* 513. The Act is valid. 104 Ark. 425.

McCULLOCH, C. J. The city council of Little Rock, by an ordinance duly enacted upon the petition of property owners as prescribed by statute, has created a local improvement district "for the purpose of aiding the County of Pulaski in building a bridge across the Arkansas River, said bridge to land on Broadway street in the city of Little Rock, Arkansas." A majority of the owners of real property in the district petitioned for the improvement and the commissioners have been appointed by the city council and are about to proceed with the assessment of benefits and the levying of assessments to pay for the improvement. Appellant is the owner of real property in the district and instituted this action in the chancery court to restrain further proceedings in the assessment of benefits, levying of assessments, issuing bonds and the construction of the improvement through the agency of this improvement district, on the ground that there is no lawful authority for the organization of a local improvement district for the purpose named. The chancery court denied relief and an appeal has been prosecuted to this court from the decree.

Another district was once formed for the same purpose mentioned in the organization of this district, but this court held that under the law, as it then stood, there was no authority for the formation of a local improvement district to aid in the construction of a bridge connecting two cities. *Mullins* v. *Little Rock,* 113 Ark. 590. The property owners made another attempt to further the improvement by organizing a district to construct one-half of the bridge across the Arkansas River between the cities of Little Rock and Argenta, and this court held that the effort was futile, and that the formation of the

district for that purpose was void. *Mullins* v. *Bridge Improvement District,* 114 Ark. 324. In each of those cases the decision was based upon the lack of legislative authority to form an improvement district for the purposes named. In the first case it was held that the Legislature, in the enactment of the general statute authorizing the organization of improvement districts in cities and towns, had not conferred authority to form a district for the purpose of aiding another agency, such as the county, in constructing an improvement; and in the last case it was held that there was no legislative authority to form a district to build one-half of a bridge, or any part less than the whole. Since those cases were decided the General Assembly enacted a special statute applicable only to Pulaski County authorizing the organization of improvement districts in this county for the purpose of raising money to aid the county to "build, repair, reconstruct, strengthen, alter or widen, bridges across the Arkansas River between the cities of Little Rock and Argenta." Acts of 1915, p. 1346.

The first section of the act reads as follows:

"Districts may be organized in Pulaski County in the manner set forth in sections 5664 to 5742, of Kirby's Digest, and the amendments thereto, for the purpose of raising money to aid the county of Pulaski to build, repair, reconstruct, strengthen, alter or widen, bridges across the Arkansas River between the cities of Little Rock and Argenta, which the county has heretofore built or may hereafter undertake to build, to the extent petitioned for and under such restrictions as may be prescribed, in the petition of the majority in value of the property owners and in such event, it shall be the duty of the commissioners, if they can make satisfactory arrangements with the county court of Pulaski County within the limits of the authority conferred by such petition, to issue the negotiable interest-bearing bonds of the district to the amount prescribed in the petition, and to sell said bonds and turn the proceeds thereof over to said county court, to be used in the construction, reconstruction

repairing, strengthening, altering or widening of such bridge or bridges."

Section 2 of the act provides that when such bridge or bridges are proposed to be built, repaired, reconstructed, etc., the county court of said county shall appoint a commission composed of three persons whose duty shall be to locate and superintend the erection, reconstruction or repair of the proposed bridge. It is thus seen that legislative authority is conferred, as far as is possessed by the law-makers, to form an improvement district for the purpose mentioned in the organization of the present district.

The statute in question is not open to the objection that it attempts to amend or extend a statute by reference only to the title. *Common School District No.* 13 v. *Oak Grove Special School District,* 102 Ark. 411. Nor is the statute objectionable on the ground that it authorizes the appointment of two sets of commissioners, one by the county and the other by the city council. The question of extent of the authority of the respective sets of commissioners is not before us for determination and need not be decided until it properly arises. There may not arise any conflict in the authority attempted to be exercised by the respective boards in this instance.

(1) The only question presented, therefore, for our determination is whether or not the statute authorizing the formation of the district for the purpose named is valid, and the validity of the statute is challenged by appellant on several grounds. The Constitution of the State contains but one limitation upon legislative power with respect to the creation of local improvement districts, and that limitation is that the taxation of property in districts situated wholly within cities and towns must rest on the consent, actually ascertained, of a majority in value of the owners of real property. *Butler* v. *Fourche Drainage District,* 99 Ark. 100. In other respects the legislative will is supreme, at least as far as any express constitutional limitation is concerned. Of course, there is the further limitation that since the only justification for

the imposition of local assessments rests upon the enjoyment of special benefits to the property thus taxed, the amount of the tax must not exceed the special benefit derived; and also that the imposition of the tax must be uniform and free from unjust discrimination.

(2) It is insisted, in the first place, that it is beyond the power of the Legislature to authorize the organization of an improvement district inside of a city or town to make an improvement situated outside of its limits. We decided in one of the former cases cited that a district could not be organized for the purpose of constructing such an improvement, but since then the Legislature has supplied the power, and we perceive no sound reason why it can not be done, for special benefits may inure to property within a given locality inside of the municipality, even though the improvement lies partly outside. The improvement now under consideration affords an apt illustration, for the property adjacent to a bridge spanning a river which forms the boundary between two cities may receive marked benefit from the improvement, even though the greater part of the improvement lies outside of the district and municipality. There is nothing in the Constitution which forbids the organization of such a district. In fact, the Legislature passed a statute many years ago authorizing the organization of improvement districts for the construction of waterworks and sewer systems with part of the improvement lying outside of the municipalities, and the validity of that statute has never been questioned, although this court had previously held that in the absence of such legislative authority it could not be done. *Rector* v. *Board of Improvement,* 50 Ark. 116. The Constitution places certain limitations, as before stated, upon the power to organize districts for "assessments on real property for local improvements in towns and cities," but we have construed that provision not to restrict the power to organize districts lying partly inside and partly outside of cities and towns. *Butler* v. *Fourche Drainage District, supra.* All that the framers of the Constitution meant was that the assessments on

real property in districts wholly within cities and towns must be based upon the consent of the majority in value of the property owners to be affected. It was not a grant of power, but a limitation to that extent upon the power of the lawmakers.

(3-4) Again, it is urged that a bridge which forms part of a highway constitutes a general improvement which affects the whole public and can not be made the object of a local improvement district. There are decisions in other States to the effect that bridges, as well as other parts of public highways, can not be treated as local improvements, but this court has steadily held to the contrary. In fact, the most frequent applications of the improvement district laws in this State have been to the organization of districts for the purpose of improving streets and highways, and the power has scarcely ever been questioned. We have expressly held that a bridge situated either in a rural district or one situated inside of a city may be constructed as a local improvement. *Shibley* v. *Fort Smith & Van Buren District,* 96 Ark. 410; *Board of Directors* v. *Collier,* 104 Ark. 425; *Ferguson* v. *McLain,* 113 Ark. 193. That subject is fully discussed in the recent case of *Bennett* v. *Johnson,* 130 Ark. 507, where we reiterated the rule so often announced by this court that an improvement may be a local one so as to justify local assessments where there is a special and peculiar benefit inuring to the adjoining property, even though the general public enjoys a degree of benefit from the improvement. We held, too, that the legislative determination of the character of an improvement as a local one is conclusive, unless arbitrary and unfounded in reason, and that principle applies to the present case, because the statute under consideration is a special one and necessarily constitutes a legislative determination of the fact that bridges across the Arkansas river between the cities of Little Rock and Argenta may constitute local improvements. We can not say as a matter of law that that determination is such a manifest error as to call for judicial interference with the legislative will.

(5) One of the most serious considerations in the case is whether or not the authority to levy assessments on adjacent property for the purpose of raising money to aid the county in the construction or repair of bridges, which presupposes that the benefits to be derived from the use of funds out of the county treasury does not overturn or render inconsistent the further determination of the lawmakers that the improvement is a local one so as to justify special assessments on the adjacent property. We think, though, that the better rule is to uphold the legislative determination to the extent that the improvement is local in its nature, even though the general public will receive benefits so as to justify expenditures of public funds. That is just another way of saying, as we have often said heretofore, that an improvement may be local in its nature even though the general public enjoys a degree of the benefits. We have, in fact, held that an improvement district may be organized to improve a public street in a city even though it is necessary to obtain public funds from the city in order to complete the improvement. *McDonnell* v. *Improvement District No.* 145, 97 Ark. 334. This conclusion is very forcibly and aptly stated by the Supreme Court of Minnesota, in dealing with the subject, as follows:

"Such improvements being public in their nature, it is rare that a case arises where the general public do not share to a greater or less extent in the benefits, though in some cases, as of alleys or lateral streets or sewers, the benefit may seem to be peculiarly local. But it has never been contended that, in authorizing local assessments in pursuance of this constitutional provision, municipal authorities were to be limited to such improvements as are entirely local in their character. The city at large is benefited, and at the same time special benefits in ordinary cases result to the owners of property adjoining or in the vicinity of the improvement. If the special benefits to property so locally affected are equal to the cost of the work then an amount, not exceeding the whole cost may be assessed upon such property; but if the expense

thereof exceed such benefits, then the city at large should in any event bear a portion of the burden.'' *State* v. *District Court of Ramsey County,* 33 Minn. 295.

We are of the opinion, therefore, that it is not beyond the power of the Legislature to authorize a district to be formed for the purpose named.

(6) It is urged that the assessment of property in Little Rock will be unjust and discriminatory because no part of the property adjacent to the bridge on the Argenta side is to be taxed. Counsel cite in support of that contention decisions of this court holding that uniformity must be observed in assessments for local improvements and that where there is other property which would obviously be benefited by an improvement in the same degree, it can not be omitted from the assessment. *Davis* v. *Gaines,* 48 Ark. 370; *Heineman* v. *Sweatt,* 130 Ark. 70. Those were cases, however, where property lying inside of the improvement district was excluded from taxation, and where it was a demonstrable error to say that the omitted property would not be benefited. It is only in such instances as that that in a judicial review the legislative will may be overturned. The decision of this court in *Conway* v. *Miller County Highway & Bridge District,* 125 Ark. 325, is, we think, conclusive of this question. There must be a limit somewhere to the boundary of a district organized for the construction of an improvement of this kind, and the action of the city council in fixing the boundaries is conclusive, unless it is obviously erroneous and arbitrary. We can not say that the property on the other side of the river will be so obviously, benefited in the same degree as the property on this side as to constitute an unjust discrimination in the assessment of the property in the district for the construction of the improvement.

(7) A majority of the court, therefore, reaches the conclusion, not without some difficulty, it is true, that there is no legal objection to be found to this district, or to the validity of the statute under which it is formed, and that the decree of the chancery court in so declaring was correct. The decree is, therefore, affirmed.

HART, J., (dissenting). Mr. Justice WOOD and myself are of the opinion that the forming of a local improvement district within the city for the purpose of constructing a bridge without the city limits is in plain violation of our Constitution.

Article 19, section 27, of our Constitution reads as follows:

"Section 27. Nothing in this Constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected; but such assessments shall be *ad valorem* and uniform."

What the meaning is of the phrase "local improvement" is a question of law. In the case of *Crane* v. *Siloam Springs,* 67 Ark. 30, the court said:

"If we look for the technical or legal meaning of the phrase 'local improvement,' we find it to be 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."

In the case of *Hundley & Rees* v. *Commissioners, etc.,* 67 Ill. 559, the court had under consideration the assessments for the improvement and completion of Lincoln Park, which was situated partly in North Chicago and partly in Lake View. It was claimed that the proceedings in that case were had under a clause of the Constitution which provides that "the General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments or by special taxation of contiguous property or otherwise." In determining whether the assessment for the park was a local improvement within the meaning of this

clause of the Constitution, Chief Justice Breese, who delivered the opinion of the court, said:

"From the evidence in the record, it appears this park is to be constructed within the corporate limits of two towns. The property in both the towns is assessed to defray the costs and expenses of acquiring the land and improving the park, and assessments are to be paid by the property owners of those towns, not to pay for lands lying inside, and improvements which are to be made within those towns, but for lands situated outside, and for improvements which are to be made outside the corporate limits of such towns. Thus, taxes paid on property in North Chicago would be expended for lands and improvements, some of them in North Chicago and some in Lake View, and taxes paid on property situated in Lake View would be expended in North Chicago. How, then, can it be contended that the creation of a park in Lake View by taxes in part paid by North Chicago would be a local improvement of North Chicago, or *vice versa* in Lake View?

"We must hold, therefore, that an assessment on property in North Chicago, for a local improvement in Lake View, or *vice versa,* is not within the meaning we are disposed to give this clause of the Constitution."

As far as the principles of law involved in this case are concerned, it will be seen that the clause of the Constitution of the State of Illinois granting to municipal corporations the power to make local improvements is in no respect different from our own Constitution. The holding of the Supreme Court of Illinois in the case just referred to is in accord with our previous decisions on the attempted organization of an improvement district to construct the identical improvement involved in this case. *Mullins* v. *City of Little Rock,* 113 Ark. 590, and *Mullins* v. *Commissioners of Bridge Improvement District No.* 2, 114 Ark. 324.

In the latter case the court held invalid an ordinance of the city establishing an improvement district to construct a portion of a bridge across the Arkansas river,

the portion to be constructed by the district to be to the center of the river which was the geographical boundary of the city. In that case it was proposed that the other half of the bridge should be erected by Pulaski County or by an improvement district in the city of Argenta. The court said:

"It might be possible for these different agencies to co-operate harmoniously in the construction of this improvement, so that, when their joint labors were completed, a bridge would be constructed, but, while this is possible, it is not certain. Even if satisfactory plans should be prepared and accepted, many questions of detail would arise, which would require conferences and concessions, and if these conferences were not held and concessions made, a condition would arise which the law has not contemplated nor provided for. Such improvement as a bridge must be situated wholly within the improvement district, and, in our opinion, this ordinance seeks to do indirectly what it is not permitted to do directly, and that is to aid in the construction of this bridge."

Thus it will be seen that here is a distinct announcement of this court that such an improvement as a bridge must be situated wholly within the improvement district which was organized to construct it. We presume under the views expressed in the majority opinion that this language is now considered *obiter dictum,* but it will be readily seen from the context that such is not the case because it was a part of the reasoning which led the court to the conclusion reached by it.

Again, in the case of *Loeffler* v. *Chicago,* 246 Ill. 43, 92 N. E. 586, 20 A. & E. Ann. Cas. 335, the court held that a sewer partly in one municipality and partly in another, for the use and benefit of both, is one continuous improvement and not two separate and distinct improvements. The court further held that the question of whether an improvement is local in character so that it may be made by special assessment is one of fact, but the determination of the local authorities is subject to review by the

courts. There it was contended that in order for the sewer in the city of Chicago to be of any benefit to the property within said city an outlet in the town of Cicero for such sewer was required. It was contended that while it is the general rule that a municipal corporation can only exercise its power within its corporate limits, still that this doctrine is subject to the qualification that such authorities may do those things which are necessarily and fairly implied or incident to the powers expressly granted to them. Therefore, it was insisted that a municipality must have the power to obtain an outlet for a sewer outside its corporate limits if no such outlet can be found within such limits. The court recognized this qualification to the general rule, and in commenting upon the cases announcing it, said:

"A reading of these decisions shows that they were based upon the theory that the outlet of the sewer was really a part of the improvement and was for the exclusive use of the municipality in question. Such, however, is not the case here. True, that part of the sewer in the town of Cicero is to furnish an outlet for that part of the sewer in the city of Chicago, but it is also for the use and benefit of land in Cicero adjacent to it. These cases are not in conflict with and do not overrule the general doctrine on this question laid down in *Hundley* v. *Lincoln Park, supra.*

"Counsel for appellees further argue that this improvement, considered as a whole, is a benefit to a special locality and will specially and peculiarly enhance the value of the property in that vicinity; that, therefore, under the definitioins of 'local improvement' this improvement can be held to be one even though it is partially within two municipalities; that none of the decisions in this State except the Hundley case, *supra,* would conflict with such a holding. It is clear from an examination of the cases where this court has discussed the meaning of the phrase 'local improvement,' as used in said provision of the Constitution, it has been understood to be an improvement within and under the control of one munici-

pality." See also *Waukegan* v. *De Wolf,* 258 Ill. 374, 101 N. E. 532, Ann. Cas. 1914, B-538.

Again, in *Sylvester* v. *Macauley,* Wilson's Superior Court Reports, volume 1, page 19, the court had under consideration an ordinance for the grading of a street of the city of Indianapolis in the State of Indiana. A property owner refused to pay the assessment on the ground that that part of the street which was contiguous to her property was not in fact within the city. The court held that the city council had no power to construct its improvements beyond the city limits, and that no assessment would lie, therefore, against property owners abutting such improvements. A review of the authorities cited and a comparison of our clause of the Constitution with reference to local improvements with the clause of the Constitution of the State of Illinois relating thereto leads us to the conclusion that a local improvement can not be organized within the corporate limits of a city or town to construct an improvement outside of the corporate limits of such city or town. It is perfectly evident that the bridge when constructed will be of as much benefit to the property contiguous to it on the side of the river on which North Little Rock is situated as it is to the property near it on the side of the river on which Little Rock is situated. The cities of Little Rock and of North Little Rock are entirely disconnected at the points where it is proposed to span the river with the bridge. The purpose of the bridge is to connect these two cities so as to give the public unobstructed and convenient access from one city to the other. It will necessarily be as much used on the North Little Rock side of the river as on the Little Rock side. That is to say, the improvement will be as much used outside of the city of Little Rock as in it. The improvement will necessarily benefit adjoining property on the North Little Rock side of the river as much as it will benefit adjoining property on the Little Rock side of the river. It is evident that the primary purpose and effect of constructing the bridge is to benefit the public generally and not to improve the particular lo-

cality. While it is true that if its purpose and effect is to improve a particular locality it is a local improvement, although there may be an incidental benefit to the public, yet it is equally true that if the primary object is to benefit the public it is not a local improvement, although it may incidentally benefit property in a particular locality. Hence we do not think the improvement is a local improvement in a town or city within the legal definition of the phrase "local improvement," as used in our Constitution. It is only local in the sense that it is to be erected in a particular locality, and is nearer to some persons and property than to others.

Our conclusion on this point is decisive of the entire case, and we therefore forbear comment on other points discussed in the majority opinion.

WOOD, J., concurs in this dissent.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN *v.* DARDEN.

Opinion delivered November 5, 1917.

FRATERNAL INSURANCE—CONDITIONS IN POLICY—LIABILITY OF ORDER.—Deceased held a policy in a fraternal insurance company which provided that the policy should be void if (among other things) he lost his life, in consequence of a misdemeanor, violation of the law, duel, or combat, except in a case of self-defense. Deceased was shot and killed by one L. after a quarrel or altercation. *Held,* under the evidence and instructions, a verdict in favor of deceased's beneficiary, would not be disturbed on appeal.

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

Trimble & Williams, for appellant.

1. The deceased violated the terms of the contract by voluntarily engaging in a duel. 109 Ark. 400; 118 *Id.* 226.

2. The court erred in giving instructions Nos. 5 and 7. 59 Ark. 132; 109 *Id.* 514. The instructions were conflicting. 123 Ark. 600; 83 *Id.* 204; 74 *Id.* 441; 65 *Id.* 98; *Ib.* 64; 72 *Id.* 40; 99 *Id.* 384. See also 95 *Id.* 506. The

error was not cured by other instructions. 87 *Id.* 366; 88 *Id.* 550; 79 *Id.* 13. Nos. 5 and 7 are incorrect, conflicting contradictory, misleading and prejudical. *Supra.*

Appellee, *pro se.*

1. Even if Darden was the aggressor, defendant can not set up that as a defense. The verdict is sustained by the evidence, and there is no error in the instructions. 111 Ind. 462; 60 Am. Rep. 702; 11 N. E. 230; 89 N. E. 398; 6 L. R. A. 731; 101 Tenn. 22; 42 L. R. A. 247; 170 Ill. 79; Richards on Insurance (3 ed.) 536; 136 U. S. 297, etc.

McCULLOCH, C. J. J. W. Darden was a member or "guest," as described in the policy or benefit certificate, of a fraternal benefit society known as The Eminent Household of Columbian Woodmen, the policy being payable to his wife, Nannie M. Darden, who is the plaintiff in this action. Darden, while a member in good standing of said society, came to his death by violence at the hands of one Linn. The suit on the policy is defended on the sole ground that there was a violation of a clause of the by-laws of the order which constituted a part of the contract, in the following language:

"If a guest holding a covenant shall * * * die, or become totally and permanent disabled, or suffer loss of limb, or eye, or sustain broken limb in consequence of such misdemeanor, or any violation of law, * * * or in consequence of a duel, or combat, except in self-defense, * * * the covenant shall be void, and of no effect, and all payments made or benefits which may have been accrued thereunder, shall be forfeited without notice or service."

The case was tried before a jury on the issue as to the cause of Darden's death, whether or not the manner of his death constituted a violation of the terms of the policy.

It appears from the testimony that Darden and Linn were both farmers in Lonoke County, and that an altercation arose between them on account of the conduct of Darden in ordering one of Linn's tenants to vacate a house on the farm leased by Linn. The two parties, Linn

and Darden, met one day on a bridge in the neighborhood where they both resided, and Linn shot and killed Darden in the encounter. Linn testified that when he and Darden met on the bridge, after a brief conversation concerning other matters, the altercation arose about Darden having ordered the tenant out of the house and that Darden cursed him and drew his pistol and that he shot Darden while the latter was making effort to shoot him. Darden was shot twice and fell from his horse as the horse ran away from the scene of the shooting. Another witness in the case corroborated Linn in his statement that he shot Darden after the latter had drawn a pistol and was attempting to shoot him. On the other hand, testimony was adduced which tended to show that Darden was unarmed at the time, and the jury could have found, and doubtless did find, that the killing of Darden by Linn was not justified. Under the instructions of the court the verdict of the jury necessarily constituted a finding to the effect that the death of Darden did not result from his own unlawful act or while he was engaged in a duel or combat, within the meaning of the policy.

The only ground urged for reversal is that the court erred in giving two instructions, which read as follows:

"No. 5. Upon the issue in this case as to whether or not the assured came to his death by reason of violation of the law, unless you find that the assured drew his pistol and was attempting to take the life of Fred Linn or was attempting to inflict great bodily injury upon the said Fred Linn, then you will find for the plaintiff."

"No. 7. Unless you find that the assured was armed with a pistol and that he had drawn the same and that he was intending and attempting to take the life of the said Fred Linn, or to inflict upon him great bodily injury, then your verdict will be for the plaintiff."

It is contended that each of those instructions is in conflict with another instruction given by the court at the instance of the defendant, and are erroneous for the reason that they ignore the principle that if Darden was the aggressor in the encounter, and that when Linn fired the

fatal shot he honestly believed without fault or carelessness on his part that he was in actual danger of receiving great bodily injury, the killing was justifiable. The instructions are open to the objections stated, but the error in omitting the principle just mentioned is not prejudicial for the reason that there is no question in this case of Linn acting upon mere appearances of danger. The meeting between the two men was in broad daylight and Linn and another witness described with certainty the details of the encounter, and they both state that Darden drew his pistol and presented it, or "threw it on Linn," as they say, and attempted to shoot. Other circumstances in the case contradict that testimony, and the jury only had to consider whether or not the statement was true. There is no testimony in the case which would have warranted the conclusion that even though Darden did not draw a pistol and make an assault upon Linn, that the latter honestly and in good faith believed that he was in actual danger of receiving great bodily harm.

We think that the instructions, though not strictly accurate, presented the issue to the jury in a way that no prejudice resulted, and that the defendant was bound by the verdict of the jury.

Affirmed.

THOMPSON v. WILHITE, ADMINISTRATOR.

Opinion delivered November 5, 1917.

1. ESTOPPEL IN PAIS—DEFINITION.—An estoppel *in pais* is conduct intended and calculated to induce, and in fact inducing, another person to alter his condition so that it would be a fraud on him to allow the other person to take an inconsistent attitude to his detriment.

2. DOWER—ACT OF WIDOW—ESTOPPEL.—*Held*, under the facts, that a widow was estopped from claiming dower in the funds of her husband in the hands of his administrator, and which he had used in paying the debts of the estate.

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

R. A. Nelson, for appellants.

1. Appellants are not estopped to claim their rights, nor were they waived by any acts or conversations. 16 Cyc. 679.

2. The court erred in its instructions. 15 Ark. 41; 96 *Id.* 222.

W. D. Gravette, for appellee.

1. Appellants are estopped. The instructions are not set out nor abstracted. But the jury were properly instructed and the evidence sustains the judgment. Appellee paid the debts under the instructions of the widow. It was then too late to claim dower.

WOOD, J. W. H. Needham died in December, 1912, leaving his wife and daughter. After his death his wife, Eliza, married Thompson, and his daughter, Gertrude, married Jones. In January, 1913, B. H. Wilhite was appointed administrator of the estate of Needham. On the 30th of October, 1915, the administrator filed his first and only report, showing certain amounts received and collected by him for the estate, and certain amounts paid out. Appellants filed their exceptions to the report, which exceptions were sustained by the probate court, and the administrator appealed to the circuit court, where the judgment on the exceptions was in favor of the appellee, and the appellants have prosecuted this appeal.

The only issue presented on this appeal is whether or not the appellant Eliza Thompson, as the widow of Needham, was entitled to a dower interest of $377.45 out of the estate of Needham.

The undisputed testimony shows that at the death of Needham there was realized out of the personal property of his estate the sum of $1,132.45. The appellee, administrator, contends that at the request of Mrs. Needham he used the money coming into his hands of the estate for the payment of debts, and that she is estopped by her conduct from claiming her statutory dower in this money. The appellant, Eliza Thompson, on the other hand, denies this contention, and claims that she is not

estopped, under the facts, from claiming her statutory dower. The testimony on this issue is substantially as follows:

At the death of her husband Mrs. Needham and her attorney called upon Mr. Wilhite and asked him to act as administrator of the estate. She did not tell him anything about selling the property or paying the debts; did not instruct him to pay the debts. Needham never told her what he wanted. He did not owe many bills. There was a $1,000 insurance policy, made payable to his estate. She did not tell Mr. Wilhite that Mr. Needham had this policy made payable to his estate in order to have his debts paid. She did not mind the honest debts being paid. After the death of her husband she lived with a man by the name of Fields, who married her aunt, until about two days before she married Thompson. She never told Fields that she wanted Wilhite to pay the debts. She never told him that Wilhite was giving her all the information she wanted about the matter. She stated that she had complained about the way Wilhite had managed the estate before she married Thompson. The first attorney she consulted with reference to her affairs after the death of her husband was Mr. Rodgers. She paid Mr. Rodgers his fee. Her husband told her before his death that he had paid Rodgers for the services that Rodgers had rendered him, and that her husband did not owe Rodgers any attorney's fee. She was relying upon the advice and counsel of Rodgers in the settlement of her husband's estate. Rodgers procured for her an order on the administrator to refund to her the funeral expenses which she had paid, and also secured an order for the administrator to pay her the sum of $300 as the widow's allowance. She had received a letter from Mr. Rodgers stating, in substance, that he had procured these two orders, and that he would file another petition to determine her further interest in the estate, and stating that his fee for this service was $50, which amount she paid to Rodgers. She stated that she did not, with the administrator, check over any accounts against the Needham estate or

authorize the administrator to use her interest to pay Needham's debts.

Witness Wilhite testified that he became administrator of the estate upon the solicitation of Mrs. Needham. The personal property of the estate consisted of an insurance policy for $1,000 and a small stock of goods, amounting to $132. He had paid out $1,026.17 on claims against the estate filed with him. Mrs. Needham instructed him to pay these claims; told him the reason Mr. Needham had the policy made payable to his estate was for the purpose of paying his debts. Nothing could be ascertained from the books and Mrs. Needham went over the accounts with witness; told him which ones to pay and which not to pay, and he paid what she told him to pay. After paying these claims there was a balance in his hands of $131.43. Witness was appointed administrator in January, 1913, and did not file any report until October 30, 1915. None of the accounts against the estate are marked "filed." Witness thought that none of the accounts paid by him were presented later than a year after he took out letters of administration. He took the whole thing over on October 30, 1915, and filed it with the clerk of the probate court, and then carried it all back to the bank with him.

The report does not show the dates that the claims were filed, but does show the dates that they were paid. The court never directed him to pay the claims, but witness paid them under the instructions of Mrs. Needham.

Rodgers testified that he was a practicing lawyer in Blytheville; that he had represented Mr. Needham during his life in a legal matter, and that he represented the administrator in some matters after the death of Needham. He assisted in the collection of the insurance policy on the life of Needham; that Mrs. Needham came to his office a short time after the death of Needham and said something to him about taking the administration of the estate; that he would not do it, and she suggested Mr. Wilhite. They went to see him and Mr. Wilhite at first refused to accept it, but finally agreed to do so. Mrs. Needham

said there would be very little in this, as there was only a policy of insurance to collect and a small stock of goods; that it was her desire for this money to be used for the payment of Needham's debts. She never at any time told witness to tell Mr. Wilhite to pay the accounts against the estate. Witness advised her that she was entitled to be reimbursed for the amount she had paid for the funeral expenses and also $300. He did not advise her that she was entitled to one-third of the personal property, because she did not ask him about it. He wrote Mrs. Needham the letter referred to in her testimony in regard to protecting her interest, but such letter referred to her rights of homestead, and not to her rights of dower. He stated in the letter that he was to file a petition to determine her further interest in the estate. Witness knew that the homestead was exempt to the widow and minor child.

Fields testified that after the death of Needham, Mrs. Needham lived with him. She talked with him about the administration of the estate; stated to him that she wanted her husband's debts paid; that she was satisfied with the way Wilhite was handling the estate; that he never heard her complain until after she married Thompson. Witness did not become angry at Mrs. Needham after her marriage with Thompson. Mrs. Needham told witness that she had been treated nicely by Mr. Wilhite.

Witness Anthony testified that he was the bookkeeper of the Bank of Blytheville and heard a conversation between Mrs. Thompson and Wilhite regarding the estate; that he had seen them going over the accounts together; that he had heard her say she wanted Mr. Needham's debts paid.

The appellant, Mrs. Thompson, was recalled and testified that Mr. and Mrs. Fields told her that if she married Thompson they would "turn the back of their heads on her forever."

Under the above evidence it was an issue of fact as to whether or not the appellant, Mrs. Thompson, was estopped by her conduct from claiming her dower in the

personal property of the estate of her deceased husband. The instructions are not abstracted, and we must therefore presume that the trial court submitted this issue under proper instructions.

(1) An estoppel *in pais* is conduct intended and calculated to induce, and in fact inducing, another person to alter his condition so that it would be a fraud on him to allow the other person to take an inconsistent attitude to his detriment. *Scharfenberg* v. *Town of New Decatur,* 47 So. 95, 155 Ala. 651.

Equitable estoppel (estoppel *in pais*) "is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon." 2 Pom. Eq. Jur., § 804, cited and quoted in *Geren* v. *Calderera,* 99 Ark. 260, 263. See also Words & Phrases, "Estoppel in Pais," 366 *et seq.;* 16 Cyc. 679; *Rogers* v. *Galloway Female College,* 64 Ark. 627, 639.

(2) Under the above familiar doctrine of *estoppel in pais,* the jury, under proper instructions, were justified in finding that the appellant, by her conduct, was estopped from claiming dower in the funds in the hands of the administrator and which he had used in paying the debts of the estate. The judgment is therefore affirmed.

BALLARD v. KANSAS CITY & MEMPHIS FARMS COMPANY.

Opinion delivered November 5, 1917.

1. PLEADING AND PRACTICE—TITLE TO LAND—ISSUE AS TO OWNERSHIP—EJECTMENT.—Plaintiff brought ejectment, setting out a complete chain of title. Defendant answered merely denying plaintiff's ownership; *held,* the answer was not sufficient to put the question of plaintiff's ownership in issue.
2. TAXES—SEVEN YEARS.—The payment for seven years of taxes upon land, under color of title, makes out a *prima facie* title in favor of the person paying the same.
3. SWAMP LANDS—COMPROMISE—EFFECT OF.—The compromise between the United States and the State of Arkansas, approved by the State on March 10, 1897, and by act of Congress of April 29, 1897, does not affect lands already patented by the United States to the State of Arkansas. It had only to do with swamp lands which the State had not received, but was still claiming, and with lands claimed by the United States as not being in fact swamp land, and with certain debts due the United States from the State.

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

Mardis & Mardis, for appellant.

1. This is a suit in ejectment, and plaintiff must deraign and prove title. Kirby's Digest, § 2742.

The complaint does not allege that the title ever passed from the United States by patent or otherwise, nor was there such proof.

The patent to Porter was not filed, nor a copy thereof, the original was not exhibited nor is it of record and hence not admissible in evidence. 38 Ark. 181; 40 *Id.* 237. The title is still in the United States, having never passed to the State. 100 Ark. 94. If the State ever issued its patent to Porter it was four years before it ever could have acquired title. It was only a quitclaim deed, and any subsequently acquired title would not inure to Porter.

But the forfeiture for taxes terminated Porter's title.

Under the settlement and compromise act of 1895, the land reverted to the United States, 231 U. S. 564-8, and

was not subject to taxation. The board of directors of the St. Francis Levee District acquired no title.

Seven years payment of taxes would not divest the United States of its title and the deed to Chatfield was *in trust* and his *heirs* had no title to convey. Appellee fails to prove its title.

Hughes & Hughes, for appellee.

The United States granted the land to the State by the swamp land grant, and it is so alleged. The State granted to Porter and the chain is complete to appellee. Appellants did not deny the title and no proof was necessary.

But payment of taxes under color of title was proven for more than seven years. The compromise act of 1898 did not give title to the United States. 39 Stat. at Large, 368, 6 Fed. Stat. Anno. 314.

The defense is frivolous, appellants being mere squatters without right or title or claim.

SMITH, J. This was a suit in ejectment, and the complaint alleged that on January 12, 1854, "the State of Arkansas, being then the owner of the said land (the land sued for) under the Swamp Land Grant, by its patent of that date, conveyed the same to Ethel H. Porter." A chain of conveyances from Porter direct to the plaintiff is then alleged. In the last paragraph of the complaint, it was alleged that appellants, who were the defendants below, entered into the possession of the land for the purpose of homesteading it, claiming that the land belonged to the United States, but "the said claim is wholly without foundation, as the Government parted with its title by the Swamp Land Grant of 1850." It was also alleged that the said land had forfeited to the State for the nonpayment of the taxes due thereon for the years 1866, 1869, 1870 and 1878, and had been granted by the State of Arkansas to the board of directors of the St. Francis Levee District, and that plaintiff had, by mesne conveyances, acquired this title.

It was also alleged that the land was wild and unoccupied, and that plaintiff and its predecessor in title had paid the taxes continuously thereon for more than twenty years.

Appellants, in their answer, "deny that plaintiff is the owner of the land set out in the complaint." The answer admitted the forfeiture of the land for the nonpayment of taxes, but denied the execution of the deed from the levee board or the payment of the taxes thereunder. The answer further alleges "that on the ..... day of ....., 1915, said land belonged to the Government of the United States, and that on said date defendants went on said lands and commenced to make improvements thereon with the view of making homestead entry thereon, and that the legal title to said land is in the United States by reason of the settlement and compromise between the United States and the State of Arkansas made in 1897."

The plaintiff filed copies of the conveyances pleaded in the complaint except the patent from the State to Porter, and no showing was made that the land had been selected and approved to the State under the Swamp Land Grant. Payment of taxes by plaintiff and its vendor for more than seven years was shown. One of the defendants testified that he had settled on the land for homestead purposes, having been advised that the land belonged to the United States. There was a verdict in favor of plaintiff, and the defendants have appealed.

It is first said that the plaintiff did not show that the title had ever passed from the United States by patent or otherwise. It may be said, however, that there was no denial of the existence or validity of a single link in the plaintiff's chain of title so far as the original title is concerned. It is true the answer denied plaintiff's ownership of the land, but this was not sufficient to put that question in issue, as that was pleading a mere conclusion and was not a denial of the facts stated in the complaint. *Beard* v. *Wilson,* 52 Ark. 290; *Harvey* v. *Douglass,* 73 Ark. 221; *Grier* v. *Yutterman,* 102 Ark. 433.

Moreover, the payment of taxes under the color of title shown was sufficient to make a *prima facie* title in favor of plaintiff.

Appellants argue that the forfeitures for taxes for the years 1866, 1869, 1870 and 1878 operated to extinguish any title passing to Porter under the patent from the State and restored the title to the State, and that this title passed to the United States under the compromise agreement between the State and the United States which was ratified by the State March 10, 1897 (Acts Regular Session 1897, page 88), and by the act of Congress of April 29, 1898, 30th U. S. Stat. at Large, 367, chap. 229, 7 Fed. Stat. Ann. 125. But, as pointed out by appellee, this compromise had nothing to do with lands already patented by the United States to the State of Arkansas. It had only to do with swamp lands which the State had not received but was still claiming, and with lands claimed by the United States as not being in fact swamp lands, and with certain debts due the United States from the State. Section 3 of the act of Congress referred to reads as follows: "That the title of all persons who have purchased from the State of Arkansas any unconfirmed swamp lands and hold deeds for the same, be and the same is hereby, confirmed and made valid as against any claim or right of the United States, and without the payment by said persons, their heirs or assigns, of any sum whatever to the United States or to the State of Arkansas."

If the land in controversy was, in fact, embraced in this settlement between the United States and the State—a fact which we do not know from the record before us—the title passed to the State under it, whether a patent was ever issued to the State or not, for it is alleged, and not denied, that the State had conveyed this land to Porter in 1854.

No error appears and the judgment is affirmed.

ETCHERSON *v.* HAMIL.

Opinion delivered November 5, 1917.

1. ADVERSE POSSESSION—CLAIM OF PERSON IN POSSESSION.—A person acquires title to land by adverse possession, where by mistake he encloses and occupies more land than he intended to, but all the time claims title thereto; but where he occupies more land than his own but claims title only to the exact and true boundary line, he acquires no title beyond the actual boundary.
2. APPEAL AND ERROR—GRANTING MOTION FOR NEW TRIAL—FINALITY.—Where a verdict was rendered in appellant's favor, but the trial court granted a new trial, appellant can not later complain, where he submitted to the court's order, and went to a second trial where judgment was rendered against him.

Appeal from Randolph Circuit Court; *J. B. Baker,* Judge; affirmed.

T. W. Campbell and *W. L. Pope,* for appellants

1. The first verdict was right, and should have been allowed to stand. It was error to set it aside. There was a variance between allegation and proof. The verdict was correct and it was an arbitrary abuse of discretion to set it aside. 2 Cyc. 559; 43 S. W. 426; 38 *Id.* 433.

2. The instructions are erroneous. Hamil farmed the land more than twenty years before suit but intended to claim and claimed only to the true line and his title never ripened by adverse possession. The instructions asked by appellants should have been given. 80 Ark. 444; 101 *Id.* 409; 100 *Id.* 555; 83 *Id.* 74; 2 C. J. 139. The instructions given were error.

3. The remarks of the judge to the jury were reversible error. 58 Ark. 108; 53 *Id.* 381.

4. There is no proof that appellants cut any timber from the land described in the complaint or amended complaint before the suit.

Jno. W. Meeks, C. H. Henderson and *McCaleb & Reeder,* for appellee.

1. Appellants should have appealed from the order setting aside the first verdict. They elected to submit to a new trial. 122 Ark. 262.

2. The instructions refused did not state the law correctly and were properly refused. 80 Ark. 444; 101 *Id.* 409; 100 *Id.* 555; 83 *Id.* 74. Appellee's possession was adverse and ripened into title. *Supra.*

3. The instructions given were correct. Cases *supra.*

4. The evidence shows a trespass before suit and the evidence supports the verdict. There is no error.

5. The bill of exceptions fails to show any remarks of the court, or exceptions thereto. 126 Ark. 305.

SMITH, J. Appellee filed a suit in which he alleged his ownership of the southeast quarter of Section 23, Township 19 North, Range 1 East, inuring from fifteen years' continuous possession, and that appellants had trespassed thereon by cutting timber of the value of $34.43. It was alleged that appellants knew themselves to be trespassers, and treble damages were prayed. At the trial below appellee undertook to show that the timber had been cut on the land above described; whereas appellants undertook to show that the timber had been cut on the northeast quarter of the same section, which was owned by him.

There was testimony in regard to several different surveys, which varied in the location of the line between the two quarter sections of land, and the jury evidently found that the timber was cut on the northeast quarter of the section, for a verdict was returned in favor of appellants. A motion for a new trial was filed and granted, and before the second trial appellee amended his complaint to allege ownership of the part of the northeast quarter on which the timber was cut. At the trial from which this appeal was prosecuted, appellee offered proof of his enclosure of the land in controversy, and while there is a conflict in this testimony, it was amply sufficient to support a finding that appellee had maintained his enclosure for more than seven years, and there

was a verdict in appellee's favor for $15, which was the market value of the timber.

Appellants say the proof does not show that appellee claimed title to the land beyond his true line, and they base this contention upon appellee's answer to a question that "I was trying to claim all that belonged to me, and no more, like a reasonable, honest man." But his testimony, considered as a whole, makes it perfectly apparent that he was claiming title to all the land which had been enclosed. He supposed his fence was on the true line, which he had had surveyed by the county surveyor, and he had occupied as owner, all the land which the fence enclosed, claiming the title thereto.

Appellants requested instructions to the effect that, if appellee held possession of the land under an erroneous belief that he had his fence on the correct line, when, in fact, he did not have his fence on the correct line, his possession of said land was not adverse; and that, if when appellee built his fence, he only intended to put it on the true line, but was mistaken as to what was the true line, and put the fence east of the true line, then his possession was not adverse.

(1) These instructions were properly refused, because they did not declare the law as stated by this court in the case of *Shirey* v. *Whitlow,* 80 Ark. 444. It was there said: "When a landowner, acting under a mistake as to the true boundary between his land and that of another, takes possession of land of another, believing it to be his own, incloses it, claims title to it and holds possession for the statutory period, he becomes the owner, for such possession and claim of title, though founded on a mistake, would be adverse; but this would not be so if his intention was to claim only to the true line, wherever that may be, for then the possession would not be adverse beyond such line. *Wilson* v. *Hunter,* 59 Ark. 628; 1 Cyc. 1037, and cases cited."

It would not have been sufficient for the jury to have found, as stated in the requested instructions, that appellee had only intended to put his fence on the true

line and had been mistaken as to where that line was; but, to have been correct, the instruction should also have required a finding that it was only appellee's intention to claim to the true line, wherever that line might be. See also *Goodwin* v. *Garibaldi,* 83 Ark. 74; *O'Neal* v. *Ross,* 100 Ark. 555; *Butler* v. *Hines,* 101 Ark. 409.

Appellants say no error was committed at the first trial, and that the court erred in setting aside the verdict of the jury and granting a new trial.

(2) Sections 1188 and 1238 of Kirby's Digest make the order of the court granting a new trial a final and appealable judgment, from which an appeal may be taken upon compliance with the statute authorizing it. Appellants had the right to prosecute an appeal from the order of the court granting a new trial and to have had then a review of the question he now presents. He did not do so, however, but elected rather to try again the issues before another jury, and he is now bound by his election. *Bush, Recvr. St. L., I. M. & S. Ry. Co.* v. *Barksdale,* 122 Ark. 262.

It is finally insisted that the evidence does not show that the trespass was committed before the suit was brought. No express statement to this effect is found in the record; but that such was the case is, not only fairly, but is necessarily, inferable from the evidence.

Finding no error, the judgment is affirmed.

ROBERTS v. ROBERTS, ADMINISTRATRIX.

Opinion delivered November 5, 1917.

FRAUDULENT CONVEYANCES—DEPRIVING INTENDED WIFE OF DOWER.—Where a man or woman conveys away his or her property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance or compel the person taking it to hold the property in trust for, or subject to the rights of the defrauded husband or wife.

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

J. F. Wills, for appellant.

1. The sole purpose of the conveyance was to defraud plaintiff of her dower rights, and the fraud was participated in by both grantor and grantee. The deed is void. 191 S. W. 963; 40 Cyc. 1164; 10 Col. App. 443; 14 Cyc. 944; 9 R. C. L. 591; 1 Scribner on Dower, 588; 4 Pom. Eq. Jur., § 1383; 7 N. D. 475; 41 L. R. A. 258; 219 Ill. 146; 43 Ky. (43 Mon.) 215; 39 Am. Dec. 501. See also, 65 Am. St. 350; 134 Ind. 350; 96 N. W. 900; 63 Oh. St. 125; 6 N. J. Eq. (2 Halst.) 515; 60 W. Va. 9; 1 Ann. Cas. 856; 54 How. Pr. 228; 10 Hun 194; 37 S. C. 285.

2. The fact that the conveyance is to children will not render it valid, if it covers all or a greater part of the grantor's property. 71 Ky. (8 Bash.) 201; 35 Mich. 415; 15 Phil. 339; 14 Vt. 107.

3. The mere fact that a voluntary conveyance is made on the eve of marriage, without the knowledge of the intended spouse, is conclusive proof of fraudulent intent. Cases *supra;* 5 Jones Eq. (58 N. C.) 258.

4. The decisions are not confined to cases where the conveyances were voluntary. 64 Wis. 301; 25 N. W. 88; 254 Ill. 281; 94 N. E. 563; 45 Am. Rep. 75, 79; 120 Ark. 500.

5. As to inadequacy of consideration, see 33 Ark. 328; 20 Cyc. 441; 59 Mo. 537.

Mehaffy, Reid & Mehaffy and *W. C. Adamson,* for appellees.

1. John W. Roberts helped to accumulate the property. The consideration is $100 and *other considerations.* There was no fraud, but an act of justice.

2. Where two or more persons jointly pay the consideration and the title is taken in the name of one only, a resulting trust will arise in favor of the one not named in proportion to the consideration paid. 39 Cyc. 133; 64 Ark. 155; 101 *Id.* 451. Such trust can be established by evidence full, clear and convincing. The consideration was adequate and no fraud shown. No intention to defraud the intended wife of dower was shown. 45 N. W. 603; 8 L. R. A. 814; 14 Cyc. 944.

3. Mere inadequacy of consideration is not even constructive fraud. 2 Pom. Eq., § 926-7. The inequality must be so great as to shock the sense of justice. 6 Am. & E. Enc. L. 701; 92 Ark. 248. Or fraud must be proven. Fed. Cases No. 6638, 17068; 91 Ill. 288; 20 N. J. Eq. 433; 76 Va. 744. The deed was for a valuable consideration and there was no fraud or undue influence, or mental incapacity. 116 Ill. 340, 6 N. E. 428; 91 Mich. 618; 52 N. W. 58; 1 Humphr. (Tenn.) 459.

4. The wife can not complain where, in good faith, as here, only a reasonable provision is made for children, although she is ignorant and the effect is to decrease her dower. 90 Ky. 1; 76 Wis. 567; 5 Kan. App. 285; 57 Iowa 15; 134 Ind. 350. See also, 21 Kan. 521; 13 Me. 124; Story Eq. Jur., § 273, 23 Gratt 102, 123; 3 Del. Chy. 99, 110-13; 41 L. R. A. 258. The contract of marriage does not debar a man from all control of his property, or tie up his estate. 21 Kan. 527; 34 *Id.* 740; 57 Iowa 15; 56 Kan. 1.

5. A settlement merely concealed may be vindicated on the ground it was dictated by equitable or meritorious considerations. 2 Beav. 522; 1 Vern. 408; 2 P. Wis. 675. Each case must be determined by its own circumstances. 1 Myl. & K. 610; 43 Pa. 67; 71 Pa. 386. It is for the court to determine whether a fraud on the marital rights was intended. Bigelow Fraud 51; 64 Wis. 307; 84 Ky. 527; 57 Iowa 15; 6 New Eng. Rep. 707; 8 L. R. A. 874, 95.

6. Fraud must be proven, it is never presumed. 120 Ark. 500; 99 *Id.* 45; 63 *Id.* 22.

7. The findings of the chancellor are conclusive unless clearly against the preponderance of the evidence. 67 Ark. 200; 91 *Id.* 69; 95 *Id.* 482; 84 *Id.* 429; 100 *Id.* 370.

SMITH, J. This was a suit brought by appellant to set aside a deed which she alleged was executed in fraud of her marital rights. She alleged that she was the widow of Thomas Roberts, whom she married on January 12, 1911, and who died June 4, 1913. It was alleged that prior to their marriage Roberts had owned

seven lots in the town of Carlisle, in Lonoke County, and that the ownership of said property was, in part, the inducement for her marriage. That Roberts, during their marriage negotiations, represented to her that he owned that property, and that on January 11, 1911, the day before the marriage, Roberts, without her knowledge or consent, and in fraud of her rights, executed a deed to said property to one John W. Roberts, which was without consideration, or without adequate consideration. It was further alleged that her husband continued to keep and use said property until his death, and that she remained in ignorance of the conveyance until after his death. John W. Roberts died on March 13, 1913, and the suit was brought against Estelle Roberts, as widow, and Agnes Roberts, as infant child and only heir at law. There was a prayer for the cancellation of the deed and the assignment of dower.

The answer contained a general denial of all the allegations of the complaint.

The chancellor found against the plaintiff and dismissed the complaint for the want of equity, and this appeal has been duly prosecuted.

In support of the prayer of the complaint, appellant offered the following testimony. She testified that when she and Mr. Roberts were talking about getting married, she said, "Mr. Roberts, you are old, and do you think you can take care of us the rest of our lives?" and he said, "Certainly; I own ten lots in Carlisle," and he showed her the deed therefor, and he also said, "I have got a little money, but I am not going to show it to you; and I draw a pension of $36 quarterly." He showed her the deed on Monday before they were married on Thursday. Roberts owned a lot on Main street in Argenta, and had a small store with stock of goods worth about $200, on which he owed $80. About two weeks before Roberts' death, she asked him to move to Carlisle, and he said "All right," and she looked for the deed and could not find it, and asked him about it, and he said, "Well, I kinda made it over to John, but I am going to

get it back. It is no trouble to get it back. I have just kinda made it over." She did not learn of the deed sought to be canceled, however, until after the death of her husband, who continued paying the taxes on the lots and collected the rent amounting to $6 per week, until he died. She testified that her husband had raised John Roberts, but had never adopted him; that he gave John Roberts $200 at one time, and $25 several times after her marriage.

The deed recited a consideration of $100 and "other considerations," and was recorded twelve days after its execution.

The testimony as to the value of the lots varies widely, appellant putting the value as high as $1,600, while a disinterested witness places it at a thousand. But the witness whose opinion is evidently most dependable places the value of the lots at $700.

Mrs. Estelle Roberts testified that the $100 was actually paid, and there is testimony that John Roberts, both before and after his marriage, assisted Thomas Roberts in his store, and had lived with him from infancy until after his marriage as a member of the family and had given Thomas Roberts his earnings as a boy. John Roberts was born in 1878, and a note of that fact was made by Thomas Roberts in his family Bible. John Roberts called Thomas Roberts "Pa," and called Mrs. Roberts "Ma," and both of them referred to him as "Son," and he was commonly spoken of as the son of Thomas Roberts and his wife, by his acquaintances. Some effort was made to show that John Roberts had been legally adopted, but it is not contended that the evidence establishes that fact. A Mrs. Styrne testified that she, too, lived with Mr. and Mrs. Roberts for fourteen or fifteen years as a servant and as a member of the family, and called them "Pa" and "Ma," and that John did but little work, and did not contribute to Mr. Roberts as much as his living cost. The preponderance of the evidence on that question, however, appears to be otherwise, and, although the testimony does not show that the boy was adopted, it does show that Mr.

Roberts entertained great affection for him and treated him like a son, and gave him money from time to time. Indeed, while the testimony shows the payment, in some form, of the $100 recited in the deed—the circumstances and details of the payment not being shown—yet, it also appears that after appellant's marriage, Mr. Roberts had given John $200 and other smaller sums in addition.

The same difference of opinion in regard to the value of the remainder of the property (the Argenta property) exists as was shown in regard to the value of the lots in controversy. There was testimony that Mr. Roberts had refused $3,500 for the property, and that it was worth that sum of money; but it was shown that a half interest was sold at a public sale for $825, and the other half interest at a private sale for $1,250.

There is no intimation in the record that any undue or improper influence was exercised over Mr. Roberts to induce the execution of the deed. On the contrary, it appears to have been a deliberate act, prompted, no doubt, by the affection he entertained for the boy he had reared, then grown to be a man thirty-three years old. But the deed, if permitted to stand, divests Mr. Roberts' estate of about one-fourth of its value and, consequently, and proportionately, reduces appellant's dower interest. If the $100 was in fact paid in money, it represented only about one-seventh of the value of the property, and although the deed is absolute on its face, there was no change of possession. Mr. Roberts continued to pay the taxes in his own name and to collect the rent on the little house which stood on one of the lots, this being all the income derived from said property. John Roberts was present when the deed was executed, and had known for two months prior thereto that Thomas Roberts was to be married to appellant, and he became a party to a transaction which resulted in leaving to his grantor the beneficial interest in the property during the lifetime of the grantor, and yet, if allowed to stand, one that deprives the grantor's wife of her dower after his death.

In 9 Ruling Case Law, page 591, it was said: "That the wife's right of dower is a substantial property right, entitled to protection by the courts, is perhaps most strikingly shown in action by her to set aside conveyances made by the husband for the purpose of defeating her expectation (though not yet vested even as an inchoate right) of dower. If shortly before a marriage, the future husband conveys away his real estate without consideration, and without the consent or knowledge of his betrothed, with the purpose and result of unfairly depriving her of dower, the courts will set aside the conveyance as a fraud upon her rights; and even the fact that it was made for a valuable consideration will not save it, if the grantee participated in the intent to defraud the wife." Numerous cases are cited which support the text.

In our recent case of *West* v. *West,* 120 Ark. 500, we stated our own views of this subject in the following language: "This brings us to a consideration of the law governing cases of this character. The general rule is that if a man or woman convey away his or her property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance or compel the person taking it to hold the property in trust for or subject to the rights of the defrauded husband or wife. Perry on Trusts and Trustees (6 Ed.) Vol. 1, section 213; Bishop on the Law of Married Women, Vol. 2, section 350; *Smith* v. *Smith,* 2 Halstead Ch. (N. J.) 515; *Leach* v. *Duvall,* 8 Bush. (Ky.) 201; *Dearmond* v. *Dearmond,* 10 Ind. 191; *Collins* v. *Collins,* 98 Md. 473, 103 Am. St. Rep. 408, and case note."

Applying the doctrine of that case to the facts of this, we have concluded that the chancellor's finding is contrary to the preponderance of the evidence, and that the deed in question was executed for a grossly inadequate consideration and for the purpose of defeating the dower right which otherwise appellant would have had.

The decree is, therefore, reversed and the cause will be remanded with directions to the court below to enter a decree canceling the deed in so far as it affects appellant's dower as in fraud of her dower rights, and to assign dower therein.

BOWLIN v. CITIZENS BANK & TRUST COMPANY.

Opinion delivered November 5, 1917.

1. MERGER OF ESTATE—SPENDTHRIFT TRUST.—Equity will not recognize a merger, even where there is a union of legal and equitable estates in the same person, if the effect of such merger is to destroy a valid trust, and to defeat the will of the party creating the trust.
2. TRUSTS—SPENDTHRIFT TRUST.—Spendthrift trusts declared valid.
3. TRUSTS—SPENDTHRIFT TRUST—MERGER OF ESTATES IN CESTUI QUE TRUST.—Where a testator created a valid spendthrift trust in favor of his son, equity will not permit the testator's intention to be defeated, by a merger of the life estate and remainder in the said cestui que trust.

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

Wear & London and *Starbird & Starbird,* for appellants.

1. A trust can not be attached to a full estate. It can not be attached to a greater one than a life estate. There must be a preceding estate. By purchasing the remainder, appellants became the owners of the full legal title, and the life estate was extinguished and merged and the trust terminated under the doctrine of merger of estates and acceleration of remainders. 16 Cyc. 665; 5 Words & Phr. 4492-3, 70 S. W. 414; 1 Jones on Mortg. (4 Ed.), § 848. The remainder here was vested and as such could be and was conveyed. 38 S. W. 1061. Merger destroyed the life estate and accelerated the remainder. 16 Cyc. 651; 25 Atl. 1087; 28 S. E. 583; 81 S. W. 874; 70 *Id.* 414-17. See also 71 Mo. 642; 146 Mass. 395; 15 R. I. 549; Underhill on Torts (Am. Ed.)

370; 15 N. E. 786; 4 Am. St. 320; 10 Atl. 589; 217 Ill. 434; 141 U. S. 315.

Southmayd & Southmayd, for appellee.

1. A spendthrift trust was created and as such is valid in this State. 91 U. S. 716; 66 Ark. 153; 104 *Id.* 439; 124 *Id.* 395. See also 244 Ill. 101, 18 Ann. Cas. 490; 189 S. W. 1186; 94 Kan. 654; 146 Pac. 1030.

2. A spendthrift trust is not contrary to law nor against public policy. 73 N. E. 1051.

3. The intentions of the testator clearly manifested in the will will be carried out and can not be defeated by the voluntary acts of the beneficiaries. The cases cited by appellants do not apply. 262 Ill. 308; 104 N. E. 659; Ann. Cases, 1915 B. 720; 181 N. Y. 39; 73 N. E. 498; 229 U. S. 90; 33 U. S. C. Rep. 686; 133 Mass. 170; 168 Ky. 847; 9 Am. St. Rep. 358; 191 S. W. 994. There was no merger or acceleration of remainders by the purchase. The will of the testator will be carried out, and the demurrer was properly sustained.

T. J. Wear, for appellants in reply.

1. This is purely a question of law. By purchasing the remainder a *merger* was created and the life tenants acquired the full absolute title. The trust terminated. 262 Ill. 308; 36 Am. & Eng. Ann Cases 720; 104 N. E. 659; 91 Atl. 503; 90 Mo. App. 650; Underhill on Trusts 370-5, 13 and cases cited; Hill on Trustees 278; Tiffany & Bullard Trusts & Tr. 815-16.

2. The trustee had no title. 39 Cyc. 19; 16 *Id.* 656; 123 S. W. 1162-8; 39 Cyc. 203; 34 Ala. 150; 4 S. W. 8, 10.

3. The cases cited by appellee are not in point. The will and its purposes are not defeated by the merger. Merger applies even to spendthrift trusts. But such are not valid in Arkansas. 8 Ark. 153. It follows the English rule. 3 Ann. Cases 589; 79 Ky. 5; 14 N. Y. 41; 186 *Id.* 339; 78 N. E. 1074; 217 Ill. 434; 141 U. S. 315; Underhill on Wills, 649, § 491.

4. There is a difference between a vested and a contingent remainder. 20 A. & E. Enc. L. (1 Ed.) 840; 16 Cyc. 650-1. A vested remainder may be conveyed by deed. 16 Cyc. 652-3; Underhill on Wills, 1333. The law of merger is based upon the acceleration of remainders. 1 C. J. 377; 16 Cyc. 651; 40 *Id.* 2091; 55 Atl. 679; 35 L. R. A. (N. S.) 153; 17 Am. Rep. 617; 30 A. & E. Ann. Cases 414, 421 Here there was a merger. 25 Atl. 1087; 2 Chester Co. Rep. 410; 25 Atl. 76; 70 S. W. 414; 7 L. R. A. (N. S.) 1119; 16 Cyc 648, 652.

5. All interested parties are *sui juris* and satisfied. Jarman on Wills (6 Ed.) 484. The demurrer should have been overruled.

HUMPHREYS, J. Appellants brought suit against appellee, as trustee for John Bowlin and Mattie Bowlin, and as executor of the last will of William Bowlin, deceased, in the Crawford chancery court, to terminate a trust and recover the trust fund amounting in round numbers to $22,000.

A demurrer to the bill was sustained. Appellants refused to plead further and the bill was dismissed for want of equity. From the decree dismissing the bill, an appeal has been prosecuted to this court.

The alleged trust was created by the eighth clause of the last will of William Bowlin, deceased, which is as follows, towit:

"I give and bequeath unto the Citizens Bank & Trust Co., of Van Buren, Ark., as trustee for John Bowlin and Mattie Bowlin, his wife, the one-seventh part of the remainder of my personal property after paying my debts and funeral expenses and the legacies hereinbefore set forth in articles three and six more particular set forth in article seven of this will, upon the trust that said trustee shall invest the same in its name as trustee in any manner proper for a trust that it may yield the greatest income, with power from time to time to vary and change such investments, and the income thereof upon such trust fund shall be paid by my said trustee quarterly the one-half thereof to my said John Bowlin and

the one-half thereof to his wife Mattie Bowlin, during their natural lives, provided that if the said Mattie Bowlin shall survive her husband John Bowlin and remain a widow, and if the said Mattie Bowlin shall survive the said John Bowlin and marry again, that this shall immediately cease and determine upon the happening of that event, that upon the death of either the said John and Mattie Bowlin the one-half of said income shall be paid to Marcus L. Bowlin, Paul C. Bowlin, Othel Bowlin, and Maud E. Campbell, children and their heirs or the survivor of them until the final determination of this trust as hereafter provided. That upon the death of John and Mattie Bowlin or the marriage of Mattie Bowlin should she survive her husband John Bowlin, this trust shall immediately cease and determine and the trust fund with any income that may have accrued at the time I give and bequeath unto the said Marcus Bowlin, Paul C. Bowlin, Othel Bowlin, and Maud E. Campbell and their heirs share and share alike or their survivors in the event that either of said legatees should not survive the determination of this trust and die without issue of their bodies. I further direct that this trust shall be without power of anticipation of such income by way of assignment charge or otherwise by the said beneficiaries. It is not that I have any less affection for my son John than my other children that I make this provision in my will for him, but to provide a stated income for him and his wife and relieve him of the care and charge of an estate which I fear that he would not be able to properly care and manage."

John Bowlin and Mattie Bowlin, *cestuis que trust* of the life estate in said property, acquired the remainder interest therein from the remaindermen all of whom were, at the time, *sui juris*.

Appellants contend that under the doctrine of merger of estates and acceleration of remainders, the trust was terminated when the beneficiaries of the life estate acquired the interest of the remaindermen. As a general rule this is true when the estates, both legal and

equitable, unite in the same person, but otherwise, if the merger is held in abeyance by the clear intent or purpose of the trust. What is characterized in law as a spendthrift trust usually acts as a barrier and prevents merger. It seems that equity will not recognize a merger, even where there is a union of legal and equitable estates in the same person, if contrary to the intention of the parties if the effect would be to destroy a valid trust. 39 Cyc. 246; *In Re Moore's Estate,* 48 Atl. 884, (Pa. St.); 2 Washburn on Real Estate (6 Ed.), section 1484; *Evansville Gas Light Co.* v. *State,* 73 Ind. 222; *Watson* v. *Dundee Mortgage & Trust Investment Co.,* 8 Pac. 548 (Ore.); *Asch* v. *Asch,* 21 N. E. 70 (N. Y.); *Mason* v. *Rhode Island Hospital Trust Co.,* 78 Conn. 81.

The soundness then of appellants' contention must depend upon whether spendthrift trusts are valid in Arkansas, and if valid, whether a spendthrift trust was created by the terms of the section of the will quoted above. The English doctrine condemns and the American doctrine upholds spendthrift trusts. *Nichols, Assignee* v. *Eaton et al.,* 91 U. S. 716.

It is a mooted question in this State. Being a question of first impression here, the court adopts the American doctrine both upon reason and because the American doctrine is supported by the increasing weight of authority. This court said in the well considered case of *Booe* v. *Vinson,* 104 Ark. 439, that, "Although it is intimated in *Honnett* v. *Williams,* 66 Ark. 153, that such a trust can not be created or exist in this State, the increasing weight of authority in America favors the contrary rule." It may be noted also that the distinguished jurist, in rendering the opinion in *Honnett* v. *Williams, supra,* reserved the question for future consideration. It was unnecessary to decide the question in *Booe* v. *Vinson* for the reason that no restriction was placed upon the *cestuis* by the testator in the disposition of the income from the life estate. This court has jealously protected the free and unlimited right of a person in sound mind and otherwise competent to dispose of his property ac-

cording to his pleasure, unless in contravention of some statute or the well established rule against perpetuities. *Fortner* v. *Phillips,* 124 Ark. 395.

There is no misconstruing the intent of the testator in the instant case. The language of the eighth clause is direct and unambiguous. By the very wording, the legal title and the absolute control of the property passed to the trustee for the sole purpose of creating, by use and investment, a permanent income for the maintenance of the testator's son during life, and his daughter-in-law so long as she remained the wife or widow of his son. The testator assigned as a reason for creating the trust, the inability of his son to care for and manage the estate. In the fear that his son might resort to some method of defeating his purpose, he provided against the anticipation of the income *in any manner.* He evidenced his intention most clearly by creating a *stated* income. His purpose was to impound the *corpus* of the estate in such way that the *cestuis* should not receive it, or even the income therefrom, except at certain and reasonable intervals. All power of alienation of the trust fund was withheld from the *cestuis.* By the bequest appellants acquired no vested estate therein. Every essential necessary to create a spendthrift trust is present in the devise.

Having subscribed to the American doctrine upholding spendthrift trusts, and the intention of the testator being manifest to create such a trust for the protection of the *cestuis* against improvidence and incapacity, which trust is not contrary to law or public policy, and being convinced the doctrine of merger of estates can not operate to destroy a valid spendthrift trust, the decree of the learned chancellor is affirmed.

COLE v. COLLIE.

Opinion delivered November 12, 1917.

DEEDS—REPUGNANCY BETWEEN GRANTING AND HABENDUM CLAUSES.—A deed is void where the habendum is irreconcilably repugnant to the granting clause.

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

I. J. Matheny, for appellant.

1. While the deeds are not written in the best of language, the exceptions are sufficient to retain the mining interests in John W. Cole and his heirs. The grant and reservation are not repugnant. The intention of the parties should be ascertained and carried out. 8 Rul. Case Law 1037; 53 Ark. 185.

Samuel M. Casey, for appellee.

1. The reservation is not sufficient. It is ambiguous and repugnant to the granting clause and void. The deed conveyed an absolute estate in fee. Brewster on Convey., § § 119, 127; 92 Ark. 570; 112 *Id.* 522. See also, 111 Am. St. Rep. 767, 770 and note; 110 *Id.* 873; 94 Ark. 615; 93 *Id.* 5; 82 *Id.* 209; 78 *Id.* 230.

McCULLOCH, C. J. This is an action instituted by appellants to recover the mineral interests in certain land alleged to have been reserved in a deed executed by their ancestor to the remote grantor of appellees.

The question presented is whether or not the alleged reservation of mineral interests is operative, or whether, on the contrary, it is repugnant to the grant, and, therefore, void. The granting clause of the deed recites that the grantor, John W. Cole, and his wife, Elizabeth Cole, in consideration of the certain sum of money mentioned "do hereby grant, bargain, sell and convey unto the said James J. Lewis, and unto his heirs and assigns forever, the following lands," the description of which then follows. The habendum clause and the clause stating the alleged reservation are as follows:

"To have and to hold the same unto the said James J. Lewis and unto his heirs and assigns forever with all appurtenances thereto belonging with the privilege of working same, and we except the manganese and lithograph claim, hereby covenant with the said James J. Lewis that we will forever warrant and defend the title to said lands against all lawful claims whatever."

The reservation is couched in ambiguous language, but, even if it were more definite, it is irreconcilably repugnant to the granting clause of the deed, and is, therefore, void. *Carl Lee* v. *Ellsberry,* 82 Ark. 209. In subsequent cases a distinction was pointed out as to deeds which do not contain in the granting clause express words of inheritance. *Fletcher* v. *Lyon,* 93 Ark. 5; *McDill* v. *Meyer,* 94 Ark. 615.

The present case falls squarely within the rule announced in *Carl Lee* v. *Ellsberry, supra,* and the circuit court was correct in its decision. Affirmed.

INCORPORATED TOWN OF PARIS *v.* HALL.

Opinion delivered November 12, 1917.

MUNICIPAL CORPORATIONS—REPAIR OF HOUSE—ORDINANCE—POLICE POWER.—A city is without authority, under Kirby's Digest, section 5439, to prevent, by ordinance, the owner of property from repairing a building thereon, in any manner other than that prescribed in the ordinance, where the building was constructed before the passage of the ordinance. *Semble.* The power to regulate the building of houses carries with it, impliedly, the power to prevent complete renewal of a structure so as to constitute an evasion of the ordinance by converting the house into a new one in defiance of the provisions of the ordinance.

Appeal from Logan Chancery Court, Northern District; *W. A. Falconer,* Chancellor; affirmed.

Sid White, for appellant.

1. The ordinance conforms to the Constitution and laws of this State and is not void. 26 App. Cases (D. C.) 133; 6 A. & E. Ann. Cases 1014; 97 Pac. 199; 113 S. W. 1005; 62 W. Va. 665.

2. The town had ample power and authority to pass the ordinance. Kirby's Digest, § 5439, 35 Ark. 352; 71 *Id.* 4-9; McQuillin on Mun. Corp., Vol. 3, p. 2063, § 948.

3. The building was a nuisance. 18 Ark. 252. See also 76 Ark. 57; 101 *Id.* 223.

J. H. Evans and *Robert J. White,* for appellee.

1. The ordinance is void. 13 L. R. A. 481, 485-6-7; 6 Sup. Ct. Rep. 1064; 118 U. S. 356; 77 S. W. 669; 28 N. E. 312; 165 Ind. 304; 6 A. & E. Ann. Cas. 748; 71 Ind. 189; 85 Ark. 544; 183 S. W. 555-8; 3 McQuillin Mun. Corp. 2074-5, § 949; 101 Va. 182; 43 S. E. 343; 25 L. R. A. 621; 15 *Id.* 423; 110 N. C. 609.

2. The building was legally erected before the passage of the last ordinance, and appellee had the right to reasonably repair it. Appellee did not violate the ordinance by erecting any building contrary to the ordinance. Kirby's Digest, § 5439. The town had no authority to remove the building, or prevent repairs. 13 L. R. A. 481, and notes, 485-6-7; 4 Ont. 377; 27 Conn. 332; 10 Watts 307.

3. No uniform rule or plan is prescribed by the ordinance, but it is left to the unregulated and arbitrary discretion of the council. 118 U. S. 356; 77 S. W. 669; 28 N. E. 312; 6 A. & E. Ann. Cases 748; 71 Ind. 189; 85 Ark. 544; 183 S. W. 555-8, etc. See also 110 N. C. 609, 15 L. R. A. 423.

McCULLOCH, C. J. The plaintiff, Geo. A. Hall, owns a two-story frame building in the incorporated town of Paris, Arkansas, and instituted this action in the chancery court of that county to restrain the mayor and other officers of the town from interfering with him in making repairs on said building by putting a new roof on it. The officers of the town assert the right to prevent plaintiff from making repairs on his house under an ordinance prohibiting the building or repairing of houses within certain prescribed fire limits of the town, except

such buildings constructed in conformity with the ordinance.

There was an ordinance in force prior to the institution of the suit, but a new one was passed after the institution of the suit, but before the decree, and the correctness of the decree must, of course, be tested by the legal effect of the ordinance in force at the time of its rendition. The last ordinance created a fire limit which embraced plaintiff's property and prohibited the repairing or construction of frame buildings. The effort on the part of the officers of the town is to prevent plaintiff from putting a new roof on his house because it is not constructed in accordance with the terms of the ordinance. Ordinances of cities and towns depend for their validity upon the authority granted by the Legislature. The sole power conferred upon municipal corporations with respect to regulating the building of houses is as follows:

"Sec. 5439. They shall have the power to regulate the building of houses; to make regulations for the purpose of guarding against accidents by fire, and to prohibit the erection of any buildings or any addition to any building unless the outer walls thereof be made of brick or mortar, or stone and mortar; and to provide for the removal of any building or addition erected contrary to such prohibition." Kirby's Digest, § 5439.

It will be observed that the statute relates only to the building of houses and additions thereto and contains no authority to prevent the repairing of houses constructed prior to the passage of the ordinance. The authority "to make regulations for the purpose of guarding against accidents by fire" does not relate to the construction or repair of houses. Of course, the power to regulate the building of houses carries with it, impliedly, the power to prevent complete renewal of a structure so as to constitute an evasion of the ordinance by converting the house into a new one in defiance of the provisions of the ordinance. We have not, however, such a case presented by the facts now before us, for the

evidence in the case shows that the building is a very substantial structure, in good condition, and that the attempt to repair it does not constitute an evasion of that portion of the ordinance which relates to building houses.

We need not enter into a discussion now as to how far the Legislature can go in conferring authority on municipal corporations to regulate the repairing of houses constructed prior to the passage of any regulatory ordinance. There being no power conferred on the incorporated town to interfere with plaintiff in making repairs to his house, it follows that the decree of the chancellor in restraining such interference on the part of the officers was correct. Affirmed.

SULLIVAN v. STATE.

Opinion delivered November 12, 1917.

1. ASSAULT—DEGREES OF CRIME.—One can not violate section 1652 of Kirby's Digest, without also violating section 1583 of Kirby's Digest, because the element of assault enters into the higher crime, and the greater includes the lesser, and a conviction for the higher crime would bar a prosecution for the lesser.
2. CRIMINAL LAW—CONVICTION FOR LESSER CRIME THAN THAT CHARGED.—A conviction for a lesser crime may be had under an indictment which defectively charges a higher one, if the allegations of the indictment sufficiently charge the lesser.

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

W. P. Smith, for appellant.

1. The demurrer to the indictment should have been sustained, because it does not state such a description of the facts and circumstances as constitute the offense charged nor inform defendant of the specific charge he is called upon to answer. 26 Ark. 323; Kirby's Digest, § 2227. The indictment charges some facts constituting assault with intent to kill, some facts necessary for aggravated assault, some for violating § 1652, as amended by Acts 1907, p. 810, contrary to § 2231, Kirby's Digest.

2. There was no allegation in the indictment and no proof of an assault of any kind. 49 Ark. 179; 77 *Id.* 37; 88 *Id.* 91.

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

1. The indictment is sufficient. It certainly charges a simple assault of which he was convicted. Kirby's Digest, § 1652; 99 Ark. 188; 54 *Id.* 439; 34 *Id.* 275; 52 *Id.* 276; 5 *Id.* 660.

2. The evidence is sufficient. The evidence was conflicting and the verdict will not be disturbed.

SMITH, J. Appellant seeks by this appeal to reverse the judgment of the court below imposing upon him a fine of $90.00 for the commission of a simple assault. The indictment was drawn to cover an alleged violation of Section 1652 of Kirby's Digest, which provides that every person who shall, by drawing a gun, pistol, or other deadly weapon, intimidate another from doing a lawful act, shall, if he is not justified in self-defense in so doing, be subject to a fine of not less than five hundred nor more than one thousand dollars, and be imprisoned in the county jail for twelve months.

It is argued that the indictment does not sufficiently charge that offense, although appellant's guilt upon that charge was submitted to the jury. We need not stop to inquire whether this is true or not, as appellant was not convicted under that section. He was convicted of a simple assault, and we only need inquire whether the allegations of the indictment sufficiently charged that offense and whether the evidence sustained the charge. The indictment alleges:

"The said E. N. F. Sullivan, in the district, county and State aforesaid, on the first day of August, 1916, did unlawfully, wilfully and maliciously assault the person of Walter Wells with a certain deadly weapon, towit, a gun, by brandishing said gun and pointing said gun toward the said Walter Wells and seeking unlawfully then and there to frighten, intimidate and alarm the said

Walter Wells from doing a lawful act, no considerable provocation then and there appearing, and the circumstances of said assault then and there showing an abandoned and malignant disposition against the peace and dignity of the State of Arkansas."

These allegations are sufficient to charge a simple assault, which is defined by the statute to be "an unlawful attempt, coupled with present ability to commit a violent injury on the person of another." Section 1583 of Kirby's Digest. One could not violate Section 1652 of Kirby's Digest without also violating Section 1583 of Kirby's Digest, because the element of assault enters into the higher crime, and the greater includes the lesser, and a conviction for the higher crime would, therefore, bar a prosecution for the lesser. A conviction for the lesser crime may be had under an indictment which defectively charges a higher one if the allegations of the indictment sufficiently charge the lesser. *Fox* v. *State,* 50 Ark. 528; *Davis* v. *State,* 45 Ark. 464; *Jones* v. *State,* 100 Ark. 195; Section 2413 of Kirby's Digest.

The testimony on the part of the State shows the commission of an assault. According to this testimony, the appellant came out of his office, with a gun in his hands, and commanded Wells to come into the office and there settle their difference. The command was not obeyed, and was repeated, and appellant raised his gun and pointed it at Wells. While the truth of this statement was denied by appellant, yet it has been passed upon by the jury, and, if true, it is sufficient to sustain the conviction for simple assault.

Judgment affirmed.

BARNETTE v. MILLER.

Opinion delivered November 19, 1917.

MARRIAGE AND DIVORCE—ACTION TO SET ASIDE DECREE OF DIVORCE—LAPSE OF TIME.—Plaintiff obtained a divorce from her husband M. in 1908, upon the ground of his misconduct toward her. She then remarried and was again divorced. M. also remarried and died in 1916, leaving four children by the second marriage. Plaintiff then brought an action to set aside the decree of divorce between herself and M. *Held,* plaintiff's action could not be maintained.

Appeal from Scott Chancery Court; *W. A. Falconer,* Chancellor; affirmed.

Jo Johnson, for appellant.

1. A divorce decree can be set aside on bill of review after the death of the husband. 80 Ark. 451; 44 L. R. A. (N. S.) 507 and note; 77 Atl. 766; 2 Bishop Mar. & Div., § 1554-5.

2. The delay was explained and the findings and decree are against the evidence. The decree was obtained by fraud. 75 Ark. 415; 80 *Id.* 451.

McCULLOCH, C. J. The plaintiff, Emilie Barnette, intermarried with M. C. Miller in Sebastian County, Arkansas, in the year 1891, and they lived together in Sebastian and Scott counties, Arkansas, until the year 1908, when they separated in Scott County and a decree for divorce was rendered by the chancery court of Scott County in an action instituted by the present plaintiff against her said husband. The decree, in addition to a divorce, awarded to the plaintiff the sum of $500 out of the property of M. C. Miller, and also required the latter to pay the cost and attorneys' fees. After the divorce was granted the plaintiff intermarried with one Barnette and has since obtained a divorce from him. Miller intermarried with another woman and there are four children now living who were the issue of that marriage. Miller died in March, 1916, and in November of that year the plaintiff began the present proceedings in the nature of a bill of review to set aside said decree for divorce

on the ground of its procurement by fraud. The administrator of the estate of M. C. Miller, deceased, and the heirs at law of said decedent were made parties. The plaintiff alleged in her complaint that her husband subjected her to cruel treatment and threatened to kill her to compel her to consent to the procurement of the divorce, and that by force and intimidation she was compelled to go to an attorney in the county and consent to the procurement of the divorce. She alleged that she did not know that she was to be made, or was made plaintiff in the divorce suit. The chancellor heard the matter upon the pleadings and the testimony and dismissed the complaint for want of equity. The record in the divorce suit was introduced and shows that it was instituted by the plaintiff and that the ground for divorce set forth in the complaint was that the defendant, M. C. Miller, had been guilty of adultery. The deposition of the plaintiff herself appears in the record and her testimony tended to establish the charge of adultery against her husband. She testified in that deposition that she and her husband had separated on account of his criminal intimacy with another woman, and that she would not again live with him. The acts of adultery were proved by other witnesses and upon the testimony thus adduced the chancellor rendered the decree.

The plaintiff in giving her deposition in the present case testified that her husband and his brother grossly mistreated her and by threats and intimidation compelled her to sue for the divorce. Her statements are contradictory, however, for she admitted that she had appeared and testified in the case concerning her husband's misconduct. Her testimony is contradictory in many other particulars. The attorney who conducted the former litigation testified that he was employed by the plaintiff to prosecute the divorce suit, and that he did so solely at her instance. The plaintiff offered to prove by certain other witnesses that her former husband, Miller, had mistreated her in many ways, but the

chancellor declined to hear the testimony on the ground that it was immaterial.

The chancellor was correct in refusing to set aside the decree for divorce under the circumstances shown by the evidence. The plaintiff is estopped by her own conduct and by lapse of time and change of circumstances of the parties to ask an annulment of the divorce decree. She disclaimed any desire to share further in the estate of her former husband, but says that she merely wants her status restored as the wife of M. C. Miller. The effect of the restoration of that status is, however, more far-reaching than mere property rights, for Miller married again and has left a widow and children who were the issue of that marriage. The plaintiff married again too, and waited eight years, and after the remarriage of her former husband and his death before she attempted to set aside the decree.

"There are excellent reasons," says Mr. Bishop in his work on Marriage and Divorce (Vol. 2, sec. 1533), "why judgments in matrimonial causes, whether of nullity, dissolution or separation, should be more stable, certainly not less, than in others, and so our courts hold. The matrimonial status of the parties draws with and after it so many collateral rights and interests of third persons that uncertainty and fluctuation in it would be greatly detrimental to the public. And particularly to an innocent person who has contracted a marriage on faith of the decree of the court and calamity of having it reversed and the marriage made void is past estimation. These considerations have great weight with the courts, added whereto there are statutes in some of the states according a special inviolability to such judgments."

The rule thus stated by Mr. Bishop was applied by this court in *Corney* v. *Corney,* 97 Ark. 121, and *Womack* v. *Womack,* 73 Ark. 281, and we are of the opinion that its application to the facts of the present case are conclusive against the plaintiff's effort to set aside the decree. The other testimony concerning the mistreatment

of plaintiff by her husband was, as held by the chancellor, wholly immaterial. The decree is, therefore, affirmed.

JOHNSON v. HOUSE, RECEIVER PLANTERS FIRE INSURANCE COMPANY.

Opinion delivered November 19, 1917.

1. INSURANCE COMPANIES—INSOLVENCY—MUTUAL COMPANY—PREMIUM NOTES.—The insolvency of a mutual insurance company before the expiration of its policies, is no defense to actions on premium notes, and in such cases the receiver of the insurance company may recover from a policy holder the full amount of an unpaid premium note given for insurance.
2. INSURANCE COMPANIES—INSOLVENCY—PAST DUE PREMIUM NOTES. The receiver of an insolvent mutual insurance company, may collect past due notes from policy holders given for premiums; such premium notes are assets for the payment of debts.

Appeal from Craighead Circuit Court, Jonesboro District; *R. H. Dudley,* Judge; affirmed.

H. M. Mayes, for appellant.

1. It was error to direct a verdict. All issues of fact should be submitted to a jury. Kirby's Digest, § § 4382, 6170.

2. Plaintiff did not comply with Act No. 192, Acts 1905, p. 489. 51 Ark. 446.

3. The premium notes were more than six months past due. The contract should be construed most strongly against the party who prepares it. 4 Crawford's Digest, p. 412, § 31, Acts 1905, p. 489.

121 Ark. 236 is a different case and does not apply. The case should have been dismissed; at most it should have been submitted to a jury.

4. The bond was an asset of the company and the company was not insolvent.

Roy Penix and *J. W. House, Jr.,* for appellee.

1. The notes were valid obligations and not void because past due. 51 Ark. 441; 74 *Id.* 506.

2. Act 192, Acts 1905, was complied with. 97 Ark. 251. See also, 121 Ark. 236. It is presumed the auditor did his duty. 25 Ark. 311; 30 *Id.* 69; 96 *Id.* 477; 98 *Id.* 30; 81 *Id.* 1; 50 *Id.* 266.

3. The company was insolvent.

4. There was nothing for a jury to pass upon. 98 Ark. 370; 74 Minn. 208.

HART, J. Eighty or more separate actions were filed by J. W. House, Jr., receiver for the Planters Fire Insurance Company against W. T. Johnson et al., upon notes given by them for premiums for policies of fire insurance. The cases originated in a justice of the peace court, where judgment was rendered against each of the defendants and the cases were appealed to the circuit court. There all the cases were consolidated and tried together.

The Planters Fire Insurance Company was a domestic corporation engaged in the business of insuring property against fire. It was a mutual insurance company doing business in the State of Arkansas. It was adjudged insolvent in March, 1915, and J. W. House, Jr., was appointed as receiver to take charge of its assets and wind up its business. Its outstanding obligations were largely caused by fire losses and its principal assets consisted of premium notes. It became insolvent before the expiration of the policies for which the premium notes were given.

The court directed the jury to return a verdict for the plaintiff and the defendants have appealed.

(1) In the case of *House, Receiver* v. *Siegle,* 121 Ark. 236, it was held that the insolvency of a mutual insurance company before the expiration of its policies is no defense to actions on premium notes and that in such cases the receiver of the insurance company may recover from a policy holder the full amount of an unpaid premium note given for insurance. The reason is that companies organized upon the mutual plan have no capital stock. Cash paid for premiums and the premium notes constitute their assets and the members are

in a way stockholders. Hence so long as the company has outstanding debts its insolvency gives no right to a policy holder to recover a premium paid or to avoid the payment of a premium note.

Counsel for the defendants seek to avoid the effect of this decision by contending that the company has not complied with an act to regulate fire insurance companies approved April 24, 1905. See Acts of 1905, p. 489.

The company was duly organized under the laws of this State and filed its bond in compliance with the statutes thereof. The articles of incorporation, the amendments thereto, the by-laws of the company and the order adjudging the company insolvent and the appointment of the receiver were introduced in evidence. It was also shown that the receiver was directed by the court to bring suit on these premium notes for the purpose of paying claims for losses which had been filed and established against the company. It is claimed that the bond given under this act is an asset of the company and when so considered shows that the company was not insolvent. This court has decided adversely to this contention. In *Forte* v. *Chamberlin,* 93 Ark. 112, the court held that while a receiver of an insolvent mutual insurance company is authorized to enforce the rights of the corporation, he is not entitled to sue the sureties of such company upon the indemnity bond given under the Act of April 24, 1905. The reason is that the liabilities of the sureties on this bond are purely collateral and are in no sense an asset of the corporation.

(2) Again it is contended that the premium notes sued on were six months or more past due and for that reason under our statutes could not be considered an asset of the company. To sustain their contention counsel rely on section 8 of the Act of April 24, 1905, above referred to. The section reads as follows:

"The State Auditor shall not consider any past due promissory note as an asset of the company unless the unearned premium on the policy, for which it is given, is considered a liability. No promissory note that is six

months or more past due shall be considered an asset of the company."

That act gives the Auditor of State complete supervision over the affairs of the company and grants him authority to examine the books and papers and also the officers of the company as to its condition and management. The section which we have just copied provides that no promissory note that is six months or more past due shall be considered by him an asset of the company. This has no application where insolvency proceedings have been instituted and a receiver has been appointed to wind up the affairs of the company. In such cases according to the authorities above cited the premium notes are assets for the purpose of paying the debts of the company. The section of the statute referred to merely provides that when the auditor is making an examination of the affairs of the company to determine its condition these notes shall not be considered as assets.

It follows that the judgment must be affirmed.

BARNHART v. GORMAN.

Opinion delivered November 19, 1917.

1. HOMESTEAD—NATURE OF THE RIGHT.—The homestead privilege is a personal one, which may be waived by the person entitled to its benefits; it must be claimed by the party who seeks its benefits in the manner prescribed by statute; the burden is upon the claimant of the exemption to show that the property claimed is exempt.
2. HOMESTEAD—AREA AND VALUE.—Where appellants' claim of homestead exceeded $2,500 in value, the burden is upon her to show that it does not exceed one quarter of an acre in area, and where this fact is not shown, an exemption will not be allowed.

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

Mann & Mann, for appellant.

1. The property was a homestead and exempt, and even if the husband paid for it and took the deed in the

name of the wife, creditors can not complain. 43 Ark. 429; 75 *Id.* 205; 54 *Id.* 9; Art. 9, § 3, Const.; etc.

2. There is no question of an express trust in this case. 107 Ark. 535; 103 *Id.* 145; 56 *Id.* 585.

3. As to the bank stock there is nothing in the record to reflect upon the good faith of appellant. It was purchased with her money.

S. S. Hargraves and *C. W. Norton,* for appellee.

1. Appellant has received more than the $2,500 allowed by the Constitution, and has not shown that the area did not exceed one-quarter of an acre. 34 Ark. 61; 54 S. W. 213; 67 Ark. 232; Thompson on Homest. & Ex., § § 701-2.

2. The proceeds of a voluntary sale of a homestead are not exempt. 13 R. C. L. 584; 21 Cyc. 497, and notes.

3. The bank stock belonged to the husband and he was insolvent. The chancellor so found.

SMITH, J. J. W. Barnhart bought a certain parcel of land in the town of Forrest City on May 27, 1908, and took the title thereto in the name of his wife, who is the appellant here. He built a home on the property, which he and his wife occupied as such until the 15th day of March, 1915, at which time they sold the property for $7,500, one-half cash, and the balance evidenced by two notes, each for $1,875, due, respectively, in one and two years. Barnhart was adjudged a bankrupt by the Federal Court for the Eastern Division of the Eastern District of Arkansas on the ..... day of ....., 1915, and appellee, H. P. Gorman, was made trustee of the estate. Claims approximating sixty thousand dollars were proved in the bankruptcy proceedings, most of which were for sums of money obtained by Barnhart through fraudulent means from his creditors. It is admitted that the finding of the court below that Barnhart furnished the money with which the homestead was purchased, and that he was insolvent when he did so, is not contrary to the preponderance of the evidence.

On March 3, 1911, Barnhart bought a thousand dollars worth of the stock of the Planters Bank, of Forrest City, and took a certificate therefor in the name of his wife. The stock was paid for by the note of Barnhart, and the note was paid by Barnhart by giving his check therefor on May 31, 1911. The court below so found the facts in regard to the purchase of the stock, and we approve that finding, although appellant says that the finding is against the preponderance of the evidence, her contention being that she furnished the money to her husband with which the stock was purchased. This certificate of stock had been attached to a promissory note of Mrs. Barnhart held by another bank in Forrest City. The court ordered this stock sold as the property of Barnhart, subject to the lien of the bank. The correctness of this finding is attacked as being contrary to the preponderance of the evidence. But, as we have stated, we think the finding of the court, that the stock belonged to Barnhart, and not to his wife, is not clearly contrary to the preponderance of the evidence.

The trustee in bankruptcy sued to impound both the bank stock, and the unpaid purchase money notes given in payment of the homestead, and obtained a decree to that effect. Mrs. Barnhart, by this appeal, questions the correctness of the finding of fact of the court below in regard to the purchase of the bank stock. But we dispose of that contention by saying that we do not think the chancellor's finding is clearly contrary to the preponderance of the evidence. The principal point in the case appears to grow out of the insistence of Mrs. Barnhart that she is entitled to claim the notes as the proceeds of the sale of her homestead.

Appellee takes issue with appellant on this position and denies its correctness for two reasons. First, because it is shown that appellant has already received more than is allowed to be exempted as a homestead; and, second, that this action does not involve the homestead itself, but involves the proceeds of a voluntary sale of the homestead, and that it is not the law that the

proceeds of a voluntary sale retain the sacred characteristics of the property from which they are derived. We have concluded that appellee is correct in his first contention, and we have not, therefore, decided whether he is also correct in his second contention.

Appellant's claim is based upon Section 3900 of Kirby's Digest, which is also Section 5, of Article 9, of the Constitution. It reads: "Sec. 3900. The homestead in any city, town or village, owned and occupied as a residence, shall consist of not exceeding one acre of land with the improvements thereon, to be selected by the owner. Provided, the same shall not exceed in value the sum of two thousand five hundred dollars, and in no event shall such homestead be reduced to less than one-quarter of an acre of land, without regard to value."

The property in question was a homestead in the town of Forrest City, and its value is shown to be $7,500, as evidenced by its purchase price, and appellant has in her possession $3,750 of this money, and it has not been shown that the area of her homestead does not exceed one-quarter of an acre. It will be observed that the homestead in a city, town or village may equal one acre in area, provided its value does not exceed the sum of $2,500, but that it may consist of as much as a quarter of an acre without regard to its value.

(1) The homestead privilege is a personal one, which may be waived by the person entitled to its benefits. *Jones* v. *Dillard,* 70 Ark. 69. And it must be claimed by the party who seeks its benefits in the manner prescribed by the statute. *Chambers* v. *Perry,* 47 Ark. 400; *Jones* v. *Dillard,* 70 Ark. 69. And the burden is upon the claimant of the exemption to show that the property claimed is exempt. *Russell* v. *Suddoth,* 123 Ark. 200; *Gibbs* v. *Adams,* 76 Ark. 575; *Pace* v. *Robbins,* 67 Ark. 232.

(2) In the case of *Pullen* v. *Simpson,* 74 Ark. 592, this court held that an insolvent debtor might use his own means, upon which his creditors had no lien, in improving his wife's homestead, if such homestead is

within the maximum area and value permitted by the Constitution. But the Constitution has placed a limit both as to value and area. Appellant's homestead exceeds $2,500 in value, and she may, therefore, claim it as a homestead only by showing that its area does not exceed one-quarter of an acre, and this she has not done. She seeks to claim the benefit of the exception to the provision of the Constitution limiting the value of the homestead to $2,500, and to do so she must show that her claim comes within the exception, *i. e.,* that her homestead does not exceed one-quarter of an acre in area.

Substantially the same question was involved in the case of *First National Bank of Owatonna* v. *Wilson,* 62 Ark. 140. There the homestead claimant owned a tract of nine acres in an incorporated town, which had not been subdivided into lots, and the value of the entire property was only one thousand dollars, and it was cultivated as a farm. The claimant contended, and the lower court decided, that, as the property did not exceed $2,500 in value, it should be treated as a rural homestead. This court reversed the judgment of the lower court, and, in doing so, said:

"The right of one who establishes his home in a city or town of this State to claim such homestead as exempt from execution depends upon this section of our Constitution (the section quoted above) and, as it provides that such homestead shall not exceed one acre of land, he can not lawfully claim a greater amount."

The section of the Constitution quoted contains a limitation both as to area and as to value, and they are equally binding on the claimant who seeks the benefit of its provisions. If one may not claim more than one acre in a town, although the value of the entire nine-acre tract of which it is a part only amounts to one thousand dollars, it must necessarily be true that one can not claim a greater exemption than $2,500 without also showing that the property does not exceed one-quarter of an acre in area. As that showing was not made, the claim of exemption was properly refused. Decree affirmed.

KENTUCKY MILITARY INSTITUTE *v.* COHEN.

Opinion delivered November 12, 1917.

1. APPEAL AND ERROR—FAILURE TO OBJECT TO THE GIVING OF INSTRUCTIONS.—Where no exceptions are saved, instructions will not be reviewed on appeal.
2. CONTRACTS—BREACH—INSTRUCTION.—An instruction is properly refused, which charges the defendant with liability, irrespective of whether the plaintiff has fulfilled his part of the contract or not.
3. CONTRACTS—BREACH—DAMAGES.—Plaintiff incurred certain expenses for clothing and supplies required by appellant, to whose school plaintiff sent his son. Plaintiff withdrew his son from the school because of appellant's breach of its agreement; *held*, plaintiff could not recover from appellant the value of the clothing and supplies purchased for his son, but that he could recover advanced tuition, railroad fare, and a sum expended for the purchase of a quartermaster's card.

Appeal from Cleburne Circuit Court; *J. I. Worthington*, Judge; modified and affirmed.

J. P. Kerby and *W. T. Tucker*, for appellant.

1. This was a written contract and it was error to admit previous conversations and the court should have construed the contract and not the jury. 75 Ark. 162; 90 *Id.* 272; 89 *Id.* 239; 77 *Id.* 261.

2. The instructions given were erroneous. 80 Ark. 399; 47 *Id.* 54.

3. The second instruction asked by appellant should have been given. 156 Ky. 380; 161 S. W. 206; 164 *Id.* 808; 112 N. Y. S. 1089; 60 N. C. 217; 145 S. W. 672; 40 Barb (N. Y.) 541; 69 N. Y. Supp. 985. See also, 56 Ark. 309; 60 *Id.* 603; 85 *Id.* 596. There was no breach of contract by appellant, because performance was prevented by the conduct of appellee. 85 Ark. 596.

Williams & Seawel, for appellee.

1. Appellant has failed to comply with Rule 9. The record is not abstracted.

2. There was no error in the instructions given, nor in refusing No. 2 asked by appellant. No exceptions were properly saved to the court's charge. 91 Ark. 427.

3. The verdict is supported by the evidence. 86 Ark. 600-8; 89 *Id.* 321. Appellant breached the contract and caused the expense. 26 Cyc. 988; 58 *Id.* 504. No errors are shown and the judgment should be affirmed.

HUMPHREYS, J. Appellant brought suit against appellee in the Cleburne Circuit Court to recover a balance of $494.40 with interest, alleged to be due it under contract for attention, education and board of his son for the school year beginning September 14, 1915, and ending May 23, 1916.

Appellee pleaded a breach of the contract on the part of appellant. The breach consisted in alleged references and acts by teachers and assistant teachers, which rendered the condition of his son intolerable, and humiliated him to such an extent that it was necessary to take him out of the institute, to appellee's damage in the sum of $400 for money expended in preparing his son for school, $100 in sending him to the school and bringing him home, and $5,000 on account of humiliation. Appellant filed a motion to make the cross-complaint more definite and certain. Also filed a demurrer to the cross-complaint. The court overruled the motion to make the cross-complaint more definite and certain, and sustained the demurrer to the $5,000 item.

The cause was heard upon the pleadings, evidence adduced and instructions of the court and a verdict rendered in favor of appellee for $275. A judgment was rendered in accordance with the verdict and a motion for a new trial was filed and overruled. From the judgment an appeal has been prosecuted to this court.

The appellant, Kentucky Military Institute, was located at Lyndon, Kentucky, and published a catalogue descriptive of the school, the kind and character of training offered to students, its terms, etc. The fixed charge of tuition was $500 for the term, $10 for a uniform and $10 for card entitling the student to buy articles at the quartermaster's department. It was also provided that no deduction would be made if a student quit during the term. Appellee entered his son, who remained in the

school only three days. He paid $30 as an advanced fee and gave his check for $369 to be applied on the fixed charges, payment on which was stopped and the check went to protest. He expended $62.50 railroad fare in sending him to school, $400 in preparing him to go, and $10 for quartermaster's card. The undisputed evidence disclosed that appellee's son was accorded treatment by the teachers and assistant teachers, and by pupils with the knowledge of teachers, which rendered his further attendance on the school intolerable, and, for that reason, he withdrew and returned to his home.

(1) Appellant insists that the court erred in instructing the jury. At the request of appellee, the court gave three instructions. No exceptions were saved to the instructions given, so they are not properly before this court for review. For the same reason we can not review the action of the court in refusing to give the peremptory instruction requested by appellant.

(2) Appellant insists that the court erred in refusing to give instruction No. 2, requested by it, to which proper exceptions were saved. The instruction is as follows:

"Gentlemen of the jury, the court instructs you that when Ed Cohen entered his son, Jerome E. Cohen, as a student at the Kentucky Military Institute he was bound by the public announcement of the school in its published catalogue of the condition upon which students would be received therein and the terms of and time of payment for the services rendered or to be rendered by the school in the education of the student; and it was the duty of the said student, Jerome E. Cohen, to remain in said school for the whole year for which he was entered and to obey the rules and regulations of the school; hence, if you believe from the evidence that Ed Cohen entered his son as a student in the said school for the school year of 1915 and 1916 you should find a verdict for plaintiff for whatever sum the evidence shows him to be entitled to, notwithstanding you may believe the said stu-

dent left the school and remained away for the whole term for which he was entered."

This instruction is predicated upon the theory that appellee became absolutely responsible for the payment of the total tuition and required incidentals for the entire term by the entrance of his son in the institute without reference to any breach of the contract on the part of appellant. This position is not sound. The instruction requested excluded the defense of appellee that he withdrew his son from the institution on account of mistreatment on the part of teachers and assistant teachers such as to render his further attendance intolerable. It was proper to refuse the instruction as it ignored a material issue in the case. *St. Louis, I. M. & S. Ry. Co.* v. *Rogers,* 93 Ark. 564.

(3) Appellee claims $400 damages by reason of the breach, on account of expending $400 for clothing in preparing his son to enter the institute. He kept the clothing and other articles, such as valise, trunk, etc., and the presumption is that they can be used by his son. It is true he testified that he did not need them, but it does not follow as a matter of course, that he can not or will not use them. Touching upon this point, it was said in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Campbell,* 108 Ark. 432, "Neither was he (referring to appellee in that case) entitled to recover the value of the articles of clothing purchased by him. They were articles that could be worn on other occasions by a person of his station in life, and, in the absence of testimony to the contrary, it must be presumed that he received value for the money he paid out for this purpose."

The only items of damage sustained and proved by appellee in the instant case were $30 advanced on tuition, $10 expended for quartermaster's card, and $62.50 railroad fare. The proof as abstracted will not warrant a greater judgment on the cross-complaint.

The judgment on the main issue in behalf of appellee is affirmed. The judgment upon the cross-complaint

is modified by reducing the amount to $102.50 with interest at 6 per cent. per annum from the 14th day of September, 1915, to date.

PETTUS *v.* RAWLS.

Opinion delivered November 19, 1917.

1. LIMITATIONS—PAYMENT ON AN ACCOUNT.—To constitute a payment on an account so as to bar the running of the statute, the money or other thing must pass from the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose.
2. LIMITATIONS—PAYMENT ON ACCOUNT—CORRECTION.—A credit by the creditor on his books, made to correct an item of the account which had been erroniously charged, will not bar the running of the statute of limitations.

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

M. B. Norfleet and *J. M. Prewett,* for appellant.

1. The suit was not barred; the Redman credit was known and agreed to by appellees. It was part payment. The amount due was an account stated and the statute only began to run from the date thereof. 2 Greenleaf Ev., § 127; 89 Am. Dec. 85; 107 U. S. 325; 27 L. R. A. 811. See also 60 Ark. 491; 20 *Id.* 189.

2. Part payment forms a new period from which the statute begins to run. 14 Ark. 85; 18 *Id.* 521; 68 *Id.* 399; 19 Am. & E. Enc. Law 325-9; 5 Ark. 555; 12 *Id.* 762; 20 Ala. 105; *Ib.* 687; 1 Mich. 40; 92 Ark. 247; 25 Cyc. 1377; 99 Ark. 214. It was error to direct a verdict.

Mann & Mann, for appellee.

1. There was no part payment. In order to arrest the statute there must be an express promise to pay in writing or a voluntary payment. 20 Ark. 171; 60 *Id.* 171; 66 *Id.* 73; 68 *Id.* 397. See also 30 Cyc. 1180. No promise was made.

HART, J. On August 26, 1916, Robert L. Pettus sued J. A. Rawls and Allie Rawls for the sum of $294.11. He alleged they owed him for merchandise. An itemized account duly verified was filed with the complaint.

The defendant answered denying all the allegations of the complaint and pleading in bar of the action the statute of limitations of three years. The case was tried before a jury on March 21, 1917. At the conclusion of the evidence the court told the jury that the last payment on the account was made in February, 1913, and that the account was barred by the statute of limitations, the suit having been brought in August, 1916. The jury were therefore directed to return a verdict for the defendant which was accordingly done. From the judgment rendered the plaintiff has appealed.

It is conceded that the last payment was made in February, 1913, and that the account is barred by the statute of limitations unless the following constitutes a payment: On the itemized account under date of November 9, 1909, there appears the folowing charge: "On the Redman account $12.98." On the credit side of the account appears in pencil the following: "By Redman 3-5 1914, $12.98." Pettus claims that this is a credit on the account. His testimony on the point is as follows:

"Q. All you did was to make a correction in the account by crediting her with this item that was charged to her in 1909?

A. Yes, sir.

Q. And no payment was made on the account?

A. Not in money.

Q. You just gave her credit for this amount charged in 1909?

A. I agreed to give her credit.

Q. She was not out anything?

A. She did not pay anything then."

This testimony is not sufficient to constitute proof of a payment of the date of March 5, 1914. To constitute payment the money or other thing must pass from

the debtor to the creditor for the purpose of extinguishing the debt and the creditor must receive it for the same purpose. 30 Cyc. 1180; *McAbee* v. *Wiley,* 92 Ark. 245.

Tested by this rule it is perfectly plain that there was no payment. The creditor simply made a correction of an item of the account on his books by crediting his debtor with an amount with which she had been erroneously charged.

It follows that the judgment must be affirmed.

STATE *v.* BROWN.

Opinion delivered November 19, 1917.

1. CRIMINAL LAW—FAILURE OF JURY TO ASSESS FULL PUNISHMENT.—A defendant in a criminal prosecution can not complain because of the failure of the jury to assess against him the full penalty allowed by law.
2. CRIMINAL LAW—APPEAL FROM JUSTICE COURT—TRIAL DE NOVO.—An appeal from a judgment in a justice court, is tried *de novo* in the circuit court.
3. CRIMINAL LAW—APPEAL FROM JUSTICE COURT.—In a criminal prosecution before a justice, judgment was rendered against the defendant assessing a fine, but not assessing a jail sentence. On appeal to the circuit court, it is the duty of the court to try the cause *de novo,* and it is error to quash the judgment of the justice.

Appeal from Fulton Circuit Court; *J. B. Baker,* Judge; reversed.

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

1. The court erred in quashing the judgment of the J. P. On appeal the case was for trial *de novo.* The judgment was too favorable to appellant but of this he can not complain. Kirby's Digest, § 2580; 29 Ark. 299; 80 *Id.* 495; 104 *Id.* 606; 82 *Id.* 25; 14 S. W. 88.

HUMPHREYS, J. The State of Arkansas has prosecuted an appeal in this case to test the ruling of the circuit court in quashing a judgment against appellee for

petit larceny rendered by a justice of the peace in Mt. Calm Township, Fulton County.

On the 16th day of July, 1917, appellee was tried and convicted by a jury in a magistrate's court for petit larceny and his punishment fixed at a fine of $10. Appellee prosecuted an appeal from the judgment to the circuit court for Fulton County. When the case was called in the circuit court, both parties announced ready for trial and the petit jury was sworn to answer questions touching their qualifications to serve as jurors in that case. At this juncture, over the objection of the State, appellee was permitted to withdraw his announcement, and thereupon orally moved the court to quash the judgment of the justice of the peace for the reason that a fine only was imposed by the verdict of the jury in the magistrate's court. Petit larceny is punishable by both fine and imprisonment in this State. The jury in the magistrate's court returned a verdict of guilty and fined appellee $10. The circuit court sustained the motion, quashed the judgment and discharged appellee.

(1) The justice of the peace before whom appellee was tried and convicted had jurisdiction of the crime charged and the person of appellee. He was regularly tried and convicted of the crime charged. The only error committed by the jury was in the failure to assess a jail sentence. This was an error favorable to the appellee and of which he could not complain. *Cook* v. *State,* 80 Ark. 495; *Price* v. *State,* 82 Ark. 25; *Hamer* v. *State,* 104 Ark. 606.

(2-3) Appellee prosecuted an appeal to the circuit court, and in so doing, carried the whole case up for trial *de novo.* It is provided by Section 2580 of Kirby's Digest in the chapter entitled, "Appeals to Circuit Court in Criminal Cases," that "Upon the appeal the case shall be tried anew, as if no judgment had been rendered, * * *." The court should have proceeded in the manner provided by the statute. The judgment of the justice of the peace was not before the court for review, hence, it was error to quash it.

The judgment of the circuit court is therefore reversed and the cause is remanded for trial *de novo*.

STATE v. HANNA.

Opinion delivered November 19, 1917.

