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CASES DETERMINED

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

UNITED STATES FIDELITY & CASUALTY COMPANY *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Opinion delivered June 24, 1918.

1. ACTIONS—ABATEMENT AND REVIVOR.—There is no abatement of an action which is revived in the name of the successor or representative of the deceased party; the revivor operates as a continuation of the original action.

2. COST BOND—NON-RESIDENT PLAINTIFF—DEATH AND REVIVOR—CONTINUING LIABILITY OF THE SURETY.—Kirby's Digest, § 959, which requires the giving of a cost bond by a non-resident plaintiff, requires a bond for a continuing liability throughout an action, and extends to costs which accrue after the death of the original plaintiff and the revivor of the action in the name of the personal representatives of the deceased plaintiff.

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

W. M. Hall and *Robert A. Rowe,* for appellant.

The surety was not liable for costs accrued after the death of Miller. Kirby & Castle's Digest, § 7740; Kirby's Digest, § 6298; Kirby & Castle's Digest, § 7738; 1 C. J. 215; 31 Ark. 643; 15 C. J. 74; 1 Root (Conn.) 259; 9 Conn. 235; 2 N. H. 552; 23 A. & E. Ann. Cas. 1037; 110 Ark. 317; 3 *Id.* 136; 11 *Id.* 675; 1 Hill (S. C.) 41; 115 Mass. 26; 79 Fed. 408; L. R. A. (N. S.) 1917-B 990.

Thos. B. Pryor, for appellee.

The surety was liable on the bond for costs. The bond remained in full force until the case was finally

disposed of. Kirby's Digest, § 6298; Kirby & Castle's Digest, § 7738; 7 Ark. 149; 3 *Id.* 136; 11 *Id.* 675, 685; 29 Kan. 487; Kirby & Castle's Digest, § 7810.

McCULLOCH, C. J. Adam Miller instituted ten separate actions at law against the St. Louis, Iron Mountain & Southern Railway Company in the circuit court of Crawford County to recover for damages to certain consignments of peaches. Miller was not a resident of the State, and gave bond for costs with appellants, United States Fidelity & Guaranty Company, as surety, in compliance with the statute, which reads as follows:

"A plaintiff who is a non-resident of this State, or a corporation other than a bank created by the laws of this State, before commencing an action shall file in the clerk's office a bond, with sufficient surety, to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the courts." Kirby's Digest, § 959.

The bond is worded in the precise language of the statute. The ten cases were consolidated and tried together, and after appeal to this court and to the Supreme Court of the United States, there was a final judgment against the plaintiff for recovery of damages, but Miller died before final judgment, and the cause was revived and proceeded to final judgment in the name of a special administrator. The costs which accrued up to the death of Miller had been paid, but after the final judgment in appellee's favor a judgment was rendered in its favor against the surety on the cost bond for all the costs which accrued after Miller's death. The present appeal is from that judgment, and the contention is that the sureties on the bond are liable for costs which accrued after Miller's death.

The statute on the subject of revivor of actions provides that upon the death of either the plaintiff or defendant pending the action "it shall be lawful for the court before which suit or suits may be pending, on the

motion of any party interested, to appoint a special administrator, in whose name the cause shall be revived, and said suit or suits shall progress, in all respects, in his name with like effect as if the plaintiff or defendant (as the case may be) had remained in full life." Kirby's Digest, § 6298.

Another section of the statute provides that a special administrator or executor in whose name an action is revived shall not be liable for costs of suit. Kirby's Digest, § 6300.

(1) It will be observed that the statute requiring bond for costs to be given by a non-resident does not in terms exclude liability in any circumstances, but in the broadest terms provides that a bond must be given "for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried." It provides, we think, for liability which accrues immediately upon the filing of the bond and continues throughout the litigation regardless of the court to which it may be carried. The bond, in other words, creates a continuing liability for the payment of all the costs, and the death of the plaintiff without abatement of the action does not discharge the obligation as to further costs. There is no abatement of an action which is revived in the name of the successor or representative of the deceased party, for the revivor operates as a continuation of the original action. Kirby's Digest, § 6298; *Vandiever* v. *Conditt,* 110 Ark. 311.

(2) The statute requiring bond for costs was a part of the Civil Code of Practice which went into effect in the year 1869, and it should be construed as having been enacted in view of the statute on revivor of actions then in force which provided that a revived action should "progress in all respects" in the name of the party in whose name there is a revivor, and "with like effect as if the plaintiff or defendant (as the case may be) had remained in full life."

In the case of *Fowler & Pike* v. *Scott,* 11 Ark. 675, the question arose as to the liability of a surety on an

injunction bond after the death of the plaintiff, and this court held that the liability of the surety continued and embraced liability for all injury which accrued up to the final dissolution of the injunction. The same principle controls the present case and makes the liability under this statute a continuing one throughout the litigation in which the bond is given. The statute only requires a bond where the plaintiff is a non-resident of the State, but there is no provision for discharge of the liability when plaintiff ceases to be a non-resident or passes out of the action by death.

The cases relied on by counsel for appellants are not, we think, in point. For instance, the case of *Ryan* v. *Williams, Admr.*, 29 Kan. 487, involved the question of liability on a bond for costs given by an administrator pursuant to a rule of court, and the decision turned upon the peculiar language of the bond which provided that the surety obligated himself to pay all costs that might accrue in case the plaintiff be adjudged to pay the same, and the court construed the bond to merely create a liability for costs for which the plaintiff himself was liable. The administrator resigned in that case during its pendency, and the court held that the cost of the action which accrued subsequent to resignation could not be adjudged against the principal on the bond, and for that reason there was no liability on the part of the surety. There is no such restriction in the bond involved in the present case, and the statute, when properly construed, does not provide merely for liability for such costs as the plaintiff himself may be required to pay.

The cases of *Parsons* v. *Williams,* 9 Conn. 236, and *Eaton* v. *Sloan,* 2 N. H. 552, were also on a different form of bond, and for that reason the decisions in those cases have no force in the present controversy.

We are of the opinion that our statute on this subjest requires a bond for a continuing liability throughout an action, and extends to costs which accrue after death of the original plaintiff and the revivor of the action

in the name of the personal representative of the deceased plaintiff.

The judgment is, therefore, affirmed.

SCHIRMER v. HALLMAN.

Opinion delivered June 24, 1918.

1. EVIDENCE—VALUE OF PERSONAL PROPERTY—ASSESSMENT BOOKS.—A. sued B. for damages to his horse caused by frightening it, and thereby rendering it useless to A. *Held*, the court erred in not allowing B. to prove by the assessment books the value of the horse; the assessment books are competent evidence, but *held* the error was not prejudicial where B. did not offer to prove by the assessment books that A. had assessed the horse at a much less value than that given in his testimony.
2. AUTOMOBILES—FRIGHTENING HORSE—DUTY OF CARE.—A. sued B. for damages alleged to have resulted from the frightening of A.'s horse. The evidence showed that A. was driving over a bridge and that B. in an automobile passed him on the far side of the bridge, going in the same direction; it showed nothing to indicate that A.'s horse was frightened or about to become frightened; the evidence did show that the horse had always been gentle and unafraid of a car. *Held*, under the evidence that B. was not required to anticipate that the passing of his automobile would frighten A.'s horse, and in the absence of evidence tending to prove such fact, no duty devolved upon B., to anticipate that such would be the case, and to slow down and stop his car, if necessary to avoid an injury, which he had no reason to expect would occur.

Appeal from Howard Circuit Court; *J. S. Lake*, Judge; reversed.

W. C. Rodgers, for appellant.

1. It was error not to allow appellant to prove by the assessment books the value of the horse. 65 Ark. 278, 284; 30 *Id.* 362, 371. The weight to be given it was for the jury.

2. There was no proof of injury to the horse. Juries can not base their verdicts upon conjecture or speculation. 88 Ark. 231; 92 *Id.* 297; 88 *Id.* 510; 105 *Id.* 161.

3. The instructions are erroneous. An automobile has the same right on the roads as a horse and buggy. 58 Minn. 555. The burden was on appellee to show the damage; that the car struck the horse and made his market value less. The physical facts show no injury. Nor is unusual speed shown. The evidence does not support the verdict and the instructions do not state the law correctly. 79 Ark. 608, 621; 100 *Id.* 529; 85 *Id.* 464. They are abstract and also assume certain facts to be true. The evidence does not support them. 74 Ark. 19-22; 69 *Id.* 380-5. The evidence shows that appellant did slow down his car and used due care.

D. B. Sain, for appellee.

1. There is no error in the instructions. Unusual speed was shown.

2. The evidence shows injury and supports the verdict.

3. The assessment was a matter of record and parol testimony was not admissible of the assessed value of the horse.

4. The verdict is not excessive. No errors are shown.

STATEMENT OF FACTS.

This action was brought by the appellee against the appellant to recover damages which appellee alleged he had sustained by reason of the negligence of the appellant in frightening appellee's horse.

Appellee alleged that he was a helpless cripple from rheumatism; that he traveled by buggy and had trained his horse so that he could be easily driven by the appellee in his crippled condition; that he was upon a public highway in his buggy and that when he reached a certain bridge in the road he reined his horse from the road and just as the horse was leaving the road and the buggy partially out of the road, appellant's automobile, which was behind appellee's buggy and traveling in the same direction drove upon appellee's buggy at such rate of speed that before appellee could turn his horse fully

from the bridge the top of the appellant's automobile struck his horse on the nose, frightening him and damaging appellee in the sum of $350. Appellee alleged that before the occurrence his horse by reason of his training and docile condition was of much more value to the appellee than the real value of the horse, and that since the occurrence the horse was rendered practically worthless, because he had since then been unable to drive him along the public highway on account of the horse's fear of automobiles.

The answer denied specifically the allegations of the complaint.

It could serve no useful purpose to discuss in detail the evidence. Suffice it to say the evidence as to the issue of negligence and as to whether or not the appellee's horse was injured thereby in the manner alleged in his complaint, and the amount of damages, if any, which he sustained, were all issues of fact and there was evidence to sustain the verdict on those issues.

The appellee on cross-examination testified concerning the value of the horse, that he gave a mule worth $135 and $60 extra for the horse. Appellee was asked this question: "How much did you assess this horse at, Mr. Hallman?" Appellee objected to the question. The court sustained the objection, holding that it was not material. Appellant excepted to the ruling. Appellant offered to show the value of the horse in controversy by the assessment for the purpose of contradicting the appellee on this question. The court held that the assessment was not admissible, regardless of the value the assessment showed. To which ruling the defendant excepted.

Among other instructions, at the instance of the appellee, the court gave the following:

"No. 2. You are instructed that if you believe from a preponderance of the evidence that the defendant saw or could by the exercise of ordinary care have seen that the plaintiff's horse would become frightened at the ap-

proach of his car, then it was his duty to slow down and if necessary to stop the car to avoid an injury."

From a judgment based on a verdict in the sum of $50 rendered in favor of the appellee is this appeal.

Other facts stated in the opinion.

WOOD, J., (after stating the facts). (1) The court erred in not allowing the appellant to prove by the assessment books the value of the horse. Assessment books are made up by sworn officers and as to personalty are based on the sworn statements of the property owners and they are competent evidence and were entitled to such credit as the jury might see proper to give them as to the value of the horse. *Winter* v. *Bandel,* 30 Ark. 362-371; *White* v. *Beal & Fletcher Gro. Co.,* 65 Ark. 278-284. If these books had shown that the appellee assessed his horse at a much less sum than the value put upon him in his testimony on the trial, the jury was entitled to consider this evidence for what it was worth as tending to contradict the appellee's testimony, and therefore as affecting his credibility.

This error, however, was not shown by the appellant to be prejudicial for the reason that the appellant did not offer to prove by the assessment rolls that the appellee had assessed his horse at a much less value than the value given in his testimony.

The court erred in giving instruction number two, at the request of the appellee.

The appellee testified that when he heard the honk of the machine he did not think it was right on him and couldn't turn around and look, he thought he would have time to cross the bridge and commenced running his mare on the side of the bridge. When he crossed the bridge she was clear out of the road and there was just enough of the bridge to the right to keep appellee from slipping off. He thought he had plenty of time to cross and did "for the front wheels had crossed and the hind wheels were on the bridge and they came up and sent the buggy over into the ditch and the horse wheeled * * * and

by that time she had crossed the road and appellee got her checked up and got back into the road."