1. STATUTES—CONSTRUCTION.—Parts of statutes relating to the same subject must be read in the light of each other.
2. ARSON—BURNING ONE'S OWN HOUSE.—Defendant can not be indicted for the crime of arson under Kirby's Digest, section 1576, for the burning of his own dwelling house.
3. ARSON—BURNING ONE'S OWN DWELLING HOUSE.—Kirby's Digest, section 1576, which provides that "every person who shall wilfully and maliciously burn, or cause to be burned, any dwelling house or other house, although not herein specially named, shall be deemed guilty of arson," must be read in connection with Kirby's Digest, section 1575, which provides, "arson is the wilful and malicious burning the house or other tenements of *another person*."

Appeal from Benton Court; *J. S. Maples,* Judge; affirmed.

John D. Arbuckle, Attorney General, *T. W. Campbell,* Assistant, for appellant; *F. G. Lindsey,* of counsel.

1. The burning of one's own dwelling is a crime under our statutes. 1 Wharton Cr. Law (10 Ed.), § § 825, 830, note 4; 2 R. C. L. 503, § 8; 78 Mo. 307, 313; 19 N. Y. 537; 51 N. H. 176; 8 La. Ann. 109; 12 *Id.* 382; 21 *Id.* 157; 36 Cyc. 1114, § 3; 80 Conn. 646; 232 Ill. 312; 169 Ind. 691; 60 Neb. 384; 162 Fed. 331; 168 U. S. 95; 206 Mo. 541; Kirby's Digest, § 1576.

HART, J. It is conceded by the Attorney General and the special counsel for the State that this appeal involves the question of whether the burning of one's own dwelling house is an indictable offense under Section 1576 of Kirby's Digest. At common law arson was regarded as an offense against the possession rather than the property. Consequently arson was defined as the malicious and wilful burning of another's house. By "another's house," in the definition, is meant another's to occupy. Bishop's New Criminal Law (8 Ed.), Vol. 2,

Secs. 8-12, and Wharton's Criminal Law (11 Ed.), Vol. 2, Secs. 1049-1051.

Counsel for the State contend that the common law rule stated has been changed by our statute. They insist that the general spirit of our statute on the subject of arson indicates that the Legislature intended to change the nature of the offense to one against the property instead of against the security of the home. Their claim is not without merit, but we think it is contrary to the previous decisions of this court.

We quote from Kirby's Digest, as follows:

"Sec. 1575. Arson is the wilful and malicious burning the house or other tenements of another person.

Sec. 1576. Every person who shall wilfully and maliciously burn, or cause to be burned, any dwelling house or other house, although not herein specially named, shall be guilty of arson.

Sec. 1577. If any person shall wilfully and maliciously burn, or cause to be burned, any statehouse, courthouse, prison, church, bridge, or any other public building, although not herein specially named, such person, on conviction, shall be adjudged guilty of arson.

Sec. 1578. If any person shall wilfully set fire to his own buildings or other property with the intent to burn the property of any other person, and the property or building of any other person shall thereby be burned, such person shall be deemed guilty of arson."

These sections were a part of the Revised Statutes. In the case of *Mary* v. *State,* 24 Ark. 44, it was insisted that an indictment for arson was fatally defective because it failed to allege that the house was burned. The court held that the burning necessary to constitute arson of a house at common law, must be an actual burning of the whole or some part of the house; but that it was not necessary that any part of the house should be wholly consumed; and that our statute does not materially change the common law definition of the offense.

The four sections of the statute above quoted, together with another section relating to arson were copied

in the opinion and the court said: "Our statute makes it arson to burn buildings, etc., which by the common law were not the subjects of arson, but does not otherwise materially change the common law definition of the offense."

Again in the case of *State* v. *Snellgrove,* 71 Ark. 101, the court had under consideration the question of whether or not the indictment stated facts sufficient to constitute the crime of arson. The court said:

"Under the common law, arson is defined to be the wilful and malicious burning the house of another. 2 Am. & Eng. Enc. Law (2 Ed.), 917. Our statute defines it as the wilful and malicious burning the house or other tenements of another person. Sand. & H. Dig. 1464.

While other sections of the statute make it arson to burn structures which were not subjects of arson at common law, still the definition of arson at common law was not in other respects changed by the statute. *Mary* v. *State,* 24 Ark. 44."

In both these cases the court expressed the view that the common law definition of arson had not been materially changed except to add other buildings which were not subjects of arson at common law. It can not be said that the language of the court in this respect was *obiter dictum* because it was part of the reasoning of the court in reaching its conclusion on the validity of the indictments and the conclusion of the court is in accord with the settled rules of statutory construction. Parts of statutes relating to the same subject must be read in the light of each other. When this is done it is evident that the Legislature did not have in mind to change the offense of arson from a crime against the possession to one against the property.

The first section of our statute defines arson as the wilful and malicious burning of the house or other tenements of another person. When this section is read in connection with those following, the buildings named in them must necessarily refer to buildings of another person than the one doing the burning. If the second sec-

tion is to be construed as changing the common law rule so as to make arson include the burning of the buildings of one doing the burning, obviously there is no place in the statute for the first section. In other words it would be a vain and useless thing for the first section to define arson as the wilful and malicious burning the house or other tenements of another person and in the section next following to enlarge the definition to include the house of the person doing the burning. Such a conclusion would make the two sections in conflict with each other instead of harmonizing them. This view is strengthened when we consider section 1576. It would serve no useful purpose to make it an offense for a person to set fire to his own building with intent to burn the property of another person if it was a crime under section 1576 to wilfully and maliciously burn his own house, for it is obvious that the burning of his own house would be malicious if it was done for the purpose of setting fire to the property of another.

Counsel for the State in support of their contention cite the cases of *State* v. *Hurd,* 51 N. H. 176, and *State* v. *Cazeau,* 8 La. Ann. 109. It is true that in each of those states there is a section similar to Section 1576 of Kirby's Digest, but an examination of the statutes of each of those states show that there is no section corresponding to Section 1575 of Kirby's Digest. Hence the section which corresponds to section 1576 was the only definition given in the statute of the crime of arson and the court properly held that it changed the crime from one against the habitation or dwelling place to one merely against the property.

As above stated the language of Section 1576 of Kirby's Digest must be read in connection with the section preceding it and those following it and when this is done it is evident that arson in this State is still an offense against the possession rather than the property.

It follows that the judgment must be affirmed.

BUSH, RECEIVER ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *v.* STEPHENS.

Opinion delivered July 9, 1917.

1. RES JUDICATA—OVERFLOW OF LAND—FORMER ACTION—ESTOPPEL.—In a former action plaintiff recovered damages by reason of the overflow of her land, caused by the construction of an embankment by defendant railway company. In a second action for damages caused by a continuation of the overflow, *held*, the court properly instructed a verdict for the plaintiff. Where the second action is based upon the same facts as the first, the defendant is estopped to deny the existence or character of the nuisance or the plaintiff's right to recover, and the plaintiff need prove only that the nuisance remains in the same condition as before, or in a more or less damaging condition. The rule is not altered in this case because the defendant had made some changes in the character of its trestle and embankment, causing the overflow.
2. RECEIVERS—TORT OF CORPORATION BEFORE APPOINTMENT.—A receiver is not liable for a tort committed by a corporation prior to his appointment.

Appeal from Craighead Circuit Court, Jonesboro District; *W. J. Driver,* Judge; modified and affirmed.

Troy Pace and *Gordon Frierson,* for appellant.

1. The court erred in instructing the jury to find for the plaintiff. The embankment was permanent. It was constructed more than thirty-two years ago. This suit is therefore brought on the theory of a continuing or recurring tort. The original case is reported in 72 Ark. 127. Cases of this character are in principle based upon the question of negligence in *maintenance,* and the cause of action arises not upon the construction of the embankment but upon the occurrence of the damage. The question of the existence of identical conditions at the time of the former suit and the later one is of the very essence, and the rule as to *res judicata* is therefore necessarily different. 23 Cyc. 1188. The burden was on plaintiff to "show the continuance of the same conditions." See 94 U. S. 606; Black on Judgments, 951, § 624; 55 Ark. 292; 66 *Id.* 344; 108 *Id.* 574-8; Black on Judgments, 940, 936, etc.

2. The court erred in refusing to give instruction No. 1, asked by defendant. The suit is barred by limitation. 62 Ark. 360; 35 *Id.* 622; 86 *Id.* 406.

Basil Baker and *Horace Sloan,* for appellee.

1. There is no estoppel by former judgment. 2 Black on Judgments, § 742, p. 1118. This was a continuing trespass or tort.

2. The suit is not barred. 72 Ark. 127. The wrong is a continuing one. 52 *Id.* 240; 56 *Id.* 612; 57 *Id.* 387; 72 *Id.* 127; 66 *Id.* 271; 76 *Id.* 542; 80 *Id.* 235; 82 *Id.* 387, 392.

3. The court erred in striking out of the complaint against the receiver all items of damage alleged to have accrued prior to the time of his appointment. 4 Fed. Stat. Am. 387, § 3; 22 S. W. 50; 38 Atl. 690.

WOOD, J. These suits were instituted to recover damages alleged to have been suffered by the plaintiff during the years 1913, 1914, and 1915 because of overflow of lands of plaintiff.

It was alleged that an opening in the railroad embankment a quarter of a mile north of plaintiff's land was inadequate to allow the passage, under the railroad tracks, of water which naturally accumulated at that point, with the result that such surplus quantity of water was deflected and caused to run southward along the west bank of the railroad to a point where it overflowed into another water course, thereby swelling the volume of water in such second watercourse; that in the original construction of the railroad embankment, the channel of this second watercouse was changed so as to cause an abrupt curve in the same, which caused the water to pour out over the east bank of the channel and thereby overflow plaintiff's land, causing damage by reason of the destruction of her crops in the years 1913, 1914 and 1915 in the aggregate sum of $969.50, and by making ditches, holes and gulleys therein and washing off the top soil, to her damage in the sum of $1,800.00. Wherefore, she prayed judgment for the sum of $2,769.50.

A suit was filed against the railway company, and also one against the receiver, the complaints contained the same allegations with the exceptions of the allegations concerning the receivership.

The answers denied all the material allegations of the complaints as to negligence. The cases were consolidated and tried together. The jury returned a verdict assessing amounts of damages accruing for the years 1913, 1914 and 1915.

Appellant concedes in its abstract that there was ample evidence upon which the jury might have found either for the plaintiff or the defendant upon the sole question as to whether or not the overflow of plaintiff's property was caused by the negligence of the defendant at a point where the second or southern watercourse passes under the railroad track.

There was no evidence introduced on the trial concerning the condition or capacity of the northern channel, that is, the channel which it is alleged in plaintiff's complaint was diverted through the negligence of the company into the southern channel.

At the close of the evidence the plaintiff's attorney offered in evidence the pleadings and judgment in a case between the plaintiff and the defendant railway company which was tried in 1913. The appellants objected, whereupon the following stipulation of counsel was entered into: "It is hereby stipulated by and between the respective attorneys for the parties hereto, that since the trial in 1913, pleadings and judgment in which suit have been admitted in evidence, that the trestle mentioned in the complaint as a quarter of a mile north of plaintiff's land has been altered and changed in the following respects, towit: By the construction of an addition thereto, consisting of a two-panel trestle or bridge, with a waterway area of seventy-two square feet."

The court directed the jury to return a verdict in favor of the plaintiff, on the ground of *res adjudicata,* and this raises the first question for our consideration.

While the appellee alleges in both the suit of 1913 and in the present suit that about a quarter of a mile north of her land there was a natural channel or watercourse sufficient in size to carry all the water naturally accumulating therein, which the appellant had obstructed and filled up by not leaving a sufficient opening in its embankment across said stream to allow the water to pass through, thereby diverting the same into another and larger channel about two hundred yards west of appellee's land, she also alleges in these complaints that this second channel was sufficient to carry off all the water which naturally accumulated therein, but that appellant, by the negligent and careless construction of its railway over this channel, so changed the watercourse as to make an abrupt curve therein, which curve caused the water therein, when it was high, to overflow appellant's land, which resulted in her damage, and for which she sued.

The allegations show that the gravamen of appellee's charge in both complaints is that appellant, by the negligent construction of its railroad made an abrupt change or curve in a watercourse which ran about two hundred yards from her land, which abrupt curve and change resulted in her damage. The allegations plainly show that but for this change in the watercourse near her land she would not have been damaged. In other words, the proximate cause of her damage, as shown by the pleadings in both lawsuits, was the negligent construction of the railroad over the watercourse near her land, which changed its course and caused the land to overflow.

Now the appellants contend that the plea of *res adjudicata* can not avail because, while the allegations of negligence in the two lawsuits remain the same, the conditions on the last lawsuit were not the same as they were on the first trial, because of the fact, as shown by the stipulation, that since the trial in 1913 the trestle mentioned in the complaint as being a quarter of a mile north of appellee's land had been changed by the addition thereto of a two-panel trestle or bridge with a waterway area of seventy-two square feet. We must take it from

the statement in appellant's abstract, and its failure to set forth the evidence in favor of the appellee on the issue of negligence, that the testimony was ample to show that, notwithstanding the above change in the trestle a quarter of a mile north of appellee's land, the undisputed evidence showed that the lands of appellee still overflowed as they did before this change. Therefore, we must assume that the court, in directing the jury to return a verdict, found that the undisputed evidence showed that the conditions, so far as they affected appellee's cause of action and right to recover damages on account of appellant's negligence, were the same on the trial of the last lawsuit as they were in the first.

If the change by the enlargement of the upper trestle did not prevent or tend to prevent the overflow and damage to appellee's land, caused by the negligent construction of the embankment over the watercourse near her land, and if this curve or change in the watercourse two hundred yards west of appellee's land, caused by the negligence of appellant, would necessarily result in damage to her, notwithstanding the change in the upper trestle, then there was no change in the conditions as to the negligence which was the proximate cause of her damage, between the first lawsuit and the last. In other words, the existing conditions of negligence which were the proximate cause of her injury were shown to be the same in the last lawsuit as they were in the first. This is the test.

(1) Mr. Black, in his work on judgments, announces the correct doctrine when he says (volume 2, section 742): "According to the generally accepted doctrine, in an action for the continuance of a trespass or nuisance, a former proceeding upon the same cause of action and between the same parties, or those under whom they claim, wherein judgment was recovered by the plaintiff, is conclusive of the rights of the parties; the defendant is estopped to deny the existence or character of the nuisance or the plaintiff's right to recover, and the latter need only prove that the nuisance remains in the same condition as before, or in a more or less damaging condition."

And at page 936, section 614, he says: "The doctrine of *res judicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried—that the parties have had an adequate opportunity to say and prove all that they can in relation to it, that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. * * * For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict or finding, whether it was statedly and technically in issue or not."

Appellee obtained judgments in former suits on complaints alleging precisely the same grounds of negligence as alleged in the complaint in the present suit, and before there was any enlargement of the trestle of the upper stream. In the present suit, although it was shown that there was an addition to the trestle, enlarging the same, nevertheless the proof on the part of the appellee showed that this change or enlargement of such trestle did not lessen or prevent or affect in any manner the overflow caused by the negligence of appellant in so constructing its railway as to cause a sudden curve and changing of the course of the stream (Breedlove creek) near her land. In other words, the undisputed evidence showed that appellee's land was overflowed after the enlargement of the upper trestle, the same as it was before, showing that the change made in the upper trestle did not change the conditions caused through the negligence of appellant in changing the course of the stream near her land that caused it to be overflowed.

It is stated in the brief of counsel for appellee that the same witnesses testified who testified in the former case, the same map that was used by the railway company in the former suit was offered in evidence, that the witnesses gave the same testimony that they did on the former hearing. These statements are not challenged, and no testimony is set forth controverting the state-

ments. The stipulation did not change the conditions caused by the acts of negligence upon which appellee's cause of action was predicated. The cause of action in the former and in the present suit was identical.

In *Edwards* v. *Wallace,* 108 Ark. 574, 578, we said: "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even although there be different demands, where the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

It follows that the court was correct in holding that the doctrine of *res judicata* applied in favor of the appellee, under the facts of this record, and did not err in directing a verdict in her favor.

(II) The court erred in striking from the complaint against the receiver all items of damage alleged to have occurred to appellee prior to his appointment on August 19, 1915. Appellee alleged in her complaint against the receiver that he was appointed as such of the St. Louis, Iron Mountain & Southern Railway Company on August 19, 1915; that in the order appointing said receiver the following language was used: "That said receiver be and he is hereby authorized and empowered to institute and prosecute within this State or elsewhere, and in his own name as receiver, or in the name of the defendant railway company, as he may be advised by counsel, all such suits as in his judgment may be necessary for the recovery or proper protection of said property, or any part thereof, and the discharge of his trust, and likewise to defend, compromise or settle any and all actions which may be instituted against him as receiver, and to appear in and conduct the prosecution or defense of, or compromise or settle, any and all actions which may be instituted against him as receiver, and to appear in and conduct the prosecution or defense of, or compromise or settle, any actions, proceedings or suits now pending or which may hereafter be brought in any court or before any

officer, department, commission or tribunal in which the defendant railway company is or shall be a party, which in the judgment of said receiver, affect or may affect the property of which he is hereby appointed receiver; but except upon further order or directions of this court, no payment shall be made by said receiver in respect of any such suits, actions or proceedings and no action taken by the receiver in the defense or settlement of any such actions or suits against the defendant railway company shall have the effect of establishing any claim upon or right in any property or funds in the possession of the receiver so as to alter or change any existing equities or legal rights of the parties."

In the recent case of *Bush, Receiver,* v. *State,* 128 Ark. 448, quoting from *Jordan* v. *Harris,* 98 Ark. 200, we said: "'The receiver of an insolvent corporation stands in the place of the corporation and has only such rights as it had, so that the rights of third parties are not increased, diminished or varied by his appointment.' So here the receiver stood in the place of the corporation owning the railroad."

The broad power and leave conferred upon the receiver by the order of the Federal court appointing him implies a consent upon the part of such court in advance that he may be sued for acts of the railroad company prior to his appointment. This leave for him to be sued for acts of the company prior to his appointment is plainly to be inferred from the language of the order making the appointment. Therefore, if consent was necessary it was granted in advance. The court therefore erred in striking from the complaint against the receiver the damages that accrued to appellee prior to August 19, 1915.

The judgment in favor of the appellee against the railway company will be affirmed. And the judgment in favor of the appellee against the receiver will be amended and judgment rendered here in her favor against the receiver for the damages that accrued to her as returned by the verdict of the jury for the years 1913 and 1914, as well as for the year 1915. With this amendment the

judgment in favor of the appellee against the receiver will be in all respects affirmed.

McCULLOCH, C. J., (on rehearing). (2) The conclusion is reached by the majority of the judges that we were in error in holding that the plaintiff was entitled to a judgment against the receiver of a railway company for recovery of damages arising from a tort committed by the railway company before the appointment of the receiver. Such is not the law according to the great weight of authority. There are some cases holding to that view, but the weight of the authority is the other way. See note to *Emory* v. *Faith,* 22 Am. & Eng. Ann. Cas., page 586. "It is settled, we think," said the Maryland court in the case just cited, "by all the well considered authorities, that an action at law for personal injuries sustained by the alleged negligence of a corporation, prior to the appointment of a receiver, can not be maintained against the receiver subsequently appointed. In other words, a receiver is not liable for a tort committed by a corporation prior to his appointment." That is the rule stated by Mr. High in his work on Receivers, section 397, where the rule is stated as follows:

"But since a receiver of a railway is not liable to an action for injuries sustained before his appointment and while the road was operated by the company, leave of court will not be granted to bring such action, and the person aggrieved will be left to pursue his remedy against the company."

In the case of *Decker* v. *Gardner, Receiver,* decided by the New York Court of Appeals, 124 N. Y. 340, 11 L. R. A. 480, the court said: "He did not represent the corporation, or supersede it in the exercise of its powers, except in relation to the possession and management of the property committed to his charge. Notwithstanding his appointment, the corporation was clothed with its franchises, and still existed. It could still exercise its power, so it did not interfere with the management of the

railroad. It could do many corporate acts, and it could do all things necessary to preserve its legal existence. It could sue and be sued, and was liable for its acts and upon its contracts and covenants the same as if the receiver had not been appointed." To the same effect see *Northern Pac. Ry. Co.* v. *Heflin,* 83 Fed. 93. This court recognized that principle in *Ratcliff* v. *Adler,* 71 Ark. 269, but held that a receiver could be sued for damages for the taking of land for right-of-way where it was shown that he continued the wrongful possession of lands originally appropriated by the railway company before the appointment of the receiver. The principle was also recognized by this court in the more recent case of *St. L. & S. F. Rd. Co.* v. *Coy,* 113 Ark. 265, where we held that after the appointment of a receiver an action could be prosecuted against a railway company on a cause of action which arose before such appointment.

The order of the court which appointed the receiver is not, and could not, be broader than the law itself, and does not attempt to create liability on the part of the receiver where none exists under the law. The order merely contains consent on the part of the court to the maintenance of a suit against a receiver in cases where liability of the receiver is asserted, but does not attempt to create liability on the part of the receiver, and does not authorize suit against him in cases where the corporation itself only was liable. There is, it is true, an authority conferred upon the receiver to defend suits brought against the company, but this was not intended to authorize a suit to be brought against the receiver in cases where no liability on his part exists. The purpose of the order was to permit the receiver to defend for the railroad corporation so that the rights of the company could be safeguarded. But that court possessed exclusive jurisdiction over the distribution of the assets of the corporation and an adjudication of another court concerning liability of the corporation itself would not be binding on the court in which the receivership is pending as to the right of the judgment creditor to participate in the assets in the hands

of the receiver, as would be the case where judgment was obtained against the receiver in a suit brought against him by permission of the court on his own liability.

The receiver has not intervened in this case for the purpose of defending the suit against the railroad company, and the fact that he was given authority to do so by the court that appointed him afforded no justification for suing him for a tort committed by the railroad corporation before his appointment. A rehearing is, therefore, granted as to this branch of the case, as well as to the other branch in which the receiver is sued for the tort committed by his servants and employees.

WOOD, J., (dissenting). Mr. Justice HART and I have no quarrel with the authorities cited by the majority in their opinion on the rehearing. These authorities are sound and applicable to the usual and ordinary orders made by courts appointing receivers to take charge of the assets of insolvent corporations, but they have no application to the order under which the present receiver was appointed and acting. We are of the opinion that the peculiar and broad language of this order was sufficient to authorize the receiver to be made a party to suits to establish liability of the corporation for injuries accruing prior to his appointment as well as those that accrued after his appointment. We know of no statute nor any rule of the common law that prohibits a court, when it takes charge of the assets of an insolvent corporation, to conserve and administer same for the benefit of the corporation and the creditors thereof and all concerned therein, to make an order as broad as the one here under review. We can see that such an order would serve a wise and useful purpose in preventing confusion and enabling the court, having charge of the assets and the administration thereof, to dispose of all matters in which the property of the corporation is in any wise affected. The language of the order when taken as a whole plainly shows that it was not the intention that liability should be fixed against the receiver as such for acts of the corporation causing injury prior to his appointment.

The order was doubtless intended by the court to provide a convenient, simple and easy method of establishing claims and settling all controversies in which the assets of the corporation in the hands of the receiver might be in any manner affected.

We are, therefore, still of the opinion that the court erred in striking from the complaint all items of damage alleged to have accrued to appellee prior to the appointment of the receiver.

HART, J., concurs in the dissent.

NAKDIMEN v. BRAZIL.

Opinion delivered October 15, 1917.

1. CONTRACTS—SALE OF LAND—ASSUMPTION OF MORTGAGE.—N. purchased land from B., the deed to N. reciting that "this deed is given subject to the mortgage for $15,000 in favor of * * *, which the said grantee assumes and agrees to pay." *Held,* N.'s undertaking was to assume payment of the mortgage, and the amount mentioned is merely descriptive of the instrument, and not a limitation upon the amount to be paid.
2. CONTRACTS—SALE OF LAND SUBJECT TO MORTGAGE.—N. purchased land from B. which was subject to a mortgage in favor of a building and loan association, N. agreeing to assume this mortgage. *Held,* under the contract that N. had the right to repay the amount of the loan, and that when he elected to repay the loan, that he was not required to both repay the loan, and also pay monthly stock assessments.
3. CONTRACTS—TERMS—BOND AND MORTGAGE.—Where a contract between two parties is expressed in a bond and mortgage, the terms of those instruments will control the interpretation of the contract.
4. CONFLICT OF LAWS—SPECIFIC PERFORMANCE—LANDS IN ANOTHER STATE.—Courts of equity may specifically enforce a contract to convey land situated in another State.

Appeal from Sebastian Chancery Court, Fort Smith District; *W. A. Falconer,* Chancellor; modified and affirmed.

Oglesby, Cravens & Oglesby, for appellant.

1. As between appellant and the loan company the only questions involved are the right of plaintiff to pay off the mortgage, the amount he should pay, and, if paid, his right to be subrogated to all the interest and equities of Brazil.

The issue between plaintiff and Brazil is whether plaintiff is compelled to pay not only the $15,000 loan with interest, but also to pay the monthly installments due by Brazil on the stock. It is the contention of plaintiff that under his purchase contract he only assumed and agreed to pay the $15,000 borrowed by Brazil. The option, the deed and all the testimony sustains this contention. He is not liable for the stock payments due, but only for the loan and interest.

The court erred in its ruling as to the stock payments; they should be charged to Brazil.

2. It also erred in decreeing specific performance as to the land in Oklahoma. It has no jurisdiction over the lands. But if it did it was error to enter judgment for $3,000 as the value of the land and requiring plaintiff to pay if he did not execute a deed in forty days.

3. The court erred in the amount decreed to be paid the loan company, as he was only liable for the $15,000 and interest to March 28, 1916. It was certainly error to require plaintiff to pay the $618.75 stock installments and the fines.

Kimpel & Daily, for R. E. Brazil.

1. The burden is upon him who alleges fraudulent representations to establish same by evidence that is clear and convincing. None are proven. He agreed to pay off the mortgage according to its terms and recitals, and not merely $15,000. The words are descriptive merely of the obligation, and can not be considered as limiting the amount. 75 S. W. 661, 105 Ia. 122; 130 Mass. 460. See also 51 Conn. 11; Jones on Mortg. (5 ed.), § 735; 3 *Id.* (7 Ed.), § 739a.

The loan was to be paid by maturing the stock. Plaintiff knew this.

2. The court had jurisdiction over the persons who were parties, and properly directed a deed to be executed or pay the $3,000, the value of the land. It was the duty of the court to administer complete relief. Story, Eq. Jur. (13 Ed.), par. 1291, also pars. 743-4; 55 Ark. 639; 6 Cr. 160; 24 Oh. St. 474; 37 N. Y. 499; 45 Ark. 212; 45 Ark. L. R. 360; 194 S. W. 234, and many others.

3. The testimony shows the Oklahoma lands were worth $3,000.

4. The findings of the chancellor will not be disturbed on appeal unless clearly against the weight of the evidence.

John F. Lawrence and *A. J. Bryant* of Colorado for the loan company.

1. This was a Colorado contract and must be construed by the laws of that State. The bond and mortgage cover the loan with interest thereon and all stock dues and fines, etc. Dues, fines and expense charges are allowed by the laws of Colorado. Colorado statutes, § § 1, 2, 6 and 7; Thompson on Building & Loan Assn., pp. 272-410; 99 Mo. 96; 93 N. Y. 474-480-1; 25 Oh. St. 186-205, 206-7; 19 W. Va. 769; 47 Pa. St. 352; 57 N. W. 142; 140 Ind. 662; 77 N. W. 889.

2. When one buys property subject to a recorded mortgage he is charged with notice of the contents of the mortgage contract. 2 Jones on Mortg. (7 ed.), § 739-a; 105 Ia. 122; 74 N. W. 750; 19 N. E. 382; 13 *Id.* 476. Nakdimen was bound by the record and also had actual notice and was bound. He also assumed and agreed to pay the mortgage according to its terms, and is estopped to set up usury or other invalidity. 2 Jones on Mortg. (7 ed.), § § 735-6-A, 744-5; 45 Ark. 301; 48 *Id.* 258; 66 *Id.* 121; 46 S. W. 370; 49 *Id.* 353; 81 N. W. 308, etc.

3. The contract will be construed with reference to the law of the place where it is to be performed, or with reference to the law which the parties stipulated shall govern. The contract is valid in Colorado, and its laws govern. 71 Kan. 185; 79 Pac. 1077; 110 Fed. 859; 101 *Id.*

12; 33 S. E. 355; 181 U. S. 227; 69 S. W. 312; 84 *Id.* 717; 137 Ala. 119.

4. In the absence of fraud and mistake, a building and loan contract must be considered as a whole and as the rate of interest finally to be paid is necessarily contingent upon the profits ultimately to be realized, a claim of usury can not be founded upon such a contract by a member of the association. 39 Okla. 12; 26 N. J. Eq. 355; 19 S. W. 917-18; 63 *Id.* 979; 1 Wallace, 540; 49 S. W. 633; 181 U. S. 227; 116 Fed. 735.

5. The findings and decree are fully sustained by the testimony.

McCULLOCH, C. J. Brazil owned a valuable piece of real estate in the city of Fort Smith, and on January 3, 1916, mortgaged the same to the Midland Savings & Loan Company, a building and loan association, incorporated under the laws of the State of Colorado and doing business at the city of Denver, to secure a loan of money in the sum of $15,000 made by said association to Brazil upon shares of stock in accordance with its plan of lending money to its shareholders. The mortgage recited that Brazil was the holder of 225 shares of stock of a certain class in the association and had obtained a loan of $15,000 thereon, and the condition of the mortgage was that the mortgagor should pay "the principal sum of $15,000, with interest thereon, and the premium bid for obtaining said loan at the office of the said party of the second part in Denver, Colorado, according to the tenor and conditions of a certain first mortgage bond of even date herewith, for the said sum, interest and premium, executed and delivered by the said second party, contemporaneously with the instrument."

The note or bond secured by the mortgage also contained a recital as to the loan of $15,000, and the pledge of said shares of stock as collateral security for the loan and the obligation of the mortgagor to pay to the association "the sum of two hundred forty-eight and 75/100 dollars monthly, on or before the last day of each month,

of which sum one hundred twenty-three and 75/100 dollars is the monthly installment due upon said shares of stock above described, and the sum of one hundred twenty-five and no/100 dollars is the monthly interest due upon said principal sum, also such fines as may accrue upon delinquent monthly payments upon said stock and interest, according to the by-laws and resolutions of said company governing the same, said interest and fines to be credited on the debt, until said principal shall have been paid in full, by said shares of capital stock having matured to their par value, or until otherwise paid as herein provided."

The bond also contained the following stipulation with reference to repayment of the loan prior to the final maturity of the shares of stock:

"The undersigned may fully repay this bond at any time before the stock and loan have been carried eighty-five months, by returning to the company the full amount, or balance then due, of said principal sum, together with all interest and fines delinquent and due, and all amounts due for insurance, abstract, taxes and other advances made by the company, then due and unpaid, with interest thereon from the time of payment at 10 per cent. per annum, and repayment charges, if any; and in case of such repayment, if the owner wishes to cancel the certificate, the loan shall be entitled to a credit of the withdrawal or cash surrender value of said shares of stock, as provided by the rules and regulations of the company, and by the certificate itself, on surrender thereof."

Brazil sold and conveyed the property to Nakdimen, the latter assuming payment of said mortgage as a part of the consideration for the conveyance. The deed to Nakdimen bears date of March 23, 1916, and contains the following recital:

"This deed is given subject to the mortgage for $15,000 in favor of the Midland Savings & Loan Company of Denver, Colorado, which the said grantee assumes and agrees to pay."

There was an option contract between Brazil and Nakdimen, the precise date not being stated, but the deed was made pursuant to the contract, which contains a similar recital with respect to the assumption of the mortgage debt. The other considerations for the conveyance were also set forth in the contract, among which was an agreement on the part of Nakdimen to convey to Brazil a certain tract of land situated in the State of Oklahoma. A controversy subsequently arose between Nakdimen and the building and loan association concerning the amount necessary to discharge the mortgage debt, the former claiming the right to satisfaction of the debt by payment of the sum of $15,000, and the latter insisting on additional payments of accumulated interest and monthly dues on the shares of stock. Nakdimen failed to convey the Oklahoma land to Brazil in accordance with the terms of his contract and also withheld the sum of $625 of the cash consideration to be paid in addition to the other considerations referred to.

This action was instituted in the chancery court by Nakdimen against Brazil and the building and loan association, in which he claims that according to his agreement with Brazil he was only to pay to the building and loan association the sum of $15,000, and offered to pay that sum and asked that the total sum due by Brazil to the building and loan association be ascertained by the court and a decree rendered against Brazil for the excess, the same to be deducted from the balance in his hands due Brazil under the contract of purchase. Brazil filed a separate answer, denying the allegations of the complaint with respect to the agreement, and alleging that according to the contract Nakdimen was to pay and satisfy in full the mortgage to the building and loan association, but that he failed to do so, and has also withheld the sum of $625, and failed to convey the Oklahoma lands. The answer of Brazil was made a cross-complaint containing a prayer for specific performance of the contract, and that Nakdimen be required to convey the Oklahoma lands in accordance with the contract, or pay the value

thereof, the sum of $3,000, and also that he recover of Nakdimen the balance of $625, alleged to be due under the contract. The building and loan association filed an answer and cross-complaint, denying the allegations of the complaint with respect to the agreement to pay only $15,000, and asked for a foreclosure of the mortgage, alleging an amount of balance to be due in accordance with an itemized account, as follows:

Principal	$15,000.00
Five months' interest	625.00
Stock dues for same time, five months	618.75
Fines at the rate of 2 per cent	25.00
Abstract fees	23.50
Total	$16,292.25

The cause was heard by the chancellor on oral testimony reduced to writing and brought into the record, together with all the writings evidencing the agreement between the parties. The court decreed in favor of the building and loan association for foreclosure of the mortgage, finding the sum to be due thereunder $16,268.75, including all the items set forth in the account copied above, to bear interest from July 1, 1916. The decree was also in favor of Brazil against Nakdimen for the recovery of the sum alleged to be the balance due on the consideration, and also requiring Nakdimen to convey the Oklahoma lands in accordance with the contract, or pay the sum of $3,000, found to be the agreed value. Nakdimen has appealed.

(1) There is a conflict in the testimony as to the oral negotiations and conversations between the parties with respect to the amount of the debt to the building and loan association which Nakdimen was to assume and pay. The language of the contract is, however, free from ambiguity and must be interpreted by the court according to its obvious meaning. The undertaking was to assume payment of the mortgage and the amount mentioned is merely descriptive of the instrument and not a limitation upon the amount to be paid. *Shanahan* v. *Perry,* 130

Mass. 460; *Johnson* v. *Nichols,* 105 Ia. 122. The evidence is not sufficient to show fraudulent misrepresentation concerning the amount of the mortgage debt. We are, however, of the opinion that the court decreed recovery of an excessive amount by including the item of $618.75 monthly dues on the shares of stock. We find nothing in the contract which warrants the imposition of that charge in addition to the amount advanced on the stock as a loan.

(2) This is a Colorado contract, the debt being payable there and being stipulated in the contract that it shall be so treated, it must be interpreted in accordance with the laws of that State. The statutes of that State authorize such a charge by building and loan associations without offending against the usury laws of the State; but such is not the effect of the particular contract involved in this case, which contains an express stipulation that the owner may discharge the obligation at any time prior to the maturity of the shares of stock "by returning to the company the full amount, or balance then due, of said principal sum, together with all interest and fines delinquent and due, and all amounts due for insurance, abstract, taxes and other advances made by the company, then due and unpaid, with interest thereon." Nothing is said in the stipulation about the payment of dues on stock, and it would be obviously unjust if it did include the stock payment, for that would constitute double payment. The justice of the matter would call for a credit of the amount of stock dues actually paid, and we can not, by any stretch of the language employed in the contract, interpret it to mean that the stock dues must be paid in addition to the amount of the loan. The last clause of the stipulation concerning the cancellation of certificate has nothing to do with the amount to be paid in discharge of the loan, except to provide that the payments already made shall be credited on the loan in the event the stock certificate is to be surrendered. Regardless of Brazil's right under the contract, either to continue the stock by keeping up the payments, or to withdraw it, the obligation of Nakdimen in assuming the mortgage was merely to satisfy it in ac-

cordance with its terms, which do not include the payment of any dues on the stock.

The term "repayment charges" is too indefinite to mean anything in the absence of further provision defining it, and there is none.

(3) Counsel for the company rely on section 29 of the by-laws as sustaining the right to require payment of delinquent stock dues. The section reads as follows: "When the loan becomes due or in case of foreclosure the withdrawal value of stock held as collateral shall be applied in payment of the loan and all arrearages of dues, interest and premiums for reissuance, fines and other charges, if any, according to the company's books, and the deficiency shall be collected from the remaining securities held by the company."

This provision relates to credit of withdrawal value after deducting the charges mentioned and does not require payment of delinquent stock dues on repayment of a loan, where there is no credit on the loan of the withdrawal value of the stock. Nor does section 32 of the by-laws providing that "3 per cent. of the par value of all stock shall be deducted from the first payment or payments made on same, to be used as an expense fund," have any application to the question of repayment of a loan. Neither the by-laws nor the bond provide for payment of the 3 per cent. so specified as a prerequisite to the repayment of a loan.

Moreover, the bond and mortgage constituted the last expression of the terms of the contract and must control. *National Annuity Association* v. *Carter,* 96 Ark. 495.

(4) We think the chancery court erred in including that item in the amount of the foreclosure decree. The decree in Brazil's favor for the recovery of the balance of the purchase money, and for the conveyance of the Oklahoma land, or the recovery of $3,000 in lieu thereof, is correct. The court had jurisdiction to render the decree compelling Nakdimen to convey the Oklahoma land, notwithstanding the fact that the lands were situated in an-

other State and beyond the jurisdiction of the court. *Fegan* v. *Anderson,* 128 Ark. 353, 194 S. W. 234.

The evidence was sufficient to warrant the finding that the parties themselves agreed upon the valuation of $3,000, and the court was correct in requiring that sum to be paid in the alternative. The decree is modified by reducing the amount to be recovered under the mortgage to the extent of the sum of $618.75, and, as so modified, the decree will be affirmed.

SOUTHERN GROCERY COMPANY *v.* BUSH, RECEIVER ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Opinion delivered October 22, 1917.

1. APPEAL AND ERROR—DIRECTED VERDICT.—In testing the action of a trial court in directing a verdict, the Supreme Court will review the evidence offered against the verdict, and will give it its highest probative value, including all inferences reasonably deducible therefrom.
2. CARRIERS—DESTRUCTION OF FREIGHT BEFORE DELIVERY—JURY QUESTION.—Cotton was shipped over the line of defendant carrier, consigned to appellant. At its destination defendant delivered the cotton to a compress company; the building of the latter company was destroyed by fire, and the cotton with it. Appellant sued defendant (appellee) for damages for the loss of the cotton. *Held,* it was a question for the jury, whether the compress company acted as the agent of the appellant or the appellee, before the appellee had give the cotton a clearance, for if it was agent of the appellee, then the latter was liable for the loss, and if it was the agent of the appellant, the carrier would not be liable; and that the trial court erred in directing a verdict for the appellee.
3. CARRIERS—LOSS OF FREIGHT—TIME OF LIABILITY.—The liability of a carrier for loss of freight after arrival at destination may extend beyond what is ordinarily a reasonable time, where the consignee is, without fault, prevented from removing the goods, by reason of some act or omission of the carrier.

Appeal from Jefferson Circuit Court; *W. B. Sorrells,* Judge; reversed.

Bridges, Wooldridge & Wooldridge, for appellants.

1. The liability of defendant as a common carrier had not terminated upon delivery to the compress company, but continued until the railway company had issued its release or clearance for the cotton. It was proven that the railway company had established a custom of requiring consignees, before they could get cotton shipped to them, from the compress company, to pay the freight charges and then the railway company would issue its release or clearance. It was the fault of the railway company that the cotton was not delivered to appellant before the fire. Appellants were offering to pay the freight and asking for a release.

If the compress company was the agent of the railway company, delivery to it was not delivery to appellants and the carrier is liable. The question should have been submitted to a jury, and it was error to direct a verdict. 90 Ark. 70, 72; 89 *Id.* 591; 81 *Id.* 549; 100 *Id.* 37, 42; 109 *Id.* 218; 60 *Id.* 375; 4 R. C. L. 758; 40 Pac. 899; 37 Am. Dec. 434; 95 *Id.* 656; 17 N. W. 351; 79 Ala. 395; 90 N. Y. 267; 2 Hutch. on Car. 788; 124 Ark. 490; 60 *Id.* 333, 339.

2. The contract between appellee and the compress company was inadmissible. Nor was it binding on appellants. 2 Elliott on Contracts, 661; 87 N. E. 21; 34 C. C. A. 363; 106 Ark. 411, 49 N. Y. 464.

E. B. Kinsworthy, W. G. Riddick and *R. E. Wiley,* for appellee.

1. There was an actual and complete delivery of the cotton, the carrier retained no custody of it and no power to control and direct disposition of it for any purpose. 35 N. W. 718, 721, 95 U. S. 43; Michie on Car., § 3649; 44 N. W. 1120; 104 U. S. 146; 38 Minn. 95; 106 Ark. 410, etc.

2. The fact that appellee assumed to control or actually did control the disposition of the cotton after delivery to the compress company to secure payment of its charges would not continue the carrier's strict liability. 35 N. W. 718; 44 *Id.* 1120. See also Michie on Carriers, 1154, 1161; 56 Ark. 430; 112 *Id.* 301.

3. The contract between appellee and the compress company was competent. Michie on Carriers, p. 590; 70 Alt. 232.

No negligence or fault was proven and a verdict was properly directed.

SMITH, J. Two suits are embraced in this appeal, both of which were brought to recover damages from appellee on account of the failure of the railway company to deliver certain shipments of cotton. The causes were consolidated and tried together, and are treated in the briefs as a single case.

Two consignments of cotton were shipped to appellant, the first consisting of thirty-one bales, and designated as the Peacock cotton. The second consisted of fifty-three bales, and is referred to by the witnesses as the Mears cotton. The Peacock cotton was received in Pine Bluff on November 16, 1915, and was delivered by the railway company on that day to the Pine Bluff Compress & Warehouse Company. The Mears cotton was delivered to the same compress company on November 26, 1915. This compress company's warehouse, together with the cotton herein sued for, was destroyed by fire on November 28, 1915. It is not contended that the railway company was guilty of any negligence in the destruction of the cotton, but liability is sought to be enforced against it as a carrier, upon the theory that there had been no completed delivery of the cotton to the consignee at the time of the fire.

The bills of lading under which both consignments were shipped contained the following clause: "For loss, damage or delay caused by fire occurring after forty-eight hours, exclusive of legal holidays, after notice of the arrival of the property at destination, or at port of export (if intended for export), has been duly sent or given, the carrier's liability shall be that of warehouseman only."

The Peacock cotton had been in the warehouse for twelve days at the time of the fire, and appellant had actual knowledge of that fact during all that time. The

Mears cotton, however, had only been received on Saturday afternoon before the fire occurred on the following day at about 3:45 P. M., and no notice of its arrival had been communicated to the consignee before its destruction. However, both shipments had been actually delivered to the compress company pursuant to a general direction from appellant to so deliver its cotton.

Over appellant's objection, there was offered in evidence a contract between the railway company and the compress company, wherein it was agreed upon the part of the compress company, that it would receive at its own risk cotton consigned to consignees who stored their cotton in its warehouse, and that it would assume responsibility for loss of or damage to cotton so delivered to it by the railway company. The action of the court in admitting this contract is assigned as error by appellant, upon the ground that it was not aware of nor a party to the contract, and that its right to assert a demand against the railway company as a carrier can not be affected by a contract which the railway company had with a third party to assume liability which would otherwise rest upon the railway company.

It is admitted that the compress company was engaged in the business of receiving and storing cotton for customers, on terms agreed on between them, and that appellant was a cotton factor and had made arrangements with the compress company to receive from the railway company cotton consigned to appellant and to store it in consideration of the customary charges and hold it for appellant until it was sold and ready for delivery by appellant to the purchasers in the ordinary course of its business. It was the practice of the compress company to take samples of all cotton stored with it and to send these samples immediately to the consignee, and that these samples were used in making sales of the cotton, and it is also shown that samples of the Peacock cotton had been delivered to appellant pursuant to this custom.

Appellant requested the court to give an instruction numbered 3, which presents its theory of the case. That instruction reads as follows:

"3. If you find from the evidence that under the rules and custom of the defendant, as receiver of said railway company, as to the delivery of cotton, that straight shipments of cotton, that is, not to shipper's order, were treated as shipments to shipper's order, and before the cotton would be delivered to the consignee he was required to pay the freight thereon and delivered the bill of lading therefor to defendant's agent and get from such agent a clearance showing the payment of the freight bill upon said cotton and a delivery of the bill of lading therefor, and that said rule or custom of said railway company was in force at the time the cotton sued for was burned and had been in force for a long time prior thereto, and that said cotton would not be delivered to the consignee without a compliance with such rule or custom, then there was no delivery of said cotton to the consignee until he had complied with such rule or custom. Therefore, if you find from the evidence in these cases that the cotton sued for was delivered to the Pine Bluff Compress Company at Pine Bluff, Ark., by the defendant as receiver of said railway company and before the cotton would be delivered to the Southern Grocery Company, it was required under the rules or custom of said defendant, to pay the freight on said cotton and to surrender the bill of lading therefor to the agent of said defendant and to get from such agent a clearance showing the payment of the freight and the surrender of the bill of lading therefor and then was required to present such clearance to the agent of the compress company before the compress company would deliver the cotton to the plaintiffs, Southern Grocery Company, and this had not been done before the cotton was destroyed by fire, then there was no delivery of said cotton to the Southern Grocery Company by defendant, and you should find for the plaintiffs, unless you should find from a preponderance of the evidence that the compress company in receiving said cotton

from defendants was acting as the agent of the Southern Grocery Company."

The court refused to give this instruction, but, upon the contrary, directed the jury to return a verdict in favor of appellee, and this appeal has been prosecuted to reverse the judgment pronounced upon the verdict so rendered.

Appellee seeks to justify this action of the court upon two grounds. The first is that there was an actual and complete delivery of the cotton; that the railway company retained no custody of it and no power to control and direct its disposition for any purpose. And upon the second ground that the fact, if true, that the railway company did assume control, or even actually did control, the disposition of the cotton, after its delivery to the compress company, would not make it liable to appellant as a carrier, because such control was for the purpose merely of securing the payment of its freight charges, and that the retention of control for this purpose would not, and did not, operate to make it liable as a carrier.

The railway company calls attention to the fact that it was the intention of the appellant, even if it had gotten the clearance from the railway company for the cotton, to leave the cotton stored in the warehouse of the compress company until the same was sold, and there was testimony on the part of an officer of the compress company that that company would have issued warehouse receipts for the cotton upon the presentation to it either of the clearances from the railway company or the surrender to it of the bills of lading together with a guaranty to pay the freight on the cotton therein covered. The railway company, therefore, insists that under this proof the verdict was properly directed in its favor, on the theory that there had been an actual physical completed delivery of the cotton to the consignee.

(1) In testing the action of a trial court in directing a verdict, we are required to take the evidence offered against the verdict, and to give it its highest probative value, including all inferences reasonably deducible therefrom.

(2) In the excellent brief filed in behalf of the railway company, it is assumed that the compress company was, in fact, the agent of the consignee, and if this concession is made, it must necessarily follow that the verdict was properly directed. But this admission is not made; in fact, the controversy over the agency of the compress company is the essence of this lawsuit. And if the evidence on this subject is not undisputed, and if it may be reasonably inferred from this evidence that the compress company was in fact the agent of the railway company in holding the cotton, then that question should not have been taken away from the jury.

It was shown, and not denied, that for many years the railway company had the practice of issuing clearances to the consignees of cotton which it had delivered to the compress company. These clearances recited the point of origin of the shipment, the marks upon the cotton, and the number of bales, and the other evidences employed for the identification of the cotton, and concluded with the following statement: "The owner of the above cotton having accepted control of same, you will please discontinue reporting same to this company for insurance protection for our account after midnight above date."

The manager of the appellant company, and other large handlers of cotton at Pine Bluff, testified that it was the custom of the railway company, without exception so far as they were advised, to issue this clearance for cotton after the same had been checked up and it was found that the freight had been properly paid, and that these clearances were delivered to the agents of the compress company, whereupon those agents issued to the consignees warehouse receipts showing that the compress company held for the account of the respective consignees the bales of cotton of the weights, numbers and marks indicated in the warehouse receipts. It is shown, and not denied, that it was the custom of the appellant company to send its representative to the office of the freight agent of the railway company and to check up with that officer the cotton which had been received in Pine Bluff

for appellant, and for this representative of the appellant to issue checks in payment of the freight thereon. It is shown that this representative of appellant, after being advised of the receipt of the Peacock cotton, applied at the office of the freight agent on each morning after the receipt of the cotton, until the Saturday before its destruction, for the clearance, and tendered to this freight agent the amount of freight due upon this consignment. It was known by the freight agent that appellant's representative desired this clearance for the purpose of obtaining warehouse receipts from the compress company, and appellant says that, under the rule of the railway company, which had long been effective in Pine Bluff, the clearance was essential to obtain the warehouse receipts from the compress company. At any rate, because of a discrepancy in the marking of one of the bales of this cotton, the railway company persisted in its refusal to issue the clearance, and as a result thereof no warehouse receipts were ever obtained therefor. It is true that the cotton had been stored where appellant desired it to be stored, and that samples thereof had been furnished appellant. But is fairly inferable from this testimony that this was tentatively done upon the assumption that appellant would, pursuant to its usual practice, obtain the necessary clearance from the railway company.

We think it is not of controlling importance in this case that the cotton was, in fact, stored where appellant would have stored it if no controversy had arisen over the clearance and no difficulty had been encountered in obtaining the warehouse receipt. We think the test is whether the consignee could have removed the cotton had it desired to do so. In other words, was the clearance essential for the actual delivery of the cotton to appellant. Would the compress company have made such a delivery without the production of the clearance as a matter of right, and not as a mere matter of accommodation upon the assumption that the consignee was entirely solvent and responsible and would hold the compress company harmless from any damage resulting from the failure

of the compress company to comply with the railway company's requirement? And we think the record in this case presents the question of fact whether otherwise the compress company would have surrendered the cotton or issued warehouse receipts for it in the absence of the clearance, for, in answer to the question propounded by the court, "Would you have delivered that cotton to the Southern Grocery Company (appellant) without that clearance?" the witness Daily, who was manager of the compress company, answered "No, sir."

Witnesses for appellant who are large handlers of cotton at Pine Bluff testified that the custom of the railway company to require the clearance from it was adopted by the railway company for its own protection and to insure the payment of its freight charges, and that so far as their experience went, warehouse receipts from the compress company could not be obtained without the exhibition to the compress company of the clearance. We think, therefore, that the jury might have found that, for its own purposes and protection, the railway had adopted a rule, the enforcement of which by its agent rendered the compress company the agent of the railway company until the rule or custom of the railway company had been complied with. It will be borne in mind that the railway company was not withholding its clearance for the purpose of collecting its freight charges, for a tender had been repeatedly made of these charges, but that the basis of its refusal was that the number on one of the bales of cotton did not correspond with the number on the bill of lading.

(3) At page 395, Section 8, Vol. 1 (2nd Ed.) of Moore on Carriers, it is said: "Where goods, after arrival at their destination, have been applied for or demanded, but are refused or detained by the carrier, except where the goods are properly held for freight charges due, the carrier's liability as an insurer of the goods may be extended beyond what would ordinarily be a reasonable time and be continued until a reasonable time after the goods have been offered for delivery to the consignee. The carrier's liability as a common carrier continues with-

out regard to the time the goods may have actually been ready for delivery, where the consignee is prevented, without fault on his own part, from removing and caring for his goods by reason of the failure of the carrier to have the goods ready for delivery, or so placed that they can be unloaded with reasonable convenience; or because of being wrongly informed by the carrier or its agent, through mistake, on calling for goods, that they have not arrived, although they have arrived and are stored in the depot or warehouse; or by any similar conduct or wrongful act on the part of the carrier. In some jurisdictions the carrier is held not to continue liable as an insurer by reason of such failure in the goods being delivered through misinformation or mistake on the part of the carrier, but it is held liable as a warehouseman on the ground that its negligence in failing to deliver the goods, or causing them to be detained, is the proximate cause of loss. But where by the terms of the contract of shipment the liability is that of a warehouseman, negligence must be shown to render the carrier liable. And where the consignee has had sufficient time for the removal of the goods after the discovery and correction of a mistake as to their arrival, and notice thereof, the carrier is not liable for loss on the ground of conversion."

The case of *Arkansas Midland Rd. Co.* v. *Moody*, 90 Ark. 70, presented a case, the facts of which are similar to the facts of this case, as appellant here asserts them to be. There it was shown that cotton had been delivered at the compress where Pendergrass, the plaintiff, stored his cotton for his account. In a suit for the damages sustained by this cotton, it was claimed by the railway company that it had discharged its liability by delivering the cotton to the compress company. The court there said:

"If the compress company was the agent of Pendergrass, the consignee, then, when the cotton was delivered to it in 'good order', the duty of appellant was terminated, and it was no longer liable to appellee. If, on the other hand, the appellant has failed to show that the compress

company was the agent of Pendergrass, then it has not discharged its duty under the contract, and is liable for the damages resultant. The only question then is, does the uncontroverted evidence show that the compress company was the agent of Pendergrass?"

In the case of *Arkadelphia Milling Co.* v. *Smoker Merchandise Co.*, 100 Ark. 37, it was said: "The liability of the common carrier ceases with delivery of the goods at the point of destination according to the directions of the shipper, or according to the usage and custom of the trade at such place of destination. This delivery may be actual, or it may be constructive; and in either case the liability of the carrier terminates with such delivery. An actual delivery of goods is made when the possession is turned over to the consignee or his duly authorized agent and a reasonable time has been given him in which to remove the goods. When such delivery is thus made, the carrier is fully discharged from further liability. *Southern Exp. Co.* v. *Everett,* 37 Ga. 688; *Brunswick & W. Ry. Co.* v. *Rothchild,* 119 Ga. 604. To constitute constructive delivery, the carrier must give notice to the consignee or his duly authorized agent, if that is at all practicable, of the arrival of the goods, and must also give a reasonable opportunity and time thereafter for the consignee or his agent to remove same. When that is done, the liability of the carrier is terminated, whatever its liability may otherwise be."

See also, *Ark. Mid. Rd. Co.* v. *Premier Cotton Mills,* 109 Ark. 218. A number of cases on this subject are cited in the note to the case of *Hicks* v. *Wabash Railway Co.,* 8 L. R. A. (N. S.) 235.

Appellee insists with equal earnestness that it can not be held liable here, both because it had fully complied with its contract for the carriage of the goods, and because any control it may have retained over the cotton was for the purpose only of enforcing its claim for the freight due on the cotton. In support of this view, counsel cites and relies upon the case of *Arthur* v. *St. Paul & Duluth R. R. Co.,* 38 Minn. 95, 35 N. W. 718. It was there held that

the carrier was absolved from liability as such upon delivering goods to the warehouseman, notwithstanding the direction of the carrier to the warehoueman not to issue warehouse receipts until paid freight bills were presented. But in that case it was said: "The custody of the property had completely passed from the carrier into that of the public warehouseman. All control over or right to it on the part of defendant had ceased except the right to resort to it to enforce collection of its freight charges in case plaintiffs, after demand, should refuse to pay them. Defendant's directions to the warehouseman that no warehouse receipts should be issued until the paid freight bills were presented imposed no condition upon their issue which is not imposed by clear implication by the statute itself, which provides for the issue of such receipts only upon application of the consignee, accompanied by proof that all transportation or other charges which may be a lien upon the grain, including charges for inspection and weighing, have been paid." Under the law of that State, warehouses are public warehouses, and the carrier discharged his contract of carriage when he delivered the commodity carried into the possession of one of them, and the conditions which the carrier there imposed were imposed by the law of that State, and did not affect the question of agency. The warehouseman received the goods under the law of that State for the consignee, and the carrier's direction imposed no condition not provided for by the statute, and the parties could not have contracted against the provisions of the law, while here the relation of the parties was fixed by their own acts.

Appellee insists that the contract between the railway company and the compress company, whereby that company agreed to assume responsibility and liability for loss or damage to cotton delivered to the compress company by the railway company, makes complete the delivery and absolves the railway company from liability here. But we do not agree with counsel in this contention. We express no opinion as to the effect of the contract between

the railway company and the compress company affecting liability for the loss of this cotton as between themselves, for we have no such question before us; but their agreement can not affect the rights of one not aware of nor a party to it.

We think no distinction can be made between the two shipments of cotton. If the compress company was the agent of appellant, then the delivery was complete in both cases, and there would be no liability in either case. If, however, the compress company was not the agent of appellant, and if the surrender of the bill of lading to appellee was essential to obtain the clearance upon which a warehouse receipt would be issued, then the right of recovery would be the same as to both shipments, for while there might have been no trouble in obtaining the clearance for the last shipment upon application therefor, still no opportunity had been afforded appellant so to apply. We conclude, therefore, that the court should not have directed a verdict in this case, but should have submitted the cause to the jury under instructions conforming to the views here expressed, and the judgment will therefore be reversed, and the cause remanded for a new trial.

McCULLOCH, C. J., (dissenting). The test in this case is correctly stated in the majority opinion to be whether or not the warehouse company was the agent of appellant, or of appellee, in holding custody of the cotton, and I think the undisputed evidence determines that test in appellee's favor. Appellant selected the place of delivery and gave general directions to appellee to deliver the cotton to the warehouse company, and the delivery was made in accordance with those instructions. The Peacock cotton was in possession of the warehouse company twelve days and the Mears cotton was in its hands two days before the cotton was destroyed by fire. The completed delivery in accordance with the directions of the consignee terminated the liability of the carrier. The fact that pursuant to a custom the warehouse company refrained from issuing warehouse receipts or from deliver-

ing the cotton to the owner until a clearance was given by the agent of the carrier did not change the effect of the custody of the warehouse company being that of the consignee and that the delivery was, therefore, complete. If such a custom can be considered in the case as having any bearing on the relation between the parties it is only for the protection of the carrier in the collection of freight charges. It may be conceded that the warehouse company was the agent of the carrier for the purpose of collecting the freight charges, but that does not affect the relation of principal and agent which subsisted between the warehouse company and the consignee. The same person may be the agent, for different purposes, of both parties to a contract. *Phoenix Ins. Co.* v. *State,* 76 Ark. 180; *Traveler's Fire Ins. Co.* v. *Globe Soap Co.,* 85 Ark. 169. The cotton was in the hands of the custodian selected by the consignee as its agent to hold and to care for it, and the effect of that relation was not destroyed by the other agency mentioned so as to continue the liability of the carrier.

The question of liability would be different if there was any proof that appellee had wrongfully refused a clearance and that appellant had failed to get possession of the cotton by reason of such wrongful act, but there is no such proof in this case. It is not shown either that the refusal to give a clearance was wrongful nor that appellant would have removed the cotton from the warehouse before the fire occurred. In other words, there is no charge of wrongful or negligent conduct on the part of the carrier, but liability is asserted solely on the ground that the relation of shipper and carrier subsisted at the time the fire occurred, and that the carrier was liable as an insurer of the cotton.

The Michigan and Minnesota cases cited by counsel for appellee are, I think, directly in point, and should control the decision in this case. *Black* v. *Ashley,* 44 N. W. 1120, 80 Mich. 90; *Arthur* v. *St. Paul & D. Ry.,* 35 N. W. 718, 38 Minn. 95. The fact that in the Minnesota case the delivery was to a public warehouse and that the stat-

ute gave a lien for freight charges does not distinguish it in principle from the present case, for the cases are similiar as to the controlling feature that warehouse receipts were withheld from the owner at the request of the carrier for the collection of freight charges. The court said: "It is true that it had been delivered to the warehouseman for the plaintiffs, subject to the instruction that a warehouse receipt should not be issued to them until evidence was presented that the transportation charges had been paid, and that, by reason of the freight bills not having been yet presented to them, they had not had an opportunity to obtain this written evidence of their title. But it does not seem to us that this fact at all affects or bears upon anything connected with the situation or custody of the property which goes to the considerations of public policy upon which the strict liability of the carrier rests. The custody of the property had completely passed from the carrier into that of the public warehouseman. All control over or right to it on part of defendant had ceased, except the right to resort to it to enforce collection of its freight charges, in case plaintiffs, after demand, should refuse to pay them."

My conclusion is that the delivery of the cotton to the warehouse according to directions of appellant ought to be treated in law as a complete delivery to the consignee so as to terminate the liability of the carrier.

SHURN v. WILKINSON.

Opinion delivered October 29, 1917.

1. ACKNOWLEDGMENTS—TERMS OF.—An acknowledgment can not be any broader than the language of the deed itself.
2. HOMESTEAD—CONVEYANCE—FAILURE OF WIFE TO JOIN.—A conveyance of a homestead is invalid where the wife does not join in the execution, but merely relinquishes dower.
3. MORTGAGES—RELEASE OF VALID SECURITY FOR INVALID SECURITY.—SUBROGATION.—A mortgagee who releases, in good faith, a valid mortgage, for one which was invalid for the failure of the wife to join in its execution, may treat the former mortgage as subsisting and foreclose upon it.

4. MORTGAGES—RELEASE OF VALID MORTGAGE FOR INVALID ONE—APPLICATION OF PAYMENTS.—S. mortgaged certain property to W. for $400, the mortgage being valid. Thereafter S. having become indebted to W. in additional sums, executed another mortgage covering the total indebtedness, the first mortgage being surrendered. The second mortgage was invalid under the homestead statute. *Held,* equity would restore the lien of the first mortgage, and payments made by S. subsequently to the execution of the first mortgage, would be ordered applied to the payment of the indebtedness which accrued since then, and the remainder, if any, to the payment of the first mortgage debt.

Appeal from St. Francis chancery court, *Edward D. Robertson,* chancellor; reversed.

Morrow & Harrelson, for appellants.

1. The trust deed was not given to secure a debt due for purchase money. 114 Ark. 14.

2. The wife did not join in the execution of the deed as required for the conveyance of a homestead. 57 Ark. 242; Kirby's Digest § 3901; 62 Ark. 431; 90 *Id.* 113; 152 N. W. 809; 64 Ark. 494.

3. The debt is usurious. 62 Ark. 370; 64 *Id.* 69. Usury may be proven by circumstances. 199 Fed. 406. See also, 50 N. Y. 437; 22 Hun. 208; 1 Hill, 227; 54 So. 166.

Walter Gorman, for appellees.

1. The deed was executed to secure a purchase money debt. 66 Ark. 367; 69 *Id.* 123, 21 Cyc. 533; 15 A. & E. Enc. L. (2nd. Ed.) 673. Wilkinson was entitled to be subrogated to the rights of Jones. 114 Ark. 14; 44 *Id.* 504.

2. The wife joined in the execution of the deed. Kirby's Digest, § 3901; 90 Ark. 116; 87 *Id.* 371; 91 *Id.* 268; 94 *Id.* 613.

3. No usury is proven. 91 Ark. 462; 74 *Id.* 252; 87 *Id.* 539; 54 *Id.* 571; 57 *Id.* 251; 68 *Id.* 164; 62 *Id.* 380.

The burden was on appellant to show usury. 57 Ark. 257; 59 *Id.* 366; 62 *Id.* 491; 65 *Id.* 316; 25 *Id.* 191. An intent to take is necessary. A mere mistake or error in calculation is not sufficient. 75 Ark. 387; 83 *Id.* 31; 87 *Id.* 534; 75 *Id.* 387.

4. The findings of a chancellor will not be disturbed unless clearly against the weight of the evidence. 81 Ark. 68; 91 *Id.* 268; 100 *Id.* 555; 97 *Id.* 566; 92 *Id.* 30; 89 *Id.* 309.

STATEMENT OF FACTS.

Appellee instituted this action in the chancery court against appellants to foreclose a mortgage on real estate. Appellants answered and as a defense to the action set up usury in the mortgage indebtedness. They also alleged that the mortgaged property was their homestead and that the mortgage was void because the wife did not acknowledge the same in compliance with our statutes relating to the acknowledgment of mortgages on homesteads.

The facts are as follows: On December 12, 1900, Willie Shurn bought the eighty acres of land in controversy from J. A. Jones paying him $50 in cash and giving him a mortgage on the land for $350, the balance of the purchase money. He immediately moved on the land and it became his homestead. On the 25th day of March, 1904, a mortgage on the land was executed by Willie Shurn and Bettie Shurn, his wife, to S. E. Bradshaw to secure the sum of $44. This deed of trust commenced as follows: "This deed made the 25th day of March, 1904, by and between Willie Shurn and Bettie Shurn, his wife, of the County of St. Francis, State of Arkansas, parties of the first part." The granting clause contains the following: "That the said parties of the first part for and in consideration of the debt and trust hereinafter mentioned * * * do by these presents grant, bargain, and sell unto the said party of the second part an absolute estate, in fee simple, including all our right or claim of homestead, in and to the following described real and personal estate, situated and being in the County of St. Francis, in the State of Arkansas, towit":

The deed also contains the following: "And said parties of the first part covenant with the said parties of the second and third parts that no part of said real and

personal estate is mortgaged, pledged held in trust or otherwise encumbered than as herein expressed. And do hereby waive and relinquish unto the said party of the second part, and his heirs, executors or assigns all right, title and benefit whatever in or to said property, which are given or may hereinafter be acquired by any exemption or homestead laws of the State of Arkansas. And Bettie Shurn, wife of the said Willie Shurn, for the consideration above set forth, do hereby relinquish and forever release and quitclaim unto the said party of the second part all her right, title or interest or possibility of dower in and to the above granted real estate."

The mortgage was given to secure a note for $400 with interest at 10 per cent. per annum from date until paid. The deed was properly acknowledged by Willie Shurn and Bettie Shurn, his wife. In July, 1906, Bradshaw transferred the note and the deed of trust given to secure it to C. M. Wilkinson. On the 16th day of March, 1907, Willie Shurn and wife executed a mortgage on this property to C. M. Wilkinson. In this mortgage Bettie Shurn joined with her husband in the execution of the mortgage and relinquished her homestead rights thereto. Indeed, the mortgage was in all respects similar in form to the one given to Bradshaw and contained identically the same clauses which we have copied above except that in the first clause copied above where the name of Bradshaw appears is the name of C. M. Wilkinson. This mortgage was given to secure an indebtedness of $787.10, evidenced by a promissory note of even date bearing interest from maturity at the rate of 10 per cent. per annum until paid. This mortgage was also properly acknowledged by Willie Shurn and Bettie Shurn. On the 8th day of April, 1911, Willie Shurn executed the mortgage in question in the place of the former mortgage executed by him on his homestead. This mortgage commences as follows: "This deed made the 8th day of April, 1911, by and between Willie Shurn of the County of St. Francis, State of Arkansas, parties of the first part." The granting clause contains the following:

"Witnesseth: That the said parties of the first part for and in consideration of the debt and trust hereinafter mentioned and created, and one dollar to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents, grant , bargain and sell unto the said party of the second part an absolute estate, in fee simple, including all our rights or claim of homestead, in and to the following described real and personal estate, situated and being in the County of St. Francis, and State of Arkansas, towit:"

It also contains the following: "And the said parties of the first part covenant with the said parties of the second and third parts that no part of said real and personal estate is mortgaged, pledged, held in trust or otherwise encumbered than as herein expressed. And do hereby waive and relinquish unto the said party of the second part, and his heirs, executors or assigns all right, title and benefit whatever in or to said property, which are given or may hereafter be acquired by any exemption of homestead laws of the State of Arkansas. And Bettie Shurn, wife of the said Willie Shurn, for the consideration above set forth, do hereby relinquish and forever release and quitclaim unto the said party of the second part all her right, title or interest or possibility of dower in and to the above granted real estate."

This mortgage was given to secure a note for $1,075, and certain supplies to be furnished Willie Shurn by C. M. Wilkinson. According to the testimony of Willie Shurn, the indebtedness secured by this mortgage and embraced in the complaint herein contains items which made it usurious.

On the other hand according to the testimony of Wilkinson there was no usury and he stated in positive terms that there was no intention on his part to charge any interest exceeding the rate of 10 per cent. per annum and he did not charge Willie Shurn with interest in excess of 10 per cent. per annum in any of his dealings.

The $400 note, to secure which, Willie Shurn executed a mortgage to Bradshaw and which Bradshaw transferred to Wilkinson, was never paid. It, with the accrued interest, became a part of the indebtedness of Willie Shurn to Wilkinson and was so charged in the former's account. When the new mortgage was taken in substitution of the old one, it was not the intention of the parties to release the old mortgage until the new one became effective.

The chancellor found that Willie Shurn was indebted to C. M. Wilkinson, principal and interest, in the sum of $1,211.95 and judgment was rendered for that sum, and a foreclosure of the mortgage was decreed, if that sum was not paid within twenty days from the date of the decree. The case is here on appeal. Other testimony will be referred to in the opinion.

HART, J., (after stating the facts). The principal contention of appellants is that the mortgage is void because it was not executed in compliance with section 3901 of Kirby's Digest concerning conveyances of the homestead. The statute 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 said instrument and acknowledges the same.

(1-2) It will be remembered that the mortgage executed on the 8th day of April, 1911, is the one sought to be foreclosed. In that mortgage Willie Shurn alone is described as the party of the first part. It is true the granting clause contains the words "including all our right or claim of homestead", but it will be noted from the granting clause which we have quoted in the statement of facts that this referred to "parties of the first part" and as we have just seen Willie Shurn alone is described as "parties of the first part." We have copied in the statement of facts that part of the mortgage which relates to the release of the homestead and the relinquishment of dower and it is not necessary to repeat it here. It will be noted from reading that

portion of the mortgage that "the parties of the first part waive and relinquish unto the party of the second part all right, title and benefit whatever in said property which are given by any exemptions or homestead laws of the State of Arkansas." Just following this recital Bettie Shurn relinquishes dower. It is true that in the acknowledgment it is recited that Bettie Shurn relinquished both dower and homestead but the acknowledgment can not be any broader than the language of the deed itself. When the language of the deed of trust is considered in its entirety it is perfectly evident that Bettie Shurn did not join in the execution of the deed but only relinquished dower therein. This was not a sufficient compliance with the provisions of our statute regulating the conveyance of the homestead and the mortgage is therefore void within the rule announced in *Pipkin* v. *Williams,* 57 Ark. 242, and subsequent cases decided by this court. An attempt is made by counsel for appellees to bring the case within the rule laid down in *Sledge & Norfleet Company* v. *Craig,* 87 Ark. 371. In that case the name of the wife was not mentioned in the deed at all but she signed the deed with her husband. The deed contained no clause relinquishing the wife's dower and the court held that under these circumstances her signature to the deed itself must be construed to evidence an intention on her part to join in the execution of the deed. This construction was placed upon it in order to give some effect to her signature. No such state of facts obtains here. The name of the wife only appears in the deed where she in express terms relinquishes dower. Her husband is described throughout the deed as "the parties of the first part" and the deed expressly names "the parties of the first part" in the granting clause. It also specifically describes "the parties of the first part" as waiving and relinquishing all right of homestead. Thus it will be seen from the language of the deed itself that the wife only relinquished dower. Therefore the case does not fall within the rule announced in *Sledge & Norfleet Co.* v. *Craig, supra.* Neither does

it fall within the rule announced in *Gantt* v. *Hildreth,* 90 Ark. 113. In that case the deed recited that the wife relinquished and released all her rights of dower and homestead. The court said that this showed clearly and unequivocally that her intention was to join her husband in the conveyance of the homestead. As above stated the language of the deed of trust itself shows that the wife did not intend to relinquish her right of homestead but that she only relinquished dower. This is shown by the clause which recites that she only relinquished her dower and also by the recital just above it that "the parties of the first part" (meaning the husband) waived and relinquished all rights of homestead. It follows that the chancellor erred in decreeing a foreclosure of the mortgage prayed for in the complaint.

(3) The record does show, however, that the wife joined in the execution of the mortgage of the 16th day of March, 1907. According to the recitations of that mortgage she and her husband were "parties of the first part" and she joined him in the execution of the mortgage. The deed recites that "the parties of the first part * * * do by these presents grant, bargain and sell unto the said party of the second part an absolute estate in fee simple including all our right or claim of homestead." It also contains another clause in which "the parties of the first part" waive and relinquish all their right of homestead. This deed of trust was properly acknowledged and constituted a valid conveyance of the homestead under our statutes. When Wilkinson accepted the new mortgage with the name of his wife signed to it and the proper certificate of acknowledgment he was justified in assuming that it was executed by her in proper form. The record shows that he did not intend to relinquish the first mortgage until he had secured a new valid one. Having surrendered a valid security for another which proved invalid because of the wife failing to join in the conveyance, Wilkinson is entitled to treat the mortgage of March 16, 1907, as a subsisting mortgage and to fore-

close it for the debt secured by it. *Davies* v. *Pugh,* 81 Ark. 253, and *Roark* v. *Matthews,* 125 Ark. 378.

On the question of usury it may be stated that the record shows that there was no intention on the part of Wilkinson to charge Shurn a rate of interest in excess of 10 per cent. per annum. There is no claim even that there was any usury in the mortgage executed on the 16th day of March, 1907. This mortgage was given to secure a debt of $787.10 evidenced by a promissory note of even date due and payable on November 1, 1907, with interest from maturity at the rate of 10 per cent. per annum until paid. No part of this mortgage has been paid and it is a valid mortgage and we are of the opinion that for the reason given above, Wilkinson has the right to have foreclosure proceedings on this mortgage.

It follows that the decree will be reversed and the cause remanded with directions to the chancellor to enter a decree in accordance with this opinion.

ON REHEARING.

HART, J. (4) Counsel for appellants admit the correctness of the conclusions of law of the court but claim that they are not applicable to the facts of this case. The property involved in this suit is the homestead of Willie Shurn. As pointed out in our original opinion, the mortgage of March 16, 1907, was executed in conformance with our statutes in regard to the conveyance of the homestead, and was valid. Wilkinson was a merchant and Shurn continued to trade with him so that on the 11th day of April, 1908, Shurn owed Wilkinson $860 and gave a new mortgage on the same property to secure the indebtedness. Bettie Shurn, the wife of Willie Shurn, did not join in the execution of this mortgage as provided by our statute; but only relinquished dower in the land. Shurn continued to buy goods from Wilkinson and on the 8th day of April, 1911, owed him $1,075. Shurn executed a new mortgage on this homestead to Wilkinson to secure this sum. His wife did not join in the execution of this mortgage but only relinquished her dower in the property.

For this reason, as pointed out in our original opinion, this mortgage was invalid. For the same reason, the mortgage dated April 11, 1908, was also invalid. It is fairly inferable from the whole record that it was the intention of the parties that the new mortgages should be executed in the place of the old ones. In their motion for rehearing counsel set out payments to the amount of several hundred dollars, which have been made since the execution of the mortgage of March 16, 1907. They claim that these payments should be applied to the extinguishment of the mortgage of March 16, 1907. This is in application of the general rule of payments. That is to say, in the absence of an agreement or instruction to the contrary, payments and credits should be applied to the extinguishment of those items which are earliest in point of time. But the application of this general rule would defeat the equities upon which our decision was based. Equity looks through the mere form of a transaction to the substance. In the application of this maxim in *Wooster* v. *Cavender*, 54 Ark. 153, the court held that when a senior mortgagee in good faith and without culpable negligence satisfied the lien of his mortgage on the record, in ignorance of the existence of an intervening mortgage on the same premises, and took a second mortgage as a substitute, equity will restore the lien of the first mortgage provided it can be done without working hardship or injustice to innocent parties. In discussing the principle in an opinion on rehearing in *American Savings Bank & Trust Company* v. *Helgesen et al.*, Ann. Cas. 1913, A-390, the Supreme Court of the State of Washington said:

"The cancellation of the old mortgage and the substitution of the new one were contemporaneous acts. The manifest intention of all parties interested and participating was not to discharge the lien of the mortgage but to continue it. The purpose was not to create a new incumbrance but merely to change the form of the old. A court of equity will look straight to the substance of the

transaction, rather than give heed to the mere form which it may assume. As between the parties it would be plainly inequitable to permit the release of the old mortgage, which was intended only to give place to a valid new one, to have any operative force when the new mortgage contrary to all intention was ineffectual. The new notes and mortgage were not given in satisfaction, but in renewal of the debt and on the same security. By a doctrine closely akin to that of equitable subrogation—and it seems to us one founded in equal equity and reason—the old mortgage, though released, must be substituted for the new one and treated as a continuing lien securing the continuing debt. This is certainly true as between the original parties. The new mortgage failing, the release was without consideration and also fails."

In *Swift* v. *Kraemer,* 13 Cal. 526, 73 Am. Dec. 603, the court said:

"We regard the cancellation of the old mortgages and the substitution of the new as contemporaneous acts. It was not creating a new incumbrance, but simply changing the form of the old. A court of equity, looking to the substance of such a transaction, would not permit a release intended to be effectual only by force of, and for the purpose of giving effect to the last mortgage to be set up, even if the last mortgage was inoperative."

The same equitable principle applies here, and a court of equity will afford relief and restore the lien on the homestead for the security of the debt of March 16, 1907. If this debt could be reduced by the subsequent payments instead of applying them to the satisfaction of the new debt, this equitable principle would afford no relief. We have thought it best, however, to change the directions to the chancery court.

The cause will be remanded to the chancery court to apply the payments made subsequently to the execution of the mortgage of March 16, 1907, first to the payment of the indebtedness which has accrued since that time and the remainder, if any, to the payment of the

mortgage executed on March 16, 1907. A foreclosure of this mortgage will then be decreed for the payment of the amount so found to be due under it. It is so ordered.

THORN v. DAVIS.

Opinion delivered November 5, 1917.

BILLS AND NOTES—ALTERATION—EFFECT—INTENTION.—The effect of an alteration in a written instrument depends upon the nature of the alteration, the person by whom made, and the intention with which it is made; where neither the rights, interests, duties or obligations of any of the parties is changed in any manner, the alteration will be considered as immaterial.

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

Baker & Sloan, for appellant.

1. The part payment on the two notes was not sufficient to take them without the operation of the statute of limitation. The evidence shows that the payments were not made. The notes were barred. The proof shows that the alleged payments were not made, if at all, until the notes were barred, and it is nothing more than a self-serving statement made by Davis or his agent and is therefore not competent evidence for any purpose. 44 Ark. 532; 14 *Id.* 213; 9 *Id.* 455; 12 *Id.* 775; 18 *Id.* 531; Ann. Cas. 1913-A, 1219.

2. The signing of the note as surety without the consent or authority of the maker and the subsequent payment thereof by such self-constituted surety was a voluntary payment and the addition of such signature to the note constituted a material alteration of the instrument and avoided it. 9 Ark. 122; 5 *Id.* 277; 33 *Id.* 771; 35 *Id.* 146; 32 *Id.* 166; 2 Am. & E. Enc. L. 232.

N. F. Lamb, for appellee.

1. The notes were not barred. Payments are endorsed on both, and they are valid endorsements. The evidence shows actual payments and valid endorsements

thereof on the notes. 44 Ark. 532; 79 *Id.* 393-5; 16 Cyc. 791.

2. The signature by Davis to the $1,500 note was not a material alteration and did not avoid it. It did not affect anybody's liability. 2 Corp. Jur. 1173, § 2, 1219, § 83; 112 U. S. 139; 2 Cyc. 222; 1 R. C. L. 982; 96 Ala. 189; 80 Ga. 200; 148 Ill. 349; 50 Neb. 16; 31 *Id.* 165.

WOOD, J. This suit was instituted by the administrator of the estate of F. G. Keich against W. T. Thorn and others to foreclose a mortgage executed by Thorn and wife to Keich to secure an indebtedness of $1,000. Davis was made a party defendant on account of the alleged existence of a second mortgage executed by Thorn and wife to him. He filed a cross-complaint against Thorn and wife, setting up, in substance, that on November 20, 1906, W. T. Thorn had executed to Davis a note in the sum of $950, due November 20, 1907, and that on March 19, 1908, Thorn had executed his note to Davis in the sum of $950, due January 1, 1909; that on December 31, 1913, Thorn had executed his note to the Jonesboro Trust Company in the sum of $1,500, payable one year after date, which the Jonesboro Trust Company, in due course, had sold to Davis.

Without setting up in detail the answer of Thorn to the cross-complaint of Davis, it in substance alleged that the note for $1,000 and the note for $950 were barred by the statute of limitations of five years, and that the $1,500 note was signed by Davis as surety without the authority and consent of Thorn, the maker, long after the date when the note was executed by Thorn and his wife to the trust company and that such signature was an unauthorized and unwarranted act on the part of Davis; that the payment of the note to the trust company by Davis was therefore voluntary and that he could not recover on same against the makers.

The testimony is substantially as follows:

The notes executed respectively November 20, 1906, and March 19, 1908, each bear an endorsement showing

that the sum of $10 was paid on each note on November 1, 1911. The appellants contend that these payments were not made by them, and that the endorsements were therefore not valid.

The assistant secretary of the Jonesboro Trust Company testified that he entered the endorsements of the payment of $10 on each of the notes; that Thorn and Davis came in the bank and explained that they wanted to make a payment on the notes. He got the notes and the money. Davis was keeping the notes in the bank at the time. Thorn handed witness the money, and witness got the impression that Thorn got the money from Davis. The purpose of the payment, as he gathered from what was said at the time, was to keep the notes from running out, from being barred by the statute of limitations. Witness' recollection was that Thorn said that he borrowed the money to make this payment on the notes from Davis, or else Davis said he would loan the money to Thorn. Witness would not be right positive that the date of November 1, 1911, was the correct date, but was reasonably sure that it was either that date or about that time. The language of the witness on this point is, "My impression now is that the date is correct, but I have no way of fixing the date absolutely. It might have been a day or two, or three days after that." Again, "It is possible it might have been four years ago. I am pretty sure it was only a short time from the date that is on the notes there. I handle a great many notes at the bank and do not pretend to charge my memory with the actual date of particular occurrences."

Davis testified concerning these payments, in substance, as follows: That he called Thorn's attention to the notes and suggested that he had better make a payment on them. Thorn said that he would like to pay them off but did not have the money. Davis told him that he would loan him the money to go in the bank and make the payment on them. They went in the bank, and Armstrong, the cashier, got the notes. As they were walking from the door to the window Davis gave Thorn the $20.

Thorn handed it to the cashier. Davis told the cashier that he would loan the money to Thorn. Davis and Thorn several times talked about the notes becoming barred if the payment was not made. The real purpose and intention on the part of Davis and Thorn with reference to the loan of the $20 by Davis to Thorn on the occasion mentioned, and the payment by Thorn on the notes was to renew the notes, that is, give them new life, to keep the statutes of limitations from running. Witness had no recollection of other than the date that appears on the notes about the time when the payments were made. Witness did not instruct the cashier, who endorsed the payment on the notes, to date the payments back, and did not hear Thorn tell him to do so. The date, November 1, 1911, was the correct date so far as witness knew.

Thorn testified that the note of November 20, 1906, and the note of March 19, 1908, had never been renewed or paid in any way, and that they were still in life unless barred by the statute of limitations. He never paid the $10 endorsed on each of the notes. He explains how this took place, as follows: Davis asked witness to go over to the bank a minute. He did not say what he wanted and witness had no idea. He went to the bank teller's window and told Mr. Armstrong to hand him his notes. Davis said, "You haven't got any money, have you?" This made witness a little angry, and he stepped back a bit. Davis threw two bills in the window. Witness did not know what the amount was. Witness heard the cashier say, "I don't believe that will constitute a credit." Davis said it would. "The pretended credit is dated November 1, 1911. I just had cashed this check here at the First National Bank for $242. I did not ask Davis to let me have any money to pay on the notes." Davis and witness went to the bank on June 5, 1914, and there never was any other time when witness went there with Davis.

John Russell Lane testified that there was a notation on the mortgage record showing the mortgage from Thorn to Davis, as follows: "The within mortgage is credited with $10, November 1, 1911," signed "C. H. Da-

vis, A. B. Lane, clerk, by John R. Lane, deputy." Witness was present at the time the writing was done and Davis requested the notation to be made this way. Witness thought the notation was placed there some time in June, 1914. Davis said that $10 had been paid along in November, and he made the entry on the record to correspond with what he said was the date of the payment of the money.

The court found that Thorn had paid the $10 on the $950 note of November 1, 1911; also that on the same date he paid the sum of $10 on the $1,000 note.

The finding of the chancellor is sustained by the preponderance of the evidence. The testimony of the cashier and of Davis to the effect that the payment was made by Thorn November 1, 1911, under the circumstances detailed by them, is not overcome by the testimony of Thorn to the contrary, nor by the testimony of the clerk showing that under the direction of Davis he entered on the margin of the record of the mortgages a credit for $10 as of November 1, 1911, but that these entries were not made until some time in the summer of 1914. The clerk testified that Davis at the time he requested him to enter this notation said that the payments had been made along in November, and that the entry was made on the record "to correspond with what Davis said was the date of the payment of the money." This tends to show that Davis had neglected to enter the credits on the margin of the record of the mortgages on the date when the payments were made, but it does not contradict the testimony of Davis to the effect that the payments were in fact made November 1, 1911, the date appearing on the notes. The notes respectively for $950 and $1,000 are therefore not barred by the statute of limitations.

Concerning the alleged unauthorized alteration of the $1,500 note, Armstrong testified that this $1,500 note was executed in collection of a previous note of Thornton upon which Davis was surety. The $1,500 note was executed to the trust company by Thornton, but there was never any agreement entered into with Thornton or Davis that

Davis should be released upon any of the indebtedness. Witness' understanding was that Davis would endorse the Thorn note as surety. Witness thought that not over a week elapsed after Thorn signed the note before Davis came in and signed it.

Davis testified that he was not at the bank when Thorn signed the $1,500 note, and did not remember how long it was after the date of the note before witness signed it. His understanding was that the $1,500 note took up other notes of Thorn that witness had signed as surety. The bank had never entered into any agreement that witness was to be released from the indebtedness. The $1,500 note was merely a renewal of the old obligation upon which witness was surety and to the same extent of the $1,500 note.

The secretary of the trust company, who wrote the $1,500 note, said that he did not presume there was any agreement on the part of the trust company that Davis' personal obligation on the indebtedness should be released. Davis and Thorn did not sign the note at the same time. The $1,500 note was given in payment of another note of Thorn to the trust company which Davis had signed as surety.

Thorn testified concerning the $1,500 note as follows: "He (Davis) never spoke to me about any of these notes except the $1,500 note payable to the Jonesboro Trust Company. This note has been renewed once or twice. Davis told me that they were cutting up about that note at the bank, and I said that I would see what I could do about it. I went down to Mr. Mason and asked if they would renew this note and take the mortgage themselves, that is, let me make the mortgage direct to the bank, instead of to Davis as security. The note I signed was dated December 31, 1913, and made in the bank at the time. I did not know that Mr. Davis' name was on this note until some time in December, 1914. I did not ask him to go to the bank and pay any portion of this debt. I did not know he had taken up this note until Mr. Lamb showed it to me." He further testified that when he gave

the $1,500 note to the bank the bank did not say that it intended not to have Davis on it as surety. It was witness' idea to get Davis off of it. "It wasn't proper for Davis to sign it because I carried him this note and tore his name off and handed it to him. He couldn't have thought he was a surety on it when I gave him his signature. I got the old note with Davis' name on it on the 31st of December, 1913, the same day as the renewal note for $1,500 was made to the bank without Mr. Davis' name on it. It was a few days after that that I showed Mr. Davis the old note with his signature off of it and he didn't say anything about signing any notes for me."

From the above testimony it clearly appears that Thorn executed the $1,500 note in payment of prior indebtedness to the trust company on which Davis was his surety, and that there was no intention upon the part of the trust company to release Davis as surety on this indebtedness, and the note was manifestly signed by him as surety in recognition of his obligation as such on the notes which the $1,500 note was given to pay. Even though this may have been done without the knowledge or request of Thorn, it did not in any manner affect the liability of Thorn to the trust company on the note.

In *Mersman* v. *Werges,* 112 U. S. 139, 142, it is said: "Where the signature added, although in form that of a joint promisor, is in fact that of a surety or guarantor only, the original maker is, as between himself and the surety exclusively liable for the whole amount, and his ultimate liability to pay that amount is neither increased nor diminished; and, according to the general current of the American authorities, the addition of the name of a surety, whether before or after the first negotiation of the note, is not such an alteration as discharges the maker." The authorities to this effect are collated in 2 C. J., p. 1219, n. 1. See, also, 1 R. C. L. 982; *Miller* v. *Finley,* 26 Mich. 249. This is well settled by our own court, as well as the authorities generally.

Of course, any material unauthorized alteration that affects the liability of the maker of the note, by increas-

ing or decreasing the same, would invalidate the contract. See *Overton* v. *Matthews,* 35 Ark. 147, and other cases cited in appellant's brief.

But such is not the case here. The signing of the $1,500 note by Davis did not change the contract of appellant Thorn to the trust company in any essential particular. It neither increased nor diminished his liability as the maker of the note.

It was held in *Ryan* v. *Springfield First National Bank,* 148 Ill. 349, that "the effect of an alteration in a written instrument depends upon the nature of the alteration, and the person by whom and the intention with which it was made. If neither the rights nor the interests, duties or obligations of either of the parties are in any manner changed, an alteration may be considered as immaterial."

The decree is therefore correct, and is, in all things, affirmed.

SIMS v. STATE.

Opinion delivered November 12, 1917.

1. BRIBERY—SOLE GUILT OF BRIBE-TAKER.—Under Kirby's Digest, § 1602, the guilt of a bribe-taker depends solely upon his own corrupt intention, and the defendant can not escape conviction upon the ground that the bribe-giver had no criminal intent.
2. CRIMINAL LAW—BRIBERY—PROOF OF CONSPIRACY.—In the prosecution of a State senator for the crime of bribe-taking, *held,* the testimony warranted the submission to the jury, of the question of a conspiracy. A conspiracy need not be proved by positive testimony, but may be established by circumstances.
3. BRIBERY—PROOF OF CONSPIRACY.—In a prosecution for the crime of bribe-taking, where a conspiracy existed among certain legislators and others to introduce certain bills, for the purpose of getting money from persons interested in the bills, it is proper for the jury to consider that fact in determining the guilt or innocence of the accused, and it is also proper for the jury to consider any of the statements of the participants in the conspiracy made during its progress.
4. BRIBERY—STATE LEGISLATOR—INTENT.—In the prosecution of a State legislator for taking a bribe, the consideration for which

was that he "would kill a bill on the floor of the Senate," proof that the accused was himself opposed to the bill, is no defense, where the proof showed that he accepted the bribe.

5. BRIBERY—STATE LEGISLATOR—RECEIPT OF MONEY.—Defendant was accused of receiving a bribe, in return for which he was to "kill a certain bill, pending in the Senate," the evidence showed that defendant and another senator B. received certain sums of money from one M. in a dark alley in the city of Little Rock. *Held,* that it was immaterial whether the money was handed by M. directly to defendant or was first handed to B. and by B. handed to defendant.

6. BRIBERY—STATE LEGISLATOR—TAKING A BILL BEYOND THE JURISDICTION OF THE LEGISLATURE.—The acceptance of money by a State senator for the purpose of inducing him to turn a bill over to an interested party to take beyond the jurisdiction of the Senate, constitutes bribery.

7. APPEAL AND ERROR—MULTIPLICATION OF INSTRUCTIONS.—The trial court is not required to multiply instructions upon the same point.

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea,* Judge; affirmed.

Joe T. Robinson, Thos. C. Trimble, Jr., and *Ross Williams,* for appellant.

1. The court erroneously construed the statute under which defendant was indicted in holding that the intent of the giver was wholly immaterial and so instructing the jury. Kirby's Digest, § 1602; 65 Ill. 58; 47 La. Ann. 977; 23 Col. 300; 47 Pac. 375; 18 Col. 373; 38 Mich. 313.

2. The instruction No. 10 as to conspiracy was not justified by the evidence and was prejudicial. 87 Ark. 34; 95 *Id.* 460.

3. No. 11 was confusing and calculated to mislead.

4. It was error to instruct the jury that it was immaterial whether the money was given to defendant by McGraw or Burgess as was done in No. 14, and No. 18 was upon the weight of evidence. 171 Mo. 1; 2 Phillipine, 616; Hines, Par. Prec., vol. 4, § § 3470-4-5; Cushing, Law of Leg. Ass., par. 2396.

5. It was error to refuse No. 10, asked by defendant, that a corrupt intent was essential.

6. The argument of the prosecuting attorney was unfair and prejudicial. 2 R. C. L. 416; 31 Tex. Cr. 530; 48 L. R. A. 641, and note; 22 Ga. 211; 70 Ark. 306; 75 *Id.* 210; 72 *Id.* 138; 58 *Id.* 353; 110 Ala. 48; 54 Vt. 83; 46 L. R. A. 641-2, notes and cases cited.

John D. Arbuckle, Attorney General, and *T. W. Campbell,* Assistant, for appellee; *M. E. Dunaway* and *Lewis Rhoton,* of counsel.

1. The court properly construed the statute (act 210, Acts 1909, Kirby's Digest, § 1602). It is declaratory of the common law. 29 Ark. 299; 1 Russell on Crimes, 154.

The gist of the crime is the guilty intent of the bribe-taker. 47 La. Ann. 996-7; 135 Mass. 530; 4 R. C. L. 178, § 5; 9 C. J. 404, § 4; 84 Pac. 364; 73 Minn. 150-9; 70 Tex. Cr. 634. The intent of the giver was immaterial, and it was not error to so hold. Cases *supra;* 47 La. Ann. 977, 996.

2. Instruction 12 correctly states the law. 105 Mich. 80; 99 N. E. 1125; 86 N. J. L. 525; 158 S. W. 288; 8 R. C. L. 128, § 105; 156 U. S. 604; 165 *Id.* 300; 86 N. J. L. 525.

3. The evidence justified the giving of instruction No. 10 as to conspiracy. 77 Ark. 444; 105 *Id.* 72; 81 *Id.* 173.

4. There was no error in giving No. 11. It was not made a ground in the motion for new trial. 80 Ark. 345; 95 *Id.* 363; 101 *Id.* 120. Nor is there error in No. 14.

5. There was no error in giving No. 18. The objections are not well founded. Const., art. 5, § 22; 72 Ark. 565. But if error, it was not prejudicial. Kirby's Digest, § § 2605, 2619.

6. It was not error to refuse No. 10, asked by defendant. It was conflicting. 102 Ark. 627; 95 *Id.* 506; 89 *Id.* 213; 94 *Id.* 202; 83 *Id.* 202; 92 *Id.* 71; 94 *Id.* 511; 97 *Id.* 180. The principle of law had been fully covered by

No. 3, and courts are not required to duplicate instructions. 103 Ark. 352; 101 *Id.* 120.

7. The remarks of the prosecuting attorney were withdrawn. They were provoked by objectionable argument on the part of counsel for defendant. 75 Ark. 350; 93 *Id.* 66, 581. The jury were properly admonished. 65 Ark. 475; 75 *Id.* 246; 67 *Id.* 365; 82 *Id.* 64; 84 *Id.* 16; 88 *Id.* 602; 105 *Id.* 608; 84 *Id.* 131, and many others.

McCULLOCH, C. J. Appellant Sims was a senator in the General Assembly of Arkansas, which convened in regular session in January, 1917, and he is charged with the crime of bribery, alleged to have been committed by accepting from one John E. McGraw the sum of $900 to influence his official action with respect to a bill then pending in the Senate, designated as Senate Bill No. 302, providing for the regulation and taxation of trading stamps or coupons.

A demurrer to the indictment was presented on the ground that it was not alleged that McGraw paid the money to appellant with the corrupt intent to influence the action of the latter on the pending bill. The court overruled the demurrer, and in submitting the case to the jury gave instructions to the effect that in determining the guilt or innocence of the defendant it was immaterial whether or not McGraw paid the money with the corrupt intention to influence appellant's official conduct. The court told the jury that "the whole question being what was the intention and motive of the defendant in receiving said money, if you find from the evidence that he did receive it." The evidence is undisputed that McGraw did not pay the money with intent to influence appellant's official conduct, but, on the contrary, McGraw was a detective brought here by the prosecuting attorney to discover the operations of corrupt members of the General Assembly, or those believed to be corrupt, and that his offer to appellant and the payment of the money was a part of his plan to entrap appellant and bring to light corrupt practices on his part. McGraw passed under the

assumed name of McGarvey. On the other hand, the proof adduced by the State was sufficient to show that appellant accepted and received the sum of money named for the purpose of influencing his official conduct with respect to the bill mentioned in the indictment, which was then pending before the Senate.

(1) The question then is squarely presented whether, under the statutes of this State, the guilt of a bribe-taker depends solely upon his own corrupt intention, or whether it is an essential element of his guilt that the bribe-giver should also have acted with a guilty intention of influencing official action in giving the bribe. The rule at common law was that either the bribe-giver or the bribe-taker was indictable for bribery upon his own guilty participation in the transaction regardless of the corrupt intention of the other. 1 Russell on The Law of Crimes (7 Div.), p. 627; 3 Wharton's Criminal Law, § 2215; 9 Corpus Juris, p. 404; 4 Ruling Case Law, p. 178.

Does the statute of this State on the subject change the common law definition? The statute is, as far as applicable to the present case, correctly epitomized by counsel for appellant in their brief as follows:

"If any person shall, directly or indirectly, promise or offer to give, or cause to be promised, offered or given, any money * * * to any member of the General Assembly of the State of Arkansas, after his election as such member, * * * with intent to influence his vote or decision on any question, matter, cause or proceeding which may then be pending or may by law * * * be brought before him in his official capacity * * * and shall be convicted thereof, such person so offering, promising or giving * * * any such money, * * * and the member * * * who shall in any wise accept or receive the same or any part thereof, shall be liable to indictment." Kirby's Digest, § 1602.

The statute applies to all public officers and persons performing public functions under the laws of the State where a bribe is given or received to influence their official conduct. *State* v. *Bunch,* 119 Ark. 219.

It is argued that the use of the word "and" in joining the bribe-receiving official with the bribe-giver necessarily makes the guilt of the former depend upon the guilty intention of the latter. We think that that is not a reasonable interpretation of the statute, and that it would lead to illogical results. For instance, if that interpretation were correct, then an official by receiving money might be guilty of a crime without any guilty intention or actual participation in the guilt of the bribe-giver, whereas the obvious purpose of the lawmakers in framing this statute was to follow the common law rule and to make either of the parties to such a transaction guilty who gives or receives money to influence official action regardless of the intention of the other in giving or receiving the money. Similar statutes in other States have been so construed. In the State of Massachusetts the statute on the subject of bribery is similar to the statute in this State, but the guilt of the bribe-giver and of the bribe-taker is declared in separate sections. The Massachusetts court, in construing the statute, held that the guilt of each party to the transaction depended upon his own guilty intention. *Commonwealth* v. *Murray,* 135 Mass. 530. The California statute is also similar, except that it, too, defines the offense of the respective participants in different sections, and the appellate court of that State held that "the guilt of a State senator receiving a bribe on the understanding that his official conduct should be influenced thereby is not affected by the absence of intent to bribe on the part of the persons furnishing the money which was paid to him." *People* v. *Bunkers,* 2 Cal. App. 197, 84 Pac. 364. The Louisiana statute is almost identical with our statute on this subject, and the Supreme Court of that State decided that an official who accepted a bribe was guilty where there was no guilty intention on the part of the giver. *State* v. *Dudoussat,* 47 La. Ann. 977. Our conclusion, therefore, is that the indictment was sufficient in charging the guilty intention of appellant without also alleging an intention on the part of McGraw to influence appellant's official action. The court was cor-

rect in so instructing the jury. Since the statute denounces the act of a public official in receiving a bribe for the purpose of affecting his official conduct it is no defense that the bribe was given solely for the purpose of entrapping him and exposing his guilt.

It is contended that one of the instructions given by the court (No. 12) told the jury in substance that appellant might be found guilty if neither the giver nor the receiver of the bribe had a corrupt intention, but we do not think the instruction bears that interpretation. Instruction No. 12 relates entirely to the subject of the absence of guilty intention on the part of McGraw, and when read in connection with the other instructions given by the court telling the jury that the case turned upon the "intention and motive of defendant in receiving said money," it can not be said that it permitted the jury to find appellant guilty even though he had no corrupt intention in receiving the money.

Error of the court is assigned in giving instruction No. 10, which reads as follows:

"You are instructed that if you find from the evidence that the defendant and other senators, and other persons had entered into a conspiracy and agreement to introduce and have introduced in the Senate, bills for the purpose of inducing and forcing money to be paid for their passage or defeat, then it is proper for you to take this fact into consideration in determining the guilt or innocence of the defendant, and it is proper for you to consider evidence of any statements made by any of the persons connected with such agreement and conspiracy, if any during the existence of such agreement and conspiracy."

(2-3) The contention is that there was no evidence to support the theory that appellant entered into a conspiracy with others to introduce bills for the purpose of extorting money from interested parties to have them defeated. The evidence adduced by the State tended to show that one Powell occupied a room at one of the leading hotels in the city during the session of the Legisla-

ture, to which several senators habitually resorted; that Powell prepared bills known as "revenue-raisers," meaning bills that were intended to be used in extorting money from interested parties, and had them introduced for that purpose, and that appellant was present in Powell's room with certain other senators when this particular bill was handed to a senator to be introduced, and that it was intended as one of the bills to be used in extorting money from others. Burgess, another Senator, who is also under indictment for receiving money from McGraw at the time appellant is charged with receiving the bribe, testified that he went to Powell's room with appellant and found numerous Senators there, three or four of whom he mentioned in his testimony by name, and that Powell discussed there with the Senators present, including appellant, these various bills that were intended "to raise revenue." Powell handed over to one of the Senators a bill which he declared, according to the testimony of Burgess, was "the bill that would bring the persimmons down." Powell handed this particular bill, that is to say, the one concerning which appellant is alleged to have been bribed, to Burgess, who agreed to introduce it, and who did in fact subsequently introduce it in the Senate. Burgess testified that the conversation between Powell and the other Senators was carried on in the presence of appellant. In fact, it is fairly inferable from the testimony of Burgess that appellant was one of the participants in the conference between Powell and the Senators concerning the introduction of the bills for the wrongful purposes mentioned above. In response to a direct question whether or not appellant was present when the conversation took place, Burgess replied that he was, and in response to another question the witness stated that appellant was present when Powell made the statement concerning the bill that was to "bring the persimmons down." The testimony warranted the submission of the question of conspiracy, which need not be proved by positive testimony, but may be established by circumstances. *Chapline* v. *State,* 77 Ark. 444; *Butt* v. *State,* 81 Ark. 173.

If the conspiracy existed, it was proper, as stated by the court in the instructions, for the jury to consider that fact in determining the guilt or innocence of appellant, and it was also proper for them to consider any of the statements of the participants in the conspiracy made during its progress, for if the testimony adduced by the State be accepted as true, appellant entered into the fraudulent design of introducing bills in the Legislature to use in extorting money from interested parties, and that the transaction now under consideration occurred pursuant to that design. Bill No. 302 was introduced by Senator Burgess, and was referred to a committee, of which appellant was chairman. The committee reported the bill back to the Senate with the recommendation that it not pass, and while that was the status of the bill the evidence shows that McGraw approached appellant and offered him money to kill the bill on the floor of the Senate, which offer appellant and Burgess both accepted. The money was paid over to Burgess and Sims by McGraw, according to the testimony, at night in an alleyway near the business portion of the city of Little Rock. A package containing $1,000 was delivered to Burgess and another package containing $900 was handed to appellant, McGraw having previously handed him $100. Appellant denied that he accepted any money or agreed to do so, but the State's version of the matter has been accepted by the jury and the evidence was sufficient to justify that conclusion.

(4) Another instruction (No. 11) was objected to on the ground that it constituted an instruction on the weight of the evidence by singling out one of the circumstances and presenting it to the jury separately. We have held that it is not good practice to single out a particular circumstance in an instruction to a jury, but that it does not constitute reversible error for the court to do so. *Hogue* v. *State,* 93 Ark. 316. The instruction in question is in no sense one upon the weight of the evidence, but it merely states, in effect, the proposition of law that the fact that appellant claimed to be opposed to the bill in question did

not constitute a defense to the charge of bribery if he received the money for the purpose of being influenced as to his vote or decision in any way affecting the bill. That is a correct statement of the law. The fact that appellant had declared himself to be opposed to the bill might be considered as a circumstance tending to rebut the contention that he accepted a bribe, but if the proof shows that he did in fact accept a bribe, then it constitutes no defense that he had previously set himself up as being opposed to the bill.

(5) Again it is contended that the court erred in giving the following instruction:

"No. 14. You are instructed that if you find from the evidence beyond a reasonable doubt that the defendant received money as charged in the indictment, it is wholly immaterial whether the money was handed directly to the defendant by the said John E. McGraw, or was handed to the witness Burgess, and was by Burgess handed to the defendant."

The evidence adduced by the State was sufficient to show that the money was paid by McGraw directly to appellant, but the testimony shows that McGraw, Burgess and appellant were together in the alley, and that the money came from McGraw, and it was correct to say, as stated in the instruction, that it was immaterial whether the money was handed by McGraw directly to appellant or was first handed to Burgess, who in turn handed it over to appellant. It is undisputed that if there was any money passed at all it came from McGraw, and that if Burgess handed over any money to appellant it was money that had been handed to him by McGraw in appellant's presence. It is urged in the same connection that the proof constituted a variance from the allegations in the indictment in that it is alleged in the indictment that the money was paid over by McGraw. The evidence is abundant, however, to show that McGraw in fact handed the money directly to appellant, but, even if it was first handed to Burgess by McGraw and then turned over to appellant by Burgess in McGraw's presence it would not constitute a

variance from the allegations in the indictment. The only real issue is whether or not appellant received the money at all. He denies that it was given to him, but on the other hand, the testimony adduced by the State shows money furnished by McGraw was in fact paid over to him according to previous agreement to influence his official act, and that at the time the money was paid he delivered to McGraw the original bill, which he had procured from the secretary of the Senate.

(6) Instruction No. 18 was objected to and the ruling of the court in giving it is also assigned as error. It reads as follows:

"You are instructed that when a bill has been introduced in the Senate of the General Assembly and has been referred to a committee to act and report upon it and the committee has acted and reported upon it, that it do or do not pass, and that before any further action is taken the bill is extracted from the Senate and placed beyond the control of the Senate or any of its officers, it makes it impossible for the Senate to consider such bill for the purpose of either passing or defeating it."

That instruction was not literally correct in the unqualified statement that it was impossible for the Senate to consider a bill "either passing or defeating it" after it had been taken from the Senate and placed beyond the control of any of its officers. This instruction was based upon testimony which showed that part of the plan was for the bill to be turned over to McGraw so that he could take it out of the State with him. The Senate would not have been powerless, under those circumstances, to proceed further with the consideration of the bill, for a legislative body would necessarily be clothed with power under those circumstances to restore a lost or stolen bill. It is correct, however, to say that after the bill itself had been carried beyond the reach of the Senate it could not either defeat it or pass it while that status existed. In other words, it is true that the absence of the bill from the jurisdiction of the Senate constituted an obstacle which prevented further action on it until it could be restored, or a

copy substituted, and that the acceptance of money by a Senator for the purpose of inducing him to turn a bill over to an interested party to take beyond the jurisdiction of the Senate constitutes bribery. The instruction was, therefore, correct only to the extent that it expressed that idea to the jury, but, though it was incorrect to tell the jury further that that disposition of the bill absolutely defeated its further consideration, it could not have had any prejudicial effect. The important thing for the jury to know was that the acceptance of money by appellant to induce him to extract the bill from the Senate and turn it over to McGraw was such official misconduct as would constitute bribery, and it was wholly immaterial that the court incorrectly told the jury that that would defeat the final passage of the bill.

The court refused to give the following instruction at appellant's request:

"Even though you believe from the evidence that McGarvey gave defendant nine hundred dollars, or any other sum, to defeat or kill the bill, No. 302, in the committee, and further find that it had already been defeated in the committee, and that McGarvey knew at the time that it had been so defeated, and was not thereafter to be acted on by the committee, and did not make the gift with the intent to influence his vote or decision, and that defendant did not receive it or accept it with intent that it should influence his vote or decision, then you should find the defendant not guilty."

(7) The instruction is conceded to be poorly worded, but it is insisted that it ought to have been given because it stated the one essential thing, that appellant could not be found guilty if he did not receive the bribe with intent that it should influence his official conduct. That statement of the law, however, was fully expressed to the jury in other instructions given by the court. In instruction No. 3, which set forth in detail the material allegations of the indictment, one was stated to be that the accused must have received the money "for and by way of a bribe to influence his vote or decision upon a certain

bill, towit: Senate Bill No. 302, then pending in the Senate;" and in instruction No. 5, the court told the jury that the whole question of the case was "what was the intention and motive of the defendant in receiving said money, if you find from the evidence that he did receive it." It was unnecessary for the court to multiply instructions, and this particular instruction might have misled the jury into the belief that appellant was not guilty of accepting the bribe merely because he had previously opposed the bill in the committee and had reported it adversely.

The last assignment of error relates to improper argument of the prosecuting attorney, but it appears from the record that the prosecuting attorney withdrew the improper remarks and that the trial judge very emphatically admonished the jury to pay no attention to those remarks. It can not be said that the effect of the remarks was necessarily so harmful that no action of the court could eradicate the same. We must assume that the jury heeded the emphatic admonition of the court and disregarded the improper remarks of counsel, and considered the case solely upon the testimony and the instructions of law given by the court.

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

VAUGHAN v. HINKLE.

Opinion delivered November 12, 1917.

1. APPEAL AND ERROR—DIRECTED VERDICT.—In testing the correctness of a directed verdict, the testimony will be given its strongest probative force in favor of the appellant, and the cause will be reversed where the facts, when so viewed, present an issue which should have been submitted to jury.
2. PRINCIPAL AND AGENT—PROOF OF RELATIONSHIP.—Appellant sold cattle to C. and L., believing that C. and L. represented appellee in the transaction. *Held*, while the agency of C. and L. for appellee could not be established by declarations and representations made by C. and L. to appellant, yet appellant could show by the testimony of C. and L. that they were appellee's agents, and

that they had the authority to represent the appellee in the purchase of these cattle.

3. PRINCIPAL AND AGENT—PROOF OF RELATIONSHIP.—The evidence held sufficient to establish the relationship of principal and agent between appellee and certain parties who were engaged in the purchase of cattle for appellee.

4. CONTRACTS—SALE OF CHATTELS—MEETING OF MINDS.—C. and L. agents for appellee offered to purchase certain cattle from appellant, paying therefor with a check on appellee's account. At the request of C. and L. appellant 'phoned a certain bank to ascertain whether the check drawn by C. and L. would be honored, and upon being informed that it would, appellant accepted the check. *Held,* that there was a sufficient meeting of the minds of the parties to establish a contract between them.

5. SALES—RESCISSION—JURY QUESTION.—Appellant sold certain cattle to appellee's agent, taking a check in payment. Later appellee told appellant that he doubted if he could handle the cattle, and appellant resumed possession of the same. *Held,* it was a question of fact, whether the contract was rescinded by the conduct of the parties.

6. SALES—MORTGAGED CHATTEL.—The sale of a chattel subject to mortgage is not invalid, although the purchaser knows nothing of the mortgage, where the mortgagee has given the mortgagor express permission to make the sale.

7. SALES—BREACH OF CONTRACT—RIGHT OF SELLER TO IMPOUND.—Where the purchaser of chattels fails to pay the purchase price, where the sale is complete and the purchaser is in possession, the seller may, without giving bond, have the chattels impounded, pending an action for the purchase price.

Appeal from Independence Circuit Court, *D. H. Coleman,* Judge; reversed.

Samuel M. Casey, for appellant.

1. The court erred in quashing the writ for want of a bond. No bond was required by law. Kirby's Digest, § § 4968, 4967; 52 Ark. 453.

2. The court erred in directing a verdict for defendants. There was evidence of the agency of Crownover and Cole, and the principal was bound by the apparent authority he holds them out as possessing. 1 Clark & Skyles Law of Agency 1000, 1001; 48 Ark. 138; 42 *Id.* 97; 77 *Id.* 364; 55 *Id.* 632; *Ib.* 627, 630. Taking the

evidence in the strongest light for appellee it shows these agents had general authority to buy cattle. The case should have been submitted to a jury at least. 47 Ark. 366; 112 Am. St. 436.

3. Even if there was a mortgage on the cattle plaintiff had the right to sell, and it was no cloud on the title. 94 Ark. 168. A parol release of a mortgage is valid. 124 Ark. 545. Defendants obtained a good title. There was no fraud. 94 Ark. 168. See also 88 Ark. 103.

Joe McCaleb, John B. McCaleb and *Lyman F. Reeder,* for appellees.

1. The attachment was properly dismissed because the property was already in the possession of plaintiff and no bond was given. Acts 1877, p. 47; Kirby's Digest, § § 4966-9, 400-12; 45 Ark. 136; 52 *Id.* 450; 57 *Id.* 13; 49 *Id.* 287, 290; 68 *Id.* 417, 421; 64 *Id.* 132; 76 *Id.* 273; 99 *Id.* 335; 91 *Id.* 218.

2. No agency was shown and none existed. The only proof was the testimony of the alleged agents, which was not competent. Agency can not be proven by the agent himself. 92 Ark. 315; 31 *Ib.* 212; 33 *Id.* 251; *Ib.* 316; 44 *Id.* 213.

It was the duty of plaintiff to inform himself of the extent of the agents' authority before the deal. 62 Ark. 33, 40; 94 *Id.* 301; 66 *Id.* 336; 92 *Id.* 315; 74 *Id.* 557; Mechem on Ag., § 289; 23 Ark. 411; 98 *Id.* 166; 81 *Id.* 202; 28 *Id.* 95.

3. Any trade or sale which appellant may have made was immediately rescinded by him and possession of the cattle taken.

4. According to all the evidence there was no meeting of minds and no completed contract.

5. Appellant can not rely upon the existence of an agency by implication. There was not even apparent nor ostensible authority in the alleged agents. 2 C. J. 573-4-5, § § 213, 215, 218; *Ib.* 575-7.

6. As to agency by estoppel, see Clark & Skyles on Agency 460, § 195, 140, § § 56-9, p. 495. Also on appar-

ent scope of authority, 1 Clark & Skyles on Ag., 497; 112 Ark. 190.

6. As to when contract or act is apparently authorized, see 1 Clarke & Skyles on Ag., p. 100, 1005, § § 451-5; 10 R. C. L. 765, § 83. As to estoppel, 10 R. C. L. 698; 16 Cyc. 722-6, 734, 738, 744; 99 Ark. 260; 101 *Id.* 135.

7. The cattle were mortgaged. 35 Ark. 483. A verdict was properly directed.

STATEMENT OF FACTS.

C. P. Vaughan, through his sons, who were authorized by him to do so, sold to W. R. Crownover and S. N. Cole, who claimed to be the agents of and acting for the Hinkle Livestock Company, a firm composed of John A. Hinkle, Elmer Hinkle and Bernard Hinkle, 106 head of cattle.

This suit was instituted by C. P. Vaughan, appellant, against the appellees, to recover of appellees the sum of $3,883.75, the purchase price of the cattle. Vaughan alleged, in substance, that the sale was negotiated on his part through his sons as his agents and on the part of the appellees through Crownover and Cole, who represented themselves as the agents of the appellees; that Crownover and Cole took the cattle in their possession, and executed checks on the First National Bank of Batesville, which checks were not paid. Vaughan also attached to his complaint an affidavit under the provisions of chapter 101 of Kirby's Digest, to have the property, which he alleged was in the possession of the appellees, impounded and held by the sheriff subject to the orders of the court.

The appellees answered, in substance denying the allegations of the complaint, and denying that Crownover and Cole were the agents of the appellees, and alleging that they had no authority to act for them, and further averring that as soon as they ascertained that appellant had sold the live stock to Crownover and Cole they notified appellant that Crownover and Cole had no authority to act for them and that thereupon appellant

immediately took the live stock back into his possession, and that the appellees had never at any time had possession of the live stock; and that at the time of the alleged sale the live stock was under mortgage to the Citizens Bank & Trust Company, and that no information as to such mortgage was given to Crownover and Cole, and that therefore even if Crownover and Cole were the agents of the appellees the concealing from them the fact that the property was then under mortgage would be a fraud on the appellees and render the sale absolutely void.

The undisputed evidence shows that Crownover and Cole purchased the cattle on the 9th day of February, 1917, from the sons of the appellant and that they represented themselves as the agents of the appellees and executed two checks in the sum of $1,941.88 each, one of the checks being signed "Hinkle Livestock Company, by W. R. Crownover," and the other being signed "Hinkle Livestock Company, by S. N. Cole;" that these checks were endorsd on the back "Payment stopped by Hinkle Livestock Company on the 10th of February, 1917."

At the conclusion of the testimony the appellees moved the court to direct the jury to return a verdict in their favor, and before the court ruled upon the motion the appellant asked the court to grant certain prayers for instructions presented by him, which the court refused, and to which the appellant duly excepted. Thereupon the court gave to the jury the following instruction: "Gentlemen of the jury, under the law applicable to this case and the facts in this case I instruct you to return a verdict for the defendants."

The appellant duly excepted, and from a judgment in favor of the appellees this appeal has been duly prosecuted. Other facts stated in the opinion.

WOOD, J., (after stating the facts). The appellees contend that the judgment was right for the following reasons: First, that there was no testimony to show that Crownover and Cole were the agents of the appel-

lees and authorized by them to make the contract of purchase; second, that if Crownover and Cole were the agents of the appellees, there was no meeting of the minds of the parties to the alleged contract of sale, and hence no completed contract; third, that if there was a completed contract of sale, the same was immediately rescinded by the appellant as soon as he ascertained that the checks would not be paid; and, fourth, that the failure of the appellant to notify Crownover and Cole at the time of the alleged sale that the cattle were under mortgage was a fraud upon the appellees that would void the sale, even if Crownover and Cole were their agents and authorized to make it. We will consider these questions in the order stated.

First: Was there any testimony to warrant the jury in finding that Crownover and Cole were appellees' agents and authorized as such to purchase the cattle?

C. P. Vaughan, Jr., testified concerning this that Crownover and Cole said they were buying the cattle for the Hinkle Livestock Company, and that they gave him the checks signed as appears on the face of the checks themselves which were introduced in evidence; that after the cattle were turned over to Crownover and Cole, and after they had driven the same as far as Sulphur Rock, and while there Hinkle called witness and asked him if the cattle had been sold and turned over to Crownover and Cole, and upon the witness informing him that they had, Hinkle asked what kind of cattle they were. Witness told him as near as he could, and the number, and where the cattle were, and Hinkle said he didn't know whether he could handle them or not at the price.

Cole testified that he and Crownover contracted for the cattle at the price for which the checks were drawn; that they were buying the cattle for the Hinkle Livestock Company; that they had commenced trading for them about the last of August of the year 1916. Witness testified that he had been trading some in cattle and did not have as much money as he wanted and he made arrangements with Mr. John A. Hinkle, of the Hinkle Live-

stock Company, to furnish him money to buy with; that he had been trading some along for them and had been buying for the Hinkle Livestock Company from last August up to the time of the sale, February 9; that he was buying a few cattle all along up to the time of the deal in controversy; that they bought both heifers and steers; that when cattle were purchased he would bring some of them to Hinkle at Batesville, and some he sold up the other way, that is, to Northern men, and when he sold the cattle to Northern men he would send the money to Mr. Hinkle. After buying the cattle from Vaughan they paid for same by writing a check for the Hinkle Livestock Company on the First National Bank at Batesville. When witness bought cattle for the Hinkle Livestock Company he signed the checks "Hinkle Livestock Company, by S. N. Cole." Witness was asked how he got the checks that he gave in payment for the cattle, and answered, "Hinkle would give me a check book." They gave witness authority to sign their names, that is, the "Hinkle Livestock Company," to these checks. Witness stated that after Hinkle told witness to buy cattle for him that Hinkle did not notify witness that he could not sign any more checks. To remunerate witness for his services he received as a commission half of the profits from the sale of the cattle bought by him for the Hinkle Livestock Company. Witness was asked how many checks he had drawn on the Hinkle Livestock Company's account while he was buying for them, and said that he could not say how many but that he had used more than one book of checks, and when he used one book Mr. Hinkle furnished him with another. He sent witness the check books by mail. Hinkle gave as a reason for not taking the cattle that he thought witness had paid too much for them. Hinkle had never before objected that the price paid by witness for cattle was too high. Witness had never consulted with John A. Hinkle, or any member of the Hinkle Livestock Company, in making deals for them in the purchase of cattle, as to whether or not he would buy. Witness was asked whether he had any authority

to buy these cattle for the Hinkle Livestock Company, and answered, "Well, I had the same that I thought I had had before," and stated that Hinkle had never limited him about the number of cattle that he should buy nor as to the kind he should buy. Witness was asked how many cattle he had bought for the company, and answered that he did not know. He testified that on one occasion before he had bought in one bunch fifteen head and gave a check for them signed "Hinkle Livestock Company, by S. N. Cole," which check he supposed was paid.

Crownover testified to substantially the same facts concerning his agency to purchase cattle for the Hinkle Livestock Company. Among other things he said that they had been buying most all kinds of cattle, cows, yearlings, heifers and steers, and when asked if he had authority to buy these cattle he stated that he thought he did. Witness then related that he had received a letter a short while before the purchase of these cattle from Capt. Hinkle in which he stated that if witness could get any "springing" cows he, Hinkle, wanted them, but that Hinkle had never told witness not to buy any other kind of cattle than what witness had been buying.

John A. Hinkle and Elmer Hinkle, members of the firm of Hinkle Livestock Company, testified that Crownover and Cole had no authority to purchase the stock in question or to buy stock generally for the Hinkle Livestock Company, and that they only had authority to buy for the company in a small way "up around Sidney," and that they had been specifically instructed just a short time before the purchase of the cattle in controversy to buy only a few "springers," that is, cows that would come fresh in the spring.

Other witnesses testified tending to corroborate the testimony of the Hinkles to the effect that before the purchase of these cattle they had limited the authority of Crownover and Cole to purchase only "springers."

(1) In testing the correctness of the verdict which was directed to be returned in favor of the appellees we

must give the above testimony its strongest probative force in favor of the appellant in determining whether or not it was sufficient to show that Crownover and Cole were the agents of the appellees to purchase cattle and as such agents had authority to purchase the cattle in controversy. When viewed in this light it is manifest that the above testimony presented an issue of fact which should have been determined by the jury under proper instructions. The court therefore erred in not submitting this issue to the jury.

(2) While the existence of the alleged agency of Crownover and Cole could not be established by their own declarations and representations made to Vaughan, yet it was perfectly competent for the appellant to show by the testimony of Crownover and Cole that they were the appellees' agents and that they had authority to represent the appellees in the purchase of these cattle. Even though these witnesses may have stated, after rehearsing the facts, that they thought they had authority to represent the appellees, the facts related by them were sufficient to warrant the jury in finding that they were the agents of the appellees and that they had authority to make the purchase. And the testimony of C. P. Vaughan, Jr., and of Crownover and Cole, considered in connection was sufficient to have warranted the jury in finding that express authority existed to purchase these cattle.

In *Concordia Fire Ins. Co.* v. *Mitchell,* 122 Ark. 357, 361-2, we said: "It is, of course, well settled that the existence of an agency can not be established by proof of the acts and declarations of the agent; but it is equally as well established that the agent himself may prove his agency."

(3) The evidence was uncontroverted that Crownover and Cole were the agents of the appellees to purchase cattle, but the appellees testified that the agency, at the time of the purchase under review, was limited to the purchase of cattle only in a small way up around Sidney, and to purchase what is designated as "springers" only. But the testimony of Crownover and Cole would have

warranted a finding that their authority was not so limited.

The testimony of the cashier of the First National Bank of Batesville to the effect that the Hinkle Livestock Company had left written instructions with the bank to honor the checks of Crownover and Cole when drawn in the name of the Hinkle Livestock Company, and the testimony of Crownover and Cole tending to prove that they had been furnished blank check books by appellees, with authority to purchase cattle and to draw checks for the purchase price and sign the name of "Hinkle Livestock Company" to these checks, without any limitation either as to the number, kind or price of cattle, was certainly sufficient to warrant a finding that Crownover and Cole were clothed with authority to represent the appellees in making the purchase under consideration.

(4) Second: Appellees contend that there was no meeting of the minds of the parties because Crownover and Cole, before the contract was completed by the acceptance of the checks on the part of the appellant and the delivery to and acceptance of the cattle on the part of Crownover and Cole, had instructed C. P. Vaughan, Jr., to phone to Hinkle Livestock Company and ascertain whether the checks they had signed for the purchase money would be paid. Appellant, on the other hand, contends that Crownover and Cole instructed C. P. Vaughan, Jr., to phone the bank and ascertain whether or not the checks would be honored. Appellees insist that these contentions did not present a question of veracity as to who had produced the preponderance of the evidence, but that all the evidence should be accepted as true, and when so accepted it shows that there was no meeting of the minds. We can not follow the learned counsel for appellees in this argument, nor agree with them in their conclusion.

If Crownover and Cole told C. P. Vaughan, Jr., before he received and accepted the checks, to phone the bank and ascertain whether the same would be paid, and

young Vaughan followed these instructions, and upon being informed that same would be paid, accepted the checks and turned over the cattle to Crownover and Cole, there was a meeting of the minds of the parties to the contract and the same became complete, assuming that Crownover and Cole were the agents of appellees and had authority to make the purchase. Also if Crownover and Cole instructed young Vaughan, before he accepted the checks in payment to phone the Hinkle Livestock Company and Vaughan misunderstood such instructions and phoned the bank instead, and upon receiving information that the checks were good, accepted them, there still would have been a meeting of the minds of the parties to the contract. For, whether the instructions were to phone the bank or the Hinkle Livestock Company, in either event these instructions were for the benefit of Vaughan and to enable him to determine whether or not he would accept the checks signed by Crownover and Cole, and the minds of the parties met when Vaughan by inquiry ascertained facts which satisfied him that the checks would be paid and it was clearly the intention of the parties to the contract that the same should be complete when Vaughan accepted the checks in payment for the cattle, if he did do so, and delivered the cattle to Crownover and Cole. It was, therefore, an issue for the jury under the evidence to determine under proper instructions as to whether or not there was a meeting of the minds of the parties, and as to whether or not the contract thereby became complete.

The testimony of the young Vaughans was to the effect that Crownover and Cole instructed C. P. Vaughan, Jr., to phone to Batesville and ascertain whether the First National Bank, on which the checks were drawn, would honor the same by payment, and that he had followed these instructions by phoning to one Kennerly, cashier of the Citizens Bank & Trust Company, with which his father transacted business, to ascertain the fact for him and report; that Cole and Crownover were present in the room when he was talking to Kennerly.

and he informed them that Kennerly said that the First National Bank would honor the checks; that they were in the room when the witness put in the call for Kennerly and were there when the report came back. The testimony of Cole and Crownover is in sharp conflict with this, which only shows that it was an issue to be submitted to the jury under proper instructions, as we have stated, to determine whether or not there was a completed contract of sale.

(5) Third: If there was a completed contract of sale, was the same immediately rescinded by the appellant as soon as he ascertained that the checks would not be paid?

Crownover testified, on cross-examination, that after Clarence Vaughan had talked with John Hinkle, at Sulphur Rock, he said to witness that he "would have to stop me." He stopped the cattle and took charge of them and took them back down to his grandfather's and put them in the field and forbade the witness from moving them out of that field. And on redirect examination he testified that when witness got word from Hinkle that they would not pay the checks he went up ahead of the cattle and stopped them. Cole came up there and said that Clarence said "we would have to stop them;" said that Clarence Vaughan said to hold the cattle up awhile, and he turned them down there in the lot, and witness and Cole stayed there that night and over the next day until along in the evening. He was asked if he did not try to get hay to feed them and answered that there was something said about hay there by Don Vaughan at the depot. "We decided that they could leave them there in the field until something was done with them." Witness said he did not want any hay at the high price of feed.

C. P. Vaughan, Jr., testified, in substance, that Hinkle called him at Sulphur Rock and asked him about the cattle and if the cattle had been turned over to Crownover and Cole; that witness informed him that they had; Hinkle then asked what kind of cattle they were, the price, etc., and said that he did not know whether he could han-

dle them at the price. Witness told Cole what Hinkle said and Cole asked witness what he intended to do about it. Witness replied that he intended to call Kennerly, and he did call Kennerly and Kennerly reported that the checks would be paid. Witness was asked this question: "Where did they put these cattle while you all came to Batesville?" and answered, "They were drove back to my grandfather's farm, on the Sulphur Rock and Cord road, and were put in his stalk field there." His testimony further discloses that after the cattle were put in this stalk field that they all went to Batesville that night, and that Crownover and Cole went to see Hinkle about the trade and the Vaughans went to consult their lawyer, and that they proceeded, under his advice, to sue for the purchase money and at the same time to impound the cattle as the property of the appellees, the vendees, still in possession.

The above testimony also presents an issue of fact, which should have been submitted to the jury under proper instructions, as to whether or not the sale was rescinded by the conduct of the parties to it.

(6) Fourth: If the alleged sale was complete, the failure of the appellant to inform the appellees at the time thereof that the cattle were mortgaged was not a fraud, under the undisputed proof in the record, and would not have rendered the sale, if otherwise good, void. For the undisputed evidence shows that the appellant had express permission from the mortgagee of the cattle to make sale thereof at any time he wanted to. Kennerly, the cashier of the Bank and Trust Company to whom the mortgage was executed, testified concerning this that it was the understanding at the time Vaughan executed the mortgage to the bank on the cattle that he could sell them at any time he wanted to and that he would not have to consult the bank before he did it. Witness knew they were selling the cattle when young Vaughan telephoned him in the morning, and the bank had no objection to it. If the sale had gone through and

the checks had been paid the bank had no objection to the deal.

This testimony shows clearly that the mortgage was no cloud upon the title which the appellant transferred to the appellees, if there was a sale.

In *Fincher* v. *Bennet,* 94 Ark. 165, we said: "The conveyance of the title to personal property by a mortgage or deed of trust is in effect only a security for a debt. Such property may be released from the mortgage or deed of trust by a sufficient parol agreement. And where the mortgagee authorizes or gives consent to the mortgagor to sell the mortgaged property, the mortgage lien thereon is discharged. Under such circumstances, a *bona fide* purchaser for value from the mortgagor obtains a good title to the property, whether he knew of the existence of the mortgage or not." See also, *Horton* v. *Thompson,* 124 Ark. 545; *State* v. *Asher,* 50 Ark. 427. Such was the case here, and the failure upon the part of the appellant to disclose the fact of the existence of the mortgage upon the property was no fraud upon the appellees.

The facts in the case of *Merritt* v. *Robinson,* 35 Ark. 483, upon which counsel for appellees rely, differentiate that case from the present one, and the case at bar is therefore not ruled by *Merritt* v. *Robinson, supra,* but is clearly within the rule announced in *Fincher* v. *Bennett, supra.*

Fifth: The court, before the trial began on the issues raised by the pleadings, on motion of the appellees, quashed the writ which was issued by the clerk under the authority of chapter 101, section 4967 of Kirby's Digest.

(7) If there had been a completed contract of sale, and appellees were in possession of the property, appellant had the right, in this action for the purchase money, to proceed to impound the property. This he was proceeding to do and no bond was required of him, under the above statute, as a condition precedent to the maintaining of his petition for impounding the property. In advance of the determination of the issue by the jury as

to whether or not there was a completed sale, and whether or not the property was in the possession of the appellees at the time of appellant's petition to have the same impounded, the court erred in quashing the writ directing the sheriff to take possession of the property, and in declaring that the property was still in the possession of the appellant.

For the error in directing the jury to return a verdict in favor of the appellees the judgment is reversed and the cause is remanded for a new trial.

LAMB & RHODES *v.* HOWTON.

Opinion delivered November 12, 1917.

1. COUNTY COURTS—JURISDICTION—ALLOWING CLAIMS AND DISBURSING MONEY.—In the matter of allowing claims and disbursing money for county purposes, the county court has exclusive original jurisdiction.
2. COUNTY COURTS—ALLOWANCE OF CLAIMS AGAINST COUNTY.—Kirby's Digest, § 1453, forbidding any county court to allow any claim against the county that is not verified as provided in that section, does not take away the jurisdiction of county courts, under the Constitution, over claims against the county; and the statute does not prohibit the court from adjudicating the validity of the claim.
3. COUNTY COURTS—JURISDICTION.—The statute requiring a verification of a claim presented against a county, is not jurisdictional.
4. CERTIORARI—ALLOWABLE WHEN.—A writ of *certiorari* can not be used in any case where there is or has been a right of appeal, unless the opportunity for appealing has been lost without fault of the petitioner.
5. CERTIORARI—ATTORNEYS' FEES—SERVICES TO COUNTY.—A writ of *certiorari* will not lie to set aside the judgment of the county court, based upon a claim for fees for services rendered the county by a firm of attorneys, the claim showing on its face that it was not verified, and the record not showing on its face any authority to represent the county in litigation.

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

J. N. Thomason, for appellants.

1. The county judge has authority to defend cases appealed to the circuit or Supreme courts. Kirby's Digest, § 1493; 60 Ark. 516, 519. Special counsel may be employed.

2. Failure to verify claims is not jurisdictional and it can be amended in circuit court. 84 Ark. 329; 107 *Id.* 292.

3. Before *certiorari* can be invoked there must be not only want of authority but want of discretion. 37 Ark. 532; 66 *Id.* 139. Mere errors must be corrected by appeal. *Certiorari* only lies where the judgment is void. 66 Ark. 139.

4. Plaintiffs had no right to bring suit. 37 Ark. 532. They had a right to appeal and *certiorari* will not lie. 37 Ark. 318; 87 *Id.* 519; 70 *Id.* 71. *Certiorari* is not a matter of right, but within the sound discretion of the court. 28 Ark. 87; 43 *Id.* 243; 44 *Id.* 509; 89 *Id.* 604.

5. The county is bound by the contract with the attorneys as the county judge had authority to contract. 122 Ark. 161; *Ib.* 114.

S. L. Gladish and *J. T. Coston,* for appellees.

1. *Certiorari* was the proper remedy. 66 Ark. 141; 37 *Id.* 541; Van Fleet on Collateral Attack, § 2; 52 Ark. 219, 220.

2. As to the fee in the Chicago Title etc. case, we make no question. As to the others the county judge was not authorized nor justified in employing special counsel. 179 S. W. 179, 180.

3. The account was not verified. Kirby's Digest, § 3147; 164 Pac. 727. The court had no jurisdiction and was forbidden by statute to allow the claim. Kirby's Digest, § 1453; 10 Kan. 88; 11 N. W. 32; 17 *Id.* 130; 20 Cal. 681; 11 N. W. 41; 105 S. W. 582. The defeat could not be remedied by verification on the day of trial.

WOOD, J. The question presented by this appeal is whether or not the writ of *certiorari* will lie to set aside the judgment of the county court, based upon a claim for fees for services rendered the county by a firm of attor-

neys, which claim shows upon its face that it was not verified, and where the authority of these attorneys to represent the county in litigation, if any existed, is not shown on the face of the record.

In *Burgett* v. *Apperson,* 52 Ark. 213, 220, Judge Cockrill, speaking for the court concerning the writ of *certiorari,* said: "The writ is granted in two classes of cases: First, where it is shown that the inferior tribunal has exceeded its jurisdiction; and, second, where it appears that it has proceeded illegally and no appeal will lie, or that the right has been unavoidably lost." See, also, *Ex parte Goldsmith,* 87 Ark. 519. The case at bar does not come within either of these classes.

(1) In the matter of allowing claims and disbursing money for county purposes the county court has exclusive original jurisdiction. Const. of Ark., Art. 7, sec. 28; *Saline County* v. *Kinkead,* 84 Ark. 329, 331.

(2) The jurisdiction of county courts therefore over the subject-matter of allowing claims against the county is derived from the Constitution, and although section 1453 of Kirby's Digest forbids any county court to allow any claim that is not verified as required by that section and while the allowance of any claim not so verified would be unauthorized and an error for which the judgment of such court could be set aside or reversed on appeal, yet the above statute does not take away or effect the jurisdiction, that is, the constitutional power vested exclusively in the county court over the subject-matter of allowing or refusing to allow claims presented against the county.

"Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to the suit; to adjudicate or exercise any judicial power over them. *Rhode Island* v. *Massachusetts,* 12 Peters 657, 717, and other cases collated in Black's Law Dictionary, p. 673, under the word "jurisdiction." Words & Phrases.

(3) The fact that a claim, when presented to the county court for allowance is not verified in the manner required by the above statute does not take away from

the county court the jurisdiction to adjudicate the question as to whether or not such a claim should be allowed. The statute, section 1453, *supra,* prescribed a method of procedure which the court must pursue in exercising its constitutional jurisdiction, but that is another and entirely different matter from jurisdiction to adjudicate upon the subject-matter of the allowance of claims and disbursements of money by the county court.

The principles announced in *Saline County* v. *Kinkead,* 84 Ark. 329, and *Van Hook* v. *McNeil Monument Co.,* 107 Ark. 292, settle the proposition that the statute requiring a verification of a claim presented against the county is not jurisdictional. In the first case the court had under review a special statute requiring certain officers to verify their fee-bills, and if found correct it was made the duty of the county court to audit and allow same. The court, in that case, held that section 1453 of the digest was not applicable. The court said of the special act: "It directs that the fee-bill shall be sworn to, but the neglect of the claimant to thus verify it does not oust the county court of its jurisdiction." While there was a special act, and the language was somewhat different from the language of the general act, nevertheless what was said there is applicable to the act now under consideration, as was decided in *Van Hook* v. *McNeil Monument Co., supra.* In the latter case the claim was one that came within the terms of the general statute as to verification, and the court said: "It has been held by this court that the failure to properly verify a claim is not jurisdictional." Citing *Saline County* v. *Kinkead, supra.*

The judgment of the county court does not come within the second class mentioned in *Burgett* v. *Apperson, supra,* for the reason that it was neither alleged nor proved that an appeal by the appellees would not lie from such judgment of the county court under section 1487 of Kirby's Digest, providing for appeals from such judgments; nor does it anywhere appear in this record that an appeal by appellees was unavoidably lost.

(4) This court has often ruled that a writ of *certiorari* should not be used in any case where there is or has been a right of appeal unless the opportunity for appealing has been lost without fault of petitioner. *A fortiorari,* in one of the latest cases upon the subject, we said: "Unless the judgment sought to be canceled is void on its face, or the right of appeal has been lost without fault on the part of the defendant, the writ of *certiorari* can not be invoked. The writ of *certiorari* can not be used as a substitute remedy for appeal." *Kenyon, Ex'r.* v. *Gregory,* 127 Ark. 525, and cases there cited. See also other cases collated in Crawford's Digest, Vol. 1, p. 903-905.

(5) The judgment of the county court allowing attorneys' fees was certainly not void on its face. As to whether or not the county court proceeded to allow the fees contrary to the statute, and whether its judgment was erroneous because the claim for such fees was not verified as required by the statute, and because there was no order or contract made between the county court and the attorneys, as set up in the petition, were matters which could and should have been corrected by appeal. But, as we have stated, these were subject-matters within the jurisdiction of the county court.

For aught that appears to the contrary on the face of the judgment record of the county court allowing this claim for fees, the court may have found that the fees were earned in cases under a contract of employment with the county court and in cases deemed by it of sufficient importance to justify the employment of additional counsel to assist the prosecuting attorney. In recent cases we have held that the county court has power to employ additional counsel when in his judgment the interests of the county are of sufficient importance to demand it. *Sumpter* v. *Buchanan,* 128 Ark. 498; *Oglesby* v. *Fort Smith District of Sebastian County,* 119 Ark. 567, 572; *Leathem* v. *Jackson County,* 122 Ark. 114; *Spence & Dudley* v. *Clay County,* 122 Ark. 157, 161. That proof could have been made showing the employment of coun-

sel by the county court, under circumstances that justified such employment, and that the counsel so employed rendered the services for which they presented their claim is enough to render void the writ of *certiorari* issued herein. See *State, Use Izard County* v. *Hinkle,* 37 Ark. 532; *St. Francis County* v. *Roleson,* 66 Ark. 139.

It follows from what we have said that *certiorari* will not lie to quash the judgment of the county court, and that the court erred in issuing the writ and in granting appellees the relief prayed for in their petition. The judgment is therefore reversed and the writ of *certiorari* is quashed, and the cause is dismissed.

BANK OF RECTOR *v.* PARRISH.

Opinion delivered November 12, 1917.

1. INSANE PERSONS—APPOINTMENT OF GUARDIAN.—Before he can enter upon his duties as such, the guardian of an insane person must be appointed by the court, and the guardian must execute a a bond as required by the statute.
2. INSANE PERSONS—APPOINTMENT OF GUARDIAN WITHOUT BOND—VOID ORDER.—An order of the probate court authorizing a person to take charge of the property of an insane person, as guardian, without bond, is without authority and void on its face, and is subject to collateral attack, and a deed of trust executed by said guardian is void.
3. INSANE PERSONS—ESTATE OF—USE FOR MAINTENANCE.—The estate of an insane person may be subjected to the payment of actual and necessary expenses for his support and maintenance.

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

W. E. Spence and *Block & Kirsch,* for appellants.

1. A mortgagee who lends money on the faith of a record title, without actual or constructive notice of outstanding equities, is an innocent purchaser and will be protected. 54 Ark. 273; 31 *Id.* 85; 71 *Id.* 31.

The judgment of the probate court adjudging G. B. Holifield insane was valid and not subject to collateral

attack. Const. Ark., Art. 7, § 34; 11 Ark. 519; 54 *Id.* 480; 70 *Id.* 88; 84 *Id.* 32; 86 *Id.* 131; 66 *Id.* 416.

2. W. S. Holifield was the duly constituted guardian of his father G. B. The execution of a bond and filing an inventory were mere matters of error, to be corrected on appeal, but not subject to collateral attack. 118 U. S. 194; 35 N. W. 80; 13 *Id.* 705; 58 *Id.* 522; 24 Kan. 204; 79 Am. Dec. 62; 59 Ala. 158; 37 Am. Dec. 299; 10 N. E. 675; 33 Pac. 242. Failure to give bond is a mere irregularity. Kirby's Digest, § § 4005-9.

3. The execution of the trust deed was properly authorized. Kirby's Digest, § § 4019-20.

4. A purchaser from a trustee is not bound to see to the application of the purchase money, except where there is a breach of trust and the purchaser has notice or knowledge of the trustee's violation of duty. 1 White & Tudor Lead. Cas. in Equity, 109 and note; Story, Eq. Jur., § 1131-A; 44 Ark. 61; 46 *Id.* 109. W. S. Holifield did not misappropriate the funds.

The lunacy of a partner does not dissolve the partnership. Am. & Eng. Ann. Cas. 1913, D. 1148; Burdick on Partnership 349; 21 N. E. 566. $1,750 was paid on partnership debts, $350 to the guardian and $400 for the maintenance of the insane. There was no misappropriation of funds. As to the $400, the decree should be affirmed; as to the $2,100, it should be reversed and a foreclosure ordered.

Huddleston, Fuhr & Futrell, for appellees.

1. The mortgage was properly canceled. W. S. Holifield was not the duly constituted guardian and was without power to execute the deed of trust. The judgment of the probate court was a nullity. It can be attacked collaterally. The appointment must be valid and a bond given. This is jurisdictional. Kirby's Digest, § 4009; 32 Ark. 97; 68 Fed. 43; 45 Atl. 305.

2. Probate courts have no jurisdiction at common law and beyond the limits given by statute have none now and such judgments and acts are void. 32 Ark. 97; 33 *Id.* 428; 47 *Id.* 428; 74 *Id.* 81; 106 *Id.* 106.

3. It was error to declare a lien even for the $400. The lands belonged to appellees and the guardian had no authority to mortgage. 3 Pom. Eq. Jur., § 1234; Bispham Eq., § 351.

HUMPHREYS, J. Appellees brought suit against appellants in the Clay Chancery Court for the restoration of an alleged lost deed to the following described lands, Clay County, Arkansas, towit: The N. E. 1-4 of Sec. 25, and the S. 1-2 of the S. W. 1-4 of Sec. 24, T. 20 N. R. 6 E. executed to them in 1896 by their father, G. B. Holifield; and for the cancellation of a deed of trust covering the same lands, executed on the 25th day of February, 1909, by W. S. Holifield, guardian for G. B. Holifield, to J. C. Rogers, as trustee for the Bank of Rector, to secure an indebtedness of $2,500. It was alleged that G. B. Holifield was without authority as guardian to execute the deed of trust aforesaid.

Appellants denied that G. B. Holifield executed a deed for said property to appellees and asserted authority in W. S. Holifield to execute the deed of trust as guardian for G. B. Holifield.

A decree was rendered vesting the title to said real estate in appellees subject to the payment of $400 expended out of the $2,500 loan for the support of G. B. Holifield and for the taxes paid by appellant bank on the lands. The case is here on appeal for trial *de novo.*

Appellants concede that the evidence does not sufficiently preponderate against the finding of the chancellor that G. B. Holifield executed the deed in question to appellees, to justify this court in disturbing the finding. This concession renders it unnecessary to set out or discuss the evidence relating to the execution and delivery of the deed.

G. B. Holifield became insane and the probate court of Clay County appointed W. S. Holifield guardian and curator for him. That part of the judgment pertinent to the inquiry here is as follows:

"The court appoints W. S. Holifield the guardian and curator of the person and estate of the said G. B.

Holifield, without bond, and he will not be required to inventory said estate or to do any other act in said capacity of guardian except to keep an account and pay the legal demands of his said ward for one year, unless otherwise directed by an order of this court."

Under this appointment and by virtue of subsequent orders obtained from the probate court, W. S. Holifield, as guardian for G. B. Holifield, borrowed $2,500 from appellant bank and executed the deed of trust in question to secure said indebtedness. $400 of the amount so borrowed was used by W. S. Holifield in maintaining and supporting G. B. Holifield in a private sanitarium in the State of Kansas, where he was sent for treatment. It is in dispute as to whether the balance was expended in the payment of G. B. Holifield's or W. S. Holifield's indebtedness.

At the time the Bank of Rector took the deed of trust in question to secure the loan of $2,500, it had no knowledge that G. B. Holifield had executed a deed for said lands to appellees. It made the loan after having the title examined by a competent attorney.

W. S. Holifield entered upon and attempted to perform his duties as guardian and curator without bond.

The proceeding here amounts to a collateral attack upon the order appointing W. S. Holifield as guardian and curator of G. B. Holifield. If the order is void, it is subject to collateral attack.

Section 4009 of Kirby's Digest, provides: "Every such guardian shall, before entering on the duties assigned him, enter into bond to the State of Arkansas, in such sum and with such securities as the court shall approve, conditioned that he will take due and proper care of such insane person, and manage and administer his effects to the best advantage, according to law, and will faithfully do and perform all such other acts, matters and things touching his guardianship as may be prescribed by law or enjoined on him by the order, sentence or decree of any court of competent jurisdiction."

(1) Statutes not materially different from Section 4009 of Kirby's Digest, were under consideration in the case of *Guynn et al.* v. *McCauley,* 32 Ark. 97. Mr. Chief Justice English in rendering the opinion in that case, on page 104, said: "The probate court had no jurisdiction to grant the father an order to sell the lots of his minor children, until he was duly appointed their guardian. The first step in the actual jurisdiction of the court over the estate of the minors was the appointment of their guardian. The appointment was not complete until the applicant entered into bond. The statute declares that no entry of the appointment of a guardian shall be made until bond and security be given, etc." In the statutes under consideration in that case, two initial jurisdictional acts were necessary—the appointment by the court and the execution of a bond. So, likewise, under chapter 83 of Kirby's Digest, the court must appoint and the guardian must execute bond before he can enter upon his duties. The same reasons for safeguarding property of minors exist with reference to safeguarding property of insane persons.

The initial order in the instant case authorizing W. S. Holifield to take charge of the property of G. B. Holifield as guardian without bond is without authority in law and void on its face and subject to collateral attack.

(2) It follows that the probate court had no authority to authorize W. S. Holifield as such guardian to sell the lands in question and that the trust deed executed by the guardian to appellant bank is void.

(3) A cross-appeal has been prosecuted to question the correctness of that part of the decree allowing appellant bank $400 on account of money advanced for the necessary keep and care of G. B. Holifield after he became insane. It is not insisted that this sum was expended for other than absolute necessities. The contention is that purchase money for necessities furnished an insane person can not be recovered out of his estate unless administered through a duly appointed guardian.

The doctrine of necessity applies with the same force to insane persons as to infants. Ordinary humanity dictates that the insane should be fed and clothed and properly treated. If an insane person has an estate, there is no good reason why it should not be subjected to the payment of actual and necessary expenses for his support and maintenance. Page on Contracts, Vol. 2, 1404; *Henry, Admr.* v. *Fine,* 23 Ark. 417; *McNairy County* v. *Ellen McCoin,* 41 L. R. A. 862 (Tenn.).

The Bank of Rector advanced the money in good faith, believing that the lands belonged to G. B. Holifield. It had the title to the lands examined by a competent attorney before making the loan. It is an innocent purchaser of the lands to the extent of the amount advanced for the necessary maintenance and support of G. B. Holifield while in the Kansas sanitarium.

The decree is in all things affirmed.

McGAUGH, ADMINISTRATOR, v. MATHIS.

Opinion delivered November 19, 1917.

1. MARRIAGE—PROOF OF—CERTIFICATE OF JUSTICE.—Where the question of appellee's marriage to deceased is in issue, and appellee has shown a proper marriage license, a certificate of marriage signed by a justice of the peace, is admissible, although no proof is offered that the person signing the certificate was in fact a justice at the time.
2. MARRIAGE—PROOF.—The fact of marriage may be proved by direct, circumstantial or presumptive testimony, by either documentory or oral evidence.
3. MARRIAGE—PROOF—PRESUMPTION.—Where the existence of a marriage is established in fact, every necessary prerequisite to the validity thereof will be presumed until the contrary is shown.
4. MARRIAGE—PROOF—PRESUMPTION.—The evidence held insufficient to overcome the presumption of the validity of the marriage between deceased and appellee.
5. DOWER—SEPARATION—ACCEPTANCE OF DEED.—A wife can not claim dower in deceased's lands where she agreed to a separation from him and accepted a deed to certain lands in lieu of dower.

6. HOMESTEAD—WHAT LAND MAY BE SET ASIDE.—A widow can be allotted the homestead right only in land upon which the husband impressed the homestead during his lifetime.

Appeal from Benton Circuit Court; *J. S. Maples,* Judge; reversed in part, affirmed in part.

Vol T. Lindsey, for appellants.

1. The evidence is insufficient to show that appellee was lawfully married to the intestate. There is no proof as to the official character of the Missouri justice. 99 Ark. 147; 9 R. C. L. 568. The burden was on appellee to prove a valid marriage.

But if so, the marriage was rendered void by proof of a former marriage. 67 Ark. 278; 54 S. W. 744. In the absence of proof the law of Texas as to marriage is presumed to be the same as the law of Arkansas. 70 Ark. 17; 65 S. W. 143. See also, 16 L. R. A. (N. S.) 98.

2. It was error to admit the decree of the circuit court of Jasper County, Mo., granting a divorce from Lucinda Mathis. 47 Ark. 120; 70 *Id.* 343; 201 U. S. 561; 110 *Id.* 701.

3. The court erred in setting aside as a homestead the lot in Gentry. The husband had not impressed the homestead character upon the lot during life, and they never resided upon it. 33 Ark. 399-404; 29 *Id.* 280; Const. Ark., Art. 9, § 6.

Appellee, *pro se.*

1. The evidence is sufficient to show a lawful marriage between appellee and the deceased. The presumption is in favor of marriage.

2. The appellants are estopped from objecting to the decree of divorce. Lucinda consented to it and accepted a settlement deed under it. Appellants can not collaterally attack the decree. 14 Cyc. 723.

2. The evidence sustains the decree as to both dower and homestead.

HUMPHREYS, J. Appellee filed a petition in the probate court of Benton County, Arkansas, for the allotment of dower in the personal property and real estate

of R. J. Mathis, deceased, described in the inventory of the administrator; and for a homestead right in lot 1, block 3, original town of Gentry, Arkansas, alleging that she is the widow of R. J. Mathis, deceased, and that her husband died intestate on the 24th day of January, 1916; that W. S. McGaugh was appointed administrator of the estate and entered upon his duties on February 3, 1916.

Lucinda Mathis was permitted to file an intervention alleging that she is the lawful widow of the said R. J. Mathis, deceased, and entitled to dower in the personal property and lands described in the inventory of the administrator.

Henry Philpot, as next friend of John and Archie Philpot, minors, became a party to the proceeding. In the trial of the cause, W. S. Floyd appeared as attorney for Lucinda Mathis, the administrator and heirs, and alleged the illegality of the marriage of petitioner, Lillie Mathis, to R. J. Mathis, deceased.

The cause was heard upon the pleadings and evidence by the probate court and a judgment rendered allotting petitioner, appellee herein, a dower interest in all the personal and real estate, from which judgment an appeal was prosecuted to the circuit court.

On trial anew in the circuit court, a like judgment was rendered in favor of appellee for dower interest in the real and personal property, and in addition, lot 1, block 3, in the original town of Gentry, was set off to her as a homestead.

The issue presented by this appeal for determination is which of the alleged widows is the lawful widow of R. J. Mathis deceased. The determination of this issue does not involve the title to the property in question. The property is conceded by all parties concerned to be the estate of R. J. Mathis, deceased. Authority has been conferred upon probate courts to allot dower on proper application. Kirby's Digest, § 2720.

"This section is not inconsistent with the Constitution and confers on the probate court a limited jurisdic-

tion in the allotment of dower concurrent with the chancery court." *Hilliard* v. *Hilliard,* 52 Ark. 283.

It is insisted that the marriage of appellee to R. J. Mathis was not sufficiently established. Appellee testified that she was married to R. J. Mathis on September 15, 1915, at Joplin, Missouri, and lived with him until his death, which occurred four months thereafter, within one-half mile of Springtown, Arkansas, as husband and wife; that they lived in her home where she had resided for seventeen years.

A certified copy of the marriage license was introduced without objection, proper authentication being waived. The license showed upon its face to have been issued by Dan S. Major, recorder of deeds in Newton County, Missouri. It authorized any justice of the peace, among others, to solemnize a mariage between R. J. Mathis of Decatur, County of Benton, State of Arkansas, to Lillie South of Springtown, in said county.

(1-2) A certificate of marriage signed by G. F. C. Coin, justice of the peace, Galena township, Jasper County, Missouri, was introduced over the objections of appellant for the reason that no showing was made that G. F. C. Coin was at the time a justice of the peace. The certificate was introduced in connection with the testimony of plaintiff. It purported on its face to be signed by a justice of the peace. Under the liberal rule allowable in proving marriages, we think it admissible as a circumstance tending to establish the marriage.

The general rule laid down by Cyc.. is that the fact of marriage may be proved by direct, circumstantial or presumptive testimony, either in the form of documentary or oral evidence. 26 Cyc. pp. 882-883.

(3) The marriage between appellee and Mathis having been established in fact, every necessary prerequisite to the validity thereof must be presumed until the contrary is shown. 9 R. C. L. 568.

We think the evidence amply sufficient to support the finding of the court that a lawful marriage was consummated between appellant and R. J. Mathis.

(4) It is contended that the marriage was void for the reason that at the time of the marriage R. J. Mathis was the lawful husband of intervener, Lucinda Mathis. Lucinda Mathis established her marriage to R. J. Mathis, on the 9th day of July, 1882, by record evidence, as well as oral proof. Prior to her intermarriage to R. J. Mathis, she married Sam Barris in Montague County, Texas, and removed with him to Benton County, Arkansas. They lived together about two years. Barris returned to Texas where he was convicted and sent to the penitentiary. Lucinda heard from him for eighteen months after he returned to Texas, and within five years after she last heard from him, married Mathis without having obtained a divorce from Barris. Mathis and Lucinda lived together about thirty-two years, at Decatur, as husband and wife. They finally separated and entered into a written contract settling their property rights. By the settlement, Lucinda procured a deed from Mathis, on the 16th day of November, 1914, to a portion of his real estate. After the settlement, Mathis lived in a little house near his old home until he married appellee and moved to her home. The facts related above are insufficient to overcome the presumption in favor of the validity of the marriage of appellee to R. J. Mathis, which was his last marriage. Touching upon the very point, this court, in the case of *Estes* v. *Merrill,* 121 Ark. 361, said: "So strong is this presumption and the law is so positive in requiring the party who asserts the illegality of a marriage to take the burden of proving it, that such requirement obtains even though it involves the proving of a negative, and although it is shown that one of the parties had contracted a previous marriage, and the existence of the wife or husband of the former marriage at the time of the second marriage is established by proof, it is not sufficient to overcome the presumption of the validity of the second marriage, the law presuming rather that the first marriage has been dissolved by divorce, in order to sustain the second marriage."

Lucinda Mathis can not be regarded as the lawful widow of R. J. Mathis, deceased, for the purposes of allotment of dower. She failed in the proof to meet the burden placed upon her by the last marirage. Her proof was particularly weak in establishing that she herself ever entered into a lawful marriage contract with Mathis. If at the time of her marriage to Mathis she was the lawful wife of Sam Barris, her marriage to Mathis was void. She testified that she was lawfully married to Sam Barris; that she never procured a divorce from him and that she married Mathis in less than five years after she last heard from Barris. Even if her marriage to Mathis was legal, in order to overcome the presumption in favor of the validity of the marriage of appellee to Mathis, she must have shown that her marriage was not dissolved by divorce. Especially would this be so in view of an admitted separation and property settlement between her and Mathis.

(5) In any view of the case, there is no merit in Lucinda's contention that she should be endowed of the estate of R. J. Mathis, deceased, because she agreed to a separation and accepted a deed to certain lands in lieu of dower. Section 2697, Kirby's Digest.

(6) Lastly, it is urged that the court erred in setting aside lot 1, block 3, Gentry, Arkansas, to appellee as a homestead. The record affirmatively disclosed that prior to the marriage of R. J. Mathis to appellee, he resided in Decatur, and after the marriage, resided in Springtown with appellee in her home. We do not understand on what theory the Gentry property was set aside to appellee as a homestead. The husband must have impressed the homestead character on the land in his lifetime to entitle the widow to succeed in that right. *Hoback* v. *Hoback,* 33 Ark. 399; *Trotter* v. *Trotter,* 31 Ark. 145; *Johnston* v. *Turner,* 29 Ark. 280; *Ward* v. *Mayfield,* 41 Ark. 94.

We have failed to discover any evidence whatever showing that the Gentry property was ever occupied as a homestead by Mathis in his lifetime. For the reason

then that the Gentry property was not impressed with the homestead right in the lifetime of Mathis, the circuit court erred on appeal in setting aside the Gentry property to appellee as a homestead.

The judgment allotting dower to appellee is affirmed, but insofar as it attempted to set aside the Gentry property to appellee as a homestead, it is reversed.

RICE BELT TELEPHONE CO. v. MALCOMB.

Opinion delivered November 26, 1917.

1. STATUTES—REPEAL OF GENERAL BY SPECIAL ACT.—A special act does not repeal a general act unless there is a manifest repugnancy in their provisions, or unless the special statute was obviously intended as a substitute for the general act.
2. STATUTES—REPEAL—SERVICE OF SUMMONS—TELEPHONE COMPANIES.—Acts of 1913, p. 192, establishing two judicial districts in Arkansas County, does not repeal Act of 1909, p. 293, regulating the service of summons upon corporations.
3. TELEPHONE COMPANIES—FAILURE TO GIVE SERVICE—PENALTY.—It is error to instruct the jury that a telephone company is liable for the statutory penalty for failure to install a telephone in plaintiff's place of business upon request, irrespective of whether the telephone company acted wilfully or merely negligently.

Appeal from Arkansas Circuit Court, *Thomas C. Trimble,* Judge; reversed.

Lee & Moore and *John L. Ingram,* for appellant.

1. The suit should have been dismissed or transferred. Acts 1913, 192; Acts 1909, 293. Both parties resided in the Northern District and courts of the Southern District had no jurisdiction.

2. Instruction No. 1 was error. The penalty is not for negligence or delay, but only for wilful refusal or discrimination. Kirby's & Castle's Digest, § 9903; 123 Ark. 197. There is no testimony of wilful refusal nor discrimination.

J. M. Brice and *Moncrief & Condray,* for appellee.

1. The verdict is supported by the testimony. 125 Ark. 225, 464.

2. Instruction No. 1 is correct. 102 Ark. 547. There is no error.

STATEMENT OF FACTS.

Alice Malcomb sued the Rice Belt Telephone Company in the circuit court for the Southern District of Arkansas County to recover the statutory penalty for the refusal of the telephone company to install a telephone in her place of business in Stuttgart, Arkansas County, Arkansas.

In September, 1916, Alice Malcomb resided in Stuttgart, Arkansas, and was running a restaurant there. On September 18, 1916, she entered into a written contract with the Rice Belt Telephone Company to install a telephone in her restaurant. The telephone company failed to install the telephone, and she instituted the present action on the 30th day of December, 1916, to recover the penalty prescribed by the acts of 1913. See Acts of 1913, page 346. In a short time after the institution of the suit the telephone company installed a telephone in her restaurant.

On the part of the telephone company it was proved that during the ten days following the execution of the contract for the installation of the telephone in the restaurant of the plaintiff that it sent its agents there during three different days for the purpose of installing the telephone and that they were not able to do the work because the house was shut up. It was also shown that the officers of the telephone company did not know where the plaintiff resided in Stuttgart and they thought she had abandoned her business.

On the other hand, the plaintiff testified that her place of business was running every day after she made the contract, and her testimony in this respect was corroborated by that of other persons who did business with her. She stated that her business was opened from 9:30 to

10:30 o'clock in the morning and was kept open throughout the day.

The jury returned a verdict for the plaintiff for $100 penalty and for $5 per day for 101 days, making a total of $605. From the judgment rendered the defendant has appealed.

HART, J., (after stating the facts). The plaintiff resided in the town of Stuttgart in the Northern District of Arkansas County, and the telephone company had its principal office there. Its lines extended into the Southern District of Arkansas County and it had a branch office there. The plaintiff brought this suit in the Southern District and the telephone company moved to transfer it to the Northern District. The court refused to make the transfer and its ruling is now assigned as error calling for a reversal of the judgment.

The Legislature of 1909 passed an act regulating the service of summons on corporations. Section 1 provides that all foreign corporations and domestic corporations who keep or maintain in any of the counties in this State a branch office or other place of business shall be subject to suits in any of the courts in any of said counties where such corporation so keeps or maintains such office or place of business and that service of summons upon the agent or employee in charge of said office or place of business shall be sufficient service and shall give jurisdiction to any of the courts of this State held in the counties where such service of summons is had. Acts of 1909, page 293.

The Legislature of 1913 passed an act establishing two judicial districts in Arkansas County. Courts were to be held at Stuttgart for the Northern District and at DeWitt for the Southern District. Section 6 provides that said districts for all purposes of the act shall be considered as separate and distinct counties and that the mode and place for trying suits shall be determined by the general law applicable to different counties. Acts of 1913, page 192.

(1) It is the contention of counsel for the telephone company that the latter act repealed the former one. We

do not agree with counsel in this contention. A special act will not repeal a general law unless there is a manifest repugnancy in their provisions or one was obviously intended as *pro tanto* a substitute for the other. 36 Cyc., p. 1093.

(2) There is a field of operation for both statutes. The later special act does not in express terms repeal the former one. Repeals by implication are not favored. The two acts were passed to accomplish different objects and their provisions are not irreconcilable or necessarily inconsistent. Both may stand and be operative without being repugnant to each other. *Chamberlain* v. *State*, 50 Ark. 132, and *McFarland* v. *State Bank*, 4 Ark. 415.

Neither can it be said that because the act of 1913 was enacted after the act of 1909, that the provisions of the former do not apply to the judicial districts created by the latter act. The statute of 1909 is general in its terms and must be held to apply to any county or district existing during the life of the act. Hence it could not be said that the general act did not apply because it was enacted prior to the passage of the special act of 1913.

(3) It is next contended that the court erred in giving instruction No. 1, which is as follows:

"You are instructed that telephone companies, by the necessities of commerce and by public use, have become common carriers of communications, and as such must supply all applicants alike, who are similarly situated, within ten days after written demand therefor and can not discriminate in favor of or against any one, and if you find from the testimony in this case that the plaintiff, Miss Alice Malcomb, applied for telephone service in the city of Stuttgart, Arkansas, and a mutual contract was signed by her and defendant company on the 18th day of September, 1916, which contract is in evidence and was complied with on the part of the plaintiff, and after ten days from the date of said contract defendant company had not supplied her with telephone connections with its switchboard in said city as alleged in her complaint, and as provided in said contract, then defendant company

would be liable for $100 penalty and an additional sum of $5 per day for each day thereafter that it failed to supply plaintiff with telephone connections and service."

In this contention we think counsel are correct. In the case of *Southwestern Telegraph & Telephone Company* v. *Murphy,* 100 Ark. 546, in construing a statute in all respects similar to the one now under consideration except as to the penalty provided, the court said:

"The manifest purpose of the statute is to inflict a penalty on a telephone company, not for negligence or inattention in failing to repair its instrumentalities for supplying service, but for wilful refusal to furnish telephone connections and facilities without discrimination or partiality to all applicants who comply or offer to comply with the rules. The statute forbids discrimination, and mere neglect or inattention in repairing instruments does not constitute that. The most that the evidence tends to establish is negligence in failing to repair plaintiff's telephone. There is nothing to show that this was prompted by any intention to deprive plaintiff of the use of his telephone, and for that reason we are of the opinion that the question of discrimination during that period should not have been submitted to the jury. That error calls for a reversal of the judgment, for we have no means of determining whether the verdict of the jury was based upon that feature of the case or upon the other as to removal of the telephone in June."

It is manifest that the instruction complained of is contrary to the decision of the court just quoted. Under the instruction as given the jury was required to find for the plaintiff if the defendant company had not supplied her with telephone connections within ten days after the date of her contract with the company regardless of the fact of whether the failure was wilful or not. The burden of the proof was on the plaintiff to bring the case within the terms of the statute. It is true the undisputed evidence shows that the company failed to install the telephone within the limit of time prescribed by the statute, but it can not be said that the undisputed evidence shows

that the failure was wilful or prompted by any intention to deprive the plaintiff from having a telephone.

According to the evidence adduced by the company, its servants went to the place of business of the plaintiff within reasonable hours for the purpose of installing a telephone under the contract. The house was closed up. They went again on two separate days and did not find any one there.

According to the plaintiff's own testimony she did not open her business until very late in the morning from 9:30 to 10:30 o'clock. The servants of the company did not know where the plaintiff resided. Under these circumstances the giving of the instruction in the form set out above was prejudicial to the rights of the defendant company. See also *Southwestern Tel. & Tel. Co.* v. *Garrigan,* 107 Ark. 611, and *Hill* v. *Southwestern Tel. & Tel. Co.,* 117 Ark. 104.

For the error in giving instruction No. 1, at the request of the plaintiff, the judgment must be reversed and the cause remanded for a new trial.

LESS v. LESS.

Opinion delivered November 26, 1917.

DOWER—MORTGAGED PROPERTY.—Dower may be assigned in property subject to mortgage, the dower interest being held subject to the mortgage.

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

A. S. Irby, G. M. Gibson and *H. L. Ponder,* for appellants.

1. The husband only had an equity of redemption at the time of his death. The widow was only entitled to dower in this equity of redemption. 14 Cyc. 914; 31 Ark. 580; 66 Am. Dec. 467; 9 Am. Dec. 322; 37 *Id.* 390; 16 Atl. 669; 9 R. C. L., § 31, 588; 6 Am. Dec. 137; 1 Am. Rep. 60;

68 Ark. 457; 55 *Id.* 230; 2 Jones on Mortg., § 1067; 25 Ark. 54; 29 *Id.* 596.

2. The contract with Beloate gave him such an interest that he should have been made a party.

3. The giving of the first supersedeas bond stopped and stayed all further proceedings under the decree to assign dower.

4. The Commonwealth Loan Company should have been made a party. No dower should have been assigned over its protest. 2 Jones on Mortg., § 1067; Kirby's Digest, § 2691-2.

W. A. Cunningham and *W. E. Beloate,* for appellee.

1. Dower was properly assigned in the mortgaged lands, subject to the burden of the widow's proportionate share of the debt. 2 Scribner on Dower, 696; 31 Ark. 580; 68 Ark. 457; 101 *Id.* 298.

2. No objection was made to Tharp acting as special chancellor. All parties consented. 6 Ark. 227; 2 *Id.* 282.

3. Beloate's contract was not a sale. No vested estate passed. It was only an option to purchase. Tiedeman on Real Prop., § 26.

4. The superseded decree was not final.

5. The loan company not being a party, its rights were not affected. But all its rights were protected. The decree burdens the lands with one-third of all liens and the amount necessary to purchase an annuity. 68 Ark. 457. There is no error.

HUMPHREYS, J. Appellee brought a friendly suit against appellant to the March term, 1917, of the Eastern District of Lawrence County Chancery Court for her homestead and allotment of dower in her deceased husband's real estate, containing in all about 2,000 acres of very valuable land. All the allegations of the bill were conceded by answer, and a consent decree, adjudging appellee a one-third interest in said real estate for life and appointing commissioners to lay off the interest in kind, was rendered on the 21st day of March, 1917, by a special

chancellor, who was also at the time the regular county and probate judge of Lawrence County.

At the same term of court in April, Gussie Less, the divorced wife of Isaac Less, deceased, filed an intervention setting up that she had a lien on certain of the lands to secure the payment of alimony, and asking that no dower be assigned in these particular lands; and the other appellants, only heirs at law of Isaac Less, deceased, filed a motion to set aside the consent decree for the alleged reasons—that the decree was void because rendered by a special chancellor not eligible to election and that Ida Less was not the owner of the dower interest, having sold same prior to the date of the decree, and that the lands were subject to a mortgage lien in favor of the Commonwealth Farm Loan Company for about $40,000, which company was not a party to the suit, and which company now desired to be made a party for the purpose of objecting to the assignment of dower; and said mortgage company also filed an intervention asking to be made a party, and alleged that it was not to its interest to have dower assigned in said lands.

An answer was filed by appellee joining issue on all the material allegations of the interventions and motion. Appellants also filed a motion objecting to the selection of lands as dower made by appellee, and excepting to the report of the commissioners, for the alleged reasons that the lands were not equitably appraised, and that in assigning dower no account had been taken of the liens resting upon said real estate. The court struck out the selection filed by appellee and ordered her to present her selection of lands to the commissioners for consideration; also ordered the commissioners to make a reallotment of one-third in value of the lands to appellee, as ordered in the former decree. The court also charged the lands assigned to the widow with one-third of the interest due and to become due on the mortgage until maturity of the principal debt, and after maturity thereof, a sum sufficient to produce an annuity for the remainder of appellee's expectancy, for one-half of the amount of the an-

nual interest. Also charged the lands to be assigned as dower with one-third of the monthly allowance due Gussie Less. Appellants excepted and prayed an appeal to the Supreme Court. The court then heard the case upon the pleadings, record evidence, depositions and contract between Ida Less and W. E. Beloate, and overruled the motion to set aside the original decree and to make the Commonwealth Farm Loan Company a party to the action. Appellants excepted, prayed an appeal to the Supreme Court, which was granted, and filed a supersedeas bond. Thereafter the clerk issued a writ of supersedeas pending appeal to the Supreme Court.

Immediately thereafter, appellants filed another motion setting out the steps that had been taken in the case and asked for a stay of proceedings until the case could be settled in the Supreme Court. The court overruled that motion and exceptions were saved and an appeal prayed and granted.

The commissioners then filed a report showing the value of the lands assigned by them to Ida Less as dower. This report was excepted to for the reasons: (1 and 2) that the selection of dower was not based upon a fair market value of the lands; (3) that the order of the court on April 25, 1917, apportioning the payment of the liens on the land, was not in accordance with law; (4) that the supersedeas theretofore filed had the effect of suspending all proceedings in the case.

In these exceptions, appellants prayed that the matter be held in abeyance until the final action of the Supreme Court. The report and exceptions thereto was heard by the court and a decree rendered confirming the appraisement of the lands and assignment of dower by the commissioners. Appellants excepted and prayed an appeal to the Supreme Court, which was granted, and filed a second supersedeas bond and the clerk issued his supersedeas thereon.

(1) It is insisted by appellant that the court erred in setting aside dower in said lands to appellee upon which a mortgage lien rested. There are a number of

authorities holding that it is improper to assign dower in mortgaged lands until the mortgage debt has been paid. This court has adopted the contrary view and permitted the assignment of dower in mortgaged property, subject to the mortgage indebtedness. The doweress takes an undivided one-third life interest in the lands according to value, subject to the payment of a just proportion of the indebtedness. *Hewitt* v. *Cox,* 55 Ark. 225; *Crosser* v. *Crosser,* 121 Ark. 64.

The rule for ascertaining the proportion of indebtedness to be paid by the widow was fixed in the case of *Salinger* v. *Black,* 68 Ark. 449. The court did not commit error in the instant case in assigning dower and imposing thereon a proportionate amount of the lien indebtedness. It must be borne in mind, however, that this rule in no way conflicts with the rights of the mortgagee or lien holder whose lien is prior and paramount to the dower interest in the lands. That question is fully discussed and decided in the case of *Crosser* v. *Crosser, supra.*

It is next insisted that the contract between appellee and W. E. Beloate had the effect of making Beloate a necessary party in the assignment of dower. Beloate acted as attorney for Ida Less in the procurement of her dower interest and is bound by the consent decree. Under the decree, Ida Less is clearly the owner of the dower interest as against any rights that Beloate might set up under the contract, having acted as appellee's attorney in procuring a consent decree for assignment of dower on the theory that she was the true owner thereof at the time the decree was procured. This eliminates any necessity for construing the terms of the contract.

It is next insisted that the effect of the first supersedeas bond was to suspend proceedings under the original decree allotting dower. This bond was filed on an appeal to the Supreme Court from an order overruling a motion to set aside the original decree and to make the Commonwealth Farm Loan Company a party. The effect of the court's ruling was to leave the original decree in full

force. An appeal from a motion refusing to set aside a decree does not suspend proceedings under the decree.

Lastly, it is insisted that the Commonwealth Farm Loan Company should have been made a party. This position is not sound, for the assignment of dower in no way affected the mortgagee's interest in the lands. The dower interest assigned was subject to the rights of the mortgagee under the law. The mortgagee will have a right to enforce its mortgage against all property described in the mortgage. The dower interest must yield to the mortgagee's interest in case of foreclosure.

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

BUSH, RECEIVER ST. LOUIS, IRON MOUNTAIN & SOUTHERN COMPANY, *v.* CURRY.

Opinion delivered November 19, 1917.

1. CARRIERS—LOSS AND DAMAGE TO FREIGHT—NOTICE—WAIVER BY AGENT.—Notice of loss or damage to freight may be waived by the agent of the carrier who has the authority to receive the notice; and this is true notwithstanding a stipulation in the contract of carriage attempting to limit the authority of the agent.
2. APPEAL AND ERROR—EXCLUSION OF TESTIMONY—FAILURE TO PERFECT RECORD.—A cause will not be reversed for the failure of the trial court to admit testimony, when the record does not show what the testimony would have been.

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

E. B. Kinsworthy and *W. G. Riddick,* for appellant.

1. There was no delay in the shipment and no rough handling. No negligence or want of due care was proven. Delivery was complete on delivery to the representatives of the commission people.

2. There was error in the court's instruction on the question of delay. 63 Ark. 332; 81 *Id.* 474; 50 *Id.* 397.

3. There was error in the instructions as to notice. The provision in the contract was reasonable. 63 Ark. 372; 101 *Id.* 172; 82 *Id.* 353; 60 U. S. (L. Ed.) 948. No

agent of the company had authority to waive notice. 203 Fed. 971.

4. There were errors in admitting and excluding testimony.

5. The plaintiff failed to prove the value of the cattle lost and the verdict is unjust.

Williamson & Williamson, for appellees.

1. There was proof of undue delay and slow transportation. 63 Ark. 332.

2. There is no error in the instructions. 50 Ark. 397.

3. Cattle were lost and their value was proven. 128 Ark. 103.

4. There was no error in admitting nor excluding testimony. 96 Ark. 384.

5. Notice was waived. 89 Ark. 157; 6 Cyc. 509; 70 Ark. 402; 127 Ark. 261; 129 Ark. 450.

6. The verdict is sustained by the evidence. 196 S. W. 471, 816; 122 Ark. 349; 126 Ark. 427; 125 Ark. 486; 51 Ark. 332; *Ib.* 324; 49 *Id.* 382; 44 *Id.* 258.

McCULLOCH, C. J. Appellees shipped seven car loads of cattle over the railroad operated by appellant from Monticello, Arkansas, to East St. Louis, Illinois, and this is an action instituted by appellees to recover damages sustained by reason of injuries to the cattle while being transported by appellant. Five of the cars were consigned to the Moody Commission Company, and the other two cars were consigned to the Keys Commission Company, and damages on both shipments were laid in the sum of $761.87. The jury returned a verdict in appellee's favor for recovery of the sum of $541.87, and judgment was rendered accordingly.

It was alleged in the complaint that there was delay in the shipment which caused shrinkage in weight and injury to the appearance of the cattle, and thereby affected the market value thereof, and that some of the cattle were lost from the cars, others killed, and still oth-

ers crippled. The court submitted to the jury the allegations of negligence and also the elements of damages. It is contended, however, that there was no evidence of delay in the shipment, and that for that reason the question should not have been submitted to the jury.

The question of delay does not appear to have been very satisfactorily established by the evidence, yet we can not say that there was entire absence of evidence on that subject, for several of the witnesses testified that the train made slow time and that there was unnecessary delay in the movement.

It is also insisted that the evidence does not establish the value of the cattle alleged to have been lost, but we think the evidence was sufficient on that subject.

The bill of lading contained a stipulation with respect to giving notice of loss or damage to appellant's agents at destination within twenty-four hours. Notice was given in some instances, and not in others, but the evidence is sufficient to show that the agent at destination instructed the commission companies in advance that it was unnecessary to give the notices. It is insisted that the clause in the contract limiting the authority of the agent to waive the notice is conclusive, and that the waiver, if proved, is inoperative. Counsel for appellant cite cases which sustain their view of the law, but this court has steadily held to the rule that the notice may be waived by the agent of the company who is clothed with authority to receive it. *St. Louis S. W. Ry. Co.* v. *Grayson,* 89 Ark. 154; *St. Louis, I. M. & S. Ry. Co.* v. *Nunley,* 120 Ark. 268; *Lusk, Receiver,* v. *Long,* 127 Ark. 261, 192 S. W. 214. This is true notwithstanding the stipulation attempting to limit the authority of the agent. *Peoples' Fire Ins. Association of Arkansas* v. *Goyne,* 79 Ark. 315.

There are certain assignments of error with respect to the rulings of the court in the admission and exclusion of testimony, but an examination of the record fails to sustain appellant's contention as to what the rulings of the court were on those subjects. For instance, there is an exception as to the admission of a certain letter,

said to have been written and delivered by one of the commission companies to appellant's officers in St. Louis, but the record does not show that this letter was read in evidence. Another instance is that there is an exception to the ruling of the court in refusing to permit witness McPherson to testify as to certain matters, but the record does not indicate what the answers of the witness would have been. Therefore, according to well settled rules, we can not treat the rulings of the court as prejudicial, even though they may have been erroneous.

Our conclusion is that there was no prejudicial error committed by the court in the trial of the cause, and that the judgment should be affirmed. It is so ordered.

HINSON v. GILLESPIE.

Opinion delivered December 3, 1917.

CONTRACTS—FOR BENEFIT OF THIRD PARTY—STATUTE OF FRAUDS.—Appellant rented her farm to appellee, and appellee rented his farm to appellant's son. The testimony was conflicting as to whether appellant agreed to remit the rent due her in consideration that appellee furnish her son in an amount equal to the rent due appellant. In an action by appellant against appellee for rent, *held*, it was improper to direct a verdict for appellee, and that the jury should have been permitted to determine whether appellant's promise was original or collateral, and within the statute of frauds.

Appeal from Faulkner Circuit Court; *Thomas C. Trimble*, Judge; reversed.

Robins & Clark, for appellant.

1. It was error to direct a verdict. The agreement was not a collateral promise but an original one and not within the statute of frauds. Certainly there was a question of fact for a jury. 79 Ark. 1; 40 *Id.* 429; 124 *Id.* 480; 110 *Id.* 325.

2. Appellee's letter took the case out of the statute, or at least made it a question for the jury. 1 Jones Com. on Ev. (1913), 924.

P. H. Prince, for appellee.

The promise was collateral and clearly within the statute of frauds. A verdict was properly directed as no case for a jury was made. Kirby's Digest, § 3654. A verdict was properly directed for appellee.

HART, J. Mrs. M. A. Gillespie sued L. A. Hinson before a justice of the peace in Faulkner County for $85 for rents alleged to be due her on her farm for the year 1915, and $20 damages for holding the farm after the expiration of his term. There was a verdict for the defendant before the justice of the peace and the plaintiff appealed to the circuit court. In the circuit court the case was tried before a jury upon the following facts:

Mrs. Gillespie testified that in the first part of January, 1915, she rented her farm in Faulkner County, Arkansas, for that year to the defendant, Hinson, and that he agreed to pay her the sum of $85 therefor, and owes her that amount.

L. A. Hinson testified for himself and admitted that he had rented Mrs. Gillespie's place in Faulkner County, Arkansas, for the year 1915, for the sum of $85. He stated further, however, that he went to Mrs. Gillespie's house in the city of Argenta, in the early part of January, 1915, to see her about renting her place in Faulkner County; that he was running a small supply store near her place and also owned a small place of his own; that Mrs. Gillespie was anxious to get some one to supply her son Arthur; that she finally agreed that she would rent her place to Hinson for $85 and let the rent stand for supplies that he, Hinson, should furnish to her son Arthur; that pursuant to this arrangement he rented her son his place and furnished him supplies for the year 1915; that there was due him by her son for supplies so furnished, an amount equal to the rent he had agreed to pay Mrs. Gillespie; that sometime in the spring he learned there was some misunderstanding about the terms of their oral agreement and that he wrote Mrs. Gillespie about it; that in reply to his letter, among other things, she stated that she intended for her son

to pay her next fall the amount that Hinson was due her for rent. Other evidence tended to corroborate the statement of the plaintiff.

Mrs. Gillespie and a young son about sixteen years old deny that Mrs. Gillespie had told Hinson that if he would rent his place to her son Arthur and furnish him for the year 1915, that she would let the rent on her place stand for the supplies so furnished him.

Mrs. Gillespie relied upon the statute of frauds to defeat Hinson in his defense to the action. At the conclusion of the testimony the court stated to the jury that even if the testimony of Hinson was true, it was an oral agreement to answer for the debt of another and under the statute of frauds was not binding because it was not in writing. The jury was therefore directed to bring in a verdict for the plaintiff. The defendant has appealed.

We think the learned circuit judge erred in directing a verdict for the plaintiff. In *Brown* v. *Morrow*, 124 Ark. 480, the court held that in determining whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded; and in determining such intention the words of the promise, the situation of the parties, and all of the conditions attending the transaction, should be taken into consideration. In the application of this rule to the present case we think it was a question for the jury to determine whether or not the promise of Mrs. Gillespie was an original promise to answer for the debt of her son Arthur. According to the testimony of Hinson she was interested in getting some merchant to furnish him. She agreed to rent her place to Hinson and let the rent stand for supplies for that amount to her son Arthur in consideration that Hinson should rent his place to her son and furnish him supplies. Pursuant to this agreement Hinson rented his own place to Arthur and furnished him with supplies during the year to the amount of the rent he agreed to pay Mrs. Gillespie.

As above stated this state of facts made a question for the jury to determine whether or not the promise of Mrs. Gillespie was an original or a collateral promise.

Therefore the court erred in directing a verdict for the plaintiff and for that error the judgment must be reversed and the cause remanded for a new trial.

BROWN & HACKNEY *v.* COVINGTON.

Opinion delivered December 3, 1917.

1. APPEAL AND ERROR—BILL OF EXCEPTIONS—SUFFICIENCY OF JUDGE'S SIGNATURE AND APPROVAL.—A bill of exceptions was signed by the trial judge, and after his signature appeared the following: "Signed subject to change if found to be incorrect or incomplete." *Held,* the certificate was insufficient to bring up the record.
2. APPEAL AND ERROR—JUDGE ON EXCHANGE—APPROVAL OF BILL OF EXCEPTIONS.—Where a cause is tried by a judge sitting on exchange, he alone can approve the bill of exceptions.

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

E. H. Vance, Jr., for appellant.

Argues the merits of the cause.

N. A. McDaniel and *W. D. Brouse,* for appellee.

The case was tried before Judge Scott Wood and the bill of exceptions is not properly signed by him. 99 Ark. 97; 51 *Id.* 280; 81 *Id.* 65; 101 *Id.* 84; 102 *Id.* 439; 80 *Id.* 619.

SMITH, J. The trial of this cause in the court below was presided over by the Honorable Scott Wood, judge of the Eighteenth Circuit, upon an exchange with the Honorable W. H. Evans, regular judge of the Saline Circuit Court, where the cause was tried. Within the time allowed, a bill of exceptions was presented to Judge Wood for his approval, and was signed by him after he had written just above his signature the notation: "Signed subject to change if found to be incorrect or incomplete." Following Judge Wood's signature, the bill

of exceptions was endorsed: "Approved: W. H. Evans, Judge Seventh Judicial District." The trial of the cause was had on March 12 and 13, at which time Judge Wood was presiding. The motion for a new trial was filed March 20, 1917, when Judge Evans was presiding, and the motion was overruled by him on that day.

The Act of March 5, 1909, page 147, which provides that "Where the judge who presided at any trial shall die, become insane or for any other cause become incapacitated before he has signed the exceptions, his successor in office shall allow, or correct, and sign said exceptions," has no application here, because Judge Evans was not the successor of Judge Wood, and Judge Wood had not in any manner become incapacitated from signing and approving the bill of exceptions. Having presided at the trial, it was the duty of Judge Wood to allow and sign the bill of exceptions if one presented for his approval was correct. *O'Neal* v. *State,* 98 Ark. 449; *Carnehan* v. *Parker,* 102 Ark. 441.

Judge Wood did sign the bill of exceptions; but did he also approve it? We must hold that he did not. In the case of *Williams* v. *Griffith,* 101 Ark. 84, it was said:

"Where the judge signed a bill of exceptions but immediately following his signature added the words: 'Proper corrections to be made if necessary,' and attested the letter by his initials, the certificate was a qualified one and insufficient to bring up the matters therein contained for review." See also, *Barry* v. *White Drug Co.,* 109 Ark. 120, 123.

The language employed here is as equivocal as that set out in the case cited, and upon the authority of that case we must affirm the judgment in this for the lack of a proper bill of exceptions, the errors complained of consisting of exceptions appearing in the purported bill of exceptions. It is so ordered.

CHERRY *v.* DILLARD.

Opinion delivered December 3, 1917.

PROPERTY TAKEN UNDER VOID PROCESS—REMEDY OF OWNER.—Where property is taken from the owner under process which is apparently good, but is in fact void, the owner's remedy is to proceed to attack the process and the proceedings under which it issued, but not to sue the officer for the property nor for damages. Where property has been sold under a void proceeding the owner may maintain replevin for it.

Appeal from Marion Circuit Court; *John I. Worthington,* Judge; reversed.

Allyn Smith, for appellant; *G. W. Rogers,* of counsel.

1. The property was *in custodia legis* under a writ valid on its face, and replevin would not lie. No one except the mortgagee, where the property is mortgaged, can replevy. The creditor is not liable where he did not direct the levy. 42 Ark. 236; 58 *Id.* 354; 41 *Id.* 295; 94 *Id.* 216; 126 S. W. 842; Kirby's Digest, § 6854, subd. 5; 57 Ark. 195; 127 S. W. 467; 94 Ark. 384; Kirby & Castle's Digest, § 8426; 23 Tex. 269; 2 Greenl. Ev. (8 Ed.), § 560; 4 Gray 441.

2. The execution was not levied by direction of the creditor and he is not liable. 7 J. J. Marsh 646; *Ib.* 263; 3 Ill. App. 635; 51 Vt. 183; 23 Ark. 101; 62 *Id.* 135.

3. Sinor and Stewart did not appeal.

J. H. Black and *Williams & Seawell,* for appellee.

1. A verdict was properly instructed for appellee. The remedy was not by replevin, but by bill to foreclose. 42 Ark. 236.

2. The property was not subject to execution and the levy and taking were unlawful. On failure to release replevin would lie. 52 Ark. 128. Cherry was a joint tort-feasor and liable. 7 Cyc. 18.

3. The evidence as to whether the team was offered to be returned to Dillard was properly submitted to a jury. Sinor and Stewart did not appeal. 48 Ark. 454; 70 *Id.* 74; 45 *Id.* 392; 43 *Id.* 230. There is no error.

HUMPHREYS, J. Appellee brought replevin in the Marion Circuit Court against B. F. Stewart, constable of Jefferson township, Lee Sinor and appellant to recover a horse and mule which had been levied upon and taken into custody by the constable under an execution, regular on its face, issued on a judgment theretofore obtained by appellant against appellee. It was alleged in the complaint that the Bank of Yellville had a mortgage on the horse and mule at the time the execution was levied on them and that for that reason they were not subject to levy and sale under the execution.

Appellant answered for himself and B. F. Stewart, the constable, in substance, that the property was not wrongfully taken from appellee, and denied that appellee was entitled to the possession thereof. He admitted that the property was seized under an execution as alleged in appellee's complaint, and charged that as soon as they discovered that the property was mortgaged in favor of the Yellville Bank he instructed the constable to return it to appellee and that the property was tendered to appellee on or about the 20th of November, 1916, but appellee refused to accept same.

Lee Sinor filed separate answer setting up that he was the keeper of a livery stable on or about the 11th day of November, 1916, and that the constable brought the property and placed it in his stable for purposes of feed and care; that he fed and cared for the stock up to the institution of the suit in replevin and that he was entitled to a lien on the stock in the sum of $80 under and by virtue of Section 5044 of Kirby's Digest; and as a further defense he charged that he and the constable tendered the property to appellee on or about November 20, 1916, and that appellee refused to accept same.

The cause was heard upon the pleadings, oral evidence and instructions of the court. The court instructed the jury to return a verdict in favor of appellee for the team and to determine whether or not they were wrongfully detained and to ascertain the usuable value of the property during the time of detention. The jury re-

turned a verdict in favor of appellee for his team and assessed damages for the detention thereof in the sum of $67. A judgment was rendered in accordance with the verdict against Lee Sinor, B. F. Stewart and J. J. Cherry. Neither Lee Sinor nor B. F. Stewart have appealed and are bound by the judgment. J. J. Cherry took the proper steps and has prosecuted an appeal to this court.

The evidence in the case is conflicting as to whether the property was unconditionally tendered back to appellee after being seized under the execution; but the undisputed evidence revealed the fact that the property was *in custodia legis,* under process regular upon its face, when appellee instituted suit in replevin for it. There had been no sale of the property under the judgment or process at the time appellee instituted suit. This court said in the case of *Emerson* v. *Hopper,* 94 Ark. 384, that "Property taken by an officer under process regular upon its face should, as between the officer and the owner from whom it is so taken, be considered as *in custodia legis.* The remedy of the owner in such case, where the process is apparently good but void in fact, is not to sue the officer for the property or for damages, but he may proceed, as was said in *Crowell* v. *Barham,* 57 Ark. 195, to attack the process and the proceeding under which it issued 'in any form of action the law affords at any time.' If the property has been sold under the void proceeding, he can then successfully maintain replevin for it. He is not remediless, even though he may not maintain replevin against the officer under the statute."

The instant case is ruled by the case of *Crowell* v. *Barham,* 57 Ark. 195, and *Emerson* v. *Hopper,* 94 Ark. 384.

For the error indicated, the judgment is reversed and the cause against appellant Cherry is dismissed.

FISKE RUBBER CO. v. HAYES.

Opinion delivered December 3, 1917.

BULK SALES LAW—SALE OF PORTION OF STOCK.—In order to constitute a fraudulent sale under Act 88, Acts 1913, it must appear that a material portion of the seller's stock was sold in bulk out of the ordinary course of trade and contrary to the regular prosecution of the business of the seller.

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

Hinton, Rogers & Barber, for appellant.

1. Defendants failed to comply with the Bulk Sales Act and the sale was void. 123 Ark. 285; 185 S. W. 263; 189 Mass. 598; 78 S. E. 51; 127 Ga. 303. A very material portion of the stock was sold.

June P. Wooten, for appellee.

A sale of $39.24 from a stock of $1,500 is not a violation of act. In both of the Arkansas cases cited, the *entire stock* was sold in bulk. Here the sale was of a small portion—an ordinary retail sale—and was not a violation of the act. Act 88, Acts 1913. No effort was made to defraud creditors and the sale was in the ordinary course of retail business—a very small proportion of the whole stock and in good faith.

HUMPHREYS, J. Appellant brought suit to the 1917 April term of the Pulaski County Chancery Court against Robert A. Thompson and Louis H. Dalhoff to recover $377.60 due it on open account by the firm of Thompson & Dalhoff; and against Orlando C. Hayes, J. N. Moxley and W. J. Cox, trading as Hayes Motor Car Company, to charge them as receivers of goods, wares and merchandise purchased by them from Thompson & Dalhoff. It was alleged in the complaint that the Hayes Motor Car Company, composed of Hayes, Moxley and Cox, purchased the stock of merchandise owned by Thompson & Dalhoff in Little Rock, in bulk, without complying with Act No. 88 of the session acts of 1913, commonly known as the Bulk Sales Law.

Neither Thompson nor Dalhoff made answer.

Orlando C. Hayes, J. N. Moxley and W. J. Cox, trading as Hayes Motor Car Company, filed a separate answer denying the material allegations of the complaint.

The cause was heard by the chancellor upon the pleadings and evidence, from which he found that the sale was not within the Bulk Sales Law. The bill, in so far as it sought to hold Hayes Motor Car Company, as receiver, for articles bought by Thompson & Dalhoff, was dismissed for the want of equity. An appeal has been lodged in this court for the purpose of testing the correctness of the chancellor's ruling in dismissing the bill.

The evidence in substance disclosed that Thompson & Dalhoff had been local agents in Little Rock for the sale of Allen and Jackson cars and had exhibition cars on hand when they surrendered the local agency to Hayes Motor Car Company. They were in business at 916 Main street. In fitting up the place of business, they had expended $35 for a partition, calcimining and show window; $10 for electric fixtures; $4 advanced charges on telephone; $8 for two pairs of rubber boots; $2.50 for washer, sprinkler and bucket; 80 cents for a mallet; 85 cents for a lock; 40 cents for a cuspidor; 35 cents for a waste basket; $2.60 for coal; $1 for floor sweep; $2.10 for hose with nozzle; 75 cents for a brass faucet; $25 partial payment on chairs and desk, the title of which remained in the vendor; $19 for Allen and Jackson stationery; $3 for gasoline in exhibition cars; $1 for lumber; $2.22 for cheese cloth; $2.45 for three Allen crank caps; $2.70 for three Allen cranks; 60 cents for an Allen hub cap; and $2.50 for express on advertising matter. Hayes Motor Car Company had been organized for the purpose of taking the local agency of the Allen and Jackson cars and did so on December 4, 1916. They desired the same location theretofore used by Thompson & Dalhoff on Main street, and, on December 7, agreed to remunerate Thompson & Dalhoff for all items above mentioned, and on the same day purchased the following additional

items out of the automobile stock owned by Thompson & Dalhoff, towit: 24 talcum, 50 cents; 18 quarts of polish, $10.80; tape, $5; cold patches, $2.30; blow-out patches, $5.90; star wrenches, 34 cents, and 14 Hell-fi spark plugs, $8.75. Thompson & Dalhoff were also conducting an automobile accessory business at the same place and had an accessory stock of about $1,500 including some old machines they had gotten in exchange, exclusive of the Allen and Jackson sample cars. A bill of sale setting forth all the items above mentioned, of the total value of $154.91, was delivered by Thompson & Dalhoff to the Hayes Motor Car Company. It is not clear whether a majority of the items included in the bill of sale constituted a part of the stock of the automobile accessory business, or items incident to the conduct of the agency for the Allen and Jackson cars. The character of most of the items rather indicated that they were items connected with and incident to the agency. It is certain that items to the value of $35 or $40 were sold out of the automobile accessory stock. The sale of items such as these in respect to value and quantity was not out of the ordinary in the conduct of the retail business in which they were engaged. At the time of the exchange of the agency and sale of the items aforesaid, the intention was for Thompson & Dalhoff to secure another location and continue the automobile accessory business. No place was secured and the business was discontinued. The parties to the transaction never attempted to comply with the requirements of the Bulk Sales Law.

It is insisted that the sale constituted a purchase or assignment in bulk of the stock and fixtures of Thompson & Dalhoff to the Hayes Motor Car Company without complying with the Bulk Sales Law, and therefore void.

The Bulk Sales Law was passed by the Legislature to protect the rights of creditors from fraudulent sales of property upon which credit had been extended. *Stuart* v. *Elkhorn Bank & Trust Co.*, 123 Ark. 285.

In the instant case only a small portion of the stock was sold. The number of items and value thereof were inconsequential when compared with the amount and value of the entire stock. The number of articles sold and the value thereof were within an ordinary retail transaction. Thompson & Dalhoff were engaged in the retail business. It is manifest that the sale was not intended to impair a continuation of the Thompson & Dalhoff automobile accessory business at some other location in the city. It is well said by appellee that the Bulk Sales Law was never intended to prevent a merchant from moving his business to a new location and in so doing to dispose of odds and ends or remnants. The purpose of the act was to prevent fraudulent sales. In order to constitute a fraudulent sale under the act, it must appear that a material portion of the stock was sold in bulk out of the ordinary course of trade and contrary to the regular prosecution of the business of the seller. The chancellor found in the instant case that the sale was an ordinary retail transaction. We think the finding was supported by the weight of evidence. It certainly can not be said that the finding was contrary to a clear preponderance of the evidence.

The decree is affirmed.

ROSENBAUM v. STATE.

Opinion delivered December 10, 1917.

1. EVIDENCE—OPINION OF WITNESSES—NON-EXPERT TESTIMONY—EXPEDIENCY OF ACTS IN VIOLATION OF THE LAW.—The opinion of a witness, not founded on science or in relation to any special business, art or trade requiring peculiar knowledge, but given purely as the witness' theory concerning an issue of morals or duty, is inadmissible, whether such opinion be by a professional or non-professional witness.
2. EVIDENCE—OPINION OF NON-EXPERT WITNESS.—The opinion of an ordinary witness on a question of law or on a question which is for the jury to decide on the facts, is inadmissible. Opinions or conclusions are inadmissible on issues which the tribunal alone must determine.

3. EVIDENCE—VIOLATION OF SABBATH LAW—OPINION EVIDENCE AS TO EXPEDIENCY.—Appellant was indicted for the violation of Kirby's Digest, § 2030, prohibiting persons from laboring on Sunday, by conducting and operating a moving picture show in Argenta, Ark. *Held,* opinion evidence of witnesses that they regarded moving pictures on Sunday as a necessity, in view of the large numbers of soldiers stationed at Fort Roots and at Camp Pike, is inadmissible.
4. SABBATH BREAKING—OPERATION OF MOTION PICTURE SHOW.—The operation of a motion picture show on Sunday is a violation of Kirby's Digest, § 2030, which provides: "Every person who shall on the Sabbath, or Sunday, be found laboring, or shall compel his apprentice or servant to labor or to perform other services than customary household duties, of daily necessity, comfort or charity, on conviction thereof, shall be fined. * * *"

Appeal from Pulaski Circuit Court, First Division; *Edward B. Downie,* Judge; affirmed.

Hal. L. Norwood and *Rhoton & Helm,* for appellant.

It was error to direct a verdict. The evidence establishes the moral fitness and the *necessity* of the labor, and the issue should have been submitted to a jury. Kirby's Digest, § 2030; 61 Ark. 219-20; 85 *Id.* 135; 72 *Id.* 169; 55 *Id.* 10.

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

1. The operation of the show was not a "necessity" within the meaning of the statute. The witnesses merely gave their opinions. 125 Ark. 159; 61 *Id.* 216; 20 *Id.* 290; 55 *Id.* 10; 80 Conn. 582. See also 37 Cyc. 548; 144 Mass. 363; *Ib.* 28.

2. A verdict was properly directed. 84 Ark. 564; 88 *Id.* 269.

STATEMENT OF FACTS.

Section 2030 of Kirby's Digest reads as follows: "Every person who shall on the Sabbath or Sunday, be found laboring, or shall compel his apprentice or servant to labor or to perform other services than customary household duties, of daily necessity, comfort or

charity, on conviction thereof, shall be fined one dollar for each separate offense."

Louis Rosenbaum was convicted of violating this statute. The proof on the part of the State consisted in an admission by the defendant that he had operated a moving picture show in the City of Argenta, Pulaski County, Arkansas, on Sunday, July, 29, 1917; that he charged for admission to the show; that he operated a moving picture show in the afternoon of that day, and worked employees in connection with his business. He testified that his show was clean and educational in character.

Several witnesses testified on behalf of the defendant. Some of these witnesses were officers of high rank and prominent in army circles at Camp Pike; others were prominent in the social and business activities of the cities of Argenta and Little Rock. One of the appellant's witnesses was D. M. Pixley, mayor of Argenta. He testified that at the time the defendant operated his moving picture show there were between four and five thousand soldiers at Fort Logan H. Roots, and taking into consideration the unusual conditions that exist over there he was of the opinion that clean moving picture shows were a necessity for the soldiers.

One of the defendant's witnesses, W. B. Smith, who was president of the Chamber of Commerce of Little Rock, and as such took a most conspicuous and commendable part in the location of the cantonment in proximity to these cities, had given the matter of camp activities and other matters connected with it considerable thought and time. His testimony fairly illustrates the character of the testimony given by each of the witnesses who testified on behalf of the appellant. He testified in part as follows:

Q. "Taking into consideration the number of soldiers camped at Fort Roots on the 29th of July—approximately 4,000 men—and conditions as they existed with that number of men camped there and the hours for

getting off to come to town—state whether or not the operation of clean and wholesome picture shows on Sunday was a necessity?" A. "I think so."

He was then asked to state why, and answered: "The soldiers have their entire Sunday off, except those who are on some particular duty; their mornings are devoted, or should be devoted to religious services. The afternoon is on their hands; they are away from their homes; they are largely in strange communities; and in my mind and opinion it is to the interest of the soldiers that they should have clean and wholesome diversion for the Sunday afternoon. I am clear in my opinion that the picture shows, such as we have in Little Rock and Argenta, and Sunday baseball, one of the clean sports of the country, would be beneficial to the physical and moral life on their recreation day."

On cross-examination he stated: "I am not in favor of violating a statute law, but common practice in the community justifies the exception to the law as we have it practiced in our community on many things that are considered necessities on Sunday. Personally, I care nothing for Sunday baseball and do not favor it except under the conditions I have mentioned, and I would not advocate the violation of the statute on it. I like picture shows as well as drama. I consider them of high educational value."

He was asked if he based his opinion of the necessity of moving picture shows here on Sunday on the fact of the unusual situation of having so many soldiers in close proximity to the town, and answered: "I do not consider it a necessity under normal conditions in the city; base it entirely upon the ground as stated, that we have a large number of men here in July and now, and a large number of men detached with no home life and none of the soft and loving influence of home life that would take them there for their rest and diversion. You can not expect the men to give attention to the spiritual life the entire Sunday. Get him to devote some hours

in the morning to religious and spiritual matters and you have accomplished all that is possible with the average man. I base it on the large number of men detached. If we had 8,000 or 9,000 laborers imported here I would say that the conditions were just as urgent as for the soldiers."

It was shown by Colonel James, of the 153d Infantry (formerly First Arkansas) that the soldiers underwent strenuous training, requiring the physical movements of their entire bodies. The hours of training were from half past seven in the morning until half past three in the afternoon with an hour at noon for luncheon. One-fifth of the men had permission to visit the cities of Argenta and Little Rock each night, and on Sunday they all had that permission except those who were on guard duty. Sunday was the recreation day for all the men.

It was shown that before the night of the moving picture show the defendant gave out a lot of passes; he had some three hundred passes distributed. He was not selling tickets on the night of July 29; just took the money if they offered it and let them pass in. It was further shown that there were seventy soldiers in attendance upon the picture show on the occasion mentioned. It was contemplated that there would be between 25,000 and 40,000 soldiers located at Camp Pike.

Eliminating that testimony of the witnesses which was but the expression of their opinions, the undisputed facts are that the defendant and his employees operated a moving picture show in the City of Argenta, Pulaski County, Arkansas, on Sunday, July 29, 1917; that at Fort Logan H. Roots at that time there were approximately 4,000 men who were detached from their homes and who daily were put through the strenuous exercise of body and mind that was incident to their training. There were to be stationed at Camp Pike between 25,000 and 40,000 soldiers, one-fifth of whom were permitted each night to visit the cities of Little Rock and Argenta, except on Sunday, when all were given this permission

except those on special guard and other duties at the camp. Sunday was their general recreation day. There were at that time at Camp Pike about 8,000 working men, engaged in the construction of the buildings of the cantonment, who did not have an opportunity to go to moving picture shows except on Sunday.

The State objected to the opinion evidence of the witnesses on behalf of defendant, which objection the court overruled, to which the State duly excepted. The court instructed the jury to find the defendant guilty, to which the defendant excepted. The jury returned a verdict of guilty, and the court entered a judgment fixing defendant's punishment at a fine of one dollar and costs, from which judgment this appeal has been duly prosecuted.

WOOD, J., (after stating the facts). The court, upon the objection of the State to the opinion evidence of the witnesses, should have excluded such testimony from the jury. But the ruling of the court directing the jury to return a verdict of guilty, notwithstanding the opinion of these witnesses, was, in legal effect, tantamount to excluding such evidence. This ruling of the court was correct.

The witnesses who testified on behalf of the appellant were unanimous in the opinion that the operation of clean, wholesome and moral picture shows in the cities of Little Rock and Argenta, under the conditions above stated, was a necessity for the physical comfort and moral well being of the soldiers who were located at Fort Logan H. Roots and Camp Pike.

Considering the general intelligence and high standing of these witnesses, their opinions would be entitled to great respect and might have a cogent influence in any subject-matter of controversy where it was competent and proper to take into consideration such opinions in determining the issue involved. These opinions, and especially the arguments to sustain them, might be addressed with perfect propriety to the legislative depart-

ment of the government, whose province it is to enact laws, but they certainly have no place before the courts, which have no power to legislate and whose exclusive and only province is to interpret the laws as they have been enacted by the Legislature.

(1-3) It is a familiar rule, without exception, that the opinion of a witness not founded on science or in relation to any special business, art or trade requiring peculiar knowledge, but given purely as the witness' theory concerning an issue of morals or duty, is inadmissible, whether such opinion be by a professional or non-professional witness. See Rogers' Expert Testimony, p. 32, Sec. 11. It is also a well established rule of evidence that the opinion of an ordinary witness on a question of law or on a question which it is for the jury to decide on the facts, is inadmissible. Opinions or conclusions are inadmissible on issues which the tribunal alone must determine. Lawson on Expert and Opinion Evidence, p. 557.

Here the issue is not what the law might or should be, but the issue is, did the appellant violate the law as it is? The appellant testified that he was operating a moving picture show that was clean and educational in character, without giving the facts upon which he based such conclusion. This bald expression of opinion on his part, and likewise the expressions of the earnest conviction of the witnesses testifying in his behalf that the operation of such a show was necessary for the soldiers, were a patent usurpation of the functions of the court and jury, and, under the above rule, were wholly incompetent.

Some of the witnesses, in advocacy of the moving picture show for the benefit of the soldiers at Camp Pike, declared with perfervid enthusiasm that although under normal conditions such shows might not be necessary, yet in view of the exigencies now existing on account of the location of so many soldiers at Camp Pike, the term "necessity" as used in the statute should be so con-

strued as to meet the present conditions. Of course, such opinions are not evidence. They relate to the policy of the law, with which the courts have naught to do. They ignore the fact that the statute under consideration is a general one, with no exceptions in favor of those who may operate moving picture shows in the cities of Argenta and Little Rock because of conditions existing in those cities. Moreover, all such views evince either a total misconception or superficial knowledge of the statute, or else but slight regard for laws intended to protect and preserve for the civilization of mankind one of the most cherished and venerable institutions of the Christian world.

Those who believe in God and accept the Bible as the revelation of His will, look upon the Sabbath as of divine origin. They believe that the creator himself established it by the fourth commandment in commemoration of that period in the cycle of creation designated by him as the "seventh day," when he ended the work he had made, and blessed and sanctified that day as a day of rest. Gen. 2:2; Ex. 20: 8-11.

"The scope and meaning of the Sabbath day"—the seventh day of the Hebrew week—"was very much extended and amplified by the provisions of the laws of Moses." The Americana, Vol. 18, *verbum* "Sabbath."

When Jesus came he found that a certain religious sect among the Jews were so fanatical, in the observance of these laws, and were adhering so closely to the very letter of the fourth commandment that they considered it a violation of the same for one to be engaged in any work of necessity or charity. For instance, the Pharisees construed the fourth commandment to prohibit the healing of a sick man, the plucking of ears of corn to feed the hungry; no Jew might kindle a fire; the healed patient could not bear his own bed; broken bones could not be set, nor poulticed or bound up on the Sabbath day. These religious zealots dogged the footsteps of Jesus in order that they might accuse him of violating the fourth com-

mandment as they construed it. At length, with anger, he turned upon them, and, in a scathing rebuke, admonished them that they were in the presence of one who was Lord of the Sabbath day, greater than the temple and the ceremonies connected with its service, and he proceeded to teach them that it is lawful to do good on the Sabbath, that the Sabbath was "made for man and not man for the Sabbath," and by both precept and example illustrated that any labors incident to works of necessity, comfort or charity were not prohibited by the law of the Sabbath as contained in the fourth commandment, and that in construing it otherwise they had wholly misapprehended its divine purpose. Matthew 12:1-14; Mark 2:23-28; Mark 3:1-6. The Americana, *supra.*

Those who accept the authenticity of the scriptures as contained both in the Old and the New Testament believe that Jesus was the Son of God, as well as the Son of Man; that he was made flesh and dwelt among us; that he was in the beginning with God; that he was a divine teacher, and hence could teach as one having all authority and not as the scribes; that he arose from the dead on Sunday, the first day of the week under the Julian calendar. John 1:1-14; Luke 24:1. Those who do not accept the biblical account of the divine origin of the Sabbath must, nevertheless, yield to the voice of tradition and secular history which abundantly establish the fact that at the time of the coming of Christ there existed an institution of religion which had its origin sometime in the dim and remote past, which was called the Sabbath and which was then being observed by the Jewish people on the seventh day of the week of the Hebrew calendar in commemoration of the day on which it was believed by them that God, having finished the work of creation, rested from his labors and consecrated the day as one of rest and worship. And those who do not believe in the biblical account of the divinity of Jesus and of the manner of his death and resurrection must concede that profane history indisputably establishes the fact that a man

called Jesus lived; that he was at least a great moral philosopher and teacher; that he established his church, and that his disciples were called Christians; that his life and teachings had such a wonderful influence upon his followers that in commemoration of what they believed to be the day of his resurrection from the dead they set apart Sunday, the first day of the week, to be observed as a perpetual memorial of that event. It was to be observed in precisely the same manner that Jesus had taught for the observance of the Hebrew Sabbath. Hence, Sunday is now designated throughout all Christendom as the Lord's day or Christian Sabbath. Therefore, whether the Christian Sabbath be considered as a matter of human or divine origin, we have it established as a potent factor of history with a clear interpretation by him in whose memory it was established as to how it should be observed.

From the time of the inauguration of the Christian Sabbath, which is almost coevil with the existence of Christianity itself, it is easy to trace its history down to the present day. For, although it began as a purely religious institution, it had had such a marvelous effect in the betterment of the civil conduct and life of the nation that in the early part of the fourth century the Christian emperor Constantine issued a decree commanding all the people of the city of Rome to rest and cease from their ordinary avocations on that day, making an exception however in favor of those engaged in agricultural pursuits, "who, on account of the bounty of heaven may have lost the opportunity to reap or sow their grain on another day." As showing some of the things that are not in keeping with the observance of Sunday as it was celebrated by the Christians in that early time, Theodocius, in the latter part of the fourth century, issued a decree suspending theatrical shows and circus races on Sunday. "These historical facts," says the Americana, "are important as bearing on the present Sunday laws of England and America."

The Frank Emperors had Sunday observed; the Code of Napoleon ordered it, and the observance of the Lord's day has been enjoined by statutes in England from the earliest times. The Americana. Coming on down to the legislation in the mother country, which forms the basis of such legislation in practically all the states of the Union, we find that in the reign of Charles II an act, entitled, "An act for the better observation of the Lord's day, commonly called Sunday," was passed, which, among other things, provides: "That no tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly labor, business or work of their ordinary callings upon the Lord's day, or any part thereof (works of necessity and charity only excepted)." Stat. at Large, 29 Chas. II, chap. 7, p. 412, (12 Char. 2, p. 412).

It will be observed that our statute is almost a literal copy of the act just quoted.

The history of the origin of the Sabbath and of the legislation which has been enacted to preserve and perpetuate Sunday or the Christian Sabbath as a civil institution is a subject upon which volumes have been written, but the above brief resume sets forth the salient features that are indispensible for the correct interpretation of the meaning of the words "necessity, comfort or charity" as used in the act under review.

Christ, in expounding what he and those of the Christian faith believed to be the divine law as contained in the fourth commandment, did not specifically designate the labor which it was lawful to perform on the Sabbath day as works of necessity, comfort or charity. Yet a critical analysis of his examples and precepts illustrating the character of deeds that might lawfully be done on the Sabbath day demonstrates clearly that it was only such labor as might be properly classed as that of *daily necessity, comfort or charity.* The fact that such legislation is colored and molded by the teachings of One whom the great majority of people in this country and

other nations of Christendom worship as their Lord and Savior does not render such legislation unconstitutional, as has been often held. *Kreider* v. *State,* 103 Ark. 438; *Scales* v. *State,* 47 Ark. 476, and cases there cited.