(2) We do not discover, in this testimony as abstracted by the appellant nor in any other testimony set forth in his abstract, that there was any indication that the horse had become frightened. The testimony does not disclose any circumstances that were calculated to lead appellant to believe that appellee's horse would become frightened at the passing of the automobile. On the contrary, the testimony of the appellee was to the effect that up to the time the automobile passed his horse had been perfectly gentle and was not afraid of a car at all, until this one struck his buggy. Appellant, therefore, was not required to anticipate that the passing of his automobile *would frighten appellee's horse,* and, in the absence of evidence tending to prove such fact, no duty devolved upon appellant to anticipate that such would be the case, and to exercise ordinary care to slow down and stop his car if necessary to avoid an injury which he had no reason to suspect would occur.

The instruction was, therefore, abstract, misleading, and prejudicial. *St. L. & S. F. Ry. Co.* v. *Townsend,* 69 Ark. 380-5. See, *American Standard Jewelry Co.* v. *Hill,* 90 Ark. 78-85, and other cases in Crawford's Digest, title "Trial."

For the error indicated the judgment is reversed and the cause remanded for a new trial.

CAUSEY v. WOLFE, ADMINISTRATOR.

Opinion delivered June 24, 1918.

1. TITLE—FEE SIMPLE—DECREE OF COURT.—One C. held to have a fee simple title in certain lands by virtue of a decree of court, based upon a gift, and actual possession, with the making of valuable improvements.
2. GIFT OF LAND—FEE SIMPLE TITLE.—A promise to give land and make a deed therefor is a promise to convey the grantor's whole estate and not merely a life estate.
3. TITLE—DEFINITION.—"Title" in the law of real estate means the "fee," and nothing less.

4. JUDGMENTS—EFFECT UPON CHILDREN OF LITIGANT NOT YET IN ESSE —TITLE TO LAND.—One C. acquired title to certain lands by gift from his uncle. In an action to perfect his title, it was decreed that he had a fee simple estate in the lands. *Held,* this decree was binding upon his heirs, although at the time of the rendition of the decree they were not *in esse.*

5. WASTE—BY LIFE TENANT—REMOVING TIMBER.—A life tenant who removed all the timber from the estate held liable to the remaindermen, under the testimony, for one-fourth of the actual value of the timber taken, and in this case *held* that one-fourth of the timber should have been left to supply the necessary upkeep of the farm.

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

R. W. Wilson, for appellants.

1. Eugene A. Causey only took a life estate in the lands in section 16, remainder to his heirs, the plaintiffs. Kirby's Digest, § 735; 116 Ark. 233; 67 *Id.* 517; 75 *Id.* 19; 95 *Id.* 18; 98 *Id.* 570. Neither the life tenant nor any court could defeat the rights of the remaindermen. The life tenant could not convey to Tillar more than a life estate. 116 Ark. 233; 117 *Id.* 170-1.

The whole will must be so construed as to give effect to it as a whole and carry out the intention of the testator. 116 Ark. 574. The decree in *Causey* v. *Williams* only corrected an erroneous description of the lands and could reform a will. 40 Cyc. 111; 86 Ark. 8.

No conveyance by a life tenant could affect the interest of the remaindermen. 49 Ark. 125; 117 *Id.* 370; 116 *Id.* 324.

2. Appellee's grantor was barred by the statute of limitations in *Causey* v. *Williams.* Kirby's Digest, § 8029.

3. Appellees are estopped by the acts of their grantor from claiming any interest except a life estate under the will. A gift was made to him and he was put in possession and made improvements and Adair promised to bequeath the property to him by will which he did. 94 Ark. 191; 109 *Id.* 500.

4. There was error in the court's findings as to the damages sustained. 63 Ark. 75; 95 *Id.* 18; *Ib.* 246. See also, 102 *Id.* 42; 66 Am. Dec. 773. At least $5,000 damages should be allowed for cutting all the usable timber. 129 Ark. 245.

5. That part of the decree in *Causey* v. *Williams* vesting title in fee is void. 62 Ark. 443; 81 *Id.* 462; 56 *Id.* 399; 58 *Id.* 181. 16 Cyc. 479-480. It is not a bar nor *res adjudicata.* 107 Ark. 38; 82 *Id.* 131; 105 *Id.* 86; 96 *Id.* 454; 66 *Id.* 307.

F. M. Rogers, J. G. Williamson and *Robert C. Knox,* for appellees.

1. There was no error in decreeing to the widow and heir of Tillar the fee simple title to the land. He gave Causey the land, placed him in possession and told him to clear and improve it and that he would *complete a title* in his will. A *title* means a fee simple estate. 23 Barb. 370-381; 21 Fed. 615-617; 19 Pac. 526; 9 Ala. 252; 65 Oh. St. 17; 21 W. Va. 294-9. Causey took possession and made valuable improvements and this took the gift out of the statute of frauds. 107 Ark. 473; 82 *Id.* 33.

2. The decree in *Causey* v. *Williams* vested a fee simple title. 102 Ark. 30.

3. Under the will Causey took a fee simple title, as he had no "heirs of his body lawfully begotten." 16 Cyc. 655; 98 Ark. 570; 3 *Id.* 147; 23 *Id.* 387.

4. The former adjudication is *res adjudicata.* 16 Cyc. 31; 97 S. C. 757; 85 Minn. 333; 146 Ill. 227; Story Eq. Pl. (10 ed.) par. 145, 152.

5. There is no error in the findings as to damages.

F. M. Rogers and *Moore, Smith, Moore & Trieber,* also for appellees.

Under the decree a title vested in fee simple and this decree is *res adjudicata.* 61 S. W. 1025; 1 Scholes & L. 408.

STATEMENT OF FACTS.

This action was instituted by appellants, the children and prospective heirs at law of Eugene A. Causey, against the appellee to recover damages for certain alleged acts of waste and to restrain them from further alleged acts of waste on certain lands in Desha County, Arkansas. All the appellants except James I. Causey are minors and sue by their father Eugene A. Causey as next friend.

Appellants alleged in substance that they were bodily heirs of Eugene A. Causey and that at his death they will become owners in fee of the following lands, towit: "west half of the west half of section 15 and the east half of section No. (16) sixteen, township No. 11 (eleven) south, range No. (3) west, containing 480 acres, and also of the northwest quarter of section No. (16) sixteen, township No. eleven (11) south, range No. 3 west, containing 160 acres."

They alleged that Isaac Adair was the owner of the lands in fee and on the 21st of June, 1887, devised the same to Eugene A. Causey under the following clause in his will:

"I give and bequeath to my nephew, Eugene A. Causey, and the heirs of his body lawfully begotten * * *. Also the west half of the west half of section No. (15) fifteen, east half and southwest quarter and northeast quarter of southwest quarter (E½ and SW¼ and NE¼ of SW¼) of section sixteen (16), all in township No. eleven (11) south, range No. (3) west in said County of Desha."

They alleged that the lands described in the above clause as the southwest quarter and the northeast quarter of the southwest quarter was an error in description which was subsequently corrected by a decree of the Desha chancery court, so as to show that the northwest quarter section 16 township 11 south, range 3 west, as above described was intended to be embraced in the will; that under the will their father took a life estate only and the remainder in fee was vested in them; that their

father had sold his life estate in all of the lands except the northwest quarter of section 16 above to T. F. Tillar; that of these lands 160 acres (west half of west half of section 15) was the only woodland on the entire tract; that the owners of the Tillar estate and those claiming under them had divested and were proceeding to divest these lands of its timber suitable for the proper husbandry and maintenance of the lands of which appellants were the owners in fee. They alleged that they believed that they had been damaged in the sum of $3,500 for the timber removed and they prayed that the amount of damages to their inheritance be ascertained and that they have judgment therefor and that the Tillar heirs and those claiming under them be enjoined from committing further waste of the estate of the appellants.

The appellees, the administrator of the Tillar estate, the widow of T. F. Tillar, and Mrs. Rogers, his daughter and the only heir of the Tillar estate, answered and denied specifically all of the allegations of the complaint, and among other things they alleged that in the year 1890 Eugene A. Causey brought suit in the chancery court of Desha County in which he alleged that prior to his death Isaac Adair had placed him (Causey) in actual possession of the lands in controversy in section 16, and had promised him at that time to vest him with title thereto. That Causey went into the possession of the land and made valuable improvements thereon. That Isaac Adair died leaving only four persons capable of inheriting lands from him, towit: Eugene A. Causey and his brother James I. Causey, both nephews of Adair, and Alice and Laura Williams, nieces of Adair. That prior to the institution of that suit Eugene A. Causey had acquired the interest of his brother James I. Causey in the land. That the object and purpose of that suit was to enforce specific performance of the contract made between Isaac Adair and Eugene A. Causey, and that a decree was rendered in said cause vesting the fee simple title in Eugene A. Causey and that he by his deed conveyed the fee simple title to T. F. Tillar.

The appellees made the pleadings, the depositions, and the decree in that cause an exhibit to their answer, and they were introduced in evidence and made a part of the record in the instant cause.

The complaint in that case was against Alice and Laura Williams, who were minors. It alleged in substance that Isaac Adair was the owner in fee simple of the east half and the northwest quarter and the northeast quarter of southwest quarter of section 16, township 11 south, range 3 west, in Desha County, Arkansas, containing 520 acres. That the land was wild; that Adair, the uncle of Eugene A. Causey made him a gift of the land and placed him in possession of the same, under the promise that he would devise the same to him by will; that he built a dwelling house at a cost of $800, and made other valuable improvements on 20 acres in the northwest quarter. That in 1888 Adair executed his will and intended to devise the land above described to Eugene A. Causey, but through the mistake of the draughtsman the southwest quarter was inserted instead of the northwest quarter, and the northeast quarter of northwest quarter instead of the northeast quarter of the southwest quarter of the above section. That it was the intention of Adair to devise to plaintiff the east half and the northwest quarter and the northeast quarter of the southwest quarter of said section 16 containing 520 acres. That Adair died leaving his widow, who accepted the provisions of the will in lieu of dower; that Eugene A. Causey and James I. Causey and Alice and Laura Williams were his only heirs at law. That Eugene A. Causey had acquired the interest of James I. Causey; that Eugene A. Causey had been in continuous, open, and adverse possession for more than seven years.

The prayer of the complaint was as follows:

"Wherefore the premises considered plaintiffs pray a decree of this honorable court correcting the error in the description of said land in said section sixteen so intended to be willed and bequeathed to plaintiff by said Isaac Adair and that all title or interest that said defendants

may have in said lands be divested out of them and vested in plaintiff and that plaintiff's title to said lands (describing them) be confirmed and quieted and for all other proper relief as his bill in equity and good conscience shall entitle him."

T. H. Williams, the father of the minors, was appointed special guardian to defend for them, and also F. M. Rogers was appointed guardian *ad litem,* and they filed answers denying the allegations of the complaint and prayed that the plaintiff be required to make strict proof thereof.

On the issue thus joined in that case Causey testified among other things as follows: "That his uncle made him a gift of the lands as described in his complaint. "He instructed me to clear up the lands, it being wild and unimproved; he also selected a house site for me to build on. He also told me that it would be unnecessary to execute a deed, as he would complete a title to me in said lands in his will. He then and there placed me in actual possession of the land, and I proceeded to clear up and make valuable, lasting and permanent improvements on the land. My uncle, Isaac Adair, left a will but the description of the land in the will calls for some land in said section that he was never the owner of." His testimony then shows the value of the improvements he placed upon the land, and that he and his brother and half sisters, the minor defendants, were the only heirs of Adair.

A witness by the name of Berry testified, in that case, that he was a brother-in-law of Adair, living near him, and that Adair talked frequently to him concerning his business affairs. He told witness that he wanted his nephew Eugene "to have among other lands all the land he owned in section 16." Prior to Adair's death he heard him tell the plaintiff Eugene "that he then gave him all the land he then owned in section 16 and to go ahead and clear up and improve it. Eugene did so and occupied it as a home with his family. Adair left no

children and his widow accepted the provisions of the will in lieu of dower.