The Supreme Court of New York, in *Lindenmuller* v. *The People,* 33 Barb. 548, 562, 564, speaking on this point, said: "Religious tolerance is entirely consistent with a recognized religion. * * * Compulsory worship of God in any form is prohibited, and every man's opinion on matters of religion, as in other matters, is beyond the reach of law. No man can be compelled to perform any act or omit any act as a duty to God; but this liberty of conscience in matter of faith and practice is entirely consistent with the existence, in fact, of the Christian religion, entitled to and enjoying the protection of the law as the religion of the people of the State, and as furnishing the best sanctions of moral and social obligations. The public peace and public welfare are greatly dependent upon the protection of the religion of the country, and the preventing or punishing of offenses against it, and acts wantonly committed subversive of it."

Our statute seeks to protect and preserve the observance of the Christian Sabbath as a civil institution. According to the testimony of some of the best writers and most profound thinkers of the world, legal, literary and ecclesiastical, it would appear that such legislation is fully justified. Blackstone says:

"For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day, in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment, as well as for public worship, is of admirable service to a State considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the in-

dustrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people their sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labor, without any stated times of recalling them to the worship of their Maker." Cooley's Blackstone, Vol. 2, Book 4, star pages 63 and 64.

Daniel Webster says: "The longer I live the more highly do I estimate the Christian Sabbath, and the more grateful do I feel to those who impress its importance on the community."

Emerson says: "The Sunday is the core of our civilization, dedicated to thought and reverence. It invites to the noblest solitude and the noblest society."

Macauley says: "If the Sunday had not been observed as a day of rest during the last three centuries, I have not the slightest doubt that we should have been at this moment a poorer people and less civilized."

Henry Ward Beecher says: "Sunday is the common people's great liberty day and they are bound to see to it that work does not come into it." Dictionary of Thought, Edwards, verbum "Sabbath."

(4) Excluding from our consideration the opinion evidence, reasonable minds under a correct interpretation of the statute could not reach any other conclusion than that the labor performed by appellant and his employees was not that of daily necessity, comfort or charity. The qualifying word "daily" is significant of the kind of necessity. It must be such as is required to meet a daily need.

In construing the term "necessity" we have given it a liberal rather than a literal interpretation, holding that an absolute unavoidable physical necessity is not meant, but rather an economical and moral necessity. It is said in *Shipley* v. *State,* 61 Ark. 219: "If there is a moral fitness or propriety for the work done in the accomplishment of a lawful object, under the circumstances of any

case, such work may be regarded a necessity, in the sense of the statute." See also, *State* v. *Collett,* 72 Ark. 169; *Barefield* v. *State,* 85 Ark. 135; see *Turner* v. *State,* 85 Ark. 188.

But this court, in *Quarles* v. *State,* 55 Ark. 10, has held upon a state of facts which can not be distinguished, in principle, from the facts here proved that the manager of a public theatre who sells tickets for and superintends an entertainment therein on Sunday is guilty of laboring on the Sabbath within the meaning of our statute. See also, *Lyric Theatre* v. *State,* 98 Ark. 437.

The Supreme Court of Connecticut, in a similar case, held that the sales on Sunday of tickets to a moving picture show to be given that evening in an opera house, was not a work of necessity or mercy. *State* v. *Ryan,* 80 Conn. 582.

Appellant having admitted that he performed the labor as charged, the burden was upon him to show by competent evidence that the labor done was a work of necessity. *Lee Wilson & Co.* v. *State,* 125 Ark. 159. This he has failed to do. The judgment is therefore correct, and it is affirmed.

WILLIAMS v. STATE.

Opinion delivered October 29, 1917.

1. FORGERY—FORM OF INDICTMENT.—Forgery is a crime defined by the statutes and it is sufficient under our criminal code to allege the offense in the words of the statute.
2. FORGERY—NOTE—PROOF OF JUDGMENT BY JUSTICE OF PEACE.—Defendant was charged with forging a promissory note, and in a trial of the cause it is proper to permit a justice of the peace to testify that a judgment had been rendered in his court in favor of the payee (the person defrauded) and against the defendant, and that no part of the judgment had been paid.
3. FORGERY—EVIDENCE—CUSTOM AS TO PERMITTING PERSONS TO SIGN NAMES TO NOTES.—Defendant was charged with forging the name of his brother, Oscar Williams, to a promissory note. There were several Williams' brothers. *Held,* it was proper to exclude testimony offered by defendant, that a practice existed among the

Williams' brothers generally of signing each other's names to notes. *Semble,* defendant might offer evidence to prove that it had been the practice of Oscar Williams to allow him to sign his name to notes.

4. TRIAL—CRIMINAL LAW—ARGUMENT OF STATE'S ATTORNEY.—In a prosecution for forgery, the State's attorney said in argument to the jury: "The defendant brought J. W. here, and L. E. W., and placed them on the witness stand to prove certain things, and the court promptly refused to let him do it. If he had any defense he could have shown it." Defendant's sole defense was that he believed that he had authority to sign the name of the person whose name he was accused of forging. *Held,* the remarks of counsel were not prejudicial, where the court told the jury that if counsel made statements of matters not in proof, that they should disregard those statements entirely, disregarding prejudice, denunciation and sympathy, and follow the law and evidence.

Appeal from Randolph Circuit Court; *J. B. Baker,* Judge; affirmed.

S. A. D. Eaton, for appellant.

1. The indictment is defective. It does not charge that the note was signed without the authority of Oscar Williams. 56 Pac. 750; 37 N. E. 1040; 28 Pac. 597; 46 *Id.* 99; 48 *Id.* 1024; 67 N. W. 267. A failure to allege want of authority to sign can not be supplied by proof. 32 S. W. 983; 86 N. W. 406; 27 Iowa 402; 43 Pac. 1075; 22 Cyc. 296.

Kirby's Digest, § 2243, was not intended to validate an indictment that would be invalid at common law. 29 Ark. 149. The words "forge" and "counterfeit" with intent, etc., state a conclusion of law merely and are insufficient. 38 Ark. 521; 12 Bush 343; 27 S. W. 816; 154 S. W. 222; 25 Tex. Supp. 340; 8 Oh. C. C. 463, 2 Mill 135; 12 Tex. App. 395; 13 Wend. 311, 317; 83 Mo. 299; 19 Cyc. 1405. The facts here differ from those in 104 Ark. 213. See 191 S. W. 899; 26 S. W. 330; 27 *Id.* 493; 43 *Id.* 93; 67 *Id.* 308. It fails to comply with Kirby's Digest, § 1712. It also fails to allege that the note was given for the payment of money, or that a note or other writing was forged.

2. There is a variance between the note set out in the indictment and the one offered in evidence. 58 Ark. 242; 77 *Id.* 537; Bishop New Cr. Proc. 407; 7 N. W. 331; 19 Cyc. 1400.

3. It was error to admit Oscar Williams' testimony and E. Dalton's as to the note, and in allowing leading questions. It was also error to permit the justice to testify as to the judgment rendered by him, and also in allowing the record of said judgment. This was wholly irrelevant and prejudicial. 189 S. W. 262.

4. It was error to refuse evidence showing the practice among the Williams' brothers of signing each other's names to notes. 51 Ark. 88-92; 52 *Id.* 45.

5. There was error in the instructions and in the closing remarks of counsel for the State.

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

1. The indictment is not defective. It charges the crime sufficiently. 104 Ark. 212; 114 *Id.* 452; 125 *Id.* 215; Wharton Cr. Law 1151; 30 Kan. 365; 76 Minn. 211.

2. The indictment follows the statute. Kirby's Digest, § 1714.

3. There is no variance. 90 Ark. 123; 127 Ark. 204; Wharton Cr. Law 1159.

4. There was no error in allowing the justice to testify, nor in admitting the record of the judgment. If part of it was inadmissible a specific objection should have been made. Only a general objection was made. 82 Ark. 23; 84 *Id.* 377; 82 *Id.* 555.

5. There was no error in refusing to allow L. E. and John Williams to testify as to the custom of the brothers in signing each other's names to notes. The questions were too general and in no way connected the signing of this note.

6. There is no error in the instructions, and none in the remarks of counsel. The evidence supports the verdict.

HART, J. O. C. Williams was indicted for the crime of forgery charged to have been committed by forging the name of his brother, Oscar Williams, to an instrument of writing purporting to be a promissory note with the fraudulent intent to injure Lewis Dalton in his estate. He was tried before a jury and convicted, his punishment being fixed at a term of two years in the State penitentiary. From the judgment of conviction he has duly prosecuted an appeal to this court.

On the part of the State it was proved that the defendant, O. C. Williams, owed Lewis Dalton a promissory note in the sum of something over one hundred dollars. He made payments sufficient to reduce the indebtedness to $61.65. Dalton agreed to grant Williams an extension of time if he would make a new note and get his brothers other than L. E. Williams as sureties. O. C. Williams executed a new note to Dalton for $61.65 and the note purports to have been signed by Oscar Williams and other persons. After the note became due, Dalton being unable to collect the note from O. C. Williams, demanded payment thereof of Oscar Williams. Oscar Williams refused to pay it and denied that he had signed the note. Oscar Williams was placed upon the stand by the State and the note in question was presented to him. He denied that he ever signed the note or authorized any one else to sign it for him.

On cross-examination Oscar Williams stated that it had been the practice of his other brothers to sign each others names to notes without consulting each other about it. He stated that he had never signed any of his brothers' names to notes but that his brothers had signed his name to notes before the execution of the one in question; that the defendant had signed his name several times to notes before this and that he had not made any objection.

On redirect examination he stated that there was no understanding that the defendant might sign his name to notes; that while he had done this several times, that

there has been no understanding that he should do it. He stated again that he did not give his brother permission to sign his name to the note in question. When Oscar Williams was sued on the note he defended on the ground that his name on the note had been forged.

The defendant testified that he signed the name of Oscar Williams to the note, that the reason he did so was that Oscar had always told him to do it; that it had been the practice of the brothers to sign each other's name to notes; that Oscar had never before objected to him signing his name to notes; that at the time he signed Oscar's name to the note in question that he had no thought or intention of injuring Lewis Dalton in his property.

The evidence on the part of the State if believed by the jury was sufficient to warrant the conviction of the defendant.

The charging clause of the indictment reads as follows:

"The said O. C. Williams, in the county and State aforesaid, on the 9th day of May, 1914, did then and there fraudulently and feloniously forge and counterfeit the name of Oscar Williams to an instrument of writing purporting to be a promissory note, with the fraudulent intent to him, the said O. C. Williams, then and there to cause Lewis Dalton to be injured in his estate and lawful rights."

It is the contention of the defendant that the indictment is defective because it did not state that the note was signed without the authority of Oscar Williams. Authorities are cited by him to sustain his contention but we think they are not in accord with the trend of our own decisions and are contrary to the better reasoning on the question.

(1) Forgery is a crime defined by our statutes and it is sufficient under our criminal code, as a general proposition, to allege such an offense in the words of the statute. In *Ary* v. *State,* 104 Ark. 212, it was held that

an indictment for the forgery of a check which alleged that the accused "did make, forge and counterfeit the check, with the intent fraudulently and feloniously to obtain possession of the property of B. M.," sufficiently alleged that said B. M. did not sign the check or authorize it to be signed. Now, the indictment here uses the words, "did then and there fraudulently and feloniously forge and counterfeit the name of Oscar Williams." These words are a statement of facts and are not a mere conclusion of law.

In the case of *State* v. *Foster,* 30 Kan. 365, the court held that forgery in that State was a statutory offense and that as a general proposition it was sufficient to allege such an offense in the words of the statute. The court said:

"While there may be some limitations on this general doctrine, as where the statute simply designates the offense, and does not in express terms name its constituent elements, yet we think the rule obtains in the case at bar. Of course it was never the duty of the pleader to narrate the evidence, and we think the words 'pass, utter and publish' make a clear and sufficient description of fact. They are words of common use, and refer to acts which are understood by every one."

In the case of *State* v. *Greenwood,* 76 Minn. 211, the court said:

"The gist of the offense of forgery is the intent to defraud. It is not necessary nor advisable to set out the name of the person intended to be defrauded. The elements of fraud to be charged in the indictment, according to the law books, are a writing apparently valid, and evil intent on the part of the accused, and a false making of such writing."

The court held that the matters just referred to are all charged in an indictment which uses the word "forge" and that the word "forge" contains a statement of fact and not a mere conclusion of law, and includes the false making of an instrument, in whole or in part.

Tested by this rule we are of the opinion that the indictment in question was not defective.

(2) The next assignment of error on the part of the defendant is that the court erred in allowing the justice of the peace to testify that a judgment had been rendered in his court in favor of Dalton against the defendant and that no part of the judgment had been paid. The note had been filed before the justice of the peace and judgment had been rendered on it. It was competent for the justice of the peace to identify his record and read it in evidence before the jury in order to show that the note had never been paid and thus to establish that Dalton had been injured in his property.

It is true that the defendant testified that he was not served with summons in the suit before the justice of the peace and the record shows that fact, but the record of the justice of the peace also shows a return of summons by the sheriff of personal service on Oscar Williams in the township where the justice of the peace resided and held office.

It is also contended that the judgment of the justice of the peace should not have been introduced in evidence because it contained a recitation of a finding by the justice that Oscar Williams did not sign the note but that his name was forged thereto by O. C. Williams. A general objection only was made to the introduction of the judgment of the justice of the peace. As before stated it was competent to introduce it to show that the note had not been paid and thus to establish that Dalton had been injured in his property. The defendant should have asked by appropriate instructions or otherwise to have it limited for that purpose but not having done so, he is not now in the attitude to complain.

(3) It is next contended by counsel for the defendant that the court erred in not allowing L. E. Williams and John Williams to testify as to a practice among the Williams brothers in signing each other's names to notes. The testimony offered to the jury by the defend-

ant was that a practice existed among the Williams brothers generally in signing each other's names to notes. The court held that this was too general but offered to allow the defendant to prove that it had been the practice of Oscar Williams to allow him to sign his name to notes. The court was right in its ruling. The fact that any of his other brothers had permitted the defendant to sign their names to notes would have no tendency to prove that Oscar Williams had given such permission to the defendant. *Tongs* v. *State,* 130 Ark. 344.

It is next insisted that the court erred in refusing to give instruction number two with reference to the practice of the Williams brothers in signing each other's names to notes. The instruction need not be set out here. The instruction was fully covered by an instruction which the court gave which is as follows:

"You are further instructed that if you believe from the evidence in this case that the defendant had been in the habit of signing the names of his brothers, including Oscar, to instruments of writing, with the knowledge and consent of Oscar Williams, without objection by said brothers or any of them thereto, prior to the signing of the note, the forgery of which is charged in the indictment in this cause, then you will be authorized to consider such fact in considering the question of criminal intent of the defendant in signing the name of said Oscar Williams to the note in evidence in this case."

Without approving the form of this instruction, it may be said that it was as favorable to the defendant as he had a right to ask.

(4) Error is assigned in refusing other instructions asked by the defendant. We do not deem it necessary to set out these instructions. The defendant admitted that he signed his brother's name to the note in question and his sole defense is that he had been in the habit of signing his brother's name to notes before and that he had never objected to his so doing; that he had no thought or intention of injuring Dalton in his property

when he signed his brother's name to the note but believed that he had a right to sign it.

The defendant's theory was fully presented to the jury by the instructions given by the court and he can not complain that the court refused to multiply instructions on this point.

Special counsel for the State in his closing argument to the jury used the following language:

"The defendant brought John Williams here, and L. E. Williams, and placed them on the witness stand to prove certain things, and the court promptly refused to let him do it. If he had any defense he could have shown it."

It is contended that this was error because if the court refused to permit defendant to prove certain things by these witnesses, then such matters were not in the record and it was not proper for counsel to comment on them. It will be noted that counsel did not state what defendant had offered to prove by his brothers and it does not seem to us that the language used could have in any wise prejudiced the defendant's rights before the jury. The argument of counsel is generally within the discretion of the trial court and its rulings in regard thereto will not be reversed unless there is manifest error therein. The court gave the jury a specific instruction in which it told the jury that if counsel made statements of matters not in proof, it should disregard those statements entirely, disregarding prejudice, denunciation and sympathy and follow the law and evidence.

The court further told the jury that what the attorneys said they believed about the case should not be considered by the jury. The court refused to exclude the remarks in question, giving as its reason for such refusal that the instruction it had already given fully covered the statements. Thus it will be seen that if any

prejudice might have resulted to the defendant from the remarks, it was removed by the remarks of the court.

We have carefully considered the record and finding no prejudicial error in it, the judgment will be affirmed.

COTTON v. WHITE.

Opinion delivered October 29, 1917.

1. TAX SALES—DESCRIPTION.—A tax sale is void which describes the land to be sold as "E Pt. NW SE, 27 acres."
2. ADVERSE POSSESSION—NOTORIETY—AGREEMENT TO ATTORN.—A bare agreement on the part of one in possession of land as tenant of the original owner, to attorn to a tax purchaser, who claims it is insufficient, in the absence of notoriety, to render the latter's possession adverse to such original owner.
3. CORPORATIONS—EXECUTION OF DEED—CORPORATION DE FACTO.—The deed of a corporation *de facto* is binding against the rest of the world, and can be objected to only by the State. Where land is conveyed to a company as a corporation, and by its president and secretary it undertakes, as such corporation, to convey such land to another, it will be presumed that it was regularly incorporated and that its officers were authorized to make the deed.
4. TAXATION—PRESUMPTION AS TO TAX SALE.—The statutory presumption in favor of a conveyance of land forfeited for taxes, executed by the Commissioner of State Lands (Kirby's Digest, § 4807) is overcome by proof that the land was not assessed by a description sufficient to identify it.
5. TAX SALES—VOID DEED.—One holding possession of land under a void tax deed, holds as a trespasser.
6. EJECTMENT—AGAINST TRESPASSER HOLDING UNDER VOID TAX DEED.—In an action in ejectment, the rule that the plaintiff can recover only upon the strength of his own title, does not apply when defendant is a mere trespasser invading the actual possession of plaintiff, in which case plaintiff can recover on prior peaceable possession alone.
7. TAX SALES—FORFEITURE AND PURCHASE BY PERSON IN POSSESSION.—One in possession of land, and receiving the rents and profits thereof under claim of ownership, will not be permitted to strengthen his title by allowing the land to forfeit for taxes and purchasing it at tax sale.
8. OFFICERS—OFFICIAL ACTS—PRESUMPTION OF VALIDITY.—The law presumes that every public officer does his duty, and that in his official acts that he has not exceeded his authority, and, if he

can act only in a certain contingency, that such contingency has happened.

9. TAX SALES—DEED—DELINQUENCY IN PREVIOUS YEARS.—A valid tax sale will pass title, though the State might still have a lien for delinquent taxes of previous years.

10. TAX SALES—DESCRIPTION.—A description of lands in the assessment as "part NW¼ of the NE¼, and west p. SE¼ of the NE¼, 50.96 acres," will render a sale thereof for non-payment of taxes, void.

11. TAX SALES—VOID SALE—REDEMPTION.—Where a tax sale is void because of the description, an attempt to redeem therefrom by the same description is ineffective.

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

J. M. Shinn and *Troy Pace,* for appellant.

1. Appellee is barred by the statute of limitations. Kirby's Digest, § 5061; 77 Ark. 324; 20 *Id.* 508; 20 *Id.* 542; 60 *Id.* 163, 499; 71 *Id.* 117; 53 *Id.* 418; 82 *Id.* 80; 59 *Id.* 460.

2. Appellant had the right to accept attornment from Patrick, although a tenant of appellee. 53 Ark. 238; 47 *Id.* 351; 17 *Id.* 546; 21 *Id.* 160; 45 *Id.* 177.

3. Appellee fails to show title in himself and can not maintain this action. He must succeed upon the strength of his own title. 95 Ark. 445; 37 *Id.* 643; 77 *Id.* 338; 82 *Id.* 295; 88 *Id.* 37; 90 *Id.* 420.

4. The lands are not sufficiently described in any of appellee's deeds. There is no proof of actual possession for two years. Appellee has paid no taxes since 1906, except a redemption. 74 Ark. 383. A redemption is not a payment of taxes. 83 *Id.* 520.

5. The tax sale of 1907 was valid and the description good, and therefore appellant by his purchase acquired a valid title. No forgery by erasure or interlineation was shown. Kirby's Digest, § 7086, provides that the clerk shall keep a record of delinquent lands, etc. The record alone can be looked to. 55 Ark. 30; 100 *Id.* 488; 51 *Id.* 34; 55 *Id.* 218. It can not be contradicted by parol evidence. 61 *Id.* 36; 68 *Id.* 248. Errors may be corrected. Kirby's Digest, § 7031.

6. As to indefinite descriptions, see 111 Ark. 220; 56 *Id.* 44; 45 *Id.* 17.

7. In conclusion, appellee is barred, he has failed to establish title in himself, as to the lands conveyed by clerk's deed, he has not complied with § 7105, Kirby's Digest; the descriptions are valid, the tax sales regular and appellant has acquired valid title to the lands.

C. M. Cooke, for appellee.

1. The description was void for uncertainty. 59 Ark. 460; 50 *Id.* 484; 56 *Id.* 172; 62 *Id.* 188. The deeds are not color of title and the two years' statute is no bar. A tenant can not dispute his landlord's title. 27 Ark. 50; 28 *Id.* 143; 84 *Id.* 220. Nor can a third person make use of his possession thus acquired to found a hostile claim to the landlord. Tiedeman, Real Property, Art. 171; 26 Barb. 443; 28 Ark. 153; 28 *Id.* 153; 39 *Id.* 136; 43 *Id.* 28. Patrick was appellee's tenant. Defendant's possession was not adverse. 76 Wis. 555; 45 N. W. 418. The deeds were not even color of title. 50 Ark. 484; 3 *Id.* 18; 30 *Id.* 640; 40 *Id.* 237. Appellant acquired no better title by the tax sale of 1910. 62 Ark. 188. The deeds to appellee sufficiently describe the lands to identify them.

2. It is presumed that the officers who executed the deeds were authorized to do so. 90 Ark. 420. The corporation would be estopped to deny its corporate existence. As against it appellee would have title and right of possession. 31 Ark. 274; 36 *Id.* 464. In cases like this it is only necessary to show such title that if the cloud raised by defendants' unfounded claim were removed, plaintiff would have a reasonably clear title. 37 Ark. 643.

3. Ejectment may be maintained upon the prior possession, or if parties through whom he claims, such possession being a sufficient *prima facie* title. 15 Cyc. 30; 21 Ark. 62; 31 *Id.* 334; 33 *Id.* 150; 40 *Id.* 108; 62 *Id.* 51.

4. It was not necessary to prove payment of taxes for seven years. The proof shows that the taxes were

paid until the void forfeiture in 1907. Kirby's Digest, § 5057, refers only to wild and unimproved lands, not in actual possession. The lands here were under fence, in cultivation and a house built.

5. Appellants' deeds were void. 56 Ark. 172. It was the duty of the clerk to correct errors found in his tax books (Kirby's Digest, § 7031), but it was beyond his powers to make the changes after the assessment and publication. 5 How. 365.

6. A tenant can not purchase the landlord's title. 21 Ark. 160. Tenants can not acquire title by limitation under a tax deed, their possession not being adverse. 77 Ark. 570; 33 *Id.* 195; 61 Tex. 302.

7. The void tax sale did not extinguish appellee's title. 62 Ark. 194; 15 *Id.* 363. Appellant acquired no title by adverse possession for two years. 62 Ark. 213. The descriptions are insufficient. 120 Ark. 528; 122 *Id.* 376. Adverse possession must be open, visible and notorious. 92 Ark. 30. The deeds should be canceled, and the title quieted in appellee.

STATEMENT OF FACTS.

On July 26, 1914, appellee brought suit in the Boone Chancery Court, alleging that he was the owner of the following land situated in Boone County, Arkansas, towit:

Commencing in the middle of the main channel of Crooked Creek, five chains due west of a point on line between the northeast quarter of northeast quarter and northwest quarter of the northeast quarter of section 1, township 18 north, range 20 west, 76 poles and forty links south of mutual corner of said tract on north line of said section, running thence north 46 degrees west, 4 chains to a branch; thence up said branch with meanderings of same 28 poles to a post oak marked "K;" thence north to north line of said section 1; thence west to the northwest corner of the northwest quarter of the northeast quarter of said section 1; thence south to the southwest corner of the southwest quarter of the northeast quar-

ter of said section 1; thence east to the dividing line between the lands of David Smith, Sr., and Samuel Milum; thence to the division line between the northwest quarter of the southeast quarter and the southwest quarter of the southeast quarter of said section 1; thence east to the center of southeast quarter of said section 1; thence north to the northeast corner of the northwest quarter of the southeast quarter of said section 1; thence due east to the middle of the main channel of Crooked Creek; thence down said creek to the beginning point, containing 98 acres more or less, and being a part of the west half of the northeast quarter; part of the northwest quarter of the southeast quarter and part of the southeast quarter of the northeast quarter of section 1, township 18 north, range 20 west.

That the same was assessed for the year 1907, as follows, towit:

SECTION 1, TOWNSHIP 18, RANGE 20.

Pt. NW. NE., W. Pt. SE. NE., 50.96 acres...Valuation $250
N. Pt. SW. NE., 20.04 acres.....Valuation $100
E. Pt. NW. SE., 27 acres.....Valuation $150

That, after the lands were returned delinquent under the above description, the tax books and delinquent list were fraudulently altered so as to describe the said lands as follows:

E Pt. NW NE, W Pt. SE NE, 50.96 acres.

N½ SW NE, 20.04 acres.

E 27/40 NW SE, 27 acres.

That all of the above lands, by the latter description, were sold to the State of Arkansas on the second Monday in June, 1908, and after the second Monday in June, 1910, the clerk certified the same by the latter description as having been sold to the State, and on June 15, 1910, defendant purchased from the State Land Commissioner the N½ SW¼ of the NE¼ and the E 27/40 of the NW¼ of the SE¼, both in section 1, township 18 north, range 20 west, and procured deed therefor.

Plaintiff further alleged that, on April 24, 1914, plaintiff redeemed from the State the following lands, towit:

E Pt. NW NE, W Pt. SE NE, above section, township and range; paying all taxes due on same up to and including the year 1913, and that this portion of his lands embraces part of the NW of the NE and part of the SW of the NW and part of the SE of the NE, section 1, township 18 north, range 20 west, and this, with the 47.04 acres bought by the said defendant from the State Land Commissioner, is all the land plaintiff claims, being 98 acres, more or less.

Plaintiff further alleged that for the year 1910, the following lands were erroneously placed on the tax books and were sold by the collector of taxes to the defendant, towit:

W ½ NW NE, 18 acres.

W ¼ SE NE, 6 acres.

S ½ SW NE, 20 acres.

N ½ SW NE, 20 acres, all in section 1, township 18 north, range 20 west.

Plaintiff deraigned title from the Bartles Lead & Zinc Company, a corporation, back to the original enterers of the land, and asked that the defendant's deed from the Commissioner of State Lands, and the four deeds from the clerk of Boone County, be removed as clouds upon his title.

Defendant's answer denied plaintiff's ownership of the lands in question, and denied that the tax titles relied upon by defendant were void as alleged, and further pleaded the statute of limitations of two years as to the N½ of the SW of the NE and the E 27/40 of the NW of the SE of section 1, township 18 north, range 20 west, alleging that he had been in actual possession thereof since June, 1910.

The chancellor found, from the evidence, that the lands claimed by plaintiff were assessed for the year

1907 in the name of H. A. Bower and described on the tax books as follows, towit:

Pt. NW NE.

W Pt. SE NE, 50.96 acres.

N Pt. SW NE, 20.04 acres.

E Pt. NW SE, 27 acres, section 1, township 18 north, range 20 west.

He found that there were erasures made both on the tax books and on the record of the notice of publication of the delinquent lands and interlineations made thereon, changing the N Pt. SW NE 20.04 acres to read N ½ SW NE 20.04 acres, and the E. Pt. NW SE 27 acres to read, E 27/40 NW SE, 27 acres.

The chancellor held that the description in the assessment and in the notice of delinquent lands as N Pt. SW NE, 20.04 acres, and E Pt. NW SE, 27 acres is a good description and sufficient to identify the lands in question. He accordingly decreed that the defendant's title thereto should be quieted as against the plaintiff.

He further found that defendant acquired no title to W½ NW NE, S½ SW NE, and W¼ SE NE, section 1, township 18 north, range 20 west, by virtue of the deeds from the clerk, and accordingly canceled the latter deeds as clouds upon plaintiff's title.

Defendant has prosecuted this appeal, and plaintiff has been granted a cross-appeal.

T. D. CRAWFORD, Special Judge, (after stating the facts). Appellant asks that his deed from the State Land Commissioner to the E 27/40 of the NW¼ of the SE¼, section 1, township 18 north, range 20 west, in Boone County, be confirmed and quieted. The chancellor found that this tract was assessed and advertised in the list of delinquent lands as "E Pt. NW SE, 27 acres," and that the tax books and record of the notice of the delinquent lands were changed so as to make the description read "E 27/40 NW SE, 27 acres." He held, however, that the description in the assessment as E Pt.

NW SE 27 acres, was a good description and sufficient to identify the land. **Was this holding correct?**

(1) This court has uniformly held such a description to be insufficient in a tax title. In *Covington* v. *Berry*, 76 Ark. 460, a tax deed describing the land sold as "E Pt. of the SE¼ of section 30, township 5 north, range east, containing 60.30 acres," was held void. So, where at a tax sale the deed described the land sold as "Part E½ NE¼, section 32, township 12 south, range 1 west, 55 acres," the deed was held void. *Dickinson* v. *Arkansas City Improvement Co.*, 77 Ark. 570. See also, *Hewett* v. *Ozark White Lime Co.*, 120 Ark. 528.

As a further source of title, appellant relies upon the two years' statute of limitations. He testified that he took possession of the above tract in 1910 by going down there and finding a Mr. Patrick in possession and cultivating the land. Patrick told him that he had been a tenant of the original owner. Appellant told Patrick that he had bought the land at tax sale and wanted possession, and Patrick agreed to hold under appellant and pay rent to him provided certain improvements were made by appellant. These improvements were made, and Patrick remained on the land as appellant's tenant for three years. Was Patrick's possession as tenant of appellant adverse to the holders of the legal title?

(2) The element of notoriety must be added to adverse possesion before it can ripen into title by limitation. A bare agreement on the part of one in possession of land to attorn to another, who claims it, is insufficient, in the absence of notoriety, to render the latter's possession adverse to a third party. *Johnson* v. *Elder*, 92 Ark. 30, 121 S. W. 1066. There is no evidence in this case that notice was in any manner brought home to appellee, or to his predecessors in title, that Patrick was holding adversely to him or them. Under these circumstances, the claim of title by adverse possession must fail.

(3-4) Appellant insists that appellee is not entitled to have his title to this tract of land confirmed, because he failed to show title in himself to the land. He quotes from *Bullock* v. *Duerson,* 95 Ark. 445, to the effect that a plaintiff in a suit to quiet title must succeed, if at all, as in actions of ejectment, upon the strength of his own title, and not upon the weakness of his adversary's. Appellee relied upon a deed purporting to be executed by the Bartles Lead & Zinc Company, by its president and secretary. Appellant in his answer denied that the Bartles Lead & Zinc Company was a corporation, and, if it was such, denied that said president and secretary had any authority to execute said deed conveying said lands. The appellant's abstract shows that a deed conveying these lands was executed by Jacob Bartles to the Bartles Lead & Zinc Company, and that the company conveyed the lands to appellee by a deed executed by its president and secretary, and that both deeds were duly acknowledged and recorded. There was no affirmative proof as to whether the Bartles Lead & Zinc Company was a duly incorporated company, or, if it was a corporation, whether its officers were authorized to execute such deed.

Appellant insists that, in the absence of proof, it will not be assumed that there was such a corporation, or that the president and secretary were authorized to execute the conveyance upon which appellee relies.

Appellant's abstract justifies a finding that the Bartles Lead & Zinc Company as a corporation undertook to receive and convey title to these lands. Except as against the State, it is immaterial whether such corporation was a *de jure* or a *de facto* corporation, and its conveyances are binding as against all the rest of the world. 1 Clark & Marshall, Private Corporations, Sec. 81d. Mr. Cook says: "The execution and delivery of an instrument by a corporation as a corporation raises the presumption that the company was regularly incorporated." 3 Cook on Corporations, Sec. 722, page 2554.

"Whenever the circumstances may have been such as to authorize a conveyance, lease, mortgage or pledge of its property by a corporation, that it was authorized will be presumed until the contrary is affirmatively shown." 1 Clark & Marshall, Private Corp., Sec. 164. Where land is conveyed to a company as a corporation, and by its president and secretary it undertakes, as such corporation, to convey such land to another, it will be presumed that it was regularly incorporated and that its officers were authorized to make the deed.

(5) Moreover, appellant is not in a position to insist upon the rule upon which he relies. The statutory presumption in favor of a conveyance of lands forfeited for taxes, executed by the Commissioner of State Lands (Kirby's Digest, § 4807) has been overcome in this case by proof that the land was not assessed by a sufficient description to identify the land. The deed of the commissioner being invalid, plaintiff was in fact a trespasser.

(6) While it is a general rule that a plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's, this rule has no application where the defendant is a mere trespasser invading the actual possession of plaintiff, in which case plaintiff can recover on prior peaceable possession alone. 15 Cyc. 22; *Green* v. *Jordan,* 83 Ala. 220, 3 Am. St. Rep. 711; *Horton* v. *Murden,* 117 Ga. 72; *Rhule* v. *Seaboard Air Line Ry. Co.,* 102 Va. 343; Newell on Ejectment, p. 434; Warvelle on Ejectment, Sec. 237; *John Henry Shoe Co.* v. *Williamson,* 64 Ark. 100; *Price* v. *Greer,* 76 Ark. 426.

The rule requiring the plaintiff, in actions of this character, to recover on the strength of his own title, is based upon the presumption that a defendant in possession is rightfully in possession. No such presumption obtains in favor of a mere trespasser.

Appellant claims title, by purchase at tax sale in 1911, to the following tracts of land, all situated in section 1, in township 18 north, range 20 west, towit:

1. The N½ of the SW¼ of the NE¼.
2. The W½ of the NW¼ of the NE¼.
3. The S½ of the SW¼ of the NE¼.
4. The W¼ of the SE¼ of the NE¼.

Four separate deeds were executed in 1913 by the county clerk, conveying the above lands to appellant in pursuance of the tax sale in 1911.

Appellee has pointed out no defect in the sale or in the deeds, except that he contends that tracts 1, 2 and 4 were improperly placed on the tax books, and that appellant was disqualified from purchasing the first tract by reason of being in possession thereof.

(7) As to the tract numbered 1, the N½ of the SW¼ of the NE¼, appellee contends that, inasmuch as this land forfeited to the State in 1907 by an erroneous description, and was purchased by appellant from the State, he could not acquire a better title by allowing it to forfeit for taxes and buying it in. This contention must be sustained. One in possession of land, and receiving the rents and profits thereof, under claim of ownership, will not be permitted to strengthen his title by allowing the land to forfeit for taxes and purchasing it at tax sale. *Rodman* v. *Sanders,* 44 Ark. 504; *Wade* v. *Goza,* 99 Ark. 543. The purchase of land at tax sale can not have the effect of strengthening the title of those who are in possession and taking the profits, since they ought to keep down the taxes. *Hunt* v. *Gaines,* 33 Ark. 275.

In this case, defendant testified that he was in possession of the land, and that he received the rents and profits thereof for the year in which it was delinquent. As to this tract, his title must fail.

As to the second and fourth tracts, appellee's contention is that these tracts forfeited to the State in 1907, and that this took the tracts off the tax books and they

could not be replaced thereon until the State Land Commissioner certified the lands back to the clerk.

(8) Conceding, without deciding, that this is true, it does not appear that the lands were not properly certified by the State Land Commissioner, before the county clerk placed them on the tax books. The law presumes that every officer does his duty, and that in his official acts he has not exceeded his authority, and, if he can act only in a certain contingency, that such contingency has happened. *McCamey* v. *Wright,* 96 Ark. 477.

(9) The sale of these lands for the taxes of 1910 was not invalid because the taxes due on these tracts for previous years were not entered on the tax books for the year 1910. It is true that Kirby's Digest, § 7022, makes it the duty of the county clerk to enter on the tax books the taxes for the years in which the lands have escaped taxation. A valid tax sale for 1910 would pass title as against the original owner, though the State might still have a lien for the taxes of previous years. It does not appear, however, that the taxes for the intervening years have not, in fact, been paid.

(10) Furthermore, appellee's contention is that the description of these two tracts in the assessment of 1907 was absolutely void. They were described in the tax sale in 1911 as the W½ of the NW¼ of the NE¼, and the W¼ of the SE¼ of the NE¼; but in the tax assessment of 1907 they were described as part NW¼ of the NE¼, and W. pt. SE¼ of the NE¼, 50.96 acres. The court agrees with appellee's contention that the description in the tax assessment of 1907 was void, and that it described no lands and that the tax sale was thereby rendered void, even though the land was correctly described in the State Land Commissioner's deed. It is obvious that, under these circumstances, no title passed to the State by the forfeiture, and the lands could properly be placed on the tax books.

(11) On April 24, 1914, appellee undertook to redeem the two tracts of land which forfeited to the State

in 1910 for the taxes of 1907, towit, E Pt. NW¼ NE¼ and W Pt. SE¼ NE¼, section 1, township 18 north, range 20 west, 50.96 acres, by paying the taxes for that year and the intervening years. He claims to own that part of NW¼ NE¼ of the section which lies west of Crooked Creek and a certain branch thereof. He admits that so much of the forty-acre tract as lies east of these streams belongs to a third person, whose taxes have been paid. Inasmuch as the forfeiture of the above described tracts in 1910 is held to be void for inadequacy of description of the lands, a redemption thereof by the same description is equally ineffective, since it can not be ascertained from the redemption deed what lands were redeemed.

No objection whatever is pointed out to the third tract purchased in 1911 by appellant from the tax collector, namely, the S½ of the SW¼ of the NE¼, in the section, township and range aforesaid. This tract does not seem to have forfeited in 1907.

It will be noticed that appellee's record title is meandered by a certain stream called "Crooked Creek" and by a certain branch thereof. No plat has been furnished in the transcript showing the course of this stream. It is impossible for this court to determine just how much of the land purchased by appellant at the tax sale of 1911 was included in the lands claimed by appellee under his deed from the Bartles Lead & Zinc Company.

As against the appellant, the appellee's title to the E 27/40 of the NW¼ of the SE¼, and the N½ of the SW¼ of the NE¼, both of section 1, township 18 north, range 20 west, will be quieted.

As against the appellee, the decree as to appellant's title to the W½ of the NW¼ of the NE¼, and the S½ of the SW¼ of the NE¼ and the W¼ of the SE¼ of the NE¼, all in section 1, township 18 north, range 20 west, in Boone County, is reversed and remanded with directions to enter a decree accordingly.

HART and SMITH, JJ., dissent in part.

HUMPHREYS, J., not participating.

MITCHELL v. HAHN.

Opinion delivered November 5, 1917.

1. NEGLIGENCE—OVERFLOW OF LANDS—VIS MAJOR—CO-OPERATING CAUSES.—In an action for damages resulting from an overflow, the plaintiff claimed that the overflow was caused by defendant in the construction of a drainage ditch. Defendant plead excessive rains and *vis major*. *Held*, an instruction was proper which told the jury that an act of God, in order to excuse the defendant must be both the proximate and sole and only cause of the damage, and that defendant could not escape liability if his own negligent act in conjunction with the act of God, resulted to cause the injury, and that said instruction was not in conflict with another instruction given by the court, which told the jury: "Defendants are not liable for any damage resulting from causes beyond their control," and if the rain which caused the overflow "was such an extraordinary rain that no reasonable man would expect and guard against it," to find for the defendants.
2. OVERFLOW OF LANDS—IMPROPER CONSTRUCTION OF DAM—INSTRUCTIONS FROM ENGINEER AND COMMISSIONERS.—A contractor can not escape liability resulting from the negligent construction of a dam, on the overflow of lands, although he acted under the direction of the engineer, appointed by the commissioners, of a drainage district for which he was working; but the contractor is not liable, where he followed the terms of the contract with the district, and operating in accordance therewith, built the dam complained of, with that degree of skill which is ordinarily possessed and exercised by contractors doing the same or similar work, and was not negligent in the building or maintenance thereof.

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

Brundidge & Neelly, for appellant.

1. The instructions are conflicting and erroneous. 55 Ark. L. Rep. 348. Other instructions were abstract and misleading.

Rachels & Yarnell, for appellees.

1. There is no conflict nor error in the instructions. None of them are abstract or misleading. They state the law correctly. 104 Ark. 62; 95 *Id.* 300; 110 *Id.* 416;

94 *Id.* 380; 95 *Id.* 345; 118 Ark. 1; 95 *Id.* 345. The verdict is supported by the evidence and the instructions were harmonious and correct.

McCULLOCH, C. J. This is an action instituted by appellant Mitchell against appellees, E. J. Hahn and the Northern Construction Company, for recovery of damages on account of alleged negligence of the defendants in damming up a natural stream of water so as to overflow lands of appellant on which there were growing crops. The case was tried before a jury and the verdict was in favor of appellees.

A certain drainage district was organized in White County, Arkansas, and appellees contracted with the district to construct the improvement, and in doing so dammed up Overflow Creek in order to secure a sufficient quantity of water to float the drainage boat. Appellant's nearby lands were overflowed from the waters of the creek, and it is alleged that crops were damaged and that the overflow was caused by damming up the stream and failing to provide a spillway of sufficient capacity to carry off the surplus water in time of excessive rains. Appellees denied the allegation of negligence and contended that the work was done strictly in accordance with the plans and specifications formed by the drainage district for the construction of the work, and that there was no negligence in constructing and maintaining the dam in Overflow Creek. The evidence was sufficient to warrant a finding in appellees' favor that there was no negligence or that the damage was not caused by the construction or maintenance of the dam.

(1) The only contention here is that there was error of the court in giving instructions. In the first place it is contended that instruction No. 6, given at the request of appellant, and instruction No. 7, given at the request of appellees, were contradictory and erroneous. Those instructions read as follows:

"No. 6. The jury are instructed that it is urged by the defendants that the rains which occurred in May,

1915, were so unprecedented that the flood caused thereby was extraordinary, that it was, in legal contemplation, the act of God, for which the defendants should not be liable. Now, such an act of God which excused the defendants from liability for damages must be not only the approximate cause of the injury, but the sole and only cause thereof; and, if you find from the testimony that the injury was caused by the act of God and that act was so mingled with the acts of the defendants in constructing a dam across Overflow Creek and not leaving sufficient openings therein to carry off the water and that this failure was one of the co-operating causes that produced the injury complained of then the defendants would still be liable to the plaintiff for whatever damage he has sustained as shown by the proof in this cause."

"No. 7. You are instructed that the defendants are not liable for any damage resulting from causes beyond their control, and, if you find from the evidence that the rain which caused the overflow complained of was such an extraordinary rain as that no reasonable man would expect and guard against then you will find for the defendants."

We do not think there is any contradiction in the two instructions, for they each state the correct principles of law applicable to the issues in the case. Instruction No. 6, given at appellant's request, correctly states the doctrine of concurring causes of injury under which appellees might be held liable, and instruction No. 7 correctly states the circumstances under which appellees might be held liable for the damages. The two instructions present different phases of the case, and are both correct and can be read in harmony with each other.

(2) It is next contended that instruction No. 5, given at the instance of appellant, and instruction No. 9, given at the instance of appellees, are likewise conflicting and erroneous. Those instructions read as follows:

"No. 5. The jury are instructed that, although you may find from the testimony that the dam across Overflow Creek was built under the direction and supervision of the engineer in charge of said drainage district, and that said engineer was acting under the supervision and at the instance of the commissioners in charge of said drainage district, still, if you find from the evidence that the injury complained of resulted from negligence and unskillfullness in the construction of said dam, or that the same was constructed higher than necessary for the completion of said work and that by reason thereof plaintiff's crops were damaged, then your verdict will be for the plaintiff."

"No. 9. You are instructed that the defendants are only responsible for their negligent acts done independently of the Overflow Drainage District and for their own private ends and convenience and for the acts done in pursuance of the contract with said district in a negligent, improper or unskillful manner, and if you find from a fair preponderance of the evidence that the defendants were following the terms of their contract with the Overflow Drainage District, and operating in accordance therewith, built the dam complained of herein, as a part of the said ditch, and that they built said dam with that degree of skill which is ordinarily possessed and exercised by contractors doing the same or similar work, and were not negligent in the building or maintenance thereof, then the defendants are not liable in this action and your verdict will be for the defendants."

These two instructions correctly state the principles upon which liability is imposed, respectively, as laid down by this court upon an improvement district and its independent contractors. *Wood* v. *Drainage District No.* 2, 110 Ark. 416; *Timothy J. Foohey Dredging Co.* v. *Mabin,* 118 Ark. 1. Instruction No. 5 states the circumstances under which the contractor might be held liable, and instruction No. 9 states, conversely, the circum-

stances under which liability may be imposed upon the improvement district, and not on the contractor.

Error is also assigned in giving instruction No. 5, which reads as follows:

"No. 5. Before you can find for the plaintiff you must find from a fair preponderance of the evidence that the damage complained of was caused by the dam set out in the complaint and that the damages must have been of such a nature that an ordinary person could have foreseen and prevented it."

The objection made to this instruction is that it confines the inquiry to the overflow caused by the dam and ignores the question of faulty construction in failing to provide a spillway of sufficient capacity to allow the surplus water to flow over the dam. We do not think the instruction is open to that objection. In some respects the instruction is not accurately worded, but it is not open to the objection urged here against it.

The giving of another instruction is assigned as error, which told the jury in substance that if the overflow complained of resulted from causes other than the dam constructed by appellees, then there could be no recovery in this case. The objection made to the instruction is that there was no testimony tending to show that the damage might have resulted from the other causes recited in the instruction, and that for that reason the instruction was abstract. We think under the circumstances the jury might have found that the damage resulted from some of the other causes mentioned, and the instruction was, therefore, not abstract.

There is no error in the proceedings, and the judgment is, therefore, affirmed.

HARRINGTON v. WHITE.

Opinion delivered November 5, 1917.

1. STOCK LAWS—RESTRAINING STOCK FROM RUNNING AT LARGE.—The Act of 1915, p. 676, providing for an election, following a petition to restrain stock from running at large, held not invalid as an attempted delegation of legislative authority.
2. STATUTES—VALIDITY OF PASSAGE.—Where an act of the Legislature is signed by the Governor and deposited with the Secretary of State, a presumption is raised that every requirement necessary to its passage has been complied with, unless the contrary permanently appears from the records of the General Assembly. An apparent conflict between the journals of the two houses which arises merely from the silence of the Senate journals as to the exemption of certain counties from the operation of the act, will be treated as a clerical misprison.
3. STATUTES—VALIDITY OF PASSAGE.—The rule announced in 2, above, is limited to those things which the Constitution does not require that the journals of the respective Houses of the General Assembly shall show; the rule does apply where there is no constitutional requirement that the journals shall recite the substance or contents of an amendment.
4. STATUTES—REFERENCE TO OTHER ACTS—CONSTITUTIONAL LIMITATION.—Where a statute by its own language grants some power, confers some right or creates some burden or obligation, it is not in conflict with the Constitution, although it may refer to some existing statute for the purpose of pointing out the procedure in executing the power, enforcing the right, or discharging the burden.
5. STOCK LAWS—PUBLICATION OF NOTICE.—*Held*, the publication of the notice required by Act of 1915, p. 676, to have been legally complied with.
6. STOCK LAWS—ELECTION—WHO MAY VOTE.—Under Act of 1915, p. 676, the qualified electors in the townships in certain counties may sign the petition and vote at the election to determine the restriction of the running of stock at large, and *held*, under the act, residents of towns in the townships may sign the petition and vote at the election.

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

1. The act is not a delegation of legislative authority. 35 Ark. 70; 37 *Id.* 374; 141 Ala. 84; 11 Ariz. 430;

46 Cal. 240; 42 Conn. 364; 62 Fla. 211; 234 Ill. 146; 109 Me. 48; 200 Mass. 152; 51 U. S. (L. Ed.) 523; 35 *Id.* 294, and many others.

2. The last sentence in section 4 is not in conflict with section 23, Art. V, Const. 102 Ark. 411; 121 Fed. 283.

3. Section 1 is not void for ambiguity. 91 Ark. 5.

4. The bill properly passed the Legislature. 40 Ark. 215; 61 *Id.* 226, 238; 90 *Id.* 600, 603; 110 *Id.* 269; 90 *Id.* 174.

5. Notice of the result of the election was sufficient. 77 Ark. 161, 166; 39 Am. & E. Ann. Cases 707-8; 53 Am. Dec. 69; 50 Ark. 266; 9 R. C. L. 992.

6. Citizens of cities and towns were not disqualified to sign the petition. 63 S. W. 884; 3 C. J. 175.

Stevens & Stevens, for appellees.

1. The act is void as it delegates legislative authority. 51 U. S. (L. Ed.) 523; 35 Ark. 69; 37 *Id.* 374, 382; 91 S. W. 298; 104 Ark. 595; 110 *Id.* 534

2. Section 4 extends the estray law by reference to its title only. 49 Ark. 131-3-5; 52 *Id.* 294-6; 6 So. 119; 11 *Id.* 414.

3. The act never passed the Legislature. 40 Ark. 200; 72 *Id.* 565; 41 *Id.* 471; 40 L. R. A. 200; 38 *Id.* 74.

4. The act is vague, indefinite and uncertain. It is contradictory. 44 Cent. Dig. 2837; 64 N. W. 365; 66 *Id.* 658; 37 N. J. L. 228; 19 Vt. 129; 59 N Y. 53.

5. The proper notice was not given. 116 Ark. 291; 74 S. W. 773; 105 *Id.* 539.

6. Citizens of cities and towns had no right to sign the petition or vote. 110 Ark. 532; 104 *Id.* 583; Black on Int. Laws (2 Ed.), § 105, p. 345, 331-2-3.

7. "Township" means political township. 54 Mich. 641; 40 N. J. 302; 29 Ark. 354.

McCULLOCH, C. J. This appeal brings in review a special statute enacted by the General Assembly of 1915 (Acts of 1915, page 676), for the creation of dis-

tricts wherein live stock is to be prevented from running at large, and appellees, who were plaintiffs below, attack the validity of the statute and the proceedings pursuant thereto organizing a district. The statute provides in substance that whenever twenty-five per cent of the voters of any three or more townships situated in a body in any county shall petition for an election on the question of restraining horses, mules, cattle, swine, etc., from running at large, the county court shall make an order for such an election in those townships; that if the vote of a majority at the election shall be in favor of enforcing the law restraining the running at large of animals in the given territory, the clerk of the county court shall enter the result of the election upon the records of said court and give notice of the result, and that six months thereafter it shall be unlawful for the owners of such animals to permit the same to run at large in the territory. The statute provides that it shall be lawful for any person to take up stock found running at large inside of the prohibited territory, and to keep the same until compensation be paid, and that notice of the taking up of the stock be given if the owner be known, otherwise, that such animal "shall be deemed to be strays and shall be dealt with as required by law with respect to taking up such property as strays, under the estray law of this State." The statute further provides for an appraisement to ascertain the compensation for the keep of the animals while restrained and for the damages caused by depredation of animals while at large.

The particular district now under review was formed in Columbia County, and is composed of the townships of McNeill, Magnolia and Buena Vista, which lie in a body. Appellees instituted this action in the chancery court of Columbia County to enjoin appellants from taking up stock running at large in the townships mentioned. The chancery court held that the statute and the proceedings thereunder were void and rendered a decree granting the relief prayed for, enjoining appellants from

taking up stock pursuant to the terms of the statute. No question is raised as to the right of appellees to relief in equity instead of resorting to an action at law for damages, so we will not discuss that question, but will proceed, in response to the argument of counsel, to determine the questions they present concerning the validity of the statute and the proceedings thereunder.

(1) It is insisted, in the first place, that the statute is void because it is an attempt to delegate legislative authority. It seems plain to us, however, that the statute is not a delegation of legislative authority, but comes within the rule that the Legislature may "make a law to delegate the power to determine some facts or state of things, upon which the law makes or intends to make its own action depend." *Boyd* v. *Bryant,* 35 Ark. 69; *Nall* v. *Kelley,* 120 Ark. 277. In each of the cases cited we approved the rule announced by the Supreme Court of Ohio in *Cincinnati, etc., Rd. Co.* v. *Commissioners,* 1 Ohio State 77, as follows: "The true distinction is between the delegation of power to make the law, which necessarily involves the discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first can not be done. To the latter no valid objection can be made." Applying that test to the case in hand, it is plain that the statute does not amount to a delegation of the legislative power, but on the other hand the Legislature exercised its power by declaring what the law shall be when put into operation in a given locality by ascertainment of certain facts, *i. e.,* the will of the majority in the given locality to be affected.

(2-3) It is next contended that the statute was never legally passed by the General Assembly for the reason, it is argued, that certain amendments adopted by the House were not, according to the records, adopted by the Senate. The history of the passage of the bill, as reflected by the records in the office of the Secretary of State, is as follows: It originated as a House bill

and after amendments were adopted in the House exempting eight counties named therein from its operation it was duly passed by that body and sent to the Senate for consideration. The journals of the Senate recite that the bill was amended by adding to the exemption clause the counties of Monroe, St. Francis, Arkansas and Crittenden, and that the bill as amended was duly passed and returned to the House. The journals of the House recite an amendment by the Senate adding the counties of Monroe, St. Francis, Arkansas, Crittenden, Drew, Desha, Bradley and Union to section 11 of the bill, which is the section exempting certain counties from the operation of the statute. The journals also show that the amendment was concurred in by the House and engrossed into the bill, and that the bill as thus amended was finally voted on and passed. The enrolled bill which was signed by the Governor and filed in the office of the Secretary of State, includes the last four mentioned counties as being exempted. The original bill has been lost. Two of the counties originally put into the exemption clause by the House appear in pencil in the engrossed bill. The state of the record concerning the passage of the bill, therefore, is that the enrolled bill as signed by the Governor is complete on its face, and is in accordance with the recitals of the House journal, but the Senate journals fail to recite that the counties of Drew, Desha, Bradley and Union were included in the amendment adopted by that branch of the General Assembly. The question presented, therefore, is whether the omission of those counties from the recital of the journal of the Senate is sufficient to raise the presumption that they were not included in the amendment acted upon by the Senate, or whether the presumption in favor of the regularity arising from the face of the enrolled bill as signed by the Governor should prevail, notwithstanding the silence of the Senate journals on the subject of including those four counties in the exemption clause. An act of the Legislature signed by the Governor and deposited with

the Secretary of State raises the presumption that every requirement was complied with, unless the contrary affirmatively appears from the record of the General Assembly, and we think that the mere silence of the journals of the Senate as to the inclusion of certain counties in the amendment to the exemption clause is not sufficient to overcome the presumption of regularity. *Chicot County* v. *Davies,* 40 Ark. 200; *State* v. *Corbett,* 61 Ark. 226; *State* v. *Bowman,* 90 Ark. 174; *The Mechanics Building & Loan Association* v. *Coffman,* 110 Ark. 269. The application of this rule is, of course, limited to those things which the Constitution does not require that the journals of the respective Houses of the General Assembly shall show. The rule does apply, however, to a case like this where there is no constitutional requirement that the journals shall recite the substance or contents of an amendment. There is an apparent conflict between the journals of the two Houses which arises merely from the silence of the Senate journals concerning the four counties named, and this should be treated as a clerical misprision rather than to establish the falsity of the recitals in the House journals which support the authenticity of the bill as enrolled and signed by the Governor.

(4) The next ground for assault upon the validity of the statute is that the concluding sentence of section 4 constitutes an attempt to extend the operation of another statute by reference only to its title in violation of that clause of the Constitution which provides that the provisions of no law shall be extended by reference to its title only, but that "so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length." Constitution, Art. V, Sec. 23. Section 4 of the statute provides unqualifiedly that when its terms shall have been adopted in a given territory, after six months "it shall be unlawful for the owner or keeper of any of the animals named in the petition, that has been submitted and adopted, to permit the same to

run at large outside the enclosures of the owner or keeper; and if any of the animals aforesaid be found running at large outside of the enclosure of the owner, it shall be lawful for any person to restrain the same forthwith," and that after notice being given, the owner "shall pay the person taking such animal or animals a reasonable compensation for taking up, keeping and feeding such animals running at large, (and) the actual damages sustained by him or them." The last sentence of section 4 is as follows: "If the owner or keeper of such stock be not known, or if notified, and fail to make compensation for the taking up, feeding and keeping of animals taken up under the provisions of this act, the same shall be deemed to be strays and shall be dealt with as required by law with respect to taking up such property as strays, under the estray law of this State." The contention is that the reference to the estray laws of the State constitutes an extension of that part of those laws, and that this conflicts with the Constitution. We have steadily adhered to the rule that where a statute "by its own language grants some power, confers some right or creates some burden or obligation, it is not in conflict with the Constitution, although it may refer to some other existing statute for the purpose of pointing out the procedure in executing the power, enforcing the right, or discharging the burden." *Watkins* v. *Eureka Springs,* 49 Ark. 131; *Common School District No.* 13 v. *Oak Grove Special School District,* 102 Ark. 411; *State* v. *McKinley,* 120 Ark. 165. An analysis of the statute before us shows that there is distinctly imposed upon the owners of stock the burden of not permitting the same to run at large in the territory coming within the operation of the statute, and also the right of any person to take up stock unlawfully running at large and to hold the same until compensation for the expense of keep and the damage resulting from the depredation of the stock shall be paid. The remainder of the statute merely refers to the method of enforcing those burdens

and rights and the reference is, therefore, merely to the matter of procedure in the enforcement thereof. We do not think that this particular statute is objectionable as an improper extension of the terms of another statute merely by reference to title.

It is argued that the act is too vague and uncertain in its meaning to be enforceable, and for that reason is void; but we do not discover any such uncertainty as would make it impossible to determine, by proper construction, the real meaning of the law makers. This case does not call for an interpretation of the statute concerning other matters mentioned in the argument, and, therefore, we refrain from doing so.

(5) The statute provides that if a majority of the legal voters be in favor of the adoption of the law in a given locality the clerk of the county court shall enter the result upon the records and "shall immediately give notice of the results of said election by publishing the same in a weekly newspaper published in said county, and by causing notice thereof to be posted in at least three public places in each township in said county." The facts, as agreed upon by the attorneys in the case, are that the clerk gave notice by publication in a newspaper and by posting notices in three public places in each of the townships composing the district, but it does not appear from the agreement of facts that the notice was posted in other townships of the county. It is argued by counsel for appellants that the statute does not require the posting of notices in each township in the county, but only in the townships embraced in the prohibited territory. We think counsel are in error in their interpretation of the statute, for it says that the notice shall be posted "in each township in said county." We are of the opinion, though, that the statute with respect to the notice is merely directory and that substantial compliance with its terms is sufficient. While the direction is to publish the notice in two methods, the publication thereof by one of the methods prescribed is suffi-

cient. *Harper* v. *Smith,* 89 Ark. 284. The agreed statement of facts recites that the notice was given by publication in a newspaper and by posting in the three townships affected, which constitutes substantial compliance with the statute. It will be observed that section 4, which declares when the provisions of the statute shall go into effect, says that it shall become effective six weeks after "the provisions of this act shall have been adopted as herein prescribed." The adoption there referred to is the approval by a majority vote of the qualified electors, and not the publication which constitutes no part of the adoption of the act, and for that reason substantial compliance with its terms with respect to the notice is sufficient.

(6) There is one other question raised, and that is that electors residing in the cities and incorporated towns have no right to sign a petition or vote at the election, it being the purpose of the statute to limit this right to residents of the rural districts. This view is not in conformity with the statute, which provides that the qualified electors in the townships may sign the petition and vote at the election, and, of course, the residents of the towns in the territory named are also residents of the township in which those towns are situated.

The decree of the chancery court was, therefore, erroneous, and the same is reversed and the cause remanded with directions to dismiss the complaint for want of equity.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN *v.* HOWLE.

Opinion delivered November 5, 1917.

1. TRIAL—ARGUMENT—OPENING AND CLOSING—BURDEN OF PROOF.—In an action on a fraternal insurance policy, the insurance company admitted the issuance of the policy, and that deceased died while in good standing and denied liability solely upon the ground that there had been a violation of the provisions of the policy of insurance. *Held,* the burden of proving the only issue involved was upon the defendant, and that it was entitled to the opening and closing arguments.

2. INSURANCE—ACTION TO RECOVER—INSTRUCTION.—Deceased held a policy of insurance in appellant company which provided that it become void if deceased was killed while violating the law. Deceased was killed by being shot by a town marshal, after he had first fired upon the marshal. In an action on the policy, judgment was rendered against the insurance company. *Held,* instructions given in behalf of the plaintiff relating to the killing, were erroneous and prejudicial.

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

Brundidge & Neelly, for appellant.

1. The court erred in refusing appellant the privilege of opening and closing the case, after admitting the issuance of the policy, the payment of all premiums and the death, and thus assumed the burden of showing that deceased had violated the by-laws of the order. Kirby & Castle's Digest, § § 3417-18, 7635; 82 Ark. 333; Kirby's Digest, § § 3107, 6196; 61 Ark. 628; 59 *Id.* 142.

2. The admission of non-expert testimony as to the insanity of Howle was error. 103 Ark. 200; 76 *Id.* 286, etc.

3. The court erred in giving instructions requested by appellee and in refusing those requested by defendant and in modifying them. 124 Ark. 227.

J. N. Rachels, for appellee.

1. The right to open and conclude is settled by the pleadings. The burden was on the plaintiff. 80 Ark. 329; 98 *Id.* 139; 31 *Id.* 306.

2. Non-expert witnesses may testify as to insanity, when properly qualified.

3. There is no error in the giving or refusing instructions. The law has been settled on former appeals. 124 Ark. 224; 118 *Id.* 226; 109 *Id.* 400; 14 R. C. L. 751, § 22; 94 Ark. 254; 102 *Id.* 326; 121 *Id.* 599.

STATEMENT OF FACTS.

This is the fourth appeal in this case. *Eminent Household of Columbian Woodmen* v. *Howle,* 124 Ark. 224; 118 Ark. 226, and 109 Ark. 400.

John W. Howle was shot and killed while a member in good standing of a fraternal insurance company. His widow as beneficiary sued the insurance company to recover upon the policy issued by it to her husband. The insurance company denied liability on the ground that Howle's death occurred while he was violating the law and relied upon a provision of the policy which reads as follows:

"If a guest holding a covenant shall be convicted of a felony, or expelled from the order, or become intemperate in the use of liquor, or use opiates, cocaine, chloral, or other narcotics or poison, to such an extent as to impair his health, or shall die, or become totally and permanently disabled, or suffer loss of limb or eye, or sustain broken limb in consequence of any such misdemeanor, or any violation of law, or use of liquor or drugs, or in consequence of a duel, or a combat, except in self-defense, or by the hands of a beneficiary (except by accident), or by the hands of justice, or by disease resulting from vicious, intemperate or immoral acts on the part of such guest, or if representations in the application upon the faith of which the covenant was issued shall be found untrue, or if there shall be any failure to comply with the constitution, laws, rules and regulations of the Fraternity, the covenant shall be void and of no effect, and all payments or benefits which may have been accrued thereunder shall be forfeited without notice or service."

At the beginning of the trial the insurance company admitted the issuance of the policy sued on and that John W. Howle had died while a member in good standing in the insurance company. It denied liability on the ground that the provisions of the policy of insurance had been violated and asked to be permitted to open and close the case before the jury. The court refused to allow the defendant to open and close the case and it duly saved its exceptions to the ruling of the court.

On the part of the insurance company it was shown that John W. Howle was killed by Marvin Sowell on the streets of Searcy in White County, Arkansas. Sowell was the marshal of the town of Searcy and was on duty in the day time. There had been a previous difficulty between him and Howle and Sowell had been informed that Howle had made threats against his life. J. W. Treadway was night marshal at the time Howle was killed.

According to the testimony of both Sowell and Treadway they were standing together talking on the streets in the business part of the town of Searcy when Howle approached them and began shooting at Sowell. Sowell then drew his pistol and began to shoot at Howle and two shots entered his body causing his death. Both of these witnesses testified that Howle fired the first shot and that Sowell killed him in necessary self-defense. They both stated that Treadway did not fire his pistol at all and Treadway testified that he did not even draw it from his scabbard.

Other witnesses who were standing near and witnessed the difficulty corroborated their testimony.

On the part of the plaintiff one witness testified that after Howle and Sowell had emptied their pistols at each other that Treadway fired two shots at Howle and that these shots caused his death. Other testimony will be referred to in the opinion.

There was a verdict and judgment in favor of the plaintiff and the defendant company has appealed.

HART, J., (after stating the facts). In the opinion on the first appeal it was held that when a policy of insurance in a fraternal order provides for a forfeiture in case the insured met his death while committing an act in violation of law, in order to avoid the policy the insured must have met his death while voluntarily engaged in the violation of the law and if the insured was insane and not responsible for his acts when the act was committed, then he did not voluntarily commit an unlawful act in violation of the law.

It was the contention of the plaintiff that Howle at the time of the killing was insane and testimony was introduced on the part of the plaintiff to establish that issue. Some of the witnesses who testified on this branch of the case were not experts and it is now insisted that they did not sufficiently detail the facts upon which their testimony was based to make it competent. We do not deem it necessary to set out their testimony. It is substantially the same as the testimony given by the witnesses on the last appeal and we there held that the testimony was competent.

(1) It is also insisted by counsel for the defendant company that the court erred in denying it the right to open and close the case before the jury. In this contention we think counsel are correct. The record shows that at the beginning of the trial the defendant admitted the issuance of the policy sued on and that John W. Howle died while a member in good standing in the company. It denied liability solely on the ground that there had been a violation of the provisions of the policy of insurance. The burden was upon the company to show that there had been a forfeiture under the terms of the policy. *Arkansas Mutual Fire Insurance Co.* v. *Stuckey,* 85 Ark. 33.

Section 6196 of Kirby's Digest provides that in the argument of a case the party having the burden of proof shall have the opening and the conclusion.

Section 3107 provides that the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side.

The insurance company, having admitted the issuance of the policy and that Howle died while a member in good standing and the burden being upon it to show a violation of the provisions of the policy, would necessarily have been defeated if no evidence had been introduced. *Roberts* v. *Padgett,* 82 Ark. 331. See also *Mansur, etc., Implement Co.* v. *Davis,* 61 Ark. 628.

Counsel for the plaintiff say that Section 6190 of Kirby's Digest gives the opening and conclusion of the

argument to the party upon whom the burden of proof rests under the pleadings. Hence they claim that the opening and conclusion is a matter to be determined by the pleadings in the case and in support of their contention cite *Excelsior Mfg. Co.* v. *Owens,* 58 Ark. 556, and *Beal & Doyle Dry Goods Co.* v. *Barton,* 80 Ark. 326.

In answer to that argument it may be stated that at the beginning of the trial and before any evidence was offered to be introduced by the plaintiff the defendant admitted the execution of the policy and that Howle died while a member in good standing in the company. Its sole defense was that there had been a forfeiture of the policy because he had violated the terms thereof. Under these circumstances the court should have treated the pleadings as amended to conform to the admission made by the defendant and erred in not giving the defendant the right to open and close the case before the jury.

(2) It is next insisted that the court erred in giving certain instructions to the jury at the instance of the plaintiff. The instructions are as follows:

"No. 6. You are further instructed that under the law and the evidence in this case, that unless you find that Marvin Sowell, in self-defense fired the fatal shot, hit and killed, or caused the death of John W. Howle, your verdict will be for the plaintiff.

"No. 7. You are instructed that even though you may find from the evidence that the deceased John W. Howle provoked the difficulty with Marvin Sowell and that Marvin Sowell, in self-defense, shot at John W. Howle, unless you further find from the evidence that the shots fired by Marvin Sowell killed, or caused the death of said John W. Howle, you will find for the plaintiff.

"No. 8. You are further instructed that if one J. W. Treadway, a bystander, shot the deceased John W. Howle, and that the shots from the gun of the said J. W. Treadway, killed the said John W. Howle, and not the

shot, or shots, fired by the city marshal, then your verdict will be for the plaintiff."

The instructions complained of were erroneous and prejudicial to the rights of the defendant. The only theory upon which it could be held that the instructions complained of were not prejudicial would be to say that if Treadway killed Howle, the undisputed evidence shows that he killed him after Howle had retired from the conflict and that on this account although Howle might have been the aggressor in the beginning, his death was not the proximate result of his original unlawful act and hence was not within the clause in the policy limiting the liability of the insurer in case the insured meets his death in consequence of a violation of the criminal law. See *State Life Ins. Co.* v. *Ford,* 101 Ark. 513, and *Supreme Lodge of K. of P.* v. *Bradley,* 73 Ark. 274.

It can not be said that if the evidence shows that Treadway killed Howle, that the undisputed evidence shows that he killed him after Howle had retired from the combat.

According to the witnesses for the defendant company, Sowell and Treadway were standing close together at the time that Howle approached them and began shooting at Sowell. Both Sowell and Treadway as well as the other witnesses for the defendant say that Treadway did not shoot at Howle at all. It was shown that only two bullets entered the body of Howle. One of the witnesses for the plaintiff testified that the shot that caused Howle to fall was a shot fired by Treadway. He also said that Treadway fired another shot into Howle's body after he fell. He said that he did not know who fired first; that Howle was shooting at Sowell and emptied his pistol at him; that he had his pistol in his hand at the time Treadway shot him and that he does not know whether he was snapping it at the time or not; that Howle and Sowell were shooting high and that some of Howle's shots went through the awning.

According to the testimony of Treadway, Howle fired two shots after he was down upon the sidewalk and these two bullets went through the sign of the store in front of which they were.

Another witness testified that Howle continued to shoot after he had fallen on the sidewalk. Under these circumstances it can not be said that even if Treadway shot Howle that he did so after the undisputed evidence showed that Howle had retired from the combat or was so disabled that Treadway knew that he could not continue the combat.

The jury were the judges of the credibility of the witnesses and had a right to believe such parts of the testimony as they believed to be true and to reject that part which they believed to be false. In the exercise of this right the jury might have found that Treadway did shoot and kill Howle but that he did so in order to prevent Howle from killing Sowell.

It follows that the giving of the instructions complained of was prejudicial to the rights of the defendant. For the errors indicated, the judgment must be reversed and the cause remanded for a new trial.

MACKAY TELEGRAPH & CABLE COMPANY v. CITY OF LITTLE ROCK.

Opinion delivered November 5, 1917.

1. MUNICIPAL CORPORATIONS—LICENSE FEE—POLES OF TELEGRAPH COMPANY ON RAILWAY RIGHT-OF-WAY.—A city may levy a reasonable tax upon the poles of a telegraph company, located upon the right-of-way of a railroad company within the corporate limits of the city.
2. MUNICIPAL CORPORATIONS—CHANGE OF BOUNDARIES—OPERATION OF CONTRACT OR ORDINANCE.—A city ordinance or a city contract designed for a city at large operates throughout its boundaries, whatever their change.

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

Marshall & Coffman, for appellant.

1. The findings and judgment are contrary to the law of the case. Appellant is liable to the tax or fee on its poles on the streets and highways of the city, but is not liable for those on the right-of-way of the Rock Island Railway Company, under either the franchise ordinance or the general ordinances of the city. Such a tax was not contemplated by the franchise ordinance. The city has no such power; it can only tax or license poles on the streets of the city. 26 Pa. Sup. Ct. 346; 12 Dec. Dig. 1331; 70 Ark. 549; 72 *Id.* 556; 121 *Id.* 606; 23 Hun. 277; 11 Phila. 327; 12 Atl. 144; 15 Pa. Co. Ct. 518; 36 Cent. Dig. 1951; 7 Del. Co. Rep. 395; 9 Pa. Sup. Ct. Rep. 615; 14 Dec. Dig. 1730; 79 Am. Dec. 444.

All cities have power to regulate streets, and if the power to tax poles arises from the power to regulate streets, the tax is confined to streets. Dillon, Mun. Corp., § 691; 107 N. Y. 593; Crosswell on Electricity, Ch. 6; 195 U. S. 540.

The poles on private property are not nuisances and do not interfere with the rights of others, justifying police regulation. 78 L. R. A. 230; 28 Cyc. 735; 66 L. R. A. 587, and note; 18 *Id.* 367.

The railroad right-of-way is not a street and the poles thereon are not subject to tax. 18 L. R. A. 367; 83 S. E. 259; 232 U. S. 548; 25 Pa. Sup. Ct. 406; 192 U. S. 64.

See also, 31 N. J. Eq. 630; 41 Atl. 146; 37 *Id.* 438; 9 L. R. A. 556; 28 Am. Rep. 642; 28 Cyc. 388; 43 Atl. 620; 49 Mo. 401; 118 U. S. 356.

James W Mehaffy, City Attorney, for appellee.

Under the general ordinances as well as the franchise ordinance, the city has the right to supervise the erection and regulate the maintenance of poles and wires *within the city limits.* This includes the power to tax or license; the fee is not unreasonable and every presumption is indulged in favor of the validity of the ordinance. 88 Ark. 263; *Ib.* 353; Dillon on Mun Corp. (5

Ed.), § § 665, 1275; 72 Ark. 556; 25 L. R. A. 161, and note.

Power to regulate carries with it the power to license for a reasonable fee. Curtis on Electricity 247-8; 43 Ark. 82; 96 *Id.* 199; 88 *Id.* 265; Kirby's Digest, § 5461.

The fee is provided for in the franchise ordinance which appellant accepted. The right of the city and its power is settled. 101 Ark. 223; 70 *Id.* 221; 72 *Id.* 563; 52 *Id.* 301; Dillon, Mun. Corp. (5 Ed.), § 242-3; 64 Ark. 155; 72 *Id.* 562-5.

It was clearly the intention of the ordinance to tax or license every pole erected within the city limits. It is a valid exercise of the police power. 7 Cush. 85; 35 Ark. 355; 2 Am. & E. Ann. Cases 894-5; 18 Ark. 259.

STATEMENT OF FACTS.

The City of Little Rock in May, 1916, commenced this action against the Mackay Telegraph & Cable Company to recover from it the sum of $461.25, with interest, alleged to be the total charges due from the defendant for the past four and one-half years on account of a license fee, by virtue of an ordinance to that effect, of 50 cents for each pole erected by the Telegraph Company within the corporate limits of the city.

Section 1 of the ordinance under which the license fee is taxed by the city reads as follows:

"That the right be, and the same is hereby granted to the Mackay Telegraph & Cable Company, its successors and assigns, to set poles, string wires and operate and maintain lines of telegraph, including all poles and guys, cables, wires and fixtures thereon, and the installation of underground ducts and manholes along and over certain streets in the City of Little Rock as follows, towit:

"The placing of underground ducts and the necessary manholes from the approach of the Free Bridge on Main street to a manhole at the intersection of Main and the alley between Markham and the river; from

Ashley street east in said alley to Scott street; thence south on Scott to East Second; thence east on East Second to McLean street. Also a line of poles and fixtures, and the right to string wires or cables thereon, beginning at the intersection of East Second street and Rector avenue and running thence on the west side of Rector avenue to East Sixth; thence east on the north side of Sixth to the Chicago, Rock Island & Pacific Railway tracks. From this point the pole line will follow on and along right-of-way of said railway to the south city limits."

Section 3 reads as follows: "Section 3. That the company shall pay to the city immediately upon the completion of said line, and on January 1, of each year thereafter, a license or tax of fifty cents for each pole erected or set up and a license or tax on all conduits constructed to an amount equal to four poles to each block. And said company shall comply with all ordinances hereafter passed in regard to the licenses or tax on poles, conduits or wires, either decreasing or increasing the same, that are general and applicable to all telegraph or telephone companies in said city. And said company agrees and consents to pay a license or tax on all its conduits displacing poles equalling the license or tax that is or may be imposed on the poles replaced by said conduits by general ordinances applying to all telegraph or telephone companies."

At the time of the passage of this ordinance, there was already a general ordinance on the question as follows: "Each telegraph, telephone, electric light or power company shall pay annually a sum equal to fifty cents for each pole used by them whether such poles are leased, rented or owned by them." There were also other sections of an ordinance making it the duty of the city electrician and of the city police to keep a watch over all such wires and to perform certain specified duties in regard to them. Inasmuch as the reasonableness of the

amount fixed by the ordinance in question is not questioned, we need only refer to these sections.

The defendant company offered to pay the license fee on the number of poles erected on the streets of the city but declined to pay for those erected on the right-of-way of the Chicago, Rock Island & Pacific Railway Company. Hence this law suit.

From East Second street and Rector avenue to East Ninth street the telegraph poles are erected in a thickly populated part of the city. The wires of the company cross East Ninth street where there is a street car line. It also crosses a turnpike at Fifteenth street and in that neighborhood there are several stores and quite a number of dwelling houses. It also crosses Sweet Home Pike and the Arch Street Pike; both of which are leading thoroughfares into the city of Little Rock. For the rest of the way where the poles are erected on the right-of-way of the railroad company the line runs through an unsettled portion of the city. Other facts will be stated or referred to in the opinion.

HART, J., (after stating the facts). In *Fort Smith* v. *Hunt,* 72 Ark. 556, the court held that a tax on an electric company for the use of its streets is valid so long as the amount exacted therefor is reasonable.

In *Atlantic & Pacific Telegraph Co.* v. *Philadelphia,* 190 U. S. 160, it was held that where telegraph companies engaged in interstate commerce, carry on their business so as to justify police supervision, the municipality is not obliged to furnish such supervision for nothing, but it may in addition to ordinary property taxation, subject the corporations to reasonable charges for the expenses thereof.

Numerous cases from the Supreme Court of the United States and from the courts of last resort of several of the states sustaining the validity of ordinances imposing taxes on telegraph and telephone companies for the use of the street where the amounts charged are

reasonable, may be found in a case note to 16 A. & E. Ann Cas., pp. 343 and 344.

It is not contended that the amount fixed in the ordinance is unreasonable and such could not be logically made when we consider the object sought to be accomplished by the ordinances, and the necessity which existed for local governmental supervision as well as the conditions which existed in the City of Little Rock and those which might reasonably be anticipated would exist in the future.

We may first consider whether or not the language of the ordinance granting the franchise to the defendant is broad enough to include a license tax upon the poles on the right-of-way of the railroad company. We are of the opinion that when the language of the section is considered together, that it is susceptible of the construction that it was the intention of the parties that the poles to be erected upon the railroad right-of-way should be included in the license fee mentioned in section 3 of the ordinance. Otherwise there would seem to have been but little use in designating that the pole line should follow on and along the right-of-way of the railroad to the south city limits. Little Rock is a large and growing city. The record shows that the line of the company as it was to be laid along the right-of-way of the railroad company would cross a street car line and several turnpikes coming into the city. It was highly necessary that there should be local governmental supervision of the lines across these highways for the necessary protection of the travelers along them. It was no doubt in contemplation of the parties that in a growing city like Little Rock, its streets and highways would at some time be laid out across the right-of-way of the railroad company and it would become necessary to enforce local governmental supervision over them. Hence we are of the opinion that from the language of the ordinance itself it was in contemplation of the parties that the defendant company

should pay a license tax of fifty cents for each pole erected within the corporate limits of the city.

The defendant's franchise ordinance took effect on the 18th day of March, 1912. The order extending the city limits was made on the 20th day of May, 1912. About thirty-five poles of the defendant company were brought into the city limits by the order extending the boundaries of the City of Little Rock.

It is earnestly insisted by counsel for the defendant that the ordinance granting the franchise to the defendant company could not embrace these thirty-five poles. But we do not agree with counsel in this contention. A city ordinance or a city contract designed for a city at large operates throughout its boundaries whatever their changes. Dillon on Municipal Corporations (5 Ed), Vol. 3, Sec. 1304; McQuillin on Municipal Corporations, Vol. 2, Secs. 656 and 846 and cases cited; *St. Louis Gas Light Co.* v. *St. Louis,* 46 Mo. 121; *Illinois Central Rd. Co.* v. *Chicago,* 176 U. S. 646, and *People* v. *Chicago Telephone Co.,* (Ill.), 77 N. E. 245.

Moreover at the time of the passage of the ordinance granting the franchise to the defendant company there was a general ordinance that provided that each telegraph, telephone or electric light or power company should pay annually a sum equal to fifty cents for each pole used by them whether such poles were leased, rented or owned by them. This was a general ordinance and applied to the poles of any telegraph company which might be brought within the city limits during its existence.

It follows that the judgment will be affirmed.

JENKINS v. STATE.

Opinion delivered November 5, 1917.

1. APPEAL AND ERROR—CONTINUANCE—ABSENT WITNESS.—It is not an abuse of the discretion of the trial court to refuse a continuance on account of the absence of a witness, where the testimony, if the witness were present, would be merely cumulative.

2. ROBBERY—ALLEGATION OF OWNERSHIP.—The ownership of property taken by robbery may be alleged to be in the party from whom the property was taken, where the property was taken either directly from the person or in the presence of the party robbed, by the exercise of force or a previous putting in fear.
3. CRIMINAL LAW—ROBBERY—MONEY—PROOF.—An indictment charging robbery, alleged that the money stolen was the lawful money of the United States. *Held,* there was no variance between the indictment and proof where the person from whose possession the money was stolen described the money as $645 in gold, and as currency and silver and minor coins where other witnesses used the same terms, and also referred to portions of the money as greenbacks, and as bills.
4. CRIMINAL LAW—EVIDENCE—ADMISSION MADE BY DEFENDANT.—Any admission of a defendant, whenever made, which tends to show his connection with the crime charged in the indictment, is admissible against him.
5. CRIMINAL LAW—IMPEACHMENT OF VERDICT BY JUROR.—A juror can not impeach the verdict, in the rendition of which, he joined.

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

Brundidge & Neelly, for appellant.

1. The motion for continuance should have been granted. It was an abuse of discretion by the court as the testimony was material.

2. There was a fatal variance between the indictment and proof. The money was alleged to be the property of R. E. Kent, cashier, and the proof shows it was that of the Bank of El Paso. It does not charge that the money was in Kent's possession as cashier or that he had a special ownership in it. 58 Ark. 37; 72 *Id.* 525; 70 *Id.* 165.

3. It was not proven that it was lawful money of the United States as alleged. 80 Ark. 97; 71 *Id.* 418.

4. It was error to permit witnesses to detail conversation had with defendant at the time of his arrest, subsequent to the robbery. It was not competent evidence.

5. There was misconduct of the jury. There was a set of Arkansas Reports in the jury room accessible

to the jury and one of the jurors read the case of *State* v. *Fox.* This was prejudicial. 16 R. C. L. 301, 313; 103 Ark. 10. It devolved upon the State to show that no prejudice resulted. 26 Ark. 323; 40 *Id.* 454; 57 *Id.* 8; 66 *Id.* 545; 29 *Id.* 268; 44 *Id.* 120.

6. The record does not show that the jury were sworn. 37 Ark. 63; 34 *Id.* 257; 25 *Id.* 106; 45 *Id.* 143.

7. The verdict is contrary to the evidence and there is error in the instructions.

John D. Arbuckle, Attorney General, and *T. W. Campbell,* Assistant, for appellee; *W. L. Pope,* of counsel.

1. The continuance was properly refused. Due diligence was not shown. 100 Ark. 180; 130 Ark. 245; 94 Ark. 169. The evidence was cumulative merely.

2. There is no variance. The money was in the possession and custody of the cashier. 94 N. E. 857; 79 S. W. 691; 1 Strange 505.

3. There was proof that it was lawful money of the U. S. viz. gold, silver, currency, greenback, dollars and cents. Any of these is sufficient. 115 Ala. 80; 6 Ark. 292; 83 Ala. 51; 79 *Id.* 259; 23 Ind. 21; 25 Ark. 121.

4. The statements of appellant at the time of his arrest subsequent to the robbery were properly admitted. 102 Ark. 525; 105 *Id.* 72.

5. No misconduct of the jury was shown; the juror's affidavit was not competent. Kirby's Digest, § 2423; 130 Ark. 48; 109 Ark. 193; 130 Ark. 189.

6. The jury were properly sworn. 29 Ark. 17; 34 *Id.* 257.

7. The evidence is sufficient.

8. There is no error in the court's instructions. They state the law correctly. 64 Ark. 247; 86 *Id.* 23; 97 *Id.* 92; 79 S. W. 691.

SMITH, J. Harold and Ellis Jenkins are brothers, and were jointly indicted as accessories before the fact to robbery. Their trials were separate, but both were convicted, and they have each prosecuted an appeal to

this court. The questions raised in these appeals are so similar that we dispose of them in a single opinion. The principals in the crime were D. F. Lemmons and John Quattlebaum, and the indictment alleged that it was committed by robbing R. E. Kent, cashier of the Bank of El Paso, of $1,700, lawful money of the United States, of the value of $1,700 and the ownership of the money was alleged to be in Kent as cashier of the bank.

Both Quattlebaum and Lemmons confessed their guilt, and testified at the trial that the Jenkins boys were parties to the conspiracy to rob the bank, although they were not present when the crime was committed.

(1) There was a motion for a continuance in each case, on account of the absence of Harry Gans, who, if present, would have testified, according to the recitals of the motion, that he had talked with Quattlebaum about the case, and Quattlebaum had told him that neither of the Jenkins boys had advised or encouraged the commission of the crime, and neither of them had any part in it. In the motion filed in Harold Jenkins' case, it was recited that Henry Pearl, an absent witness, would testify that he was with Harold Jenkins on Friday and Saturday before the commission of the robbery, and that Jenkins was not with Quattlebaum or Lemmons on those days and had no conversation with them. This testimony was important because Quattlebaum and Lemmons had fixed Friday and Saturday as the time when the final details of the robbery were perfected.

It appears, however, that the sheriff made a *non est* return on the subpoena three days before the day of trial, and that the defendants knew the witnesses were not residents of the county to whose sheriff the subpoenaes were issued, and no showing is made that the sheriff to whom the subpoena was issued and delivered could ever have served it. The motion recites that depositions can, and would be taken if time were granted and the case postponed to a later day in the term of the court.

This testimony appears to be largely cumulative to that of four witnesses who were present at the trial and did testify, and we can not say that the court abused its discretion in overruling the motion for a continuance. *Holub* v. *State,* 130 Ark. 245.

The real and difficult question in each of the cases is whether there was a variance between the allegations of the indictments and the proof in each case. Kent, the cashier, testified that the money stolen was the property of the Bank of El Paso, a corporation, and that it did not belong to him, and none of it was on his person; but he also testified that he was the officer of the bank in charge of the money, and that it was taken from the bank and out of his custody and possession by putting him in fear. It is earnestly insisted by counsel for appellant that the allegation of ownership being essential, there is a fatal variance, because the testimony shows the bank to have been the owner of the money, and not Kent, the cashier. This same question was raised in the case of *State* v. *Montgomery*, 79 S. W. 693, where the Supreme Court of Missouri decided that a clerk having possession of his employer's money has a sufficient ownership thereof to support an allegation of ownership in the clerk in an indictment for robbery.

This is a well considered case, and, in reaching the conclusion stated above, the court reviewed numerous authorities dealing with the characteristics of the crime of robbery which distinguishes it from other forms of theft, and the reasoning of the court is so cogent that we quote liberally from the opinion. It was there said: "The question presented by this record * * * is whether a clerk left in charge of, and intrusted with the care of, his employer's cash, with authority to sell his goods and make change out of the drawer, is not a person in whom the ownership of such money may be laid, as against a robber * * * The question is one of much practical moment. Mr. Mills bore a contract relation to Mr. Radford, by which, in consideration of

his wages as clerk, the law, in the absence of an express agreement, implied a promise on his part to exercise care and prudence in the management of Mr. Radford's store in the course of his employment. Certainly the law imposed upon him the obligation of collecting the price of the goods he sold, and of accounting for the same. He was, for that purpose, intrusted with the cash register; and by virtue of his employment he was authorized to take money out of the register to make change when he sold an article, and was required to place his receipts in the register. He was an agent for hire, and Mr. Radford had, by the course of business adopted delivered to him the possession of the cash in the register, in law, as effectually as if he had gone through the most formal act of delivery. The delivery in this case, while not the transfer of the absolute title to Mr. Radford's money, was a transfer of its possession, with its accompanying temporary rights. Even bailees without reward have an interest sufficient to enable them to sue tort feasors, and to maintain trover against all strangers to the bailment who wrongfully invade their possession. Possession is *prima facie* evidence of right, and the party who seeks to dispossess should show a better title; and, moreover, the possessor sustains a responsibility to the true owner."

After citing the decision of the Court of Appeals of New York in the case of *Brooks* v. *People,* 49 N. Y. 436, to the same effect, the opinion of the Supreme Court of Missouri continues:

"The same question again arose on a statute in the same words in *State* v. *Adams,* 58 Kan. 365, 49 Pac. 81, and the court very aptly says: 'The characteristic of robbery, distinguishing it from other forms of larceny, lies in the violence inflicted on the person of one in possession of the property, or in putting him in fear of injury to his person. So far as the mere taking is concerned, the offense is neither greater nor less if filched in any other way. The gravity of the offense lies in the

breach of the peace, in the personal violence inflicted, or the terror excited in the mind of the individual robbed. At common law it was never held that the property taken must belong to the person robbed. It was sufficient that the property belonged to the person robbed or some third person.' 'As against the robber, a servant has the same right and rests under the same duty to preserve and defend his possession of the property that the owner has. He is the custodian, and has a right to oppose with violence, if necessary, the violence offered by the robber. As against him, he stands as owner, and we think the statute intended to extend to him the full measure of protection that it gives to the owner or bailee. The principles governing civil actions for the recovery of property wrongfully taken have no application in a case of robbery.' '' See, also, *Commonwealth* v. *Butts,* 124 Mass. 449.

(2) We approve the decisions of these courts and the reasoning leading to their conclusions, and we follow their lead in holding that the ownership of property taken by robbery may be alleged to be in the party from whom the property was taken, where the property was taken either directly from the person or in the presence of the party robbed by the exercise of force or a previous putting in fear. *Clary* v. *State,* 33 Ark. 561; *Routt* v. *State,* 61 Ark. 594.

(3) The indictment alleged that the money stolen was lawful money of the United States; and it is said the testimony does not establish this allegation. It does not appear that any witness said, in express terms, that the money stolen was lawful money of the United States. But this is the necessary meaning of all that was said on that subject. The cashier described the money as $645 in gold, and as currency and silver and minor coin. Other witnesses used the same terms, and also referred to portions of the money as greenbacks and as bills, and it is perfectly obvious that in each instance the witness was talking about the medium of exchange circulating

in this country which we call money and which is measured in dollars, and we conclude, therefore, that there was no failure of proof on this subject. *Cook* v. *State,* 196 S. W. 922.

(4) It is insisted that error was committed in permitting witnesses to detail conversations had with the defendant prior to the arrest of one, and at the time of the arrest of the other, and subsequent to the robbery, because they were indicted as accessories before the fact. But any admission of a defendant, whenever made, which tends to show his connection with the crime charged in the indictment, is admissible against him.

(5) Affidavits were filed touching certain alleged misconduct of the jury in the Ellis Jenkins case. An affidavit of a juror was filed which recited that the jury retired to a room in the courthouse where there was a set of the Arkansas Reports, and that, after the jury had failed to agree, a member of the jury found and read the decision of this court in the case of *Fox* v. *State,* 102 Ark. 393, whereupon the jury then agreed upon its verdict. The evidence of this fact appears from the affidavit of the juror, and the statute forbids a juror from thus impeaching his verdict. Section 2423, Kirby's Digest. The only competent evidence on this subject consisted of the affidavit of an attorney, who stated only that there was a set of the Arkansas Reports in the room to which the jury retired; and a new trial can not be granted on that evidence.

Exceptions were saved to the action of the court in giving, and in refusing to give, instructions on the subject of the sufficiency of the corroboration of an accomplice. But, without setting out these instructions, it may be said that they declare the law in conformity with the decisions of this court in the cases of *Celender* v. *State,* 86 Ark. 23, and *Russell* v. *State,* 97 Ark. 92.

It is finally argued that there is not sufficient corroboration of the testimony of accomplices to sustain the conviction. But, as to Harold Jenkins, it may be said

that several witnesses testified that he had spoken to them about robbing the bank, and one witness he had asked to assist in the robbery was told that the bank would be robbed about three weeks before that crime was committed. Harold Jenkins was in El Paso at the time of the robbery, offering a mule for sale, which he did not sell; and one witness testified that shortly before the robbery Jenkins asked him what he supposed Kent would do if a man walked into the bank and threw a gun on him and told him to hand out the dough.

As to Ellis Jenkins, the testimony is to the effect that he sent Sid Quattlebaum to El Paso to assist the robbers in making their escape, and that he attempted to exculpate Sid Quattlebaum, and he explained circumstances leading to Sid's arrest. He was shown to have attempted to assist one of the robbers in making his escape from the jail, and that he made the statement that if he did not get him out, they were all stuck. Damaging statements were made at the time of his arrest, and the principal part of the stolen money was found in his possession.

Explanations of these circumstances were offered, but the jury has passed upon them, and we need only to say that, if these explanations were not credited, the evidence of corroboration is sufficient to meet the requirements of the law.

Finding no prejudicial error in either case, the judgments in both cases are affirmed.

SCRUGGS v. STATE.

Opinion delivered November 12, 1917.

1. CONTINUANCES—ABSENT WITNESSES—DILIGENCE—CUMULATIVE TESTIMONY.—A cause will not be continued on account of absence of a witness where there has not been due diligence in procuring the witnesses' attendance, and where the witnesses' testimony would be merely cumulative.
2. CRIMINAL LAW—OPINION OF JUROR.—Jurors are competent to serve where they have an opinion upon the issue involved, ob-

tained however only from hearsay, and where they stated that they had no prejudice against defendant, and that they could try the case entirely in accordance with the evidence adduced **at the trial.**

3. CRIMINAL LAW—RE-READING INSTRUCTIONS—WAIVER OF DEFENDANT'S PRESENCE BY HIS COUNSEL.—At the jury's request the court re-read to them its instructions. The defendant was absent from the court room, but his attorney was present. *Held,* in the absence of showing to the contrary, the presumption is that the attorney in a criminal trial had the right to waive the defendant's presence when the instructions were re-read to the **jury.**

4. HOMICIDE—PLEA OF INSANITY—BEHAVIOR OF ACCUSED.—Defendant, charged with homicide, plead insanity as a defense. The evidence showed that after the killing accused went to his brother's home, got in an automobile, went to the county seat and surrendered. *Held,* it was proper to refuse to charge the jury that in considering the question of whether defendant was sane or insane at the time of the killing it might also consider all his acts at the time, before and since the killing.

5. HOMICIDE—PLEA OF INSANITY—TEST.—In a prosecution for homicide, when the plea of insanity was interposed, and instruction by the court that for the plea to be availing, the defense must show that defendant was incapable of distinguishing between right and wrong in respect to the act with which he is charged.

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

Brundidge & Neelly, for appellant.

1. The continuance should have been granted. The testimony of the absent witnesses was material and important. 99 Ark. 394, and cases cited.

2. The court erred in instructing the jury in the absence of defendant. 66 Ark. 206, citing 24 *Id.* 620, and 44 *Id.* 331. Counsel could not waive the right to be present. 66 S. E. 149; 108 Ark. 191; 72 *Id.* 379.

3. The court erred in holding that Gaines and Lee were competent jurors. 79 Ark. 127; 102 *Id.* 180; 91 *Id.* 582.

4. The conviction is against the undisputed testimony. Insanity was proven and the conviction is clearly against the evidence. 96 Ark. 37; 96 *Id.* 500; 101 *Id.* 522.

5. The court erred in giving and refusing instructions.

John D. Arbuckle, Attorney General, and *T. W. Campbell,* Assistant, for appellee; *W. L. Pope,* of counsel.

1. The motion for continuance was properly overruled. No diligence was shown nor application for an order to take depositions was made. Kirby's Digest, § 3157; 32 Ark. 462. The evidence was cumulative. *Holub* v. *State,* ms op.

2. Defendants counsel was present when the instructions were re-read to the jury. No request for his presence was made—his presence was waived. 66 Ark. 206; 25 Pac. 816; 3 Nev. 566; 53 Ind. 294; 40 Ark. 364; 108 *Id.* 191; 20 S. W. 217; 97 *Id.* 137; 89 N. W. 1083; 70 Iowa 505; 38 La. Ann. 459.

3. The jurors objected to were competent. 103 Ark. 21; 104 *Id.* 616.

4. The verdict is not against the evidence. The jury were warranted in finding that defendant was sane.

5. There is no error in the instructions. 120 Ark. 549; 54 *Id.* 588; 40 *Id.* 523. The case was properly submitted to the jury and there is abundant evidence to sustain the verdict.

STATEMENT OF FACTS.

E. T. Scruggs was indicted for the crime of murder in the first degree charged to have been committed by killing E. L. Benton. Both Scruggs and Benton were married and lived within a mile of each other in White County, Arkansas. Benton became intimate with the wife of Scruggs. Scruggs found out that Benton was having illicit relations with his wife and this caused a difficulty between Scruggs and Benton and also the separation of Scruggs and his wife. The difficulty and separation occurred in November, 1916, and about the first of March, the next spring, Mrs. Scruggs returned to her home. Benton continued his illicit relations with her whenever Scruggs was away from home and Scruggs

was informed of this fact. Both Benton and Scruggs went to a church in the neighborhood in White County, Arkansas, on July 1, 1917. Scruggs remained out of doors for some time and finally went into the house and sat down near Benton with a pistol concealed under his hat. He got up and went out of the house for a while and again came back during the services and sat down close to Benton. He pulled out a pistol from under his hat and shot at Benton three times. One of the shots went in the neck and one in the shoulder ranging downward. There was also one bullet wound in his right arm. He died in the afternoon of the same day and these gun shot wounds caused his death.

The defense of the defendant was insanity. Evidence was adduced in his behalf tending to show that he was informed of the fact that Benton had illicit relations with his wife and that he brooded over this fact until his mind became unbalanced and he did not realize that he was doing wrong at the time he shot and killed Benton.

The jury returned a verdict of guilty of murder in the second degree and fixed his punishment at five years in the State penitentiary. The defendant has appealed.

HART, J., (after stating the facts). (1) It is first contended by counsel for the defendant that the court erred in not granting him a continuance on account of the absence from the State of Irvin Scruggs and Effie Scruggs his wife. In his motion the defendant stated that Irvin Scruggs and Effie Scruggs lived near him, and if present would testify that as far back as the summer of 1915, they discovered that Benton had illicit relations with the wife of the defendant, that they communicated this fact to the defendant and also on subsequent occasions discovered the same fact and communicated it to the defendant; that on the night before the separation of the defendant and his wife in November, 1916, that Benton was found at the home of the defendant at a late hour of the night; that he was confronted by the defendant and admitted to him that he was ruining his

home and that if he would leave him alone that he would leave before sunrise the next morning; that the witnesses would further testify that after this Scruggs became morose and moody and seemed to take no further interest in life; that his condition finally became such they regarded him as insane; that these witnesses had removed to the State of Texas about the first of February, 1917, and that if a continuance was granted him he could procure their attendance at the next term of the court. The court did not err in refusing a continuance on account of the absence of these witnesses. In the first place the killing occurred on the first day of July, 1917. The defendant after the shooting got in a car with his brothers and went to the town of Searcy and surrendered to the sheriff. He was indicted on the 17th of July, 1917, and his trial was commenced on the 27th day of July, 1917. All the parties lived out in the country. The absent witnesses were of the same name as the defendant and the defendant knew where they went when they left the neighborhood. He knew what their testimony would be and made no effort whatever to have their depositions taken. Besides this it was proved by several other witnesses that Benton had been having illicit relations with the wife of Scruggs and no attempt whatever was made by the State to disprove this fact. It is true there were no other witnesses present on the night in November when the defendant and Benton had their difficulty but several witnesses came in after the difficulty and testified in regard to the actions of the parties. They testified that the separation of Scruggs and his wife occurred on account of her illicit relations with Benton and the undisputed evidence shows that the defendant knew of the intimacy of his wife with Benton and killed Benton on this account. The only defense was that he was insane at the time he committed the act. The testimony of the absent witnesses would have been in part as to facts which were undisputed and cumulative as to the other facts.

(2) It is next contended that the court erred in its ruling as to the competency of two jurors. The jurors were examined separately at great length. We do not deem it necessary to set out their entire testimony. When the whole record bearing on this aspect of the case is read, it is fairly inferable that each of these jurors had formed his opinion from hearsay and not from talking with persons who were witnesses in the case. Each of them said that he had no prejudice against the defendant and that he could try the case entirely in accordance with the evidence adduced at the trial. *Jackson* v. *State,* 103 Ark. 21; *Bealmear* v. *State,* 104 Ark. 616. Hence there was no error in refusing to grant his motion for a continuance.

(3) It is next insisted that the court erred in instructing the jury in the absence of the defendant. The defendant was confined in jail during the trial. The record shows that after they had deliberated on the case for considerable time, they came back into the court room and requested the court to re-read the instructions. The court re-read all the instructions that it had previously given to the jury but did not give any additional instructions. The defendant was not in the court room at the time but his attorney was present. He did not request the presence of the defendant and did not object to the instructions being re-read to the jury in his absence. He saved his exceptions to the giving of the instructions exactly as he had done when the instructions were first read to the jury, that is to say, he made both general and specific objections to the giving of the instructions on the ground that they were wrong in the respects pointed out by him. In support of their contention, they rely upon the case of *Kinnemer* v. *State,* 66 Ark. 206. In that case the court re-read the instructions exactly as first given to the jury. The defendant was not present when this was done and the record does not show that even his counsel was present. The court held that the re-reading of the instructions was tanta-

mount to instructing the jury originally and that it was error to do so in the absence of the defendant. It is true the court said that even had the record showed affirmatively the presence of defendant's counsel that his counsel could not have waived his presence while the jury was being instructed. This language was not necessary to the decision of that case and the decision must be considered with reference to the facts of that particular case. Hence that case can not be taken as an authority that the presence of the defendant can not be waived by his counsel. There are authorities to the effect that the presence of the defendant at his trial can not be waived by his counsel but we need not consider these cases for this court has taken the contrary view. It is well settled in this State that the defendant has a right to be present during the whole of his trial when any substantive step is taken, but in the case of *Davidson* v. *State,* 108 Ark. 191, it was held that when the record shows that counsel acted for the accused in waiving his right to be present at the rendition of the verdict, it will be presumed in the absence of a showing to the contrary, that they had authority from the accused to waive that right. The right to be present at every stage of the trial is a personal right limited to criminal prosecutions and is not a jurisdictional limitation upon the authority of the court because it secures simply a personal right of the defendant and in no manner affects the jurisdiction of the court. It may be waived by the defendant himself. The defendant has the right to be represented by counsel who it is presumed is always fully advised by the defendant. It is a matter of common knowledge that the rights of the defendant are always better preserved by his attorney than could be done by himself. We can conceive of no good reason why he may not waive by his attorney anything that he might waive in person. In the absence of a showing to the contrary the presumption is that the attorney had the right to waive his presence when the in-

structions were re-read to the jury. Therefore this assignment of error is not well taken.

(4) It is next insisted that the court erred in telling the jury that in considering the question of whether the defendant was sane or insane at the time of the killing it might also consider all his acts at the time, before and since the killing. Counsel for the defendant claim that there is no evidence in the case showing the acts of the defendant since the killing. The record shows that the defendant walked out of the church deliberately after the shooting, went to the home of one of his brothers and got in an automobile with his brothers and then went to the county seat and surrendered to the sheriff. Hence the court did not err in giving this instruction to the jury.

(5) It is next insisted that the court erred in giving on its own motion instruction number 5, which is as follows:

"The court instructs the jury that the law presumes every man to be sane until the contrary is shown; and when insanity is set up as a defense by a person accused of crime, in order that the defense may avail, the jury ought to believe from the evidence that at the time of the commission of the alleged crime, the mind of the accused was so far affected with insanity as to render him incapable of distinguishing between right and wrong in respect to the act with which he is charged; or, if he was conscious of the act he was doing and knew its consequences, that he was in consequence of his insanity wrought up to frenzy which rendered him unable to control his actions or direct his movements."

Counsel claim that the instruction is almost a literal copy of one condemned in *Bolling* v. *State,* 54 Ark. 588. A review of that case leads us to the conclusion that counsel are mistaken. The court in that case did condemn an instruction that the defense should show that the accused was at the time of the killing insane to such an extent as not to know right from wrong. The instruction in the present case does not make this the test at

all but on the contrary states the test to be that the defendant must be incapable of distinguishing between right and wrong in respect to the act with which he is charged.

Counsel assign as error the action of the court in giving certain instructions and its refusal to give other instructions. We do not deem it necessary to set out these instructions or to discuss them in detail. We have carefully examined them and find them to be in accord with the principles of law decided in *Bell* v. *State,* 120 Ark. 530.

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

NEELY *v.* WILMORE.

Opinion delivered November 12, 1917.

1. PRINCIPAL AND AGENT—ACTION FOR COMPENSATION—MISCONDUCT OF AGENT.—Appellee was employed by appellants as manager of their plantation, and one H., a relative of appellants, was employed to keep the plantation accounts. Appellee sued appellants for salary due him, and appellants set up a counter-claim, alleging that appellee had permitted H. to overdraw his (H.'s) salary account, for which appellee was responsible. The court charged the jury that if appellants knew, or by the exercise of reasonable care, could have known that H. was overdrawing, and continued to pay his drafts for salary, and that if appellee did not know of such overdrafts, and had no information that would cause an ordinarily prudent person to know of such overdrafts, that appellee was not responsible therefor, and was entitled to a verdict. *Held,* under the testimony the instruction was correct.
2. PRINCIPAL AND AGENT—CLAIM FOR SALARY—COUNTER-CLAIM.—An agent sued his principal for salary due, the principal setting up a counter-claim growing out of the agent's negligence. The agent's defense to the counter-claim was a ratification of his acts by the principal. *Held,* the court properly refused to give an instruction at the principal's request, which overlooked the issue of ratification.
3. PRINCIPAL AND AGENT—WAGES—INTEREST.—An agent is entitled to interest on salary due him and withheld by his principal, by agreement.

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

S. M. Neely, of Memphis, and *Bevens & Mundt,* for appellants.

1. The court erred in its instructions given for plaintiff. 124 Ark. 460.

2. It was error to refuse No. 6 asked by defendant. Also in refusing No. 2 and in modifying it. 96 Ark. 451. Also in refusing and modifying No. 4. Also in refusing No. 5.

3. Defendants were entitled to open and close. The argument of counsel was improper. 33 Ark. 257; 102 *Id.* 640.

4. The verdict was excessive. No interest on yearly balances should have been allowed.

Andrews & Burke and *Fink & Dinning,* for appellee.

1. There was no error in giving instruction No. 2. 129 Ark. 163.

2. No. 3 was properly given. 2 C. J. 734; Mechem on Agency, § 503. It is not contrary to the rule announced on the former appeal of this case. 124 Ark. 460. Taken as a whole the instructions are correct. No recovery could be had if plaintiff had been guilty of fraud, unfaithfulness, negligence or carelessness in the discharge of his duties; this was *settled* by the verdict of the jury and appellants can not complain of mere defects. 117 Ark. 518. See also, 83 *Id.* 61.

Appellants had full knowledge that Harrison was drawing drafts for more than his salary and that appellee did not know that he had overdrawn.