The decree in that cause contained recitals showing that the findings of the court were in accordance with the allegations of the complaint. Among other findings was one to the effect, that Isaac Adair did in due and legal form execute his last will and testament, giving to plaintiff the lands he owned as claimed in section 16 but that through the mistake of the draughtsman other lands were inserted, that Adair at the time did not own.

There was another finding to the effect that Causey during the lifetime of Adair had taken possession of the lands and had been in the adverse possession of same for more than seven years "as his own in fee simple." The decree of the court recites:

"It is therefore by the court considered, ordered, adjudged and decreed that plaintiff's title to said lands, (described as claimed in plaintiff's complaint) be confirmed and quieted in him, the said Eugene A. Causey, in fee simple, and any interest that said defendants have or may have in same be divested out of them and vested as aforesaid in said plaintiff."

The deed of Eugene A. Causey to T. F. Tillar upon which appellees rely was introduced in evidence and was shown to be dated April 5, 1895. It was a warranty deed conveying the fee simple estate in the west half of the west half of section 15 and the east half and the northeast quarter of southwest quarter of section 16, township 11 south, range 3 west, conaining 520 acres of land.

There was testimony on behalf of the appellants tending to prove the value of the timber which had been removed from the west half of the west half of section 15. This testimony and such other facts as we deem necessary will be referred to in the opinion.

The court found that T. F. Tillar by the deed of Eugene A. Causey acquired a fee simple estate to the east half and the northeast quarter of the southwest quarter of section 16. This finding was grounded upon the de-

cree of the chancery court of Desha County in the case of *Eugene A. Causey* v. *Alice and Laura Williams.* The court also found that Causey, by virtue of the will of Isaac Adair, acquired a life estate in the west half of the west half of section 15, and that T. F. Tillar through Causey's deed acquired a life estate in these lands in section 15. The court further found that the owners of the Tillar estate and its grantees and licensees had committed waste on the 160 acres of woodland in section 15, by removing therefrom more timber than was necessary for the proper purposes of husbandry, to the damage of the appellants in the sum of $154.84. The court rendered a decree in accordance with its findings from which is this appeal.

WOOD, J., (after stating the facts). (1) The principal question as stated by counsel for the appellants is: "Did Eugene A. Causey at the time of his conveyance to T. F. Tillar have a life estate or an estate in fee simple in the east half and the northeast quarter of the southwest quarter of section 16, township 11 south, range 3 west?"

The chancery court was correct in finding that Eugene A. Causey acquired title in fee to these lands "by virtue of the decree of the chancery court of Desha County in the case of *Eugene A. Causey* v. *Alice and Laura Williams.* The decree of the court in that case confirmed and quieted the title to these lands in Eugene A. Causey in fee simple and the pleadings and the evidence in that cause as well as the findings of the court show that the court rendering such decree had jurisdiction of the subject-matter and of the proper parties and that its decree was within the issue. This rendered the decree binding upon the parties and their privies." *Rankin* v. *Schofield,* 81 Ark. 440-462, and cases cited.

Analysis of the complaint in that case shows that plaintiff was suing not for a life estate but for fee simple title in the lands. He set up an oral contract by which Adair promised to give him the lands and under which he went into possession and made valuable improvements,

which took the contract out of the statute of frauds and entitled him to specific performance of the contract. *Young* v. *Crawford*, 82 Ark. 33; *Williams* v. *Neighbors*, 107 Ark. 473.

While the complaint sets up that it was the purpose of the testator Adair to carry out his contract by will and sets up the will and alleges that certain lands intended to be given him were not included therein, and that certain other lands which the testator did not own were through the mistake of the draughtsman inserted in the will and asked that the description of the lands be corrected, yet it is very clear when these allegations are taken in connection with other allegations of the complaint and in connection with the testimony that was adduced in that cause and with the decree rendered, that the plaintiff Causey was seeking to have fee simple title vested in him to all the lands in section 16 described in his complaint. Whatever may be the ambiguity in the complaint, that Causey intended thereby to raise the issue that he was entitled to a fee simple estate in the lands described therein can not be doubted when his testimony and the testimony of Berry adduced in the trial of that cause is considered.

(2) The language of the decree shows that the court understood that the issue joined was whether or not the plaintiff Causey was entitled to the specific performance of the contract of Adair to give Causey a fee simple estate in the lands. The allegations of the complaint, and the testimony of Causey and of Berry fully justified such conclusion. The testimony of Causey in short was that his uncle Adair made him a gift of all his lands in section 16, selected a site for his home, told him that it would be unnecessary to execute a deed as he Adair by his will would complete a title in (him) Causey.

"A promise to give land absolutely and execute a deed therefor is a promise to convey the whole of the grantor's estate, not merely a life estate." *Burlingame* v. *Rowland*, 19 Pac. 526.

(3) The word *title,* when used in reference to title in real estate, "implies an estate in fee; nothing short thereof is a complete title." *Gillespie* v. *Broas,* 23 Barber 370-381.

"Title, in common acceptance, means the full and absolute title." *U. S.* v. *Hunter,* 21 Fed. 615-617. "Title" Century Dict.; *Hoult* v. *Donahue,* 21 W. Va., 294; *Langmede* v. *Weaver,* 65 Ohio St. 37; *Johnson* v. *Gardner* (N. Y.), 10 Johns. 266-269; *Pinkston* v. *Huie,* 9 Ala. 252.

(4) The appellants here are bound by the decree in *Causey* v. *Williams,* although they were not *in esse* at the time of the rendition of said decree.

Judge Story says: "So, if there be a tenant for life, remainder to his first son in tail, remainder over; and the tenant for life is brought before the court before he has issue, it is settled in equity that the contingent remaindermen are barred, and (as has been said) from necessity." Story's Equity Pl. (10 ed.), p. 153; *Riddley* v. *Halliday,* 61 S. W. 1025, and other authorities there cited and reviewed.

In the latter case, after reviewing English and American authorities, the court announces substantially the above rule and quotes from *Kent* v. *Church of St. Michael,* 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 331, as follows: "Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience and almost of necessity."

Counsel for appellants rely upon *LeSieur* v. *Spikes,* 117 Ark. 366, where we held that "a life tenant could not by conveying a greater interest than she possessed before the birth of any child or children deprive such child or children of their fee simple estate in remainder."

But this does not conflict with the rule above announced, which, as we have seen out of considerations

of convenience and necessity for the purpose of settling litigated titles, makes the life tenant the representative of the remainderman not in being. It follows that the suit of *Causey* v. *Williams* vested a fee simple title to the lands in controversy in that suit in Causey. He was not estopped from maintaining such suit by his conduct nor barred by the statute of limitation. His children, the appellants here, were bound by that decree and by his conveyance to Tillar.

The court found that Eugene A. Causey was the owner of a life estate in the west half of the west half of section 15 by virtue of the will of Isaac Adair and that T. F. Tillar acquired this life estate through Causey's deed.

This finding was also correct. The land in section 15 was not in issue in the suit of *Causey* v. *Williams*. The will unquestionably created but a life estate in Causey with the remainder in fee to his children. *Rogers* v. *Ogburn,* 116 Ark. 233, and cases there cited.

The appellees have not appealed and do not challenge the correctness of the court's finding as to title of the land in section 15.

(5) This brings us to a consideration of the issue as to what damages, if any, appellants have sustained by reason of waste committed by appellee on the west half of the west half of section 15.

In *McLeod* v. *Dial,* 63 Ark. 10-15, the rule as to the rights of the life tenant is announced substantially as follows:

"He has no right to cut trees growing on this portion of the land, or allow them to be cut except so far as was necessary to the proper and reasonable enjoyment of his life estate in conformity with good husbandry. For the purpose of using it as farming land, he had the right to clear a part of it, provided such part and that already prepared for cultivation, as compared with the remainder of the tract, did not exceed the proportion of cleared to wooded land usually maintained in good husbandry, and provided, further, that

he did not materially lessen the value of the inheritance. He also had the right to cut and use so much of the timber standing on the one-half which belonged to his wife as was necessary for fuel, and for making and repairing fences and buildings on the same. But the timber could only be cut or used for the proper enjoyment of the estate for life and not merely for sale."

Several witnesses testified on behalf of the appellants placing their damage by reason of the removing of the timber from the 160 acres in section 15, all the way from $2,500 to $7,000, but this testimony was based on the theory that the entire Causey tract of more than 500 acres was involved.

The court, as we have seen, correctly limited the damage to the 160 acres in section 15, which was all woodland.

The Tillar Mercantile Company, the lessee of the Tillar estate, had sold to the Fee Crayton Lumber Company all the merchantable timber on this tract, and received therefor the sum of $1,600. The latter company was made a party to this suit and interrogatories were propounded to it by appellants to ascertain the value of the timber taken by it from the land. Its answer shows the value of the timber removed by it from the land, was $619.38. This answer was duly verified and was not denied by the appellants and it fixes the actual value of the timber taken.

The testimony shows that good husbandry required that 25 per cent. of standing timber should be left to supply the upkeep of a farm. Therefore, under the above rule the Tillar estate as life tenant had the right to clear all except 40 acres of the 160 acres for farming purposes, and the damage to the appellants could not have been more than one-fourth of the actual value of the timber taken.

The chancery court found that the appellants had sustained damages in the sum of $154.84, which sum was exactly one-fourth of the value of the timber that had been removed from the entire tract of 160 acres.

The decree of the court is correct, and is, therefore, affirmed.

DAVIES & DAVIES *v.* PATTERSON.

Opinion delivered June 24, 1918.

1. ATTORNEY AND CLIENT—RIGHT OF CLIENT TO SETTLE LITIGATION.—An attorney has a lien for his fees which can not be defeated by any settlement of the parties litigant, before or after final judgment or order; but an attorney can not compel his client to continue litigation, and the client may dismiss or settle the cause of action without consulting his attorney.

2. ATTORNEY AND CLIENT—AGREEMENT AS TO FEES.—A. employed B. to represent him in the collection of certain claims against certain insurance companies, the agreement providing that B. receive a fee of $100 for his services, at all events, but in the event of a suit B. was to receive a contingent fee, the amount being dependent upon a recovery in favor of A. in a greater sum than that which the insurance companies had offered to pay. B. brought suits, but A. settled privately with the companies for a sum less than the amount demanded by the suits, and less than the amount which the insurance companies had offered to pay. *Held,* under the law the companies would not have been liable for attorney's fees had the suits been prosecuted to final judgment, and therefore B. could not recover from A. more than $100 and costs paid for him.

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

Davies & Davies, pro se.

1. The matter in controversy in this suit was settled in 201 S. W. 504. The directed verdict is grievously wrong, and contrary to that decision.

2. The question should have been submitted to a jury. 140 Pac. 439; 57 Ark. 461; 38 Am. St. 254. Under the contract appellants were entitled to recover. We were not allowed to prove the services rendered nor their value.

3. The court erred in overruling the demurrer and in not sustaining the motion to dismiss. Kirby & Castle's Digest, § § 1078, 7809.

4. Numerous errors were made in ruling upon the evidence, which were duly excepted to.

STATEMENT OF FACTS.

This action was instituted by the appellee, plaintiff below, against the Stuyvesant Insurance Company on a policy of fire insurance. It was alleged that the plaintiff made proof of loss and that the insurance company admitted its liability on the policy in the sum of $847.20 which the plaintiff was willing to accept and had demanded payment thereof but the company had refused to pay the same. The company answered admitting its liability, but alleged that it issued its draft payable to the plaintiff; that the draft was delivered to Davies & Davies, plaintiff's attorneys, who were then in possession of the same and who declined to surrender the same, that the company was ready and willing to pay the draft but that same was negotiable paper and that Davies & Davies claimed a personal interest in the draft which prevented the issuance of a duplicate and canceling the outstanding draft.

The court ordered that Davies & Davies be made parties defendant in the action and that the insurance company pay the sum of $847.20 into court, all of which was done.

Davies & Davies filed what they designated their answer and interplea in which they set up that they had a lien on the draft in question in the sum of $124.50, for balance due them as attorneys' fee for services rendered in five several actions at law brought by them as attorneys for Patterson against the insurance company.

Upon the payment of the money in court by the insurance company the complaint against it was dismissed and the cause proceeded to a trial before a jury on the issue between Davies & Davies and A. J. Patterson as to the attorneys' fee.

The facts developed on this issue were substantially as follows: On the 14th of November, Davies & Davies, hereafter called appellants, and A. J. Patterson, here-

after called appellee, entered into the following contract: "It is hereby agreed by and between A. J. Patterson and the firm of Davies & Davies, attorneys, that the said attorneys are to attend to the business of securing a settlement of the claim of said Patterson for payment of five insurance policies for damages on account of fire sustained to and on account of a fire November 2, 1916, by which the building and furniture of said Patterson were burned, situated on lot 10, block 146, in Hot Springs, Arkansas, for a fee of one hundred dollars to be paid by said Patterson whether suit is brought or not. If suit is brought and a recovery is had for an attorney's fee, it is agreed that the amount paid by the said Patterson shall be returned to said Patterson from any fee so recovered. If no fee is allowed by the court then said sum of $100 is to be kept by said Davies & Davies, and in that event shall be considered as payment in full for such services as shall be rendered by said Davies & Davies, on account of the fact that said Patterson shall have the costs of any such suit to pay, and shall not have recovered more than the insurance companies have offered to pay."

R. G. Davies' testimony tended to prove that the contract above contemplated the bringing of five suits against the several insurance companies for sums covered by their respective policies amounting in the aggregate to $7,000, provided the insurance companies had not settled within sixty days from the time they received the proof of loss. The proofs of loss were received by the companies about November 25. The appellant agreed with the several companies upon a settlement in which he was to receive in the aggregate the sum of $5,000, which sum was to be paid within sixty days from the receipt of the proof of loss. This agreement for settlement was made without the knowledge of the appellants and when R. G. Davies was informed of it by the appellee he protested against it and stated to the appellee that he was entitled to the benefit of his contract and that if he, appellee, had settled the lawsuits without the appellants' consent they were entitled to the same amounts that

they would have received if they had brought suit. Appellee replied that he had settled. Davies then asked him whether he was going to pay the fee or not. The appellee replied, "If they do not pay all the money in sixty days from the time we made that proof, why, go ahead and sue them." Davies wrote to the companies a letter to that effect on December 26, 1916.

Patterson was not living in Hot Springs but was there at the time when he gave Davies the directions to write the insurance companies.

On the 20th of January, 1917, appellants had received drafts from three of the companies covering the amounts as agreed upon between them and the appellee. Appellants wrote the appellee that they had received these checks but that the others had not arrived and that unless the checks of all five companies were turned over by the 22nd appellants would bring suit; that they had forwarded the checks received for payment but that the companies had refused settlement on the ground that the checks would have to be endorsed by the appellee. In the letter of appellants to appellee, appellants informed him that as the companies had refused to pay he could sue for the full amount. Among other things appellants wrote "if you do not want to sue them wire us as soon as this reaches you. We have prepared the complaints and will file them unless you refuse to permit us to bring suit according to our agreement." Appellants also wrote the appellee on the 25th of January, stating among other things that they had received four of the checks, and that one had not yet arrived. This letter informed the appellee that appellants had brought suit on all the policies for the full amount thereof and attorneys' fee; that they had cashed one of the checks for $678.04 and they were enclosing the rest. In this letter appellants among other things advised appellee that he should not receipt the insurance company in full but have it distinctly understood that the payment of the checks was only to go on the credit of the indebtedness as a whole. Appellants further stated, "The time elapsed before we acted and they

refused to pay some of the checks and one of them has not arrived yet." Other letters were written by appellants to the appellee all of which he acknowledged he received, in which appellants protested against the appellee accepting the amount of the checks and advised him if he did so that they would insist upon his liability to them the same as if they had pursued the litigation to the end and recovered the full amount for which they sued. In a letter of the 27th of January appellants wrote the appellee among other things as follows: "One of the checks still not turned over. Sent three to you by registered letter and cashed the other."

After introducing the above letters R. G. Davies testified among other things that what they stated in those letters was true. "We did not receive all the drafts before we brought the suits. We received three. The fourth was received on the 27th and the last one on the 30th of January. The suits were brought either on the 23rd or 24th." Davies further testified that after the suits had been brought that appellee demanded that he dismiss the same and stated that he would pay the $100 mentioned in the contract, but that the witness refused to accept that amount and insisted that appellee owed more than that.

Witness was asked how he arrived at $124 which he claimed, and answered that if he had maintained suits for $7,000 with 12 per cent. penalty added to that it would amount to $8,400, the total amount, and that they were entitled to at least 10 per cent., which would have left due them the sum of $124. As Patterson by his settlement had prevented witness from prosecuting the suits witness was entitled to the full amount of the fee he would have received. He admitted that he had received the sum of $678.04.

Appellee testified admitting that he entered into the contract with Davies and that he had agreed to settle with the companies for $5,000, and if the companies had not paid him within sixty days from the time they received the proofs of loss he expected the appellants to

sue them. But he denied that he ever authorized appellants to enter suit. He stated that appellants had collected $678 from the insurance companies and still held that amount, and therefore since appellants drew on witness for the sum of $124 he refused to pay the same and told the banker that he did not owe Davies anything.

There was much more testimony but the above is sufficient to test the correctness of the ruling of the court in instructing the jury to return a verdict in favor of the appellee.

WOOD, J., (after stating the facts). The orders of the court eliminating the insurance company from the case and requiring the appellants to be made parties and the interplea filed by appellants narrowed the issues to, and the cause progressed as if it were, a suit by appellants against the appellee for fees for services as attorneys.

Appellants contend that under their contract with appellee they were authorized to institute suit against the insurance companies, which they did, and that inasmuch as the appellee effected a settlement of these suits for a less amount than the sum sued for without the consent and over the protest of appellants, that they were entitled to the same fee that they would have recovered had the suits progressed to a successful termination in favor of the appellee for the full amount of his demand as made by those suits.

A correct decision of this issue involves a construction of the contract. The contract contemplated that appellants should attend to the matter of making the settlement of the controversy between the appellee and the insurance companies, and for these services the appellants were to be paid the sum of $100 at all events, whether the settlements were had with or without suit. But in the event of a suit appellants were to receive a contingent fee, the amount thereof being dependent upon a recovery in favor of the appellee in a greater sum than

that the insurance companies had offered to pay. If appellee did not recover by the suits more than the insurance companies had offered to pay then the appellants were to receive the sum of only $100 for their services in bringing suits and the appellee was to pay the costs.

Now, giving appellants' evidence the strongest probative value in favor of the appellants, it tends to prove that they were authorized by the appellee to institute the suits against the insurance companies for $7,000, which they did. That after these suits were instituted appellee without appellants' consent settled the same for the sum of $5,000. Assuming these facts to be true, the question of law, therefore, is: "Were appellants entitled to recover a greater sum than $100 as attorney's fee and the costs, which they paid, in connecetion with the suits?"

In *Davis* v. *Webber,* 66 Ark. 190, we held that "A stipulation, in a contract for an attorney's fee for prosecuting a suit, that the client shall not settle the suit without the attorney's consent is void as against public policy." See, in addition to the authorities there cited, 2nd Page on Contracts, sec. 775, and the cases in the note.

(1) Under our statutes an attorney has a lien for his fee which can not be defeated by any settlement of the parties litigant, before or after final judgment or final order. But an attorney has no right to compel his client to continue litigation and the client may dismiss or settle the cause of action without consulting his attorney. *St. L., I. M. & S. Ry. Co.* v. *Blaylock,* 117 Ark. 507; *St. L., I. M. & S. Ry. Co.* v. *Kirtley & Gulley,* 120 Ark. 389.

The contract between appellants and the appellee must be read in the light of the law and construed as though it contained a provision permitting the appellee to settle the suits at any time without consulting his attorneys, the appellants. The appellants, therefore, must be held to have contemplated, when they entered into the contract, that after the suits were instituted the appellee might settle the same and for a less sum than sued for and for a sum no greater than that which the insurance companies had offered to pay. Appellants must

be held to have known that if the appellee did thus settle the amount which he received in the settlement would represent the amount recovered by virtue of the suits the same as if they had been prosecuted to a final judgment in that sum.

(2) It follows that, since appellee recovered from the insurance companies less than the amount demanded by his suits, and less than the amount that the insurance companies offered to pay, the companies would not have been liable for attorneys' fees had the suits been prosecuted a final judgment. *Pacific Mutual Life Ins. Co.* v. *Carter,* 92 Ark. 378.

Therefore, under the express terms of the contract, appellants could not recover of the appellee more than the sum of $100 and the costs they had paid for him. The appellants were entitled to a judgment against the appellee for that sum and to have a lien declared on the funds in their hands for its payment. *Railway* v. *Blaylock, supra; Railway* v. *Kirtley & Gulley, supra.*

Appellants contend that the issues raised by the pleadings and the proof in this case have already been determined in their favor by the opinion of this court in the case of *Davies & Davies* v. *Patterson,* 132 Ark. 484. Appellants misapprehend the effect of the decision in that case. While the parties were the same and the same subject matter was brought under review, yet the issue in that case was entirely different from the case at bar. In that case Patterson filed a motion for a summary judgment against Davies & Davies asking that they be required to pay over $678, the funds in their hands, which he alleged they had collected. It appears that the above sum was collected on a policy of insurance under the same contract of employment as is in this suit.

In that case Davies & Davies in their response to the motion for summary judgment set up the contract and alleged substantially the same facts in response to the motion as they have alleged here in support of their contention, that they are entitled to a judgment for the full amount of the fees claimed by them.

That case was disposed of as if on demurrer to the response. In that case the opinion was concluded in the following language: "The answer herein stated facts which, if true, were sufficient to constitute a defense to the motion for a summary judgment. In all such cases the court should deny the motion and treat the proceedings as an ordinary action at law and transfer the same to the proper docket and allow it to take its regular course in such proceedings." We further said in the course of the opinion: "If the facts set forth in the answer of the defendants are true, they had a just and meritorious defense."

Treating the facts set up in response to the motion as true, we held that the court had no jurisdiction to render judgment against the attorneys on summary proceedings. But an action by clients under a special statute on summary motion to have attorneys pay over moneys collected by them is an entirely different proceeding and presents a wholly different issue from that of an action instituted by clients against their attorneys for money had and received by the attorneys in the regular course of the common law to recover fees for services rendered by them. Although the summary motion and the action at law may be between the same parties and concerning the same subject matter, it does not follow that facts which would constitute a good defense to summary motion to have attorneys pay over the moneys collected by them and which would defeat the jurisdiction of the court to render judgment on such motion, would also constitute a cause of action in favor of the attorneys for fees for services rendered.

It appears from the undisputed evidence in this cause that the appellants have collected and now have in their hands the sum of $678, funds belonging to the appellee. As this sum exceeds the amount of the fee and costs for which appellants were entitled to judgment, as above indicated, there was no prejudicial error in directing

a verdict and rendering judgment herein in appellee's favor.

Judgment affirmed.

HART and HUMPHREYS, JJ., dissenting.

BRECKENRIDGE & BRASHEARS *v.* HEARNE TIMBER COMPANY.

Opinion delivered June 24, 1918.

1. EVIDENCE—CONTRACT SILENT AS TO DURATION—ORAL EVIDENCE TO EXPLAIN.—A. and B. entered into a contract whereby A. was to cut and deliver certain timber and B. was to pay for the same. In an action by A. against B. to recover for an alleged breach of the contract, oral testimony by A. that the contract was to run for a year is admissible, the contract being silent as to its duration.
2. STATUTE OF FRAUDS—DELIVERY AND ACCEPTANCE OF STAVES.—Where staves were manufactured and delivered by one party to a contract, and accepted by the other party, a contract to manufacture and deliver, and to accept and pay for the same is taken out of the statute of frauds.
3. GARNISHMENT — AMOUNT INVOLVED. — Garnishment proceedings only draw into controversy so much of the garnishee's indebtedness as is necesary to satisfy the plaintiff's debt.
4. GARNISHMENT—JUDGMENT FOR DEFENDANT—RES ADJUDICATA.—A garnishment proceeding in which A. is defendant and M. is plaintiff, and judgment is rendered for A. can not be pleaded as *res adjudicata* in an action by A. against B., garnishee in the former suit, on a claim of A. against B. for breach of contract.

Appeal from Greene Circuit Court; *W. J. Driver,* Judge; reversed.

Huddleston, Fuhr & Futrell, for appellants.