3. There was no error in No. 4. Annual statements were rendered appellants and all drafts submitted to them. If they failed to object they will be held to have ratified the overdrafts.

4. It was not error to refuse No. 6 asked by defendants. They asked no other and it singled out one feature of the testimony and lays undue stress upon it.

114 Ark. 411; 93 *Id.* 316; 57 *Id.* 512; 30 *Id.* 362; 75 *Id.* 76; 105 *Id.* 469.

5. There is no error in the modification of No. 2 and 4 and 5. Although an agent has been guilty of negligence, he is not liable if the principal ratifies the act after knowledge even impliedly as by silence. 2 C. J. 719, 733-4; 49 Iowa 273; 111 Ill. 487; 2 C. J. 740.

6. The instructions as a whole are correct. 2 C. J. 724, 720-1.

7. Plaintiff was entitled to open and close. 85 Ark. 123.

8. Interest was properly allowed. His salary was due at the end of each year.

STATEMENT OF FACTS.

This is the second appeal in this case. The opinion on the first appeal is reported in 124 Ark., p. 460, under the style of *Neely* v. *Wilmore.*

Appellee was manager of the plantation of the appellants for nine years and quit their services on the first of January, 1915. He instituted this suit to recover his wages for the last three years of his service. Appellants filed a counter-claim in which they allege that appellee had without authority overpaid R. E. Harrison for services as bookkeeper.

According to the testimony adduced in favor of appellee, R. E. Harrison had been employed as bookkeeper for several years prior to the time appellee was employed by them as manager of their farm. Harrison was the cousin of J. C. Neely and the other appellants. He recommended the employment of Wilmore to them. Hugh Neely employed Wilmore to manage the farm. During the time that Wilmore served as manager, Harrison was the bookkeeper and his books were open to the inspection of Hugh Neely when he visited the farm. Hugh Neely had active charge of the farm until August, 1914, and then Sidney Neely took charge of it. During the

years 1912, 1913 and 1914, appellee drew very little of his salary and this suit is for the balance due him on salary for these years. The expenses of the farm as well as the salary of Harrison were paid by drafts drawn on Sternberg, Mallory & Co., of Memphis, Tennessee, which were signed by appellee as manager. During the last three years of his services, Wilmore signed drafts in favor of Harrison on account of his salary largely in excess of the amount due him. These drafts showed on their face that they were for Harrison's salary. The annual statements were delivered to appellants for their examination.

Appellee testified that he relied on Harrison to keep the account because he was a first cousin to appellants and that he did not know that he had overdrawn except in certain instances named by him and that he had permission from Hugh Neely for Harrison to overdraw on these occasions; that the books of Harrison were open to inspection to Hugh Neely when he visited the farm and that the annual statements to him included the checks drawn in favor of Harrison on his salary account. The testimony of appellee is corroborated by that of Harrison.

Another witness testified that he heard Hugh Neely, on one occasion, direct appellee to pay Harrison $75 on salary during the high water in the spring of 1913.

S. M. Neely, one of the appellants, testified that the J. C. Neely estate was the owner of the land managed by appellee; that he, S. M. Neely, was the sole trustee for the estate and that Hugh Neely was his agent; that nearly all the drafts, prior to 1914, drawn in favor of Harrison showed that they were on salary account; that one of the drafts drawn in 1914 showed that it was for salary.

The jury returned a verdict in favor of appellee and the case is here on appeal.

HART, J., (after stating the facts). (1) Appellants assign as error the action of the court in giving the following instruction:

"If you find from the testimony in this case that the defendants knew, or by exercise of reasonable care should have known, that the salary account of R. E. Harrison was overdrawn, and, with such knowledge, continued to pay drafts drawn upon them for his salary; and if you further find that the plaintiff did not know that such account was overdrawn and had no such information as would cause an ordinarily prudent person to believe that said account was overdrawn, then you will find for the plaintiff."

They insist that under this instruction appellee when charged with negligence in the performance of his duties as general manager is allowed to interpose the defense that the defendants were guilty of contributory negligence in not keeping watch on their agent's wrong doing. In other words, they claim that under this instruction a premium was placed on the wrong doing of the agent. We do not agree with counsel in this contention. Harrison was a first cousin of appellants and had charge of keeping the plantation's accounts for them. The drafts which were drawn by appellee in Harrison's favor for salary nearly all prior to the year 1914, showed on their face that they were for salary. These drafts were turned in to appellant for examination annually. If any examination had been made by appellants they would have seen at the end of each year that Harrison had overdrawn his account. By continuing to pay drafts for his salary when they knew that his salary accounts were overdrawn or were in possession of facts which would lead to such knowledge, they ratified the action of appellee. It was the duty of appellants to have examined the drafts showing overpayments of salary to Harrison and they will be deemed to have been in possession of the knowledge which such an examination would have imparted to them. The continued payment of drafts

drawn by appellee in favor of Harrison for his salary after this, as above stated, constituted a ratification of appellee's action. Hence the instruction was not erroneous.

(2) It is next insisted by counsel for appellants that the court erred in refusing to give the following instruction:

"No. 6. Even if the jury find from the evidence that the plaintiff did not know what the salary of R. E. Harrison was, still this fact would be no answer to the defenant's counter-claim, because unless the plaintiff had this information he should not have drawn the drafts."

There was no error in refusing this instruction. It is true as stated by counsel for appellants that the instruction was in the language of the court on the former appeal in this case but it is not always proper to use the language of the court in an instruction. The court in using this language was considering the subject of a directed verdict for appellee. The court said in testing the correctness of a directed verdict it must view the evidence in the light most favorable to appellants and on that account must assume that appellee exceeded his authority in drawing drafts in favor of Harrison when his salary was overpaid. The court further stated that it was no answer to this contention for appellee to say that he did not know the amount due; for unless he had this information he should not have drawn the drafts. The language was correct in the discussion of the point then under review by the court. It would be incorrect for the court to have given the instruction as asked, for the instruction did not take into consideration the question of ratification at all and this was the main defense to the counter-claim relied upon by appellee.

Counsel for appellants also assign as error the action of the court in refusing to give the following instruction:

"The jury are instructed that if they find from the testimony that the plaintiff was the agent for the defendants, and, as such agent, had charge of the business of managing the plantation of the defendants, and, if you further find from the evidence that the plaintiff was guilty of any fraud or unfaithfulness in the transaction of his agency, he can not recover in this action, and your verdict will be for the defendants."

The court modified, by adding to the end of the instruction, "for the amount of the counter-claim," and this modification, it is insisted, is error. To sustain this contention they cite the opinion on a former appeal in which the court quoted from the case of *Doss* v. *Long Prairie Levee District,* 96 Ark. 451, as follows:

"The rule is well settled, both by the text-writers and the adjudicated cases, that where the agent is guilty of fraud, dishonesty or unfaithfulness in the transaction of his agency, such conduct is a bar to the recovery by him of wages or compensation."

That case was only cited as tending to show that the view of the court was that unliquidated damages flowing from a tort could be set up by way of a counter-claim. The facts in that case were essentially different from those in the present case. There it was charged and evidence was adduced to prove that the chief engineer of a levee district had conspired with the construction company to defraud the levee district in the construction of the levee. It was held that where the agent is guilty of actual fraud towards his principal and causes his principal trouble and expense of litigation in order to secure his rights, the agent forfeits his rights to compensation for his services as the penalty for his fraudulent conduct.

No such state of facts exists here. There is no fraud shown or attempted to be shown on the part of appellee. There is no proof tending to show collusion between him and Harrison in drawing the drafts for Harrison's salary. The most that can be said with reference to his con-

duct is that he negligently permitted Harrison to overdraw his salary. There is no testimony tending to show that his conduct in this respect was fraudulent. Therefore the rule anounced in the case just cited does not apply and the court was right in modifying the instruction.

(3) Finally it is contended that the court erred in allowing appellee interest on yearly balances. Appellee was employed by the year to manage the plantation of appellants. His compensation was due at the end of the year. According to his testimony he refrained from collecting his salary during the last three years of his service in order to accommodate the appellants. It would have been better to have calculated the interest on these amounts up to date of the rendition of the judgment against appellants for a stated sum but the language of the judgment amounts to this and no prejudice resulted to appellants in this respect.

It follows that the judgment will be affirmed.

EVANS v. RUSS.

Opinion delivered November 12, 1917.

1. DEEDS—INVALID DESCRIPTION.—A deed containing the following description, *held* void: "North part of south half of southeast quarter, 20 acres, and south part south half north half of southeast quarter of southeast quarter of section 3, 4 N., 9 W., 32 acres."
2. DEEDS—DEFECTIVE DESCRIPTION—NOTICE TO THIRD PARTIES.—The description of land is a necessary part of the deed; if the description is so indefinite that the land can not be identified, the deed will not furnish the constructive notice necessary to charge innocent purchasers, and will be void as to them.
3. DEEDS—VOID DESCRIPTION—ADVERSE POSSESSION.—One H. undertook to deed certain land, upon which he was residing with his wife, to his wife. The deed was invalid. H.'s wife then died, and H. deeded the land to one T. *Held,* under the testimony that H.'s wife acquired no interest in the land by deed, adverse possession or otherwise, which could defeat T.'s claim.

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

Richard M. Mann, for appellants.

1. Appellants were entitled to a reformation of the deed. 102 Ark. 83; 142 S. W. 595. They are not barred by laches. 98 Ark. 23; 135 S. W. 453.

2. They are entitled to recover by adverse possession begun by their mother and continued after her death by her husband, their father by his curtesy estate. 98 Ark. 30; 38 Miss. 359; 194 S. W. 19. They are not barred being under coverture. Kirby's Digest, § 5056; 35 Ark. 84.

3. They are not barred by laches. 84 Ark. 19; 115 S. W. 931; 67 Ark. 320; 94 *Id.* 122; 108 *Id.* 248; 70 *Id.* 371.

4. Nor are they estopped. 62 Ark. 316; 100 *Id.* 399. Appellee is not an innocent purchaser. The deeds were recorded and he had notice.

Trimble & Williams, for appellee.

1. The deed to Mrs. Harkins was void for uncertainty of description. It is too vague and indefinite and is not notice to a subsequent purchaser. 48 Ark. 419; 42 *Id.* 362; 95 *Id.* 255.

2. Appellee is an innocent purchaser for value and without notice. 34 Cyc. 956.

3. Appellant's claim is stale. 103 Ark. 499; 60 *Id.* 55; 61 *Id.* 589; 72 *Id.* 456; 55 *Id.* 96; 168 U. S. 685; 64 Ark. 345.

4. Appellants are estopped. Laches are pleaded. 70 Ark. 374. They also fail to show adverse possession at all. They ratified the sale by accepting part of the purchase money and are barred. 106 Ark. 14.

STATEMENT OF FACTS.

On March 14, 1914, Kate Evans and Annie Mayhan instituted an action of ejectment against Robert Russ, Jr., to recover possession of 52 acres of land in Lonoke County, Arkansas. After the suit was instituted in the circuit court the plaintiffs discovered that the description of the land in the deeds under which they claim title was erroneous. They filed an amended complaint set-

ting up this fact and asking for a reformation of their deed and that the case be transferred to the chancery court. The transfer to the chancery court was made and plaintiffs again amended their complaint and set up an additional ground for recovery. They set up that they had acquired title to the land by adverse possession and asked for a recovery of the land on that ground. No objection was made to the transfer of the case to the chancery court or the subsequent amendment to the complaint of the plaintiffs. The facts are as follows:

The land in question was originally owned by Elizabeth A. Harkins. On November 23, 1882, she conveyed the land by quit-claim deed to her son, Geo. W. Harkins. He at once took possession of the land and made it his homestead. On December 13, 1886, Geo. W. Harkins conveyed by warranty deed to S. A. Harkins, his wife, for the consideration of $350 named in the deed the following described lands:

"North part of south half of southeast quarter of southeast quarter, 20 acres, and south part south half north half of southeast quarter of southeast quarter of Section 3, 4 N., 9 W., 32 acres."

It was the intention of Geo. W. Harkins to convey the land in controversy by this deed. He resided on the land as his homestead at the time he made the deed to his wife. After he executed the deed to his wife he and his wife continued to live on the land as before until March 8, 1889, when his wife died. After her death he continued to reside on the land until October 3, 1901. On that date he conveyed the land to J. L. Tillman by warranty deed for a consideration of $700. Tillman then moved on the land and took possession of it and G. W. Harkins moved off of it. On March 5, 1905, Tillman conveyed the land by warranty deed to Nathan Russ for a valuable consideration. In 1912 Nathan Russ for a valuable consideration conveyed the land to his brother Robert L. Russ, Jr., the defendant in this action.

Kate Evans was a daughter of G. W. Harkins and S. A. Harkins. She was thirty-five years of age at the

time her deposition in this case was taken and has been a married woman since October 20, 1895. Annie Mayhan was also a daughter of G. W. Harkins and S. A. Harkins and has been a married woman since September 2, 1903. G. W. Harkins married again after his wife, S. A. Harkins, died. After he sold the land to Tillman he gave each of the plaintiffs in this suit $100 out of the proceeds of the sale. He at the time had children by his second wife but did not then or at any time thereafter give them any part of the money. He died on January 8, 1906, and his second wife survived him and is now alive. Other facts will be referred to in the opinion.

The chancellor found in favor of the defendant and the plaintiffs have appealed.

HART, J., (after stating the facts). (1) It is conceded that the description under which G. W. Harkins attempted to convey the land in question to his wife, S. A. Harkins, was so indefinite as to render it void under the rule laid down by the decisions of this court. *Smith* v. *Smith,* 80 Ark. 458; *Adams* v. *Edgerton,* 48 Ark. 419; *Colonial & U. S. Mtg. Co.* v. *Lee,* 95 Ark. 253.

Counsel for the plaintiffs, however, claim title by adverse possession under the authority of *Stricklin* v. *Moore,* 98 Ark. 30. In that case the allegations of the complaint were that the wife held the land adversely from the date of the deed to her by her husband until her death and that her husband held adversely as tenant by the curtesy from then until the land was purchased at execution sale against him.

The demurrer admitted the allegations of the complaint. The court held that adverse possession of the husband as tenant by the curtesy coupled with the adverse possession of his wife before her death would constitute an investiture of title in the heirs of the wife subject to the life estate of the husband. The reason was that the estate by the curtesy is a mere continuance of the wife's estate and is in the nature of an estate by descent rather than by purchase. We held that under the alle-

gations of the complaint that his adverse possession could be tacked to the possession of his wife and that if the possession was continued for the statutory period it would invest title in the heirs of the wife subject to the life estate of the husband. This was fully explained on the second appeal of the case. *Stricklin* v. *Moore,* 106 Ark. 14. On that appeal the facts had been developed and we held that the evidence was not sufficient to show that the wife held the land adversely prior to the death of the husband. We are of the same opinion as to the facts of this case. On this point we quote from the testimony of Mrs. Kate Evans as follows:

"Q. Well did your father occupy this place as a homestead when he deeded it to your mother?

A. Yes, sir.

Q. Did she live there afterwards?

A. She did.

Q. About how long?

A. About ten years to the best of my knowledge.

Q. Did she die there?

A. She did.

Q. When did she die?

A. She died on the 8th day of March, 1889."

On cross-examination Mrs. Evans admitted that she was too young to remember anything about what was said at the time her father executed the deed to her mother. Mrs. Annie Mayhan testified that her father acquired title to this property by deed from his mother and that it became his homestead; that he then deeded it to her mother in consideration of certain property of hers which he had used. We quote from her testimony as follows:

"Q. How long did your mother occupy it and hold possession after this deed?

A. I have forgotten. I had the date of her death but I lost it. Sister Kate has it.

Q. She occupied it how long?

A. I don't remember.

Q. Did she occupy it until she died?

A. Yes, sir; never was off the place—never lived anywhere else.

Q. You don't know about how many years?

A. No, sir."

(2-3) The testimony on the part of the defendant shows that Tillman did not have any knowledge of the claim of Mrs. S. A. Harkins when he bought the land from her husband, G. W. Harkins. He paid a valuable consideration for the land and immediately went into possession of it. He and his successors in title have been in possession of it ever since. G. W. Harkins remained in possession of the land from the time his mother made him a deed to it until he sold the land to Tillman. It is true his wife lived on the land with him until her death but the record does not disclose that there was ever any visible change in the possession of the land. It is not shown that Mrs. Harkins ever exercised any acts of ownership over it. It will be noticed that the testimony on this point on the part of the plaintiffs, which we have copied above, does not amount to a statement that she held the land adversely after the deed received by her from her husband. The questions and answers seem to be only the conclusion of the plaintiffs and of their attorneys. It does not amount to a statement of fact by the plaintiffs that their mother took possession of the land after her husband executed the deed to her and held it adversely to him. In this respect the record is very similar to that on the second appeal in the case of *Stricklin* v. *Moore,* referred to above. We there held that the record did not show any visible change in the possession of the land and that the continued possession of the land after her death would not constitute adverse possession by him as tenant by the curtesy. So here the record title to the land was in G. W. Harkins and the title to it was not wrested from him by adverse possession. The record title being in him and the possession not having been wrested from him by his wife, his continued possession after her death will be deemed to be under the record title. As we have already seen Till-

man did not have any actual notice of the claim of Mrs. Harkins to the land. It is true that her deed was placed of record but on account of the defective description, it did not constitute constructive notice to Tillman of her claim of title. The description of land in a deed is an essential part of it. If the description is so indefinite that the land cannot be identified the deed will not furnish the constructive notice necessary to charge innocent purchasers, and will be void as to them. *Neas* v. *Whitener-London Realty Co.*, 119 Ark. 301, and *Adams* v. *Edgerton*, 48 Ark. 419.

It follows that the decree must be affirmed.

BUSH, RECEIVER ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *v.* SNOW.

Opinion delivered November 12, 1917.

1. CARRIERS—RIGHT TO TAKE UP TICKET FROM PASSENGER—INJURY TO ANOTHER PASSENGER.—Plaintiff, a passenger on defendant railway company's train, occupied a seat opposite a male passenger, who refused to give his ticket to the conductor upon request. A scuffle ensued in which plaintiff, a lady, claimed to have sustained an injury. *Held,* an instruction that if the male passenger having a ticket entitling him to transportation, was asleep and disturbing no one, that the train operatives had no right to molest him, and if they did so and the difficulty ensued and plaintiff was injured, that a verdict should be rendered for the plaintiff, was erroneous.
2. CARRIERS—DUTY OF PASSENGER TO SURRENDER TICKET ON DEMAND.—A passenger must not only have a ticket entitling him to transportation, but he must surrender it upon demand being made therefor by the representative of the carrier whose business it is to take up tickets. The representative of the carrier may arouse a sleeping passenger and demand the surrender of the ticket.

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

Thos. B. Pryor and *W. P. Strait,* for appellant.

1. Under the proof appellee failed to make out a case, and the court erred in refusing to instruct a ver-

dict for defendant. The proof establishes clearly no right to recover—that the injury did not occur on the train.

2. It was error to refuse to give appellant's instruction No. 10. This is the law and it was error to give those asked by plaintiff. The officers had the right to take up his ticket, and the brakeman the right, if assaulted, to use such force, acting as a reasonable prudent man, as was necessary to repel the assault and protect himself. 92 Ark. 205; 59 *Id.* 132; 67 *Id.* 594; 69 *Id.* 573; 64 *Id.* 613.

3. Appellant had the right to have the court confine the jury in their deliberations in passing upon questions of liability to the specific acts of negligence alleged in the complaint and tendered by appellee as the specific grounds upon which she attempts to recover. 2 Ark. 101; 16 *Id.* 303; 30 *Id.* 285; 31 *Id.* 103; 79 *Id.* 490; 29 *Id.* 500; 41 *Id.* 393.

4. Appellee's instructions are erroneous, confusing and misleading and are contradictory. Especially is No. 8 erroneous. Cases *supra.*

Robins & Clark, for appellee.

1. The instructions correctly embody the law of this case. Before pleading self-defense one must show he acted without fault or carelessness. 93 Ark. 409; 104 *Id.* 317; 95 *Id.* 428.

There is no error in No. 8. Appellee was injured by the wrongful acts of the servant of appellant in assaulting a passenger. Appellant denied the assault and pleaded self-defense on the part of its servant and contributory negligence by appellee. The instructions simply gave the jury appellee's theory of her case. 82 Ark. 289; 118 *Id.* 397.

Appellants instructions fully presented the law applicable to its theory. There is no error.

SMITH, J. Appellee recovered judgment for damages to compensate an injury which she says she sustained while traveling as a passenger on one of appel-

lant's trains from Argenta to Conway, in this State. Her testimony was substantially as follows: The train was crowded, but she found a seat at the front end of the coach, facing to the rear of the coach, and next to the window. On the seat immediately in front of and facing her, next to the window, there was seated a man who had entered the train at Little Rock, with a ticket to Fort Gibson, Oklahoma. His ticket had been examined by the brakeman when he entered the train at Little Rock. He did not appear to be drunk when he entered the train; but he soon fell asleep, and when the train was only a few miles out of Little Rock the auditor attempted, without success, to arouse him sufficiently to take up his ticket. Failing to obtain the ticket from the passenger, the auditor signaled to the brakeman and told him to go to this passenger and get his ticket. From this point on the evidence is in irreconcilable conflict. According to appellee, the brakeman began the difficulty by striking the passenger on the head with his lantern with such force as to break the lantern, and in the scuffle following threw the passenger against appellee with such force as to knock her down and injure her. The brakeman testified that he did not hear the auditor's direction to take up the passenger's ticket, and that he did not attempt to do so, but was fixing a ventilator when the passenger arose and struck him, and that he did not assault the passenger but only attempted to restrain the passenger from further assaulting him or creating a disturbance in the car. Appellee testified that, when the auditor came to the obdurate passenger, he shook him and said, "Your ticket, please." The passenger roused up and leaned back in the seat and opened his coat and took the ticket partly out of his pocket and said, "The ticket"? and then dropped his head over again in a stupor like he was asleep, and when he refused to give the ticket, the auditor then motioned for the brakeman. Appellee started to move her seat when the passenger said to her, "Now, lady, sit down; if it was not for you being a lady, I would show these trainmen whether they would get my

ticket or not." After the altercation, the train crew carried the passenger out of the coach, and a bottle of whiskey was found in the seat which he had been occupying.

The instructions covered the widest range, including the law of contributory negligence, and of self-defense, and numerous exceptions were saved to the action of the court in giving and refusing instructions. The majority of the court is of the opinion that no error was committed except in the giving of an instruction numbered 8, which reads as follows:

"If you find from the evidence that the passenger with whom the trouble was had was asleep and not molesting or disturbing anyone, and had a ticket entitling him to transportation on the train, then the brakeman had no right to molest him and if he did so and the difficulty ensued and the plaintiff was injured thereby, then your verdict will be for the plaintiff."

This instruction was erroneous. It is the absolute duty of the servants of the railway company in charge of a train, not only not to assault a passenger, but to protect him from assault or injury or any unnecessary disturbance or annoyance. But it is a far different matter to tell the jury that a passenger has the right to refuse to comply with the reasonable and necessary regulations of the carrier in the conduct of its business and in the collection of its fares. Such is not the law. It was not sufficient that the passenger have his ticket, but it was right and proper that he should have surrendered it upon demand being made therefor by the representative of the carrier whose business it was to take it up. Of necessity, some system must be adopted to avoid overlooking the collection of the fares of all the passengers, and if it were the law that a passenger could not be disturbed until after he had slept off a drunken stupor, before his ticket was demanded from him, simply because he did, in fact, have a proper ticket, this duty could not be properly performed. The auditor had the right to demand the surrender of the ticket at the time when ap-

pellee says a demand was made, and he had the right to arouse the passenger for this purpose, and the court was in error in telling the jury that such right did not exist if the passenger, in fact, had his ticket. See sections 1077, 1079, and 1085 of Hutchinson on Carriers, 3rd Ed.; *St. L. & S. F. Rd. Co. v. Blythe,* 94 Ark. 153; *Bradford* v. *St. L., I. M. & S. R. Co.,* 93 Ark. 244; *St. L. & S. F. Rd. Co.* v. *Dyer,* 115 Ark. 262.

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

SUMMERS v. WOOD.

Opinion delivered November 12, 1917.

SALE OF CHATTELS—STATUTE OF FRAUDS—PAYMENT BY CHECK—INTENTION OF THE PARTIES.—Chattels valued at over $30 were sold by appellant to appellee, there being no writing evidencing the transaction. However, appellee gave appellant a draft in part payment for the goods bought. *Held,* a draft or check, when delivered and received may operate to take an oral undertaking out of the operation of the statute of frauds, when so intended by the parties as payment and the intention of the parties is a question for the jury.

Appeal from Craighead Circuit Court, Jonesboro District; *R. H. Dudley,* Judge; reversed.

Basil Baker and *Horace Sloan,* for appellants.

1. The statute of frauds does not apply. There was part payment by check and it was given and accepted as such. Part payment may be made by check. 70 Fed. 190; 128 S. W. 285. The Federal case is supported by the better reason and weight of authority. 25 Cyc. 1329; 94 Ark. 387, 390; 119 Pa. St. 30.

2. The question should have been submitted to a jury as to whether the check was accepted as part payment.

3. The defense of the statute of frauds was waived by failure to object to the evidence. 43 Cal. 274; 77 *Id.*

427; 63 Mo. App. 293; 9 Neb. 174; 31 S. W. 317; 46 Vt. 151; 47 *Id.* 348; 19 Ann. Cas. 317.

N. F. Lamb, C. D. Frierson and *Eugene Sloan,* for appellee.

1. There was no waiver of defense of the statute of frauds by failure to object to evidence. 38 Atl. 265; 19 Ann. Cas. 317, 72 N. W. 768. The cases cited by appellants do not sustain their position. The defense was insisted on all through the case.

2. The check was not part payment. 20 Cyc. 277; 10 Barb. 573; 28 How. Pr. 463; 128 N. W. 243; 128 S. W. 285, 72 Mo. App. 613; 130 N. W. 208; 147 N. Y. S. 44; 29 Am. & Eng. Enc. of Law (2 Ed.), 970; 76 Wash. 600; Ann. Cas. 1915 D. 348, note. With the exception of 70 Fed. 190, the rule is uniform that a check is not payment within the statute of frauds, unless it is given and accepted as payment. The payment contemplated is actual payment. § 7067 K. & C. Digest; 98 Ark. 1; 100 Ark. 537.

3. Diligence was shown by Wood. The trade was rescinded and he made due efforts to return the draft.

4. There was no question for a jury. 71 Ark. 445; 57 *Id.* 461; 145 U. S. 593; 6 Enc. Pl. & Pr. 679-680; 97 Ark. 438.

SMITH, J. Appellants were plaintiffs in the court below, and sued to recover the difference between the contract price and the market value on the sale of 110 head of sheep. Appellee defended upon the ground that the agreement, if any made, related to the sale of goods, wares and merchandise for the price of more than $30 and was, therefore, within the statute of frauds. Appellants alleged that a partial payment of $50 had taken the transaction out of the statute. A verdict was directed in appellee's favor, and, in reviewing this action, we need, therefore, only consider the undisputed evidence and that offered in appellant's behalf.

It was shown by the vice-president and by the cashier of the Bank of Jonesboro that Freer had arranged with

that bank to cash drafts drawn by him on Mark Summers, of West Plains, Missouri, and that the draft drawn in payment of the sheep would have been paid upon presentation. But it was never presented. These officers stated that had payment of the draft been refused, they would have charged it to the account of appellee; but there was no reason to assume that the jury would have found that such a contingency would have arisen, because the officers of the Bank of Jonesboro testified that the Bank of West Plains, Missouri, had agreed to honor all drafts drawn by Freer on Summers and cashed by the Bank of Jonesboro.

The draft in question reads as follows:

"MARK SUMMERS, Live Stock Dealer No. 1214.
West Plains, Mo., Aug. 29, 1916.
Pay to the order of S. W. Woods $50.00
Fifty .....Dollars
pounds
For purchase money of on 110 head sheep sold me, W. D. Freer.
(Signed) W. D. Freer, Buyer.
To Mark Summers,
West Plains, Mo.
122 West Main Street."

The terms of the sale were completely agreed upon, and the necessity only remained of weighing the sheep to ascertain the balance due. The check was given in part payment of the purchase price, and was accepted as such. Appellee denies that this was done, but as there was evidence tending to establish that fact, we must assume that the jury would have so found had the cause been submitted on that issue.

The briefs in the case are largely devoted to a discussion of the question whether part payment of the purchase money can be made by check or draft, thereby taking the transaction out of the statute. Our statute on the subject reads as follows:

"No contract for the sale of goods, wares and merchandise, for the price of thirty dollars or upward, shall be binding on the parties unless, first, there be some note or memorandum, signed by the party to be charged; or, second, the purchaser shall accept a part of the goods so sold, and actually receive the same; or, third, shall give something in earnest to bind the bargain, or in part payment thereof." Section 3656 of Kirby's Digest. It will be noted that the statute does not require the payment to be made in money.

The cases chiefly relied upon by counsel are those of *McLure* v. *Sherman,* 70 Fed. 190, and *Groomer* v. *McMillan,* 128 S. W. (Mo.) 285. The Federal case held that payment may be made by check; while the Missouri case held to the contrary. The Missouri case recognizes a check, however, as sufficient if it is received by the seller as an absolute payment, but says that this fact must be clearly established.

Payment is defined in Volume 29 Am. & Eng. Enc. of Law, (2d Ed.), pages 969, 970, as follows: "What the parties agree shall constitute payment, the law will adjudge to be payment. It is competent for parties to designate by their contract how and in what payment may be made. It is by no means true that payment can only be made in money; on the contrary, it may be made in property or in services. In short, whatever the parties agree shall constitute payment will be regarded by the courts as payment, provided the thing agreed upon is of some value. A check given by the buyer when it is accepted in payment and is actually paid satisfies the statutes."

And in 30 Cyc. p. 1191, it is said: "An order drawn by the debtor upon a third person in favor of the creditor for the payment of money or goods is not a payment of the debt unless such order has been actually paid, or accepted by the creditor as a discharge of the debt *pro tanto.* It is not enough that the creditor accepts the order unless he accepts it as a payment. On the other hand, if the order is accepted by the creditor as pay-

ment, or is actually paid to the creditor, or if the creditor agreed to accept such order when the debt was created, the debt is extinguished *pro tanto*. At any event, where due diligence is not used in collecting or enforcing the accepted order, whereby the claim is lost, the order is deemed a payment." These authorities cite a large number of cases which discuss this subject of payment.

The question here involved was considered by the Supreme Court of Iowa in the case of *Rohrbach* v. *Hammill,* 143 N. W. 872. It was there said: "We understand the contention of appellant to be that there must be an actual payment of a part of the consideration before the contract is taken out of the statute of frauds; that the delivery of a check is not a payment in itself and of itself until the same is paid, until the consideration, evidenced by the check, has passed into the hands of the vendor. This proposition is supported by authority, but it is also true that parties may agree that a check be taken as absolute payment of the debt, or in discharge of a portion of the consideration agreed to be paid, and it will then have the effect of a payment, taking it out of the statute of frauds." And in the opinion, the court pointed out that, as there was evidence to support the purchaser's theory, that the check had been given and received as payment *pro tanto* of the purchase price, that question was properly submitted to the jury. In the discussion of the law of the question, that court said:

"A check, such as the one in question, is a negotiable instrument. It is a thing of value. It may be the subject of larceny. Checks are in common use, and pass from hand to hand. It is the usual and ordinary way of transacting business of any magnitude, and courts take judicial notice of such custom. Courts ought not to assume ignorance of that which is known to all men. The subject here under discussion is considered in *Groomer* v. *McMillian,* 143 Mo. App. 612, 128 S. W. 285; *Griffin* v. *Erskine,* 131 Iowa 444, 109 N. W. 13, 9 Ann. Cas. 1193.

"The case of *Conde* v. *Dreisam Gold Min. & Mill Co.,* 3 Cal. App. 588, 86 Pac. 828, we think states correctly the

rule as applied to cases of this kind as follows: 'It is further claimed that a draft or check is only conditional, and not absolute, payment of the debt for which it is given, and does not extinguish the debt, unless it is expressly agreed that it shall constitute payment. This is undoubtedly the rule in this State. * * * Mr. Benjamin thus states the rule: 'A check is accepted as a particular form of cash payment, and, if dishonored, the vendor may resort to his original claim, on the ground that there has been a defeasance of the condition on which it was taken.' Benjamin on Sales (7th Ed.) pp. 755, 772. We do not, however, understand the rule to require that there should be express words or writing of the parties agreeing that the check should be absolute payment. The circumstances and the conduct of the parties taken together may show an express understanding that the check is taken in satisfaction of the debt, or estop the creditor from claiming the contrary.''

And we approve the conclusion of that court that, while a delivery and acceptance of a check or draft does not, in all cases, discharge the original debt *pro tanto,* but that it may be so delivered and received, and that, when this is done, payment has been made and the transaction in which it was made is taken out of the statute of frauds. This question should have been submitted to the jury, and for the error of the court in failing so to do, the judgment will be reversed and the cause remanded.

STRICKLAND, ADMINISTRATOR, v. SMITH.

Opinion delivered November 12, 1917.

1. WILLS—PROOF OF EXECUTION—TESTIMONY OF BENEFICIARY.—The beneficiary under a will, who is not an attesting witness, may testify as to the circumstances of its execution.
2. WILLS—PROBATE—READING WILL TO JURY.—The probate court refused to probate a will and an appeal was prosecuted to the circuit court where a trial was had before a jury. *Held,* the trial court did not commit error in permitting the will to be read to the jury.

3. APPEAL AND ERROR—INSTRUCTIONS UPON WHAT POINTS MAY BE ASKED.—A litigant has a right to have a correct declaration of the law given upon any material point in the case where he has offered competent testimony tending to sustain that theory.

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

Bratton & Bratton, for appellant.

1. The only question was was the will entitled to be admitted to probate. Kirby & Castle's Digest, § 10069.

It was error to permit the will to be read in evidence. Its provisions unduly influenced the jury.

2. It was error to refuse the peremptory instruction asked. The proponent failed to show by the attesting witnesses that Allen had executed the will. Kirby & Castle's Digest, § 10073, 4, 5. The attesting witnesses both testified that Allen never requested them to witness his will.

3. It was error to allow L. J. Brown, the attorney, and Mrs. Smith to testify. 19 Ark. 545, 553; Kirby & Castle's Digest, § § 10092, 3, 4-8. Outside parties, attorneys and beneficiaries can not establish a will. It was clearly error to allow a beneficiary to testify. Thompson on Wills (1916 Ed.), 396; 14 Bush 434; Schouler on Wills (1915 Ed.), § 353; 78 Mo. 27; 27 Tenn. 278; 2 Root. 303; 28 La. Ann. 377.

4. The court erred in giving instruction No. 4. It is abstract.

5. No. 5 is erroneous in that it tells the jury that they may take into consideration the testimony of other witnesses who were present at the time of the execution of the will.

J. H. Hamiter and *E. B. Buchanan,* for appellee.

1. The objections to the testimony of Brown and appellee were not raised at the time of the trial. It is not the province of a motion for a new trial to bring upon the record irregularities occurring at the trial. 44 Ark. 122; 94 *Id.* 147.

2. Brown and Mrs. Smith were competent witnesses. Proponent is not bound by the testimony of the subscribing witnesses. 2 Wigmore on Ev., § § 1285 to 1304; 13 Ark. 479. Kirby's Digest, § 3093, has no application to the contest over the probate of a will. 87 Ark. 286. Jones Com. on Law of Evidence, Vol. 4, § § 792, 796; 26 Ark. 476. Nor do § § 8053, 4, 5-9 apply; they refer only to subscribing witnesses. Devisees and legatees are competent witnesses to prove a will. 38 S. E. 110; 108 Pac. 73; 18 So. 831; 47 S. E. 501; 63 Ala. 448.

3. This case comes within § 8056, Kirby's Digest. Appellee's claim is a debt against the estate.

4. Kirby's Digest, § 8053, is unconstitutional and conflicts with § 2 schedule to the Constitution. *Ib.*, § 3094, 5. These sections are taken from the Civil Code, § 513. Devisees and legatees are competent witnesses. 27 S. W. 254; 79 Atl. 600; 47 S. E. 501; 63 Ala. 448.

5. The instructions were correct. 13 Ark. 88, 483.

SMITH, J. This cause originated in the probate court of Pulaski County, where the purported will of Adolph Allen, a colored man, was offered for probate by Kate Smith, a colored woman, who was not of kin to the testator but who received a substantial portion of the estate under the will. The probate court refused to probate the will, and an appeal was prosecuted to the circuit court, where, upon a trial before a jury, there was a verdict in favor of the will.

The subscribing witnesses were O. Samington and W. Beavers, both of whom testified at the trial in the circuit court, and their testimony was of a character to cast some doubt both upon the testamentary capacity of the testator at the time of the execution of the will, or the fact that they signed as witnesses at the testator's request. Thereupon one Brown, who was the attorney who had prepared the will, testified concerning the circumstances of its execution, which he had witnessed, and Kate Smith, who was also present at its execution, gave similar

testimony. The admissibility of this testimony is the principal question raised on this appeal.

It is argued that Kate Smith was an incompetent witness under § § 8053 and 8057 of Kirby's Digest. Section 8053 is attacked by appellee as being in conflict with Section 2 of the Schedule to the Constitution, which provides that "In civil actions, no witness shall be excluded because he is a party to the suit or interested in an issue to be tried. * * *"

(1) It is also contended by counsel for appellee that Section 8057 of Kirby's Digest does not apply to either Kate Smith or to the attorney, as neither of them was a subscribing witness; and, as we agree with them in this contention, we do not consider the constitutionality of the section attacked.

The States of the Union generally appear to have statutes more or less similar to the above mentioned sections of Kirby's Digest. Missouri has such a statute, and the Supreme Court of that State, in the case of *Miltenberger* v. *Miltenberger,* 78 Mo. 27, held that a legatee who was interested as such in the establishment of the will, would not be allowed to testify to its due execution, notwithstanding he may not have signed as an attesting witness; that, while the statute only disqualifies him in express terms in the case in which he has so signed, it would defeat the manifest policy of this statute to allow him to testify when he has not so signed.

Kansas has a similar statute, which was construed by the Supreme Court of that State in the case of *Sellards* v. *Kirby,* 108 Pac. 73, and that court said that the statute of that State, making void a devise or bequest to a witness to a will, which can not be proved without his testimony, applies only to attesting witnesses, and not to other persons called upon to testify when the will is offered for probate.

A similar conclusion was reached by the Supreme Court of Vermont in the case of *In re Wheelock's Will,* 56 Atl. 1013.

Upon principle, we perceive no reason why the beneficiary under a will, who was not an attesting witness, should not be permitted to testify. It is argued that it would contravene public policy to permit this. But the Supreme Court of Vermont, in the case cited, answers that argument as follows: "It is argued that to allow a legatee to testify to the execution of the will is improper as against public policy. At common law, in the probating of a will, a legatee thereunder was incompetent to testify. This, however, was solely on the ground of pecuniary interest in the outcome of the action. 1 Underhill on Wills, Sec. 192; 4 Kent's Commentaries (11th Ed.) 598. Since such disqualification has been removed by statute, it is no more against public policy to allow a legatee to testify as a common witness on all questions arising in the probation of a will than it is to allow any other person interested in the result of a suit to give testimony therein. In either case the only reason why it could be against public policy is the interest of the witness, and that ground is no longer available."

Nor is it the law that the proponents of a will are limited, in making proof of its execution, to the evidence of the subscribing witnesses. This subject was reviewed by Professor Wigmore in Volume 2 of his work on Evidence. Chapter 40 is devoted to the subject of preference for attesting witnesses. He discusses the subject with his usual learning and expounds the reason for the rule. In Section 1302 of this chapter he says:

"The notion of the rule of preference for the attesting witness is that of the general desirability, in the furtherance of truth, of obtaining his knowledge on the subject. What its tenor may be, remains to be seen; the object of the law is to obtain his knowledge, irrespective of the side in whose favor it may bear. Accordingly, it is not necessary, as a part of the rule, that he should testify in favor of execution. The rule is satisfied by calling him, *i. e.*, by making *his testimony available* for the trial. If his testimony fails to evidence the execution, the present rule says nothing about the

consequences—whatever any other rule may say. The present rule's force is absolutely spent when the witness is produced for examination. Here also policy agrees with principle; for the practical working of the rule, if it require that the witness should not only testify but testify favorably (*i. e.* if the party desiring to prove execution must fail if the attesters failed to prove it) would be unfair and disastrous, especially in testamentary causes. Accordingly, the failure of the attester *from lack of memory,* to prove execution, is not in itself any breach of the present rule; and though the proponent has still to prove the execution in some sufficient way, he is no longer hampered by any rule about attesting witnesses.

"For the same reason, the attester's positive *denial* of the facts of execution, contradicting the statements implied or expressed in his attestation, leaves the proponent still free to prove by other testimony, if he can, the facts of due execution; a permission demanded not only by principle but also by policy, inasmuch as the proponent would otherwise be defeated of his rights by a corrupt attester."

(2) It is argued that prejudicial error was committed by permitting the will to be read to the jury. The basis of this argument is that the will recited the reasons prompting the testator to make the devise which was made to Kate Smith, thereby arousing sympathy in her favor and inclining the jurors to give it an unduly favorable consideration. We think, however, that no error was committed in this respect, as the will could not be probated unless it was offered in evidence, and we can not say that it was improper for the jury to read the disposition there made of the property devised, as we can not assume that such information would control or influence the jury in determining whether the will had, in fact, been executed.

(3) Objection is made to an instruction numbered 4, upon the ground that it was abstract. The instruction is admittedly a correct declaration of the law, and, according to appellee's theory of the case, it was not

abstract. A litigant has a right to have a correct declaration of the law given upon any material point in the case where he has offered competent testimony tending to sustain that theory. Finding no prejudicial error, the judgment of the court below is affirmed.

BROOKFIELD v. JONESBORO TRUST COMPANY.

Opinion delivered November 12, 1917.

RES ADJUDICATA—CLAIM FOR PRELIMINARY EXPENSES AGAINST IMPROVEMENT DISTRICT—FINAL ADJUDICATION OF CLAIM—REMEDY OF CLAIMANT.—The original proceeding looking to the organization of an improvement district was dismissed for want of jurisdiction, but no order was entered of record. The engineer (appellant) of the district sought to recover his fees for preliminary work, and moved to redocket the original case for this purpose and to *nunc pro tunc* the original decree dismissing the proceedings; the court entered the original decree now for then, but denied appellant the relief sought. *Held,* it was appellant's duty to appeal from this order, which was a final adjudication of his claim, and that a separate suit would be defeated by a plea of *res adjudicata.*

Appeal from Craighead Circuit Court, Jonesboro District; *R. H. Dudley,* Judge; affirmed.

H. M. Mays and *J. C. Brookfield,* for appellant.

1. The plea of *res adjudicata* does not apply, because appellant was never a party to the issue herein. The judgment was not final as to him. 113 Ark. 196; 116 *Id.* 416; 119 *Id.* 315.

2. The sureties in the bond are liable for the costs and expenses of the survey. 106 Ark. 296; 119 *Id.* 20; Act 229, Acts 1911; 122 Ark. 14; 123 *Id.* 246; 122 *Id.* 491; 115 *Id.* 427.

Baker & Sloan, for appellees.

1. The court dismissed the cause for want of jurisdiction. Appellant was a party but failed to appeal. The matter is *res adjudicata.* The court has no jurisdiction

and could not adjudicate costs and expenses. 1 Ark. 55, 58; 21 *Id.* 264-7; 24 *Id.* 177, 182; 85 *Id.* 213.

2. There was no adjudication of costs or fees at the time the case was dismissed.

This is a new and original suit for fees never adjudicated. The only evidence that could be heard was the record of the former proceedings. No extraneous or oral testimony could be offered or heard, for the value of his services must have been determined in the original action. 52 Ark. 103, 106.

3. The circuit court passed upon and dismissed the claim of appellant on September 25, 1915 and this precluded him, because it became *res adjudicata* on his failure to appeal.

If the court was without jurisdiction, Brookfield was never in law appointed engineer; if there was jurisdiction the court acted in the exercise of that power in dismissing his claim.

HUMPHREYS, J. Appellant, who is a civil engineer, brought suit in the circuit court for the Jonesboro District of Craighead County against appellees on a bond to recover a fee of $5,000 for making a survey preliminary to the attempted organization of Big Creek Drainage District in Craighead County.

Appellees denied liability upon the bond and pleaded *res adjudicata.*

The cause was heard upon the complaint, answer, the original petition filed in the matter of the attempted formation of Big Creek Drainage District, and all the orders and judgments of the circuit court rendered in connection with said district. The complaint was dismissed and the cause is here on appeal.

Big Creek Drainage District was attempted to be organized by appellees under Act 279 of the General Assembly of the State of Arkansas for the year 1909, as amended by Act No. 221 of the public acts of 1911. All the necessary steps preliminary to the organization of said district, as provided by said act, were complied

with. In the course of the proceedings, the required statutory bond was filed by these appellees. Appellant was duly appointed engineer to make the preliminary survey and signed and filed his report in the manner provided by law. Upon hearing, the cause was dismissed for the want of jurisdiction, on the 1st day of July, 1912. This order was not entered. Appellant filed a motion to reinstate the cause for the purpose of adjudicating the costs of the preliminary survey. He also moved for a *nunc pro tunc* order to enter the judgment rendered by the court dismissing the cause for the want of jurisdiction. The above motions were presented to the court for consideration on September 25, 1915, and the following judgment was rendered on that date:

"It is therefore by the court considered, ordered and adjudged that this cause be dismissed for want of jurisdiction, and that as this order was made and rendered on the 1st day of July, 1912, that same be entered now for then, and the motion to reinstate and tax costs to pay the engineer's claim for fees is on that account denied and dismissed."

The bond executed by appellees was a statutory bond conditioned for the payment of the costs and expenses of the survey in the event the proposed district should not be established.

This court has held that it was proper to present the claim for the costs and expenses of a preliminary survey in the original proceeding for the formation of the district. *Burton* v. *Chicago Mill & Lumber Co.*, 106 Ark. 296.

Appellant filed a motion to redocket the original case for this purpose and to *nunc pro tunc* the original decree dismissing the proceeding for the want of jurisdiction. The court entered the original decree now for then and for the reason that the original proceeding was dismissed for the want of jurisdiction the court denied and dismissed the motion to reinstate and tax costs to pay the original claim for fees. It was appellant's duty

to appeal from this order for it was a final adjudication of his claim.

The plea of *res adjudicata* to the action of appellant was a good and sufficient defense.

The judgment is affirmed.

WALLACE *v.* GLESSNER.

Opinion delivered November 19, 1917.

1. EVIDENCE—DOCUMENTARY EVIDENCE BECOMES PART OF THE RECORD, HOW.—In an action to try the title to certain lands, appellees relied upon patents from the United States. The certificates of entry were not introduced in evidence. *Held,* a mere reference to the certificates will not bring them into the record. They must be read to the court and filed, or brought in by bill of exceptions.
2. TAX SALE—COLLATERAL ATTACK—VOID SALE—LACK OF JURISDICTION.—The decree in an overdue tax suit is liable to collateral attack, where the court rendering it was without jurisdiction, because the title to the lands involved was in the United States Government.

Appeal from Logan Chancery Court, Northern District; *W. A. Falconer,* Chancellor; affirmed.

J. G. Wallace & Son, for appellant.

1. The only question is did the chancery court have jurisdiction in the overdue tax proceedings. All presumptions are in favor of jurisdiction and the regularity of the proceedings. Acts 1881, § 18, p. 63. A void judgment binds no one, but a voidable one is binding until set aside. The cross-complaint made no case for equitable relief. 31 Ark. 598: 47 *Id.* 205; 26 *Id.* 54. The attacks on the decree are groundless. It is too late to raise the question of payment of taxes. § § 4 and 15 Acts 1881; Mansf. Digest, § 4475. The lands were struck off to the State and conveyed to appellant. The court had jurisdiction. 72 Ark. 601. No patents from the U. S. were exhibited.

2. Decrees in overdue tax suits can not be attacked collaterally for other than jurisdictional facts. 55 Ark.

30, 37; 66 *Id.* 539; *Ib.* 48; 53 *Id.* 445; 45 *Id.* 530; 57 *Id.* 423; 50 *Id.* 188; 91 *Id.* 95; 108 *Id.* 515; 49 *Id.* 336. The recitals in the decree are conclusive of jurisdiction. Kirby's Digest, § 4424-5, and cases cited.

When proceedings are regularly had under the overdue tax act, resulting in sale and confirmation, all persons are precluded from attacking the sale on account of defenses which could have been set up in such proceeding. 91 Ark. 95; 49 *Id.* 336; 50 *Id.* 188; 72 *Id.* 101, 112. It is the general policy to uphold tax titles when the sale is regular. 49 Id. 336; 72 *Id.* 430.

See 55 Ark. 398. After confirmation all defenses were cut off. 22 Ark. 118; 55 *Id.* 30; 57 *Id.* 423. The decree is conclusive. 105 Ark. 5.

Robert J. White, for appellees.

1. The decree was void for want of jurisdiction and the sale to appellant void. The lands belonged to the U. S. and it is not shown that title has passed or that the lands were subject to taxation. Acts 1881, p. 63-4; 56 Ark. 419; 55 *Id.* 30; 65 *Id.* 84.

McCULLOCH, C. J. Appellant instituted separate actions against appellees Glessner and Biggs, respectively, for the possession of certain lands in Logan County. The two actions were transferred to equity, and by consent consolidated, and tried together, and a final decree was rendered in favor of each of said appellees.

Appellant claimed each of the tract of land in controversy under a deed from the Commissioner of State Lands, the State's title being based on a sale pursuant to a decree of the chancery court of Logan County for overdue taxes under the act of March 12, 1881. See Acts of 1881, p. 63. Appellees answered, setting forth numerous grounds for an attack upon the validity of the overdue taxes decree, and among other things alleged that they held the lands under patents from the United States, and that the lands were owned by the government and were, therefore, not subject to taxation at the time

of the original void assessment or at the time of the institution of the suit in which the sale was decreed.

(1) The decree recites that the cause was heard upon "the record evidence, oral evidence, and patent deeds, papers, and other documentary evidences in said case." It is conceded that the patents do not show the dates when the titles passed from the government to the entrymen under the original entries, but it is contended that the mere reference in the patents to the original certificates by numbers makes them parts of the patents so as to constitute parts of the record on which the case was tried below, and that we ought to compel the production of the certificates and treat them as parts of the record. It is, however, a mistake to assume that a mere reference to the certificates brought them into the record without having been read to the court and filed, or brought in by bill of exceptions.

(2) There is, therefore, nothing in the record to prove that the title passed out of the government at a time earlier than the date of the respective patents in the case, which was after the institution of the overdue tax suit. The chancery court found that the overdue tax decree was void for want of jurisdiction of the court which rendered it, and that is correct if the lands belonged to the United States Government. The decree in the overdue tax suit is not open to collateral attack merely for correction of errors, but if the court was without jurisdiction because of the fact that the lands in question belonged to the government, the decree was void, and, in that respect, not open to collateral attack. *Burcham* v. *Terry,* 55 Ark. 398.

Upon the record presented the decree of the court is correct and the same is, therefore, affirmed.

JONES v. BANK OF COMMERCE OF FORT SMITH, ARKANSAS.

Opinion delivered November 19, 1917.

1. CORPORATIONS—RIGHT TO SUE—FAILURE TO PAY FRANCHISE TAX.—A corporation which has failed to file a report and pay the franchise tax provided in section 21 of Act 112, Acts of 1911, may bring an action on its own account where the attorney general has not proceeded to annul its charter under section 15 of said act.
2. APPEAL AND ERROR—DUTY TO ABSTRACT TESTIMONY.—Issues raised on appeal will not be considered where the testimony relating thereto has not been abstracted.
3. ATTORNEY AND CLIENT—AUTHORITY TO BRING SUIT.—In the absence of a showing of lack of authority, an attorney will be presumed to have authority to bring a law suit for the client named.
4. CONTRACTS—WRITING NOT NECESSARY—CONDITIONAL SALES.—Contracts for the conditional sale of property are not required to be in writing.
5. SALES—CONDITION—BREACH—REMEDY OF SELLER.—Where property is sold on a credit and the title thereto is retained by the vendor, the latter upon a breach of the conditions of the sale, either may treat the sale as absolute and sue for the price thereof, or he may treat the sale as canceled and recover the property.
6. LIMITATIONS—SALE OF CHATTELS.—An action for the purchase price of chattels sold, *held*, not barred by limitations.
7. APPEAL AND ERROR—FINDING OF JURY.—Where the testimony is conflicting, the verdict of the jury will not be disturbed on appeal if there is evidence legally sufficient to support it.
8. DAMAGES—FINDING OF JURY.—Under Kirby's Digest, § 6207, the jury may make a special as well as a general finding upon the question of damages.
9. DAMAGES—VERDICT—SPECIAL AND GENERAL FINDING—CONFLICT.—Where the special and general finding as to damages, by the jury, are conflicting, under Kirby's Digest, § 6208, the special finding controls.

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

T. S. Osborne and *W. H. Dunblazier,* for appellants.

1. It was error to give instruction No. 1 for appellee. The corporation had not paid its franchise tax. Act 443, Acts 1907, and No. 260, Acts 1909. It was also in the hands of a receiver and he alone could sue. The attorneys were

not authorized to bring the suit. 10 Cyc. 773-775b; 24 A. & E. Ann. Cas. 300 and note.

2. The sale was absolute and not conditional. 20 A. & E. Ann. Cas. 300 and note.

3. There was error in the other instructions. Appellants had the right to show that appellee was not entitled to possession of the property. 49 Misc. 614; 96 N. Y. S. 837; 20 A. & E. Ann. Cas. 296 and note.

4. There is no proof of damages and no demand made. 27 S. C. 244; 3 S. E. 225.

Geo. W. Dodd, for appellee.

1. There was no proof that appellee had not paid its franchise tax. It was not subject to the tax nor doing business in this State. Acts 1911, Act 112.

2. The question of the attorney's authority to bring the suit was not properly raised nor proven. 4 Cyc. 930; 2 Ark. 356; 1 *Id.* 99; 38 *Id.* 467; 40 *Id.* 131; 104 *Id.* 7.

2. The sale was conditional and by bringing replevin waived the debt for the purchase money. 97 Ark. 432; 91 *Id.* 319.

3. The suit was not barred; it was brought within three years.

4. The evidence is not abstracted.

5. There is no error in the instructions and the damages were proven.

HART, J. Appellee sued appellants in replevin to recover certain furniture, fixtures and other property usually used in a restaurant.

According to the testimony adduced in favor of appellants they bought the property from appellee and paid $25 cash, and the balance was to be paid in deferred payments. The property was to be removed from a warehouse where it was stored, at a subsequent time, and they subsequently took possession of the property under the contract of sale and moved it into their place of business. The sale was absolute and there were no conditions to it. They did not receive all the property they pur-

chased from appellee and the part they did receive was not worth more than eighty-five dollars.

According to the evidence adduced by appellee the sale was made in November, 1913, and was a conditional one. It was understood that the title to the property should remain in appellee until it was paid for. The property was worth anywhere from seven hundred to one thousand dollars.

The jury returned a verdict in favor of appellant and the case is here on appeal.

The action of the court in giving instruction No. 1 is assigned as error. The instruction reads as follows:

"You are instructed that the plaintiff is an Arkansas corporation and is entitled to bring and maintain this action."

In the first place it is claimed that appellee was not entitled to bring and maintain the action because it had not paid the franchise tax as required by Act No. 443 of the Acts of the General Assembly of 1907, and Act 260 of the Acts of the General Assembly of 1909 amendatory thereof. The first section of the Act of 1907 provides for the payment of a franchise tax by corporations and the Act of 1909 is amendatory thereof. See Acts of 1907, page 1213, and Acts of 1909, page 780. Section 2 of the Acts of 1907 provides as a penalty for the failure to pay the tax, that the corporation shall forfeit its right to do business in the State, which forfeiture shall be consummated without judicial ascertainment by the Secretary of State and thereafter that the corporation shall be denied the right to sue or defend in any of the courts in this State.

(1-2) In answer to the contention of appellants that the right of the corporation to bring and maintain an action in the courts of this State was forfeited because it had failed to pay the franchise tax prescribed by the acts above referred to, it need only be said that the acts of the Legislature just referred to were expressly repealed by section 21 of Act 112 of the Acts of 1911.

See the General Acts of 1911, page 67. That act provides for an annual report and the payment of a franchise tax by corporations doing business in the State.

Section 15 provides that upon failure of a corporation to make such report or pay such tax within the time designated in the act, the Attorney General or prosecuting attorney of the district shall bring an action in the circuit court to forfeit and annul the charter of the corporation. No such action was brought in the present case and the corporation had the right to bring and maintain the action. Another objection now made to the instruction is that the record shows that a receiver was appointed to take charge of the affairs of the corporation and that the suit should have been brought and maintained by him. It is true that appellants in their brief state that the record shows that a receiver was appointed to take charge of the affairs of the bank but they do not abstract the testimony of any witness on this point. Under the settled rules of this court appellants are required to abstract the testimony of witnesses. This rule was adopted in the early days of the court to facilitate its business in order that the judges might not be required to explore the transcript to ascertain the testimony of the witnesses. Counsel for appellee deny that the record shows the appointment of a receiver for the bank. Hence it was incumbent upon appellants to abstract the testimony of the witnesses who testified to this fact and not having done so the court will not consider this objection to the instruction.

(3) It is next contended that the attorneys for appellee had no authority from the corporation to bring this suit for it. No proof was introduced by appellants tending to show lack of authority in the attorneys for the bank to bring the suit. The attorneys are officers of the court and in the absence of a showing to the contrary they will be presumed to have such authority.

The bank based its right to recover in this case upon the fact that the sale of property in controversy by it to appellants was a conditional sale. It is insisted by coun-

sel for appellants that there is no testimony in the record sufficient to establish this fact and for that reason appellee was not entitled to recover the property. The cashier of the bank acted for it in making the sale. He testified that the sale was made in November, 1913, and that he continued in the service of the bank until March, 1914. We quote from his testimony the following:

"Q. Was there any agreement between the bank and Mr. Jones as to the title to the property, and as to the payments to be made on it?

A. Mr. Jones, as well as I remember, was to pay $25 a month, and there was never a written agreement made. I can not say whether it was negligence on my part or whether I was waiting for a payment. This property was sold to them by me as cashier of the bank before I ever collected any money on it, it was the intention all along to hold the property as security. Whenever the papers were drawn up and to be signed, that was all you might say, a verbal agreement between Mr. Jones and myself. We didn't write out the agreement.

Q. That the property was to stand for the money?

A. Yes, sir; it certainly was."

(4) In another part of his testimony he stated that Jones understood that the bank was going to retain the property as security and that it was the intention of the bank not to part with the title. He further stated that it was the intention of the parties that this should be embodied in a written contract but that through negligence on his part the property was delivered to appellant without any written contract for the sale of it having been executed; that no part of the purchase money of the property has ever been paid. In this State we have no statute requiring contracts for the conditional sale of property to be reduced to writing and in the absence of such a statute a writing is not necessary. *Butts* v. *Screws*, 95 N. C. 215.

(5) We think the testimony stated above was sufficient to warrant the jury in finding that the sale was a conditional one. It is true the appellants testified that

the sale was an absolute one. This made a conflict in the testimony on this point which was settled against appellants by the verdict of the jury. There being evidence of a substantial nature to support it, under the settled rules of this court the verdict can not be disturbed on appeal. It is settled in this State that where property is sold on a credit and the title thereto is retained by the vendor, the latter upon a breach of the conditions of the sale, either may treat the sale as absolute and sue for the price thereof, or may treat the sale as canceled and recover the property. *Butler* v. *Dodson,* 78 Ark. 569; *Hollenberg Music Co.* v. *Barron,* 100 Ark. 403.

It is also contended that there is not sufficient testimony to support the amount of the verdict. The jury returned a verdict for appellee in the sum of $421.05. The testimony as to the value of the property was in direct conflict and was variously estimated from about $80 to $1,000.

According to the testimony of appellants the property had been damaged by a fire before they purchased it and had then been stored in a warehouse where it very much deteriorated in value. They said that they did not get near all of the property they bargained for and that what they did get was very badly damaged so that it was of but little value.

According to the evidence adduced in favor of appellee the property was turned over to appellants in good condition and it was checked up to ascertain whether or not it was all there. Some of the witnesses for appellee placed a value on the property of more than $700. Hence it can not be said that there was not sufficient evidence to support the amount of the verdict. We have carefully examined the instructions of the court and think the respective theories of the parties were submitted to the jury under proper instructions.

(6) It is also contended that the action is barred by the three years statute of limitations. The suit was filed August the 2nd, 1916. According to the testimony of appellants the sale was made more than three years before

that date; but according to the evidence of appellee, the sale was not made until the latter part of November, 1913. Hence according to the evidence adduced in favor of appellee the action was not barred by the statute of limitations and the dispute between the parties upon this question of fact was submitted to the jury under proper instructions.

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

HART, J., (on rehearing). (7) In their motion for rehearing counsel for the defendant earnestly insist that there is not sufficient evidence to support the verdict of the jury as to the number and value of the articles taken. It would unduly extend this opinion to take up each article and the testimony thereon at length. There is an irreconcilable conflict in the testimony on this point and under the settled rules of this court we can not disturb the verdict of the jury if there is evidence legally sufficient to support it. We have carefully considered the evidence and find that the evidence of the plaintiff, if believed by the jury, warranted the verdict.

Upon further consideration of the case we are of the opinion that the evidence did not warrant the amount of the verdict for damages and in his contention in this respect we think counsel is correct. The verdict of the jury upon this point is as follows:

(8) "And we further find damages for the plaintiff in the sum of $5 per month, or $185 for the detention of said property."

Thus it will be seen that the jury made a special, as well as a general, finding upon the question of damages. This, in their discretion, they might do. Kirby's Digest, § 6207.

(9) Section 6208 provides that when the special finding of fact is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly. A statement of the facts upon this point will readily show that the special finding is

inconsistent with the general verdict. There was testimony from which the jury might have found the rental value to be five dollars per month. One witness testified that its rental value was ten dollars per month. The suit was commenced on August 2, 1916, and the jury returned a verdict December 21, 1916. The verdict was returned four months and nineteen days after the suit was commenced. There was no demand by the plaintiff for the property until the commencement of the suit and the plaintiff was only entitled to damages from that time.

The jury found the rental value of the property to be $5 per month and for four months and nineteen days the total would be $23.14. This is inconsistent with the general verdict on this point and as we have already seen the special finding controls. The action of the court in entering judgment for the amount of the general verdict on this point was erroneous and will be reversed. To this extent the motion for rehearing will be granted. In other respects the judgment will be affirmed.

DURFEE v. DORR.

Opinion delivered November 19, 1917.

1. NEGLIGENCE—INJURY TO PATIENT IN HOSPITAL—INSTRUCTION AS TO MODE OF INJURY.—Deceased was a patient and inmate at appellee's hospital, upon the second floor, where he had been operated upon, and where he was desperately ill. He was left unattended in his room, and was later found on the ground below a balcony and at the foot of some stairs. He died shortly thereafter. Appellant, deceased's father brought suit against appellee, alleging negligence, and also alleging that deceased "walked out of said room and out of the upstairs door upon a small platform, and fell from the banisters or down the steps." The court charged the jury that in order to find for the plaintiff they must find that deceased "fell from the porch of the sanitarium to the ground below." No one saw deceased fall, and it was entirely unexplained. *Held*, it was error to limit a recovery simply to a "fall from the porch."

2. NEGLIGENCE—INJURY TO PERSON IN HOSPITAL—PROOF OF NEGLIGENCE BY CIRCUMSTANCES.—Under the facts as set out in the above syllabus, the trial court charged the jury: "You are instructed that negligence can not and will not be presumed from the circumstances of Dolph Durfree's death, but it is incumbent upon the plaintiff to prove such acts of negligence and carelessness on the part of the defendant as are alleged in his complaint." *Held,* the giving of this instruction was erroneous, when objected to specifically on the ground that "the plaintiff's proof consisted of a series of circumstances, and this instruction, in effect tells the jury that they could not consider those circumstances."
3. NEGLIGENCE—DEATH—PAIN AND SUFFERING—CONTRIBUTIONS.—Under the facts as set out in syllabus 1, above, it is improper for the trial court to charge the jury, that if they found that deceased may have died from causes other than appellees' negligence, that plaintiff could not recover. Plaintiff was suing both for loss of contributions, and for pain and suffering. Although deceased may have died from other causes than appellees' negligence, there could be a recovery for additional and increased pain and suffering caused by appellees' negligence.
4. APPEAL AND ERROR—GIVING CORRECT AND INCORRECT INSTRUCTIONS.—The instructions of the trial court must, as a whole, properly declare the law, and a cause will be reversed where some of the instructions given are erroneous, although others given properly state the law.
5. NEGLIGENCE—TREATMENT OF PATIENT IN HOSPITAL—OPINION OF EXPERT WITNESSES.—In an action for damages for injuries received by deceased by reason of the negligence of the management of a hospital in which deceased was a patient, practicing physicians, who qualified as experts, may testify as to the character of attention a patient should receive in a hospital.
6. APPEAL AND ERROR—DISPUTED EVIDENCE—ERRONEOUS INSTRUCTIONS.—Where the evidence is conflicting the giving of erroneous instructions will call for a reversal of the judgment.

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

Hal L. Norwood and *Richardson & Ruddell,* for appellant.

1. There was error refusing and modifying the instructions asked by plaintiff. No 1 was taken from the

decision of this court on the former appeal. 123 Ark. 542-7. The court erred in adding the words "and if a cause is alleged and proven." 80 S. E. 918; 8 N. C. C. A. 369, 384.

No. 3 should have been given as asked. 79 Ark. 490. No. 3 is a correct statement of the law. 79 Ark 490, 498; 116 *Id.* 82; 105 *Id.* 161; Ann. Cas. 1915, D 342; 64 L. R. A. (N. S.) 370.

2. There was error in giving instructions requested by defendants. Nos. 5, 6, 7, 8 and 9. Cases *supra;* 98 Ark. 352; 91 *Id.* 343; 116 *Id.* 82; 103 *Id.* 81; 123 Ark. 542-7.

3. It was error to admit expert testimony of Drs. Snodgrass and Merriwether as to what attention, in their opinion, it was necessary to give the patient. 62 Ark. 70, 55 *Id.* 593; *Ib.* 65; 66 *Id.* 494.

Joe McCaleb, Jno. B. McCaleb and *Lyman F. Reeder,* for appellees.

1. The law of this case was settled in 123 Ark. 546, 7-8. Defendants were bound only to the degree of care proportionate to the danger to be apprehended, judged by the condition of affairs before the happening of the accident. 14 N. Y. Supp. 881; 148 N. W. 575; *Ib.* 582; 17 L. R. A. (N. S.) 1167; 14 *Id.* 784; 174 S. W. 409; 63 W. Va. 84; 59 S. E. 943.

2. The facts are undisputed and no fall was proven. The verdict is right, for no liability was shown, and this court will not reverse for possible errors in the instructions, not prejudicial. 126 Ark. 469; 123 *Id.* 549; 97 *Id.* 564; 88 *Id.* 236; 120 Id. 236.

3. The jury could not arbitrarily disregard the undisputed evidence. 118 Ark. 349; 96 *Id.* 37.

SMITH, J. A statement of the facts upon which appellant predicates his cause of action will be found in the opinion rendered upon a former appeal (*Durfee* v. *Dorr,* 123 Ark. 542), and we refer to that opinion for a statement of the case, and we will set out here only such portions of the evidence as are necessary to an un-

derstanding of the questions raised on this appeal. At the conclusion of the trial from which the former appeal was prosecuted, the court directed the jury to return a verdict in favor of the defendants, and we reversed the judgment pronounced upon that verdict because, as we there stated, the undisputed proof did not show that the keepers of the sanitarium had discharged their duty to their patient. Upon the remand of the cause and its trial anew, the cause was fully developed upon both sides, and a verdict was returned by the jury for the defendants, and this appeal has been prosecuted to reverse the judgment of the court pronounced thereon.

The opinion on the former appeal is the law of the case, and we undertook there to define the duty owing to appellant's intestate by appellees in the operation of their sanitarium. Appellees say that the instructions given the jury conformed to the law as announced in the former opinion. They say also that, whether this be true or not, the case has now been fully developed, and that the undisputed evidence shows that there can be no liability on their part, and that a judgment against them could not be permitted to stand, and that it is therefore unnecessary to consider whether the instructions correctly declared the law or not. We will consider these instructions in the order stated.

(1) Instruction No. 5, given over the objection of appellant, contained a recital of the findings which the jury must make before their verdict could be for the plaintiff, the third paragraph of which was "that Dolph Durfee fell from the porch of the sanitarium to the ground below."

Specific objection was made to this instruction as follows: "Because it is not incumbent upon plaintiff to prove exactly how such injury occurred, * * * and because the instruction does not follow the allegations of the complaint."

It will be borne in mind that it was the theory of the appellant that the sanitarium was in darkness, because the city lighting plant, which furnished light to

the sanitarium, had been put out of commission by the unprecedented flood in the White River, on which Batesville is located; that only a few days prior thereto an operation for an abscess on the liver had been performed on appellant's son, Dolph Durfee, and that the young man was very desperately ill. Dolph Durfee was found lying on a pile of weeds, and his night shirt was damp, although the moon was shining brightly. Young Durfee was conscious when he was found by a Mr. Hardy, whose attention was attracted by Durfee's call for help. Durfee could give no explanation of his presence on the ground, although he gave the men who carried him upstairs the information which enabled them to find his room and return him to his bed. Two theories are advanced. The first is, that Durfee fell from the porch of the sanitarium to the ground below. The other is that he fell down the stairs up which he was carried when he was returned to his room. No one knows in which manner the injury occurred. Yet the third paragraph of the instruction set out above tells the jury there could be no recovery unless the testimony shows "that Dolph Durfee fell from the porch of the sanitarium to the ground below." If appellees owed the patient a duty which they did not perform, and as a result of their failure to discharge that duty to him he was allowed to leave his bed and room and roam about as his fever, or pain, or delirium carried him, it could make no difference whether he fell from the porch or down the stairs. The complaint alleged that "said Durfee walked out of said room and out of the upstairs door upon a small platform, and fell from the banister or down the steps." He could have gotten from his room to the ground where he was found in either manner, and the court should not have made it a condition precedent to recovery that the jury find affirmatively that he reached the ground in one manner to the exclusion of the other. If appellees are otherwise liable for their lack of care to the patient, it must be immaterial whether the patient fell off the platform to the ground or fell down the steps to the ground.

(2) Instruction No. 6, given over appellant's objection, reads as follows: "You are instructed that negligence can not and will not be presumed from the circumstances of Dolph Durfee's death, but it is incumbent upon the plaintiff to prove such acts of negligence and carelessness on the part of the defendants as are alleged in his complaint."

Specific objection was made to this instruction "because the plaintiff's proof consisted of a series of circumstances, and this instruction, in effect, tells the jury that they could not consider the circumstances."

Counsel for appellees concede, of course, that it was proper for the jury to consider the circumstances that were proven in connection with the injury and death of the deceased in determining whether appellees were negligent; but this instruction is now defended upon the ground that it is, in effect, a declaration that the doctrine of *res ipsa loquitur* does not apply. We can not so consider it, in view of the specific objection made to it. All doubt on the subject appears to be removed when we consider that the court refused, at appellant's request, to modify the instruction by adding the following qualification: "In determining whether plaintiff has proved that the defendants were negligent as alleged, you are authorized to take into consideration all of the circumstances that have been proved in connection with the injury and death of the deceased."

(3) Instruction No. 8, given over appellant's objection, reads as follows: "If you believe from the evidence in this case that deceased, Dolph Durfee, may have died on account of natural causes, or that his death may have been due to other causes than the acts of carelessness and negligence complained of by the plaintiff herein, then the plaintiff has not satisfied the burden of proof devolving upon him, and your verdict should be for the defendants."

Specific objection to this instruction was made because it told the jury that the plaintiff could not recover unless he had proven that Durfee died as the result of

carelessness and negligence complained of, when plaintiff has the right to recover, as administrator, for the pain and suffering endured by Durfee, although his death may not have been caused by the injury received from the negligence of the defendants, and plaintiff asked that the instruction be amended by adding "as to the administrator in his own right."

The requested modification should have been given. The plaintiff was suing, not only for the loss of contribution on the part of the son to his father, but also for pain and suffering. The finding that death would have ensued without regard to the negligence complained of, would have defeated the recovery of compensation for loss of contribution. But that finding would not, necessarily, have defeated a recovery to compensate the pain and suffering resulting from such negligence. If there was such conscious pain and suffering on the part of the patient, in addition to the pain which his existing condition would have caused him, and the additional or increased pain was caused by appellee's negligence, there could be a recovery to compensate such pain, although the finding that death would otherwise have ensued defeated a recovery on account of the loss of contributions.

(4) In instructions numbered 1, 2, 3 and 4, the court announced the law in conformity with the opinion of this court on the former appeal. But it does not suffice that some of the instructions correctly declared the law. It is essential that the instructions, as a whole, do so, and we have already expressed our disapproval of instructions numbered 5, 6 and 8, set out above.

(5) Objection is made by appellant also to the action of the court in permitting practicing physicians, who qualified as experts, to testify as to the character of attention a patient should receive in a hospital. We think this evidence was competent, as it related to a subject upon which the average juror would have no information or experience upon which he would be in position to formulate an intelligent conclusion unless he

based his conclusion upon the opinion of one qualified to speak as an expert.

(6) It is finally insisted that the erroneous instructions set out do not constitute prejudicial error, because as insisted by appellees, the undisputed evidence shows that the patient was not delirious, and that there was nothing about his condition which made it reasonably appear that any attention should have been given the patient which was not, in fact, shown him. In support of this contention, the nurse who was in charge of the hospital on the night in question testified that she saw the patient at about 8:30 p. m., which she said was only fifteen or twenty minutes before his injury, and that he was then asleep, and that he had not been unconscious at any time. And the attending physicians, who were the owners of the sanitarium, and were the defendants below, also testified that the patient had not been unconscious prior to his injury, and that he remained conscious up to the time he died, which was about two hours after his injury.

Appellant saw his son at about 7 p. m., at which time he was rational. A nurse testified that she had placed her bed in an adjoining room and only six feet away, so that she might readily answer any call or alarm from that room, and that there was a call-bell at each patient's bed and a nurse always within hearing of the bell. It was shown that no hemorrhage had occurred, and the dressings of the wound were dry, and appellees testified that there would have been a hemorrhage had the patient fallen off the porch. The nurse on duty admitted she was not present when the patient was returned to his room, but she says she was engaged at the time in taking off her uniform and putting on her bed-room slippers and kimono and fixing for the night, and that she heard the parties bringing the patient upstairs and into his room just after they did so. The doctors were in the patient's room for the last time before his injury at 8:30, at which time appellant was told that there was not a chance in the world for the patient to recover;

and another one of the physicians testified he saw the patient in his room and asleep at 9:30, although he did not enter the room at that time. It must be conceded that, according to this testimony, appellees were not negligent in their treatment of the patient, and we should hold, under this evidence, as a matter of law that there was no negligence if the testimony was undisputed. But such is not the case. On appellant's behalf the testimony tended to show that the patient might have fallen from the platform over the banisters, which were only two feet and two inches high, on a pile of weeds lying beneath, and a physician testified in behalf of appellant that there would not necessarily have been any broken bones or hemorrhage had he done so, and this witness stated that the act of the patient in continually drawing up his legs, after he had been placed back in his bed—a circumstance testified to by the witnesses who placed him in bed—might indicate an internal injury and consequent pain. The building was in darkness, and none of the doors were fastened, and no one was in sight when the patient was carried upstairs, and the jury might have found that the nurses who were supposed to be on watch were in fact, asleep, as the nurse who did appear was dressed in her kimono, and the nurse who said her bed was only six feet away did not appear on the scene at all. Had the jury refused to believe the nurses, as they might have done, they might have found that a man, known to be desperately ill, was left to die alone, as he was found between 10 and 11 p. m. and a witness stated that he had been sitting for more than a half hour before that time in front of the hotel directly across the street where he would have seen Durfee had he fallen from the porch or down the steps, and that nothing of that kind had occurred during that time. The jury might have concluded, from the fact that the patient had left the room, and had been lying on the weeds for probably an hour, and that he could give no account of how he came there, that he was delirious when he left his room. The jury might also have found that professional nurses should

have anticipated the probability of a patient becoming delirious whose death was expected at any minute, and might also have found that the nurse's call-bell would be unavailing to a person *in extremis*. Appellant testified that he was called about midnight and was told that his son had gotten by his nurse and was not doing so well, and he was not allowed to see his son until after his death. The undertaker testified that there were some small skinned places on one knee of the patient, and the other knee was bandaged up, and there were several small scratches about the deceased's face. Should the jury find the facts to be as contended by appellant, we could not say, as a matter of law, that no negligence was shown. Consequently, we must reverse the judgment for the erroneous instructions set out above. It is so ordered.

McCULLOCH, C. J., (dissenting). The obvious meaning of instruction No. 6 is that negligence can not be presumed merely from the happening of Durfee's death, and it is a correct declaration of the law on the subject. If the word "circumstances" had been used in the singular, there would not be the slightest doubt about the meaning, but the use of the plural was not, I think, calculated to raise a doubt in the minds of the jury as to what the court meant.

It is conceded by the majority of the judges that the proof wholly fails to establish negligence on the part of the physicians in the treatment of the patient, and it seems equally clear to me that according to the undisputed testimony the patient was not delirious before the accident, and that his condition was not apparently such as to warrant the inference that the physicians or nurses could or should have anticipated that he might become delirious and need constant attention. I think the judgment ought to be affirmed.

BUSH, RECEIVER ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* COLEMAN.

Opinion delivered November 26, 1917.

1. RAILROADS—FAILURE TO PAY EMPLOYEES—PENALTY.—Kirby's Digest, § 6649, as amended by act of 1905, page 537, declaring a penalty for the failure of a railway company to pay its employees promptly, is penal in its nature, and recovery can not be had under it unless the discharged employee shows that he has made a distinct demand in accordance with the terms of the statute.
2. RAILROADS—PAYMENT OF WAGES—PENALTY.—The words "foreman or keeper of his time" as used in Kirby's Digest, § 6649, as amended by act of 1905, page 537, refer to the immediate foreman or time-keeper, and not to *any* superior of the discharged employee in the same department.

Appeal from Pope Circuit Court, *A. B. Priddy,* Judge; reversed.

Thos. B. Pryor and *W. P. Strait,* for appellant.

Appellee is entitled to judgment for the wages due, $4.20. He was not entitled to the penalty. No proper demand was made for his wages. 87 Ark. 136; 82 *Id.* 377; 125 *Id.* 366; 88 *Id.* 281; 125 *Id.* 377.

McCULLOCH, C. J. Appellee instituted this action against appellant as receiver of the St. Louis, Iron Mountain & Southern Railway Company to recover the amount of wages due him as an employee of appellant, and also the statutory penalty provided for failure to pay the wages of a discharged employee. The amount of wages sued for is the sum of $4.20, for two days work.

Appellee was employed by the receiver to work at Russellville, Arkansas, his duties being to clean the clinkers out of engines while they were stopped at that station. He worked during the month of November, 1916, until the 17th day of that month, when he was discharged. Smallwood, the station agent at Russellville, was the foreman of that work, and was also the keeper of appellee's time. Employees were paid semi-monthly, on the 1st and 15th days of each month, the time up to each pay day being included in the pay check delivered on the

next pay day. Appellee made no demand on Smallwood for his pay at the time he was discharged, but went to Van Buren to see the master mechanic, who was the division foreman, to see about getting another job. The master mechanic refused to re-employ him, and he then made demand on the master mechanic that his pay check be sent to Russellville. He went to Russellville on the next pay day, which was December 1st, and his pay check was delivered to him, but it included only his wages up to the last pay day, November 15th, and did not include the wages for the two additional days. When the check was delivered to him attention was called to the fact that it did not include pay for those two days, and he made complaint, saying: "I am going to see that they pay me every day that I am out of it." This statement was made to Smallwood. No request was made by him at that time that the check be sent to Russellville.

This action was instituted December 11, 1916, and on December 13th, Smallwood tendered to appellee the amount of his wages for the two days, which amount was refused. Appellee recovered judgment below for the amount of wages and penalty in the sum of $52.50. The statute (Kirby's Digest, § 6649, as amended by Act of 1905, page 537) provides that when any railroad company or receiver operating a railroad shall discharge an employee "the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; any such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept, and if the money aforesaid, or a valid check therefor, does not reach such station within seven days from the date it is so requested, then as a penalty for such non-payment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid."

(1) We have held that the statute is penal in its nature, and that recovery can not be had under it unless the discharged employee shows that he has made a distinct demand in accordance with the terms of the statute. *St. L., I. M. & S. Ry. Co.* v. *Bailey,* 87 Ark. 132; *St. L., I. M. & S. Ry. Co.* v. *McClerkin,* 88 Ark. 277; *Hall* v. *C., R. I. & P. Ry. Co.,* 96 Ark. 634.

(2) The words "foreman or keeper of his time" refer to the immediate foreman or time-keeper, and not to any superior of the discharged employee in the same department. The purpose of the statute is that the demand shall be made either to the superior who has immediate supervision over the discharged employee or the one who keeps his time. The master mechanic at Van Buren had general supervision over the employees in that department, but he was not the foreman or time-keeper within the meaning of the statute, and the demand on him for payment of the wages was not sufficient compliance with the terms of the statute to justify the imposition of the penalty. Nor was the complaint made subsequently when the pay check was delivered at Russellville sufficient to constitute a demand of payment of the remainder of wages with a designation of the particular station to which the check should be sent.

Our conclusion is, therefore, that according to the undisputed evidence appellee failed to make out a case for the recovery of the penalty, and the judgment in his favor was erroneous. Appellant offered to confess judgment for the sum of $4.20, the amount of the wages, and that is the judgment which the court should have entered. The judgment for the penalty and for the costs of the action subsequent to the offer to confess judgment is reversed, and judgment will be entered here in favor of appellee for the sum of $4.20 with costs up to the offer made by appellant to confess judgment.

PORTER v. MORRIS.

Opinion delivered November 26, 1917.

1. PROMOTERS—SALE OF STOCK—DUTY TO REVEAL TRUE FACTS.—Where the promoters of a corporation, capitalized at $1,000,000, issued stock to themselves for $600,000, the sole consideration for which was a tract of land valued at $925, it is their duty to reveal the true facts to a prospective purchaser of stock.
2. CORPORATIONS—SALE OF STOCK—FRAUD.—The sale of stock in a water power company, held induced by fraudulent representations.
3. APPEAL AND ERROR—EQUITY—RELIEF NOT SOUGHT BELOW.—In an appeal in an action in equity, appellee can not obtain on a cross-appeal relief not sought before the chancellor.
4. APPEAL AND ERROR—CROSS-APPEAL, TIME.—A cross-appeal can not be treated as an original appeal, when taken over six months after the rendition of the decree.

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

Carmichael, Brooks & Rector, for appellants.

1. No fraud nor misrepresentations were proven in the sale of the stock to Morris. 47 Ark. 165; 125 U. S. 247-250 L. Ed.; 31 *Id.* 678; 20 *Id.* 627; 150 U. S. 665, 673; 5 Pet. 264; 1 Wheat 175; 111 U. S. 549; 37 L. R. A. 605; 80 Am. Dec. 172; 160 S. Ct. Rep. 582; 91 Ark. 324.

2. The stock was fully paid and non-assessable as to Morris. 56 Ark. Law Rep. 229, 236; 10 Cyc. 701-2; 134 S. W. 1066; 95 Ark. 124; 4 Thompson on Corp., § 3431; 45 L. R. A. 647.

John W. Wade, for appellee.

1. The stock was sold appellee by false and fraudulent representations. 1 Cook on Corp. 410-11-12 and note 7, 419, 2397; 10 Cyc. 428; 33 L. R. A. (N. S.) 721, note.

2. The corporate statute was fraudulent. Kirby's Digest, § § 838-9, 845; 139 U. S. 417; 71 Ark. 383; 135 Fed. 159; 36 Tex. Civ. App. 317; 127 Ala. 513; 51 W. Va. 341; 90 Va. 533; 1 Cook. Corp., par. 325, 342, note 1 (1867).

3. Appellee's transferers were his fiduciaries. 71 Ark. 277; 18 A. & E. Ann. Cas. 354.

4. Appellee was made to believe he was getting treasury stock and that the price would go into the treasury. There was failure of consideration. The concern was a failure and the whole scheme a fraud. On the cross-appeal appellee should be awarded the stock at least.

McCULLOCH, C. J. Appellee Morris purchased shares of stock in a domestic corporation known as the Pike County Water Power Company, and executed his notes for the amount to be paid for the stock. The present litigation involves two actions, one instituted against appellee to recover the amount of two unpaid notes, and the other an action instituted in the chancery court of Pulaski County by appellee against certain parties to cancel the purchase of the shares of stock and the unpaid notes executed by appellee for the price. The two actions were consolidated and proceeded to a final decree in the chancery court of Pulaski County.

The domicile of said corporation was at Murfreesboro, Arkansas, with offices in the city of Little Rock. The parties who became interested in the organization of the corporation, Cox, Showers, Jones, Holman and Bain, conceived the plan of purchasing a tract of land, containing 185 acres, near Murfreesboro, on which was located a body of water with fall sufficient to develop considerable power, and organizing a corporation to develop this power and sell the same for commercial and industrial uses. In other words, the plan was to develop and operate a hydro-electric water power plant, for the purpose of furnishing power to the cities and towns in western and central Arkansas. One of the promoters of the scheme, Bain, was interested in the tract of land, in that his wife owned an interest by inheritance from her father. Pursuant to this plan, the parties mentioned purchased the tract of land, paid therefor the sum of $925, and organized the corporation, with authorized capital stock of $1,000,000, of which $600,000 was issued to the promoters mentioned above and two other gentlemen, who are practicing attorneys, and who received each a large

block of stock for his services as attorney. The capital stock was divided into shares of the par value of $5 per share. None of these parties paid into the treasury of the corporation any money in consideration of the issuance of the stock, but the testimony is to the effect that some of them expended sums of money in procuring the services of an engineer and in paying the expenses of issuing and distributing the printed prospectus. Four of the parties named, Showers, Cox, Jones and Holman, sold to appellee 4,000 shares of their stock, of the par value of $20,000, for the amount of one-third of the par value of the stock, and appellee executed his four promissory notes, each for the sum of $1,666.66. Instead of transferring the stock to appellee, they surrendered the shares of stock to the corporation, and caused the secretary to issue 4,000 new shares of stock direct to appellee. Said promissory notes were executed by appellee to his own order and endorsed in blank, and were delivered to the four parties just named, who each took one of the notes. Cox and Showers each assigned the respective notes held by them to local banks, and appellee subsequently paid the same after the institution of the present litigation.

The notes to Jones and Holman were not paid at maturity, and appellee executed new notes in renewal, payable directly to Jones and Holman, respectively, and they transferred the notes to the Jones House Furnishing Company, a corporation with which they were connected as directors. The Jones House Furnishing Company instituted an action against appellee in the Pulaski circuit court on the two notes after maturity; but subsequently, and while the action was pending, assigned the notes to another corporation, which became insolvent, and appellant Porter became the purchaser of the notes at a receiver's sale, and on his own petition was joined as a party to the action. Appellee then instituted the suit in equity against Showers, Cox, Jones, Holman, the Jones House Furnishing Company, and the Pike County Water Power Company, to cancel the notes and rescind

the contract of sale of the stock. These are the two suits that were consolidated and tried together.

Appellee alleged in his complaint that he was induced to purchase the stock by the false and fraudulent misrepresentations of the parties who negotiated the sale of the stock, concerning the financial status of the corporation and the prospect of developing the same into a profitable enterprise. The proof taken in the case shows that the sale was negotiated by Showers, who was employed by the other three interested stockholders to sell the stock; that Showers employed a man named Abbott to assist him in selling the stock, and that Abbott was the man who first enlisted the interest of appellee in the purchase.

The answer in the case contains a denial of the charges of fraudulent misrepresentations; and the chancellor decided that issue in favor of appellee and rescinded the sale and canceled the two unpaid notes.

We are of the opinion that the decision of the chancellor is correct. It is true the testimony does not show that any definite misrepresentations were made to appellee concerning the value of the property of the corporation; but it is sufficient to warrant the conclusion that there were misrepresentations concerning the true financial condition of the corporation and of its ability to develop into a going concern of the magnitude indicated in the prospectus and with prospects as represented to appellee. There are two points upon which appellee claims that there were misrepresentations: One that he was buying treasury stock from the corporation, and not shares of stock previously issued to other parties; and that there were sufficient funds in the treasury of the corporation for use in developing the plant and making it a profitable concern. Appellee testified that he was assured that there was plenty of money in the treasury to use in developing the plant, and that he was led to believe that the price he was to pay would go into the treasury. The printed prospectus upon which appellee relied stated that the capital stock of the corporation was

$1,000,000, "fully paid" and "non-assessable." And appellee testified that, in connection with that prospectus, he was given assurance that the money paid for the stock was in the treasury of the corporation. The undisputed fact is that appellee did not receive shares of stock owned by the corporation and that the corporation did not profit a cent by the sale of the stock to him; but, on the contrary, he unwittingly became the purchaser of shares of stock already issued to the four parties named, and they alone received the benefit of the purchase. The fact, too, that the notes executed by appellee, prepared by Showers, were made payable to appellee's own order, was calculated to conceal the true import of the transaction and disguise from appellee the fact that he was purchasing shares of stock from shareholders, rather than from the corporation itself. Nothing was ever done to develop the plant. Its property and assets consisted solely of the tract of land in question, which cost the promoters the comparatively small sum of $925, and for which the promoters received from the corporation shares of stock of the par value of $600,000. Again, appellee testified that he was assured that he was being let into the concern on an equality with the other stockholders—"on the ground floor" as he says they expressed it to him, and yet the fact remains that he paid one-third of the par value of the shares of stock, when the other stockholders received their stock at less than 2 per cent. of the par value, $925—the value of the land—being the sole consideration which they paid for the stock. These facts are not disputed, and there is no testimony in the record tending to show that the tract of land at any time had a value exceeding the amount which the promoters of the corporation paid for it. Now, the testimony does not show, as before stated, that there were any definite misrepresentations made to appellee by the promoters concerning the value of this property which constituted the only assets of the corporation; yet, in addition to the misrepresentations concerning the fact that the money brought in from the sale of stock would go into the treas-

ury, appellee was assured that he was being taken into the corporation on terms of equality with the other shareholders, and the undisputed proof is that this was not true. The fact that the promoters issued a misleading prospectus, showing that there was paid up stock of the par value of $600,000, whereas the only assets consisted of the tract of land of the value of $925, cast upon the promoters the affirmative duty of informing prospective purchasers of shares of stock of the true financial condition of the corporation. In other words, they should have informed purchasers of the fact that they had received their shares of stock in consideration of the conveyance of the tract of land; that nothing else had gone into the treasury of the corporation, and that there were no funds on hand to use in developing the plant. This view of the matter necessarily results from the application of elemental principles of equity and natural justice and good faith in ordinary business transactions. The cases cited by appellee on the brief fully sustains the decision of the chancellor upon that theory.

It is insisted that appellee waited too long and is barred by his own laches from repudiating the sale and seeking a rescission. The same testimony which establishes the misrepresentations to appellee, upon the faith of which he purchased the stock, lulled him into security and caused him to renew the two notes in suit and to fail to ask for a rescission. There has, it is true, been long delay in the determination of the rights of the parties in this transaction; but the suits were brought with reasonable promptness after the notes fell due, and appellee shows that he did not ascertain the true condition of the affairs of the corporation until after he was sued on these notes. The long delay in prosecuting the suit to final decree was caused by an agreement between the parties to wait to see whether or not some means could be found, in course of time, to develop the power plant. The evidence shows that the whole scheme has proved to be a failure and that the stock in the corporation has no sub-

stantial value. The assignee of Jones and Holman—the corporation which became the transferee of the notes from Jones and Holman, was not an innocent purchaser; nor was appellant an innocent purchaser, for he bought at receiver's sale after the maturity of the notes.

Appellee has cross-appealed, and asks, in addition to the relief granted him below, for the cancellation of the notes and the sale of the stock, that he be decreed the right to hold one-half of the stock, for the reason that he has paid the notes executed to Cox and Showers, and also that he should have a decree against Jones and Holman for the sum of $366.64 which he paid to them as interest on the notes.

The answer to the first contention on the cross-appeal is that appellee did not, as far as the abstract of the record shows, ask the chancellor to give him the relief which he now seeks with respect to the retention of half of the stock. In his deposition he expressly tendered the stock for cancellation, and the decree recites such tender. In other words, the chancellor took him at his word and allowed him to return the stock and have his notes canceled and it is too late now for him to ask, for the first time, that there be a division of the stock so that he can retain a portion of it.

Now, as to the other relief sought by the cross-appeal, it is sufficient to say that appellee should have taken an original appeal within the time prescribed by the statute, and is not entitled to a cross-appeal. The record shows that the attorney who represents appellant Porter also prayed, and obtained, from the clerk of this court an appeal for Cox, Showers, Jones and Holman, but the statement of the attorney shows that this was done by mistake and without authority. In addition to that, it may be said that the decree below was not adverse to those parties, and there was nothing for them to appeal from.

So, the matter of recovering from Jones and Holman the amount paid for interest was a separate controversy between appellee and those parties, and could not be made

the subject of a cross-appeal upon the appeal of appellant Porter. *Shapard* v. *Mixon,* 122 Ark. 530.

We might treat the cross-appeal as an original appeal if it had been taken in time; but it was not taken within six months from the date of the decree, and, therefore, can not be considered. The cross-appeal is dismissed, and the decree of the chancery court is affirmed.

GEO. E. KEITH COMPANY *v.* JANUARY.

Opinion delivered November 26, 1917.

1. APPEALS FROM JUSTICE COURT—PERFECTING SAME—DUTY OF PARTY APPEALING.—On appeal from justice court, it is the duty of the party appealing to see that his appeal is perfected properly and in time. While the statute makes it the duty of the justice to file the transcript, it is nevertheless the duty of the party appealing to see that it is done.
2. APPEAL FROM JUSTICE COURT—LACK OF DILIGENCE.—Where the transcript is not lodged on or before the first day of the term of the circuit court next after the appeal is allowed, and no excuse for the delay is shown, the circuit court may dismiss the appeal or affirm the judgment for the lack of the proper diligence on the part of the appellant in prosecuting his appeal.

Appeal from Benton Circuit Court; *J. S. Maples,* Judge; affirmed.

A. L. Smith, for appellant.

It was error to dismiss the appeal. It was filed in time. If there was delay it was caused by the justice. Kirby's Digest, § 4666. No prejudice is shown to appellee and the court abused its discretion.

Vol. T. Lindsey, for appellee.

The appeal was properly dismissed. Kirby's Digest, § 4676. It was appellant's duty to see that the transcript was filed in time. 110 Ark. 284; 161 S. W. 201; 96 Ark. 555; 132 S. W. 917; 48 Ark. 73; 2 S. W. 346.

WOOD, J. This cause was tried in a justice of the peace court on September 6, 1916. Plaintiff gave notice of appeal, and an affidavit for appeal was filed on Sep-

tember 12, 1916. The circuit court convened on September 18, 1916. The transcript of the justice's docket relating to the cause was filed on March 8, 1917. The defendant moved the court to dismiss the appeal, which motion was granted, and from a judgment dismissing the appeal the cause is here.

The statute provides that on or before the first day of the circuit court next after the appeal shall have been allowed the justice shall file in the office of the clerk of such court a transcript of all the entries made in his docket relating to the cause, together with all the process and all the papers relating to such suit. Kirby's Digest, § 4670.

It was the duty of the plaintiff below to see that his appeal was perfected on or before the first day of the circuit court next after the time of the filing of his affidavit, which, together with the notice and prayer for appeal, constituted the steps that were necessary for him to take in order to have his appeal allowed. While the statute makes it the duty of the justice to file the transcript, it is nevertheless the duty of the party taking the appeal to see that this is done. *Hughes* v. *Wheat,* 32 Ark. 292; *Wilson* v. *Stark,* 48 Ark. 73; *Carden* v. *Bailey,* 87 Ark. 230.

Where the transcript is not lodged on or before the first day of the term of the circuit court next after the appeal is allowed and no excuse for the delay is shown, the circuit court may dismiss the appeal or affirm the judgment for the lack of proper diligence on the part of the appellant in prosecuting his appeal. *Carden* v. *Bailey, supra; Bates* v. *Mitchell,* 96 Ark. 555; *Hart* v. *Lequieu,* 110 Ark. 284.

The judgment is, therefore, correct, and it is affirmed.

HOLT v. STATE.

Opinion delivered November 26, 1917.

TRIAL—MISCONDUCT OF JURY—FELONY TRIAL—SEPARATION OF JURY PENDING VERDICT.—During the trial of a prosecution for rape, the jury was taken out upon the streets of the town, and permitted to separate and mingle with a large crowd attending a street concert; many of the crowd were strongly prejudiced against the defendant. The State offered no evidence that this misconduct of the jury did not result in any prejudice to the defendant. *Held,* such misconduct required a reversal of a judgment of conviction.

Appeal from Randolph Circuit Court; *J. B. Baker,* Judge; reversed.

S. A. D. Eaton, for appellant.

1. The judgment should be reversed for misconduct of the jury, in separating and mingling with a crowd strongly prejudiced against appellant. No effort was made to controvert the truth of the affidavits filed. Such conduct of the jury is reversible error. 12 Ark. 782; 20 *Id.* 36, 53; 26 *Id.* 323; 95 *Id.* 428; 57 *Id.* 1, etc.

2. The court erred in its instructions to the jury. 66 Ark. 523; 42 N. W. 903; 110 Ark. 152; 33 Cyc. 1505; 46 Ark. 151; 58 *Id.* 353; 37 *Id.* 592; 49 *Id.* 448; 58 *Id.* 108. See also 62 Ark. 543; 183 S. W. 1059-1066-7-8; 191 *Id.* 1002, 469; 195 *Id.* 997; 93 *Id.* 790; 2 Bishop New Cr. Law 1182 and others.

3. There was no evidence to support the verdict of assault to rape. 77 Ark. 37; 99 *Id.* 558; 105 *Id.* 218; 33 Cyc. 1493.

4. The court erred in the admission of evidence and in allowing improper argument of counsel. 1 Thompson on Trials; 923-5; 58 Ark. 473; 62 *Id.* 126.

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

1. The misconduct of the jury was not reversible error. 95 Ark. 428; 26 *Id.* 323-8; 35 *Id.* 118; 34 *Id.* 341; 13 *Id.* 317; 26 *Id.* 323. The affidavits fail to show a separa-

tion within the rule. Cases *supra;* 12 Ark. 782, 810, 811; 29 *Id.* 248; 44 *Id.* 115.

2. There were no errors in the admission of testimony, nor instructions to the jury. 100 Ark. 132; 85 *Id.* 376; 96 *Id.* 78; 63 *Id.* 470; 78 *Id.* 407, etc; 51 *Id.* 167; 88 *Id.* 499.

3. No improper argument was allowed. 95 Ark. 172-7.

WOOD, J. Miss Mae Smithson was a school teacher. She taught school at Ponder, Missouri, where she met George Holt at Sunday school. They became "sweethearts," and he visited her frequently while she was teaching school at the school house at Ponder, Missouri, and also at her home in Reyno, Randolph County, Arkansas. Holt asked Miss Smithson to marry him and she promised to do so if he would defer the matter for two years, giving as her reason for the delay that she was then not twenty-one years old, and that her mother was a widow and needed her assistance, and promised that if he would wait for that time and they still loved each other she would marry him. He pressed his suit, and she finally told him that she had changed her mind and did not love him as he deserved to be loved, and therefore refused to marry him. Holt professed still to be her friend and told her that he would do anything he could for her, and that he thought he could get her another school near Warm Springs when her time was out with the school she was then teaching. He wrote her two letters, dated at Warm Springs, in which he represented that the directors were his friends and that he had interviewed them in her behalf and that they had promised to employ her to teach the school, but before they did so they wanted her to come up to Warm Springs so they could see her and arrange the contract. Holt arranged with Miss Smithson to meet her at Pocahontas on a certain day and to take her to Warm Springs. They met in Pocahontas on that day and started out from Pocahontas about 3:30 o'clock in the afternoon in a two-

horse buggy for Warm Springs, which was a distance of about 18 miles. Dark overtook them, and, after driving for quite a while, Holt detoured from the road they were traveling and took a dim road through a woody place. When they arrived at a certain place he stopped the team, drew a gun on Miss Smithson, told her he had not got any school, and never had, and that he was simply carrying out a plan to take her life. He asked her to allow him to have the privilege of sexual intercourse with her, and upon her resisting he continued his threats and intimidation until finally she lost consciousness and he had intercourse with her, which she could testify as a fact from her painful condition which she realized after she regained consciousness and the condition of her clothes.

The above is a condensed statement of the essential facts upon which Holt was indicted for the crime of rape, was convicted of an assault with intent to rape and sentenced to imprisonment in the State penitentiary for a period of twenty-one years, and from the judgment of the court he prosecutes this appeal.

The defendant admitted the intercourse, and set up and testified that it was obtained by the consent of the prosecutrix.

There is an exceedingly voluminous record, and the motion for a new trial assigns seventy-six grounds of alleged error in the rulings of the court in admitting and rejecting testimony and in the granting and refusing of prayers for instructions. We have examined all these and find no reversible error in any of them, except as set forth in the 68th assignment, which is as follows:

"The jury, disregarding the instruction of the court to the effect that they were to remain together and in a body at all times and would not be permitted to separate for any purpose until after the rendition of their verdict herein, on the evening of July 25th, during the progress of the trial herein, during a street concert, when there was a crowd of perhaps two hundred people on the

street, separated and mixed and mingled with such crowd, indiscriminately."

In support of this assignment of error, the appellant filed the affidavit of Dee Mock, who stated that, "during the evening of July 25, 1917, while standing on the pavement south of the court square in said town (Pocahontas) listening to the music of a street concert, which had attracted a large crowd of people, my attention was called to the fact that the trial jury, which had been empaneled to try the case of the State of Arkansas v. George Holt, charged with rape, alleged to have been committed on the person of one Mae Smithson, was present with the crowd of people, and some of said jurors had separated themselves from their fellow jurors and were mingling with said crowd of people, while another one of said jurors separated himself from his fellow jurors and walked several feet away to where a gentleman was sitting in his automobile and carried on a conversation with the gentleman for several minutes. I do not know the subject of such conversation, nor do I know that the jurors who were mingling with said crowd of people spoke to any of them, but I know that a large number of said crowd of people were strongly prejudiced against said George Holt."

The affidavit of S. N. Bailey was also read, which states that "on the evening of the 25th of July, 1917, while the jury selected in said cause (State v. George Holt) was in a body on the streets of said town (Pocahontas), a street concert was in progress in the street just south of the court square; that a large crowd of people had assembled at said place attracted by the music; that while enjoying said music, I noticed several jurors separate themselves from the other jurors and mingle with the crowd there assembled, for several minutes. I do not know if any words were passed between any of said jurors with any one in said crowd, but do know that numbers of people in said crowd were strongly prejudiced against said George Holt."

No affidavits were introduced on the part of the State by the jurors, the officer in charge of the jury, or others, to controvert the truth of the statements contained in the above affidavits, and there were no affidavits on the part of the jurors who tried the case to the effect that they had not had any conversation with anyone concerning the case and had not heard it discussed, and, in short, that nothing had occurred on the occasion mentioned which in any manner influenced them in the rendition of their verdict finding appellant guilty of the crime charged.

In *Ferguson* v. *State,* 95 Ark. 428, the facts were that after the case was in the hands of the jury to deliberate upon their verdict, and while they were in the custody of the officer, when the jury were passing a certain store in the town of Magnolia one of their number left his fellows and went to the rear of the store. The remaining members of the panel and the officer in charge passed on by the store to the corner of another building and remained there until the juror who had separated from them returned. The juror who left his fellows was out of their sight until he returned to them. The court, speaking of the facts there disclosed, quoted from *Maclin* v. *State,* 44 Ark. 115, 119, as follows: "But it has long been the rule of this court in case of felony that separation of a juror from his fellows pending the trial casts upon the State the burden of showing that no improper influence was brought to bear upon the juror during his absence. In other words, the mere fact that a juror separates from his fellows, without the order of court, is *prima facie* ground for a new trial, unless it affirmatively appears that the separating juror was not subjected to any noxious influence." The court, continuing, said: "The object of this rule is apparent. The jury are kept together, and an officer is put in charge of them and directed to see that they do not separate to protect the defendant against outside influence. They are not allowed to have any communication with outside persons with re-

spect to the guilt or innocence of the defendant on trial, and it is the duty of the officer in charge to see that they do not. This protection is due to the defendant, and the State should see that he receives it. It is not expected of him to employ someone to watch the jury and report any misconduct on their part. Hence, when they separate the burden is upon the State to show, by circumstances or directly, that the absent juror was not subjected to any injurious influence."

Now, the uncontroverted facts here disclose that the jurors who had been instructed to not separate from their fellows while deliberating upon their verdict, and who had been placed in the custody of an officer charged with the duty to see that they obeyed these instructions of the court, separated themselves and mingled with a large crowd of people, a large number of whom "were strongly prejudiced against George Holt;" that they mingled with the crowd for several minutes and one of the jurors went several feet away and carried on a conversation with a gentleman for several minutes.

If there were a large number in the crowd with whom the jurors mingled who were strongly prejudiced against the appellant, who can say, in the absence of evidence to the contrary, that members of the crowd so strongly prejudiced against appellant did not avail themselves of the opportunity thus presented to make remarks, concerning appellant and the crime with which he was charged, so derogatory in character as to inflame the minds of the jury against him. A more flagrant disobedience of the orders of the court could rarely occur, for the evidence shows a complete separation of all the jurors and an opportunity for each of them to have heard things said that might have greatly influenced and prejudiced their minds against appellant. The very object of the rule is to prevent the jury from being subjected to such possible sinister influences.

Rape is a crime so heinous that generally the mere charge of itself is sufficient to set ablaze the minds of the public in the community where the crime is alleged to have

occurred against the accused victim. Hence, courts usually adopt, and are justified in adopting, most stringent methods in order to insulate the jury, as far as possible, from any current of popular prejudice. Here the record shows they were brought in direct contact with it. When the appellant proved that they might have been affected by it this made a *prima facie* case against the purity of the verdict and was sufficient to cast the burden upon the prosecution of upholding its integrity.

As there was a palpable disobedience of the instructions of the court, both on the part of the jurors and the officer having them in custody, with no word upon the part of the State to show by the jurors themselves or others that they emerged from the poisoned circle without contamination, their verdict has been impeached and the appellant, on this account, must be awarded a new trial. See, in addition to cases above, *Vaughan* v. *State,* 57 Ark. 1, and other cases cited in appellant's brief.

We need not discuss other assignments of error. The alleged errors in regard to refusal to admit certain expert testimony, and as to the remarks of counsel, we assume will not occur on the new trial, and the other assignments are not of sufficient importance to call for a discussion.

The judgment is, therefore, reversed, and the cause is remanded for a new trial on the charge of assault with intent to commit rape.

STEVENSON v. GAULT.