1. Oral testimony that the contract was to run a year was admissible. 60 S. W. 1010; 17 Cyc. 745; 2 Elliott on Contracts, § 1634; 11 N. Y. S. 724; 81 Ark. 373; 11 Am. St. 920; 26 Am. Dec. 542.

2. The contract was not void for want of mutuality. 94 Ark. 9. See, also, 18 N. E. 790; 106 U. S. 144; 96 Ark. 184.

3. The garnishment proceedings were no bar to this. 20 Cyc. 1101; 25 N. E. 1000; 37 Pa. St. 228.

The payment into court was not in full satisfaction. 78 N. W. 332; 34 Vt. 548; 58 N. H. 312; 41 Mich. 346; 14 *Id.* 374; 70 Ark. 127; 93 *Id.* 609.

4. It was error to direct a verdict.

Block & Kirsch and *Baker & Sloan,* for appellee.

1. Oral testimony was not admissible. 83 Ark. 163; 100 *Id.* 360; 102 *Id.* 570; 112 *Id.* 165; 105 *Id.* 50; 113 *Id.* 509; 125 *Id.* 219.

2 There was no mutuality in the contract. It was unilateral. 94 Ark. 9; 90 *Id.* 504; 96 *Id.* 184-188; 64 *Id.* 398.

3. The judgment in the McDaniel case was a bar. The money was paid into court and was an accord and satisfaction. 1 C. J. 565, § 94, p. 564, § 89; 94 Ark. 158; 98 *Id.* 269; 100 *Id.* 251.

STATEMENT OF FACTS.

Appellants, a partnership composed of E. B. Breckenridge and O. M. Brashears, entered into a contract on January 28, 1914, with the appellee by which the appellee was to purchase certain cross and switch ties of certain kinds and dimensions at certain prices, all of which were specified in the contract. The contract provided that the party of the first part was to advance moneys as the ties were being made in the woods, and when the ties were delivered by the appellants at the place designated and received by the appellee the latter was to be repaid the amount that it had advanced and the balance due on the purchase price was to be paid to Richard Jackson who was the owner of the timber out of which the ties were manufactured. After Richard Jackson had been paid, then the balance due on the purchase price was to be paid to the appellants. The contract did not specify how long the same was to be in force.

The appellant instituted this action against the appellee setting up the contract and alleging that the same was to continue for a period of one year. They alleged that they had manufactured and delivered to appellee under the contract ties to the value of $8,052;

that the appellee had paid the sum of $6,533, leaving balance due appellants $1,529.34, for which they ask judgment. They further set up that appellee on the 19th day of August broke its contract by notifying the appellants that it would not thereafter receive and pay for ties under the contract. They alleged in their complaint that other damages accrued, growing out of the breach of the contract, which they specifically set forth. They prayed for damages in these several particulars, which in the aggregate amounted to $5,130.36.

The appellee answered admitting the contract but denying any breach of its conditions and denying all the allegations of the complaint. They admitted that there was a balance due appellants on the contract and alleged that the reason the same was not paid was because a suit had been instituted in the circuit court of Greene County wherein one J. E. McDaniel was plaintiff, and the appellants herein were defendants and the appellee was garnishee; that in response to the interrogatories in that cause appellee answered showing the amount of money that was due by it to appellants herein, making and filing as an exhibit a detailed account showing all the transactions between it and the appellants and the balance due appellants on the contract; that appellee paid into the circuit court in that case the amount so shown to be due appellants, and upon the trial of that cause the amount of money deposited by it into the registry of the court by the appellee, as garnishee, was accepted by appellants in full satisfaction of all claims against the appellee and appellee by the judgment of that court was discharged.

The appellee pleaded these proceedings as *res judicata* of the present issue and made the pleadings in that suit an exhibit of its answer in this suit.

In the suit of McDaniel against the appellants there was judgment in favor of the defendants, appellants here, and the judgment contained this recital:

"And it appearing to the court that garnishee, Hearne Timber Company, had answered the interroga-

tories filed in this case against them and admitted that they were indebted in the sum of three hundred forty seven and 28-100 dollars, and that they paid said amount into the hands of the clerk of this court, and it appearing to the court that of the sums of money paid in by garnishee that there is due to Richard Jackson the sum of two hundred forty-three and 15-100 dollars, and that there is due to the defendants one hundred four and 13-100 dollars, it is therefore by the court ordered and adjudged that the garnishee be discharged, and that the funds paid by it into the hands of the clerk of this court be by him paid as follows: To Richard Jackson, two hundred forty-three and 15-100 dollars, and the remainder, amounting to one hundred four and 13-100 dollars, to the defendants O. M. Brashears and Eli Breckenridge."

Indorsed as follows:

"Rec'd. Fred Watson $104.13, amount due me under this judgment from Hearne Timber Co., April 22, 1916.

"(Signed) O. M. Brashears."

The appellants offered to prove by oral testimony that they promised to operate for one year under the terms of the contract; that the contract was to continue for one year.

The court first admitted this testimony to go to the jury, but afterwards in an instruction withdrew the same from their consideration, to which the appellants duly excepted. The court then instructed the jury as follows:

"It further develops, in the course of the testimony in this case, gentlemen, that at the March term, 1915, of this court, in a proceeding brought by one J. E. McDaniel against the defendants there, who are the plaintiffs here, McDaniel sued to recover from the defendants in that case—the plaintiffs here—certain money for labor done and performed under a contract with them, and caused a writ of garnishment to be issued and served upon the defendant in that case, the Hearne Timber Company. In that proceeding the Hearne Timber Company

answered, at such March term, 1915, giving in a concise and complete way all of the transactions occurring between the parties to this suit here, growing out of this tie contract. The case as tendered by the plaintiff against the defendants went to trial before a jury in that court, and one of the jurors in this case was the foreman in that case, and reported a verdict in this court in favor of the defendants Brashears and Breckenridge, disposing of the case so far as the legal rights of the parties were concerned, but thereafter the plaintiffs here—the defendants in that case—permitted a judgment to be entered in that case, at that term, upon the answer of the Hearne Timber Company, the garnishee, containing this complete statement of all the transactions that occurred between these parties, and a judgment was rendered in that court, and the plaintiffs here accepted that judgment and the moneys that were dealt with and satisfied that record. That judgment was based upon a complete settlement offered by the Hearne Timber Company, it was accepted by the defendants—the plaintiffs here—and it is binding upon them. They can not now be heard to question those transactions that were concluded with their full knowledge and consent, in a proceeding in which they were parties, in which they permitted this settlement to go into a judgment. So it becomes the duty of the court, gentlemen, to settle this case on a question of law, and your verdict will be for the defendant."

A verdict was returned as directed, upon which judgment was rendered and from which is this appeal.

WOOD, J., (after stating the facts). (1) The testimony of Breckenridge and also of Brashears was to the effect that they agreed to operate a year under the terms of the contract, and to manufacture all the ties they could within that time. It was understood between appellants and appellee that the contract was to run a year. The above testimony was competent, and the court erred in excluding it. The writing did not specify how long the same was to continue in force. The oral

testimony offered made it clear that it was contemplated by the parties that the contract should be in operation for the period of one year. This testimony was within the rule that where a written instrudent does not express the entire agreement or understanding of the parties oral testimony may be admitted to show such agreement or understanding. In such cases the instrument on its face shows that it is not complete, and the admission of oral testimony, therefore, does not tend to vary or contradict the written contract. The contract being silent as to the period of duration, parol evidence was admissible to show it. 2 Elliott on Contracts, sec. 1634; *Brincefield* v. *Allen,* 60 S. W. 1010; 17 Cyc. 745; *Appeal of Real Estate, Title, Insurance and Trust Co.,* 125 Penn. St. 549. See, also, *Case* v. *Phoenix Bridge Co.,* 11 N. Y. Supp. 724; *St. L., I. M. & S. Ry. Co.* v. *Wynne H. C. & C. Co.,* 81 Ark. 373; 1 Page on Contracts, sec. 27, p. 44.

(2) The testimony shows that after the contract was signed the appellants manufactured and delivered to appellee about 20,000 staves, which appellee had accepted. If the contract be treated as one which the statute of frauds requires to be in writing, still under the evidence showing a delivery and acceptance of part of the ties the contract of sale was taken out of the operation of the statute. *Walnut Ridge Merc. Co.* v. *Cohn,* 79 Ark. 338. See *Izard* v. *Connecticut Fire Ins. Co.,* 128 Ark. 434.

The testimony of the appellants tended to show that they had purchased from one Richard Jackson, in November, 1912, the timber on a large tract of land agreeing to pay therefor the sum of $3,520 in three equal annual installments and they were to have four years, and in certain event five years, in which to cut and remove the timber. They informed the agent of the appellee with whom the contract was made of such purchase and terms thereof and explained to them that their purpose for wanting this contract with the appellee for a year was to enable them to meet their payments to Jackson on the timber out of which the ties contemplated by the contract were to be manufactured. That under the contract they

were to manufacture all the ties they could for a space of one year.

The contract on the part of the appellee, to purchase upon the terms specified, implied a corresponding obligation on the part of the appellants to sell upon those terms. *Thomas-Huycke-Martin Co.* v. *Gray,* 94 Ark. 9.

(3) "A garnishment proceeding only draws in controversy so much of the garnishee's indebtedness as is necessary to satisfy the plaintiff's debt." *Bank of Waldron* v. *Euper,* 93 Ark. 609.

(4) In the suit of McDaniel, the plaintiff, against appellant here, McDaniel recovered nothing, therefore no indebtedness between the defendants, appellants here, and the garnishee, appellee here, was in issue in that suit. The defendants in that suit, appellants here, did not challenge the answer of the appellee, the garnishee, to the interrogatories propounded by the plaintiff McDaniel in that case, and they were not called upon to do so.

The receipt endorsed upon the margin of the record of the judgment in that case which was signed by O. M. Brashears, showed that he had received the sum of $104.13 from appellee under the judgment rendered in that case. But the judgment in that case, as before stated, was not an adjudication of the matters in issue here between appellants and the appellee and the receipt mentioned contained none of the elements of an accord and satisfaction that would preclude the appellants from prosecuting this suit against the appellees for damages growing out of the alleged breach of contract.

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

MURREY v. LITTLE ROCK CHAMBER OF COMMERCE.

Opinion delivered June 24, 1918.

1. EQUITY PRACTICE—EXHIBITS CONTROL COMPLAINT, WHEN.—Under the practice in equity, an exhibit will control averments of the complaint and the nature of the cause of action.

2. CONTRACTS—SUBSCRIPTION CONTRACT.—Appellant entered into a contract with appellee agreeing to pay to it a certain sum in a certain manner, and to receive in return a deed to a lot in a certain locality. Appellant made a small payment and thereafter failed to make further payments. These facts were set forth in the complaint, to which the contract was attached as an exhibit. *Held,* a demurrer to the complaint was properly overruled.

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

Gordon Huffmaster, for appellant.

1. The demurrer should have been sustained. The complaint is defective. Kirby & Castle's Digest, § 7533, subd. 3, 7538; 41 Ark. 42. It does not allege performance of the conditions in the contract. It is a mere gratuitous subscription and no consideration is alleged. 132 Ark. 361. The condition was a condition precedent. Kirby & Castle's Digest, § 7572. No allegation of performance is made. 30 Ark. 186; 84 Pa. St. 388; 64 *Id.* 627; 93 *Id.* 472.

2. Material allegations omitted in a complaint can not be supplied by an exhibit attached. Kirby & Castle's Digest, § 7576; Newman on Pl. & Pr. 250; 14 B. Mon. 84; *Ib.* 254; 169 S. W. 747; 41 Ark. 42-44.

3. The complaint does not allege facts sufficient to constitute a cause of action for specific performance. 68 Ark. 263; 61 *Id.* 272; 48 *Id.* 272. See also 78 Ark. 575; 71 *Id.* 185; 76 *Id.* 578; 78 *Id.* 333; 95 *Id.* 92.

W. B. Smith and *Jno. P. Streepey,* for appellee.

1. The complaint is sufficient. 132 Ark. 361.

2. The exhibit is part of the complaint. 104 Ark. 459-462; 108 *Id.* 503-5.

3. It is sufficient to enable appellee to foreclose. 132 Ark. 361; 75 Ark. 410; 87 *Id.* 393.

STATEMENT OF FACTS.