Opinion delivered November 26, 1917.

1. JUDICIAL SALES—ADEQUACY OF PURCHASE PRICE.—The mere inadequacy of price will not justify a court in refusing to approve a sale and depriving the purchaser of the benefit of his purchase, unless the inadequacy is so great as to shock the conscience or to amount to evidence of fraud.

2. JUDICIAL SALES—INADEQUATE PRICE—RESCISSION.—A judicial sale of land will be set aside, when the purchase price was grossly inadequate, and when the purchaser permitted information to be given to prospective bidders derogatory to the value of the land.

Appeal from Yell Chancery Court, Dardanelle District; *Jordan Sellers*, Chancellor; affirmed.

Manning & Emerson, for appellant.

1. A judicial sale will not be set aside for mere inadequacy of price, if otherwise fair. 16 R. C. L., § 70; 86 Ark. 255; 65 *Id.* 152; 66 *Id.* 493; 77 *Id.* 216, etc.

Here the bid was in good faith and no fraud, mistake nor unfairness was shown. 20 Ark. 381-409; 123 *Id.* 523; 111 *Id.* 158; 108 *Id.* 366; 44 *Id.* 502; 56 *Id.* 240. Appellant was a *bona fide* purchaser.

HART, J. This is a bill in equity filed by J. L. Gault and Jane Gault to dissolve the partnership of J. L. Gault & Company and to wind up its business.

The complaint states that the firm owned large bodies of lands which were mortgaged to secure its debts and J. L. Gault and Jane Gault owned lands as tenants in common and that J. L. Gault had mortgaged his interest in said lands to secure the firm's creditors. All the creditors of the firm, both those who were secured by mortgages and those whose debts were unsecured were made parties to the action.

A decree was entered ordering the sale of the lands. Pursuant to the decree the lands were sold on May 1, 1916. Among the lands sold were the following: The northeast quarter of the northeast quarter and northwest quarter of the northeast quarter of section two, township five north, range nineteen west, containing 82.06 acres. J. F. Stevenson became the purchaser of said lands, having bid therefor the sum of $500. Jane Gault and other creditors filed exceptions to the report of sale of the commissioner, and among the lands were embraced the lands sold to Stevenson.

Testimony was taken on both sides. The court sustained the exceptions to quite a number of tracts sold and among them the tract sold to Stevenson. Inasmuch as no appeal was taken from the ruling of the court except by Stevenson, we need only set out the testimony relating thereto and the finding of the court with reference thereto.

The land purchased by Stevenson lies in both Conway and Yell Counties. The Petit Jean River runs through the land and is the dividing line between Yell and Conway Counties. All that part of the land which lies in Yell County is rich alluvial soil and produces fine crops of cotton and corn. That part of the land which is in Conway County is of slate formation. It was hilly and worth but little for cultivation or for any other purpose. These facts were known to the bidders attending the sale. J. T. Dunbar first bid for the land $1,000. J. H. Parker, a lawyer and real estate man attending the sale, had a copy of the map of the land traced by a former county surveyor of Yell County and after referring to his map, laughingly warned Dunbar that he had better be careful, that nearly all of the land was situated on the south side of Petit Jean. The map was handed around among those present at the sale and it showed that most of the land was situated in Conway County. It appears that those present accepted the map as showing the true situation of the land and on that account refrained from bidding on it. Because he thought that most of the land was in Conway County, Mr. Dunbar asked permission to withdraw his bid and this was granted him by the commissioner making the sale. J. F. Stevenson then bid the sum of $500, and that being the highest bid the land was struck off to him.

Prior to the sale the land had been appraised by three practical farmers who had lived in Yell County for many years and who were familiar with the character of land sold. They appraised the land in question at an average of $42 per acre and testified that they thought this was the reasonable value of the land.

Another witness testified that he had been over the land when it was first purchased by J. L. Gault and knew its value. He stated that the price put on it by the appraisers was very conservative.

Another witness testified that he had purchased a forty acre tract at the sale near this one for $4,000 and that he considered it to be worth that amount; that he considered the land he bought to be worth something more than 40 acres of the land in question but stated that all the land in question which was in Yell County was fine land. He also bought two other forty acre tracts at the sale situated near this one and paid for one of them $3,500 and for the other $2,900.

A tenant who had been on the land for more than ten years testified that the part of it situated in Yell County was very fine and that it always produced good crops of cotton. He stated that the land would produce nearly a bale of cotton to the acre. The thread of the stream is the dividing line between Yell County and Conway County. A survey was made of the land and something over sixty acres of it is on the Yell County side of the river. There is also a levee and a road through the land on that side of the river. There are about fifty-two acres of the land north of the levee and there are a few acres between the levee and road and Petit Jean River. The whole of the fifty-two acres except a thicket is in cultivation. The thicket comprises six or eight acres and when cleared can be cultivated and is of the same character as the remainder of the land in Yell County.

According to the testimony of Stevenson and Parker the land was not worth much more than $1,000. Parker still adhered to his original opinion that the greater part of it was in Conway County.

During the pendency of the action J. L. Gault died and A. N. Falls was appointed special administrator of his estate. After the land had been ordered sold R. E. Pugh, representing a company which had mortgages on part of the lands, came to Dardanelle for the purpose

of examining them. He went to see Mr. A. N. Falls who was the cashier of a bank, which also had a mortgage on a part of the lands. Falls and Pugh together examined a part of the land. Falls then recommended J. F. Stevenson as a suitable man to accompany Pugh. Among other lands examined by Pugh and Stevenson was the 82.06 acre tract in controversy. Falls and Stevenson were both dealers in real estate and usually each took the other in on deals that he made.

Stevenson said that he did not say anything to Dunbar or anyone else to induce him not to bid on the land. He stated that he and Pugh were standing close together at the sale and the commissioner remarked after Dunbar had withdrawn his bid that if he could not get a bid on the land he was going to throw it out; that Pugh then remarked to him "let's take a gamble on it;" that he, Stevenson, said all right and then bid $500 for the land and it was struck off to him; that later on in the afternoon that he and Pugh took Falls in on the purchase. He was asked if Falls was supposed to be in on all the lands bought by him and answered "Yes, sir. If he buys land and I want to go in I can, and if I buy land it is the other way—a kind of partnership." Stevenson further stated that there was no general partnership between him and Falls but if either one of them bought a piece of land the other usually came in on it if he wanted to.

The chancellor found that the prices in all cases in which exceptions had been filed were so grossly inadequate as to shock the conscience of the court and further found as follows:

"And as to exceptions No. 1, the same being exceptions to the report of sale to J. F. Stevenson for the sum of $500 for the north half northeast quarter, and northwest quarter of northeast quarter, section 2, township five, N. R. 19 west, 82.06, partly in Yell and partly in Conway County, on the additional grounds and for the additional reasons that there were such representations made at the sale by the persons attending the sale

as to the location of lands with reference as to whether or not the same or the greater portion was north of the Petit Jean in the Arkansas River bottom, or south in Conway County in the hills and uplands as to amount to a legal fraud and to cause the withdrawal of the bid and to cause said lands to sell for a grossly inadequate sum."

It was accordingly decreed that the sale of all the lands to which exceptions had been filed be set aside. As above stated Stevenson alone has appealed from that decree.

(1) The policy of the law founded on the interest of the owner and purchaser alike is that there should be stability in judicial sales so that bidders would be encouraged to attend such sales and in order that the property may bring its full value. It is the settled rule of this court that mere inadequacy of price will not justify a court in refusing to approve a sale and depriving the purchaser of the benefit of his purchase unless the inadequacy is so great as to shock the conscience or to amount to evidence of fraud. *George* v. *Norwood,* 77 Ark. 216; *Wells* v. *Lenox,* 108 Ark. 366, and *Gleason* v. *Boone,* 123 Ark. 523.

In the case of *Graffam* v. *Burgess,* 117 U. S. 180, which was cited in *George* v. *Norwood, supra,* the court said:

"From the cases here cited we may draw the general conclusion that, if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason, misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud."

That there was gross inadequacy of price in the present case can not be gainsaid. In Ann. Cas. 1914-D, pages 6 to 10 will be found many illustrative cases in which inadequacy of price and other circumstances were held sufficient to justify the court in setting aside the sale. Courts will seize upon slight circumstances to add to the weight of inadequacy of price to turn the scale where it shows that the purchaser is in some measure responsible for it. It can not be doubted that Dunbar withdrew his bid and that others refrained from bidding because they thought nearly all of the land in controversy was in Conway County and was of but little value. It was generally known among the bidders that the land in Yell County was very rich and productive and that the land just across the river in Conway County was a slate bank and hilly. It is true that Stevenson did not say anything to induce Dunbar to withdraw his bid or to prevent anyone else from bidding at the sale. It was perfectly apparent to him, however, that they refrained from bidding because they believed that most of the land was situated in Conway County. He had been on the land a short time before the sale for the purpose of examining it. He had not at the time of the sale agreed to take in Falls in the deal but did so later on in the afternoon. J. L. Gault, one of the parties to the suit, had died during its pendency and Falls had been appointed special administrator of his estate. There was a general understanding between Stevenson and Falls that each was to take the other in on all their deals made, when asked to do so. It is true that Falls had no duties to perform with regard to the sale; for it was conducted by a commissioner appointed for that purpose. We do not think that any fraud was intended by the conduct of any of the parties but as above stated where the price was grossly inadequate the courts will seize upon the slightest circumstance to set aside the sale where it is shown that the purchaser is in some measure responsible for it.

According to a decided preponderance of the testimony the land was worth at least $3,500. It was situated twenty miles away from where the sale was being conducted and under the peculiar circumstances detailed above, when it became apparent that the bidders were relying upon the map produced by Mr. Parker, it was incumbent upon Stevenson to have told them that he had been upon the land a short time before and that the most of it was in Yell County. This coupled with the fact that Falls was special administrator of the estate of J. L. Gault, deceased, and was taken into partnership on the deal on the same afternoon, was sufficient to justify the court in setting aside the sale.

The decree will, therefore, be affirmed.

VANHOOZER v. BUTLER.

Opinion delivered November 26, 1917.

1. MALICIOUS PROSECUTION—FINAL TERMINATION OF THE PROSECUTION.—The complaint charged that the appellant said of appellee: "John Butler is a dirty liar and a thief." *Held,* the charge of the court was correct that the words used were actionable *per se,* and for the jury to find for appellee, if they found that the words were used by appellant with reference to appellee.
2. TRIAL—BIAS OF JUROR—NEW TRIAL.—Under Kirby's Digest, § 4492, no person may be sworn as a juror who has formed or expressed an opinion concerning the matter in controversy, and if he conceals that fact when interrogated as a juror, and thereby imposes himself upon the litigants, the court should grant a new trial when these facts are made to appear. (After examination of the juror, if the trial court determines that he does not come within the rule, and refuses a new trial, the action of the trial court will not be disturbed on appeal.)

Appeal from Logan Circuit Court, Northern District; *James Cochran,* Judge; affirmed.

Hon & Woods and *E. H. McCulloch,* for appellant.

1. The court erred in failing to make the husband a party defendant. 44 Ark. 401; 92 *Id.* 486; 98 *Id.* 312; 102 *Id.* 351; 103 *Id.* 196; Acts 1915, No. 159: 119 Tenn. 425; 123 Am. St. 734; 92 *Id.* 160; Am. Ann. Cas. 1913-D, 995.

2. It was error to refuse a new trial for misconduct of the juror Turner. 29 Ark. 293; 41 Fed. 676; 6 Ill. 659; 6 Ky. 347; 7 *Id.* 191; 18 Miss. 25; 4 Vt. 363; 21 Ark. 336; 60 *Id.* 221; 61 *Id.* 354.

3. The verdict is contrary to the law and the evidence. The words were not actionable *per se.* 40 Oh. St. 99; 32 Cent. Dig., § 99; 79 Ill. 58; 40 Iowa 660; 15 Am. Dec. 122; 12 Minn. 494; 57 Mo. App. 528; 2 Ed. Smith, 388; 56 Ark. 97. The court failed to instruct the jury to disregard the question of punitive damages.

Sam R. Chew, for appellee.

1. The record fails to show that it contains all the evidence. 46 Ark. 67; 58 *Id.* 399; 74 *Id.* 551; 37 *Id.* 57; 101 *Id.* 555.

2. No exceptions were saved to the instructions. 78 *Id.* 490; 89 *Id.* 24; 79 *Id.* 176; 92 *Id.* 598; 105 *Id.* 353; 95 *Id.* 363; 78 *Id.* 374.

3. No request was made for instructions on punitive damages. 56 Ark. 594; 60 *Id.* 550; 60 *Id.* 613; 92 *Id.* 111.

4. No request was made to join the husband. The wife is liable for her torts. Acts 1915, 684; 125 Ark. 526, etc. It is too late to raise the question here for the first time. 94 Ark. 51; 93 *Id.* 346; 33 *Id.* 497; 34 *Id.* 73; 75 *Id.* 288; 97 *Id.* 560.

5. The words were actionable *per se.* 55 Ark. 494; 56 *Id.* 100.

6. Turner was a competent juror and accepted by both sides. Kirby's Digest, § § 4492-4.

SMITH, J. Appellant is a married woman, and was sued alone for slander. The complaint alleged that she said of and concerning appellee, who was the plaintiff below, that "John Butler is a dirty liar and a thief, meaning thereby to charge the plaintiff with having been guilty of committing a theft." Appellee was appellant's tenant on her farm, and they had disagreed about the rent, and she desired to eject him from the farm. One witness for appellee testified that appellant had said

that she wanted appellee to move from her place because he was a liar and a thief and she did not want him about her. Another witness testified that appellant had said appellee was not a proper character to have on her place, that he was a devil and a thief and a snake in the grass. And substantially the same testimony was given by another witness. These remarks, according to the witnesses, were made at different times by appellant to persons who sought to pacify her when she spoke to them about appellee and evidenced great bitterness of feeling.

Appellant denied having made the remarks attributed to her, and testified that one of the witnesses against her was a partisan of her adversary, and had sided with him in her controversy over the land, and had himself denounced her for her attempt to eject appellee from the farm, and she denied making the remark testified to by the other witnesses. She also testified that during the period of time when the remarks derogatory to appellee were said to have been made she was confined to her bed with a mental and physical disorder. But the suit was not defended upon the ground that appellant was mentally irresponsible.

(1) The court charged the jury that the words alleged to have been used were actionable *per se,* and to find for the plaintiff in some sum, if they found they were used by appellant with reference to him; but gave no instructions on the subject of punitive damages, although both compensatory and punitive damages were sued for.

The testimony developed the fact that appellant was a married woman. But no request was made that her husband be joined as a defendant, and no instruction was asked on that subject, and the court was not requested to make any order in regard thereto. If it be conceded that the husband is a proper party—which we do not decide—that question can not be raised here for the first time. *Hixson* v. *Cook,* 130 Ark. 401.

Nor can we review the action of the court in giving or refusing instructions, as no exceptions in this respect appear in the motion for a new trial.

Appellant insists that the court erred in instructing the jury that the words alleged to have been employed were actionable *per se,* and that such would not be the case if they were used as mere terms of abuse, and that from the circumstances under which they were used it was apparent that they were not intended or understood as charging a felony or a crime. But we have no such question in this case. The words alleged to have been used were not addressed to appellee, but were said about him, and the suit was not defended upon the ground that the words used were mere epithets and were not intended nor understood as imputing the charge which their ordinary meaning implies, and the court did not err in the charge on this subject. *Stallings* v. *Whittaker*, 55 Ark. 494; *Gaines* v. *Belding,* 56 Ark. 94; *Jackson* v. *Williams*, 92 Ark. 486.

(2) The serious question in the case is whether or not error was committed in refusing to grant a new trial on account of the misconduct of R. B. Turner, a juror. Affidavits were filed by witnesses Wackerly and Alvis to the effect that prior to the trial Turner, who appeared to be familiar with the case, had stated to them that appellee ought to recover damages in his suit. These witnesses were examined before the court, and, while they substantially repeated the material part of their affidavits, their testimony, taken as a whole, somewhat modified their affidavits. The juror was also examined in open court on the hearing of the motion for a new trial, and he testified that he knew the parties to this litigation, as he lived in the neighborhood in which they resided, and that he was somewhat familiar with the facts concerning the controversy between the parties to this litigation over the land, and he admitted that he may have mentioned the case to the witnesses Wackerly and Alvis; but he stated that he had never heard any of the witnesses talk about the case, and had never heard

the merits of the case discussed, and had not formed or expressed an opinion regarding it. Wackerly and Alvis were not witnesses in the case except upon this collateral matter. It is provided by Section 4492 of Kirby's Digest that no person shall be sworn as a juror who has formed or expressed an opinion concerning the matter in controversy, and if such person conceals that fact when interrogated as a juror, and thereby imposes himself upon the litigants, the court should grant a new trial when these facts are made to appear. But we can not say, from the testimony heard by the court below, that any imposition was practiced by the juror. The court heard the evidence and passed upon it, and we are bound by that finding, as it does not appear to have been arbitrarily made.

Judgment affirmed.

WILLIAMS v. ORBLITT.

Opinion delivered November 26, 1917.

1. MALICIOUS PROSECUTION—FINAL TERMINATION OF THE PROSECUTION.—Appellee had appellant arrested charged with petit larceny. The case was called in the mayor's court, and dismissed because the appellee failed to make bond for costs. Appellant then sued appellee for malicious prosecution. *Held,* for the purposes of the latter action the judgment of the mayor constituted a final termination of the prosecution.
2. MALICIOUS PROSECUTION—MALICE AND PROBABLE CAUSE—JURY QUESTION.—Appellee believing that appellant had stolen an article in his store, caused her to empty a sack which she was carrying. The article was not found in the sack but was found nearby on the floor. Appellee caused appellant to be arrested, charged with petit larceny. Appellant brought an action against appellee for malicious prosecution. The lost article not being found in appellant's sack, and appellee failing to testify that he thought the article was in appellant's sack, it was the duty of the trial court to let the jury pass upon the reasonableness and sincerity of appellee's belief.

3. MALICIOUS PROSECUTION—MALICE—PROBABLE CAUSE.—While there may be no affirmative showing of malice, its existence may be inferred if there is a lack of probable cause, and these questions should be submitted to the jury.

Appeal from Randolph Circuit Court; *J. B. Baker,* Judge; reversed.

S. A. D. Eaton, for appellant.

1. A motion for peremptory instruction concedes as true the evidence in behalf of the adverse party. 38 Cyc. 1563; Thompson on Trials, (2 Ed), § 2267; 89 Ark. 522; 115 *Id.* 166; 92 *Id.* 618; 96 *Id.* 394; 89 *Id.* 222, 372; 4 C. J. 765. The case should have been submitted to a jury.

2. There was want of probable cause and malice and a case for a jury. 76 Ark. 540; 99 *Id.* 490. There was substantial evidence to warrant a verdict by a jury. 98 Ark. 334; 100 *Id.* 71; 128 Ark. 347.

3. In an action for malicious prosecution, a jury may infer malice from want of probable cause. 37 Ark. 160; 94 *Id.* 433; 63 *Id.* 387; 32 *Id.* 166.

T. W. Campbell and *W. L. Pope,* for appellee.

1. A verdict was properly directed. The evidence failed to show lack of probable cause, malice or any final determination of the suit. 97 Mo. 390; 8 Cow. (N. Y.) 141; 4 Vt. 363. See also 122 Ark. 382; 124 *Id.* 26.

2. The burden was on appellant to show malice. 101 Ark. 37; 63 *Id.* 387; 26 Cyc. 47.

3. It is not shown that the prosecution was finally ended. 25 Cyc. 55; 76 Ill. 224; 160 Pa. St. 119; 38 Kan. 567; 43 N. J. L. 57; 103 Ky. 610.

SMITH, J. This suit was instituted by appellant to recover damages on account of an alleged malicious prosecution, and in support of her cause of action she offered the following testimony. The mayor of Pocahontas testified that appellee swore out before him on October 20, a warrant of arrest for appellant, charging her with petit larceny; that she gave bond for her appearance on Oc-

tober 24, and appeared in court on that day to answer the charge. Appellee was present with an attorney representing the prosecution, but no trial was had as a bond for costs was demanded; and when none was given the cause was dismissed for want of bond for costs. Appellant herself testified that she had made some purchases in appellee's store, which she put in a sack which she had with her for that purpose. Appellee's wife came to her and wanted to look into the sack and stated that another customer had lost a little roll, and the sack was emptied but the missing article was not found. Appellant replaced her things in the sack, and started to leave the store, when appellee came to her and said, "Lady, you are going to empty out your sack," and appellee emptied its contents on the floor between a table and a counter, and her purchases, which had been wrapped in separate packages rolled in different directions, and appellee reached under a table and picked up a skirt, remarking at the time, "Here is what you had in your sack, I guess." Shortly thereafter the warrant of arrest was sworn out. The garment picked up was a knit skirt, and was not wrapped up, but had not been in her sack, as she had in it only packages which were wrapped up. There was some other testimony tending to show the excitement occasioned by the incident, and the humiliation sustained as a result of it, together with certain circumstances tending to show appellant's innocence of the charge. No testimony was offered on the part of appellee, and a verdict was directed in his favor, and this appeal has been prosecuted to reverse that action.

Appellee seeks to justify the action of the court on the grounds, that the testimony failed to show a final determination of the prosecution, or a lack of probable cause, or the existence of malice.

(1) The mayor before whom the prosecution was pending testified that he had dismissed the case for the want of a bond for costs, and this action constituted a final termination of the prosecution for the purposes of this suit. *Twist* v. *Mullinix,* 126 Ark. 427.

(2) Appellee argues that appellant's testimony—that appellee said, when he emptied the sack, "Here is what you had in your sack, I guess," and that he then exhibited the article which he said was lost—shows that appellee thought he had conclusive proof of her guilt, and that he, therefore, had probable cause for procuring her arrest. But the undisputed testimony does not show that the stolen garment was found in her sack. Upon the contrary, appellant testified that it was not found in her sack, and no one disputed that statement. Appellee may have thought the garment was in the sack, and that it had been stolen from him (but he did not so testify), and the jury should have been permitted to pass upon the reasonableness and sincerity of this belief.

(3) Upon the subject of malice, it may be said that, while there was no affirmative showing of malice, its existence may be inferred if there was a lack of probable cause. These questions should have been submitted to the jury, and for the error of the court in not so doing, the judgment is reversed and the cause remanded for a new trial.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. WOMBLE.*

Opinion delivered November 26, 1917.

1. MASTER AND SERVANT—TORTIOUS ACT OF SERVANT—LIABILITY OF MASTER.—A railroad company is liable for the tortious acts of its servants resulting in the injury of another, if at the time the servant was acting within the scope of his employment, or in the line of his duty.
2. MASTER AND SERVANT—TORTIOUS ACT OF SERVANT—INJURY TO THIRD PARTY.—In an action for damages, *held,* the evidence was sufficient to support a finding by the jury that plaintiff, while stealing a ride on defendant's train, was knocked off of the train by defendant's conductor, sustaining the injuries complained of.
3. MASTER AND SERVANT—TORTIOUS ACT OF SERVANT—INJURY TO TRESPASSER ON RAILWAY TRAIN.—The conductor on defendant's train,

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*Opinion on motion for judgment against the railway company, see page 591, *post.* (Reporter.)

upon discovering that plaintiff was stealing a ride thereon, knocked him off of the train, plaintiff sustaining injuries. *Held,* under the evidence, the jury had a right to infer that the conductor was acting within the scope of his employment when he knocked plaintiff off the train.

4. DAMAGES—PERSONAL INJURIES—INSTRUCTION.—In an action against a railroad company for personal injuries, the following instruction on the measure of damages *held* not erroneous; "if the jury find for the plaintiff they will assess his damages at such a sum as will compensate him for the bodily injury sustained, if any; the physical pain and mental anguish suffered and endured by him in the past, if any; and that which he will endure in the future, if any, by reason of said injury; his loss of time, if any, and his pecuniary loss from his diminished capacity for earning money throughout life, if any; and from these, as proven from the evidence, assess such damages as will compensate him for the injuries received."

5. DAMAGES—PERSONAL INJURY ACTION—AMOUNT.—Plaintiff, a trespasser on defendant railway's train, was knocked off the train by the conductor, both his legs being crushed, and being later amputated. Plaintiff suffered great pain, and the wounds being slow to heal he will continue to suffer. Plaintiff was thirty-two years old when injured, had an expectancy of 33 9/10 years, and was earning between $60 and $70 per month. *Held,* a verdict for $25,000 compensatory damages was not excessive.

Appeal from Calhoun Circuit Court; *Charles W. Smith,* Judge; affirmed.

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

1. It was error to refuse a peremptory instruction for defendant. Plaintiff's story was a fabrication, pure and simple—not even plausible. Even taking his statement as true, he failed to make a case of tort by the conductor within the scope of his employment. 115 Ark. 289; 101 *Id.* 586; 153 S. W. 694; 89 S. E. 490; 144 Fed. 806; 21 S. E. 288; 113 Pac. 386.

2. There was no substantial testimony tending to show that the conductor knocked plaintiff from the train.

3. The court erred in giving instruction No. 4 on the measure of damages. 115 Ark. 119.

4. The verdict is excessive and the result of passion and prejudice. 115 Ark. 101-123; 100 *Id.* 107; 89 *Id.* 522;

84 S. W. 61; 158 Ill. App. 82; 125 Pac. 331; L. R. A. 1915-F. 308-9-10.

Pace, Seawel & Davis, for appellee.

1. There was no error in refusing the peremptory instruction. There were questions of fact for a jury. 100 Ark. 629; 87 *Id.* 614; 90 *Id.* 131; 74 *Id.* 16. The jury, by their verdict have settled (1) that appellee was struck with a stick by the conductor which caused the fall and injury; and (2) that he struck him for the purpose of ejecting him from the train and was acting within the scope of his employment. The law is well settled. 26 Cyc. 1533-5-6; 96 Ark. 364; 42 *Id.* 543; Cooley on Torts, 538; 62 Ark. 116; 75 *Id.* 585; 115 *Id.* 294. See also 125 Ala. 483; 98 Ga. 751; 74 Neb. 1; 197 S. W. 801; 59 Iowa 428; 68 N. H. 358; 2 Tex. Civ. App. 29; 21 S. W. 179.

The verdict is final. 56 A. L. R. 383; 56 *Id.* 373; 100 Ark. 314; 103 *Id.* 361.

2. There was no error in giving instruction No. 4 on the measure of damages. 13 Cyc. 145; 60 Ark. 481; 8 R. C. L. 470; 37 Ark. 522; 109 *Id.* 239; 69 *Id.* 632; 53 Ark. Law Rep. 228. See also 30 N. E. 458; 89 N. W. 1100; 40 S. W. 608.

3. The verdict is not excessive. 93 Ark. 564; 100 *Id.* 437; 115 *Id.* 101; 100 *Id.* 124; 99 *Id.* 280; 54 Ark. Law Rep. 320; 170 Ill. App. 140; 94 Mich. 146; 183 Ala. 138; 56 Ore. 495; 96 Tex. 301; 164 S. W. 870; 104 Minn. 58; 6 Ga. App. 18.

HUMPHREYS, J. Appellee, telegraph operator at Delmar, boarded appellant's local freight train No. 84, at Biscoe, Arkansas, while on the house track about 150 yards west of the depot, at 8 o'clock p. m. on the 17th day of November, 1915, for the purpose of riding down to Dagmar, six miles east of Biscoe. He took a position between the tender of the engine and a box car with one foot on the draw-head of each and held to the back of the tender with one hand. The depot was on the north side of the track. In appellant's position, his back was

towards the north. The train pulled out of the house track far enough east to clear the switch and this movement placed the engine opposite the depot. The train then backed on the main line west for the purpose of connecting with that portion of the train which had been disconnected when the train came into Biscoe from the west. During the backward movement of the train and while it was running smoothly, appellee fell to the track. The wheels of the engine backed over both legs and practically severed the limbs below the knees. There was evidence tending to show that the conductor struck the appellee with a brake stick on the shoulder and back, causing him to dodge, release his hold and fall to the track where he received the injury. Appellee knew the conductor when he saw him, but no personal acquaintanceship existed between them. They had never had any personal differences, quarrels or altercations. The trainmen had not seen the conductor from the time they first backed west from the depot onto the house track until about 10 or 15 minutes after the injury. When first seen by them after the injury, the conductor was at the caboose at the extreme west end of the train with a brake stick in his hand, in a dispute with intoxicated bridge men who were also insisting upon riding the train to Dagmar.

The conductor claimed that he rode the engine as the train backed west to pick up cars in the house track, and checked some cars at the switch; then went to the caboose, while the train was pulling out of the house or side track towards the depot. The brakeman operating the switch, nor the one coupling the cars, nor the engineer nor fireman saw the conductor en route to the caboose from the depot. Appellee admits drinking four bottles of beer during the day. There is evidence tending to show that appellee was drunk immediately before and after boarding the train. There is also evidence tending to show that he was sober at that time. It is conceded that appellee was a trespasser at the time of the injury. Appellant's theory is that appellee fell from the train

on account of drunkenness and received the injury. Appellee's theory is that the conductor remained at the depot while the train backed west onto the house track for the purpose of getting additional cars, and when the train pulled out of the switch east towards the depot and stopped, that the conductor boarded the train with a brake stick in his hand and discovered appellee stealing a ride, knocked him off the train and then proceeded to the caboose where he was found when the injury was reported to him. Appellee was removed from the place where injured to the depot where he remained for two hours. He was then placed on one of the seats in the caboose attached to a freight train and carried to a hospital in Little Rock. The distance was 52 miles, and the journey requires six hours. During the trip, he suffered great pain and it was necessary to give him sedatives all along. When the train jerked and jolted, he would scream out with pain. When informed that his legs would have to be cut off, he began to cry and asked for a pistol to shoot himself. He arrived at the hospital at 4 o'clock in the morning, and about 8 o'clock the following night, his legs were amputated. He remained in the hospital for nine months. At the time of the trial, some two years after the injury, one limb was still raw and the other not entirely well. Appellee was 32 years of age at the time of the injury, and had an expectancy of 33 9-10 years. His average earning capacity was about $65 per month.

Appellee brought suit against the appellant in the Calhoun circuit court for $50,000 compensatory, and $5,000 punitive damages. He recovered a judgment for $25,000 as compensatory damages and $2,500 punitive damages, from which an appeal has been prosecuted to this court.

(1) It is insisted that the court erred in refusing to give a peremptory instruction to the jury in favor of appellant. If there is sufficient legal evidence in the record to sustain the finding of the jury to the effect that Mr. Dale, the conductor, while acting in the scope of his employment, knocked appellee off of the train, which

was under his control, which was the proximate cause of the injury, then appellant was not entitled to a directed verdict in its favor. It is a settled principle of law in this State that a railroad company is liable for the tortuous acts of its servants resulting in the injury of another, if acting at the time within the scope of his employment, or in the line of his duty. *Railway Co.* v. *Hackett,* 58 Ark. 381; *St. L., I. M. & S. R. Co.* v. *Grant,* 75 Ark. 579; *St. L., I. M. & S. R. Co.* v. *Pell,* 89 Ark. 87; *St. L., I. M. & S. R. Co.* v. *Robertson,* 103 Ark. 361. In the instant case, the jury was instructed not to return a verdict for appellee unless a preponderance of the evidence showed that Dale, the conductor, knocked appellee off of the train while acting within the scope of his employment. It is admitted that the jury was correctly instructed in this regard.

(2) The contention was made that there is no substantial evidence to show that the conductor knocked appellee off the train; or, if there was substantial evidence to show that fact, then there was no substantial evidence to show that the conductor was acting in the line of his duty at the time. Appellee testified positively that the conductor knocked him off the train with a brake stick. It was strictly within the province of the jury to pass upon the credibility of the witness and the weight to be attached to his evidence. Unless his evidence was contrary to the physical facts, the findings of the jury based on his evidence are conclusive on appeal. We have examined the evidence very carefully to discover whether the conductor had an opportunity to strike him. He could have struck appellee while the train was backing west the last time. There was sufficient lapse of time after the injury and before the conductor was seen at the caboose for him to have gotten off the train and walked to the caboose. His testimony was accepted by the jury and is not contradicted by the physical facts. It alone was sufficient to support the verdict under the rule on appeal. His testimony, however, was corroborated to some extent.

When the conductor was found a short time after the injury, he had a brake stick in his hand such as was described by appellee. Enough was testified to by parties present at the time to indicate that appellee had been knocked off the train. We think the finding of the jury that the conductor knocked appellee off the train is supported by sufficient evidence of a substantial nature.

(3) It next becomes pertinent to inquire whether there is substantial evidence to show that the conductor was acting in the line of his duty when he struck appellee. It has heretofore been said by this court that, "Whether the particular act of a servant was or was not in the line of his duty is a question for the jury to determine from the surrounding facts and circumstances, * * * *." *St. L., I. M. & S. R. Co.* v. *Hendricks,* 48 Ark. 177. This court has also said that it was clearly in the line of a conductor's duty to expel or remove a trespasser from the train in his charge. *St. L., I. M. & S. R. Co.* v. *Robertson,* 103 Ark. 361.

Dale, conductor, testified that he had the train in charge and that it was a part of his duty not to permit trespassers to ride on the train if he knew it. Appellee testified that the conductor used some rough language which he did not understand and knocked him off the train; that they had no personal acquaintance and that they had never had any differences or altercations; that he was a stranger to the conductor. From the evidence of both, the jury had a right to infer that the conductor was acting within the scope of his employment when he thus removed appellee from the train. There is nothing in the record from which to infer that the conductor was attempting, by the act, to effect some independent purpose of his own. He did not know the appellee. He had no ill feeling or malice toward him or personal quarrel with him. Only a few minutes after the injury, he was found trying to keep objectionable characters off of the train. There is sufficient legal evidence in the record to support the finding of the jury that the con-

ductor was attempting to eject appellee from the train when he struck him.

(4) It is insisted that the court erred in giving the following instruction on the measure of damages: "If the jury find for the plaintiff they will assess his damages at such a sum as will compensate him for the bodily injury sustained, if any; the physical pain and mental anguish suffered and endured by him in the past, if any; and that which he will endure in the future, if any, by reason of said injury; his loss of time, if any, and his pecuniary loss from his diminished capacity for earning money throughout life, if any; and from these, as proven from the evidence, assess such damages as will compensate him for the injuries received."

This court has refused to reverse cases in which an instruction on the measure of damages similar to the present one was given. *St. L., I. M. & S. R. Co.* v. *Cantrell,* 37 Ark. 522; *St. L., I. M. & S. R. Co.* v. *Hydrick,* 109 Ark. 239; *St. L., I. M. & S. R. Co.* v. *Cobb,* 126 Ark. 225. We adhere to our former rulings regarding it.

(5) Lastly, it is insisted that the verdict for compensatory damages for the sum of $25,000 is grossly excessive and the result of passion and prejudice. There is no positive evidence in the record showing that the jury was swayed by passion or prejudice. If any existed, it must be inferred from the amount of the verdict returned. It is evident that the earning capacity of appellant is practically destroyed. This means a loss of between $60 and $70 a month to him for about 33 years. His expectancy at the time of the trial was 33 9-10 years. His mental anguish and physical suffering was almost beyond endurance. As a result of this injury, appellee will necessarily endure a degree of mental anguish all the days of his life. We do not think the amount of the verdict in this particular case is disproportionate to the loss of earning power, and physical pain and mental anguish already endured, and yet to be endured, as established by the evidence. After a full consideration of all

the facts and circumstances in the case, we are not prepared to say that the amount is so excessive as to necessarily indicate that the verdict is the result of prejudice or passion.

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

BUSINESS MEN'S ACCIDENT ASSOCIATION OF AMERICA v. COWDEN.

Opinion delivered December 3, 1917.

1. ACCIDENT INSURANCE—DEATH—BURDEN OF PROOF.—In an action to recover on an accident policy, it was admitted that deceased met his death by violent external means, the policy provided against liability if insured met his death from intentional injuries inflicted by himself or others, except in an assault committed for burglary or robbery. *Held,* under the admission above set out the burden was upon the defendant insurance company, to escape liability, to prove that deceased's death was caused by a breach of one of these conditions.
2. ACCIDENT INSURANCE—DEATH—PROOF—JURY QUESTION.—In an action on a policy of accident insurance, it was admitted that deceased met his death by violent external means. *Held,* under the evidence that it was proper for the trial court to instruct a verdict for the plaintiff.
3. INSURANCE—PROOF OF LOSS—WAIVER.—The proof of loss is a condition of the policy which may be waived by the insurer, and is waived, when it accepts without objection as to form, the proofs offered by the claimant; it is not necessary that the proofs show facts making the insurer liable.
4. EVIDENCE—DEPOSITIONS TAKEN ON NOTICE—USE BY ADVERSE PARTY.—Where depositions are taken by a party upon notice to be used in an action at law, they can not be introduced over the objection of the party by his adversary; the rule being otherwise where the depositions are taken by agreement.
5. INSURANCE—PENALTY AND ATTORNEY'S FEES.—The act of March 1905, page 307, authorizing the recovery of 12 per cent. damages and reasonable attorney's fees in cases where loss occurs, and the insurance company fails to pay after demand, will not be applied to an insurance contract, executed and to be performed wholly within another State.

Appeal from Marion Circuit Court; *John I. Worthington;* reversed as to the attorney fee; affirmed on the verdict.

Geo. H. Perry and *Gilmore & Brown* (of Missouri) for appellant.

1. No proof of loss, showing liability was furnished. 190 Mass. 171, 448; 202 *Id.* 290; 95 U. S. 232; 89 *Id.* 32; 204 Fed. 653.

2. The unexplained statements of the coroner and friends and neighbors of deceased, in the absence of explanation by plaintiff make a *prima facie* case for defendant, and imposed on plaintiff the burden of proving that deceased was not murdered, but that his death was the result of accident. 89 U. S. 32; 150 N. C. 1; 190 Mo. App. 57; 176 S. W. 253. No accidental death was proven. 267 Ill. 267; 80 Fed. 368; 65 So. 852.

3. The attorney's fee is a penalty by statute and not recoverable. 49 Ark. 455; 86 *Id.* 115; 224 U. S. 354.

4. The depositions offered should have been admitted in evidence, plaintiff had the opportunity to cross-examine the witnesses but did not do so. 15 Ark. 345; 85 *Id.* 263; *Ib.* 390.

5. The provisions of our statute have no extraterritorial effect, and no penalties should be allowed, nor attorney's fees taxed. 68 S. W. 889; 197 U. S. 262; 193 *Id.* 551; 184 *Id.* 695; 106 Fed. 815; 240 Ill. 45; 10 Wash. 202; 84 Neb. 866; 98 Tex. 230; 123 U. S. 661; 23 L. R. A. 264; 147 Cal. 763; 30 Cyc. 1347.

6. It was certainly error to direct a verdict, a clear case having been made for a jury.

Allyn Smith and *Williams & Seawel,* for appellee.

1. Proofs of death were made and no objections offered. They may be waived even. 95 U. S. 232; 112 *Id.* 896; 9 How. 390; 131 U. S. 694 (L. Ed. 25). The only condition precedent was that plaintiff furnish proof on blanks furnished by the company. This was done.

2. There was no error in the ruling of the court on the offer of appellant to introduce proofs of loss.

Where an incomplete proof of loss is furnished and accepted without objections, or where all liability is denied, there is a waiver of proof of loss. 53 Ark. 494; 77 *Id.* 27; 79 *Id.* 475; 143 Pa. St. 570; 87 Ark. 174; 74 S. W. 203; 126 Ark. 493; 106 *Id.* 91.

3. There was no error in refusing to allow the depositions for plaintiff to be read. They were taken on notice and not by agreement. 15 Ark. 345; 92 *Id.* 276; 85 *Id.* 390; 195 S. W. 13.

4. Attorney's fees and penalty were properly allowable under the statute. 102 Ark. 43; 84 *Id.* 187; 86 *Id.* 115; 207 U. S. 73; 85 Ga. 751; 12 S. E. 18; 119 Ark. 102.

5. A verdict was properly directed. Plaintiff made a *prima facie* case and defendant introduced no evidence. 80 Ark. 190; 128 Ark. 155; 9 Ann. Cas. 919 and note; 57 Ark. 461; 79 S. W. 1163; 231 Ill. 380, etc.

McCULLOCH, C. J. William L. Cowden, a resident of the State of Kansas, secured a policy of accident insurance upon his own life, payable to his wife, Florence L. Cowden, from the defendant, Business Men's Accident Association of America, an insurance corporation domiciled at Kansas City, Missouri. Cowden met his death on or about September 27, 1913, while the insurance policy was in force. His body was found in the Missouri River at Kansas City on October 1, 1913, and due notice of death was given by the beneficiary in accordance with the terms of the policy. Proof of loss was made and furnished on blanks provided by the company, and payment of the policy was refused on the ground that the manner of death did not come within the terms of the policy, so as to create liability on the part of the insurer.

The present action to recover on the policy was instituted by the beneficiary, Mrs. Cowden, in the circuit court of Marion County, Arkansas, nearly three years after the death of her husband. The trial of the cause before a jury resulted in a verdict in favor of the plaintiff for the amount of the policy and the court rendered

judgment for the amount, and also for attorney's fees, but refused to enter judgment in favor of the plaintiff for the twelve per centum damages prescribed by statute. The defendant appealed from the judgment and the plaintiff cross-appealed from that part of the judgment refusing to allow damages. The verdict of the jury was rendered in plaintiff's favor pursuant to a peremptory direction by the court.

The first question presented here for our consideration is whether or not the court erred in directing a verdict. The policy of insurance constituted, according to its terms, an undertaking on the part of the defendant company to pay the amount named therein to the said William L. Cowden in the event of his accidental injury, or, "in the event of accidental death to pay to Florence L. Cowden (his wife) the benefits * * * provided such injury or death be caused during his membership, solely and exclusively by external, violent and accidental means." Reference is made in the policy to the by-laws of the defendant association and the same were declared to be a part of the policy. The by-laws contained a provision to the effect that the company should not be liable for "intentional injuries inflicted by the insured while sane or insane, or by any other person while sane or insane, except assaults committed for the sole purpose of burglary or robbery," which said provision was, by express stipulation of counsel entered on the record at the time of trial, conceded to exclude liability on the part of the company for death of the insured caused by self-inflicted injuries, or by injuries inflicted by any other person "except assaults committed for the sole purpose of burglary or robbery." At the beginning of the trial the following agreement was entered into concerning the facts:

"It is admitted that William L. Cowden, the insured, is dead, his body having been found in the Missouri River at Kansas City about October 1, 1913, with a wound on the head and face on the right side that penetrated the brain and caused his death. It was a sharp and in-

cised wound that did not fracture the bone or tear the flesh. It was just cut."

Thereupon the court announced a ruling as follows: "Upon that admission the burden of proof is upon the plaintiff to show that proofs of death were furnished to the company, and upon the defendant to show that the insured came to his death as a result of murder, and not an accident."

(1) The plaintiff then introduced certain letters received from the defendant's manager of the claim department acknowledging receipt of the proof of loss within due time, and subsequently denying liability under the policy. The plaintiff then rested her case, and no other proof was introduced in the case except the further admission above referred to concerning the exclusion of liability for certain causes of death. The ruling was not accurate in declaring the extent to which the burden rested on the defendant, but the court was correct in holding that the admission of facts set forth in the record cast upon the defendant the burden of proof to show that the death occurred from one of the causes which exempted the company from liability and constituted a defense to the action. In other words, the admission of the fact that the death occurred from violent, external means made out a *prima facie* case in favor of the plaintiff, and put the burden of proof on the defendant to show that the death resulted from a self-inflicted wound, or from a wound inflicted by another person for purposes other than for burglary or robbery. The point is expressly ruled by the decision of this court in the recent case of *Aetna Life Insurance Co.* v. *Taylor,* 128 Ark. 155, 193 S.W. 540, where we said that "accident policies generally contain a clause, the purpose of which is to relieve the insurer from responsibility in case of death of the insured caused by intentional injuries inflicted by the insured or some third person, or caused by disease, or caused by voluntary exposure to unnecessary danger, etc., and that, where the insurer sets up the breach of one of these conditions

as a defense, the burden is, of course, upon it to prove by a preponderance of the evidence that death was caused by a breach of one of these conditions." The present case falls squarely within this rule. The policy in suit provided for payment in the event of death of the insured "solely and exclusively by external, violent and accidental means" but a further condition was prescribed in the by-laws which exempted the company from liability in certain events. So where the proof adduced either by the testimony of witnesses or by agreement of parties made out a *prima facie* case in favor of the plaintiff by establishing the death from "external, violent and accidental means" the burden shifted to the defendant to prove that the death resulted from some of the causes falling within the exemption prescribed in the by-laws.

(2) The only remaining question, then concerning the correctness of the court's ruling in giving a peremptory instruction is whether or not, upon the admission of this fact, there was sufficient testimony to warrant a submission to the jury of the issue cause of death from some of the means which would have exempted the defendant from liability. There is a presumption against suicide. *Grand Lodge* v. *Bannister,* 80 Ark. 190; Aetna *Life Insurance Co.* v. *Taylor, supra.* In the face of that presumption and of the conceded facts set forth in the agreement concerning the condition of the body when found, it can scarcely be urged with any degree of plausibility that a finding of suicide would have been justified. There is no circumstance tending to establish suicide and nothing from which any reasonable inference to that effect could have been drawn. So there was certainly no error in the failure of the court to submit that question to the jury. The condition of the body as shown by the agreement was, it is true, sufficient to warrant the inference that death was caused by a violent blow inflicted by some other person, and that question should have been submitted to the jury if

a finding thereon would have been determinative of the liability of the defendant. But, under the terms of the policy, and the rules of evidence applicable to the trial of the issue, it devolved upon the defendant to prove not only that the death of Cowden resulted from wounds inflicted by some other person, but also that the assault was for some purpose other than for burglary or robbery. Now there was nothing in the meager circumstances set forth in the agreement that would have justified the jury in determining what the purpose of Cowden's assailant was. That was purely speculative and was a matter of conjecture which the jury would have had no right to indulge in. In other words, there was entire absence of proof as to the purpose of the assailant and therefore, there was nothing to submit to the jury on that issue. The defendant simply failed to maintain the burden cast upon it to make out a defense and the court was correct in directing a verdict in favor of the plaintiff.

(3) Numerous other errors of the court are assigned. It is contended that the proof of loss furnished by the plaintiff was insufficient to show on its face liability of the company in accordance with the terms of the policy, and that the court erred in refusing to render judgment in favor of the defendant on that account. The contention is that proofs of loss making an affirmative showing of liability is a condition precedent to the maintenance of an action. Conceding that the proof of loss fails to show on its face a case of liability against the defendant, or even that it shows affirmatively a cause of death for which the defendant was not liable, yet we do not agree with counsel that this state of the proof would prevent recovery. The proof of loss is a condition of the policy which may be waived by the insurer and is waived by accepting, without objection as to form, the proofs offered by the claimant. *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 475; *Home Ins. Co.* v. *Driver,* 87 Ark. 171. The policy provided that proof of loss should be made out on blanks furnished by the company, and it appears that

that was done in the present case. No objection was made to the form or subject-matter of the proof, but liability was denied solely on the ground that the facts of the case did not make the company liable under the policy. Counsel argue the point as if the terms of the policy were sufficient to restrict liability to a case affirmatively made out by the statements in the proof of loss. In other words, it is argued that under the by-laws the liability of the company is conditioned upon an affirmative showing of liability made in the proof of loss rather than upon the facts as they really exist and proved on the trial of the cause. Such is not, we think, the law, and that view of the matter is in conflict with our decision in the recent case of *Columbian Woodmen* v. *Hewitt,* 122 Ark. 480. In that case the requirement of the policy was that where the claim was based upon the fracture of a bone an X-ray photograph must accompany the proof of loss, and it was contended that in order to establish liability it was necessary to furnish with the proof of loss itself an X-ray photograph revealing the fracture, but we held to the contrary and held that even if the photograph failed to disclose the fracture, yet there might be recovery upon proof being adduced at the trial showing that there was in fact a fracture of the bone. The decision of the Supreme Court of the United States in the case of *Insurance Co.* v. *Rodel,* 95 U. S. 232, is also in point and establishes the law contrary to the contention of counsel for defendant.

It is next insisted that the court erred in refusing to permit defendant to introduce in evidence the proof of loss furnished by plaintiff as an admission concerning the death of the insured. There is a controversy between counsel as to what really occurred, but an inspection of the record leads us to the conclusion that the court did not refuse to permit defendant to introduce the proof of loss for the purpose named, but, on the contrary, expressly ruled that the proofs could be introduced for consideration by the jury as an admission of fact made by

the plaintiff concerning the cause of death. When the court announced its ruling, counsel for defendant shifted their position, insisting that the proofs of loss were competent to show their insufficiency, or, to use the precise language of counsel at the time the incident occurred, "to show that there was no proof of claim." The evidence was not competent for that purpose, as it is shown by the uncontradicted evidence that the proof had been accepted by defendant without objection and the insufficiency of the proof was, therefore, waived. Counsel failed to take advantage of the offer of the court to introduce the proofs of loss, and the record does not show that the same were introduced at all for any purpose. The bill of exceptions contains the document merely as an offer on the part of the defendant to introduce it, but it was not introduced before the jury for consideration for any purpose. Defendant can not, however, complain for the reason that it declined to accept the court's offer to introduce the proofs of loss with a restriction of the consideration for the purpose named. We find no error according to the record in this regard.

(4) The plaintiff took the deposition of two witnesses, and the same were duly filed, but did not introduce the depositions in evidence. The defendant thereupon claimed the right to introduce the depositions, but the court refused to permit this to be done and the ruling is assigned as error. The depositions were taken upon notice, and not by agreement, and counsel for defendant appeared and cross-examined the witnesses, and also brought out new matter from the witnesses upon which counsel for plaintiff cross-examined. Notwithstanding the conflict of authority on the question, this court has steadily adhered to the rule that where depositions are taken by a party upon notice to be used in an action at law, they can not be introduced over the objection of the party by his adversary, the rule being otherwise where the depositions are taken by agreement. *Greenville Stone & Gravel Co.* v. *Chaney,* 195 S. W. 13. Counsel for de-

fendant insist that the reason upon which our ruling is based is that the party has not had an opportunity to cross-examine, and that in this particular case that reason for the rule is absent and the rule itself should not apply. It is a mistake, however, to say that the reason stated by counsel is the only one upon which the decision of this court is based. On the contrary, other reasons were distinctly given in the first case announcing the rule. *Sexton* v. *Brock,* 15 Ark. 345. The question was very carefully considered in that case and the opinion by Chief Justice WATKINS laid down the rule which appears to be sound in reason and has never been departed from by this court. Suffice it to say the present case falls within that rule, and our former decisions are now adhered to.

(5) The remaining assignment to be discussed relates to that part of the judgment which awards recovery of attorney's fees, and we are of the opinion that the court erred for the reason that the liability under this policy does not fall within the terms of the statute of this State authorizing the recovery of 12 per centum damages and reasonable attorney's fees in cases where loss occurs and the insurance company fails to pay after demand. Act of March, 1905, page 307. We have held that the statute is highly penal and should be strictly construed, and we refused to apply it to a policy issued by a fraternal insurance society. *Knights of Maccabees* v. *Anderson,* 104 Ark. 417. In the case of *Arkansas Mutual Fire Insurance Co.* v. *McManus,* 86 Ark. 115, we upheld the constitutionality of the statute and in the opinion treated it as one borrowed from the State of Texas, where it has been upheld as the proper exercise of the police power. The Supreme Court of the United States upheld the constitutionality of such statutes on the ground that they constituted conditions upon which corporations are permitted to do business in a given State. *Fidelity Mutual Life Assn.* v. *Mettler,* 185 U. S. 308. The statute was evidently intended by the lawmakers as a part of our insurance laws regulating insurance companies doing business in this State, and was intended as

a protection to the holders of policies written in the progress of that business. It was not intended to penalize insurance companies for failure to comply with contracts executed and to be performed wholly within another State, for otherwise the effect would be to give an extraterritorial force to a highly penal statute. We should not attribute any such intention to the lawmakers. It is insisted by counsel for plaintiff that this court in the case of *Massachusetts Bonding & Ins. Co.* v. *Home Life & Accident Co.*, 119 Ark. 102, held that the statute applied to losses which occurred outside of the State under policies written elsewhere, but such is not the purport of that decision. We merely held there that a penalty could not be collected out of the assets of an insolvent corporation because of the failure of the receiver to pay, and the question was not raised there as to the right to impose a penalty under the statute on a policy written elsewhere and where the loss occurred in another State. The property insured in that particular case was situated in Arkansas and that would differentiate the facts in that case from those in the present case. However, we hold that the statute was not intended to penalize a company on policies which were written and which matured in another State.

The court was in error, therefore, in rendering a judgment for recovery of attorney's fees and that part of the judgment is reversed. In other respects the judgment is affirmed.

POPE v. CITY OF NASHVILLE.

Opinion delivered December 3, 1917.

1. LOCAL IMPROVEMENT—SIGNATURE OF MAJORITY—DETERMINATION—PUBLICATION OF NOTICE.—In the formation of a local improvement district, the publication of the notice of the time when the council would hear the petition and determine whether it is signed by a majority of the property owners, *held*, to have been made in accordance with the provisions of the act of 1913, page 527.

2. LOCAL IMPROVEMENT—PETITION—WITHDRAWAL OF NAMES.—Signers of a petition for the formation of a local improvement can not withdraw their names because they later conclude that the formation of the district would be burdensome or inexpedient.
3. LOCAL IMPROVEMENT—FORMATION.—Act 1913, page 527, referring to improvement districts in cities and towns, provides that the finding of the council upon the second petition shall be conclusive, unless within thirty days thereafter, suit is brought to review its action in the chancery court of the county where such city or town lies.

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

The appellant, *pro se.*

1. The notice is jurisdictional and must be given as required by law. Here it did not so comply. 83 Ark. 344; 115 *Id.* 163; 113 *Id.* 566; 104 *Id.* 298; Kirby & Castle's Digest, § 6826. To complete the two weeks another publication was necessary. 42 Ark. 93; 219 Fed. 103.

2. The petitions did not contain a majority in value of the real estate in the districts. Petitioners had the right to withdraw their names before the council acted. 213 Ill. 302; 216 *Id.* 205; 198 *Id.* 205; 28 Cyc. 163; 37 *Id.* 76; Elliott on Roads & Streets (2 Ed.), 332.

W. P. Feazel, for appellee.

1. The publication of the notice was sufficient. Kirby & Castle's Digest, § § 5751, 6826; 194 U. S. 248.

2. Petitioners had no right to withdraw their names after signing the petition. 70 Ark. 178; 77 *Id.* 122; 75 *Id.* 155; 81 *Id.* 208; 130 Ark. 97.

3. The action of the council is final and conclusive unless within thirty days suit is brought. 94 Ark. 503; 86 *Id.* 1; 84 *Id.* 259; 69 *Id.* 70; *Jacobs* v. *Paris,* 131 Ark. 28; 106 Ark. 156; 98 *Id.* 113; 110 *Id.* 514; 84 *Id.* 390.

HART, J. This case involves the validity of two separate improvement districts in the city of Nashville, Arkansas, upon two separate petitions, each signed by more than ten owners of real estate within the proposed district. The city council laid off two separate improve-

ment districts in the city of Nashville, Arkansas. Each contained the same territory. One was for the construction of waterworks and the other for sewers. After the first ordinance was duly passed and published, a second petition for each district, purporting to have been signed by the majority in value of the real estate owners within the proposed district, was filed with the city council. On the 18th day of September, 1916, the city council, by an order entered of record, fixed the 9th day of October, 1916, as the time it would hear the second petition and ascertain if each of them contained a majority in value of the owners of real estate within the proposed districts. The city clerk was ordered to give notice of the time and place of hearing, by publication, as required by the statute. The notice was published in a weekly newspaper published in the city of Nashville. The first insertion was in the paper published on September 23, 1916, and the second, on September 30, 1916. The same notice was given for each district. On the 9th day of October, 1916, the city council, by an order, duly entered of record, postponed the hearing of said petitions until the 19th day of November, 1916. On the 13th day of October, 1916, there was filed with the recorder of the city of Nashville, addressed to the mayor and board of aldermen, a petition as follows:

"The undersigned, your petitioners, having heretofore petitioned in favor of the improvement districts in the city of Nashville, Arkansas, which undertaking is now before your body, would most respectfully represent and show that since signing the same we have made further investigation of the effect of the organization of the districts contemplated, the taxes and burdens incident thereto, and having come to the conclusion after mature deliberation and thought, that the contemplated improvement district is not wise at this time, we do most respectfully ask and request that our names be withdrawn from said petitions or request for the improvement district."

This petition was signed by certain property owners within the proposed district. On the 19th day of November, 1916, the city council proceeded to hear the petitions asking for the establishment of the improvement districts. They found that a majority in value of the owners of real estate had signed each petition as required by the statute. No notice was taken of the petition copied above in which certain property owners asked that their names be erased from the petition. These owners had property of the assessed value of over $28,000, and it is conceded that if their names should be erased from the petitions there would not be left on said petitions a majority in value of the real estate owners of the proposed districts.

The present action was instituted by a property owner in the proposed district in the chancery court for the purpose of reviewing the action of the city council in establishing the improvement districts and the record shows that it was not brought until more than thirty days after the city council had established the districts and appointed the commissioners therefor.

The cases were consolidated for the purposes of trial.

The chancery court upheld the validity of the districts and the case is here on appeal.

Section 1 of an act to amend the statute in reference to improvement districts in cities and towns passed by the Legislature of 1913, provides that where persons claiming to be a majority in value of the owners of real property within a proposed improvement district in a city or town shall present to the council a petition praying that such improvement be made, that the petition shall also designate the nature of the improvement to be undertaken upon the real property situated within the district. The section also provides that the city clerk or town recorder, by order of the council, shall give notice by publication once a week for two weeks in some newspaper published in the county in which such city or town may lie, advising the property owners within the district

that on a therein named date the council will hear the petition and determine whether or not those signing the same constitute a majority in value of such owners of real property. See Acts of 1913, page 527.

It is true that the giving of this notice is jurisdictional as contended by counsel for appellants. *Voss* v. *Reyburn,* 104 Ark. 298. The record shows that the notice just referred to was in proper form and that it was published by a newspaper with a *bona fide* circulation which was published in the city of Nashville. The first insertion was on September 23, 1916, and the next and last was in the paper issued September 30, 1916.

(1) It is the contention of counsel for appellants that this is not a compliance with the act just referred to providing for the publication of such notices. Section 4925 of Kirby's Digest provides that when any legal advertisement or notice is required by law to be published and a definite time is specified, it shall be construed to mean once a week during the time so specified. The general rule of construction is that acts relating to the same subject must be read in the light of each other. It is true the section of the Digest just referred to was passed before the act of 1913, but the section of the Digest is general in its nature and operates upon the publication of notices under subsequent acts which come within its terms. When the two acts are read and considered together, it is evident that the notices were published in compliance with the statute. The publication of the date of the 23d day of September, 1916, covered the week following it, and the publication of September 30, 1916, covered the week following it. The hearing by the council was set for October 9, 1916. This was more than seven days after the date of the last publication. Therefore we hold that the notice was given by publication once a week for two weeks as required by the statute.

(2) It is next contended that the second petition did not contain a majority in value of the owners of real estate situated within the proposed districts. In making this

contention counsel for appellant insist that the property owners had a right to come in and have their names erased from the second petition at any time before it was presented to the city council for action. In making this contention they rely upon *Littell* v. *Board of Supervisors,* 198 Ill. 205.

It is true that under that case and others of a similar nature, it has been held that unless otherwise provided by statute, the signers of a petition like the one in question are free to withdraw their names up until the town or city council has acted upon the same. This court, however, has taken the contrary view on this question. In *Echols* v. *Trice,* 130 Ark. 97, 196 S. W. 801, this court held that petitioners for a road improvement district could not withdraw their names because they had reached the conclusion that the construction of the proposed improvement would be inexpedient, burdensome, or disproportionate in benefits to the costs. The reason given was that all these matters might have been thoroughly considered by the property owners before signing the petition. In that case the statute provided that any person might withdraw his name from the original petition for the organization of the district upon presenting valid reasons therefor in writing. The court held that an excuse that existed at the time of signing the petition would not be a sound reason for allowing a withdrawal of the signature of the petitioner. The reasons which the statute contemplated were decided to be such as fraud, deceit, misrepresentations, duress, etc. The reason set forth by the petitioners in the present case for the withdrawal of their names was that after further investigation of the organization of the district and after more mature deliberation, they had reached the conclusion that it would be more burdensome than they had at first thought. These things were matters that they should have taken into consideration before they signed their names to the petition and under the reason of the case last cited, the grounds relied upon by them afforded no reason

why the council should allow them to withdraw their names. With their names allowed to stand on the petition it is conceded that a majority in value of owners of real estate within the proposed districts signed each petition.

(3) There is still another reason, however, why the decree of the chancery court must be allowed to stand. Section 1 of the act amending our statutes in reference to improvement districts in cities and towns provides that the finding of the council upon the second petition shall be conclusive unless within thirty days thereafter suit is brought to review its action in the chancery court of the county where such city or town lies. See Acts of 1913, page 527. This act has been held to be valid. *Waters* v. *Whitcomb,* 110 Ark. 511, and *Jacobs* v. *City of Paris,* 131 Ark. 28.

It follows that the decree must be affirmed.

COYNE BROTHERS v. LESLIE.

Opinion delivered December 10, 1917.

1. SALES—CONTRACT TO SELL PLAINTIFF'S PRODUCT—NEGLIGENCE.—Plaintiff employed defendant to sell his peach crop on commission. *Held,* defendant would be liable in damages to plaintiff where he did not exercise proper skill and diligence to obtain the best market price for plaintiff's peaches, and where plaintiff suffered a loss thereby.
2. SALES—CONTRACT TO SELL PLAINTIFF'S PRODUCT.—Under the above facts, defendant sold plaintiff's peaches in Chicago, when he could have obtained a better price at Nashville, Ark., *held,* the plaintiff in committing the custody of his product to defendant for sale had the right to rely upon the reasonable skill and diligence of the defendant in taking advantage of the best available market, and his failure under those circumstances to object to the shipment to Chicago would not constitute such conduct as would bar his right to recover damages, unless he also was advised of the condition of the market, at Chicago, as well as at Nashville.
3. FACTORS AND BROKERS—SALE OF GOODS—PLACE OF SALE—PRESUMPTION.—Plaintiff, residing at Nashville, Ark., employed defendant to sell his crop of peaches on commission. Defendant resided in

Chicago, but also maintained an agency at Nashville. *Held,* under the facts, that it would not be presumed that the defendant was to dispose of the crop only at Chicago.

4. FACTORS AND BROKERS—ACCEPTANCE OF PROCEEDS BY PRINCIPAL—DAMAGES FOR A BAD SALE.—Under the facts stated in the above syllabii, plaintiff is not barred from recovering damages, although without objection he received and accepted defendant's statement and the proceeds of the sale made in Chicago. This does not bar an action for damages for not making the best sale possible under the circumstances.

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

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

1. 129 Ark. 163 involves similar questions, but is materially different on the facts. This court there held that where the shipper gives no instructions and consigns to a commission house, there can be no recovery unless the factor fails to obtain the highest market price. It is presumed the factor did his duty, and there is a total failure of proof here to show that the factor failed to obtain the highest price in Chicago.

2. No instructions were given, hence the plaintiff acquiesced in the shipment. 45 Ark. 37. He is estopped. *Ib.;* 33 *Id.* 465; 83 *Id.* 548; 96 U. S. 258. The refused instructions should have been given.

3. As no place of shipment was named, the rule is that the residence of the factor was contemplated. 11 R. C. L. 753, § 22, 758, etc.; 59 Pac. 36; 68 Am. Dec. 156.

3. The case in 78 Ark. 402 is directly in point. 85 Fed. 150; 24 Am. Rep. 617. The court erred in giving the instructions for plaintiff and refusing those asked for defendant. By accepting the proceeds of sale he ratified the sale. 24 Am. Rep. 617.

D. B. Sain and *W. P. Feazel,* for appellee.

1. Appellant was negligent and did not use proper skill and diligence. Wharton on Agency, § 272; 1 A. & E. Enc. L. (2 ed.) 1063, 1067-9; 103 Ala. 181; 69 Ill. 155; 49 *Id.* 17.

2. Good faith and loyalty were absent. 1 A. & E. Enc. Law (1 ed.) 1071-2, and notes.

3. Appellee not estopped by accepting the price of the sale. 129 Ark. 163; 78 Ark. 42. There is no error in the instructions given or refused. Cases *supra*.

McCULLOCH, C. J. During the year 1916 the plaintiff, W. F. Leslie, was a peach grower in Howard County, Arkansas, and employed the defendants, Coyne Brothers, who were engaged in the commission business in Chicago, to sell his crop of peaches on commission. Defendants kept an agent, Mr. Turquette, at Nashville, the county site and business center of Howard County, who conducted the transactions for his principal with plaintiff and handled the fruit committed to the care of the defendants. The contract between plaintiff and defendant was made orally by the plaintiff and Turquette and there was no specification as to the place of sale of the peaches.

Plaintiff was not a large grower of peaches and the shipments were in small lots made in connection with shipments of peaches of other growers. Most of the peaches handled by defendants were shipped to Chicago and sold from that office, but Turquette sold several cars of peaches on the railroad tracks at Nashville—none, however, owned by the plaintiff.

This action was instituted by plaintiff to recover damages on the theory that a better price could have been obtained for his peaches by selling them at Nashville instead of shipping them to Chicago, and that defendants failed to exercise proper care in finding a market. No demand was made by plaintiff for the sale of his peaches at Nashville, nor did he make any objection to the shipment of the peaches to Chicago for sale. He knew that the peaches were being shipped, but was not advised of the prevailing prices on the Chicago market and other markets. The peach season ended about July 20 and defendant furnished plaintiff, on August 9, with statements of the proceeds of the sales, accompanied by checks cov-

ering the net proceeds, and those checks were accepted and cashed by plaintiff without any objections being expressed at that time. This action was instituted several weeks later. The plaintiff recovered damages below and the defendants have appealed.

(1) The court submitted the issues upon instruction, which, in substance, told the jury that the plaintiff's right of recovery depended upon proof by preponderance of the evidence "that defendant did not exercise such skill and diligence to obtain the best market price for plaintiff's peaches and that plaintiff suffered loss on account thereof." The following instruction was also given at the request of the defendant and is in harmony with the other instructions given by the court:

"The plaintiff to recover must show that the defendants failed to exercise ordinary care to obtain the market price for his peaches. It is not sufficient to show the mere fact that more money might have been received for the peaches; in other words, if the defendants exercised ordinary care in selling the peaches at their market value, and erred in the choice of the market whereby the said peaches brought less than might have been obtained for them, still this in itself will not be sufficient to entitle the plaintiff to recover, but before he could recover he must go further and show that the error, if any, in the choice of the markets was the result of the failure of the defendants to exercise ordinary care with regard thereto, and, unless he has shown this by a preponderance of the evidence, your verdict must be for the defendants."

(2) The evidence was sufficient to make out a case of liability upon the theory indicated in the court's instructions, which we think constituted a correct announcement of the law on the subject. It is insisted that the court erred in refusing to give certain requested instruction, telling the jury that "if the plaintiff knew that the peaches were being shipped from Nashville and did not at the time object thereto, but allowed such shipments to go forward without objection," this constituted assent on

the part of the plaintiff to the shipment to Chicago and that he could not under those circumstances recover.

Learned counsel for defendants rely upon certain language found in the opinion of this court in the recent case of *Coyne Brothers* v. *Feazel,* 129 Ark. 163, 195 S. W. 391, which involved a contract for the sale of peaches and damages were sought on the theory that the defendants had violated the instructions of the plaintiff in shipping the peaches to Chicago instead of selling on the market at Nashville. The trial court refused to give an instruction similar to the one now under consideration, and in disposing of the question involved, we said that if the plaintiff had withdrawn his instructions to sell at Nashville, or had consented to the shipment of the peaches to Chicago, he could not recover unless there was negligence in failing to secure the highest market price at Chicago. That case, however, was different from the present one in that recovery was sought entirely upon the theory of violation of positive instructions concerning the place of sale, while in the present case the plaintiff shows that, notwithstanding the fact that no instructions were given, he was not advised of the prices which could be obtained at Chicago. The plaintiff in committing his product to the custody of the defendant for sale had the right to rely upon the reasonable skill and diligence of the defendant in taking advantage of the best available market, and his failure under those circumstances to object to the shipment to Chicago did not constitute such conduct as would bar his right to recover damages unless he also was advised of the condition of the market at Chicago, as well as at Nashville.

There was no element of estoppel or waiver on the part of the plaintiff in failing to object to the shipment to Chicago unless he was advised that there was a better market at Nashville. To hold otherwise would be a denial of the plaintiff's right to rely on the skill and superior knowledge of the agents whom he had employed to handle his product.

The defendants also requested the court to instruct the jury that they had a right to ship the peaches to Chicago, that the plaintiff is presumed to have consented thereto and that no liability was established by showing that a better price could have been realized on sales made at Nashville. The theory upon which counsel for defendants argue the correctness of those instructions is that because defendants were doing business at Chicago there is a presumption that the peaches delivered to them were intended to be sold at that place. They quote from 11 R. C. L., section 22, page 768, the following which we think is a correct statement of the law on the subject:

"Where a consignment is made to a factor for sale, without instructions, and in the absence of established usage to the contrary, it may be presumed that the goods consigned are intended to be sold at the place of residence of the factor."

The undisputed evidence was that defendants maintained an agency at Nashville where there was an established market for peaches and the agent occasionally made sales on that market. Therefore, the presumption can not be indulged that the parties to the contract mutually intended that the peaches should be shipped to Chicago, the principal place of business of the defendants.

(3) It is next insisted that the court erred in refusing to give an instruction to the jury stating that, if plaintiff's peaches were loaded in cars with other shippers who demanded that their fruit be shipped to Chicago and not sold at Nashville, defendants had the right to ship the cars in accordance with the demands of other shippers and would not be liable to plaintiff for failure to sell at Nashville.

The first objection to this instruction, and one that is quite adequate, is that there appears no evidence in the record, as far as we can find in the abstract, tending to show that plaintiff loaded his fruit in cars with other shippers who made objections to sales at Nashville and requested shipment to Chicago. The instruction would,

therefore, have been abstract and it is unnecessary to search for other reasons why the court did not err in refusing to give it.

(4) It is further insisted that the returns made by the defendant to plaintiff of the sales constituted accounts stated upon the failure of plaintiff to make objection, and that his acceptance without objection of the proceeds of sale constituted a ratification and that for those reasons the right to recover damages is barred. The correctness of the sales accounts furnished to plaintiff is not questioned, and even though they be treated as accounts stated, this furnishes no grounds for barring his right to recover damages. The plaintiff's attitude in this case does not challenge the correctness of those accounts of the proceeds of sale, but he contends that there was a breach of duty on the part of the defendant in failing to take advantage of a better market, and this does not put the plaintiff in an inconsistent position. Nor do we think the plaintiff is barred of his right to recover damages by acceptance without objection of the proceeds of sale.

Counsel for defendants rely on a Mississippi case (*Meyer* v. *Morgan,* 51 Miss. 21, 24 Am. Rep. 617), wherein it was held that the acceptance by the owners of cotton of the proceeds of the sales made by a broker, contrary to instructions, constituted ratification of the sales and prevented recovery for damages on account of the violation of the contract. The decision was perhaps correct upon the facts of that case, but the reasoning has no application to the facts of the present case. The court said that the plaintiff in that case had no right to speculate on the future market of cotton and afterwards complain because of the fact that the instructions not to sell for less than a certain price had been disobeyed and a better price could have been obtained in the future. The facts of that case were that the plaintiff had shipped cotton to the broker with instructions not to sell for less than a stated price. The instructions were violated by a sale of the cotton by the broker at a price less than that

mentioned in the instruction and less than could have been obtained later. No such state of facts is presented in the present case, for the plaintiff did not give any instructions concerning the price he wanted for his fruit, but relied upon the integrity, diligence and sagacity of his agent to find the best available market. As soon as the alleged act of negligence of the plaintiff occurred in selling the fruit on a lower market than could have been found, plaintiff's right of action accrued and he did not waive his right by accepting the proceeds of sale which belonged to him.

There are other assignments of error with respect to the rulings of the court in giving and refusing instructions, but we find on consideration that those rulings were correct. The issues were correctly submitted to the jury and there was sufficient evidence to sustain the verdict.

Judgment affirmed.

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

Opinion delivered December 10, 1917.

1. CARRIERS—OVERCHARGE—DISTANCE—PASSENGER FARE.—In an action for overcharge of passenger fare, under Kirby's Digest, § 6620, the plaintiffs testified that they purchased tickets from Conway to Whelen Springs (Ark.) for which defendant charged them $4.20. That they had made the trip many times, and had always paid $3.54 for their tickets; that the rate was three cents per mile; that the distance from Conway to Whelen Springs was 118 miles, and that they had been overcharged sixty-six cents apiece. *Held*, from this testimony the jury might infer the distance to be 118 miles, and that there was evidence to sustain a finding that plaintiffs had been overcharged sixty-six cents each.
2. CARRIERS—PASSENGER FARE—OVERCHARGE—PENALTY.—Kirby's Digest, § 6620, providing a penalty against a carrier for overcharging a passenger, held constitutional. *Chicago, Rock Island & Pacific Ry. Co.* v. *Davis*, 114 Ark. 519, cited, approved and followed.

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

E. B. Kinsworthy and *R. E. Wiley,* for appellant.

1. The verdicts are without evidence to support them. 61 Ark. 354. There was no competent evidence as to the distance. 58 Ark. 108.

2. The law is unconstitutional and void. 114 Ark. 519 should be overruled. 206 U. S. 1; 217 *Id.* 196; 230 *Id.* 340; 236 *Id.* 585; 207 *Id.* 73. The penalty is exorbitant and oppressive. *Supra.* 235 U. S. 651; 60 Ark. 221; 54 *Id.* 101; 209 U. S. 123; 230 *Id.* 340.

HART, J. Dicksey Williams and Lucy Williams filed separate suits against the St. Louis, Iron Mountain & Southern Railway Company under section 6620 of Kirby's Digest to recover the penalties allowed for overcharge in the transportation of passengers. The suits were consolidated and tried together. The jury in each case returned a verdict for sixty-six cents overcharge and seventy-five dollars penalty. From the judgment rendered, the railway company has appealed.

It is first insisted by counsel for the railway company that the evidence is not legally sufficient to support the verdict. Dicksey Williams and Lucy Williams reside near Whelen Springs in Clark County, Arkansas. In June, 1915, they purchased tickets from Conway, Arkansas, to Whelen Springs. The railway agent demanded and received the sum of $4.20 from each of them for her ticket.

(1) The girls testified that it was 118 miles from Conway to Whelen Springs and that the regular fare was $3.54; that to charge them $4.20 for a ticket amounted to an overcharge of sixty-six cents. Upon being asked on cross-examination how they knew the distance from Conway to Whelen Springs to be 118 miles, they stated that they had made the trip several different times before the time in question, and that they had each time been charged the sum of $3.54; that the fare at the time was three cents per mile. It is not practical that an intended passenger should measure the distance from the point of embarkation to his place of destination. The fare which the rail-

way company is allowed to charge is fixed by law and the passenger must necessarily rely upon the statement made by the agent of the railway company whose duty it is to sell him a ticket. The girls testified that they had made the trip from Conway to Whelen Springs, at several different times prior to the one in question and had been charged the sum of $3.54 for a ticket on the basis that the fare was three cents per mile. From this the jury might have inferred the distance to be 118 miles, and it follows that there was evidence legally sufficient to warrant the verdict for sixty-six cents overcharge.

(2) It is next contended that section 6620 of Kirby's Digest is in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States and deprives the railway company of its property without due process of law. The validity of this statute was upheld in *Chicago, Rock Island & Pacific Railway Company* v. *Davis,* 114 Ark. 519. The statute in question provides for a penalty for overcharge of not less than fifty dollars nor more than $300 and costs of suit including a reasonable attorney's fee.

Counsel for the railway company again ask us to take up this question on the ground that the statute is invalid on its face on account of the size of the penalties prescribed. They point to the fact that railway companies only violate the statute in rare instances. This may be true and it may be also true that the penalties prescribed by the statute compels obedience to its mandates. Be that as it may, we have already decided the question after mature deliberation, and most of the cases cited by counsel in their brief in the present case were cited and considered by the court in the case where the question was decided. Therefore, we decline to take up the question again and adhere to our original decision.

The judgment will be affirmed.

LARKIN v. STATE.

Opinion delivered December 10, 1917.

1. LIQUOR—ILLEGAL SALE.—The evidence held sufficient to warrant a conviction for the illegal sale of whiskey.
2. LIQUOR—ILLEGAL SALE—EVIDENCE OF OTHER SALES.—In a prosecution for the illegal sale of liquor, evidence of other specific sales is admissible, where the prosecution seeks to show a place or system on the part of the accused to engage unlawfully in the liquor business.
3. LIQUOR—ILLEGAL SALE—EVIDENCE OF OTHER SALES.—Defendant was tried and acquitted of a charge of selling liquor to one S. He was later tried for selling liquor to one H. *Held,* evidence of a sale to S. would be admissible in the second trial, where the court by its instructions, carefully protected the defendant against a conviction of any charge except the one for which he was then being prosecuted.
4. APPEAL AND ERROR—TRIAL—REMARKS OF COUNSEL—BILL OF EXCEPTIONS.—A cause will not be reviewed for improper remarks of counsel, where the objectionable remarks do not appear in the bill of exceptions. It is insufficient where they appear in the motion for a new trial alone.
5. APPEAL AND ERROR—MISCONDUCT OF JURY—CRIMINAL TRIAL.—In a criminal prosecution, *held,* the record did not disclose that the jury were permitted to separate and mingle with the public during the trial.

Appeal from Carroll Circuit Court, Eastern District; *J. S. Maples,* Judge; Affirmed.

C. A. Fuller, for appellant.

1. The verdict is contrary to the law. No one shall be twice put in jeopardy for the same offense. Const., art. 2, § 8. Appellant was acquitted of the charge at a prior term. The record and proceedings were before the court and it takes judicial knowledge of all former proceedings. 16 Cyc. 917. The evidence of Spriggs *et al.* was not admissible. Other crimes can not be proven. 197 S. W. 684.

2. It was error to instruct the jury verbally. 71 Ark. 367. Also in refusing defendant's instructions requested.

3. Improper remarks of counsel were allowed. 120 Ark. 492; 72 Ark. 138; 74 *Id.* 210; 65 *Id.* 389.

4. The jury were allowed to separate and mingle with the crowd. Objections were made and incorporated in the motion for new trial which is a part of the record.

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

1. Former jeopardy was not pleaded and hence abandoned. 103 Ark. 391. The acquittal of selling to Spriggs was no bar to a prosecution for the sale to Hamlin. 57 Ark. L. R. 48.

2. No request was made to reduce the instructions to writing. 80 Ark. 201.

3. The court properly instructed the jury. 127 Ark. 289; 57 Ark. Law Rep. 48.

4. The instructions asked were properly refused. 80 Ark. 495; 84 *Id.* 119; 81 *Id.* 25; 84 *Id.* 16; 127 *Id.* 289. Courts are not required to duplicate instructions. 103 Ark. 352; 101 *Id.* 120.

5. The testimony of Spriggs, Gohn and others was admissible. Appellant was present and made the sale.

6. The remarks of the prosecuting attorney or the objections thereto do not appear in the bill of exceptions. It is not sufficient if they only appear in the motion for new trial. 121 Ark. 269; 126 *Id.* 300.

7. It is not shown that the jury separated or mingled with the crowd. 35 Ark. 118; 26 *Id.* 323; 13 *Id.* 317; 32 *Id.* 309.

HART, J. Charley J. Larkin was indicted for the crime of selling intoxicating liquors without license. He was tried before a jury and convicted, his punishment being fixed at a term of one year in the State penitentiary. From the judgment of conviction he has duly prosecuted an appeal to this court.

Oscar Hamlin testified that during the fall of 1916, that he saw Charles Larkin at the fair held at Berryville, in the Eastern District of Carroll County, Arkansas; that

he did not know Larkin at that time but has since become acquainted with him; that in company with Jim Skelton he went into the defendant, Larkin's, place, at Berryville during the fair and bought two drinks and a pint of whiskey from him; that Skelton also bought some liquor from the defendant at the time; that after he got the drinks from the defendant he told him that he would give a dollar for what was left in the bottle; that the defendant said, "You loan me a dollar until I see you again;" that the defendant set the whiskey on the counter and that he went in and got it; that he left the dollar with the defendant. James Skelton in all essential respects corroborated the testimony of Hamlin. He said they first bought drinks of whiskey from the defendant and paid for them; that the drinks were poured out in glasses from a quart bottle; that Hamlin offered the defendant a dollar for all that was left in the bottle. The defendant made the remark, "You loan me a dollar;" that Hamlin laid the money down, went up and took the bottle of whiskey and carried it out and that the defendant took up the dollar which Hamlin had laid down.

Carl Spriggs testified that during the same fair he went into the defendant's place with old man Howell and bought some whiskey from him. He also testified that he told his father-in-law, Elmer Gohn, while driving past the defendant's place of business that he thought they could get some whiskey there; that his father-in-law gave him a dollar and that he went in and threw down the dollar and Larkin gave him a pint of whiskey, three bananas in a sack, and twenty cents in change, which he took back to where his father-in-law was; that this occurred during the fair in the fall of 1916, at Berryville, Arkansas.

Elmer Gohn testified that they drove up in front of Larkin's place of business and that Carl Spriggs said to Larkin, "What have you got to drink?" that Larkin replied nothing but water; that Spriggs then said, "I have plenty of that at home. Have you any whiskey?" That Larkin hesitated a little and then said, "If you want me

to, I might get you a drink;" that they drove across the street; that he gave Spriggs a dollar; that Spriggs went back to Larkin's place and came out of it with a pint of whiskey and a little sack with three bananas in it; that they drank the whiskey and it was a poor grade.

Other witnesses for the State also testified that the defendant sold whiskey during the fair at Berryville in the fall of 1916.

The defendant testified for himself, and denied that he had sold whiskey to Hamlin, to Skelton, to Spriggs or to any one else during the fair at Berryville in the fall of 1916, or at any other time.

Joseph Howell was one of the witnesses who testified that he had bought whiskey from the defendant. The defendant testified that Howell came into his place of business with a sore throat and that he gave him a drink of whiskey; that after Howell drank the whiskey he bought a quarter's worth of cigars and paid for them but that he did not charge Howell for the whiskey. He further testified that he and Skelton would sometimes order whiskey together; that they would keep the whiskey in a bottle in his place of business; that when Skelton came in to take a drink out of the bottle, he would buy soda pop from him to drink with the whiskey. He testified that he heard of other persons near his place of business selling whiskey during the fair at Berryville in the fall of 1916, and that he reported them to the officers. Other evidence was introduced by the defendant to corroborate his testimony.

(1) The evidence for the State warranted the verdict of the jury. At the conclusion of the evidence the State was required to elect and elected to stand on the sale made to Oscar Hamlin. The court told the jury that the State elected to try the defendant upon the alleged sale made to Oscar Hamlin and that he must be convicted, if convicted at all, upon this particular sale and not upon any other sale made by him. The court also told the jury that proof of the other alleged sales was admitted to the jury for its consideration in determining whether or not a sale was made to Hamlin and not for any other purpose.

(2) The defendant objected to the testimony of Carl Spriggs and Elmer Gohn and Joseph Howell specifically on the ground that the State had elected to try him at the last term of the court on the sale to Carl Spriggs; that these witnesses had testified on the trial of that case and that their testimony was substantially the same as their testimony in the present case and that the defendant had been acquitted of that charge. The prosecuting attorney admitted this to be true. The court, however, admitted the testimony in question over the objection of the defendant and counsel for the defendant duly saved their exceptions to the ruling of the court. This brings before us, then, the question of whether or not the court erred in admitting the testimony of Carl Spriggs and the other witnesses just referred to.

It is true that in a prosecution under an indictment charging the illegal sale of liquors in general terms, where the State elects to rely on a particular sale for conviction, the general rule of the criminal law, prohibiting the proof of similar crimes, applies. There are, however, certain well known exceptions to the general rule. In *Ketchum* v. *State,* 125 Ark. 275, evidence of other distinct sales was held admissible to illustrate the character of business conducted by the defendant. In that case the defendant claimed that he had not been engaged in the selling of whiskey since the first day of January, 1916, and that he only operated a family grocery store. Proof was made of other sales after the finding of the indictment. The court expressly told the jury that the defendant could not be convicted of any sales made after the finding of the indictment, but that under the circumstances the testimony was admissible to show that the business of selling liquor was carried on by the defendant at the place where the sale was charged to have been made.

Again, in *Turner* v. *State,* 130 Ark. 48, 196 S. W. 477, the defendant was charged with selling intoxicating liquors. The proof was that he had sold cider containing alcohol in such quantities that the persons who drank it be-

came drunk. In that case the State relied for a conviction upon the sale to a particular person. The court did not admit the sale of cider to other persons in aid of the State's proof that the defendant was guilty of selling to the particular person but the evidence of the sales to other persons was admitted solely for the purpose of showing that the cider was the same kind of cider that had been sold to the prosecuting witness and that it would produce intoxication upon those who drank it. In short, the testimony of sales to other persons was admitted to show the character of the liquor sold.

Another exception to the general rule is that in order to show a plan or system on the part of the accused to engage unlawfully in the liquor business, evidence of other sales than that for which the accused is prosecuted is admissible. See case note to 18 A. & E. Ann. Cas., pp. 850 and 851; *Stovall* v. *State* (Texas), 97 S. W. 92, and cases cited; *Archer* v. *State,* 45 Md. 33, and *State* v. *Peterson* (Minn.), 108 N. W. 6. It will be observed that in the sale to Hamlin the defendant requested Hamlin to lend him a dollar and when Hamlin did so he permitted Hamlin to take away all the whiskey that was left in the quart bottle. Spriggs says that when he purchased the pint of whiskey from the defendant that the defendant gave him a little sack with three bananas in it. The defendant himself denied that he made any sales of liquor whatever. With reference to the sale to Howell the defendant stated that Howell had a sore throat and that he gave him a drink of whiskey for it; that just afterwards Howell purchased a quarter's worth of cigars from him and paid him for them. So in looking to the record it would appear that the defendant had a certain system as to making sales. The evidence was admitted for the purpose of showing the course of business of the accused with reference to the illegal sale of liquor and the testimony tended to show that the transaction charged was a sale in accordance with the system pursued by the defendant.

(3) It will be remembered that Hamlin testified that Skelton was with him when the sale was made and the defendant himself testified that Skelton had an interest in the liquor and would only buy soda water when he came to take a drink of liquor out of the bottle which had been left in the defendant's place of business. But it is contended by counsel for the defendant that the testimony of the sale to Spriggs should not have been admitted because the defendant had been acquitted at the last term of the court on the charge of making the sale to Spriggs.

In the case of *State* v. *Raymond,* 24 Conn. 204, defendant was charged with keeping intoxicating liquors with intent to sell the same in violation of law. William Taylor was allowed to testify that he had purchased of Raymond at his place of business at two different times intoxicating liquors. This was admitted to show that Raymond kept intoxicating liquors with the intent to sell the same. The prosecuting attorney admitted that charges were pending in the superior court against Raymond for making these sales to Taylor. In that case the defendant claimed that the sales to Taylor could not be used as evidence to convict him because if they could it would subject Raymond to two or more prosecutions for the same offense. The court held that the evidence was admissible to prove that he had sold to Taylor other liquor of the same kind in his store. The court said that the evidence of the sales to Taylor was admissible, not for the purpose of convicting the defendant of keeping that liquor for sale, but only for the purpose of showing the intent with which he kept the liquor, for the keeping of which he was being prosecuted. So here the court carefully protected the defendant against conviction of any charge except the one for which he was being prosecuted. Hence we are of the opinion that the court did not err in admitting the testimony of Spriggs and the other witnesses of the sale made to Spriggs.

The assignment of error based upon the giving of certain instructions at the request of the State and refusing others asked by the defendant was disposed of by the

principles of law which we have just discussed and announced. Hence it is not necessary to set out these instructions or to discuss them in detail.

It is next contended that the court erred in permitting Elmer Gohn to testify to a transaction and conversation between himself and Carl Spriggs with reference to the purchase of a pint of whiskey because the defendant was not present at the time. The record does not bear counsel out in their contention. Gohn testified that he and Spriggs drove up in front of the defendant's place of business and that the defendant seemed to hesitate about letting Spriggs have the whiskey then; that they drove across the street; that he, Gohn, gave Spriggs a dollar to purchase whiskey with; that Spriggs went back to the defendant's place of business and came out with the pint of whiskey and a sack with three bananas in it. So it will be seen that the witness' testimony referred to matters of which he had personal knowledge and could not in any sense be considered to be hearsay.

(4) Defendant asks for a reversal of the judgment because of certain alleged prejudicial remarks made by the prosecuting attorney in his argument to the jury. The remarks complained of do not appear in the bill of exceptions. It is true that they are set out in the defendant's motion for a new trial, but this is not sufficient. The language objected to must appear in the bill of exceptions. This is the only authenticated record of matters which occurred at the trial outside of the judgment roll itself. Obviously it would not do to allow the defendant to make up his own assignments of error in his motion for a new trial without there being a record made of them by a bill of exceptions or other appropriate method.

(5) Finally it is insisted that the judgment should be reversed because of the separation and conduct of the jury.

With his motion for a new trial, the defendant filed his own affidavit in which he stated that the sheriff permitted the bailiff in charge of the jury to go home while

the jury was deliberating and that while the jury was deliberating the sheriff permitted the jurors to mix and mingle with the crowd. In contradiction of his affidavit, the State proved by the sheriff and by the deputy who assisted him in having charge of the jury that the jurors were not permitted to separate while deliberating on their verdict. Some of the jurors were permitted to go from the jury room to the toilet in another part of the courthouse on the same floor, but it was shown that the jurors were under the eyes of the sheriff or his deputy while doing this and that they did not speak to any one. Affidavits of two of the jurors were also filed in which they state that the members of the jury were not allowed to mix and mingle with the public and were not allowed to converse with any one from the time they were empaneled until they were discharged.

We have carefully examined the record and find no prejudicial errors in it and the judgment will therefore be affirmed.

WALDROP, COLLECTOR, v. KANSAS CITY SOUTHERN RAILWAY COMPANY.

Opinion delivered December 10, 1917.

1. COUNTY COURTS—ADJOURNMENT FOR TERM—ACTS AD INTERIM.—A county court on June 24 ordered that July 29 be fixed as a day for the hearing of a petition relative to the incorporation of a town, but thereafter entered an order adjourning court until the next term. *Held,* any action taken by the court on July 29 was void.
2. MUNICIPAL CORPORATIONS—ATTEMPTED INCORPORATION OF TOWN—INVALID, WHEN.—The attempted incorporation into a town of a tract of land seven miles along a railway right-of-way, upon which tract there were only a few residences, three lakes and much wooded land, *held,* invalid, being an arbitrary and unreasonable exercise of power by the county court.
3. TAXATION—TAKING PRIVATE PROPERTY BY TAXATION WITHOUT RETURN OF PROTECTION—CONSTITUTIONAL LIMITATION.—An attempted method of taxation, which will result in the taking of private property for public use, without, in return, giving any protection or other compensation therefor to the owner is invalid.

4. TAXATION—RESTRAINT OF ILLEGAL LEVY.—A railway may, by injunction, restrain the county collector from collecting a tax against its property which is illegal because of the invalid organization of a municipal corporation, and because the tax is tantamount to the taking of property without giving to the taxpayer any return in protection or other compensation.
5. MUNICIPAL CORPORATIONS—DE FACTO—ASSESSMENT OF TAXES.—Where it was attempted to organize a municipal corporation, in a rural community, solely for the purpose of organizing a single school district, and there was no user of the franchise thereafter in good faith, *held*, an estoppel was not created to attack the validity of the organization of the town.
6. TAXATION—NO RIGHT TO TAX, BY PRESCRIPTION.—Neither a town nor a county can acquire jurisdiction of a territory for taxing purposes, by prescription.

Appeal from Little River Chancery Court; *Jas. D. Shaver,* Chancellor; affirmed.

M. E. Sanderson, for appellant.

1. The town of Ogden was legally incorporated. 97 Ark. 248. The incorporation could only be raised in a direct proceeding by the State. *Ib.;* 81 *Id.* 391; 47 *Id.* 269; 31 *Id.* 476; 20 *Id.* 204.

2. Acquiescence by the public for a long period of time precludes an inquiry into the legality of the incorporation. 38 Ark. 81; 54 *Id.* 372.

2. The orders were not void. The court was not held on the wrong day. Const. 1874, art. 18; Kirby's Digest, § § 1320, 1365; 104 Ark. 627; 82 *Id.* 188; 57 *Id.* 1; 39 *Id.* 448; 32 *Id.* 278; 31 Md. 247; 28 Ark. 200; 35 *Id.* 56; 40 *Id.* 431; 48 *Id.* 308; 208 U. S. 251; 95 Me. 385.

3. A valid levy of taxes was made. Kirby's Digest, § § 6894-5, 1499; 103 Ark. 529; 42 *Id.* 100; 37 Cyc. 9645; McQuillin, Mun. Corp., § 2404.

James B. McDonough, for appellees.

1. The purported levy of taxes was illegal and void. 103 Ark. 579; 100 *Id.* 488; Kirby's Digest, § § 1496-8. The levy being illegal, the injunction was proper. 46 Ark. 471; 70 *Id.* 555; 90 *Id.* 130; 124 *Id.* 349; 30 *Id.* 101, 128; 59 *Id.* 344, etc.

2. The attempted levy by the town authorities was insufficient. Const., art. 16; Kirby & Castle's Digest, § 1545, par. 8; 82 Ark. 51; 100 *Id.* 488; 103 *Id.* 579; 69 *Id.* 730; 54 *Id.* 509.

3. There was no tax levied for the years 1915 nor 1916. Const., art. 16, § 11; Kirby's Digest, § § 6894-5; 33 Ark. 690; 50 *Id.* 390; 54 *Id.* 665. The tax was levied at a time and by persons, not authorized by law. 55 Ark. 213; 68 *Id.* 34; 74 *Id.* 383; 82 *Id.* 51; 100 *Id.* 488. The record does not show that a majority of the quorum court participated in the levy. 103 Ark. 579. There was no legal meeting of the council. 64 Ark. 489; 73 *Id.* 197; 84 *Id.* 550; 105 *Id.* 109; 28 Cyc. 329, and notes 54-5; 20 A. & E. Enc. L. 1211, 1212.

4. Ogden was never legally incorporated. But if so it lost its existence by nonuser. 9 Am. Rep. 103; 6 Lea 730; 2 *Id.* 425; 76 Tex. 323; 89 Mo. 188; 5 Pac. 350; 113 Ill. 491; 76 S. W. 351; 10 Tex. 137. The orders of court were not made in term time. 68 Ark. 340; 82 *Id.* 188; 123 *Id.* 211; 124 *Id.* 234; 20 *Id.* 77; 27 *Id.* 414; 32 *Id.* 676; 55 *Id.* 213, etc.

5. The law does not authorize the inclusion of large tracts of agricultural lands into towns. 54 Ark. 321, and cases cited; 43 Ark. 324; 55 Ark. 609, 616; 106 N. W. 971; 85 S. W. 483.

6. The organization was unreasonable and void. 87 Mo. 396; 44 Mo. 574; 75 Ky. 419; 56 So. Rep. 632. The agricultural lands were not benefited.

7. Any taxpayer can enjoin an illegal tax by raising the illegality of the existence of the town. 99 N. E. 388; 57 S. E. 114; 53 S. W. 191; 8 Ia. 82. See also 10 La. Ann. 763; 1 Neb. 16; 48 S. W. 851; 87 N. E. 349; 34 Ark. 603; 46 *Id.* 471, etc.

STATEMENT OF FACTS.

This is a suit for injunction in the chancery court by the Kansas City Southern Railway Company to restrain W. D. Waldrop as collector of taxes for Little River County from enforcing the collection of taxes in the town

of Ogden, in said county, for the years 1915 and 1916. In the complaint it is alleged that there is no such incorporated town in existence and the proceedings under which such town was attempted to be organized are void. It is also alleged that there was no valid levy of taxes for the years 1915 and 1916. The facts are as follows:

On the county court records of Little River County under date of June 24, 1907, appears the following:

"In the Matter of Incorporation of Ogden.

"Now on this date comes J. N. Wood *et al.*, and present to the court their petition for the incorporation of Ogden, and upon consideration it is considered, ordered and adjudged by the court that J. T. Cowling be and he is hereby designated as agent herein, and July 29, 1907, is hereby fixed as the day to hear this cause." "Ordered that court adjourn until court in course. W. E. Kinsworthy, County Judge."

On the next page of the record appears the following:

"In the Matter of J. N. Wood *et al.* Petition to County Court.

"On this the 29th day of July, 1907, the day appointed for the public hearing of the petition filed by W. C. Forcade *et al.*, for the incorporation of certain territory in the town of Ogden, this cause coming on to be heard upon the petition, and the petitioners appearing by their agent, J. T. Cowling, heretofore designated as such agent, and it appearing to the court: That due and legal notice was published in the 'Little River News,' a newspaper published and having a *bona fide* circulation in Little River County, for four consecutive weeks, towit: July 5, 12, 19, 26, respectively, and no remonstrance having been filed or other objections made by any person to the organization of said territory or incorporating the same into the town of Ogden. That said petition is signed by twenty-five qualified voters residing within the territory described in said petition and asked to be embraced in said incorporation. That the name proposed

for said town is proper and sufficient to distinguish it from other towns in the State. And it further appearing to the court that it is right and proper that the said petition should be granted. It is therefore considered, ordered, adjudged and decreed by the court that the following territory, being the same set out in said petition, be organized and incorporated into the town of Ogden, towit: Beginning at where the north and south lines of sections seven and eight, township 14 south, range 28 west, of fifth principal meridian strikes the south bank of Red River, and running thence north along said line to the northwest corner of southwest quarter section 7, township 13 south, range 28 west of the fifth principal meridian; thence west to the northwest corner of the southwest quarter section 15, township 3 south, range 29 west of the fifth principal meridian; thence south to the south bank of Red River; thence east along said south bank of Red River to the point of beginning."

On a subsequent page of the same record appears an order of the county court changing the boundary line between Ogden Special School District and Common School District No. 6, in Little River County. All of the territory in the town of Ogden was created into the special school district. Formerly the whole of said territory had been a part of Common School District No. 6. The evidence in the record shows that originally the negroes were largely in the majority in Common School District No. 6, and the white people desired to form themselves into a special school district in order to get rid of the negroes. They were advised that the way to do this was to organize a town and then form a special school district out of the territory embraced within the corporate limits of the municipality as provided by section 7668 of Kirby's Digest *et seq.* In attempting to organize the town of Ogden the land on both sides of the railroad for seven miles in length and five miles in width was taken. There were houses on the eighty acres on which the railroad station of Ogden was situated. The balance of the territory designated was either farm lands or timber

lands. Most of the lands were timber lands. There were about four lakes situated within the proposed territory. After the purported order of the county court above set forth was entered of record an election of a mayor, a recorder, and five aldermen was had. The evidence shows that a few ordinances were passed but no record was made of them. The person elected mayor left for another place early in 1908, and the record also shows that the most of the aldermen at various times left and established residences elsewhere. After the order of the county court declaring the organization of the special school district was entered of record, there was no other attempt to exercise any of the governmental functions of a municipality. There was no other election of officers and those elected in the beginning did not attempt to exercise any of the functions of their offices after the first of the year 1908, until they were persuaded to come back in the fall of 1915, and make the levy of special taxes which is the subject-matter of this lawsuit. Other facts will be stated or referred to in the opinion.

The chancellor found that the alleged town of Ogden was not legally incorporated; that the alleged order of incorporation made July 29, 1907, was void and that there was no levy of taxes as required by law. It was decreed that W. D. Waldrop, as collector of taxes be enjoined from the collection of any taxes claimed to be due the town of Ogden from the plaintiff.

HART, J., (after stating the facts). (1) In the first place the chancellor held that the corporation was not organized in accordance with the statute so as to acquire thereby a valid existence and in this conclusion we think the chancellor was correct. Section 5576 of Kirby's Digest provides that the order for the organization of incorporated towns shall be made by the county court. The record of the county court of June 24, 1907, shows that the court ordered July 29, 1907, as the day to be fixed for the hearing of a petition relative to the incorporation of Ogden. Subsequently, however, the record shows that the court was adjourned until court in course. This su-

perseded the former order and adjourned the court until the next term thereof. There was no regular term of the county court of Little River County between June 24 and July 29, 1907. So the order purporting to have been made on July 29, 1907, was made at a time when the county court of Little River County could not be in session and the proceedings purporting to be of that date were not judicial proceedings. When it was ordered on the 24th day of June, 1907, that the county court should be adjourned until court in course, the term lapsed and no further proceedings could be taken until the court met at a subsequent term pursuant to the statute.

(2-3) The order of the court organizing the proposed territory into an incorporated town was null and void for the reason that the land was not of such character as could form an incorporated town. The record shows that the territory attempted to be formed into the town of Ogden ran parallel with the railroad track on both sides of it and was seven miles in length and about five miles in width. The railroad station of Ogden was situated on eighty acres of the land and there were a few residences on these eighty acres. Most of the remainder of the lands within the limits of the proposed town were timber lands and the remainder were agricultural lands. There were four lakes upon the lands within the limits of the proposed town. It was manifest that the owners of the lands could not derive any benefits whatever from the lands being placed within the limits of an incorporated town. It appears from the record that the town was only incorporated for the purpose of organizing a single school district. Article 2, section 22, of our Constitution of 1874 provides that the right of property is before and higher than any constitutional sanction; and that private property shall not be taken, appropriated or damaged for public use, without just compensation therefor. Article 2, section 23, provides that the State's ancient right of eminent domain and of taxation is therein fully and expressly conceded; and that the General Assembly may delegate the taxing power, with the necessary restrictions

to the State's subordinate political and municipal corporations to the extent of providing for their existence, maintenance and well-being, but no further. So it may be said that the right of taxation and the right of eminent domain rest on the same foundation. Compensation is made or secured when private property is taken in either way. When the State or municipalities take money or property for public use by taxation, the owner receives just compensation in the protection which is afforded to his life, liberty or property. It is evident that if there can be a case of taking private property for public use in the form of taxation under color of the organization of an incorporated town and without making compensation therefor, this must be regarded as one. It is perfectly plain from the record that the purpose of those signing the petition for the incorporation of the proposed town was to organize it into a single school district. They sought to bring within the taxing power of the proposed corporation the lands used for farming purposes or which were covered with timber and which were not needed for town lots and for which there could not be any reasonable anticipation of such use at any time within the future. The attempted organization of the proposed territory into an incorporated town was palpably wrong and was an arbitrary and unreasonable exercise of power. Under the circumstances, as they appear from the record, it is evident that the property of the railroad company is subject to the local burden of taxation solely for the benefit of others, and we think this is a case of taking private property for public use under the form of taxation without giving any protection or other compensation therefor. The attempted organization of the town of Ogden was therefore within the prohibition of our Constitution and was absolutely void. *Vestal* v. *Little Rock*, 54 Ark. 321; *City of Covington* v. *Southgate*, 15 B. Monroe (Ky.) 491, and *Morford* v. *Unger*, 8 Ia. 82. It follows that the proposed territory could not be organized into a single school district unless it was in an incorporated town. Kirby's Digest, § 7668. So it will be seen that

if the question presented by this appeal had been raised immediately there would have been no trouble in disposing of the case under the principles of law above announced.

(4) As we have just seen, there was no *bona fide* organization of the municipality and no user of the charter in good faith afterward. The railroad company had, under the clauses of our Constitution above referred to, a vested interest in its property, and the whole scheme was under color of taxation, an appropriation of private property without compensation. Hence the railroad company might maintain the action.

But it is claimed that even if the corporation might have been declared illegal, had proceedings for the purpose been begun within a reasonable time, that even the State would now be precluded by lapse of time and recognition of the corporation, from attacking its existence.

The leading case on this question is that of *State* v. *Leatherman,* 38 Ark. 81, where it was held that the State, by long acquiescence and continued recognition of a municipal corporation, was precluded from depriving it of the franchise long exercised in accordance with the general law. The court based its decision on the ground of public policy and the desire of the courts to sustain rather than defeat the validity of municipal corporations. The court after discussing at some length these questions of public policy, said:

"We are emboldened by them to declare in behalf of the public good, that the State herself may, by long acquiescence, and by continued recognition through her own officers, State and county, of a municipal corporation, be precluded from an information to deprive it of franchises long exercised in accordance with the general law."

(5) In the case of *Rainwater* v. *Childress,* 121 Ark. 541, the court held with reference to private corporations that color of legal organization as a corporation under some statute and user of the supposed corporate franchise in good faith were indispensable to the existence of a *de facto* corporation. We think this principle is recog-

nized in the case of municipal corporations in the case of *State* v. *Leatherman, supra,* and in *Black* v. *Brinkley,* 54 Ark. 372. In each of those cases there was a *bona fide* attempt to organize the corporation which was followed for a period of years by user of the corporate franchise in good faith. This was recognized by the State, by the courts and by the public generally. Here the facts are essentially different. There was *no bona fide* attempt to organize an incorporated town and there was no user of its franchise afterwards in good faith. The incorporated town was attempted to be organized solely for the purpose of organizing a single school district. It was not organized for governmental purposes as is usual in the case of incorporated towns and there was not even a pretended user of the corporate franchise after the single school district was organized. The mayor left and became a resident of another place within about six months after the attempted organization. Most of the aldermen also left and there was no attempt to exercise any governmental functions within the proposed corporate limits until the fall of 1915, when an attempt was made to levy the taxes which formed the basis of this lawsuit. Under these circumstances it can not be said that any estoppel was created to attack the validity of the organization of the town.

(6) In the case of *Attorney General* v. *Marr et al.* (Mich.), 21 N. W. 883, it was claimed that long acquiescence in the action of the board of supervisors in the organization of a township estops the State from questioning the validity of the proceedings. The court held that the board possessed no power to organize a township in the territory mentioned at the time it attempted to do so and that regular proceedings in such a case would not give the township a legal existence. It was, therefore, held that the action of the board furnished no foundation for the estoppel claimed. The officers of the railroad company testified that they did not know anything about the attempted organization of the town. They admitted that they paid school taxes to the State and that their

railroad ran through the county for a considerable distance. They testified that they had been accustomed to paying the school taxes on a mileage basis and thought that the territory in question still belonged to the school district in which it had formerly been situated. This action of the railroad company did not create an estoppel. Neither a town nor a county can acquire jurisdiction of a territory for taxing purposes by prescription. *Russell* v. *Robinson,* 153 Ala. 327, 44 So. 1040, and *Inhabitants of Eden* v. *Pineo* (Maine), Ann. Cas. 1913-A, page 1340, and case note.

It follows that the decree must be affirmed.