The Little Rock Chamber of Commerce brought this suit in equity against T. P. Murrey to recover upon a subscription contract, and, inasmuch as the sole issue raised by the appeal is as to the sufficiency of the complaint, we will set it out in full. It is as follows:

"Comes the plaintiff by its solicitor, John P. Streepey, and for cause of complaint against the defendant herein, alleges:

"That it is a corporation organized and existing under and by virtue of the laws of the State of Arkansas, and has its principal office in the city of Little Rock, Pulaski County, in said State; and that on..... day of January, 1913, defendant made and entered into a contract with plaintiff, whereby he agreed to purchase from the plaintiff the following described property, located in the county of Pulaski and State of Arkansas, towit:

"Tract 6, Army Post Addition to the City of Little Rock, Arkansas.

"Under the terms of said contract he bound himself to make monthly payments thereon, and, in the event he failed or neglected to do so, plaintiff should have the option to declare said contract forfeited; that plaintiff paid $12.50 on said contract on the 6th day of January, 1913, and has failed and neglected to make any further payments thereon; that there is now due on said contract the sum of $237.50; that demand has been made upon plaintiff to pay same and he has neglected and refused to do so; that said amount is long past due; that a copy of said contract is attached hereto as a part thereof, marked 'Exhibit A.'

"Wherefore, plaintiff prays for judgment against the said T. P. Murrey and ..... Murrey, his wife for $237.50, with interest at the rate of 6% per annum from this date until paid; that the equity of redemption and all right, claim or title of the said T. P. Murrey and ..... Murrey, his wife, be foreclosed and forever barred; that, upon default in the payment of said judgment within the time specified by the court, the

above described property shall be ordered sold upon the terms, manner and notice to be fixed by the court; that a special commissioner be appointed to carry out the decree of the court herein foreclosed and all other and proper relief."

The court overruled a demurrer to the complaint. The defendant declined to plead further, and the cause was considered by the court on the complaint of the plaintiff and the contract which was made an exhibit thereto, and which will be more particularly explained in the opinion.

The court entered a decree in accordance with the prayer of the complaint, and the defendant has appealed.

HART, J., (after stating the facts). The contract which was made an exhibit to the complaint is the foundation of the suit. It was executed on the first day of January, 1913, and recites the execution of a prior contract between the Little Rock Chamber of Commerce and T. P. Murrey entered into on the 29th day of January, 1912. The contract of that date which is recited in the contract sued on is in all essential respects similar to the contract which was sustained in the case of *Byington* v. *Little Rock Chamber of Commerce,* 132 Ark. 361, and reference is made to the opinion in that case for a copy of it. The original contract contained a provision that the purchase of the property is made by the subscriber upon the condition that the Little Rock Chamber of Commerce makes a sale of the property acquired by it for industrial and development purposes to the aggregate amount of $200,000.

It is insisted by counsel for the defendant that the complaint is defective because it does not allege that this condition has been complied with by the plaintiff. The contract sued on recites that in fulfillment of the contract of subscription, the Little Rock Chamber of Commerce has sold to T. P. Murrey the property described in the complaint for the price of $250. It also recites

that the Little Rock Chamber of Commerce has had the real property acquired by it for industrial and development purposes appraised by a committee appointed for that purpose pursuant to the terms of the subscription contract and that T. P. Murrey has selected the property appraised at the amount of his subscription. Thus it will be seen that the contract sued on goes further than the contract involved in the case of *Byington* v. *Little Rock Chamber of Commerce, supra.* The contract sued on contains a provision in which the Little Rock Chamber of Commerce bargains and sells to Murrey certain specific real estate for a designated price. This contract is complete in itself and is sufficiently definite and certain to sustain the present action if no reference had been made to the original subscription contract. When the whole contract is considered, however, it shows that the parties recognized that the contract sued on was executed pursuant to the provisions of the original subscription contract.

This is a suit in equity, and the contract which is made an exhibit to the complaint is the foundation of the action. Under our rules of practice, the exhibit will control averments of the complaint and the nature of the cause of action. *Swift* v. *Erwin,* 104 Ark. 459, and cases cited; *Cox* v. *Smith,* 99 Ark. 218, and *McMillan* v. *Morgan,* 90 Ark. 190. The contract contained an acceleration clause providing that upon default of any installment the whole debt should become due. The complaint contains an allegation that the whole debt had become due and that the defendant had neglected and refused to pay the same. In other words, according to the allegations of the complaint the defendant had wholly failed to perform and carry out the contract which he had entered into with the plaintiff. Upon his demurrer to the complaint being overruled, he declined to plead further and the court properly entered a decree in favor of the plaintiff.

The decree will be affirmed.

HART, J., (on rehearing). It is earnestly insisted by counsel for appellant that, under the terms of the contract, the appellant might abandon his contract of purchase at any time he chose to do so. The provision referred to is as follows:

"Now, upon the payment of the above designated installments at the time and in the manner therein set forth, the said party of the first part obligates itself, successors and assigns, to convey to said party of the second part the land hereinbefore described. But if the purchase money for said land is not paid at the time and in the manner herein specified, upon the second default made in said payments, all of said installments remaining unpaid shall at once become due and payable, and the obligation resting on the party of the first part shall become null and void, and the money therefore paid on account of the said purchase shall remain with and be the property of the party of the first part, and shall be considered as so much rent paid by said party of the second part for the use of said property from the date of this instrument to the date of such default in payment; but nothing herein contained shall release the party of the second part from his obligation to pay the balance owing by him on his subscription contract, notwithstanding such default on his aforesaid purchase contract, and in case of default, as above, the party of the first part shall have at once a right of action upon the subscription contract against the party of the second part for the balance owing thereon, without any obligation resting upon it to further perform its contract by conveying to the party of the second part the real estate above described."

The contention of counsel for appellant is not sound for two reasons. In the first place the contract provides that upon the second default made in the payments, the obligation resting on the party of the first part shall become null and void and the money theretofore paid on account of said purchase shall remain with and be the property of the first party, and shall

be considered as so much rent paid by the party of the second part. Now, the Little Rock Chamber of Commerce is the party of the first part, and Murrey is the party of the second part. This stipulation in the contract was for the benefit of the Chamber of Commerce, and it had the right to waive it if it chose to do so. Therefore the original opinion, instead of being in conflict with the cases of *Ish* v. *Morgan, McRae & Co.,* 48 Ark. 413, and *Murphy* v. *Myar,* 95 Ark. 32, is in accord with them.

Again it will be noticed that the stipulation above referred to provides that nothing in the contract shall release Murrey from his obligation to pay the balance owing by him on his subscription contract and that in case of default the Chamber of Commerce shall have a right of action against him upon the subscription contract without any obligation resting upon it to further perform the contract by conveying the real estate to him.

It follows that the motion for rehearing will be denied.

TAYLOR *v.* KING.

Opinion delivered June 24, 1918.

1. JUDGMENTS—BAR TO DEFENSES.—The judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed, or which could have been interposed in the former suit.

2. JUDGMENTS—PERSONAL SERVICE—RECITAL IN DECREE.—Where a decree in a suit to foreclose a vendor's lien recited that defendant's were personally served with summons, an allegation and proof that defendants were not personally served can not prevail in a collateral attack upon the decree.

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

McKay & Smith, for appellants.

1. Appellee is a lawyer while appellants are ignorant negroes and were clients of his. They employed

him in a suit, and he obtained their signatures to the deed to the lands through fraud and fraudulent representations. 73 Ark. 575. The evidence shows fraud and that there was no consideration for the deeds.

2. The foreclosure decree is void because no service was ever had upon Maggie Nesbit and Ellen Modest. Kirby's Digest, § 6053. The records show no service. *Ib.* § 6264.

The appellee, *pro se.*

1. The decree is correct. No fraud was proven. No such defense was made in the foreclosure suit. 75 Ark. 575 is not applicable. This is a vicious collateral attack upon a decree. 118 Ark. 449; 121 *Id.* 475; 120 *Id.* 255; 125 *Id.* 125. The findings of the chancellor are sustained by the evidence.

2. Service is shown by the records on all the defendants and the decree recites due service. There is no error.

STATEMENT OF FACTS.

This suit was commenced as an action in ejectment in the circuit court by D. L. King against Wade and Julia Taylor to recover 160 acres of land. Wade and Julia Taylor filed an equitable answer, and the cause was transferred to the chancery court. Maggie Nesbit and Ellen Modest, sisters of Julia Taylor, each claiming to be the owner of an undivided one-third interest in the land in controversy, asked to be made parties defendant and they were permitted to enter their appearance and adopt the answer of the defendants Wade and Julia Taylor as their own.

According to the testimony of D L. King, he is 67 years old and is a lawyer by profession. The land in controversy was originally owned by Ned Lemay, a colored person. Lemay mortgaged the land to Buchanan & Cornelius for a debt he owed them. Lemay died leaving surviving him his widow, Eliza Lemay, and three daughters, viz.: Julia Taylor, Maggie Nesbit and Ellen Modest. Buchanan & Cornelius, being unable to collect

their mortgage debt, prepared a deed to the land in controversy and tendered it to the widow and children of Ned Lemay, deceased, and asked them to execute the deed in satisfaction of the mortgage debt. The widow and children of Ned Lemay consulted with D. L. King about the foreclosure of the mortgage of Buchanan & Cornelius. They executed to him a deed to an undivided one-half interest in the land in consideration of his services in defeating the claim of Buchanan & Cornelius. On the same day King found out that the Bodcaw Lumber Company had been cutting timber on the land and entered into a written agreement with the same parties to collect from the Lumber Company the value of the timber cut in consideration that they pay him one-half of the amount collected. The contract and deeds were executed in January, 1907. A settlement was had with Buchanan & Cornelius with regard to the mortgage indebtedness and also the Bodcaw Lumber Company for the amount of the timber cut by it from the land. The amount recovered from the Bodcaw Lumber Company was sufficient to discharge the mortgage debt from Buchanan & Cornelius. In April, 1908, King sold to Julia Taylor, Maggie Nesbit and Ellen Modest, his interest in the land. They agreed to pay him $400 and executed to him their notes therefor. They failed to pay this indebtedness to King and he instituted a suit in the chancery court to recover judgment for the amount they owed him and to foreclose his vendor's lien. At the April term, 1911, of the chancery court, judgment was rendered against Julia Taylor for the amount of his indebtedness and a decree of foreclosure of his vendor's lien was also entered of record. The land was duly sold under the foreclosure decree for $300 and the purchaser at that sale conveyed the land to the plaintiff, King. No judgment was rendered against Maggie Nesbit and Ellen Modest, who resided in the State of Louisiana, and there was an order continuing the case in this respect against them until the next term of the court.

At the October term, 1912, of the chancery court, judgment was rendered against Maggie Nesbit and Ellen Modest for the balance of the indebtedness and in the decree there is a recital that Maggie Nesbit and Ellen Modest were served with summons in due time. The remaining undivided one-half interest of the defendants was sold under execution on the 20th day of December, 1912, to satisfy the balance due on the judgment against them. The lands were sold for the balance due and the costs of suit, and the purchaser at the execution sale conveyed his interest to D. L. King.

According to the testimony of Julia Taylor, Ellen Modest and Maggie Nesbit, they executed a written contract with D. L. King to look after the collection of the value of certain timber that had been cut and removed from their father's land and agreed to pay him therefor one-half of what he might recover. They denied that they had agreed to give him a one-half interest in their father's land and denied the execution of a deed to him therefor. They denied that they ever contracted with King to buy an interest in their father's land and testified that they could neither read nor write. They stated that the only written instrument they executed to King was to be used by him in recovering damages for the timber cut from the land, and that they did not understand that they were conveying the land to him. They were corroborated by the testimony of Wade Taylor, the husband of Julia Taylor. On the other hand the testimony of King was corroborated by that of his son-in-law.

The chancellor found the issues in favor of the plaintiff King, and against the defendants and cross-complainants. It was therefore decreed that the cross-complaint of the defendants be dismissed for want of equity and that the plaintiff's title to the land in controversy be quieted as against any claim of the defendants and that plaintiff have and recover possession of the land from defendants. The defendants have appealed.