McCULLOCH, C. J., (concurring). The decree of the chancellor restraining the tax collector from enforcing the void tax levy for the years 1915-16 was clearly correct for reasons which are not stated in the opinion of the majority and which I need not mention, though I concur in the judgment of this court on those grounds. There was no valid levy of taxes, and appellant was entitled to relief against the illegal exaction under the void tax levy, but I dissent from the holding of the majority that the legal existence of the municipal corporation can be challenged by appellant for the purpose of defeating the levy and collection of taxes. "It is the doctrine of the Supreme Court of Arkansas," we said in the case of *Brown* v. *Wyandotte & Southeastern Ry. Co.,* 68 Ark. 134, "that the existence of a corporation once formed can be questioned only by a direct proceeding and that at the suit of the State." That rule applies not only to private and *quasi*-public corporations, but with much more force to public corporations. *State* v. *Leatherman,* 38 Ark. 81; *Black* v. *Town of Brinkley,* 54 Ark. 372.

The decision of this court in *Vestal* v. *City of Little Rock,* 54 Ark. 321, which seems to be relied on by the majority as supporting their view that the original incorporation of the municipality in question was void because the territory included was agricultural lands and that the incorporators did not act in good faith, was rendered in

a direct attack on appeal by a citizen and taxpayer from the order of the county court annexing territory to a municipal corporation. The effect of the present decision is, I think, to leave the organization of a municipal corporation open to collateral attack at any time by a dissatisfied taxpayer. This is a very dangerous doctrine and will be subject to great abuse. It overturns the settled policy of this court with respect to the relations between a *de facto* corporation and a taxpayer and gives the latter the right to attack collaterally the legal status of the former in order to defeat the collection of taxes—a right that has never been recognized by this court heretofore.

ROBINSON v. EVANS.

Opinion delivered December 10, 1917.

1. JUSTICES OF THE PEACE—JURISDICTION—TEST AS TO AMOUNT.—The test of jurisdiction of a justice is not the amount of damages as shown by the proof, but the amount claimed in the complaint.
2. APPEAL FROM JUSTICE COURT—JURISDICTION OF CIRCUIT COURT.—Where the justice court had no jurisdiction in the first instance, the circuit court, on appeal, has none.

Appeal from Clay Circuit Court, Western District; *R. H. Dudley,* Judge; reversed and dismissed.

C. T. Bloodworth, for appellant.

1. Argues the merits of the cause, contending that the court erred in its instructions to the jury given and refused, citing 3 R. C. L. 109, 6 C. J. 1115; 31 Ark. 518; 36 Ala. 449; 3 Ann. Cas. 468, and note; 12 *Id.* 692, and note.

2. The complaint was amended so as to bring the case within the jurisdiction of the justice.

F. G. Taylor and *G. B. Oliver,* for appellee.

1. The court had no jurisdiction. Art. 7, § 40, Const. The damages claimed furnishes the criterion. 44 Ark. 100; 45 *Id.* 346; 47 *Id.* 59; 48 *Id.* 293; 66 *Id.* 347. The case should be dismissed.

SMITH, J. This action was begun in the court of a justice of the peace to recover damages claimed to be due appellant, who was the plaintiff below, for the death of a horse owned by him. The suit was originally brought, according to the entry of the justice of the peace on his docket, for $136, which included the value of the horse and the price of his hire. It was discovered that the hire of the horse had been paid and the transcript made by the justice of the peace shows the following entry on the justice docket: "2d day of June, 1916; complaint changed in this case, and trial set for June 12, 1916. Continued by agreement of attorneys on both sides until June 24, 1916."

A trial was had before a jury in the justice court and a verdict returned for the plaintiff in the sum of $40. An appeal was duly prosecuted to the circuit court, where, upon a trial anew, a verdict was returned in favor of the defendant, and the plaintiff has duly prosecuted this appeal. He says error was committed by the court in giving and in refusing instructions, and asks a reversal on that account. On the other hand, appellee insists the cause should be dismissed because the suit was brought for a sum exceeding the jurisdiction of a justice of the peace. Appellant concedes that the sum originally sued for exceeded the jurisdiction of the justice of the peace; but he says that all the proof shows that the value of the horse was less than $100, and that he asked judgment only for its value, and he says, also, that the record showed an amendment of his complaint and a continuance by consent and that thereafter this was, in effect, a new suit and should be treated as such.

If the correctness of this position be conceded, it does not follow that the justice of the peace had jurisdiction of the cause of action. The test of jurisdiction is not the amount of damages as shown by the proof, but the amount claimed in the complaint. *Thompson* v. *Willard*, 66 Ark. 347. It affirmatively appears from the record in this case that a sum was sued for in excess of the justice's jurisdiction, and while it does appear that the complaint was amended, it does not appear in what respect it was

amended. The question involved is one of jurisdiction, and we can not assume, in view of the facts stated above, that the complaint was so amended as to pray judgment for a sum within the jurisdiction of the justice of the peace. It does not appear that this question was raised in the court below; but it was not essential that it should be, as it is a question of jurisdiction, which may be raised in this court for the first time. The jurisdiction of the circuit court depends upon that of the justice of the peace, and as that court had no jurisdiction, the circuit court acquired none on appeal, and the cause will be dismissed here. It is so ordered.

WALDEN v. KIRKLAND.

Opinion delivered December 10, 1917.

1. CONTRACTS—LEASE—SUBSTANTIAL PERFORMANCE.—The contract price, in a contract of lease, may be recovered, upon a substantial performance in good faith, of the terms or conditions of the contract.
2. CONTRACTS—ACTION FOR CONTRACT PRICE—SUBSTANTIAL PERFORMANCE.—On conflicting evidence, it is proper for the court to submit to the jury the question of the substantial performance of a contract.
3. TENDER—AFTER SUIT—COSTS.—Where appellee tendered to appellant (plaintiff) two days after suit was brought, and again in the answer a sum greater than the amount recovered by appellant with costs, appellant is not entitled to interest.

Appeal from Yell Circuit Court, Dardanelle District; *A. B. Priddy,* Judge; affirmed.

John M. Parker, for appellant.

1. The court erred in refusing instructions 1 and 2, requested by plaintiff. Appellee agreed to pay $1,400 cash and $200 in work. If he failed to perform any of his covenants he was to pay $1,600 rent, October 1, 1916. He did not comply with his covenants, to clean out all the ditches, clear up and cultivate three acres of land, dig up the patches of Bermuda grass and clean up the Thorny creek drain, etc. Nor did he pay or offer

to pay the $1,400 when due. He failed to comply with his covenants and was liable for $1,600 and interest. 90 Ark. 88.

2. The tender was not sufficient. It was after suit brought and did not include costs.

3. The instructions were misleading, and the verdict contrary to the evidence.

4. The contract says specifically that if he failed to perform *any of said covenants* he was to pay $1,600. A failure to comply with either one of them entitles us to a reversal and new trial.

Marcellus L. Davis, for appellee.

1. A substantial compliance with the terms of the contract was all that was required of appellee and this the evidence shows. Hammond on Cont. 877-8; 77 Ark. 307, 168; 59 *Id.* 408. The court properly instructed the jury.

2. The verdict is sustained by the evidence.

HUMPHREYS, J. Appellant instituted suit against appellee in the Dardanelle District of the Yell Circuit Court to recover rents in the sum of $1,600 with 10 per cent. interest from the first day of October, 1916, on 286½ acres of land in Yell County, which appellant had rented to appellee for the year beginning January 1, 1916, and ending on January 1, 1917. It was alleged in the complaint that appellee had agreed in writing to pay $1,400 in cash on the 1st day of October, 1916, and that he would clean off, clean out and level down ditches, dig up four or five patches of Bermuda and that he would take off the timber and cultivate the lands where the timber was located on the east fifteen acres of the southwest quarter of the southeast quarter, section 1, township 5 north, range 20 west, on the home place; and that he would clean off and grub Thorny creek drain on the Kalb place and put in said new ground on said place, but upon failure to perform any of said covenants, he should pay $1,600 for rent on said lands. It was further alleged that appellee had failed to perform the covenants of the con-

tract. Appellant also alleged that she was entitled to a landlord's lien upon the crops and took the necessary steps to enforce same.

Appellee answered admitting that he entered into a written rental contract with appellant for said lands and had agreed to pay her $1,400 rent for which he executed his note, but denied that the written contract attached to and made a part of the complaint was a correct copy of the contract; denied that he had failed to perform any conditions of the contract he made; denied that appellant was entitled to a landlord's lien on the products raised by him during the year 1916, or that she was entitled to judgment for $1,600; and, by way of cross-complaint, alleged that appellant was indebted to him in the sum of $46.75 for butter, eggs and other produce sold and delivered to her and $..... damages, alleged loss on sales of cotton by reason of the proceedings taken against him.

Upon trial of the cause, appellant recovered a judgment against appellee for $1,360.25. An appeal to this court has been prosecuted, which challenges the construction placed upon the rental contract by the circuit court, and the sufficiency of the evidence to support the verdict and judgment.

The rental contract in question sets out the work appellee was required to do in lieu of the payment of $200 additional cash rent. The covenants for work are couched in the following language: "He (referring to appellee) will clean off ditches and clean out ditches and level down ditches and dig up four or five patches of Bermuda, and take off timber and cultivate said lands where said timber is located on east fifteen acres, southwest quarter, southeast quarter, section 1-5-20, on the home place. * * * Party of the second part (referring to appellee) to clean off and grub Thorny creek drain on what is known as the Kalb place and put in said new ground on said place." Then it was provided that, "If the party of the second part (referring to appellee) should fail to perform any of said covenants as herein mentioned and set forth, then he agrees to pay to the party of the first part

the sum of $1,600 for rent on said lands on date mentioned above."

The main body of the contract was typewritten, but the description of the leased premises was inserted with pen and ink, and the words "Thorny creek" and "on the E. 15 A. S. W. ¼, S. E. ¼, Sec. 1-5-20" were also inserted with pen and ink. The evidence is conflicting as to whether the words "Thorny creek" were inserted before or after the contract was executed. Appellee's contention was that they were inserted after the execution of the contract without his knowledge. The evidence was also conflicting as to whether the covenants in the contract had been complied with on appellee's part.

(1) The court held and instructed the jury that a substantial compliance with the covenants in the contract on the part of appellee was all that was required. Appellant contends that, in order for appellee to exonerate himself from paying the entire amount of $200 additional cash rent, it was necessary for him to strictly comply with each and every covenant in the contract, and insists that the court erred in refusing to give instructions numbered 1 and 2, requested by appellant, which were framed in accordance with his construction of the contract. The old rule exacted a strict performance of the covenants before the contract price could be recovered, but the modern doctrine is more liberal. The general rule now is that suit may be maintained for the contract price upon substantial performance in good faith of the terms or conditions of the contract. Elliott on Contracts, Vol. 3, § 1878; Hammon on Contracts, § 442; Page on Contracts, Vol. 3, 2144; 9 Cyc. 602. Arkansas is in accord with the liberal rule. This court said in the case of *Thomas* v. *Jackson,* 105 Ark. 353, that, "A substantial performance is all that is required to authorize a recovery of the contract price, less the additional cost of a literal compliance with the contract." The doctrine thus announced is well sustained by former adjudications of the court. *Fitzgerald* v. *LaPorte,* 64 Ark. 34; *Ark.-Mo. Zinc Co.* v. *Pat-*

terson, 79 Ark. 506; *Harris* v. *Graham,* 86 Ark. 570; *Mitchell* v. *Caplinger,* 97 Ark. 278.

(2) On conflicting evidence, as in this case, it was proper for the court to submit the question of substantial performance of the contract to the jury. *Fitzgerald* v. *LaPorte,* 64 Ark. 34. It is suggested, however, that the undisputed evidence disclosed that appellee had not attempted "to clean off and grub Thorny creek drain on what is known as Kalb place and put in said new ground on said place;" and that such agreement constituted one of the conditions in the contract. Appellee testified that the words "Thorny creek" were inserted in the contract after he signed it; that he cleaned up another drain on the Kalb place to which the contract referred. If this be true, he could not be held to a performance of that covenant in the written contract. The jury found the fact with him, and the finding of the jury is binding upon appeal. It is also contended that appellee failed to perform the contract to clear up and put three acres of woodland in cultivation on the home place. Appellee testified that he cleared up and put the fifteen acres mentioned in the contract in cultivation. No specific three acres was referred to or described in the contract. The contract did not require him to clear up and put in as much as fifteen acres. It only provided that he should clear up and put in the new ground located "on the east fifteen acres of the southwest of the southeast of section 1, township 5 north, range 20 west, on the home place." The finding of the jury that appellee cleared and cultivated all new ground required on the home place is conclusive on appeal. What has been said with reference to the performance of clearing up and putting the new ground in cultivation is equally applicable to the covenants to clean off, clean out and level down the ditches and to dig up the Bermuda patches. The jury found that there had been a substantial compliance with all the covenants in the contract upon conflicting evidence, and this court will not question the verdict of the jury on appeal.

We can not agree with counsel that because appellee's testimony was strongly contradicted it can be said there was no substantial evidence to support the verdict. The jury were the sole judges of the credibility of the witnesses and the weight to be attached to their testimony.

(3) It is also insisted that the court committed reversible error in instructing the jury that appellant "would not be entitled to interest if they found a tender had been made, without saying to them that such tender, if made after the suit was instituted, would not stop the interest unless the costs also were tendered."

Appellee, through Mr. Wirt, tendered $1,400 to appellant on the 21st day of October, 1916. This was two days after the suit was instituted. Appellant only recovered $1,360.25. The tender was for more than appellant recovered and was renewed in the answer. Then, too, the difference between the amount tendered and the amount recovered was more than enough to pay the costs, so no prejudice resulted to appellant on account of failing to tell the jury that a tender made after the institution of a suit must include the costs accrued to date of tender. The judgment is affirmed.

HARRIS v. LEMLEY.

Opinion delivered December 10, 1917.

1. CONTRACTS—ABANDONMENT—PROOF—A. and B. each made deeds to blocks of land owned by them, to a school board, they agreeing with each other that the party whose land was not taken should pay the other a certain sum of money. The school board returned both deeds; A. sold a portion of his property, and B. entered into a similar agreement with one W. After the lapse of three years the school board accepted A.'s property, and A. sued B. for the sum named in the original contract. *Held*, the contract was abandoned by lapse of time and acts of the parties, and that there was no duty upon B. affirmatively to prove an abandonment.
2. CONTRACTS—ABANDONMENT—PROOF OF RENEWAL.—Under the above facts, where A. asserted that the contract had been renewed, the burden was upon him to prove it.

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

John F. Clifford, for appellant.

1. There is but one question in this case. Did Lemley, by his uncommunicated intention to abandon, or recede from, his verbal contract, relieve himself from liability, Harris innocently proceeding thereunder and deeding his property?

The contract was binding and there was no time limit. The parties were competent, the agreement lawful and performance possible. It was never discharged by operation of law, nor rescinded by mutual consent of parties. Both parties must agree to rescind. 93 Ark. 447; 26 *Id.* 309; Elliott on Cont., par. 1857; 6 R. C. L. 921-3; 9 Cyc. 593; 47 Ark. 527.

2. A verdict should have been directed for plaintiff. 76 Ark. 603.

3. It was error to refuse plaintiff's instructions, and in placing the burden of proof upon appellant. Lemley's so-called withdrawal was never communicated to Harris, nor was the agreement abandoned or rescinded by mutual consent.

J. T. Bullock, for appellee.

1. The deeds became null and void and were returned by the school board to the parties. The contract then became null and void, and ceased to exist. Lemley withdrew from the contract and Harris knew it and notice was unnecessary.

2. The case was properly submitted to the jury. There is no prejudicial error, and the verdict should be sustained. 94 Ark. 115; 100 *Id.* 330; 101 *Id.* 120.

HUMPHREYS, J. Appellant instituted this suit against appellee in the Pope Circuit Court to recover $250 growing out of an alleged contract entered into between them, at a time not fixed in the complaint, to the effect that each had offered adjoining blocks of land to the school board of Russellville for a school site with the un-

derstanding between themselves that if appellant's block was accepted by the school board appellee would pay him $250, and if appellee's block was accepted, appellant would pay him $250. It was further alleged that appellant's block was selected; that he deeded the block to the district; that the school building was erected thereon and that appellee had failed to pay him $250, one-half the agreed value of his block.

Appellee answered in substance that two or three years before the site was selected, such an agreement was entered into between him and the appellant, but that the school board declined to accept either block; that the school board returned their deeds which had been deposited subject to acceptance; that he had conveyed away a portion of the block and that houses had been erected thereon and that the original contract had been abandoned by both; and further denied that any contract existed between them concerning the location of the school building in May, 1914, when the school board selected appellant's block of land and constructed a school building thereon.

The undisputed evidence disclosed that appellant and appellee deposited their deeds to the respective blocks in question in the year 1910 with the school board as a donation in case the school board would construct a school building thereon; that appellant and appellee agreed between themselves that if the school board desired only one block and should select appellant's block that appellee would pay appellant $250, or one-half of the value thereof, or *vice versa;* that within the time specified in the deed, the school board declined to select either lot as a school site and returned the deeds to the parties; that thereafter appellee disposed of five of the lots in his block and buildings were erected thereon; that subsequent to that time appellee and J. A. Webb made about the same proposition to the school board with reference to the donation of different property; that three or four years elapsed between the date of the contract and time appellant deeded his block to the school board; that appellant had knowledge

of these facts at the time he conveyed the block in question to the school district on the 14th day of May, 1914.

There is a material conflict in the evidence as to whether there was a renewal of the original contract between the parties. Appellant testified that he had conversations with appellee at intervals in which the original contract was reaffirmed. Appellee denied ever having the conversations with appellant in which he renewed or continued the original contract. The cause was submitted to the jury upon the pleadings, oral evidence and instructions of the court, and a verdict was returned and judgment rendered in favor of appellee, from which an appeal has been prosecuted to this court.

It is insisted that the court erred in placing the burden of proving the contract upon appellant, it being contended that by the pleadings the contract was admitted and that an avoidance by abandonment was pleaded. In other words, that the court erred in refusing to instruct the jury that the burden was upon appellee to prove abandonment of the contract.

(1) The undisputed evidence clearly established abandonment in law of the original contract. The school board refused to accept either deed and returned them to appellant and appellee. Appellee changed his situation by disposing of a part of the block. Intervening rights of third parties in appellee's block were established in such way that appellant must and should have taken notice of it for the reason that the purchasers erected houses on a part of appellee's block. Appellant also had knowledge that appellee had joined J. A. Webb in making a proposition of the same nature with respect to other property. If the original contract was made in 1910, according to the evidence of appellee, four years elapsed between the making thereof and the date appellee deeded his block to the school board. If made in 1911, according to the evidence of appellant, then three years elapsed between the making of the contract and the execution of the deed aforesaid. The law would imply that a reasonable time only might elapse before performance. Either

three or four years would be an unreasonable time. It was not error for the court to refuse to instruct the jury that the burden was upon appellee to prove abandonment of the original contract since the undisputed evidence established an abandonment of the original contract in law.

(2) Treating the pleadings as amended to conform to the proof, the only issue in the case was whether or not there was a renewal of the original contract. The affirmative of this proposition was upon appellant. It therefore follows that the burden was upon appellant to establish a renewal of the original contract. This issue was submitted to the jury under correct instructions.

It is insisted that the court erred in giving the following instruction:

"You are further instructed that either of said parties had a right to withdraw from the alleged mutual obligation at any time before the school building site was selected, and if you find that said mutual obligation was abrogated by the withdrawal of either party, then your verdict should be for the defendant unless after such withdrawal said mutual contract was renewed."

This instruction clearly referred to a withdrawal from the original contract. The original contract was abrogated by abandonment. The instruction had no place in the case as the undisputed proof showed that the original contract had been abandoned. As appellant had no rights under the original contract, an instruction that either party might withdraw from it could in no way prejudice appellant. It did not mislead the jury for the reason that it referred to the original contract and not to the renewal thereof. The instruction stated that appellant might recover if the original contract was renewed, notwithstanding the withdrawal, clearly showing that it had reference to a withdrawal from the original and not the new contract, if any were made. Under this view of the case it is unnecessary for us to decide whether either party had a right to withdraw from the contract before acceptance by the school board.

The judgment is affirmed.

BYRKETT v. GRAND LODGE INDEPENDENT ORDER OF ODD FELLOWS.

Opinion delivered December 17, 1917.

1. BILL OF REVIEW—HOW FILED.—It is not necessary to obtain leave of the court to file a bill of review founded on errors of law apparent on the face of the record, but it is necessary to first obtain leave of the court, before filing a bill of review based on newly discovered evidence.
2. BILL OF REVIEW—AGREEMENT OF THE PARTIES.—Where a decree is rendered in accordance with an agreement of the parties, a bill of review can not be filed by one of them, without the consent of the court, on the ground that her attorney, in making the agreement, exceeded his authority.

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

W. P. Smith, Gustave Jones and *Jno. W. Newman,* for appellant.

No leave of court was neccessary. The bill of review is founded on errors of law apparent on the face of the record. 104 Ark. 562-7; 59 *Id.* 441; 74 *Id.* 149; 97 *Id.* 415.

S. D. Campbell, Fred Suits, H. L. Ponder and *G. M. Gibson,* for appellees.

The bill was properly dismissed. It was filed without leave of court and was based entirely upon newly discovered evidence. 33 Ark. 153; 36 *Id.* 532; 55 *Id.* 25; 74 *Id.* 149; 95 *Id.* 517; 97 *Id.* 314; 104 *Id.* 562. See also, 17 Ark. 57.

McCULLOCH, C. J. Appellant Fairbelle Byrkett was the widow of A. W. Shirey, who died in Lawrence County, Arkansas, in the year 1910, and this appeal is from an order of the chancery court of Lawrence County striking out a bill of review filed by her attacking the correctness of a consent decree of that court rendered in the year 1910 dividing the property of said Shirey. It appears from the allegations of the bill of review filed by appellant that Shirey left a will whereby he bequeathed and devised all of his property to the Grand

Lodge of Independent Order of Odd Fellows, but the will was contested by the heirs of Shirey, and appellant elected to take her dower as widow; that after the filing of the contest of the will the widow and the heirs, and the Grand Lodge of Odd Fellows entered into a compromise written agreement whereby appellant as widow should take forty per centum of the gross value of the estate, each of the two heirs ten per centum, and the Grand Lodge of Odd Fellows forty per centum, after payment of debts; that in order to carry out the contract a joint suit was filed in the chancery court for the division of the property and that appellant's attorneys, whom she had previously employed, assumed the authority to enter into a new contract changing the terms of the old contract so that appellant was to get only forty per centum of the net value of the estate after payment of debts. Appellant alleged in the bill of review that she had not authorized her attorneys to change the contract, and that she was sick and unable to attend the session of the chancery court at which the final decree was entered by consent of all parties dividing the estate in accordance with the provisions of the last contract. The bill of review was stricken out on the ground that it had been filed without permission of the court.

It is settled by the decisions of this court that it is not necessary to obtain leave of the court to file a bill of review founded on errors of law apparent on the face of the record, but that it is necessary to first obtain leave of the court before filing a bill of review based on newly discovered evidence. *Long* v. *Long,* 104 Ark. 562. Counsel for appellant contend that the present proceedings fall within the first rule, and set forth error in the proceedings, apparent on the face of the record. We do not think that counsel are accurate in their analysis of the charge set forth in the bill, for the statement does not make out a charge of error on the face of the record. The two contracts and the decree of the court, with all of its recitals as to appearances of the parties is set

forth in the bill of review, but the substance of the charge is that the attorneys exceeded their authority in entering into the new contract and in consenting to the new decree, and that appellant was sick and unable to attend the session of the court. This in effect is an allegation of additional evidence to show the lack of authority on the part of the attorneys and the inability of appellant to attend the trial to protect her rights. From the facts recited in the record iself, the court could not have entered any other decree than the one it did render dividing the property in accordance with the terms of the agreement. The matters set forth in the bill of review merely tended to show that evidence could be adduced, if an opportunity was given, to show that the decree was erroneous because the attorneys had no authority to enter into a compromise agreement.

It is not contended that there was any abuse of the court's discretion in refusing to allow the bill of review to be filed; in fact, the present appeal is not from an order of the court refusing to grant permission to file a bill of review, but the appeal is to test the question of the right to file a bill of review without obtaining the court's consent.

Affirmed.

HAWKINS v. JONES.

Opinion delivered December 17, 1917.

MORTGAGES—FORECLOSURE AND SALE—ATTEMPT OF MORTGAGOR TO PAY THE DEBT.—Appellant foreclosed a mortgage upon appellee's land and at the sale thereunder, purchased the property. Meanwhile the mortgagor, who was ill and upon his death bed, attempted to procure money with which to satisfy the judgment, but died before accomplishing the same. The mortgagor's widow and heirs then filed exceptions to the commissioner's report, and tendered the purchase price into court. *Held*, the action of the chancellor in refusing to confirm the sale, would not be disturbed on appeal.

Appeal from Greene Chancery Court; *Archer Wheatley*, Chancellor; affirmed.

W. S. Luna, for appellant.

It was error to set aside the sale and allow the redemption. The price was adequate and no fraud, unfairness or wrongful act or injury was shown. 86 Ark. 255; 65 *Id.* 152; 77 *Id.* 216; 123 *Id.* 18; 99 *Id.* 324.

Huddleston, Fuhr & Futrell, for appellees.

Unavoidable casualty and misfortune were shown and the chancellor properly refused to confirm the sale, a matter within his sound discretion. 194 S. W. 802; 108 Ark. 366.

McCULLOCH, C. J. This is an appeal from the decree of the chancery court of Greene County setting aside and refusing to confirm a sale of real estate made by a commissioner of the court under a foreclosure decree rendered at a former term. Appellant instituted an action in the chancery court to foreclose a mortgage on the land executed to him by Levi Jones, and on November 9, 1916, the court rendered a final decree in favor of appellant for the recovery of the mortgage debt and a foreclosure of the mortgage. Time was given for the defendant in the decree to pay the debt and on failure to do so the commissioner was directed to sell. Pursuant to the decree the commissioner sold the land at public outcry on December 30, 1916, and appellant bid $959.86, the amount of his debt and interest and the cost of the action and expenses of sale, and being the highest bidder, the property was knocked off to him by the commissioner. At the next term the commissioner's report of sale came up for confirmation. In the meantime Jones, the original defendant, died, and his widow and children filed exceptions to the report, accompanied with an offer to pay to appellant the amount of his purchase price of the property and interest and costs. A deposit of a sum sufficient to cover these amounts was made with the clerk of the court. The court sustained the exceptions and refused to confirm the sale.

Testimony was adduced at the hearing of the exceptions and it appears that between the date of the de-

cree and the date of the sale Jones made effort to raise the money to satisfy the decree. He employed an attorney in Paragould to attend to the matter for him, and the attorney arranged with one of the banks in Paragould to lend sufficient sum to Jones to enable him to discharge the decree. Before that arrangement was perfected Jones became sick and never recovered from the illness. He died the following February. Jones and his family were living at a small town in an adjoining county at the time and the attorney who was employed by him to secure the loan testified at the hearing that he received a letter shortly before the sale, written by Jones, or some one for him, instructing him to bid the land in at the sale, but that he (the attorney) did not feel justified in doing that. The testimony shows that the land is worth at least $2,000, and possibly as much as $2,500.

Jones and his wife executed a conveyance of the land to their oldest son so that the latter could convey it to his mother after the redemption from the mortgage, the testimony showing that the conveyance was made solely for the purpose of getting the legal title in the name of the wife in contemplation of the husband's death. The testimony justifies the conclusion that Jones was too sick to give attention to the business of raising the funds to pay off the mortgage before the date of sale, and that but for his serious illness the arrangement to borrow the money and pay off the mortgage would have been consummated. The advertisement and sale of the property were regular in every respect, and it is not contended that there was any fraud or unfairness on the part of appellant or of the commissioner who conducted the sale.

It is the settled doctrine of this court that mere inadequacy of price does not afford sufficient grounds for withholding confirmation of a judicial sale, and if the ruling of the chancellor in this case can be upheld it must be on the grounds of unavoidable casualty in the severe illness of Jones, which prevented him from mak-

ing arrangement to pay off the mortgage and stop the sale.

In the case of *Colonial & U. S. Mortgage Co.* v. *Sweet,* 65 Ark. 152, Judge Battle announced the rule which has been frequently followed that confirmation of a judicial sale should not be withheld where it appears that "the property sold has brought its market value, and the purchaser and those conducting or controlling it have committed no fraud, unfairness or other wrongful act injurious to the sale, and there is no occurrence, or special circumstance, affording, as in other cases, a proper ground for equitable relief."

We are of the opinion that the circumstances of this case bring it within the latter part of the rule stated by Judge Battle, or at least that we can not say that the evidence in the case preponderates against the finding of the chancellor and does not afford justification for refusing to confirm the sale. It is reasonably certain that but for the illness of Levi Jones, the mortgagor, the decree would have been discharged by payment before the day of sale. He appears to have diligently set about the task of borrowing the money and employed an attorney to attend to it for him. He was guilty of no negligence in that respect, nor was his attorney negligent, for he could not consummate the loan which he had negotiated without the presence of his client. The circumstances under which the mortgagor was placed before the time of sale constituted a casualty which was unavoidable, speaking in a reasonable sense, and it would not be equitable to confirm the sale. The decree is therefore, affirmed.

OZARK GROCER CO. v. CRANDALL.

Opinion delivered December 17, 1917.

1. CONTRACTS—CONSTRUCTION OF TERMS USED.—In construing the language of contracts, it is to be presumed that the parties intended to apply it to conditions to be reasonably anticipated.

2. CONTRACTS—SUBSTANTIAL PERFORMANCE.—Substantial performance of a contract is sufficient to warrant a recovery.

3. LEASE—AGREEMENT THAT A BASEMENT BE WATER-PROOF.—A contract of lease required the lessor to furnish a basement that was and would remain "water-proof." *Held,* the court was correct, where it charged the jury "that the term 'water-proof' is a relative expression and that it is to be construed by you as meaning that the walls and floor of the basement were to be so constructed as to keep out water and dampness under such circumstances and weather conditions as might have been reasonably foreseen and anticipated, and if the walls and floor of the basement were so constructed (as to resist the ordinary invasion of water and dampness) it was in law 'water-proof.'"

4. LEASE—WATER-PROOF BASEMENT—UNPRECEDENTED FLOOD.—Under the facts as stated in 3, above, *held,* the lessor is not liable for damages resulting from water coming through the basement windows, caused by the unprecedented overflow of the waters from a neighboring creek.

Appeal from Boone Circuit Court; *Jno. I. Worthington,* Judge; modified and affirmed.

J. Lloyd Shouse and *J. Sam Rowland,* for appellant.

1. The court erred in giving the fifth instruction for plaintiff. Courts should not invade the province of the jury by charging as to matters of fact. Const. Art. 7, § 23; 49 Ark. 439; 43 *Id.* 289; 45 *Id.* 165, 492; 53 *Id.* 381; 55 *Id.* 108; 58 *Id.* 109; 26 Oh. Ct. Ct. 59.

2. The court erred also in its instruction as to the measure of damages by flood-water.

3. The verdict is excessive. It should not, at least, be more than $1,133.33.

J. M. Shinn and *Troy Pace,* for appellee; *B. F. McMahon, O. W. Hudgins* and *Karl Greenhaw,* of counsel.

1. It was not error to give instruction No. 5 for plaintiff. 80 N. Y. 312; 62 *Id.* 264; 88 *Id.* 650; 75 S. W. 330; 74 *Id.* 603; 23 *Id.* 393; 130 N. W. 924.

2. There is no error in the other instructions given nor refused. See 16 R. C. L., § 171-2-9, 184, 465; 24 *Id.,* § § 1130-1; 169 S. W. 229.

3. The general finding for plaintiff was a finding upon all the issues raised. 1 Ark. 465; 6 *Id.* 178; 15 *Id.* 403; 169 S. W. 229.

4. There is no merit in appellants' contention for a reduction of $33.33 1-3 per month on rent. The verdict is sustained by the evidence.

McCULLOCH, C. J. Defendant, Ozark Grocer Company, was engaged in the wholesale grocery business at Fayetteville, Arkansas, with a branch house at Harrison, Arkansas, and on July 15, 1913, entered into a written contract with plaintiff H. A. Crandall for the rental of a storehouse in Harrison to be constructed by plaintiff on a lot which he then owned. The contract contained many provisions having no bearing on the present controversy. The feature of the contract which is the basis of the controversy reads as follows:

"The walls and floor of said basement to be properly water-proof and so maintained during the term of this lease to prevent dampness and water entering or accumulating therein."

Other provisions of the contract were to the effect that the house was to be constructed in workmanlike manner and there were several specifications recited in the contract for the method of constructing the house. Among other things, it was provided that the roof should be "of good material, water-proof, properly laid and maintained to be equipped with proper metal flashing to extend over the roof preventing leak along side walls and shall have sufficient guttering and down spouts to carry all water from the building." There is a conflict in the testimony as to whether or not the following clause appeared in the contract, as claimed by defendant:

"That in the event basement is not kept free of dampness, and water accumulates therein so as to prevent its being continuously used without damage to goods placed therein, then same may be vacated and the rental value of building reduced in proportion as its area bears to the area of floor space of entire building, main floor,

and basement, and its use be held for the party of the first part."

The defendant introduced proof to show that the clause just quoted was attached to the contract on a separate slip referred to as "the yellow slip." Plaintiff denied that this clause became a part of the contract. The house was finished and defendant moved into it in December, 1913, but finally moved out before the expiration of the term of lease, and this is a suit to recover the unpaid rent.

At the time of the trial there was alleged to be due rent of $100 per month for 17 months, and the jury returned a verdict in favor of the plaintiff for $1,200. The defendant's contention was that the roof of the house and the basement were neither constructed in accordance with the specifications of the contract, and that on that account defendant was compelled to move out of the house, it being contended that the basement in particular was not water-proof and was not suitable for the housing of merchandise such as carried in stock by defendant. Defendant filed a counter-claim seeking damages in the sum of $6,348.15 on account of merchandise alleged to have been ruined by water and dampness which came into the building by reason of the alleged defects in construction. The testimony was conflicting upon every issue presented, but it is admitted that in the summer of 1915 there was an overflow from a nearby creek which came up above the lower line of the windows of the basement and that water got into the basement and damaged defendant's goods.

The assignments of error are very numerous, and we will not undertake to discuss them all, but will confine this opinion to a discussion of those assignments which are deemed material.

The first one of importance is that the court erred in giving the fifth instruction at plaintiff's request, which reads as follows:

"I charge you that the term 'water-proof' is a relative expression and that it is to be construed by you as meaning that the walls and floor of the basement were to be so constructed as to keep out water and dampness under such circumstances and weather conditions as might have been reasonably foreseen and anticipated and if the wall and floor of the basement were so constructed (as to resist the ordinary invasion of water and dampness) it was in law 'water-proof.' "

(1-3) We are of the opinion that the instruction was correct, and was in line with the law as declared by this court to be that substantial performance of a contract is sufficient to warrant a recovery. *Fitzgerald* v. *LaPorte,* 64 Ark. 34. The correctness of this view as applied to the contract now under consideration is emphasized by the clause which permits the lessee to withdraw from the basement in the event it is not kept free from dampness and water. This shows that a literal performance of the contract was not intended, but merely that the construction be sufficient to protect the goods of the lessee from injury. It was a question for the jury to determine whether the injury resulted from causes which might have been anticipated so as to have been within the terms of the contract. In construing the language of the contract it is to be presumed that the parties intended to apply it to conditions to be reasonably anticipated.

(4) It is also contended that the court erred in giving an instruction to the effect that plaintiff was not liable for damages which resulted to the goods of defendant by reason of flood-water coming through the basement windows, "provided that you find from a preponderance of the testimony that the flood at that time was an unprecedented one, that the waters of the creek rose higher than they had been known to rise before, and that plaintiff had placed the windows at such height that they stood above high-water mark of preceding floods, and that plaintiff had not been guilty of negligence

in the construction of the windows." We think the instruction was correct, for under the contract plaintiff was not guaranteeing the safety of the goods of defendant, but merely undertook to construct a house according to the specifications set forth in the contract so as to reasonably provide protection for the goods. Any other view of the matter would make the plaintiff the guarantor of the safety of defendant's goods during the occupancy of the house.

It is very earnestly contended that the undisputed evidence shows that the walls of the basement were not water-proof within the meaning of the contract, but we are of the opinion that there was evidence legally sufficient to sustain the verdict. While it appears to us from the testimony that the basement was not constructed so as to be "water-proof" within the meaning of the contract, yet there is testimony from which the jury might have drawn the conclusion that the work was done within the terms of the contract. It is mainly a question of the proper inferences to be drawn from the testimony adduced in the case, and it would be an invasion of the province of the jury for us to say that the evidence was not sufficient to sustain the verdict on that issue.

There was a sharp conflict as to whether the "yellow slip clause" in the contract was incorporated in it, but it seems from the amount of the verdict that the jury found that it was a part of the contract and that a deduction from the rent was allowed to defendant on that account. It is undisputed that the rent was unpaid for seventeen months, but the jury only allowed $1,200, which is approximately the amount that should have been allowed with proper deductions under the "yellow slip clause." The jury failed to allow any damages to defendant for injury to his goods, but the evidence is sufficient to sustain the verdict in that respect. Counsel for appellant demonstrate, however, that the verdict was not accurate in allowing $1,200 for the rent during the period after defendant removed from the house after deducting the

proportionate amount of the rent of the basement. They show that the verdict should have been only for $1,133.33. We think counsel are correct in that respect, and that the verdict should be reduced to that sum.

The judgment will, therefore, be modified so as to reduce the sum recovered to $1,133.33, as of the date of judgment below, and as so modified, the judgment is affirmed.

KEIRSEY v. STATE.

Opinion delivered December 17, 1917.

1. HOMICIDE—PROVOCATIVE WORDS—REDUCTION OF DEGREE OF HOMICIDE.—Mere words, however abusive or insulting, can not reduce the degree of homicide from murder to manslaughter.
2. HOMICIDE—PROVOCATIVE WORDS—PROOF OF, FOR WHAT PURPOSE.—In a prosecution for homicide, evidence of abusive and insulting words, spoken by deceased to defendant, may be admitted for consideration as mitigation of the crime in assessing the punishment; but where such evidence was excluded, no error was committed where the jury assessed the lowest punishment for the crime of which defendant was convicted.
3. APPEAL AND ERROR—OBVIOUSLY AMBIGUOUS INSTRUCTION.—Appellant should object specifically to an instruction which is obviously ambiguous.

Appeal from Yell Circuit Court, Danville District; *A. B. Priddy,* Judge; affirmed.

John B. Crownover and *Wilson & Chambers,* for appellant.

1. It was error to refuse a continuance. 103 Ark. 352; 102 *Id.* 513; 100 *Id.* 132, 301; 99 *Id.* 395; *Ib.* 547; 71 *Id.* 180.

2. It was error to permit witnesses to testify as to the remarks made by deceased as to defendants' family, which were communicated to defendant. This evidence was competent to show passion and provocation. 5 S. W. 231; 10 *Id.* 387; 10 Am. St. 289; 12 S. W. 870; 75 *Id.* 790; 51 *Id.* 912; 63 *Id.* 643; 28 Tex. App. 216.

3. The argument of the prosecuting attorney was improper and prejudicial. 74 Ark. 256; *Ib.* 489; 88 *Id.* 62; 96 *Id.* 547; 72 *Id.* 138.

4. There was error in the instruction as to threats. The instruction was properly objected to. 65 Ark. 525. See also 29 *Id.* 248; 28 Pac. 28; 76 Mo. 361; 17 Tex. App. 50; 34 N. E. 730.

5. The physical facts show a clean case of self-defense. The danger was urgent and pressing and the killing was necessary. 59 Ark. 132; 109 *Id.* 510; 85 *Id.* 48; 80 *Id.* 87; 91 *Id.* 570, and others cited. The errors of the court were prejudicial and the verdict is against the evidence.

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

1. The continuance was properly refused. No abuse of discretion was shown and Cagle's testimony was cumulative merely. 130 Ark. 245; 75 Ark. 350; 79 *Id.* 594; 100 *Id.* 149, etc.

2. The testimony as to threats was properly excluded. 126 Ark. 300; 121 *Id.* 269. Proper objections were not made, nor exceptions saved. 95 Ark. 65; 130 Ark. 365.

3. The improper remarks are not set out in the bill of exceptions. 126 Ark. 300.

4. The rulings of the trial court are presumed to be correct. 96 Ark. 627; 84 *Id.* 342. No errors nor prejudice are shown. 130 Ark. 365.

McCULLOCH, C. J. Appellant was indicted for the crime of murder, and on the trial of the case he was convicted of murder in the second degree and his punishment was assessed at confinement in the penitentiary for a term of five years. The killing was admitted, but appellant attempted to justify it by showing that he acted in necessary self-defense. The killing occurred out in a field where deceased was at work and there were no eyewitness except the parties to the killing and appellant's son, who is a mere lad. Appellant testified that

he fired the shot at Poplin just as the latter was in the act of throwing a hammer at him, and in this statement he was corroborated by the testimony of the boy. Circumstances proved by the State tended to show that appellant was not in danger of bodily harm at the time of the killing and that the homicide was not justified. The State also introduced proof to the effect that appellant had stated to parties shortly before the killing that he was going to kill Poplin.

The trouble arose between the two men over a report that Poplin had made remarks derogatory to the character of appellant's daughter which appellant resented. One of the State's witnesses testified that appellant said on the morning of the killing that "Poplin is going to chew the rag this morning, or I am going to kill him." The witness stated that when appellant made the remark he appeared to be angry and had his right hand under the bib of his overalls. Mrs. Poplin, wife of deceased, testified that appellant passed her house going towards the field where her husband was at work and that in about five minutes after he passed she heard a shot fired in that direction, and immediately after the shot heard the appellant in a loud voice exclaim "God damn your heart." Only one shot was fired, which proved fatal, and appellant at once left the scene and went to his house and rode away to find an officer to surrender himself.

The first assignment of error argued in the brief is that the court erred in refusing to grant a continuance of the cause to enable appellant to procure the testimony of three absent witnesses, Jones, Arnold and Cagle. It was stated in the motion that the witnesses, if present, would testify that on the Sunday before the killing, which occurred on Monday, deceased, in the presence of the witnesses, made threats to kill appellant and that on Sunday night Cagle, one of the witnesses, communicated those threats to appellant. The motion for continuance was filed on the day that the case was called for trial,

August 31, 1917. The court refused to continue the cause for the term, but postponed the trial until September 4, at which time two of the witnesses, Jones and Arnold were present, and the court overruled the motion and ordered that the trial proceed. Appellant proved by several witnesses that the alleged threats were made by deceased on Sunday, and one of the witnesses testified that he was present Sunday night and heard Cagle, the absent witness, communicate the threats of deceased to appellant. The testimony of Cagle would have been cumulative, and we can not say that the court abused its discretion in refusing to further postpone the trial in order to procure the attendance of that witness.

(1-2) It is next contended that the court erred in refusing to admit testimony to the effect that the night before the killing deceased made statements to other parties reflecting upon the chastity of appellant's fifteen-year-old daughter, and that these remarks were communicated to appellant. It appears from the testimony that similar remarks said to have been previously made by deceased were communicated to appellant and that the deceased and appellant met and talked about it before the last remarks were said to have been made. Appellant testified that he heard of the remarks of deceased and approached him on the subject about three weeks prior to the killing, and that they talked about it, and that when he rode up where deceased was working in his field he introduced the subject again by stating to deceased that Cagle had said that he (Cagle) had not said what deceased had told that he had said. A quarrel then ensued between the men as to what Cagle had said, and, according to the testimony of appellant, deceased attempted to throw a hammer at him, and he fired the fatal shot. It is contended that the testimony concerning the statements of deceased about appellant's daughter was competent to show provocation sufficient to reduce the degree of the crime from murder to manslaughter. It is the doctrine of this court, and well settled by the weight

of authority, that mere words, however abusive or insulting, can not reduce the degree of homicide from murder to manslaughter. *Vance* v. *State,* 70 Ark. 272; *Petty* v. *State,* 76 Ark. 515; *Clardy* v. *State,* 96 Ark. 52. They may be admitted for consideration as mitigation of the crime in assessing the punishment (*Petty* v. *State, supra*), but there was no prejudice in refusing to permit the testimony to be considered for that purpose, inasmuch as the jury assessed the lowest punishment for the crime of which appellant was convicted.

(3) The assignment of error with reference to improper argument of the prosecuting attorney is not supported by the record in the case, which fails to set out the argument or to show any exception. Counsel argue that one of the instructions given by the court was erroneous in telling the jury, in substance, that the communication to appellant of threats said to have been made by the deceased could not be considered unless it was found from the evidence that deceased had in fact made the threats. The language of the instruction as it appears in the record is very ambiguous, and it is evident that a mistake has been made in copying that part of the instructions of the court. It is not clear from the language used that the court meant to convey to the jury the idea that they could not consider the communication of threats unless the threats were in fact made as related by the witnesses, and we think the condition of the record is such that a specific objection ought to have been made to this instruction, so that the court could clear up the ambiguity in the language used, if indeed the record correctly discloses what the court said. There is a manifest omission in the instruction which might be explained if the instruction had been properly copied into the record.

Judgment affirmed.

FULBRIGHT v. MORTON, SHERIFF.

Opinion delivered December 17, 1917.

1. APPEAL AND ERROR—DECREE IN CHANCERY—PERSONAL JUDGMENT.—A decree in chancery recited that: "It is * * * adjudged and decreed that the said M. Banking Co. do have and recover of and from the said W. L. Stuckey, the sum of $7,375.64, interest and all its costs in this action, and that if the judgment, interest and costs be not paid and fully discharged within ten days from its date * * *." *Held,* the decree was intended as a personal judgment against Stuckey, and a final decree for the recovery of the amount named.
2. EXECUTION SALES—STATUTE OF FRAUDS—RETURN OF SELLING OFFICER.—The return of the selling officer is a sufficient memorandum of sale to take an execution sale out of the operation of the statute of frauds.
3. EXECUTION SALES—FAILURE OF PURCHASER TO COMPLETE THE PURCHASE—REMEDY OF SELLING OFFICER.—The statutory remedy against a purchaser at an execution sale who refuses to comply with his bid (Kirby's Digest, § 3283), does not supersede the common law remedy which a selling officer had of maintaining an action against the purchaser for the full amount of his bid.
4. EXECUTION SALES—CAVEAT EMPTOR—REPRESENTATIONS OF LIEN HOLDER.—The rule of *caveat emptor* applies to execution sales.
5. EXECUTION SALES—REPRESENTATION OF LIEN HOLDER.—The T. Co. having a lien upon certain property, caused the same to be sold on execution, alleging its lien to be superior to any other; this was not true; and *held,* the purchaser at the execution sale could not repudiate the sale upon that ground.
6. EXECUTION SALES—CREDIT—RATE OF INTEREST.—Under Kirby's Digest, § 3281, where a credit is allowed on an execution sale, interest at the rate of 6 per cent. only can be charged on the deferred payment; but the sale is not avoided where the selling officer undertook to charge 8 per cent. interest, where the purchaser did not base his refusal to complete the purchase on that ground.

Appeal from Washington Circuit Court; *J. S. Maples,* Judge; affirmed.

O. P. McDonald and *B. R. Davidson,* for appellant.

1. There was no personal decree against Stuckey and hence the *ven ex* was irregular and there was no sale. A personal judgment was withheld until after the sale of the pledged stock. The decree should be con-

strued so as to give effect to all of its language, according to its plain obvious and common sense. 9 Ark. 270; 24 *Id.* 286; *Goolsby* v. *Fulbright,* ms. op.; 46 Iowa 49; 24 S. E. 114; 4 Munf. 262.

2. The sale was never perfected. The law was not complied with. The sale should have been for cash. Kirby's Digest, § § 3281, 3279.

The officer demanded a note with 8 per cent. interest. The legal rate is 6 per cent. No certificate of purchase was issued or tendered. There was no sale. 15 Ark. 611-615.

3. The statute is highly penal and the sheriff must strictly comply with the law. The property should have been re-offered for sale. 14 Ark. 120-121; Kirby's Digest, § 3283. The word "may" is mandatory. Freeman on Ex., § 301; 15 Ark. 611; 14 *Id.* 1, 114-120; 4 Wall. 435; 113 Fed. 232; 67 N. C. 261; 92 Ind. 514; 7 Ga. 167; 78 Ala. 258; 20 Pac. 629; 85 Ark. 232; 77 *Id.* 417; etc.

A statute is never to be regarded as directory merely when the act required, or the omission works injury or advantage to any one affected by it. 4 M. Law 213; 5 Mich. 151; 19 Barb. 558; Black on Tax Titles 305-311; 30 Ark. 612; 19 Wall. 238; 22 *Id.* 98; 90 Fed. 622.

4. The sale was within the statute of frauds. Kirby's Digest, § 3279; 20 Cyc. 235.

5. There never was a sale. 15 Ark. 615; 14 *Id.* 20; 21 *Id.* 231; 41 Am. Dec. 47.

6. It was error to refuse to permit appellant to prove that the agents of McIlroy Banking Co. instructed the sheriff to make sale under the execution as a lien superior to all others. 61 Ark. 66-70; 32 *Id.* 321.

H. L. Pearson, for appellee.

1. There was a personal judgment against Stuckey. 128 Ark. 76.

2. This suit was not brought under the statute but under our common law remedy. The word "may" is not mandatory but permissive. The statutory remedy is not exclusive. 30 Ark. 32; 101 Pac. 425; 79 S. W. 132;

122 N. Y. 1037; 35 Am. Dec. 575; 7 A. & E. Ann. Cas. 1069; 25 A. & E. Enc. L. (2 Ed.) 840-772; Lewis Sutherland Stat. Const. (2 Ed.), Vol. 2, p. 720, 363; 35 Am. Dec. 575; 17 Cyc. 1259; 11 Am. Dec. 691; 65 Am. St. 339; 17 Cyc. 1259; 9 Pac. 613; 11 Minn. 200; etc. A purchaser can not withdraw his bid after the officer has accepted it. Freeman on Ex., § 300; 22 Am. Dec. 322; 43 *Id.* 528; 49 Iowa 296.

3. The case does not fall within the statute of frauds. 21 Ark. 231; 15 *Id.* 615; 25 A. & E. Enc. L. (2 Ed.) 838. The statute does not apply to judicial or execution sales. 26 Am. Dec. 254. But the return of the sheriff satisfies the statute. 11 Paige 231; 43 Am. Dec. 528; 22 *Id.* 322; Freeman on Ex., § 299; 25 A. & E. Enc. Law, (2 Ed.) 774, note 9; 14 Ark. 20; 15 *Id.* 615; 21 *Id.* 231; 5 Yerger 63; 26 Am. Dec. 254; 126 Pac. 66; 98 N. E. 380. See also, 64 Am. St. 725; 64 *Id.* 725; 46 So. 769; 126 Ga. 274.

4. The doctrine of *caveat emptor* applies to execution sales. Freeman on Ex., § 355; 25 Am. & E. Enc. L. 843, note 6; 17 Cyc. 1262-3; 31 Ark. 258; 10 *Id.* 211; 30 *Id.* 249; 31 *Id.* 252; 53 Ark. 137; 31 *Id.* 108; 54 *Id.* 457; 226 Pa. 552; 8 Ala. 153; 131 Cal. 681; 25 Am. St. 758; etc.

5. Mere irregularities do not vitiate a sale. 10 Ark. 541; 12 *Id.* 421; 19 *Id.* 297; 34 *Id.* 399; 17 Cyc. 1265, note 22. Demanding 8 per cent. interest was immaterial. It was a mistake. But appellant did not refuse on this ground. He should have tendered his bid with 6 per cent. interest.

6. No error in excluding the testimony that the McIlroy lien was superior to all others. 115 Ga. 53; Freeman on Ex., § 310; 17 Cyc. 1282-4; 14 Ark. 9.

McCULLOCH, C. J. (1) The Arkansas National Bank, a banking corporation engaged in business at Fayetteville, Arkansas, appellant Fulbright being president and managing officer, sued W. L. Stuckey in the chancery court of Washington County, and a decree was rendered in its favor against Stuckey for recovery of a debt due

on contract. The McIlroy Banking Company, another banking corporation, was made party defendant in the action for the purpose of compelling the latter to foreclose its lien on certain property pledged by Stuckey so that the surplus proceeds could be applied on the debt due from Stuckey to the Arkansas National Bank. Certain credits were allowed to Stuckey over the objections of the bank, and the decree in the bank's favor was for the balance of the debt after allowing those credits. Both of the parties, Stuckey and the Arkansas National Bank, appealed to this court and the decree was reversed on the appeal of the bank and the cause was remanded with directions to the chancery court to enter a decree in favor of the bank for an amount in excess of the amount of the original decree of that court. *Arkansas National Bank* v. *Stuckey,* 121 Ark. 302. After the rendition of the first decree in the chancery court, and while the case was pending here on appeal, the chancery court rendered a decree in favor of McIlroy Banking Company against Stuckey for the recovery of the amount of its debt and for foreclosure of the lien on Stuckey's property. The pledged property was sold in accordance with the decree and the amount of proceeds was credited, leaving a balance of $2,498.82 due McIlroy Banking Company on the personal decree in its favor against Stuckey. On the remand of the original cause to the chancery court the Arkansas National Bank insisted that the decree rendered in its favor in accordance with the directions of this court should be declared to be prior in point of time and superior to the decree in favor of McIlroy Banking Company as a lien on Stuckey's unincumbered property, but the court decided to the contrary and the Arkansas National Bank again appealed to this court, where it was decided that the prior lien of the first decree was not displaced by the remand of the cause with directions to enter another decree for the amount due. 128 Ark. 76. While the second appeal was pending in this court, McIlroy Banking Company sued out an

execution on the decree against Stuckey for the balance due after crediting the proceeds of the pledged property and the sheriff levied the execution on a piece of real estate owned by Stuckey in the City of Fayetteville and sold the same on execution at public outcry to appellant, who was the highest bidder. The sum of $1,800 was the price bid by appellant.

After the property was knocked off to appellant by the selling officer he agreed to execute the next day a note for the purchase price in accordance with the terms of the sale, but when requested by the sheriff to do so the next day, he declined. Appellant based his refusal to make good his bid on the ground that he had made the bid upon faith of representations of an agent of the McIlroy Banking Company that the execution lien of that bank was a superior one and that he had since been advised that the lien of the Arkansas National Bank under its decree against Stuckey was superior. Appellee as sheriff tendered a certificate of purchase which was refused by appellant and at the expiration of the statutory term of credit allowed on such sales, appellee sued to recover the amount of the bid. Appellant defended in the court below on the ground stated above for his refusal to make good his bid, and also on the ground that the sheriff could not maintain an action on the bid without reselling the property in accordance with the statute, which provides that when a bidder at an execution sale "shall refuse to pay the amount bid for any property struck off to him the officer making the sale may again sell such property to the highest bidder, and if any loss shall be occasioned thereby, the officer may recover such loss by motion before any court or justice of the peace." Kirby's Digest, § 3283. Appellant also contended that the decree in favor of McIlroy Banking Company was not for a personal recovery against Stuckey, but only constituted an ascertainment of the amount due for enforcing a lien on the pledged property. There was a trial before a jury, but upon the evidence adduced the trial court

directed a verdict against appellant and an appeal has been prosecuted from the judgment rendered. The decree upon which the execution was issued reads as follows, (omitting caption and formal recitals):

"It is therefore, by the court ordered, adjudged and decreed that the said McIlroy Banking Company do have and recover of and from the said W. L. Stuckey, the sum of $7,375.64, interest and all its costs in this action, and that if the judgment, interest and costs be not paid and fully discharged within ten days from its date, the commissioner of this court is hereby ordered and directed to proceed to sell for cash at public sale at the west front door of the courthouse in the City of Fayetteville, Washington County, Arkansas, after advertising said sale for four weeks in a newspaper published in Washington County, Arkansas, all of said stock in the said White Lime Company so pledged and delivered by the said W. L. Stuckey to the said McIlroy Banking Company and if said stock should not sell for a sum sufficient to pay said judgment in favor of the said McIlroy Banking Company, that the said McIlroy Banking Company have personal judgment against the said W. L. Stuckey for the satisfaction thereof, and if said stock should sell for a sum in excess of the judgment herein rendered in favor of the said McIlroy Banking Company, interest and cost, then the clerk of this court is ordered to hold the excess subject to the further orders of this court."

It is contended that this did not constitute a personal decree against Stuckey, but merely ascertained the amount due and directed a sale of pledged property for the purpose of crediting the proceeds on the amount due and reserved for future action the question of rendering a personal decree. This seems to us a strained construction of the language of the decree, which was obviously intended as a personal one against Stuckey for the recovery of the amount due, with instructions to sell the pledged property and credit the proceeds. It is in the customary form in which such decrees are rendered

and we entertain no doubt that the proper interpretation of the language used is to treat it as a final decree for the recovery of the amount named.

(2-3) The main question of law involved in the case is whether or not the statutory remedy against a purchaser at an execution sale who refuses to comply with his bid is the exclusive remedy at law and completely supersedes the common-law remedy which a selling officer had of maintaining an action against the purchaser for the full amount of his bid. It seems to have been well settled at common law that a selling officer could maintain an action against the purchaser for the amount of the bid upon the latter's refusal to comply with the terms of the sale. Murfree on Sheriffs, § 897; 25 Am. & Eng. Enc. of Law, p. 838; 17 Cyc., p. 1259; Freeman on Executions, § 313; *Armstrong* v. *Vroman,* 11 Minn. 220; *Friedly* v. *Scheetz* (Pa.), 11 Am. Dec. 691.

It is insisted that the word "may" in the statute should be construed to mean "shall" so as to render the statute mandatory and make it exclusive of all other remedies against a delinquent bidder. Such a construction of the word used is often employed by courts so as to carry out the obvious meaning of the law-makers, but that construction is usually adopted in cases where a new right, as well as a remedy, is created. 2 Lewis' Sutherland Statutory Construction, § 720. The learned author just referred to states the rule as follows:

"Where a new remedy is given by statute and there are no negative words or other provisions making it exclusive, it will be deemed to be cumulative only and not to take away prior remedies."

The statute under consideration merely confers a new remedy, but does not create the right to compel the purchaser to comply with his bid, for that right existed independently of the statute, and we think that it still exists in its original form. The statutory remedy is cumulative. *Dawson* v. *Miller, Admr.,* 20 Tex. 171, 70 Am. Dec. 380.

Counsel for appellant insist that the contrary rule with reference to the construction of this statute has been adopted by this court in the following cases: *State, use Jones, etc.,* v. *Borden,* 15 Ark. 611; *Newton* v. *The State Bank,* 14 Ark. 9; *State* v. *Lawson, Sheriff,* 14 Ark. 114. We do not construe those decisions as holding that the statute in question is exclusive of the common-law remedy, for the effect of the court's decisions in those cases was merely to hold that the selling officer was not responsible for the amount of the bid unless it was paid, as the statute prescribed another remedy which he had a right to adopt.

The statute of frauds is pleaded in this case, but it has been very generally held, as shown by the cases cited on the brief of appellee, that the return of the selling officer is sufficient memorandum of the sale to take the transaction out of the operation of the statute of frauds.

(4-5) The next contention of appellant is that the court erred in refusing to permit him to prove at the trial that the agents of McIlroy Banking Company instructed the sheriff to make the sale under the execution as a lien superior to all others, and that the sale was in fact made under the claim on the part of the agents of McIlroy Banking Company that the execution in favor of that bank constituted a superior lien. It is argued that since this court has held that the lien of the Arkansas National Bank under its original decree was not displaced by the remand ordered by this court that the assertion of superiority of lien by the McIlroy Banking Company constituted either a fraud upon appellant as a bidder or that it constituted a mistake under which appellant labored when he made the bid, which justified him in withdrawing his bid upon discovering the error. This argument is unsound for the reason that the rule of *caveat emptor* applies to execution sales and the mere assertion of superiority of liens by the agents of the McIlroy Banking Company constituted neither a misrepresentation of fact nor such a mutual mistake of

fact as would afford relief to appellant from the bid. No contractual rights arose between appellant and the McIlroy Banking Company for they dealt at arms length as adversaries in the assertion of superior liens against the property of Stuckey. If both parties to the controversy asserted their respective claims in good faith and appellant purchased the property under the belief that as a matter of law the lien of the McIlroy Banking Company was superior, yet the mutual mistake as to the law on the subject can not, under the circumstances of this case, be treated as such a mistake of fact as will relieve appellant from his obligation. There was, in other words, no mistake of fact, but merely a mistake of law, in the view of the matter most favorable to appellant. The offered evidence was therefore, immaterial, and the court was correct in excluding it.

(6) The remaining contention is that the sheriff can not maintain the action because the form of note or bond presented to appellant to sign in furtherance of his bid specified interest at eight per centum per annum. The statute (Kirby's Digest, § 3281), provides that sales under execution shall be on credit of three months, and that the purchaser must give bond with security "for the payment of the sale money, bearing interest from date." This means the legal rate of interest, or six per centum per annum, and the sheriff had no right to demand a note bearing interest at the rate of eight per centum. Appellant did not, however, base his refusal to sign the note upon that ground, and there is no indication that the sheriff intended to violate the statute, but the inclusion of interest at the rate of eight per centum was a mistake which did not avoid the sale, nor prevent the sheriff from enforcing the remedy to compel appellant to comply with his bid.

The judgment is correct upon the undisputed testimony in the case, and the same is affirmed.

HUMPHREYS, J., not participating.

HARMON *v.* HARMON.

Opinion delivered December 17, 1917.

1. GIFT—GIFT INTER VIVOS.—Where a gift is made not in contemplation of death, but to take effect and become complete immediately upon the delivery and the taking possession of the property by the donee, the gift is one *inter vivos*, notwithstanding the donor may be upon his deathbed.

2. GIFTS—CAUSA MORTIS—PRESUMPTION—MAY BE OVERCOME.—When a gift is made by one who is afflicted with a fatal malady and who at the time of the making of the gift has no hope of recovery, and where the gift is made in contemplation of the near approach of death, the presumption is that such gift was *causa mortis;* but this presumption may be overcome by proof to the contrary.

3. GIFTS—INTER VIVOS—RIGHT OF DONOR'S WIDOW.—Where deceased, by gift *inter vivos*, gave certain personal property to his sons, although deceased at the time was upon his deathbed, thereafter his widow has no right in the property given, either as widow or as administratrix.

4. CONTRACTS—WRITING—PAROL EVIDENCE TO VARY.—Evidence is inadmissible to prove that a plain promissory note, payable under the law in money, was under the terms of a contemporaneous parol agreement, to be paid partly in merchandise.

Appeal from Franklin Chancery Court, Ozark District; *W. A. Falconer,* Chancellor; affirmed.

Winchester & Martin and *J. P. Clayton,* for appellants.

1. If the father of S. W. Harmon did give his estate to his sons, did they as an inducement to C. G. Harmon to buy the interest of S. W. in the business, agree that they would trade with him and that their accounts should be credited on the notes? If made the defendants can enforce in this suit.

Such an agreement was made as an inducement to buy. The evidence supports the contention. No effort was made to alter, vary or modify a written contract, but the evidence tended to establish this as a collateral agreement. 102 Ark. 669; 27 *Id.* 510; 17 Cyc. 713. To the extent of the amounts due from Silas and Henry Harmon, the consideration of the notes has failed. Oral proof is

competent to show want or failure of consideration. 105 Ark. 281; 90 *Id.* 272; 27 *Id.* 510; 55 *Id.* 112. See also, 2 Wharton on Ev., § 1015; 27 Ark. 515.

2. Plaintiffs are not innocent purchasers and credit should be given for the accounts of Silas and Henry. 99 Ark. 458.

3. J. T. Harmon, the heir of S. W., did not give the estate of his deceased son to plaintiffs. The widow interpleader was entitled to collect these notes and to dower. 60 Ark. 169. The intention to give must be accompanied by delivery. 3 Pom. Eq. Jur., § 1149; 59 Ark. 194. There is no evidence of a gift. 60 Ark. 169; If a gift *causa mortis* the widow has dower. *Ib.*

The equities are with defendant and the interpleader and the decree should be reversed.

G. O. Patterson, for appellees.

1. No such agreement as contended for was made, but if made, it was not enforceable. Parol evidence was inadmissible. 73 Ark. 431; 49 *Id.* 285; 20 *Id.* 293; and many others.

2. Appellees were innocent purchasers.

3. A valid gift was made by J. T., the heir of S. W. Harmon. It was *inter vivos.* 60 Ark. 169; 93 *Id.* 548. The widow could have no dower. *Ib.*

STATEMENT OF FACTS.

J. T. Harmon died intestate on the 29th day of October, 1913. He was survived by his widow, Martha Harmon, and his sons, Frank, Henry, John and Silas. He had another son, Sid W. Harmon, whose death occurred before that of his father, towit, August 21, 1913, leaving J. T. Harmon (his father) as his only heir. At the time of S. W. Harmon's death he was equally interested as a partner in a mercantile business with one C. G. Harmon, and this mercantile business was conducted at Marble Hill, Franklin County, Arkansas, under the firm name of Harmon and Harmon.

At the time of the death of S. W. Harmon he owned, besides the half interest in the store of Harmon & Harmon, a span of mules valued at $300. Upon the death of S. W. Harmon, J. T. Harmon, his father and heir at law, succeeded to his property.

J. T. Harmon, about one and a half months prior to his death, made a gift of his property to his sons. He owned, at the time of his death, 80 acres of land, on which he lived, together with a horse and buggy, household goods and farming implements, in addition to the interest in the firm of Harmon & Harmon which he inherited as the heir of his son, S. W. Harmon.

The property of J. T. Harmon was divided among his sons as follows: The span of mules was given to Henry Harmon, which he accepted as his share in the property that came to his father through S. W. Harmon. The three other sons took the share of S. W. Harmon in the firm of Harmon & Harmon as their share. Soon after this division was made the three brothers, Frank, John and Silas, sold the interest which they owned in the firm of Harmon & Harmon to the other member of the firm, C. G. Harmon, for a consideration of $900, it being agreed that C. G. Harmon was to assume the indebtedness of the firm, which amounted to approximately the sum of $350. The consideration for this purchase was evidenced by two promissory notes of $450 each, executed by C. G. Harmon, and the notes were made payable to the heirs of S. W. Harmon. One of the notes was due December 10, 1914, and the other due December 10, 1915. They bore interest at the rate of 10 per cent. per annum. At the same time, to secure the payment of the notes, C. G. Harmon executed a mortgage conveying certain lands in Franklin County.

This suit was instituted by John Harmon and Frank Harmon against C. G. Harmon and Sarah E. Harmon, his wife, to recover on the notes and for a foreclosure of the mortgage given to secure the payment thereof if the indebtedness was not paid. The appellees set up the notes

and the mortgage and alleged that they had acquired the entire interest in the notes and were entitled to recover the amount due thereon. They set up that there were certain misdescriptions in the lands embraced in the mortgage which were the result of mutual mistake, and asked that the same be reformed and the mortgage foreclosed according to the correct description.

Appellant, C. G. Harmon, set up in defense, among other things, that it was mutually agreed between him and Harmon Brothers that the debt of their father, J. T. Harmon, to the firm of Harmon & Harmon should be canceled; that his wife joined him in the execution of the notes expressly upon such understanding; that it was further mutually understood and agreed between them, as a part of the consideration for the execution of the notes, that the four Harmon brothers would trade with C. G. Harmon, and that the amounts of their accounts, respectively, should be credited on the notes; that the notes were made payable to the heirs of S. W. Harmon, and the mortgage was executed to the heirs of S. W. Harmon; that he never heard before the suit was brought that the plaintiffs, John and Frank Harmon, claimed the notes; that when he made the payment credited on the note first maturing he made out the accounts of all the brothers who had been trading with him and deducted the sum total of their accounts from the face of the note with the interest on same added to the date of the credit, and offered the balance of $173.58 in full payment of the balance due on the note on which suit was instituted, but one of the plaintiffs refused to accept the same in full payment, but did receive the same as a credit. In further answer, he set up that since the institution of the suit Martha Harmon, the widow of J. T. Harmon, had intervened, setting up that she, as administratrix of the estate of J. T. Harmon, was the owner of the notes and entitled to collect the same, and has asked that whether she as intervener or the plaintiffs be entitled to recover that he have credit for the amounts due him for

merchandise on the accounts of Silas and Henry Harmon, according to the agreement that such sums should be credited on the note. He set up that plaintiffs were not innocent purchasers of the notes, and that said notes were not made payable to them, but to the heirs of S. W. Harmon, deceased; that J. T. Harmon, at the time of the death of S. W. Harmon, was the only heir of S. W. Harmon, and that he alone could pass title to the notes and mortgage, which he had not done. He further averred that after the credits which he claimed were entered upon the notes and the balance ascertained he was ready to pay the same to those who were legally entitled to receive it. Wherefore, he prayed to be discharged with his costs.

Martha Harmon, the wife of J. T. Harmon, intervened, setting up that she was the widow of J. T. Harmon, and had been appointed administratrix of his estate. She alleged that at the time of his death he owned an undivided interest in the mercantile business of Harmon & Harmon which he inherited as the sole heir of his son, S. W. Harmon, who died intestate and without issue, and that he was the owner in his own right of 80 acres of land and certain personal property, which she itemized; that the four brothers of S. W. Harmon, upon the death of their father, took advantage of her and took charge of all the property of J. T. Harmon and converted or attempted to convert the same to their own use, and that the personal property of his estate was worth approximately $1,500, which the plaintiffs and their brothers were seeking to convert, in addition to his household and kitchen furniture and 80 acres of land left as a home. She set up that she had a homestead interest in the land and a dower interest in the personal property, and prayed that the court, through proper orders, should protect her rights.

The above are substantially the issues, and facts as found by the court, upon which it allowed all credits on the note in suit that were indorsed thereon, and also the

accounts of John Harmon and Frank Harmon, and a credit of $31.57 for the sum expended by C. G. Harmon for improvements on the homestead, and the sum of $5.95 as taxes paid. After making these credits the court found that there was due plaintiffs on said notes $724.83. The court also found that there were certain mistakes in the description of the land in the mortgage which were mutual mistakes of fact, and proceeded to correct the description according to what the parties to the instrument intended, and entered a decree in favor of the appellees for the sum of $724.83, with interest, and ordered that the mortgage be reformed to correspond with the correct description as intended by the parties, and as reformed that the same be foreclosed and the property included therein be sold to satisfy the amount of the decree. The appellants have duly prosecuted this appeal.

WOOD, J., (after stating the facts). (1) The testimony bearing on the issues of fact in this case are exceedingly voluminous, and it could serve no useful purpose to set out and discuss the same in detail. After careful consideration of it we have reached the conclusion that J. T. Harmon, a few days after the death of his son, S. W. Harmon, gave to his other sons the property which he inherited from his son, S. W., and this gift was made complete by their accepting and taking possession of the property. The preponderance of the evidence tends to show that after the property was given to them by their father, something more than a month before his death, they took charge of the same and divided it among themselves. The gift from the father to the sons was an absolute gift *inter vivos;* although there is testimony tending to show that at the time the gift was made the donor was afflicted with an incurable malady and knew that he could not get well. Notwithstanding this fact, where the gift is made not in contemplation of death, but to take effect and become complete immediately upon the delivery, and the taking pos-

session of the property by the donee, the gift is one *inter vivos,* notwithstanding the donor may be upon his death bed. There is nothing in the testimony to warrant the conclusion that J. T. Harmon did not intend that the title to the property should pass to his four sons, the donees, during his life and immediately upon their taking possession of the same, which occurred, as above stated, something more than a month before his death.

This court, upon a thorough consideration of the essentials to constitute a gift *causa mortis* in *Hatcher* v. *Buford,* 60 Ark. 169, 176, said: "We think the better doctrine upon the transfer of the title to gifts *causa mortis* is that which accords with Justinian's definition, and recognizes the subject matter of the gift as becoming the property of the donee in the event of the donor's death. This seems to be the rule adopted by the English courts of chancery, and is supported also by eminent American courts and text writers." See also, *Ammon* v. *Martin,* 59 Ark. 191.

(2) When a gift is made by one who is afflicted with a fatal malady and who at the time of the making of the gift has no hope of recovery, and where the gift is made in contemplation of the near approach of death the presumption is that such gift was *causa mortis,* but this presumption may be overcome by proof to the contrary, and such was the case here.

In the same case (*Hatcher* v. *Buford, supra*), after recognizing the above doctrine, we said: "But it must not be forgotten that an absolute gift when *inter vivos* may be made by one upon his deathbed, and who is aware of the near approach of death from the ailment."

In *Lowe* v. *Hart,* 93 Ark. 548, this court said: "Where a holder of a certificate of deposit intended as he handed it to another to pass title immediately, and the latter accepted it as her own, the gift was *inter vivos,* though the donor knew he was about to die."

(3) This disposes of the issue raised by the intervention of Mrs. Martha Harmon, as administratrix of

the estate of J. T. Harmon, deceased, and also of her individual claim for dower. The gift by J. T. Harmon of the property inherited by him from his son, S. W. Harmon, to his other four sons being one *inter vivos,* his widow has no rights therein either as administratrix or in her own right as widow.

(4) The next question is, did the Harmon brothers, the donees of the interest of S. W. Harmon, in the business of Harmon & Harmon, as an inducement to C. G. Harmon to buy their interest in such business, agree that they would trade with him and that their respective accounts should be credited on the notes. This was purely an issue of fact, and it would greatly lengthen this opinion to discuss the testimony in detail bearing upon it. After a careful consideration of the testimony on this issue, we have reached the conclusion that the preponderance of the evidence shows that there was no such agreement. But even if there was such an agreement, the appellant could not enforce it in this suit, for the reason that the Harmon brothers and the appellant reduced their contract concerning this purchase to writing and evidenced the amount that was to be paid in consideration for the purchase by a promissory note. To permit appellant to prove that a plain promissory note, payable under the law in money, was, under the terms of a contemporaneous parol agreement, to be paid partly in merchandise would be to violate the rule which prohibits the production of parol evidence to vary or contradict the terms of a written contract. Such is the effect of the decisions of this court and of the authorities generally. *Borden* v. *Peay,* 20 Ark. 293; *Bishop* v. *Dillard,* 49 Ark. 285; *Tisdale* v. *Mallett,* 73 Ark. 431, and other cases cited in appellees brief.

The preponderance of the evidence shows that the appellees John and Frank Harmon were innocent holders for value of the notes in suit. The testimony showed that the other brothers had transferred before maturity for value, their interest to the appellees. The court heard

oral testimony on this issue and the testimony shows that the appellees held receipts from the other brothers showing that Silas and Henry Harmon had assigned their interest to the appellees.

There is no error in the decree of the court and the same is therefor affirmed.

McCOMBS v. MOSS.

Opinion delivered December 17, 1917.

1. APPEAL AND ERROR—SUFFICIENCY OF THE EVIDENCE—SUBMISSION TO JURY ON SECOND TRIAL.—On a former appeal this court held that the evidence introduced was sufficient to warrant a submission of the issues to the jury. On a second trial the facts proved were the same as at the first trial. *Held*, the trial court was correct in submitting the case to the jury.
2. APPEAL AND ERROR—EVIDENCE—LETTERS AND ORAL TESTIMONY.—It is not error to exclude certain letters from the jury, where the appellant and others, testified orally to the facts contained in the letters.
3. APPEAL AND ERROR—SECOND APPEAL—INSTRUCTIONS.—Instructions, on the second trial of an action, which conform to the rules of this court on appeal from the judgment on the first trial, are deemed correct on an appeal from the judgment upon the second trial.
4. APPEAL AND ERROR—LAW OF FORMER APPEAL.—The law as announced in the opinion on a former appeal, is the law of the case on a subsequent appeal.

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

John D. DeBois, for appellant

1. The evidence is not legally sufficient to warrant the verdict. Appellee has failed to make out a case from his own testimony. His agency had been discontinued.

2. The judgment is excessive.

3. It was error to refuse to admit the letters of Henry Wrape & Co.

4. There was error in giving and refusing instructions. 119 App. Div. 39; 103 N. Y. S. 876; 131 Ill. App. 414; 140 N. C. 310; 117 Ark. 599; 91 *Id.* 212; 76 *Id.* 377; 79 *Id.* 475.

Brundidge & Neelly, for appellee.

1. The verdict is sustained by the evidence.

2. The letters to and from the Wrape Co. were inadmissible.

3. The instructions were approved on the former appeal. The verdict settles all questions of fact and is final.

HART, J. This is the second appeal in this case. The opinion on the first appeal is in 121 Ark. 533, under the style of *McCombs* v. *Moss.* Moss sued McCombs for a commission of $1,023.30 alleged to be due him for bringing about a sale of some timber for McCombs in White County, Arkansas.

The jury returned a verdict for the plaintiff in the sum of $511.65 and from the judgment rendered the defendant has appealed.

It is insisted by counsel for the defendant that the evidence is not legally sufficient to warrant the verdict. For that reason it will be necessary to restate the evidence.

According to the testimony of the plaintiff himself he became acquainted with the defendant in 1906, and represented him in buying and selling timber on his lands in White County, Arkansas. The timber on the lands in question was placed in his hands for sale in 1908, and the contract was continued from time to time until the sale was made in June, 1912. A correspondence was kept up between the plaintiff and the defendant in regard to the sale of the timber in question during all this time. In the fall of 1908, Moss introduced McCombs to Mr. Cook and to Mr. Henry Wrape, Jr., with the intention of having their company buy the timber lands in question. Moss made a large plat showing the timber land and gave a copy to the Henry Wrape Company. He went over the lands at that time with the representatives of the Henry Wrape Company and it took them about two weeks to do it. There were about 1,810 acres of the land on which the timber was situated. The tim-

ber was sold to the Henry Wrape Company in June, 1912, for the consideration of $20,466.30. Moss was with the representatives of the Henry Wrape Company for one day just before the sale in 1912, and showed them the boundaries of the land.

The record from the cross-examination of Moss is as follows:

"Was this question not asked you a year ago: 'Is it not a fact that in the month of June, 1909, that Mr. McCombs wrote you a letter that his cousin had moved to this county and was going on this land and that from that time on he would be his agent to sell that land or any other land he owned, and that it was all right for you to take people that wanted to buy to him, but you would have to look to him for your money?' And did you not make the following answer: 'He wrote me to that effect, and a short time afterwards he wrote me a letter of the commissions he would allow me.'

A. Not to look to Leslie for my commissions.

Q. You have changed your mind since yesterday?

A. No, sir.

Q. You have changed your mind since a year ago.

A. No, sir.

Q. That was your answer a year ago?

A. That is a portion of it, and if it is in the brief, I suppose it is correct.

Q. Is it not exactly correct?

A. I do not know about that.

Q. You did get notice from Mr. McCombs that you could work with Mr. Leslie, but that you should look to Leslie for your pay?

A. No, sir; not to look to Leslie for my pay; no, sir.

Q. But a year ago, in this case, you, in response to the question I read, you made the answer I read? Is that correct?

A. I will not say positively whether that is correct or not, as to my answer.

Q. You are not certain about it?

A. No, sir.

Q. You do not know whether you were to look to Leslie for your pay or not?

A. I did not mean that. I know I was not to look to him for anything."

On March 3, 1910, McCombs from his home in Oshkosh, Wisconsin, wrote a letter to Moss at his home in Searcy, Arkansas, and that part of it which is applicable to the issues in this case is as follows: "I knew long ago that you and Leslie, or both combined, would yet do some nice selling and make some easy money; spot cash, too. Be friendly with each other; don't either of you get jealous, say good words for each other. I want to be kind and good to you both, Sol, and be broad. I want you both to sell and both get credit for what is your true rights, whether it is separate or together. So far both of you have been liberal and good and speak very nicely of each other. Am glad to see it. I have plenty for both of you to sell and I like you both."

According to the testimony of Moss he was entitled to the amount of commissions sued for.

On the other hand McCombs testified that Moss did not have anything whatever to do with the sale of the timber in question to the Henry Wrape Company. He admitted that Moss had at one time been his agent for the sale of the timber on his lands in White County, Arkansas, but he stated that in June, 1909, he appointed his cousin, Sam Leslie, as such agent and notified Moss of this fact. He testified that it was thoroughly understood that thereafter Moss was not to have anything to do with the sale of the timber on his lands in White County, unless he was employed by Leslie to help him and that in that event he was to look to Leslie for his pay. He further testified that he and Leslie brought about the sale of the timber to the Henry Wrape Company by correspondence with that company and that Moss did not have anything to do with it. Two of the officers of the Henry Wrape Company corroborated the testimony of the de-

fendant in every respect. We need not set out the evidence for the defendant in detail, for in testing the legal sufficiency of the evidence to support the verdict it must be considered in the light most favorable to the plaintiff. A comparison of the evidence stated, with the statement of the case made in the former opinion, will show that in all essential respects it is the same except that in the present case Moss denied that he had stated on the former trial that he was to look to Leslie for his commission.

In the present case in addition to what has already been copied from the record Moss was asked the following question:

"Q. You did get a letter from Mr. McCombs notifying you that Mr. Leslie would be his agent from this on and that if you desired to work with Mr. Leslie you could do so, and look to him for a commission if you earned one, or in substance to that effect? You did get such a letter in June, 1909?" He answered: "He wrote a letter similar to that, except that I was not to depend upon Mr. Leslie for my commissions."

(1) So it will be seen that the evidence in the present case is somewhat more favorable to the plaintiff than on the first trial. On the former appeal the court held that the evidence was sufficient to warrant the verdict.

In *McDonough* v. *Williams*, 86 Ark. 600, the court held that where, on a former appeal, this court adjudged that a plaintiff made out a case to go to the jury, and the case comes up on a second appeal with the same evidence, the former opinion will be conclusive. Hence the court did not err in submitting the case to the jury.

(2) An extended correspondence took place between the Henry Wrape Company and McCombs in 1912, in regard to the sale of the timber in question. Counsel for the defendent offered to introduce these letters in evidence and error is assigned calling for a reversal of the judgment, because the court refused to allow them to be introduced before the jury. It is not necessary to consider whether or not these letters were competent ev-

idence. They merely showed that the sale of the timber in question was made to the Henry Wrape Company by McCombs and Leslie and no reference was made to Moss in any way in these letters.

These facts were testified to by McCombs and by two officers of the Henry Wrape Company. Their testimony in regard to these facts had as much probative force as the letters could have possibly had and no prejudice resulted in the rights of the defendant in excluding them from the jury.

(3-4) Again it is insisted that the court erred in giving the instructions to the jury asked by the plaintiff and in modifying those asked by the defendant. We need not consider these assignments of error in detail. The instructions given by the court in the present case were the same as those given by the court on the former trial. Instructions on the second trial of an action, which conform to the rules of this court on appeal from the judgment on the first trial, are deemed correct on an appeal from the judgment upon the second trial. *St. L., I. M. & S. R. Co.* v. *Gibson,* 113 Ark. 419. The rule that opinions on former appeals are the law of the case on a subsequent appeal is so well settled by numerous decisions of this court that it is hardly necessary to cite any case to support it.

Other instructions were asked by the defendant but the court had already fully submitted the question of fact to the jury in the instructions given. The refusal of instructions asked by the party appealing is not erroneous where the court has already declared the law sufficiently in those given.

Judgment will be affirmed.

IOWA CITY STATE BANK *v.* BIGGADIKE.

Opinion delivered December 17, 1917.

1. SALES—REPRESENTATIONS OF SELLER—WARRANTY.—Where the buyer has no opportunity to inspect the goods bought, he may rely upon the representations made by the seller as to the quali-

ties of the goods of the seller's manufacture; and in such case the law implies a warranty that the articles shall be merchantable and reasonably fit for the purposes for which they were intended.

2. VERDICT—GENERAL FINDING.—Under Kirby's Digest, § § 6207 and 6208, a general verdict for the defendant imports a finding in his favor upon all the issues in the case which are consistent with the special findings returned by the jury.

3. VERDICT—GENERAL AND SPECIAL FINDINGS—INCONSISTENCY.—When a question of inconsistency between the general verdict and the special verdict arises, nothing is presumed in aid of the special finding, while every reasonable presumption is indulged in favor of the general verdict.

4. BILLS AND NOTES—INNOCENT PURCHASER FOR VALUE.—The A. Co. sold toilet articles to appellee to be resold by appellee, taking a promissory note in payment. Appellant purchased this note before maturity, and brought suit thereon against appellee. Appellee defended upon the ground of fraud, that the articles purchased from A. Co. were worthless. It appeared among other things that appellant had purchased several hundred notes from A. Co., similar to the one in suit; that many of them were refused payment on the ground of fraud; that when appellant purchased said notes it required A. Co. to put up collateral; and that A. Co. paid the expenses of litigation arising out of its notes. *Held*, under these facts a finding by the jury that appellant was not an innocent purchaser for value, would not be disturbed on appeal.

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

Carmichael, Brooks & Rector, for appellant.

1. The note is negotiable. 121 Ark. 59; 42 *Id.* 167; 96 *Id.* 105; Kirby & Castle's Digest, § § 6942-4; 143 Pac. 159; 108 Mich. 184; 33 *Id.* 32; 129 Wis. 84; 81 Wash. 442; 163 Iowa 205; 35 L. R. A. (N. S.) 330; 184 Ill. 158; 61 Kans. 526; 134 Fed. 538; 143 N. W. 556; 136 *Id.* 204; 61 Iowa 166; 170 Fed. 313; 188 S. W. 61, and others.

2. Plaintiff was a *bona fide* holder of the note. 63 Ark. 604; 94 *Id.* 387; 96 *Id.* 105.

3. There was no fraud nor misrepresentation in the sale. 73 Ark. 470; 48 *Id.* 325; 53 *Id.* 155; 72 *Id.* 343.

See also, 39 Pac. 566; 48 *Id.* 341; 98 N. W. 923; 49 N. Y. 390; 56 N. W. 669; 60 La. 710; 41 Ill. App. 642; 158 Mass. 194; 57 Ga. 50; 115 N. Y. 539; 77 Wis. 44; 5 Fed. 83; 32 Neb. 723; 54 N. W. 311; 77 Mich. 540.

Marshall & Coffman, for appellee.

1. The note was not negotiable, because of the provision for a discount of 6 per cent on the entire amount if paid at maturity of first installment. The Iowa law is the same as ours. Acts 1913, p. 269; 155 Pac. 1152; 40 L. R. A. (N. S.) 177; 2 Tenn. C. C. A. 366; 55 Am. Dec. 56; 8 N. W. 87; 18 *Id.* 248; 46 L. R. A. 732; 111 Mass. 525; 40 L. R. A. (N. S.) 177; 21 Am. Rep. 209; 11 Bush (Ky.) 180; 165 Pac. 508, and many others.

2. Plaintiff was not an innocent holder of the note and the jury so found. 121 Ark. 250; 79 *Id.* 94, 426; 136 Pac. 460; 117 *Id.* 1003; 91 *Id.* 382; 29 L. R. A. (N. S.) 351, 638; 125 S. W. 224; 79 S. E. 498.

3. There was fraud and misrepresentation, as well as an implied warranty of merchantability and reasonable fitness. 35 Cyc. 397; 73 Ark. 470; 72 *Id.* 343; 83 *Id.* 15; 90 *Id.* 78; 77 *Id.* 546. See also, 74 Me. 475; 44 Pac. 544; 23 W. Va. 760.

STATEMENT OF FACTS.

This is an action by the Iowa City State Bank against W. S. Biggadike to recover the sum of $148 and interest alleged to be due upon a promissory note. The Donald-Richard Company is a corporation engaged in the manufacture and sale to merchants of toilet articles at Iowa City, Iowa. On February 2, 1914, one of its traveling salesmen sold a bill of goods consisting of perfume and other toilet articles to the amount of $148 to W. S. Biggadike in the City of Little Rock, Arkansas. In payment therefor Biggadike executed the following note:

"Iowa City, Iowa, February 2, 1914.

"For value received, the undersigned promises to pay at Iowa City, Iowa, to the order of Donald-Richard Company, one hundred forty-eight and no/100 dollars as follows:

"A discount of 6 per cent. will be given if the full amount of this instrument is paid at maturity of first installment. Non-payment of any installment for more

than 30 days after maturity renders remaining installments due at holder's option.

"$37.00 three months after date.

"$37.00 five months after date.

"$37.00 seven months after date.

"$37.00 nine months after date.

"(Signed) W. S. Biggadike."

The note bore the following endorsement:

"Mar. 12, 1914. Pay Iowa City State Bank, Iowa City, Iowa, or order.

"Donald-Richard Co., by M. H. Taylor."

Biggadike testified that at the time of the sale he had been engaged in the general merchandise business in the City of Little Rock for about eight years. He stated that the salesman did not show him any samples of the articles sold, that he had a small sample case but that it was nothing like large enough to hold samples of the articles sold; that the agent said the goods sold were as good as the best and that the articles offered for sale were merchantable; that he had the articles on display in his store and used every effort to sell them and that he only disposed of $11.71 worth; that he paid freight on the goods amounting to $8.40; that most of the goods he did sell were returned by customers on the ground that they were worthless; that the goods were practically worthless and that the salesman had misrepresented them in selling them to him. Eight or nine other merchants in the cities of Little Rock and Argenta, who also bought goods from the company at about the same time, corroborated the testimony of Biggadike.

One of these merchants testified that he had been in the mercantile business in Little Rock for about fifteen years when he bought the perfume and toilet articles from the company; that he kept the goods on display from February 6, 1914, until March 11, 1916; that the goods were invoiced at $121.90 and that he had only sold $26 worth of the goods; that he had displayed the goods in a case in front of his store and did everything possi-

ble to sell them; that the goods were not merchantable and were not fit for the purposes for which they were intended.

Another witness testified that he had been in the grocery business in Little Rock for about twenty-five years; that he had also bought perfumes and toilet articles from this same company; that he displayed the goods and made every effort to sell them but had only sold a very small amount of them; that the people to whom he sold them complained of the goods; that the goods were not fit for the purposes for which they were intended and did not come up to the representations of them made by the salesman of the company.

On the other hand the chemist of the company testified that he had purchased from wholesale houses the materials that were used in the manufacture of the goods for the company and had mixed all the ingredients himself; that the materials purchased by him, of which he manufactured the goods, were first class in quality and that the articles sold to Biggadike and the other merchants by the company were of the very best quality, price considered. It was shown by the defendant that he offered to return the goods after he found they were not as represented by the salesman of the company.

When the case was submitted to the jury a special interrogatory for a finding of fact was submitted to it. At the time the jury returned its general verdict it also returned the special verdict. The general verdict of the jury was for the defendant. The special interrogatory submitted and the answer thereto is as follows:

"An innocent purchaser of a note is one who obtains it in the due course of business, for value, before maturity, in good faith, without notice of any defenses the maker may have to it.

Is the Iowa City State Bank an innocent purchaser? Ans. No."

Judgment was rendered in favor of the defendant and the plaintiff has appealed.

HART, J., (after stating the facts). The note in question was transferred to the plaintiff bank for value before its maturity.

It is earnestly insisted by counsel for the plaintiff that the note sued on was negotiable in form under our Negotiable Instrument Law (Acts of 1913, p. 270), and that the court erred in not so stating to the jury. But the views we shall hereinafter express make it unnecessary for us to decide this question. The trial court was evidently of the opinion that the note was not negotiable; for in its general instructions to the jury it refused to submit the question of whether or not the plaintiff was an innocent holder before maturity for value and in the usual course of business. The court submitted the case to the jury on the question of the false representations of the salesman of Donald-Richard Company.

Among other instructions at the request of the defendant it gave the following:

"If you find from the evidence that defendant was induced to buy the goods by reason of false and fraudulent representations of the salesman of Donald-Richard Company, and if you further find that defendant offered to return the goods within a reasonably fit time after discovering such fraud, then your verdict will be for the defendant."

The plaintiff asked the court to give the following instructions:

"No. 3. Fraud is a material false representation, made with a knowledge of its falsity, or a reckless disregard of whether it is true or false, intending that the party to whom it is made shall rely upon it, and the party to whom it is made must have the right to rely upon such statements, and he must rely upon them, and so relying act upon them to his injury."

"No. 4. By material misrepresentation is meant a false statement about existing or past facts, as distinguished from expressions of opinion of what could be done in the future; statements that goods were salable

or would increase sales, and bring business are mere matters of opinion and do not constitute fraud."

(1) The court gave instruction No. 3 but modified instruction No. 4, by striking therefrom the words "were salable or." The court did not err in giving the instruction on this phase of the case asked by the defendant nor in striking from the instruction No. 4 as asked by the plaintiff the words "were salable or." The company manufactured the goods which it offered for sale. Its place of business was in another State. The buyer had no opportunity to inspect the goods before he purchased them and had a right to rely upon the representations made by the seller of goods of his own manufacture. In such cases the law implies a warranty that the articles shall be merchantable and reasonably fit for the purposes for which they were intended. *Main* v. *Dearing,* 73 Ark. 470; *Main* v. *El Dorado Dry Goods Co.,* 83 Ark. 15; *American Standard Jewelry Co.* v. *Hill,* 90 Ark. 78; and *Metropolitan Discount Co.* v. *Fondren,* 121 Ark. 250.

(2) Tested by the principles of law laid down in these cases it is perfectly evident from the testimony recited in the statement of facts of the witnesses for the defendant (and which need not be repeated here) that the evidence is legally sufficient on this phase of the case, to warrant the verdict. This being true it becomes immaterial to decide whether or not the note sued on was negotiable in form under our Negotiable Instrument Act; for, if it be assumed that the note was negotiable in form still the court was right in rendering judgment in favor of the defendant on the general verdict. We have copied into the statement of facts the special interrogatory submitted to the jury and the answer thereto. Under this the court submitted to the jury the question of whether or not the plaintiff was an innocent purchaser. Section 6207 of Kirby's Digest, provides that in all actions the jury may be required by the court in any case in which they render a general verdict to find specifically upon a particular question of fact to be stated in writing and

that this special finding is to be recorded with the verdict. Section 6208 provides that when the special finding of fact is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly. So it will be seen that under our statutes, a general verdict for the defendant imports a finding in his favor upon all the issues in the case which are consistent with the special findings returned by the jury. *Little Rock & Ft. Smith Ry.* v. *Miles,* 40 Ark. 298, and *Mauwey* v. *Millar,* 117 Ark. 633. There is no inconsistency in the present case between the general and special verdict. Indeed, the latter aids the former.

(3) It is contended by counsel for the plaintiff that the special finding of the jury was based upon the theory that the note was non-negotiable. We do not agree with counsel in this contention. The jury specifically answered that the plaintiff was not an innocent purchaser. The court in framing the interrogatory defined an innocent purchaser of a note to be one who obtains it in due course of business, for value before maturity, in good faith without notice of any defenses the maker might have had to it. The jury must have had in mind this definition of an innocent purchaser when it made its special findings. It is well settled that when a question of consistency between the general verdict and the special one arises, nothing is presumed in aid of the special findings, while every reasonable presumption is indulged in favor of the general verdict. *Morrow* v. *Bonebrake,* 84 Kan. 724, 34 L. R. A. (N. S.) 1147, and *Kafka* v. *Union Stock Yards Co.* (Neb.), 110 N. W. 672.

Mr. Thompson says that, if possible, the special findings will be interpreted so as to support the verdict rather than overturn it. Thompson on Trials, (2 Ed.), Sec. 2693.

(4) Finally it is insisted that there is no testimony in the record upon which to base the finding that the plaintiff was not an innocent purchaser for value. But we can not agree with counsel in this contention.

It is true that the cashier of the bank testified that his bank purchased the note sued on for value in the usual course of business before maturity and that at the time he did not know for what the note was given or that the defendant had any defense to it.

On cross-examination, however, the cashier detailed a state of facts which tended to contradict this testimony and from which the jury might have found that the bank was not an innocent purchaser for value. The bank had been extensively engaged in purchasing notes of between one hundred and two hundred dollars in amount for several years prior to the transaction in question. It knew that the company was engaged in the wholesale manufacture and sale of toilet articles to merchants in various parts of the country. More than five hundred notes of about the same amount as the note sued upon had been transferred by the company to the bank during the past few years. These notes were given by persons scattered over different states. No investigation of their financial standing was made by the bank when the notes were transferred to it, except to ask the manufacturing company if the makers were solvent. The cashier stated that he understood in a general way that the notes were customers' notes; that he had been a witness in from twenty-five to fifty suits on notes of this kind during the past few years and that the defense of fraud similar to the defense made in the present case had been set up in about twenty-five per cent of these cases; that the bank had been successful in from seventy-five to eighty-five per cent. of them; that the manufacturing company was required to put $1.25 in collateral in notes for every $1.00 furnished by the bank; that the company paid all the expenses of suit when it was necessary to sue on the notes. The bank and the manufacturing company were engaged in business in the same city and under the circumstances detailed above the jury was warranted in finding that the bank was not an innocent purchaser of the note sued on. *Holland Banking Co.* v. *Booth,* 121 Ark. 171; *First Na-*

tional Bank of Iowa City v. *Smith* (Col.), 136 Pac. 460; *Johnson County Savings Bank* v. *Rapp* (Wash.), 91 Pac. 382, and *Johnson County Savings Bank* v. *Gregg,* 117 Pac. 1003.

It follows that the judgment must be affirmed.

McCABE v. MONTGOMERY.

Opinion delivered December 17, 1917.

STAY BOND—WHERE SURETY IS VOLUNTEER.—Appellees were accommodation endorsers on the note of one P. Judgment was rendered against all of them. At P.'s request appellant executed a stay bond as surety. Appellees did not wish the bond executed and refused to join in its execution. At its maturity, appellant satisfied the debt and sued appellees under Kirby's Digest, § 7924. *Held,* appellant could not recover, having acted in the transaction with respect to appellees merely as a volunteer.

Appeal from Clay Circuit Court, Western District; *R. H. Dudley,* Judge; affirmed in part and reversed in part.

F. G. Taylor, for appellant.

1. The note was a joint and several liability and all the signers were principals. Kirby & Castle's Digest, § 6597, sub. 7. Appellant by signing the stay bond became surety for all, and when he was compelled to pay the judgment, they became liable for the amount paid. *Ib.,* § 9878; 27 Am. & Eng. Enc. Law 431; Kirby & Castle's Digest, § 5354. By executing the stay bond, appellant became a supplementary surety for the debt. 32 Cyc. 18.

C. T. Bloodworth, for appellees.

1. Appellees did not sign the stay bond, nor request appellant to sign it. Appellees were sureties for Patterson and all liable to the bank, but as between themselves, they were liable in the inverse order of their undertakings. 29 Ark. 477; 34 *Id.* 73; 36 *Id.* 145. Appellant was a mere volunteer. 54 Ark. 100.

SMITH, J. Appellees were accommodation endorsers of the note of T. J. Patterson to the order of the

First National Bank, of Corning, Arkansas. The note was not paid at its maturity, and the bank recovered judgment against all signers thereof, when Patterson requested appellant McCabe to sign a stay bond with him, staying said judgment, and McCabe did so, under the impression that it was the desire of all the judgment debtors that he do so. As a matter of fact, appellees did not desire appellant McCabe to sign the stay bond, and they, themselves, refused to sign it, but on the contrary, stated to the justice of the peace that they did not desire the judgment stayed but desired that an execution be issued at once and levied upon the property of Patterson.

Upon the maturity of the bond, an execution issued against both the principal and surety, which was satisfied by appellant McCabe by paying the amount thereof, and he thereupon, pursuant to Section 4627 of Kirby's Digest, obtained judgment before the justice of the peace against the judgment debtors for the amount paid by him. In the meantime, Patterson had become insolvent and apparently indifferent as to the future progress of the litigation. An appeal was prayed by the other judgment debtors, and the cause was heard by the court below upon an agreed statement of facts, which contained substantially the recitals of facts set out above. The court rendered judgment for all the defendants, including Patterson, which was evidently a clerical misprison, as he did not appeal from the judgment of the justice of the peace, and no one appears for him here, and no one appeared for him in the court below. The judgment in his favor must, therefore, be reversed and the judgment of the justice of the peace is declared to be in full force and effect. Did the court properly find for the other defendants? Appellant argues that, when he executed the stay bond for appellees, he became their surety, and, when he was compelled to pay the judgment against them, by reason of having executed the stay bond, they became liable to him for the amount so paid under the provisions of Section 7924 of Kirby's Digest, which provides that,

when any bond, bill, or note for the payment of money, shall not be paid by the principal debtor, but is paid by the surety, the principal debtor shall refund to the surety the amount so paid. But this statute only inures to the benefit of one who has discharged one of the legal obligations mentioned above under which he rested at the time of its discharge. It does not protect the mere volunteer. Appellees were not parties to this stay bond, and did not desire its execution. It was not executed at their request, or for their benefit, and so far as appellees are concerned, appellant must be regarded as a volunteer. Section 325 Brandt on Suretyship (3 Ed.). The sections of Kirby's Digest cited above, under which appellant prays judgment, do not authorize the rendition of judgment under the facts stated, and the court, therefore, properly refused to render judgment in appellant's favor.

GARETSON-GREASON LUMBER CO. v. HOME LIFE & ACCIDENT COMPANY.

Opinion delivered December 17, 1917.

1. INSURANCE—LIABILITY INSURANCE.—The insured, in a policy of liability insurance, may assign a liability thereunder, and a restriction in the policy prohibiting the assignment of the policy during its life, does not apply.
2. INSURANCE—LIABILITY—ASSIGNMENT OF LIABILITY.—Appellee insured appellant against loss or expense resulting from legal liability for damages on account of bodily injury and accident suffered by any of its employees. An employee of appellant was injured and recovered judgment against appellant. Appellant borrowed money from the A. Surety Co., to pay the judgment, executed its note for same and secured it by an assignment to the A. Co. of its right of action against appellee; paid the money thus procured to the judgment holder in satisfaction of his judgment. *Held,* this transaction involved a loss to appellant within the meaning of its policy in appellee company, and that the A. Co. succeeded to appellant's rights under the policy; that appellant parted with a valuable chose in action when it assigned the policy, and sustained an actual loss by payment in money, within the meaning of the "loss" and "money" clauses in the policy, when it paid its employee's judgment.

3. PRINCIPAL AND SURETY—SUPERSEDEAS BOND—ASSIGNMENT TO SURETY.—Under the facts as detailed above, the A. Co., although surety on appellant's appeal bond, as assignee of the insurance policy or the liability thereunder, it succeeded to the rights of appellant, its assignor, under the policy.

4. INDEMNITY INSURANCE—TIME FOR BRINGING ACTION.—An indemnity insurance policy provided that suit must be brought within ninety days after the payment of a judgment by the insured. The insured sued the indemnity company after paying a judgment against it within the terms of the policy, but the complaint did not allege when the judgment was paid, *held,* on demurrer the insurance company could not contend that the action was not brought in time.

5. INDEMNITY INSURANCE—CONDITION PRECEDENT—TIME LIMIT.—A condition precedent in an indemnity policy is a condition to be performed before a right of action dependent upon it will accrue, such as proof of loss, etc., the performance of which should be pleaded in the complaint. A time limit clause is not a condition.

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

Crawford & Hooker, for appellant.

1. The demurrer was improperly sustained. The grounds of demurrer urged were, (1) that the policy was an indemnity policy and the lumber company never paid the policy; (2) that the assignment of the policy was a violation of the terms of the policy; (3) the lumber company was insolvent and could not pay the policy; (4) that suit was not brought within ninety days. These were all grounds of defense, not demurrer, and should have been pleaded. 97 Kans. 275; 155 Pac. 59-60, etc.

2. The surety company loaned the money to pay the judgment and took an assignment of the policy to secure the loan. It did not pay the judgment as surety in the supersedeas bond. It had the right to sue. 155 Pac. 60; Kirby's Digest, § § 5999-6005; 208 U. S. 404; 87 Ark. 60; 99 *Id.* 618; 103 *Id.* 473; 68 *Id.* 112; 43 L. R. A. (N. S.) 614.

3. The assignment of the policy was after condition broken and merely the assignment of a chose in action

and did not fall within the terms of the policy prohibiting a transfer. 68 Ark. 8; 98 *Id.* 58; *Ib.* 340. See also, 240 Fed. 36-41; 191 S. W. 5.

T. D. Wynne, for appellee.

1. The policy was one of indemnity only and the lumber company sustained no loss in money. 167 S. W. 109; 59 L. R. A. 444; 20 L. R. A. (N. S.) 956; 7 *Id.* 958; 36 S. W. 1051. Nor did it pay in money.

2. The alleged payment was a mere subterfuge to deceive. 20 L. R. A. 956. The obligations of defendant depended upon a "condition precedent" never performed. 49 Wis. 438.

3. The American Surety Co. was primarily liable and paid the judgment as surety in the supersedeas bond. 116 Ark. 277; Kirby & Castle's Digest, § 1350; 29 Ark. 208.

4. The suit was not instituted within ninety days. 116 Ark. 277. The ninety-day provision was reasonable and valid.

HUMPHREYS, J. Garetson-Greason Lumber Company, for use of American Surety Company of New York, brought suit against the Home Life & Accident Company, of Fordyce, Arkansas, in the Dallas Circuit Court to recover $1,385 on an indemnity insurance policy issued by said Home Life & Accident Company to Garetson-Greason Lumber Company on the 31st day of May, 1912, insuring it against loss or expense resulting from legal liability for damages on account of bodily injury and accident suffered by any of its employees.

H. Goza was an employee of Garetson-Greason Lumber Company within the terms of the policy, and while performing his duties on the 24th day of June, 1912, his arm was caught and crushed in the sprocket wheel of the dust conveyer in the lumber company's mill. He instituted a suit against said lumber company to recover damages for the injury. The lumber company notified the insurance company to defend the suit but it failed to

do so. The lumber company made a defense but Goza recovered a judgment against it for $1,250 on account of the injury. The lumber company appealed the case and executed a supersedeas bond with the American Surety Company of New York as surety thereon. When the judgment was affirmed by the Supreme Court it amounted, including interest and costs, to $1,385. The lumber company paid the judgment. It borrowed the money with which to pay it from the American Surety Company of New York, executed a note for same and secured the note by an assignment of the policy of insurance to said surety company. The amount so paid, together with attorney's fees incurred in defending Goza's suit, constituted the basis of this action.

The policy of insurance contained the following clause: "No action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue, nor unless such action is brought within ninety days after payment of such loss or expense * * *."

The policy also contained a clause prohibiting the assignment thereof without the written consent of the company indorsed on the policy by an executive officer. The complaint in the instant case set out the facts stated above.

A general demurrer was filed to the complaint stating that the matters and facts set forth in the complaint did not constitute a cause of action against appellee.

The court sustained the demurrer to the complaint, and appellant refusing to plead further, the complaint was dismissed. An appeal has been prosecuted to this court.

(1) The circuit court sustained the demurrer and dismissed the complaint upon the theory that the American Surety Company of New York paid the Goza judgment as a primary obligation on the supersedeas bond,

and for that reason had no right of action against appellee under the assignment of the insurance policy. We can not agree with counsel for appellee. Notwithstanding the restricted assignment clause in the policy to the effect that the policy should not be assigned without the written consent of the company indorsed on the policy by an executive officer of said company, Garetson-Greason Lumber Company had a right to assign its right of action against the Home Life & Accident Company to whomsoever it pleased. The restriction simply prevented the assignment of the policy during its life, and had no application whatever to the assignment of a liability thereunder. *Maryland Casualty Co.* v. *Omaha Electric Light & Power Co.*, 157 Fed. 514; *McBride* v. *Aetna Life Ins. Co.*, 126 Ark. 528.