HART, J., (after stating the facts). (1) The decision of the chancellor was correct. In the first place, it may be said that the issues sought to be raised in this suit might have been litigated and decided in the suit to foreclose the vendor's lien on the land in controversy which was brought against these same defendants. The rule has been often announced in this court that the judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which could have been interposed in the former suit. *Church* v. *Gallic,* 76 Ark. 423; *Livingston* v. *New England Mortgage Security Co.,* 77 Ark. 379; *Morgan* v. *Kendrick,* 91 Ark. 394; *Pulaski County* v. *Hill,* 97 Ark. 450; *Phillips* v. *Colvin,* 114 Ark. 14. When the suit was brought against the defendants to foreclose the vendor's lien on the land in controversy for the purchase money, it was the duty of the defendants to have presented all the defenses they might have to the suit. The defendants knew as well then as they did when this suit was brought the defenses they now present. All of the rights and matters asserted in this suit by the defendants could have been adjudicated in the foreclosure suit. Having failed to interpose any defense to that suit, they are barred by the decree in that case from seeking further to adjudicate the question in this case.

(2) It is also insisted that the decree of the chancery court foreclosing the vendor's lien of the plaintiff on the land in controversy is void because no service of summons was ever had upon Ellen Modest and Maggie Nesbit. It is true the evidence shows that Maggie Nesbit and Ellen Modest have been residents of the State of Louisiana since prior to the date of the first contract with D. L. King; but it also shows that the part of Louisiana where they reside was near to the part of Arkansas where all the transactions and court proceedings herein involved were had. The decree foreclosing the vendor's lien of D. L. King upon the land in controversy recites that personal service was had upon

Julia Taylor and constructive service was had upon Ellen Modest and Maggie Nesbit. A personal judgment was rendered against Julia Taylor for the amount of the debt; but this branch of the case was continued as to Maggie Nesbit and Ellen Modest. At a subsequent term, judgment was rendered against them for the balance of the debt and the judgment itself recites that personal service was had upon them. The cross-complaint of the defendants constitutes a collateral attack upon the decree of the chancery court foreclosing the vendor's lien of King and rendering judgment in his favor against the defendants for the amount of the debt.

Therefore the presumption is in favor of the validity of the decree in the foreclosure suit and the subsequent personal judgment against the defendants in the same court. The decree having recited that the parties were duly served with summons, the allegation and proof of the defendants to the effect that summons was not served upon them as required by law can not prevail against a judgment or decree regular on its face in a collateral attack. *Clay* v. *Barnes,* 121 Ark. 474; *Cassady* v. *Norris,* 118 Ark. 449; *Crittenden Lumber Co.* v. *McDougal,* 101 Ark. 390; and *Livingston* v. *New England Mortgage Security Co.,* 77 Ark. 379.

It follows that the decree must be affirmed.

PORTER v. CITY OF STUTTGART.

Opinion delivered June 24, 1918.

1. LIMITATIONS—TITLE AS AGAINST A CITY.—Under Kirby's Digest, § 5593, title by adverse possession can not be acquired against cities of the first and second class.
2. DEDICATION—IMPLIED DEDICATION—ESTOPPEL.—A dedication may be implied as well as expressed, and one may estop himself to deny that there has been a dedication.
3. DEDICATION—STREETS AND ALLEYS—ESTOPPEL OF ONE WHO CLAIMS UNDER A PLAT.—One who claims title under the plat of an addition, and acts with reference thereto, even though the name of the person filing the plat is unknown, is estopped to dispute the terms of the said plat.

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

Robert E. Holt and *Rose, Hemingway, Cantrell, Loughborough & Miles,* for appellant.

1. A dedication by one not the owner is ineffectual. 2 Greenleaf on Ev. § 663; 14 Mich. 12; 90 Am. Dec. 220; 47 Neb. N. W. 633; 37 *Id.* 956; 61 S. E. 951; 6 So. 656; 76 Ind. 244; 47 N. W. 633.

Porter has a perfect record title and to defeat his title a valid dedication by the holder of the title or his predecessor must be shown.

2. There is no presumption in favor of the title of a dedication. Proof of ownership is necessary. 28 So. 700; 37 N. E. 956-9.

3. The burden of proving a valid dedication is on the party who sets it up. 25 Pac. 386; 51 Md. 607; 21 N. Y. 477; 1 Ore. 405; 63 Ark. 5-8-9; 61 S. E. 951; 5 S. E. 148; 23 S. E. 211; 51 Ia. 373; 77 Ia. 69; 36 Mo. 532. There is no presumption of dedication. 180 U. S. 92-102.

4. Defendant acquired no right by estoppel. 89 Ark. 349, 353; 33 *Id.* 465; 125 *Id.* 146-150; 96 U. S. 659, 666; 30 S. E. 444; 14 Mich. 12; 90 Am. Dec. 220; 107 Cal. 166; 40 Pac. 235; 36 Mo. 332. The city can not reply on estoppel. 123 Ark. 175; 127 *Id.* 371. See also 36 Mo. 332; 107 Cal. 166.

5. To constitute a dedication there must be a present intent to appropriate to public use. Porter never intended to dedicate. 63 Ark. 5-8-9; 41 Atl. 911; 58 Pac. 190; 21 *Id.* 52; 107 Cal. 166. See also 41 Atl. 911; 107 Cal. 166.

6. This strip has never been used as an alley. There never was any dedication by Henry Flood or those claiming under him; nor were they barred by any petition to incorporate the town. Nor did Flood own the land when the petition was signed and presented to the county court.

Pettit, Manning & Pettit, for appellees.

1. Porter recognized the dedication of the alley and streets, Henry Flood and others having title by their petition in the county court had Stuttgart incorporated, thus dedicating the streets and alleys to public use.

2. The control of the city over alleys or streets is not lost by one taking possession, even when the holding is exclusive and adverse for seven years. Act May 27, 1907. The city holds interest for the public. 98 Ark. 158-9.

3. An owner by laying out a town into blocks, streets and alleys and selling lots by reference to the plat, dedicates the streets and alleys to public use and such dedication is irrevocable. 77 Ark. 221; 88 *Id.* 478; 98 *Id.* 158-9; 88 *Id.* 481.

4. Alleys are public ways the same as streets. 88 Ark. 533; 77 *Id.* 177. Adverse possession can never ripen into title. 80 Ark. 489. Where an owner makes and records a plat, showing blocks, streets and alleys a subsequent sale of lots is a dedication. 80 Ark. 489. See also 3 Dillon on Mun. Corp. (5 ed.) § 1073-4.

5. Intent to dedicate is presumed from user for prescriptive period. *Ib.* § 1080-3, 1086-7, etc.; 8 R. C. L. § 18. See also 85 Ark. 520; 62 *Id.* 408. Porter is estopped by his acts and by sale of lots with reference to the plat and the incorporation of the city.

SMITH, J. This suit involves a controversy over the title to a strip of land which the appellant Porter claims by purchase and the city claims as an alley. Porter, who was the plaintiff below, claims title by virtue of a chain of conveyances beginning with one by the admitted owner and coming down to himself, in which the land conveyed is described by metes and bounds and included the strip in controversy. The city claims title to it as an alley under a plat which was filed in the office of the recorder of Arkansas County on February 28, 1887. The plat bears a certificate of the county surveyor that it "is a true copy of lots laid off on Har-

per's land." Unless the fact that he made the certificate implies that he filed the plat, there is nothing on its face to indicate who did file it.

The complaint alleges that Porter is the owner of the tract, and that he acquired title by a conveyance from C. M. Johnson and wife, and that Johnson had acquired title by a conveyance from Henry Flood, dated June 26, 1902, Flood having acquired title by mesne conveyance from the Government. That Porter had had adverse possession for more than seven years, and that in addition to his paper title he had acquired title by virtue of his possession. That the city claimed a strip through it as one of its alleys and had authorized its marshal and street commissioner, who were made defendants, to open it as an alley for public use. That plaintiff Porter was then in possession and had been using it for more than seven years as a lumber yard and had a shed extending over a part of it, and that it was, and during all that time had been, a part of his lumber yard. That the officers of the city were about to remove his lumber and open the alley for public use and travel. That the alley had not been dedicated or conveyed to the city by the owner thereof or used by the public as an alley or thoroughfare. There was a prayer for a restraining order enjoining the defendants from entering upon the land or interfering with the plaintiff's use of it, and that his title be quieted against the city.

The answer denied that Porter was the owner of the land or that he had been in the actual, continuous and adverse possession thereof for more than seven years. It admits that it claimed the land in question as an alley and had directed its officers to open it to the public use as such.

An agreed statement of facts was filed which contained the following recitals: That the incorporated town of Stuttgart was made a city of the second class on December 23, 1897, and that it continued as a city of the

second class until February 22, 1917, when it became a city of the first class.

That an exhibit attached thereto was a true copy of the original plat of blocks 1, 2 and 7 of I. N. Harper's Addition to the City of Stuttgart, embracing and including blocks 1, 2 and 7 in said Harper's Addition, and showing the dedication of the streets and alleys, the blocks and lots numbered thereon, and that the alley in said block 1, which is the subject of this suit, is shown thereon.

The said plat with the streets and alleys shown thereon and so subdivided, showed the strip of land in litigation to be a part of one of the alleys and was filed December 27, 1886, and has been at all times since recognized as the subdivision into blocks, lots, streets and alleys of the incorporated town of Stuttgart, and subequently the City of Stuttgart as a city of the second class, and now the City of Stuttgart as a city of the first class.

That the officers of the incorporated town of Stuttgart, and afterwards the City of Stuttgart, have at all times dealt with and recognized said plat and subdivision, showing the blocks, lots, streets and alleys therein described as the blocks, lots, streets and alleys in said incorporated town and city, and that all persons owning lots in blocks 1, 2 and 7 and other blocks in I. N. Harper's Addition, as shown by said plat, have separately assessed the lots therein shown for taxation, executed and accepted conveyances by deeds and otherwise to the respective lots numbered and described and shown by said plat, and that J. I. Porter has executed deeds and purchased lots in said block 1 and other blocks in said I. N. Harper's Addition as shown by said plat.

It was further stipulated and agreed that the town of Stuttgart, prior to 1897, was comparatively a small place in point of population; that it has grown from 1897 to this date until it is a city of the first class having a population of five thousand people.

It was also agreed that neither Harper nor any one else had filed any dedication deed.

There was offered in evidence the petition to incorporate the town of Stuttgart, from which it appears that one Henry Flood was a signer of the petition and that three days after the order of incorporation he acquired title to the area in controversy, it being included in the conveyance to him of a five acre tract of land. The judgment of the county court incorporating the town was entered of record August 5, 1889.

The prayer of the complaint was that the officers of the city be restrained from interfering with the land in question. But the court below refused the relief prayed. It found that the petition by Flood and others to the county court and its orders thereon was an express dedication of all the streets and alleys through any and all of the lands mentioned in the petition which Flood and others had at that time or afterwards acquired, and held as a matter of law that Porter, by recognizing said plat and making and accepting conveyances according to it, is estopped from objecting to it or to any claim on behalf of the city to it, and declared the law to be that if an owner of land, who plats and sells it according to the plat, dedicates the streets and alleys, that a subsequent owner, who sells according to the plat, thereby adopts such dedication as his own.

We do not find it necessary to approve the law thus broadly stated by the court to approve the decree of the court below refusing to enjoin the officers of the city from opening up the alley. Porter did not appropriate the land to his exclusive use until after Stuttgart became a city of the second class. He took possession of a portion of the alley in 1908, but there was testimony that even thereafter the public continued such use as it desired to make of the alley until 1910, when it was enclosed. Porter obtained his deed July 17, 1907, which was about ten years after Stuttgart became a city of the second class and eighteen years after it was first incorporated and twenty-one years after the filing of

the plat. During all this time Stuttgart was growing rapidly and all of the numerous conveyances of town lots were made with reference to the plat above referred to. A number of such conveyances were to and from Porter himself. It was shown that the city did not improve the alley, but it was not shown that any improvement was necessary to adapt it to the public use as an alley.

(1) It is apparent that Porter did not acquire title by adverse possession, for it was provided by statute, during the period of his occupancy, that title could not be thus acquired against cities of the first or second class. Kirby's Digest, sec. 5593, subdivision 3.