(2-3) Under the allegations of the complaint, confessed to be true by the demurrer, the Garetson-Greason Lumber Company borrowed sufficient money from the American Surety Company of New York to pay the Goza judgment, executed its note for same and secured it by an assignment to the surety company of its right of action against the Home Life & Accident Company, and paid the money thus procured to Goza in satisfaction of his judgment. This transaction involved a loss to Garetson-Greason Lumber Company within the meaning of the "actual loss" clause in the policy. While it is true under the law in this State that sureties on an appeal or supersedeas bond are primarily liable to the judgment creditor, yet it is as well settled that they are sureties only as between the judgment creditor and themselves. As assignees of the insurance policy or the liability thereunder, the American Surety Company succeeded to the rights of its assignor, Garetson-Greason Lumber Company, under the policy. *The American Surety Co. of New York, Appellee,* v. *Maryland Casualty Co., Appellant,* 97 Kan. 275; *Pacific Coast Casualty Co.* v. *General Bonding & Casualty Co.*, 240 Fed. 36.

It is insisted that the complaint failed to allege the payment of the judgment in money required by the "money" clause in the policy. The complaint alleged that appellant paid the judgment and that in order to do so, it procured the money so paid from the American Surety Company. We think this allegation brings the payment technically within the clause of the policy. However, this court in passing upon a clause in an indemnity policy said: "It is scarcely fair to construe the language to mean that it applied only to currency actually handed over and not to a *bona fide* payment in other property." *McBride* v. *Aetna Life Insurance Co.*, 126 Ark. 528.

It is quite apparent under the allegations of the complaint that the Garetson-Greason Lumber Company parted with a valuable chose in action when it assigned the policy; and that it paid actual money in the settlement of the Goza judgment. So there was an actual loss in payment in money by appellant within the meaning of the "loss" and "money" clauses of the policy when it paid the Goza judgment.

It is insisted, however, that the complaint was subject to demurrer for failure to allege that suit was brought within ninety days after the payment of the Goza judgment. The policy provided that no action should lie unless brought within ninety days after loss. This contention presupposes that a time limit clause in an indemnity policy is a condition precedent. A condition precedent in an indemnity policy is a condition to be performed before a right of action dependent upon it will accrue, such as proof of loss, etc., the performance of which should be pleaded in the complaint. Kirby's Digest, § 6133. A time limit clause within which to bring suit deals with an action after accrual and is not a condition, the performance of which is necessary to create an action. In that regard, it is akin to a statute of limitation and must be pleaded as a defense unless the bar under the limitation stipulation in the policy were patent on the face of the complaint. In that event, it might be

reached by demurrer. The complaint did not allege when the Goza judgment was paid, hence it is not certain on the face of the complaint when the right of action accrued, and, for that reason, could not be reached by demurrer.

The judgment is reversed and remanded with instructions to overrule the demurrer to the complaint.

VALLEY OIL COMPANY *v.* READY.

Opinion delivered December 3, 1917.

1. ATTORNEY'S FEES—RECEIVERSHIP PROCEEDINGS—AMICABLE AND ADVERSARY PROCEEDINGS—COSTS.—Under the statute, any creditor or stockholder of an insolvent corporation, may institute proceedings to wind up its affairs, and where such proceedings are amicable, that is, not opposed by other stockholders, then, as the one instituting the proceedings does so for the benefit of those similarly situated, they must all share the burden of such proceedings between them in proportion to the benefits received; but where the proceeding, although instituted under the statute, is resisted by other creditors or stockholders, thus causing the proceedings to become of an adversary character, then the rule of apportioning costs according to the benefits received as a result of such proceedings does not apply.
2. ATTORNEY'S FEES—AMICABLE PROCEEDING—APPOINTMENT OF A RECEIVER.—In an amicable proceeding for the appointment of a receiver, the sum of $250 is ample compensation for the labor involved in securing the necessary information and in drawing the petition, and in presenting the application and procuring the order appointing the receiver. In determining what is a proper attorney's fee, this court, on an appeal in chancery, trying the cause *de novo,* may apply to the facts proved, its own general knowledge of the subject matter of inquiry.

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

Bevens & Mundt, for appellants.

1. The fees should not have been allowed or taxed against the funds of the oil company. This was an adversary suit, and the attorneys' fees were not payable out of the fund. 76 Ark. 146; 105 *Id.* 440.

2. The fee is unreasonable.

Danaher & Danaher and *Moore, Vineyard & Satterfield, pro sese.*

1. The fée was properly allowed by the court against the fund. 76 Ark. 504; 95 *Id.* 389; 105 *Id.* 439. See also 158 Mass. 434; 90 Fed. 39; 87 *Id.* 810; 105 U. S. 527.

2. The evidence shows the fee a reasonable one.

STATEMENT OF FACTS.

The Valley Oil Company was a corporation doing business in this State, having an authorized capital of $83,000, of which E. S. Ready of Helena, Arkansas, held 190 shares of the par value of $19,000. E. C. Hornor of Helena held a like number of shares, and T. H. Faulkner and S. S. Faulkner held forty shares each. The oil company had executed its notes for an indebtedness of $28,500 on which notes Ready, with others, was endorser.

Ready employed the law firms of Danaher & Danaher and Moore, Vineyard & Satterfield to institute proceedings for the appointment of a receiver for the oil company, which was done, and in the petition asking for a receiver it was alleged and facts were set forth to show that the oil company was insolvent, and that a receiver should be appointed to take charge of and administer its assets, and, among other things, the petition prayed that pending a final hearing of the cause the receiver, or commissioner specially appointed for that purpose, be directed to sell the assets of the corporation, and that upon a final hearing the costs of the proceeding be paid out of the funds coming into the hands of the receiver from the sale of the assets, and that a reasonable fee be allowed the attorneys for the plaintiff (petitioner), and also the attorneys for the receiver, to be paid out of any funds remaining after the payment of the other fees and costs incident to the

receivership. A receiver was appointed. The attorneys for the petitioner advised with him before they filed his petition, and also with the employees of the company, and examined the books of the company to obtain information to enable them to prepare the petition asking for the appointment of a receiver, and after the receiver was appointed they prepared his oath of office and bond and assisted him in qualifying, advised him daily as to his duties as such receiver, and prepared his several reports. They appeared before the chancellor and asked for an order of sale to sell the property, which was resisted as to the time of the sale and terms on which the sale was to be made, and as to the person who should make the same.

E. C. Hornor, through his attorney, asked the appointment of another receiver. The controversy thus raised was settled by the appointment of a commissioner to make the sale.

The attorneys employed by the petitioner prepared the order of the court in regard to the sale and advised the commissioner in regard to making the sale, and prepared notices to the creditors to file their claims, and the order of the court requiring claims to be filed. Among other claims presented was that of the New South Oil Mill. E. C. Hornor, T. H. Faulkner and S. S. Faulkner, through attorneys specially employed by them, appeared and resisted the allowance of its claim, alleging that the New South Oil Mill was a company in which the petitioner, E. S. Ready, was interested. In that controversy the petitioner, Ready, was represented by Bridges & Wooldridge.

The property was sold for $60,000, 25 per cent. to be paid in cash and the remainder in installments, on a credit of three, six and nine months after the date of sale.

Danaher & Danaher and Moore, Vineyard & Satterfield presented a claim in which they set forth that the Valley Oil Company, the insolvent corporation, was indebted to them for services rendered as attorneys in the sum of $2,500. E. C. Hornor, T. H. Faulkner and S. S. Faulkner resisted the allowance of this claim, and in their

remonstrance they denied that the Valley Oil Company was indebted to the attorneys on their claim for services in any sum, and denied that the services rendered were worth the amount claimed; and they set forth that the petition for the appointment of a receiver was not filed at the instance and request of all of the stockholders of the oil company, but was alone at the request of the petitioner, E. S. Ready, and for the protection of his own interests.

W. T. Wooldridge testified that he had been engaged in the active practice of law at Pine Bluff, Arkansas, since January 1, 1891, and that in his opinion $2,500 would be a reasonable fee for the services rendered by the claimants.

Under the facts above stated, the court rendered a decree allowing the attorneys the sum of $2,500, and directing the receiver to pay same, which decree is challenged by this appeal.

WOOD, J., (after stating the facts). In *Bradshaw* v. *Bank of Little Rock,* 76 Ark. 501, 504, we held: "When many persons have a common interest in a fund, and one of them, for the benefit of all, brings a suit for its preservation, and retains counsel at his own cost, a court of equity will order a reasonable amount to be paid to him out of the funds in the hands of the receiver in reimbursement of his outlay." Citing cases. See, also, *Federal Union Surety Co.* v. *Flemister,* 95 Ark. 389.

(1) Our statute authorizes any creditor or stockholder of any insolvent corporation to institute proceedings in the chancery court for the winding up of the affairs of such corporation, and when proceedings are instituted by a creditor or stockholder under this statute, which proceedings are of an amicable character, that is, not opposed by other stockholders and creditors, then as the one instituting the proceedings does so for the benefit of those similarly situated it is but just and equitable that they should share the burden of the costs incident to such proceedings between them in proportion to the bene-

fits received, and a court of equity in such proceedings, should so adjust it. But where the proceedings, although instituted under the statute, are resisted by the other creditors or stockholders, thus causing the proceedings to become of an adversary character, then the rule of apportioning costs according to the benefits received as a result of such proceedings does not apply.

In speaking to this subject, in *Gardner* v. *McAuley,* 105 Ark. 439, we used the following language: "In *Cowling* v. *Nelson, supra* (76 Ark. 146), we said: 'The utmost that can be said of the attorney's fees are that they were part of the costs; and as to whether the court has, in amicable suits, any right to tax them as costs is a question that the courts are divided upon, but all agree that in adversary proceedings they can not be so taxed.' Upon consideration of that question it now appears to us that the weight of authority is against the taxation of attorney's fees, even in amicable partition suits, unless the partition resulted solely from the services of the solicitors for one of the parties, and such services were accepted by the other parties. In adversary suits there is no ground for taxing the fees of the solicitor of one of the parties against the other parties, and the doctrine of allowance of attorney's fees in amicable suits of this character should, we think, be limited to those cases where the services of the plaintiff's solicitor not only result in benefit to the whole subject matter of the litigation, but are accepted and acquiesced in by the other parties. The rule does not apply where all of the parties appear by their respective solicitors and the proceedings are conducted through their joint efforts."

Applying the above principles to the facts of this record, our conclusion is that the proceedings instituted by E. S. Ready for the appointment of a receiver for the Valley Oil Company should be treated as friendly down to the time when the application was made for an order to sell the property. Then, for the first time, the appellants appeared and resisted the course which the receiver was proposing to take, and from that time on, it appears to us,

that all that was done should be treated as adversary, for it is manifest that the appellants thereafter objected to the receiver himself, and asked that another be appointed, and resisted the allowance of claims by the receiver that were filed by the New South Oil Company, claiming that E. S. Ready (petitioner) was interested in that company, and that the allowance of these claims would not be for their benefit, nor for the benefit of the stockholders generally, but that the allowance of such claims would inure solely to the personal benefit of E. S. Ready. The record warrants the conclusion that appellants, from the time they appeared and resisted the order of sale, were treating the receiver and the acts done by him as hostile to their interests, and as promoting the interests of E. S. Ready, not in his relation as a stockholder, but as furthering his private and individual interests, aside from such relation and in detriment to the interests of the appellants and other stockholders.

(2) The services appellees rendered incident to having the receiver appointed, and down to the time when the order of sale was asked for, when the proceedings became adversary, were reasonably worth the sum of $250. It occurs to us that in an amicable proceeding for the appointment of a receiver the sum of $250 would be ample compensation for the labor involved in securing the necessary information and in drawing the petition and in presenting the application and procuring the order appointing the receiver.

Of course, after the proceedings became adversary, on account of the large amounts involved and the complicated issues raised, if this were a suit against Ready on *quantum meruit* for services, the measure of compensation would have to be commensurate with the labor and talents employed and required for the conduct of litigation of such magnitude. As to what would be proper remuneration in such case we do not determine here, for that issue is not before us. We are convinced that the attorney who testified as to the value of the services rendered, and the court in fixing the amount of compensation

to the attorneys, based their estimates upon the value of the entire services that were rendered in the proceedings, which, as we have seen, is not the proper measure of compensation to be allowed the attorneys and to be taxed as costs, and paid out of the funds of the insolvent corporation in the hands of the receiver.

The character of the services rendered by the attorneys in connection with what was required to procure an order of a chancery court for the appointment of a receiver as in amicable proceedings appears to have been fully developed. This court, trying the cause *de novo,* may apply to the facts proved its own general knowledge of the subject matter of inquiry in determining the value of the services that were rendered by the attorneys. See *Lilly* v. *Robinson Mercantile Co.,* 106 Ark. 571, and cases there cited.

Therefore, the decree of the chancellor will be modified by reducing the decree in favor of the attorneys to the sum of $250, and the decree as thus modified will be affirmed.

BIDDLE v. STATE.

Opinion delivered December 10, 1917.

1. EVIDENCE—CRIMINAL CASE—PROOF OF BAD CHARACTER OF DECEASED.—In a prosecution for homicide, the general reputation of deceased only, for peace and quiet, may be proved; but such reputation can not be proved by isolated circumstances.
2. CRIMINAL LAW—PROOF THAT ACCUSED WAS ARMED.—In a prosecution for homicide the jury may consider the fact that accused was unlawfully carrying a weapon, in determining whether he used it in his necessary self-defense.
3. CRIMINAL LAW—REASONABLE DOUBT—RIGHT OF JURY TO TAKE COUNSEL TOGETHER.—The accused, in a criminal prosecution, is protected by the benefit of a reasonable doubt, until it is removed from the mind of the jury by evidence of his guilt; in arriving at their verdict, it is proper for the jury to take counsel together, and not for each juror to rely upon his own individual opinion, irrespective of the opinion and counsel of the other jurors.

4. HOMICIDE—SELF-DEFENSE—MISTAKEN BELIEF OF DANGER.—In a prosecution for homicide, where defendant fired the fatal shot under the belief that it was necessary in order to protect himself from great harm, and if he fired for that purpose, he should be acquitted, although the jury believe accused was mistaken in his conclusion as to the danger to himself.

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

Joe Joiner and *A. S. Kilgore,* for appellant.

1. Instructions Nos. 9, 5 and 6 should have been given in full as asked. They correctly state the law. 109 Ark. 478; 3 Tenn. 110; 25 Fla. 517; 172 S. W. 1010; 93 *Id.* 409; 92 *Id.* 205; 59 *Id.* 132.

2. Sam Peniger should have been permitted to testify as to character of deceased. 26 Cent. Digest, 507-510.

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

1. Instruction No. 9 was properly refused. 13 R. C. L., p. 913, § 217; 72 Vt. 381; 122 Ill. 1; 36 Miss. 531; 73 S. C. 277; 43 Tex. Cr. 328; Const., art. 7, § 23.

2. The court properly modified the fifth instruction. 117 Ala. 59-66; 105 *Id.* 8; 115 *Id.* 42; 131 Cal. 240; 63 Oh. St. 173; 72 Minn. 296; 67 Ia. 475; 157 Ill. 153; 134 Mo. 109.

3. Instruction 6, asked, is not the law, and the court properly refused the first, fourth and fifth paragraphs thereof. 67 Ark. 594; 75 *Id.* 350; 69 *Id.* 648.

4. Sam Peniger's testimony was not admissible to prove deceased's character. Violent and turbulent disposition can not be proven by an isolated circumstance. It can be proved only by general reputation. 130 Ark. 365; 38 Ark. 498; 67 *Id.* 117.

SMITH, J. Appellant seeks by this appeal to reverse the judgment of the court below, sentencing him to a term of six years in the penitentiary upon a conviction before the jury, of murder in the second degree.

The crime was alleged to have been committed by shooting Luther Peniger with a gun, and the defense interposed was that of self-defense.

At the trial appellant offered to show by Sam Peniger, a brother of the deceased, that he (Sam Peniger) had said to his brother, a short time before the killing, that if he (the deceased) did not mend his way and stop getting into so much trouble, he would die with his shoes on. The court refused to permit the introduction of this evidence and exceptions were duly saved.

Exceptions were saved to the refusal of the court to give an instruction numbered 9, which reads as follows:

"9. You are instructed that the defendant had a right to use a weapon which he carried unlawfully in his necessary self-defense, and the fact that he carried a weapon unlawfully, standing alone, should not be considered as any evidence of his guilt on the trial of this case, but you are the sole judges as to whether he used an unlawful weapon, as well as to whether he used it in his necessary self-defense."

An instruction numbered 5 was asked by appellant, which told the jury, among other things, that "so long as a reasonable doubt of his guilt remains in your minds you can not convict the defendant. He is protected by the benefit of a reasonable doubt until it is removed from the mind of each juror by evidence which convinces each juror of his guilt to a moral certainty." The court struck out the words "each juror," and inserted the words, "the jury" in both places where those words occur, and exceptions were duly saved to this action.

The court was asked by appellant to give an instruction in which the jury was told that, in determining whether or not appellant acted in his necessary self-defense, "in so far as possible you are to place yourself in the position and under the circumstances surrounding the defendant at the time of the shooting, acting without carelessness on his part, as those circumstances and his position have been disclosed by the evidence, viewing it from the standpoint of the defendant at the time, as you believe from the evidence it appeared to him, you will ask: (1) Did it appear at the time he fired the fatal shot that he was in danger of losing his life or of receiving great bod-

ily harm at the hands of the deceased? (2) If it did so appear, did the defendant reach the conclusion that he was in danger of losing his life or of receiving great bodily harm at the hands of the deceased after the exercise of such caution and prudence in judging the appearance and circumstances by which he was surrounded as it appeared to him to be reasonably consistent with his safety?"

We will discuss the assignments of error in the order in which they are stated.

(1) The excluded testimony of Sam Peniger was incompetent. It was, of course, competent to prove that the deceased was a man of bad reputation for peace and quietude, if such was the case; but this reputation could not be shown by proving isolated circumstances. Such testimony is confined to proof of general reputation. *Fowler* v. *State,* 130 Ark. 365; *Campbell* v. *State,* 38 Ark. 498; *Hardgraves* v. *State,* 88 Ark. 262.

(2) Instruction numbered 9 was properly refused. It is true we said, in the case of *Moore* v. *State,* 109 Ark. 478, that a person is not to be deprived of his right to use a weapon in his necessary self-defense because he is carrying it unlawfully. But it is an entirely different matter to say that the jury may not consider that fact as any evidence in determining whether the person who so carried it used it in his necessary self-defense. The deceased was unarmed, and the testimony was sharply conflicting as to the circumstances of the killing, and we can not say that the jury should have disregarded entirely the fact that one of the participants was armed. Such a charge would have been upon the weight of the evidence.

(3) The court properly amended instruction numbered 5. It is the duty of the jury to take counsel together. Each juror must necessarily reach his own conclusion about the merits of the case he is trying; but, in doing so, it is proper for him to take into account the fact that other jurors are supposed to be as impartial and as disinterested as he, himself, is; that they have heard the very evidence upon which he is required to base his con-

clusion. The whole policy of the law, in having more than one juror, would be defeated if they were not to take counsel together and be influenced by the views of their fellows. While the law does require a unanimous verdict, it is contemplated that this verdict will be arrived at by a comparison of views and an interchange of opinions on the part of the jurors, and that juror would be an obstructor of the processes of the law who refused to yield his opinion when shown by his fellows that it was not well founded, simply because it was the opinion he had reached before conferring with them. A similar instruction was reviewed by the Supreme Court of Alabama in the case of *Cunningham* v. *State,* 117 Ala. 59, 66, and it was there said:

"Aside from the inartificial manner in which the charge is drawn, it is vicious in that it is calculated to impress the mind of a juror with the idea that his verdict must be reached and adhered to without the aid of that consideration and deliberation with his fellow-jurors which the law intends shall take place in the jury room."

The Supreme Court of Ohio, in the case of *Davis* v. *State,* 63 Oh. St. 173, said: "The proper charge to a jury in a criminal case is, that the jury, and not that each juror, should be convinced, beyond a reasonable doubt, of the guilt of the accused before finding him guilty."

(4) It will be observed that instruction numbered 6 deals with the question of the appearance of danger, the law of which subject has been discussed in numerous decisions of this court, a late case being that of *Holland* v. *State,* 126 Ark. 332. No error would have been committed had the entire instruction been refused, because, as was said in the case last cited, no attempt was made to show that the accused was not a "reasonable person," and instructions numbered 7 and 8, given at appellant's request, declared the law on this subject in language chosen by himself, and which was as favorable to him as he had any right to ask, the instructions being to the effect that the jury must base its findings upon what they believed, from the evidence, the defendant actually

thought of the circumstances and appearances by which he was surrounded at the time; and that if he honestly, and without fault or carelessness, believed he was in danger of losing his life or of receiving great bodily harm at the hands of the deceased, and that it was necessary to shoot the deceased in order to prevent such harm to himself, and that he fired the fatal shot for this purpose, that the accused must be acquitted, although the jury may now believe from the evidence that the accused was mistaken in his conclusions as to the danger to himself and that in fact there was no danger threatening him, and no necessity for shooting the deceased. We do not quote these instructions in full, as they are somewhat lengthy and amplify the declarations of law stated, and as they fully declared the law of that subject, no error was committed in refusing to give in its entirety another instruction upon the same subject.

Finding no prejudicial error, the judgment is affirmed.

DAVIS v. STATE.

Opinion delivered December 22, 1917.

1. ARREST OF JUDGMENT—CERTAINTY IN AN INDICTMENT.—Certainty in an indictment is required when charging an offense, and a demurrer thereto should be sustained unless the language of the indictment charges an offense with reasonable certainty so as to put the accused on notice of the nature of the charge he is called upon to meet; but when the sufficiency of the indictment is called in question by motion in arrest of judgment, the rule is different, and if it can be gathered from the language of the indictment that the essentials of the crime are charged either directly or by reasonable inference, then the motion should be overruled.
2. SUBORNATION OF PERJURY—SUFFICIENCY OF INDICTMENT.—An indictment charging subornation of perjury, when tested on motion in arrest of judgment, *held,* to allege that the perjured testimony was given under oath.

Appeal from Columbia Circuit Court; *Chas. W. Smith,* Judge; affirmed.

Sid White, for appellant.

1. The judgment should have been arrested. Every material fact necessary to constitute the offense must be alleged in the indictment. Kirby's Digest, § 2427; 29 Ark. 70-1; 37 *Id.* 117; 100 *Id.* 196; 103 *Id.* 433-4. The indictment must state all the essential elements of perjury as well as of subornation of perjury. Kirby's Digest, § § 1972-3; 30 Cyc. 1440; 72 Ark. 192; 47 *Id.* 553; 53 *Id.* 395.

2. It fails to charge that the witness Atkins was ever sworn. 24 Ark. 595; 30 Cyc. 1440; 2 Wharton, Cr. Law (11 ed.), § 1549; Kirby's Digest, § 1968; 110 Ark. 555.

3. It fails to charge that the court had jurisdiction. 110 Ark. 554; 45 *Id.* 336; 80 *Id.* 226; 30 Cyc. 1440; 2 Wharton, Cr. Law (11 ed.), § 1549. It also fails to charge the falsity of the alleged evidence. 59 Ark. 119; 54 *Id.* 584; 30 Cyc. 1437. Or by antithesis the truth as to the matters alleged. 59 Ark. 119; 54 *Id.* 584; 30 Cyc. 1437. Or that Atkins "knowingly and wilfully" testified as alleged. 30 Cyc. 1437; 2 Wharton, Cr. Law, § 1593, p. 1730.

4. Perjury must be wilfully and corruptly committed. 59 Ark. 113; 32 *Id.* 192; 30 Cyc. 1403.

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

1. The same strictness is not required when an indictment is attacked by motion in arrest as upon demurrer. 110 Ark. 549; 144 Fed. 801. It sets forth the substance of the offense. Kirby's Digest, § § 1970-3; 155 Mass. 224; 149 Fed. 869. Defects not prejudicial are not material. Jurisdiction is sufficiently charged. Kirby's Digest, § 2229; 63 Ark. 618, etc.

2. The finding of a jury on a disputed question of fact will not be disturbed. 104 Ark. 162; 101 *Id.* 51; 103 *Id.* 4.

3. The witness was sworn and he was corroborated. 53 Ark. 395.

4. Atkins was not drunk and knew he was testifying falsely. The jury were properly instructed and the verdict is conclusive.

McCULLOCH, C. J. The defendant, John Davis, was convicted of the crime of subornation of perjury under an indictment which (omitting caption) reads as follows:

"The said defendant, on the 27th day of August, 1917, in Columbia County, Arkansas, did unlawfully, wilfully, corruptly and feloneously procure one Earl Atkins to commit wilful and corrupt perjury in a cause then pending in the Columbia Circuit Court, February term, 1917, wherein the State of Arkansas was plaintiff and John Davis was defendant, charged with the offense of an assault with intent to kill, alleged to have been committed upon one Frank Turner by offering to pay to him, the said Earl Atkins, the sum of ten dollars and giving to him, the said Earl Atkins, before and during said trial, whiskey; said false, perjured and corrupt testimony being given by the said Earl Atkins was then and there material to the issue and in substance as follows, towit: That the said Earl Atkins, while standing in front of Hutchinson's drug store, in the city of Magnolia, Columbia County, Arkansas, saw one Frank Turner make an assault upon him, the said John Davis, with an open knife, in the hands of him, the said Frank Turner, before he, the said John Davis, interfered or attempted to raise a difficulty with him, the said Frank Turner, which said testimony given by the said Earl Atkins was in truth and in fact false, corrupt and perjured, and the said John Davis well knew at the time he, the said John Davis, procured the said Earl Atkins to give such testimony that the same was false, corrupt and perjured, against the peace and dignity of the State of Arkansas."

There was a demurrer to the indictment, but a ruling thereon of the court was never requested. After conviction there was a motion in arrest of judgment, and the principal contention here for reversal is that the indict-

ment is not sufficient to charge a public offense and that for that reason the court erred in refusing to arrest the judgment. The sufficiency of the indictment is attacked in several particulars, but it must be remembered that the rule established for interpreting an indictment when the question arises on motion in arrest of judgment is that "the language of the indictment will be given that construction and interpretation which results in holding it sufficient, if it is not manifest that another construction and interpretation is required, as called for by the plain, ordinary and usual meaning of the words of the indictment." *Loudermilk* v. *State,* 110 Ark. 549. Certainty in an indictment is required when charging an offense, and on demurrer, which constitutes a direct attack upon its sufficiency, the demurrer should be sustained unless the language of the indictment charges an offense with reasonable certainty so as to put the accused on notice of the nature of the charge he is called upon to meet; but when the sufficiency of the indictment is called in question by motion in arrest of judgment the rule is different, and if it can be gathered from the language of the indictment that the essentials of the crime are charged either directly or by reasonable inference, then the motion should be overruled.

The first point made against the sufficiency of the indictment is that it does not charge that the false testimony of the suborned witness was given under oath. Our statute on the subject of subornation of perjury reads as follows:

"In every indictment for subornation of perjury, or for any corrupt bargain, contract or attempt to procure another to commit perjury, it shall be sufficient to set forth the substance of the offense, without setting forth the record, proceeding or process, or any commission or authority of the court or person before whom the perjury was committed, or the form of the oath or affirmation, or the manner of administering the same." Kirby's Digest, § 1973.

It will be observed that this statute eliminates the necessity of setting forth "the form of the oath or affirmation, or the manner of administering the same," but not the allegation that the oath was taken, and it is still necessary to charge in an indictment for subornation that the testimony was given under oath. We think, however, that under a liberal interpretation of the language used in the indictment, it is sufficient to constitute a charge that the testimony of the suborned witness was given under oath. It refers to the testimony as "wilful and corrupt perjury," and uses the words "said false and corrupt testimony." Testimony is, in a legal meaning, "to state or declare on oath or affirmation before a judicial tribunal or officer." We are of the opinion, therefore, that while it is essential for an indictment to charge that the testimony was given under oath, the language in this indictment is sufficient when tested on motion to arrest the judgment to constitute such an allegation.

Another objection is that the indictment fails to properly charge the falsity of the testimony given by the witness, but this point is ruled by the decision in *Loudermilk* v. *State, supra.*

The jurisdiction of the court in which the testimony was given was also sufficiently set forth in stating that the testimony was given in a certain criminal prosecution by the State in the circuit court of Columbia County. The evidence was sufficient to sustain the verdict and there is no assignment of error in the court's charge to the jury on other rulings during the progress of the trial.

Affirmed.

NATIONAL UNION FIRE INSURANCE CO. v. SCHOOL DISTRICT NO. 60.

Opinion delivered December 17, 1917.

1. APPEAL AND ERROR—HARMLESS ERROR.—A cause will not be reversed on appeal, because of an erroneous declaration or application of law by the trial judge, where no prejudice to the appellant is shown.
2. APPEAL AND ERROR—ACTION ON INSURANCE POLICY—FAILURE TO PLEAD CONDITION PRECEDENT—HARMLESS ERROR.—An action was brought on a policy of tornado insurance, and appellant demurred generally to the complaint; and set up in his brief that the appellee had not alleged the performance of certain conditions precedent to its right of action. *Held,* under the facts and pleadings that appellant failed to show any prejudice resulting to it from the rulings of the court, in overruling the demurrer.
3. APPEAL AND ERROR—INSTRUCTIONS—NOT RESPONSIVE TO THE ISSUES.—An instruction given by the court, although not responsive to the issues, is not cause for reversal, where no prejudice therefrom resulted to the appellant.
4. RECEIPT IN FULL—NOT BINDING, WHEN—MISTAKE.—A receipt is not absolute or conclusive, if given under a mistake.
5. CONTRACT—WRITING—CORRECTION FOR MUTUAL MISTAKE.—A written contract, executed under mutual mistake of the parties, is subject to inquiry and correction in a court of law as well as in equity.
6. INSURANCE—"PAYMENT IN FULL"—CORRECTION FOR MISTAKE.—An insurance company paid the claimant for a loss, the draft reciting that it was in "full satisfaction, compromise and indemnity for all claims and demands for loss and damage by storm, May 20, 1916, to the property described in the policy." It appeared that the parties were mistaken at the time as to the amount necessary to repair the loss; *held,* the statements in the draft were not absolute or conclusive.
7. INSURANCE—TORNADO—PROOF OF CONDITION UPON SUBSEQUENT DATE.—A building was damaged by a tornado in May, and very slightly damaged by another tornado in June. In an action on a tornado policy, for the damage done in May, *held,* under the facts, that evidence of its condition the following February, was admissible, it appearing that its condition in February was entirely due to the damage sustained the preceding May.

Appeal from Washington Circuit Court; *J. S. Maples,* Judge; affirmed.

J. W. Grabiel, for appellant.

1. The court erred in overruling the demurrer. The complaint does not allege the performance of the conditions precedent in the policy. 38 Ark. 127; Gould on Pleading (3 ed.) 175; 10 Ark. 416; Kirby's Digest, § § 623, 6119.

2. The court erred in its charge to the jury as to substantial compliance with the conditions of the contract. 57 Ark. 461.

3. It was error to refuse an instructed verdict for defendant. The liability has been fully settled. 93 Ark. 383. There was no fraud or mistake.

4. Testimony as to the condition of the school in February, 1917, was improperly admitted.

H. L. Pearson, for appellee.

1. The complaint stated a good cause of action. All conditions precedent were waived. 83 Ark. 126; 74 *Id.* 72; 77 *Id.* 27; 94 *Id.* 21; 79 *Id.* 266; 77 *Id.* 41; 72 *Id.* 365; 89 *Id.* 111; 94 *Id.* 227; 83 *Id.* 575; 33 *Id.* 428.

2. The instructions given are correct. But no proper exceptions were saved and no request for other instructions asked. 111 Ark. 231; 116 *Id.* 260; 110 *Id.* 209; 106 *Id.* 315.

3. The payment was not in full, as there was a mutual mistake. 86 N. W. 32; 70 *Id.* 761; 24 So. 936.

HUMPHREYS, J. Appellee instituted suit in the Washington Circuit Court against appellant on a tornado insurance policy for damages alleged to have been done to its school building by a storm on May 20, 1916. The west end of the building was blown off the foundation five or six feet and the east end five or six inches. The policy was made a part of the complaint and contained a "loss proof" clause to the effect that appellee would make written proof under oath of any loss that might occur within sixty days from the date of the loss. It also

contained a conditional arbitration clause and other clauses of like nature unnecessary to set out in this opinion, as no dispute arose in the case concerning them.

A general demurrer was filed to the complaint charging that it failed to state a cause of action. The demurrer was overruled and appellant saved its exception to this ruling of the court.

Appellant then filed an answer, reserving all rights under the demurrer. The answer admitted the issuance of the policy and that it was in force and effect on the 20th day of May, 1916; but denied that the school building was injured by tornado or wind storm or both; denied that the district suffered damage in the amount of $400, or that it was indebted to the school district in any sum whatever. By way of further defense, it alleged that if the school district suffered any damage by reason of a casualty covered by the policy, same had been proved, adjusted, compromised and paid by appellant; and specifically alleged that appellee filed its proof of loss on account of the damage on May 20, 1916, mentioned in the complaint, and that same was fully adjusted and paid by appellant. Appellee filed reply, denying that the loss pleaded in the complaint had been proved, adjusted, compromised and paid by appellant; and denied that appellee had filed proof of the loss covering damage on May 20, 1916, mentioned in the complaint; and denied that any payment was made or offered because of such casualty, loss or damage set up in the complaint.

The cause was heard upon the pleadings, oral evidence and instructions of the court and a verdict rendered in favor of appellee for $240, upon which judgment was rendered.

The necessary proceedings were had and done and an appeal has been prosecuted to this court.

(1-2) The first contention made by appellant for reversal is that the complaint failed to state a cause of action in not pleading performance by appellee of the conditions precedent in the policy. It will be observed the demurrer is general. It does not point out any spe-

cific condition in the policy as being a condition precedent. The record does not disclose that appellant pointed out to the circuit court the defect in the pleadings he now complains of. So far as the record speaks, he now, for the first time, insists that the complaint should have averred that appellee had performed all the conditions precedent in the policy or should have alleged the waiver of said conditions by appellant. Even now appellant does not point to any particular provision in the policy as a condition precedent to recovery. It is alleged in the answer that appellee made proof of loss in accordance with the requirements of the policy, therefore no prejudice resulted to appellant according to its own allegations on account of appellee's failure to plead performance in this particular. Appellant also pleaded by way of answer a compromise settlement and payment of the loss incurred by tornado or wind storm on May 20, 1916, and went to trial on that issue. This clearly constituted a waiver of the conditions precedent in the policy, and, therefore, no prejudice resulted to appellant on account of the failure to plead performance on its part or waiver on appellant's part. Learned counsel for appellant is correct in his contention that when instruments providing for mutual undertakings are made the basis of actions at law, the rule of pleading requires that the plaintiff allege performance of all conditions precedent on his part or a waiver of them by the defendant. This abstract proposition of law can not be gainsaid. It is also true, however, that before an erroneous declaration or application of law by a trial court can avail a party on appeal, he must show that he was prejudiced thereby. No prejudicial error resulted to appellant on account of the action of the court in overruling the demurrer.

(3) But it is insisted that the court erred in submitting to the jury the question of whether the appellee had substantially complied with the conditions of the contract when the pleadings did not aver a substantial compliance, and when no proof was offered upon that issue. It is true an instruction has no place in the case if not

responsive to the issues presented by the facts and pleadings, treated as amended to conform to the facts; but as stated with reference to overruling the demurrer in this case, if no prejudice resulted to appellant by the action of the court, the giving of such instructions can not work a reversal of the case. In two instructions given by the court on other issues in the case, the court predicated the right of appellee to recover upon a showing that it had substantially complied with the contract in all things on its part. Compliance with the conditions of the policy not being an issue in the case, the submission of that question to the jury placed a burden upon appellee that might have resulted in prejudice to it, but in no view of the case, could have resulted in prejudice to appellant, for the undisputed evidence showed that all conditions precedent contained in the policy were either complied with by appellee or waived by appellant. Appellant does not contend that appellee failed to comply with the conditions imposed by the policy. Unless there was a failure on the part of appellee to comply with the contractual conditions in the policy, no real prejudice resulted to appellant by the erroneous trend or course of the trial.

(4-6) Again, it is contended that appellant was entitled to a peremptory instruction for the reason that there was a complete settlement of the liability sued on. The building was repaired after it was damaged by the wind storm and paid for out of a check issued by the insurance company to the school district. One of the disputed facts in the case was which of the two parties assumed to make the repairs. The evidence was conflicting on the point. T. N. Sondgrass, who moved the building back on the foundation, and two of the directors, W. J. Vawter and C. M. Buttry, testified that Jones employed Snodgrass to repair the building. W. W. Jones testified to the contrary, stating that he agreed to make the repairs but that he employed Snodgrass at the instance of and for the board of directors. That question was submitted to the jury under proper instructions, and the finding of the jury was adverse to appellant. There was ample evi-

dence in the record to support the finding of the jury to the effect that the insurance company assumed to and did make the repairs.

After the repairs were made and the costs thereof ascertained, the directors made proof of loss. Thereupon, a draft was issued to the school district by the insurance company, which is as follows:

"Loss No. 20493. Pittsburgh, Pa., July 19, 1916.

"Draft No. 32128.

"Upon acceptance by the National Union Fire Insurance Company,

"The National Bank, Pittsburgh, Pa.,

"Will pay to (School District No. 60 the order of) ninety-five and 14/100 dollars, which payment evidenced by proper endorsement hereof, constitutes full satisfaction, compromise and indemnity for all claims and demands for loss and damage by storm May 20, 1916, to property described in Policy No. T-16214, issued at its H. O. F. D. Prairie Grove, Ark., agency, and said policy is hereby reduced in the amount of claim $95. To the National Union Fire Insurance Company of Pittsburgh, Pa. Claim, $95.14.

"Discount, $.....Net $95.14.

"Nelson Reid,
"Assistant Secretary."

The draft was endorsed by W. J. Vawter and C. M. Buttry, school directors of School District No. 60, and the proceeds thereof were apportioned among the parties who had assisted Snodgrass in repairing the building. Jones, the agent of the company, and Vawter and Buttry, directors of the school district, had each performed some labor for Snodgrass during the time he made the repairs. The proof of loss, based upon the cost of the repairs, and the draft issued and cashed by the directors and expended in the payment of repairs, was taken by the parties under the belief that the building

had been restored to its former condition. The undisputed proof, however, disclosed that the repairs were not substantial in nature and that the building began to slip from the foundation in a few days after the repairs were made. It continued to move toward the north until it became necessary to prop it with logs, and, at or about the time of the institution of this suit, was from five to ten inches out of plumb and unfit for use. It is in evidence that a second injury occurred to the property in June, and proof of loss and payment for the damage done by the second wind storm was made in the same manner as the first. This last damage, however, was of little moment, the expense of making the repairs only amounting to $5. The real damage done to the building resulted from the wind storm on May 20, 1916. The draft issued in payment of the damage caused by the wind storm on May 20, 1916, was in effect a receipt, contractual in nature. It was recited in the draft that the payment of $95.14 was in "full satisfaction, compromise and indemnity for all claims and demands for loss and damage by storm, May 20, 1916, to the property described in the policy." The law as to the effect of receipts in full settlement and compromise of claims or accounts is well settled in this State. The rule announced in *Burton* v. *Merrick,* 21 Ark. 357, is as follows:

"A receipt expressed to be in full of all demands is only *prima facie* evidence of what it purports to be, and upon satisfactory proof being made that it was obtained by fraud, or given under a mistake, it may be inquired into and corrected in a court of law as well as in equity. But where the receipt is introduced by the party relying on it, and there is no attempt from the other side to prove that it was obtained by fraud, or given by mistake, it must necessarily operate in the particular case as conclusive evidence of what it purports to be on its face."

This rule has been affirmed from time to time in subsequent decisions. *Fletcher* v. *Whitlow,* 72 Ark. 234; *Kahn* v. *Metz,* 88 Ark. 363; *Cache Valley Lumber Co.* v. *Culver Co.,* 93 Ark. 383. The proof of loss was made un-

der the belief that the building had been substantially and permanently repaired. The compromise was made and the draft or receipt was issued and accepted under the same belief. It can be said with certainty in the light of the facts in this case that the compromise was made and the receipt or draft executed and received under the mutual mistake of all parties concerned, that the building had been restored to its former condition. The instant case falls clearly within the exception to the rule to the effect that a receipt is not absolute or conclusive if given under a mistake. A written contract executed under mutual mistake of the parties would, like a receipt, be subject to inquiry and correction in a court of law as well as in equity.

(7) Lastly, it is insisted that the court erred in permitting testimony as to the condition of the school building on the 1st and 15th days of February, 1917, some seven months after the building was damaged. Immediately after the building was repaired, it began to slip and lean by degrees, and its condition became worse as time progressed. It received a second slight damage in June, but it is very clear under the evidence that the condition of the building in February was due to the damage sustained in May and not in June. The damage in June was inconsequential and so slight that its condition in February could not be traced to the damage received in June. The damage done in June was repaired at an expense of only $5. We think its condition in February, 1917, was fairly traceable to the damage done on May 20, 1916, and not too remote in time to be established by evidence. The judgment is affirmed.

McCULLOCH, C. J., (dissenting). I am unable to find in this record any justification for disregarding the written contract between the parties settling the controversy by compromise. The undisputed facts are that after the loss occurred the insurance company agreed to have the damage to the building repaired by a carpenter who was suggested by the school directors. There is a conflict in

the testimony as to who actually employed the carpenter, but none as to the fact that the directors selected him. The repairs were made and accepted by the directors, and the compromise settlement was reduced to writing in the form of a draft for the cost of the repairs and the directors signed the endorsement which recited the terms of the compromise. It was more than a mere receipt for the money. It was a contract for a settlement of the pending controversy.

This court has heretofore steadily adhered to the rule that such a contract can not be varied by parol testimony, nor set aside except for fraud or mistake. *Cleveland-McLeod Lumber Co.* v. *McLeod,* 96 Ark. 409; *Cherokee Construction Co.* v. *Prairie Creek Coal Mining Co.,* 102 Ark. 428; *Williams* v. *C., R. I. & P. Ry. Co.,* 109 Ark. 82; *K. C. S. Ry. Co.* v. *Armstrong,* 115 Ark. 123; *Hardister* v. *St. L., I. M. & S. Ry. Co.,* 119 Ark. 95; *Scullin, Receiver,* v. *Newman,* 127 Ark. 227.

In other words, the consideration mentioned in the contract and the agreement to accept it in full settlement of the controversy was of the essence of the contract and concluded the rights of the parties, unless there is sufficient proof of fraud or mutual mistake to justify a court in disregarding the contract. The distinction between a written receipt, which is only *prima facie* evidence of its contents, and a contract evidencing the mutual concessions of the parties has been recognized by this court in the decisions cited above. For instance, in *Cleveland-McLeod Lumber Co.* v. *McLeod, supra,* we said: "It is settled by authorities too numerous to mention that a receipt is only *prima facie* evidence of payment, which may be rebutted by proof that no payment was in fact made. A release, however, stands upon a somewhat different footing; and where there is an express agreement in writing for a release of enumerated demands or of all demands, this, like other contracts, is binding unless set aside on account of fraud or mistake, and can not be contradicted or varied by oral testimony." Again in the case of *Cherokee Construction Co.* v. *Prairie Creek Coal*

Mining Co., supra, we said: "The parties, in order to avoid the evils of litigation, made a compromise and settlement of all matters and differences between them. The lease or instrument in question was something more than a mere receipt. It was the final embodiment in writing of the agreement between the parties. It is a comprehensive discharge, not only of the differences between the parties, but of all matters between them."

There is no claim of fraud in this case which induced the execution of the contract, and the only mistake claimed is that the parties assumed in the contract that the building had been properly repaired. It is true that everybody, including the carpenter and one of the directors, who worked for the carpenter in making the repairs, thought the repairs were sufficient, but that was not such a mutual mistake as to justify a rescission of the contract. That was one of the contingencies which the parties settled in making the compromise agreement for final settlement of the controversy by payment of the sum spent in having the repairs made. There is no element in the case of the reliance by one party upon the superior knowledge of the other party, or its agents, concerning the subject-matter of the settlement, so as to afford grounds for setting aside the contract.

The result of the decision in this case is to release one of the parties from the binding force of the contract merely because he got the worst of the bargain, without fault of the other party, and without any mistake on either side as to what the parties intended to settle by the compromise.

JOHNSON v. ANKRUM.

Opinion delivered December 22, 1917.

BILLS AND NOTES—RENEWAL—THIRD PARTY AS PAYEE—CONSIDERATION. —One A. held two notes executed by appellee, payable to her. She gave them to appellant to collect, agreeing to give him 50 per cent. of the amount collected. The notes being about to become barred by limitations, appellee executed a new note for the aggregate amount payable to appellant. *Held,* appellant could maintain an action and enforce payment of the said new note.

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

S. S. Hargraves, for appellant.

1. Plaintiff was the agent of Alice Stanford and had the right to sue. Kirby's Digest, § 6002; 76 Ark. 558; Mechem on Agency, § § 755, 763; Clark & Skyles on Agency, 1331, 1341; 80 Ark. 228.

2. There was sufficient consideration shown. 31 Ark. 222.

F. F. Harrelson and *Mann, Bussey & Mann,* for appellee.

Plaintiff had no right to sue. Alice Stanford should have been joined. There was no consideration for the notes and no valid contract between plaintiff and appellee. 2 Black on Judgm., § 534.

McCULLOCH, C. J. Appellant instituted this action against appellee before a justice of the peace to recover the amount of a promissory note in the sum of $160. There were no written pleadings, and the record does not disclose what defense was offered. The note sued on was one executed by appellee to appellant, and the note was introduced in evidence. Appellant testified in substance that the note was executed to him in satisfaction or in renewal of two notes formerly executed by appellee to one Alice Stanford, and that he (appellant) had the notes for collection. He testified that he had an agreement with Alice Stanford that he should have, as compensation for

his services, fifty per centum of the amount collected from appellee, that the notes were about to be barred by the statute of limitations, and that he took the new note from appellee in renewal of the old ones.

At the conclusion of appellant's own testimony, the court gave a peremptory instruction in favor of appellee on the ground that Alice Stanford was the real party in interest and that appellant had no right, according to his own testimony, to maintain the suit. Counsel for appellee say that the ruling of the court was correct, and that even if an unsound reason was given for the ruling, the judgment should not be reversed. They defend the ruling of the court on the ground that even though appellant had a right to maintain the action, the note being in his name, that the proof shows there was no consideration for it. It is clear that appellee had the right to maintain the action under the statute which provides that "a person with whom, or in whose name, a contract is made for the benefit of another, * * * may bring an action without joining with him the person for whose benefit it is prosecuted." Kirby's Digest, § 6002.

The note was introduced in evidence, and it made out appellant's case for recovery of the amount. It devolved upon appellee to show that the note was executed without any consideration. There was no effort to make such proof, and the testimony of appellant himself shows that there was a consideration in that this note was executed in renewal of two others. The fact that the other two notes were made payable to Alice Stanford does not defeat the consideration, for the testimony of appellant shows that he had an interest in the note himself to the extent of one-half, and that he was authorized by Alice Stanford to represent her in the collection of the former notes. There was no attempt to show that Alice Stanford had not given any such authority and no one else could complain.

It developed in the course of appellant's testimony that he had not actually surrendered possession of the old notes, but he was not asked to explain why he had not

done so. He testified positively, however, that this note was given in renewal of the old ones and that made out a sufficient consideration; but had it been shown that he refused to surrender the old notes, or that Alice Stanford had repudiated the transaction and was attempting to enforce payment of the old notes, then a case of failure of consideration would have been shown, but no such state of facts appears in the present record.

We are, therefore, of the opinion that the court erred in giving a peremptory instruction, and that on the contrary, in the state of the record now presented, judgment should have been rendered in appellant's favor on the note.

Reversed and remanded for a new trial.

NATIONAL SURETY COMPANY *v.* BERTIG BROTHERS.

Opinion delivered December 22, 1917.

GARNISHMENT—CLAIM OF EXEMPTION BY DEBTOR—EFFECT OF JUDGMENT AGAINST GARNISHEE.—Judgment was rendered against a garnishee fixing the funds of the debtor in his hands. *Held,* the debtor may thereafter claim such funds as exempt, and when such claim is allowed by the court, the garnishee may properly pay over such funds to the said debtor.

Appeal from Greene Circuit Court, First Division; *R. H. Dudley,* Judge; reversed.

R. E. L. Johnson, for appellant.

After judgment Pigue filed his schedule for exemption. The exemption was allowed. The funds were exempt. 1 Bacon on Ben. Soc. 794; 131 Cal. 437; 61 N. W. 456; 63 *Id.* 627; 67 *Id.* 994; 143 Mass. 216; 43 Oh. St. 1; 76 Pac. 861; 65 Ark. 112.

W. S. Luna and *Jeff Bratton,* for appellee.

1. Plaintiff had a valid judgment and the writ of garnishment having been duly issued and saved, the company is liable. 89 Ark. 378; 98 *Id.* 144.

2. The fund was not exempt. Kirby's Digest, § § 4351-8. A lien was fixed by the garnishment, and no subsequent payment to defendant could destroy the said lien. 89 Ark. 378; 98 *Id.* 144. See also 117 Ark. 125; Kirby's Digest, § 4354.

STATEMENT OF FACTS.

The facts were as follows: The Supreme Forest Woodmen Circle is a fraternal benefit society organized under the laws of the State of Nebraska, and authorized to transact business in the State of Arkansas. W. C. Pigue was a beneficiary in one of its policies for $500, issued on the life of his wife. The National Surety Company was on the bond of the Forest Woodmen Circle (hereafter, for convenience, called circle) in the sum of $10,000. The bond was conditioned to protect the policy or certificate holders in the prompt payment of claims due from the circle.

Upon the death of Mrs. Pigue, and before any money was paid by the Circle to W. C. Pigue, Bertig Brothers, a partnership, obtained judgments against W. C. Pigue, amounting in the aggregate to the sum of $142.77, upon which judgments they caused a writ of garnishment to issue against the Circle, and obtained judgments against the Circle as garnishee by default for the amount of their judgments against Pigue. Notwithstanding this fact, the Circle paid over to W. C. Pigue the sum of $297, and Pigue scheduled the balance of $203 as a part of his exemptions, and that was paid to him under the order of the court.

Bertig Brothers instituted this suit against the appellant surety company, alleging a breach of the bond by the Circle in the payment of the money to the beneficiary without an order of the court, and seeking to hold the appellant liable for the total amount of their judgments against W. C. Pigue, amounting to the sum of $195.

The court below held as a matter of law that the service of the writ of garnishment fixed a lien in favor of the appellees upon the indebtedness of the garnishee to the

defendant; that the beneficiary was the absolute owner of the funds represented by the certificate, and being his funds, they were properly reached by the writ of garnishment, and that the payment of the money under the facts stated constituted a breach of the bond, for which the appellant was liable, and rendered judgment in favor of the appellees against the appellant for the amount of their claim, from which judgment this appeal comes. Other facts stated in the opinion.

WOOD, J., (after stating the facts). The undisputed evidence in the record is that after judgment was rendered by default against the Circle, as garnishee, adjudging that it had in its hands the sum of $500 that was due W. C. Pigue, Pigue filed a schedule before the clerk of the circuit court, claiming the amount thus adjudged in the hands of the garnishee as exempt. The schedule was allowed by the clerk, and the appellees here appealed from that allowance to the circuit court and the circuit court affirmed the action of the clerk, and no appeal was taken by Bertig Brothers from this judgment of the circuit court.

Thereafter, on the 5th of September, appellees filed this suit, alleging that the paying of the money by the Circle to W. C. Pigue was a breach of its bond. Passing by the other interesting questions, it is only necessary to consider this one, for it settles the issue in favor of the appellant.

The court declared the law to be that, "by the service of the writ of garnishment the plaintiff fixed a lien upon the indebtedness of the garnishee to the defendant, and no subsequent payment of the indebtedness to the defendant could destroy the lien or affect the right of the plaintiff." This was error.

In the case of *Blass* v. *Erber,* 65 Ark. 112, we held (quoting syllabus): "Funds in the hands of a garnishee may be claimed as exempt by the debtor after judgment has been rendered against the garnishee fixing the funds

in his hands." Citing *Robinson* v. *Swearingen,* 55 Ark. 55.

These cases rule the present one. Appellees predicated their cause of action upon these facts, that the Circle disregarded the writs of garnishment, and without any order of the court out of which the garnishments issued paid to Pigue the sum of $500. They contend that by so doing the Circle breached its bond to the State of Arkansas, and that by reason of such breach the appellant, as the surety of the Circle, became liable. But since it was adjudged that the $500 was an exemption in favor of Pigue, the judgment debtor, under the schedule filed by him it was wholly immaterial, under the above authorities, so far as the rights of appellant are concerned, whether the money was paid by the Circle with or without the orders of the court. It was paid to the one entitled to it, and, according to the above cases, it could not be subjected to the payment of appellees' debt, and the court erred in holding to the contrary.

The judgment is therefore reversed and appellees' cause of action is dismissed.

WESTERN COAL & MINING CO. v. WATTS.

Opinion delivered December 22, 1917.

1. MASTER AND SERVANT—INJURY TO SERVANT—OPERATION OF MINE—STATUTORY DUTY OF MASTER—JURY QUESTION.—A mine operator is liable for an injury to an employee resulting from a failure to furnish props as required by Kirby's Digest, § 5352, irrespective of the issues of assumed risk and contributory negligence; and it is a question for the jury whether the necessary props were requested, and whether the mine operator's failure to supply them was the proximate cause of the injury.
2. MASTER AND SERVANT—INJURY TO SERVANT—VIOLATION OF STATUTE.—Where the violation of any statute enacted for the safety of the employees, contributes to the injury or death of an employee, the master can not invoke the defense of contributory negligence, and assumption of risk on the part of the employee.

Appeal from Franklin Circuit Court, Ozark District; *Jas. Cochran,* Judge; affirmed.

Thos. B. Pryor, for appellant.

1. The court erred in refusing a peremptory instruction for defendant. 101 Ark. 205. It was plaintiff's duty to make and keep the entry safe. 146 Ia. 489; 41 W. Va. 620.

2. The court erred in giving the instructions for plaintiff and in refusing those of defendant. The props were not ordered, but were furnished. Plaintiff clearly assumed the risk. Cases *supra.*

J. H. Evans, for appellee.

The act of 1913 takes away the defense of assumed risk, and contributory negligence. This was a clear violation of a statute. 101 Ark. 205 is not applicable. Here the failure to furnish props when requested was the proximate cause of the injury and there was no assumption of risk. The jury were properly instructed and the verdict is sustained by the evidence. There is no error.

STATEMENT OF FACTS.

The appellant is a corporation of Missouri, and owns and operates a coal mine in the Ozark district of Franklin County, Arkansas. On the 11th of September, 1914, the appellee, an experienced miner, was in the employ of defendant, and was engaged in driving what is known as a cross-entry in appellant's mine. While so engaged rock fell from the roof of the entry which severely injured the appellee, and for the damages resulting to him from this injury he instituted this suit, alleging that it was the duty of the appellant to keep the appellee supplied with timbers to be used as props in making his working place secure; that appellee several times requested of the appellant to deliver him props, which appellant, through its servants, promised to do but failed; that appellee, relying on the promise, continued to work in the entry until the rock fell and produced the injuries for which he sued.

The appellant denied specifically the allegations of negligence, and set up affirmatively the defenses of contributory negligence and assumption of risk.

The cross-entry was something like twelve to fourteen feet wide. A track was laid on the floor of the entry. The track is laid in the entry near what is termed the "rib side." One side of the entry, next the coal, is called the "gob" side, where the rock which is taken down is thrown while the work of taking down the rock from the roof is progressing. The other side is termed the "rib" side of the entry. The entry had been driven a distance of about seven feet beyond where the rock fell. It was about twenty or twenty-five feet from the point where appellee received his injury to the face of the entry, and he and his assistant had been at work driving the entry about two days when the injury occurred.

It was not usual and customary to put props on the rib side, but where a greater space was made on that side by the kicking back of shots it became necessary to prop, and props were placed on that side. This had been done in a number of places back behind the place of the injury. The rock was in what appellee designated a "mud slip." If such rocks are not timbered at the right time they will sag down and give way. There was not enough space between the rock in the roof and the floor to allow for the passage of the mule and it was necessary to shoot part of the rock down. It was appellee's purpose to prop the side next to the rib and then shoot it down. Appellee called for the props, but they were not furnished. Some props were furnished, but they were not of the right length. They needed three props to set on the rib side, but could not get them for the top. The appellee needed props something like four feet and nine inches in length. He had ordered such props on the morning he was injured and also on the evening before. They then tried to prize the rock down and it did not give. They examined its condition and decided that it was all right to go under it and clean up the rock, and while they were doing so it came down. The props were nec-

essary because the space was wider there. The appellee wanted the props for the purpose of brushing the rock down. If there was a rock extending out over the track they propped the rock so as to take down only that that was right over the track. It was their intention to take down all the rock that would come down with the shot.

The appellee stated that if he had had the props he would have put them under the rock. The right-of-way was three feet guage, leaving two feet on either side. The rock over the track had to be shot down, and that would have left six inches on the side which appellee stated he would have propped if the props had been furnished him. It was customary to put the track from eighteen to twenty inches from the rib side of the entry. In some places the distance between the track and the rib is greater than this by reason of the fact that shots kick back and make a larger place, which was the case at the place of the injury. Instead of being eighteen inches it was from two and a half to three and a half feet. It was not customary to put props on the rib side, but where greater space was made on the rib side on account of the shots kicking back then it became necessary to place props on that side. This had been done in a number of places back behind the place where the injury occurred. There was a space of three and a half feet, according to one of the witnesses, from the rail to the rib on the rib side, and that left the rock without propping for a space of about eight feet and a half.

On cross-examination, the appellee testified that he had tested the rock and it looked like it was perfectly safe. He was asked if he was not mistaken in his judgment, and answered: "I probably was; it shows that way."

The above are substantially the facts as they might have been found by the jury under the evidence. The cause was submitted to the jury under instructions, and the verdict and judgment were in favor of the appellee. This appeal seeks to reverse the judgment. Other facts stated in the opinion.

WOOD, J., (after stating the facts). (1) The appellee predicates his cause of action upon section 5352 of Kirby's Digest, which provides: "The owner, agent or operator of any mine shall keep a sufficient amount of timber when required to be used as props, so that the workmen can at all times be able to properly secure the said workings from caving in, and it shall be the duty of the owner, agent or operator to send down all such props when required and deliver said props to the place where cars are delivered."

The appellant contends that the undisputed evidence shows that it was the duty of the appellee to make his place of work safe, that under the undisputed evidence the props were not required or desired by him for the purpose of making his working place safe, and that it was his duty, under his contract, to make his place safe by prizing or shooting down the rock, or in some other way than by the use of props to hold up the rock. To sustain this contention appellant relies upon the case of *Western Coal & Mining Co.* v. *Fountz,* 101 Ark. 205. But in that case the undisputed evidence showed that the timbers were not ordered to prop up the loose rock and would not have been used for that purpose if they had been furnished before the injury occurred. Such being the uncontradicted evidence, we held that "the failure to furnish props had nothing to do with the injury, and the result would have been the same if props had been furnished." And further on we said: "Even though the workmen were not negligent in working under the loose rock, the injury resulted solely from an error of judgment on their part in concluding that the rock would not fall unless shaken down by shot firing, and that it would be safe to work under it for the remainder of the day and until it could be ascertained whether or not the shot firing would bring it down." But the facts of that case are entirely different from the facts here. Here the jury were justified in finding from the testimony of the appellee and his assistant, who was working with him at the time of his injury, that the props were ordered by

them so as to enable them to keep the rock from falling and make the place safe while they were working under the same. The witness expressly testified that his purpose in ordering the props "was to prop the rib side so as to make it safe on that side to prevent the rock from falling." Witness stated: "If the props had been furnished he would have used the props to prevent the rock from falling," and he stated further that "going so long without sufficient props caused this to break. It was a treacherous piece of roof."

True, the witness, on cross-examination, stated that in trying to wedge it down, and prizing it down and testing it, it seemed to him that he made a mistake in judgment, and that after so testing it and after trying to prize it down, they sounded it with a pick and concluded it was safe to work under. But when the testimony of the appellee is considered as a whole it is very clear that it made a question for the jury to determine as to whether or not appellee demanded the props for the purpose of using the same to make his place safe, and whether or not, under the circumstances, they were necessary for that purpose, and whether, if the same had been furnished as requested, they would have been used for the purpose indicated and thereby have prevented the injury to the appellee.

The issue therefore as to whether or not the failure of the appellant to furnish props as the statute requires was the proximate cause of the appellee's injury was one, under the evidence, for the jury to determine. The court properly submitted this issue to the jury by declaring what the statute required, and telling the jury, in effect, that if appellant failed to furnish props and this failure was the proximate cause of appellee's injury that the appellant would be liable even though the jury should find that the appellee made a mistake of judgment and that but for such mistake he would not have been injured.

(2) The court correctly instructed the jury, in effect, that if the proximate cause of the injury was the failure of appellant to furnish props that neither the de-

fenses of contributory negligence nor assumed risk could avail the appellant. If, under the evidence, the proximate cause of the injury was the failure to furnish props as the statute required, then appellant had violated this statute (Act 175, Acts 1913). Where the violation of any statute enacted for the safety of the employees contributes to the injury or death of an employee the corporation can not invoke in its defense the contributory negligence and assumption of risk on the part of the employee.

The theory of the defense was that the uncontradicted evidence showed that the appellee would not have used, and that it was impracticable for him to have used the props if the same had been furnished him, and that therefore the failure to furnish props was not the proximate cause of appellee's injury. But, as we have stated, under the evidence this was an issue of fact for the jury. Appellant further contends that under the evidence such props as the appellee ordered had been delivered before the rock fell, and that the appellee did not use or attempt to use them to prop the rock, and that therefore the failure to furnish the props was not the proximate cause of his injury. This was also an issue for the jury, and the theory of appellant was correctly presented in prayers for instructions presented by appellant which the court granted.

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

BATTE v. ST. LOUIS SOUTHWESTERN RAILWAY CO.

Opinion delivered December 22, 1917.

1. RAILROADS—DUTY TO SCREEN WINDOWS—ESCAPE OF CINDERS—DUTY TO KEEP ENGINE IN REPAIR.—A railroad company is under no duty to screen its windows to prevent cinders coming into its cars, and causing injury to its passengers; but it is its duty to keep its engines in good repair and to see that they are supplied with the best known appliances to prevent the escape of cinders, and where a passenger's eye was injured by a cinder blowing into it through an open window, it is the duty of the railway to see

that its engines were properly operated, and that such was the case at the time the injury occurred.

2. RAILROADS—FLYING CINDER—INJURY TO PASSENGER.—A passenger, under Kirby's Digest, § 6773, makes out a *prima facie* case of negligence against a railway company, where he shows that a cinder from its locomotive engine blew through an open window in its car, on which plaintiff was a passenger, and lodging in his eye, inflicted an injury. It is then the duty of the railroad company, if it would escape liability, to show that its engine was supplied with the best known appliances to prevent the escape of cinders, that said appliances had been duly inspected, and were in good repair at the time plaintiff received his injury, and that its engine was being properly and skillfully managed and operated at the time the injury occurred.

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

J. M. Carter, for appellant.

1. It was error to direct a verdict for defendant. Having shown that he was injured by the operation of the train, under Kirby's Digest, section 6773, plaintiff was entitled to recover. 73 Ark. 552; 121 *Id.* 359; 75 *Id.* 479; 101 *Id.* 117.

2. Negligence was proven in failing to screen the car windows. 92 Ark. 432; 102 U. S. 451; 115 Ark. 269; 119 *Id.* 252; 114 *Id.* 146.

Daniel Upthegrove, J. R. Turney and *Gaughan & Sifford,* for appellee.

Screens were not required by the statutes of this State, and failure to screen was not negligence. 92 Ark. 432. The engine was provided with suitable and proper spark arresters and screens. 110 S. W. 248. No case for a jury was made and a verdict was properly directed. Some sparks will come through the most approved screens. *Ib.*

HART, J. This was an action brought by J. R. Batte against the St. Louis Southwestern Railway Company for damages growing out of an injury to his eye inflicted by a cinder from the locomotive of one of its passenger trains on which the plaintiff was a passenger.

Some time in September, 1916, J. R. Batte and his son boarded one of the defendant's passenger trains at Spirit Lake, Arkansas, for Texarkâna, Arkansas. The train was going west. They paid their fares and took a seat in the smoking car facing the way the train was going. The plaintiff sat next to the aisle and his son next to the wall on his left. The window at the end of their seat was closed but the one at the end of the seat in front of them was up. The windows in the car were not screened. Just before they got to Texarkana, the plaintiff felt something blow in his eye. It struck pretty hard and caused him severe pain. A physician was called to examine his eye and removed therefrom a foreign substance imbedded in the ball of the eye immediately over the sight, about the size of a small pin head. It looked like a coal cinder. The eye had the appearance around the place where the cinder was found imbedded in it of having been burnt as from the heat of the cinder. The plaintiff's eye was badly damaged from the cinder striking it and becoming imbedded in it.

It was shown on the part of the railroad company that its engines burned coal in making steam; that the draught of the engine blows out coal cinders; that there is a screen or net work or wire from the exhausts for the purpose of preventing cinders from being blown out; that the meshes of this net are some smaller than a lead pencil; that the screens are to prevent the throwing out of cinders and fire; that if the meshes of these screens were small enough to prevent any cinders from being thrown out that there would not be draught enough in the engine to make steam; that all of the defendant's passenger engines burn coal and the engines have nets in the smoke stacks to keep them from throwing sparks.

It was also shown on the part of the plaintiff that the windows of the car could have been screened with little cost without in any way interfering with the service of the cars; that the screens could have been put in on the outside of the windows without interfering in the least with raising them.

At the conclusion of the evidence the court instructed a verdict for the defendant company, and from the judgment rendered the plaintiff has appealed.

The Legislature of 1913 passed an act requiring railway companies operating passenger trains in this State to keep their cars screened at certain times. Acts of 1913, page 152. This act was repealed by the Legislature of 1915. Acts of 1915, Act 243, p. 903.

The injury to the plaintiff was received in September, 1916, so that it will be seen the railroad company was not in violation of any statute for failing to place screens on the windows of its passenger coaches.

(1) It was the contention of the plaintiff that the defendant company was guilty of negligence in failing to screen its car windows to protect its passengers from injuries like the one inflicted in this case. We do not agree with counsel in this contention. It was the duty of the defendant company to keep its engines in good repair and see that they were supplied with the best known appliances to prevent the escape of cinders. It was also its duty to see that its engines were properly operated and that such was the case at the time the injury occurred. *Missouri K. & T. Ry. Co.* v. *Orton* (Kan.), 73 Pac. 63.

(2) The undisputed evidence in the present case shows that the company was not negligent in the construction of the nets in the smoke stack of its locomotive. The undisputed evidence, however, does not acquit the company of negligence in the management and operation of its engine or in inspecting and keeping in repair the network in the smoke stack. Section 6773 of Kirby's Digest provides that all railroads operating in whole or in part in this State shall be responsible for all damages caused by the running of trains in this State. The railroad did not go far enough in this case to overcome by the undisputed evidence the *prima facie* case made out in favor of the plaintiff under this statute. It should not only have shown that the engine of the train was supplied with the best known appliances to prevent the escape of cinders, but it should also have shown that the

appliances had been duly inspected and were in good repair at the time the plaintiff received his injuries. It should also have been shown that its engine was being properly and skillfully managed and operated at the time the injury occurred.

It is true the evidence shows that cinders of the size of the one in question could come through screens of the most approved pattern in use; but it is equally true that many more such cinders would escape if the net or screen was torn or if the engine was not operated in a skillful manner. The burden being upon the defendant to overcome the *prima facie* case for the plaintiff under the statute, it follows that the court erred in directing a verdict for the defendant. For that error the judgment will be reversed and the cause remanded for a new trial.

SMITH, J., dissents.

WYLIE v. STATE.

Opinion delivered December 22, 1917.

1. APPEAL AND ERROR—CRIMINAL LAW—SUFFICIENCY OF THE EVIDENCE.—In reviewing the evidence in a criminal appeal, under a directed verdict, this court will consider only the undisputed testimony offered in appellant's behalf.
2. CARRYING CONCEALED WEAPON—NECESSARY PROOF.—To sustain a conviction for carrying a concealed weapon, under Kirby's Digest, § 1609, and the Act of March 29, 1907, p. 323, it is essential that the proof show that the pistol was carried as a weapon, and whether it was so carried is a question for the jury.
3. CRIMINAL LAW—DIRECTED VERDICT—CRIME PUNISHABLE BY IMPRISONMENT.—The trial court is without authority to direct a verdict, in a prosecution for the carrying of a concealed weapon, brought under Kirby's Digest, § 1609, and the Act of March 29, 1907, p. 323, where the punishment for the crime is a fine, imprisonment or both.

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

J. W. Morrow, for appellant.

1. The pistol must be carried *as a weapon.* This is a question of intent, a question of fact for a jury. 68 Ark. 447.

2. It was error to direct a verdict, as the guilt or innocence of defendant was purely a question of fact. Besides, on neither occasion was it carried as a weapon. On the first he merely carried it home and on the second it was in Lee County.

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

1. The undisputed evidence shows that he was guilty. Any errors in the instructions were harmless. 99 Ark. 576; 91 *Id.* 97; 104 *Id.* 140.

In the absence of evidence to the contrary it will be presumed that if concealed, it was carried as a weapon. 34 Ark. 448; 99 *Id.* 65, 68. The evidence being undisputed the court properly instructed a verdict, leaving the jury to fix the punishment. 84 Ark. 564; 88 *Id.* 269.

SMITH, J. (1) At the trial of this cause in the court below, the jury was directed to find the appellant guilty of the charge of carrying a concealed weapon, and fix his punishment at a fine of not less than fifty dollars nor more than two hundred dollars, and this appeal has been prosecuted to reverse a judgment imposing a fine of $100 upon a verdict so returned. The proof on the part of the State was to the effect that appellant had carried a pistol on two different occasions, but the court did not specify the occasion for which the fine should be imposed, and it will, therefore, be necessary to review the evidence upon both occasions; but, inasmuch as a verdict was directed against appellant, we need consider only, for the purpose of this appeal, the undisputed testimony and that offered in his behalf. According to this testimony, appellant had bought a pistol in Forrest City at a restaurant from a boy named Will Fleming, and the pistol was put in a suitcase, along with some cartridges, and the suitcase was carried by Fleming and placed in a truck belonging to one Charlie Walker, on whose farm appellant

lived. Appellant rode in the truck to his home. Walker testified that appellant did not have on a coat, nor did he have the pistol on his person. There was also testimony that one Clem Kilgore borrowed the pistol, and carried it to the Cut Off, where appellant some days later shot the pistol at a snake; but that the Cut Off was in Lee County, whereas appellant was charged with carrying the pistol in St. Francis County.

(2) By section 1609 of Kirby's Digest, it is made unlawful to carry a pistol as a weapon, and by the act of March 29, 1907, page 323, it is provided that any person convicted of a violation of the provisions of section 1609 of Kirby's Digest shall be punishable by fine of not less than fifty dollars nor more than two hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than three months, or by both fine and imprisonment. To sustain a conviction under this statute it is essential that the proof show that the pistol was carried as a weapon. It is true that it has been said that, when it was shown that a person wore a pistol concealed, the presumption was that it was carried as a weapon; but in the same case it was also said that this presumption was one of fact which might be overcome by affirmative proof that it was not carried as a weapon. *Hatchcock* v. *State,* 99 Ark. 65. The jury here might very well have found that appellant, in carrying the pistol from the place of its purchase to his home, was not carrying it as a weapon. *Carr* v. *State,* 34 Ark. 448. And, so far as the second occasion was concerned, the jury might have found that the venue had not been properly proved.

(3) The court erred in directing the verdict for still another reason. This offense is punishable either by a fine or imprisonment, or by both fine and imprisonment,and it was within the province of the jury to decide what the appropriate punishment would be. It is true the jury was directed to impose a fine only; but, when the court instructed the jury as a matter of law that the appellant was guilty as charged, it was the province of the jury to determine what the punishment should be. Of course,

the jury could not have exceeded the limits fixed by the statute, and the judge might have reduced the maximum sentence to a lower one, or to the lowest one, and yet the court might not have done so. We need not speculate about the probable action of a trial judge under the circumstances stated. The question is one of power. The trial judge directed the jury to return a verdict of guilty when the punishment might have been imprisonment.

In the case of *Roberts* v. *State,* 84 Ark. 564, the members of the court differed about the right of the trial court to direct the jury to return a verdict of guilty in any case, and the writer of the opinion expressed the view that it could not be done in any case; but the view of the majority was expressed as follows: "In this case, however, while the verdict rendered was for fine only, the appellant was tried for an offense punishable either by fine or imprisonment. Section 5241, Kirby's Digest. We are all of the opinion that in such cases the trial judge has no power to direct a verdict. Says Mr. Bishop: '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.' * * * The majority of the court is of the opinion, however, that our own court is already in line with the doctrine announced in the *United States* v. *Susan B. Anthony,* 11 Blatch. 200, 24 Fed. Cas. No. 4450, and the Michigan cases holding to the same doctrine. And that the doctrine of these cases is founded upon the sound legal principle that where the facts are undisputed, and only one inference can be drawn from them the question is then one of law for the court, and not of fact for the jury. But the doctrine can not apply in a case where jeopardy attaches, for the reason that in such cases, as before stated, the court is without power to set aside a verdict of acquittal or to direct a verdict either way. Inasmuch as there

might have been imprisonment in this case, it follows that the court erred in directing the verdict."

In the more recent case of *Parker* v. *State,* 130 Ark. 236, 197 S. W. 283, we held that the court, in a prosecution for embezzlement, could not direct a verdict of guilty, although the testimony was undisputed; that the plea of not guilty, itself, put in issue the truth of the evidence; and, while the charge there was a felony, the decision of the court was not controlled by that fact, as no distinction is made where imprisonment is the punishment, whether the charge be a felony of a misdemeanor.

For the errors indicated, the judgment will be reversed and the cause remanded.

LASKER-MORRIS BANK & TRUST COMPANY *v.* JONES.

Opinion delivered December 22, 1917.

REAL ESTATE BROKERS—COMMISSIONS—FACTS NOT KNOWN TO THE SELLER.—Appellee employed appellant to sell certain property, and appellant procured a purchaser for the property. A written contract between the purchaser and appellee was drawn up, which provided, among other things, that the purchaser was to pay $3,500 cash, and appellee was not to pay any commission out of that sum. Appellee then refused to complete the transaction, it appearing that the purchaser was to pay $4,000 cash, and appellant was to receive $500 of this as his commission. *Held,* the appellant was entitled to a commission of $500.

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

Cockrill & Armistead and *Edgar H. McCulloch,* for appellant.

1. The court erred in its findings of facts and conclusions of law therefrom.

Appellant was employed to sell or change appellee's property. A purchaser was procured and a binding contract entered into, which was never carried out through the fault of appellee. No valid defense was shown. 117 Ark. 566. Parol evidence was admissible to show the real

consideration of the contract. 10 R. C. L. 1020, par. 213. Specific performance against Raines could have been maintained to compel Raines to pay the $4,000. See also A. & E. Ann Cas. 1912-A, 1267; 119 Ark. 6.

Carmichael, Brooks & Rector, for appellee.

1. Appellee never agreed to pay the $500 commission. The minds of the parties never met. The findings of the court are as conclusive as the verdict of a jury.

2. Good faith was required. The agent of appellant did not act in the utmost good faith as the testimony shows he never disclosed the offer of $4,000 cash.

3. Where one party to a contract breaches it, the other may elect to treat the whole contract at an end. 3 Elliott on Cont., § 2026; 3 Page on Cont., § § 1432-1442; Lawson on Cont. (2 ed.), 525, 531; Black on Rescission and Cancellation, etc., Vol. 1, § 196, p. 507; 30 L. R. A. 30.

4. Specific performance would not lie against Raines to enforce the payment of $4,000 cash. 89 Ark. 289; 85 *Id.* 442.

5. The burden was on plaintiff to show that Raines' objection to the title was a valid one. The special findings were not inconsistent with the general finding. 84 Ark. 359; 106 *Id.* 296. Raines breached the contract and appellee was not liable. 112 Ark. 567, 571. George E. Jones was never given an opportunity to sign the deed, and his signing was not shown to be necessary.

SMITH, J. Appellant brought this suit to recover a sum alleged to be due as commissions upon a sale of real estate. The suit was prosecuted upon the theory that appellee had employed appellant to negotiate a sale of certain lots owned by her in the city of Little Rock, and that a valid and binding contract had been entered into with a prospective purchaser, which appellee should have caused to be specifically performed, and that, when she failed to do so, and thereby released the prospective purchaser from the obligations of his contract, she did not absolve herself from her liability for the broker's commissions, as these commissions were earned when an en-

forceable contract, complying with the terms of the agency was entered into with the prospective purchaser. Appellant opened negotiations with a prospective purchaser named Raines, and finally entered into the following contract in writing with him:

"Received of Mr. E. E. Raines the sum of $10 as part payment on the east 125 feet of lots 7, 8 and 9, block 175, city of Little Rock, the purchase price of property to be $3,500 cash, the assumption by said E. E. Raines of a mortgage for $5,000 now on the property in favor of the Union Trust Company, and for the remainder of the purchase price said E. E. Raines is to deed to me, free of all liens and encumbrances, lots 7, 8, 9, 10, 11 and 12, block 8, North Argenta.

"It is understood that Mr. E. E. Raines is to pay the taxes on the property I am selling to him for the year 1915, and I am to pay the taxes on the six lots in Argenta above described, also that I am not to pay any commission out of the above described $3,500.

"(Signed) Sadie L. Jones.

"Stamp, E. E. R., 12/28/1915.

"Accepted, E. E. Raines."

There was also introduced in evidence a writing identical with the one set out except that the name of Raines was signed by M. J. Sullivan, agent. Sullivan was an employee of appellant company, and had charge of the trade for it. His good faith is questioned by appellee, who insists that she was not advised that a cash consideration of $4,000 was in fact to be paid, instead of the sum of $3,500 as recited in the contract set out above. Sullivan testified that appellee was to receive the $3,500 net, and that appellant company was to have the additional $500 as its commission, and that this fact was explained to, and understood by, appellee. This suit was brought to recover this $500.

The court made the following findings of fact:

"2. Plaintiff was employed by the defendant as her agent to sell or exchange her property described in the complaint.

"3. Defendant did effect an agreement which was in writing between E. E. Raines and the defendant. This agreement was for $3,500—defendant to pay no commission. Defendant offered to comply with this agreement and submitted a deed signed by herself, which was refused by Raines on account of her son not having signed it.

"4. The plaintiff was the agent of Sadie L. Jones, defendant in this transaction.

"5. E. E. Raines was ready, willing and able to carry out the above mentioned contract.

"6. M. J. Sullivan, agent for the plaintiff, discussed the transaction with the defendant, stating to her that the deal was for $4,000 and that he 'was getting' $500 as his commission.

"7. The defendant was told that plaintiff was to get $500 commission, but defendant expected that to be included in the purchase price over and above the $3,500.

"9. Plaintiff brought defendant and Mr. E. E. Raines together in a contract that was evidenced in writing for an exchange of property and $3,500 in cash.

"10. After the making of the written contract E. E. Raines submitted to the agent of the plaintiff a memorandum evidencing an offer of $4,000 and an exchange of property."

The court was asked to specifically find whether or not appellee tendered Raines her deed in compliance with the agreement of sale and exchange, and whether or not the same was refused by Raines, and, if so, for what reason. The court answered this request by referring to its finding No. 3, set out above, upon the evident theory that the question was answered in that finding. Numerous objections were made to these findings. But we can not say that any one of them is unsupported by the testimony. It is also insisted that the verdict is contrary to the law as applied to the facts found by the court.

The case of *Reeder* v. *Epps,* 112 Ark. 566, was a similar case under the facts to the instant case so far as the controlling question is concerned, and it was there said:

"The law is well settled that, in the absence of a special contract providing otherwise, an agent employed to sell or find a purchaser for land earns his commission and is entitled to recover the same when he produces a purchaser ready, willing and able to buy upon the terms named and the principal enters into a binding contract with the produced purchaser or having an opportunity to do so declines to accept the purchaser. *Moore* v. *Irwin,* 89 Ark. 289.

"He must, however, have the opportunity to accept the purchaser upon the terms named and to enter into a binding contract, for if the negotiations are stopped by the purchaser without fault of the principal before a binding contract is entered into, then no commissions are earned.

" 'The broker, having presented a proposed purchaser who is capable of entering into a contract of purchase, and willing to do so, has earned his commission when the vendor accepts him and enters into a valid contract with him for the sale of the land, even though the sale is never in fact consummated by reason of the failure of the proposed purchaser to perform his part of the contract.' *Moore* v. *Irwin, supra.*"

A recovery in that case was denied, however, because, without fault on the part of the owner, the negotiations ended short of the consummation of a sale.

Here a valid contract in writing was made which recites the terms of the contract fully except that it recites the cash payment to be made to appellee to be $3,500, instead of $4,000, and recites that no commission was to be paid out of this $3,500. Appellee insists that under the facts a suit for specific performance of the contract could not have been maintained against Raines if a cash payment of $4,000 had been demanded in the complaint. This appears to be the real question in the case, for appellee says in her brief that, "The contract signed by Raines and appellee must have been enforceable in an action for specific performance, and must have contained the full consideration and terms." We think this writing was

sufficiently full and certain to take the transaction out of the statute of frauds, and that parol evidence was admissible to show the true consideration. In the case of *Magill Lumber Co.* v. *Lane-White Lumber Co.*, 90 Ark. 426, it was said that, though the recitals of a writing can not be contradicted by parol evidence, for the purpose of defeating such instrument, it is competent to prove by such evidence that the consideration has not been paid as recited, or to establish the fact that other considerations not recited in the deed were agreed to be paid when such proof does not contradict the terms of the writing.

The court found the fact to be that the cash consideration was to be $4,000, of which sum appellant was to receive $500, and proof of that fact, which could have been made in a suit for specific performance, would have entitled appellee to a decree accordingly. *Wilkins* v. *Eanes*, 126 Ark. 339.

The judgment of the court below is, therefore, reversed, and judgment will be rendered here for plaintiff for $500 and interest thereon.

WILLIAMS v. WHEELER.

Opinion delivered December 22, 1917.

1. EQUITY JURISDICTION—SALE OF PROPERTY AND DISPOSITION OF PROCEEDS UNDER COURT'S ORDER—CLAIM OF EXEMPTION.—In a partition suit it was ascertained that one W. owned a one-sixth interest in the land to be partitioned. Certain parties intervened as creditors of W. After hearing the intervention the court rendered a decree in favor of the interveners, and the commissioner was ordered to pay the interveners. No appeal was taken. *Held*, thereafter W. could not maintain a claim for exemptions, on the ground that the fund was exempt, and that the clerk, who was also commissioner, was without authority to issue an order superseding the decree of the chancery court, under the claim of exemptions.
2. EQUITY JURISDICTION—DUTIES OF COMMISSIONER—APPLICATION FOR SUPERSEDEAS.—A commissioner in chancery, under orders to sell certain property and to pay over the proceeds in a certain manner, is an officer of the court for the purpose of carrying out its

orders, and he has no power to entertain any application for orders, or to issue any orders in conflict with the court's decree.

3. JUDICIAL SALES—FUND IN COURT—INTERVENTION.—The proceeds of a judicial sale, after confirmation, become a fund in court not subject to intervention until the purpose for which they are held has been accomplished.

4. EQUITY JURISDICTION—JURISDICTION OF THE PARTIES—SUMMARY JUDGMENT.—All parties to a suit in chancery, may be compelled by summary orders and proceedings, to obey the decree of the court.

5. EQUITY JURISDICTION—ATTEMPT TO THWART DECREE.—Where a party undertakes to thwart the enforcement of the court's decree, the court may act upon a mere suggestion of the fact, and the filing of a motion is not prerequisite.

6. EQUITY JURISDICTION—JUDICIAL SALE—ENFORCEMENT OF DECREE AS TO PROCEEDS.—The chancery court ordered its commissioner to dispose of the proceeds of a judicial sale, in accordance with the prayer of an intervention which had been filed. One W. claimed the fund as his own, and exempt, and after the adjournment of court, the clerk, at W.'s request, issued an order superseding the decree. When court reconvened, the interveners, had the cause re-docketed, and filed a motion to quash the supersedeas. *Held,* the court had jurisdiction to enforce its decree, that the clerk's supersedeas was improperly issued, and held further, that as all the matters set forth in the intervener's motion were a part of the pleadings and proceedings, that the chancery court would take judicial notice of them, and it was unnecessary to prove the same.

Appeal from Woodruff Chancery Court, Northern District; *E. D. Robertson,* Chancellor; affirmed.

Elmo Carl Lee, for appellant.

1. The action of the clerk was final. The court was without jurisdiction to quash the supersedeas on motion. No proof was taken. Kirby's Digest, § 3906; 103 Ark. 201.

2. A postmaster's bond is a contract. 31 Cyc. 281.

J. W. & J. W. House, Jr., for appellees.

1. The clerk was unauthorized to issue the supersedeas. Kirby's Digest, § 3906.

2. The court had jurisdiction. 80 Ark. 1. Its decision was correct. Appellees were sureties and paid

the judgment. 18 Cyc. 1395, note 46; 190 Fed. 111; 96 N. E. 561.

HUMPHREYS, J. A suit was instituted on February 24, 1916, in the chancery court for the Northern District of Woodruff County, by Annie Jones *et al.* against Willie Jones *et al.*, to partition certain real estate belonging to plaintiffs and defendants. A decree of partition and order of sale was rendered and the property sold pursuant thereto. It was ascertained that one-sixth of the proceeds of the sale belonged to Willie Williams. Some of his creditors intervened for the amount. Charles Wheeler and Addie Perkins were intervening creditors for $609.55, including interest, on account of having paid a judgment for Willie Williams which the United States government procured against him, as principal, and them, as sureties, on a postmaster's bond. Willie Williams had been postmaster at Gregory, Arkansas, and defaulted. The issue on the intervention was heard by the chancellor and a decree was rendered at the 1917 January term of said court in favor of interveners for said sum, and the commissioner was ordered to pay that amount to Charles Wheeler and Addie Perkins out of the proceeds in his hands belonging to Willie Williams. No appeal was prosecuted from that order and decree.

After the adjournment of court, Willie Williams filed a claim for exemptions in the case, before the clerk, who also was commissioner in the case, and he issued an order superseding the decree of the chancery court and all proceedings thereunder as to the fund claimed as exempt. The petition or application for exemption was under the style of the original suit and contained all the necessary allegations for an exemption claimed under the statutes and Constitution of the State of Arkansas. At the following May term of the chancery court, the interveners, Charles Wheeler and Addie Perkins, had the case redocketed and filed a motion to quash the supersedeas issued by the clerk, and from the chancellor's order quashing the

supersedeas an appeal has been prosecuted to this court by Willie Williams.

It is contended by appellant that the supersedeas issued by the clerk was final and that redocketing the old case and filing a motion to quash the clerk's supersedeas did not confer jurisdiction upon the chancery court. We think learned counsel for appellant is in error for the reason that the chancery court already had jurisdiction in the case for the purpose of enforcing the decree directing his clerk and commissioner to pay the fund in court to the parties in accordance with the decretal order. The commissioner was an officer of the court for the purpose of carrying out its orders, and it was not within his power to entertain any application for orders or to issue any orders in conflict with the court's decree, which was final and binding upon all parties thereto. He had only one duty to perform and that was to execute the decree of the court. If this property was exempt to Willie Williams under the Constitution of the State of Arkansas, he should have claimed the exemption when the matter was being adjudicated by the court. It was his duty to set up all claims he had to the property in that suit. The decree was a final adjudication of all the existing rights to the property between Willie Williams and the interveners, Charles Wheeler and Addie Perkins. It is settled in this State that the proceeds of a judicial sale, after confirmation, become a fund in court not subject to intervention until the purpose for which it is held has been accomplished; and it is likewise settled that all parties to the suit may be compelled by summary orders and proceedings to obey the decree of the court. *Porter, Taylor & Co.* v. *Hanson,* 36 Ark. 591; *Green* v. *Robertson,* 80 Ark. 1. In the instant case, however, it was not only a fund in court, but the rights of all parties to the suit in it had been finally adjudicated. Unless they could obtain a cancellation, modification or reversal of the decree, they were remediless. There is no conflict between this case and *Robinson* v. *Swearingen,* 55 Ark. 55; *Blass* v. *Erber,* 65 Ark. 112, and *National Surety Co.* v. *Bertig Bros.,*

131 Ark. 559. The instant case deals with an adjudicated fund in court, and those cases deal with a fund fixed by order or decree in the hands of a garnishee.

It is insisted by appellant, however, that the matters set forth in the motion to cancel the clerk's supersedeas should have been proved. We do not think it necessary to have gone through the formality of filing a motion. A mere suggestion to the court that parties to the suit were thwarting the enforcement of the decree would be ample. A court would then proceed to enforce the decree by whatever summary orders or proceedings were necessary. Again, all the matters set forth in the motion were a part of the proceedings and pleadings, and it was the court's duty to take judicial notice of them. It was not necessary to prove them. *In re Sussman,* 190 Fed. Rep. 111; *Ladd* v. *Ladd,* 96 N. E. Rep. 561; *Brown* v. *Powers,* 134 N. W. 73.

The decree of the chancellor is affirmed.

MORRIS v. HELLUMS COMPANY.

Opinion delivered December 22, 1917.

1. CONTRACTS—COMMERCIAL TERMS—"COTTON SEASON."—Appellant agreed to perform certain services for appellee in the buying and selling of cotton "during the cotton season in said year." In an action by appellant against appellee for a sum due appellant under the contract, *held,* the court properly permitted persons engaged in the cotton business to testify that usage in the locality where the contract was made fixed the season for buying and selling cotton from about September 1 to May 1, of the following year.
2. CONTRACTS—COMMERCIAL TERMS—"COTTON SEASON."—Under the facts as set out in the preceding syllabus, *held,* the words "cotton season" as used in the contract meant buying and selling cotton from September 1, 1914, to about May 1, 1915.

3. CONTRACTS—RULES FOR INTERPRETATION.—In construing the words of a contract such effect should be given to each word and provision in the contract that, when read in the light of each other and as an entire contract, no conflicts remain, the several parts should be interpreted so as to make a harmonious whole.

Appeal from Lincoln Circuit Court; *W. B. Sorrells,* Judge; reversed.

Coleman & Gantt, for appellant.

1. Appellant substantially performed his part of the contract, and is entitled to recover. He was employed for one year, and devoted his time and attention to the business during the *cotton season.* Even if, after the cotton season he had nothing to do, he was entitled to his salary. 26 Cyc. 1018; 1 Labatt, Master & Servant, § 288, and note; 32 N. W. 865.

2. The court erred in its instructions. No breach of duty was proven and the burden was on appellee to prove such breach. 1 Labatt, M. & S., § § 271, 354, note, p. 1119.

3. Evidence of usage was admissible to show the "cotton season." 2 Elliott on Cont., § 1770; 12 Cyc. 1088; 58 Ark. 573; 69 *Id.* 313. The court takes judicial knowledge of a custom so well known. 118 N. W. 292; 26 Cyc. 1019. See also 129 N. W. 645; 57 S. E. 902; 2 Elliott on Cont., § 1614; 1 Labatt, M. & S., § § 190, 433.

E. W. Brockman, for appellee.

1. The contract must be considered as a whole, and effect given to all its terms, so as to arrive at the intention of the parties. 94 Ark. 493; 93 *Id.* 497; 99 *Id.* 112; 96 *Id.* 320; 104 *Id.* 475.

2. It was the duty of the court to construe the contract. 78 Ark. 574. The cotton season only lasted eight months. Custom can not vary the terms of a written contract. 85 Ark. 568; 100 U. S. 686. Parol evidence of custom was not admissible. 124 Ark. 432; 56 Ark. Law Rep. 350; 55 *Id.* 264.

3. Plaintiff can not recover for a year's service and work only eight months. 52 *Id.* 494.

4. There is no error in the instructions, and the verdict is supported by the evidence. 102 Ark. 200.

HUMPHREYS, J. Appellant brought suit against appellee in the Lincoln Circuit Court for an alleged balance of $600 due him upon a written contract of employment to buy and sell cotton for appellee at Grady, Arkansas, during the cotton season of 1914-15. Appellee denied that it owed appellant any balance on the contract. The cause was submitted on the pleadings, instructions of the court and oral evidence, upon which a verdict was returned and judgment rendered in accordance therewith, dismissing the complaint. An appeal has been prosecuted to test the correctness of the construction placed upon the contract by the trial court. The contract is as follows:

"This agreement made and entered into on this the 30th day of May, 1914, by and between Hellums & Co. of Grady, Arkansas, as party of the first part, and G. E. Morris of Pine Bluff, Arkansas, as party of the second part, witnesseth:

"That the party of the first part hereby hires and employs the party of the second part to buy and sell cotton for it at Grady, Arkansas, for a period of one year commencing September 1, 1914, and ending one year thereafter.

"The party of the second part shall devote his time and attention to said business during the cotton season in said year, and shall take charge of buying and selling all cotton in which the party of the first part may deal.

"For his said services the said party of the first part hereby agrees to pay to the party of the second part the sum of eighteen hundred dollars ($1,800) to be paid in monthly installments at the rate of one hundred and fifty dollars ($150) a month during the period of said employment. Also all necessary expenses, such as traveling expenses, phone bills, livery bills, etc. In addition thereto the party of the second part shall be paid an amount equal to one-third of all profits arising or accruing to the

party of the first part from the buying and selling of cotton by him or under his management. To arrive at said amount, the salary of eighteen hundred dollars ($1,800) and expenses above outlined, hereinbefore provided for, shall be deducted from the gross profits of said cotton business and one-third of the remainder shall be paid to the party of the second part as a part of his compensation for his services in buying and selling cotton for the party of the first part as herein provided."

The undisputed evidence is that appellant worked under the contract for appellee two months and received $300 therefor; that then it became apparent to both parties that no immediate necessity existed for an expert cotton buyer or seller in connection with the business conducted by appellee, on account of a demoralization of the cotton market occasioned by the European war; that by mutual agreement appellant accepted employment from Bennett & Co., cotton buyers in Pine Bluff, for a period of six months at $150 per month, with the understanding that the amount of $900 should be credited on the contract between appellant and appellee; that at the expiration of the contract with Bennett & Co. appellant did not return to Grady and offer to buy and sell cotton for appellee during the months of May, June, July and August, 1915; that appellant resided at Pine Bluff, twenty-one miles by rail from Grady, and had a telephone; that appellee made no request after the expiration of the Bennett contract for appellant to buy or sell any cotton for it; that the cotton season began about September 1 and ended about May 1, of each year, and that it was usual for cotton buyers employed by the year to work during the cotton season only; and that appellee sold and bought no cotton after May 1, 1915, and had nothing for appellant to do except to sit around.

The court construed the contract to mean that appellant must either buy or sell cotton, or actually report and offer to perform said duties for the full period of one year, in order to collect the entire contract price; and at

the request of appellee, instructed the jury to that effect over the objection of appellant.

The appellant requested an instruction which was refused by the court to the effect that it was his duty under the contract to devote his time and attention to buying and selling cotton for appellee during the cotton season, and to buying and selling all cotton in which appellee dealt during the year, except when at work for Bennett & Co.

(1-3) There is little or no difference between appellant and appellee as to the facts. The main difference between them being in the construction of the contract, as reflected by the conflict in the instructions requested by each. The contract is before us for construction. The only words contained in the contract of doubtful signification are "cotton season." These are words peculiar to the business of buying and selling cotton and were properly susceptible of explanation by persons familiar with their meaning. The court did not err in permitting persons engaged in the cotton business to testify that usage in the locality where the contract was made fixed the season for buying and selling cotton from about September 1 to May 1 of the following year. *Western Assurance Co.* v. *Altheimer,* 58 Ark. 565; *McCarthy* v. *McArthur,* 69 Ark. 313. Under the undisputed facts in the instant case, the words "cotton season," as used in the contract, mean buying and selling cotton from September 1, 1914, to about May 1, 1915. In construing contracts the purpose should be to ascertain the intent of the parties to the contract. Such effect should be given to each word and provision in the contract that, when read in the light of each other, and as an entire contract, no conflicts remain. In other words, the several parts should be interpreted so as to make a harmonious whole. *Read's Drug Store* v. *Hessig-Ellis Drug Co.,* 93 Ark. 497; *Ayers* v. *Heustess,* 94 Ark. 493; *Johnson* v. *Wilkerson,* 96 Ark. 320; *Earl* v. *Harris,* 99 Ark. 112.

In interpreting the contract by the aid of these familiar canons of construction, the first clause need not be

discussed as it simply fixed the date of, designated and located the parties to the contract. No conflict whatever existed between the second and fourth clauses. The second clause fixed the term of employment at one year and the fourth clause fixed the year's salary at $1,800, payable in twelve equal monthly installments, and in addition thereto provided for expenses of appellant and a division of the profits. The only seeming conflict exists between the third clause and the second and fourth clauses. It is said that if the third clause meant that appellant should work only eight or nine months, then it conflicted with the third and fourth clauses which provided for buying and selling of cotton by appellant for appellee for a year, or from September 1, 1914, to September 1, 1915. The only reasonable construction that can be given clause 3, so as to make it harmonize with clauses 2 and 4, is to say that the intention was that appellant should devote his whole time and attention to buying and selling cotton for appellee during the cotton season or from September 1, 1914, to about May 1, 1915; and that he should buy and sell all cotton in which appellee might deal during the remainder of the contract period. Of course, he was released from either duty by mutual agreement during the time he worked for Bennett & Co. There is nothing in the contract requiring appellant to report for duty each day after the expiration of the cotton season. He resided only a short distance from Grady, and could have been reached by telephone. It is admitted there was nothing for him to do but sit around. Appellee neither sold nor bought cotton after May 1, the end of the cotton season. We think the clear intendment of the contract was that appellant should report for duty each day during the cotton season and when needed during the balance of the contract period. Under this construction it follows that it was incumbent upon appellee to notify appellant in case he was needed at any time after the cotton season. The cause was fully developed, and under the undisputed evidence appellant should have recovered $600 with interest

at 6 per cent. per annum from the 1st day of September, 1915, less $58, advanced or loaned to him by appellee.

The judgment is therefore reversed and judgment entered here for $542, with interest from date of suit at the rate of 6 per cent. per annum until paid.

DICKINSON, RECR., C., R. I. & P. RY. CO. v. WOMBLE.

Opinion on Motion for Judgment Against the Railway Company.*

RECEIVERS—PERSONAL INJURY ACTION—SUBSTITUTION OF RAILWAY COMPANY—JUDGMENT AGAINST RAILWAY COMPANY.—In a personal injury action a judgment was rendered against the receiver of a railway company; on appeal the railway company was substituted as appellant and the judgment affirmed. After a discharge of the receiver, *held*, this court will not render judgment against the railway company.

McCULLOCH, C. J. The judgment of the trial court was against the receiver of the railway corporation upon a cause of action which arose during the operation of the railroad by the receiver, for which the corporation was not responsible. After the rendition of the judgment the receiver was discharged by order of the court which appointed him, and the property in his hands was surrendered to the corporation, subject to all liabilities incurred by the receiver. The railway corporation then came to this court and asked to be substituted for the receiver, as appellant in the case, on the ground that it was interested in the result by reason of the surrender to it by the receiver of the property. The request was granted and the corporation was substituted. The judgment was affirmed, and we are now asked to render judgment against the substituted appellant.

We find no statutory authority for that procedure, and the rendition of such a judgment would constitute the exercise of original jurisdiction. The substitution was allowed because of a showing of interest by the corporation in the result of the appeal. To render judg-

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*Original opinion reported on page 411, *infra*. (Reporter.)

ment against the substituted appellant would necessitate a determination of the extent of that interest and the grounds of liability of the corporation, if any, for the debts of the receiver, and that would be an inquiry involving the exercise of original jurisdiction. The fact that a decision as to the liability of the railway corporation for debts of the receiver would depend entirely upon an interpretation of the order of court and the report of the receiver filed here by consent, and would not involve any outside investigation as to the facts, does not change the character of the proceedings so as to make it other than original. It would introduce a new issue not involved in the trial of the case below and the fact that it is an issue which arose since the trial below does not bring it within the appellate jurisdiction of this court. Appellee is, with respect to any remedy he may have as against the railway corporation by reason of its acceptance of a surrender of the property under the order of the court, in the same situation he was before the appeal was prosecuted to this court. He has merely secured here an affirmance of the judgment against the receiver and the question of liability of the railway corporation for the satisfaction of that judgment is one to be determined in a court of original jurisdiction in a suit to enforce that liability. Whether that should be by independent action or by intervention in the suit where the receivership was pending we can not now decide.

The denial of the remedy sought here is, of course, without prejudice to appellee's right to resort to any other available remedy in a court of original jurisdiction.

Motion overruled.

APPENDIX

I.

OPINIONS NOT REPORTED.

W. T. Raleigh Co. *v.* Thurman; appeal from Washington Circuit Court; J. S. Maples, Judge; affirmed October 15, 1917, *per* Wood, J.

Arnold, Admr. *v.* Watson; appeal from Clay Circuit Court, Western District; W. J. Driver, Judge; affirmed October 22, 1917, *per* McCulloch, C. J.

Lunsden *v.* Lenox; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; judgment modified October 22, 1917; *per* Wood, J.

Solomon *v.* Robinson; appeal from Phillips Circuit Court; J. M. Jackson, Judge; affirmed October 22, 1917, *per* Smith, J.

Dixie Cotton Oil Co. *v.* Black; appeal from Jackson Circuit Court; Dene H. Coleman, Judge; affirmed October 22, 1917, *per* Humphreys, J.

State *ex rel.*, Mine Inspector *v.* Southern Anthracite Coal Mining Co.; appeal from Pope Chancery Court; Jordan Sellers, Chancellor; appeal dismissed October 29, 1917; *per curiam.*

Crebs *v.* Fulbright, appeal from Boone Chancery Court; B. F. McMahan, Chancellor; affirmed October 29, 1917, *per* Humphreys, J.

Maxey *v.* Logan; appeal from Boone Chancery Court; T. H. Humphreys, Chancellor; affirmed November 5, 1917, *per* Smith, J.

Chicago, R. I. & P. Ry. Co. *v.* Hicks; appeal from Monroe Circuit Court; Thos. C. Trimble, Judge; reversed November 12, 1917, *per* Wood, J.

Sellers *v.* Horney; appeal from St. Francis Chancery Court; E. D. Robertson, Chancellor; reversed November 12, 1917, *per* Humphreys, J.

Brashears *v.* Crews, Sheriff; appeal from Clay Chancery Court; Archer Wheatley, Chancellor; affirmed December 10, 1917, *per* McCulloch, C. J.

Yarborough *v.* Hurt; appeal from Scott Chancery Court; W. A. Falconer, Chancellor; affirmed December 10, 1917, *per* McCulloch, C. J.

United States Auto Co. *v.* Loeb; appeal from Pulaski Circuit Court, Third Division; G. W. Hendricks, Judge; affirmed December 17, 1917, *per* Hart, J.

Coats *v.* Planters Gin Co.; appeal from Poinsett Chancery Court; C. D. Frierson, Chancellor; affirmed December 17, 1917, *per* Smith, J.

Baum *v.* Ward; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; reversed December 17, 1917, *per* Smith, J.

Works *v.* State; appeal from Howard Circuit Court; J. S. Butt, Special Judge; affirmed December 17, 1917, *per* Humphreys, J.

Atkinson *v.* Murphy; appeal from Lafayette Circuit Court; Geo. R. Haynie, Judge; affirmed December 22, 1917, *per* McCulloch, C. J.

The Brunswick Balke-Collander Co. *v.* Faulkner; appeal from Union Circuit Court; Chas. W. Smith, Judge; reversed December 22, 1917, *per* Wood, J.

Garner *v.* Murphy; appeal from Lafayette Circuit Court; Geo. R. Haynie, Judge; affirmed December 22, 1917, *per* Wood, J.

Tipler, Recvr. *v.* Breedlove; appeal from Craighead Chancery Court, Eastern District; Chas. D. Frierson, Chancellor; affirmed December 22, 1917, *per* Wood, J.

Bradford *v.* Bradford; appeal from Jefferson Chancery Court; John M. Elliott, Chancellor; affirmed December 22, 1917, *per* Wood, J.

McLeod *v.* Des Arc Oil Mill Co.; appeal from Prairie Circuit Court, Northern District; Thos. C. Trimble, Judge; reversed December 22, 1917, *per* Wood, J.

Helm *v.* Jacobs; appeal from Izard Chancery Court; Geo. T. Humphries, Chancellor; affirmed December 22, 1917, *per* Humphreys, J.

II.

CASES DISPOSED OF ON MOTION.

Lulu Curtis, administratrix of the estate of W. H. Curtis, deceased, *et al.*, *v.* V. L. Morris; Benton Chancery Court; B. F. McMahan, Chancellor; settled and appeal dismissed on appellants' motion October 22, 1917; *per curiam.*

D. C. Raybourne *v.* G. W. Kirk; Crawford Chancery Court; Wm. A. Falconer, Chancellor; appellant's petition for mandamus to compel signature of bill of exceptions denied, and appeal dismissed on appellee's motion, pursuant to rule seven, October 29, 1917; *per curiam.*

J. D. Eldridge *v.* J. M. Dickinson *et al.*, Recvrs. of Chicago, Rock Island & Pacific Railway Company; Woodruff Circuit Court, Northern District; appeal dismissed for non-compliance by appellant with rule nine, October 29, 1917; *per curiam.*

Harry Eversfield *v.* Drew Mercantile Company, J. W. Connor and Hattie T. Connor; Drew Chancery Court; Zachariah T. Wood, Chancellor; appeal dismissed November 5, 1917, having been allowed by the clerk out of the time limited by statute; *per curiam.*

Robert H. Williams *v.* Supreme Tribe of Ben Hur; Pulaski Circuit Court, Second Division; Guy Fulk, Judge; affirmed November 12, 1917, pursuant to stipulations of counsel; *per curiam.*

G. P. Watkins *v.* Blanke-Wenneker Candy Company; Boone Chancery Court; S. W. Woods, Special Chancellor; appeal dismissed November 12, 1917, for want of service; *per curiam.*

Lena Lumber Company *v.* James Heffner; Saline Circuit Court, W. H. Evans, Judge; affirmed on appellee's motion, November 19, 1917, for non-compliance by appellant with rule nine; *per curiam.*

Elijah Williams *v.* Rachel Williams; Mississippi Chancery Court, Osceola District; Archer Wheatley, Chancellor; compromised and settled and appeal dismissed by consent, November 26, 1917; *per curiam.*

Phil Garrigan *v.* The State of Arkansas; Pulaski Circuit Court, First Division; Robert J. Lea, Judge; appeal dismissed on appellant's motion, December 3, 1917; *per curiam.*

E. W. Porter *v.* Ben Cox and Lloyd England, Receiver State National Bank; appeal dismissed on appellant's motion, December 10, 1917; *per curiam.*

L. G. Luckett *v.* Ben Cox and Lloyd England, Receiver State National Bank; appeal dismissed on appellant's motion, December 10, 1917; *per curiam.*

W. J. Mason, as Administrator of the Estate of S. R. Mason, deceased, *et al.*, *v.* George C. Cooper, Administrator *de bonis non* of the Estate of S. T. Crawford, deceased; Prairie Chancery Court, Southern District; John M. Elliott, Chancellor; appeal dismissed December 17, 1917, on motion of the appellants; *per curiam.*

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