(2) The court below assumed the facts to be, in the absence of proof to the contrary, that the plat in question had been filed by the owner. If the correctness of this assumption were conceded, there could be no question about the dedication. Such action on the part of the owner is an express dedication, and when once made is irrevocable. But, as has been said, we do not find it necessary to go to the extent to which the court below went in its declaration of law to support its decree. A dedication may be implied as well as expressed, and one may estop himself to deny that there has been a dedication, and we think that doctrine is applicable here. The following are cases substantially to that effect: *Hope* v. *Shiver,* 77 Ark. 177; *Davies* v. *Epstein,* 77 Ark. 221; *Brewer* v. *Pine Bluff,* 80 Ark. 489; *Stuttgart* v. *John,* 85 Ark. 520; *Paragould* v. *Lawson,* 88 Ark. 478; *Frauenthal* v. *Slaten,* 91 Ark. 350; *Matthews* v. *Bloodworth,* 111 Ark. 545; *Brookfield* v. *Block,* 123 Ark. 153; *Mebane* v. *City of Wynne,* 127 Ark. 364; *Holly Grove* v. *Smith,* 63 Ark. 5.

(3) Here the testimony does not show who filed the plat, but it does show that this plat defines the lots and blocks and streets and alleys of the City of Stuttgart and that it has been so accepted by every one since the time it was filed. This acquiescence has been without exception and Porter along with all others has

treated it as the authentic and correct plat of Stuttgart. Interminable confusion might now arise if this plat were disregarded because its original authenticity is not established.

After stating the law to be that dedication of streets and alleys may be made by the filing of a plat showing the existence of such streets and alleys as well as by executing and recording a deed for that purpose, 8 R. C. L. page 894, states the law to be "That plat need not be made by the owner, and where he sells lots in conformity to the city map on which his property is laid out into blocks, streets, avenues and squares, such recognition of the plat is a dedication to public use; he adopts the map by reference thereto." See also *Hope* v. *Shiver,* 77 Ark. 177. And in the same volume of R. C. L. in the article on Dedication, page 906, it is said: "A common law dedication does not operate as a grant, but by way of estoppel *in pais.* This doctrine is adopted from necessity for lack of a grantee capable of taking. The dedication, therefore, is regarded not as transferring a right, but as operating to preclude the owner from resuming his right of private property, or indeed any use inconsistent with the public use. The ground of the estoppel is that to reclaim the land would be a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use contemplated by the dedication, and, in case of sale with reference to plat, that the easements and servitudes indicated by the plat constitute a part of the consideration for which all conveyances referring to the plat are made, and therefore no person, while claiming under the conveyances, can be permitted to repudiate them or to deny that they exist where they are capable of existing." A number of cases are cited in support of the text, several of which are annotated cases.

A similar statement of the law is contained in Volume 1, Elliott, Roads and Streets (3 ed.), sec. 137.

We conclude, therefore, that under the facts of this case Porter is now estopped to question the authenticity

of this plat, and the decree of the court below is therefore affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. OWINGS, ADMINISTRATRIX.

Opinion delivered June 24, 1918.

1. RECEIVERS—DISCHARGE—RAILROAD RECEIVERSHIP—SUIT COMMENCED AGAINST THE RECEIVER.—The receiver of the Chicago, R. I. & P. Ry. Co. was discharged while an action was pending against him for personal injuries. In discharging the receiver the court expressly provided that the railroad should hold the receiver harmless for the defense of actions begun against him. *Held,* the action could be maintained against the receiver, the obligation being upon the railway to discharge the liability.
2. CARRIERS—PERSONAL INJURY ACTION—MAY BE SUED IN WHAT COUNTY.—Under Kirby's Digest, section 6068, a railroad may be sued in the county where plaintiff was injured, where it runs its trains through that county, but maintains no agent there.
3. DAMAGES—PUNITIVE DAMAGES.—Negligence alone, however gross, is not sufficient to justify the award of punitive damages. Punitive damages can be awarded only where there is evidence of an intentional or wilful wrong, or conduct from which malice might justly be inferred.
4. RAILROADS—COLLISION—GROSS NEGLIGENCE.—A rear-end collision between two trains *held* to have been caused by gross negligence, but not negligence sufficient to warrant the award of punitive damages.
5. NEGLIGENCE—WRONGFUL DEATH—COMPENSATORY DAMAGES.—Deceased was killed by the negligence of defendant railway company; his death was instantaneous; he left surviving him only his widow; he had been earning about $125 per month when killed and was twenty-nine years old. *Held* compensatory damages in the sum of $15,000 were all that could be recovered.

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

Thos. S. Buzbee, H. T. Harrison and *C. L. Johnson,* for Dickinson, Receiver, and Chicago, Rock Island & Pacific Railway Company, appellants.

1. The motion of the receiver to dismiss the action as to him should have been sustained. The receiver had

been discharged and his duties terminated and he was no longer liable. 97 Ark. 373; 34 Cyc. 480; 156 Fed. 735; 53 N. E. 816; 7 *Id.* 537; 19 *Id.* 477.

2. The verdict for compensatory damages is excessive. Deceased was killed instantly and there were no children—only the widow. 57 Ark. 384; 117 *Id.* 198-209; 89 *Id.* 326-334; 87 *Id.* 443-445; 77 *Id.* 405. In no view should more than $10,000 have been allowed under the well established rules for compensatory damages.

3. The verdict for punitive damages is not supported by the evidence. There was no wilfulness, wantonness or indifference to consequences from which malice could be inferred. Mere gross negligence is not sufficient. 104 Ark. 93; 77 *Id.* 109; 87 *Id.* 127; 84 *Id.* 241.

Daniel Upthegrove, J. R. Turney and *Hawthorne & Hawthorne,* for St. Louis Southwestern Railway Company.

1. The service should have been quashed. There was no proper service of summons. Kirby's Digest, § 6072-4, 6045; act April 16, 1901.

2. The verdict is excessive as to compensatory damages. 77 Ark. 405; 60 *Id.* 550; 114 *Id.* 224; 89 *Id.* 326; 87 *Id.* 443; 90 *Id.* 398.

3. The verdict for punitive damages is not sustained by any evidence. 88 Ark. 200; 53 *Id.* 7; 77 *Id.* 109; 104 *Id.* 89; 87 *Id.* 127; 78 *Id.* 331. No malice or wilful, wanton or conscious indifference to consequences was shown.

Rhea P. Cary and *G. T. Fitzhugh,* for appellee.

1. The motion to dismiss as to the receiver was properly overruled. The cases in 97 Ark. 373 and others cited by appellant are not in point. Here the receiver was not discharged finally and unconditionally, but upon conditions stated in the order of discharge. Hopkins, Jud. Code, § 66; 49 Fed. 807; 163 U. S. 456; 10 Enc. U. S. Sup. Ct. Rep. 555, 562-5; 141 U. S. 327-9; 179 *Id.* 335; 177 *Id.* 584. There was an express reservation as to pending suits. 34 Cyc. 480; 123 Fed. 359; 80 Pac. 727, 730.

2. The verdict for compensatory damages is not excessive. 60 Ark. 550-9; 188 S. W. 589; 87 Ark. 443; 76 *Id.* 377; 105 *Id.* 533; 100 *Id.* 107; 99 *Id.* 265; 171 S. W. 115; 93 Ark. 564. See many cases cited in L. R. A. 1916 C. 820, *et seq.*, and annotations. Also Watson on Damages for Personal Injuries, § 362; 155 Ky. 254; 50 L. R. A. (N. S.) 853-7.

3. The verdict for punitive damages is fully warranted by the evidence. The court's charge correctly stated the law. Reynolds, Trial Ev. 102-4; 174 Ill. 398; Jones on Ev. 134; 1 Chamberlayne, Mod. Law of Ev. § 826; 85 N. Y. 61; 84 Ark. 241, and others.

4. Service was valid on the St. L. S. W. Ry. Co. Kirby's Digest, § § 6035, 6072; 45 Ark. 94; Kirby's Digest, § 6045, 7483, etc.

SMITH, J. Appellee is the widow and administratrix of the estate of Ben L. Owings, who was killed in a rear-end collision between a train of the Chicago, Rock Island and Pacific Railway Company, known as the Rock Island Railroad, on which he was a passenger, and a train of the St. Louis Southwestern Railway Company, known as the Cotton Belt Railroad. The collision occurred while the Rock Island train was stopping at Mounds, Arkansas, a station on the Rock Island railroad, and the Cotton Belt train, which collided with it, was a train operated by that railroad over the roadbed of the Rock Island railroad between Brinkley, Arkansas, and Memphis, Tennessee. Owings became a passenger at Forrest City on the evening of January 27, 1917, to Memphis for the purpose of spending with his wife the first anniversary of his marriage.

An unusually heavy fog rendered it impossible for the operatives of the train to see more than a few hundred yards even with the aid of the headlights, and the suit for damages was brought on the theory that the roads were jointly negligent and liable. It was contended that the Cotton Belt was negligent in running its train at an excessive speed under the physical condi-

tions which existed at the time, and in the failure to observe a rule that one train shall not follow another closer than ten minutes; and that the Rock Island railroad was negligent in failing to take the proper precautions to notify the oncoming train that the train upon which deceased was a passenger was standing still at the station of Mounds.

At the time of the collision, and of the institution of the suit, the Rock Island Railroad was being operated by J. M. Dickinson as receiver under the orders of a Federal court, but the receivership had been discharged at the time of the trial. Upon discharging the receiver and restoring the property to its owners the court in which the receivership had been pending made the following order:

"Section 6. The prosecution and defense on behalf of the receiver, without cost or expense to him of any and all actions, suits or litigations to which he is or may be a party will be taken over and assumed by the railroad company, with the right, however, to control, continue or alter the policy of any such prosecution or defense, and with the further reservation that the payment of any final judgment in any action now pending or which hereafter may be rendered against the receiver in any such action now pending, shall be subject to such order as the court shall make relative thereto, either by way of reference to the special master heretofore appointed or otherwise.

"7. The Railway Company will indemnify and hold harmless, and will agree to indemnify and hold harmless, the receiver, his heirs, executors and administrators, from and against any and all claims, demands, suits, actions, litigations, liabilities, damages, costs, expense, or other matters whatsoever arising or accruing from all or any of his acts as receiver.

"13. That the defendant Railway Company shall take over and assume the defense of all actions and suits at law or in equity against the defendant Railway Company, and the receiver or receivers herein, or against

either or any of them, or in which they, or any of them, are or is a party defendant, pending and undetermined at the date of the entry of this decree, in any court or tribunal; that the property and assets of the defendant railway company are to be liable for the amounts of any judgments eventually obtained in any of such actions and suits, but the payment of any judgment pending or which hereafter may be rendered against the Railway Company on any cause of action on or prior to June 25, 1917, shall be subject, however, to such order as said Illinois court shall make in the premises, either by way of reference to said special master or otherwise, and subject to the rights of defendant Railway Company as specified in this decree."

A motion was made to dismiss the suit upon the ground that—the receiver having been discharged—the suit could not thereafter be maintained against him.

A motion was filed on behalf of the Cotton Belt to dismiss the cause for lack of proper service against that railroad. The suit was brought in St. Francis County and service of process was had upon an agent of the railroad in Monroe County. Although the railroad operated a train through St. Francis County over the Rock Island Railroad Company's tracks, it maintained no agent in that county. This motion was overruled and proper exceptions saved.

Objection was made at the trial to the submission to the jury of the question of liability for punitive damages. And it is also insisted that the sum recovered as compensatory damages is excessive. The judgment was for $22,500 compensatory damages and $5,000 punitive damages. These questions will be discussed in the order stated, and other facts will be set forth in that connection.

(1) The Rock Island Railroad Company relies upon the decision of this court in the case of *O'Leary* v. *Brent*, 97 Ark. 373, to support its contention that the judgment was improperly rendered against the receiver. But there exists a very important distinction in the facts be-

tween the two cases. There the receiver had been discharged finally and unconditionally. Here the discharge was upon the conditions stated in the order set forth above. There the receiver had fully discharged his functions. Here it was within the knowledge of the court and its contemplation, when the order discharging the receiver was made, that during the receivership of this vast system many causes of action had arisen which were then undetermined.

The case of *Denver & R. G. R. Co.* v. *Gunning,* 80 Pac. 727, announces the principle which we think is controlling here. It was there insisted that an action against a receiver could not be maintained because the control of the property had passed from his hands and that his official liability ended with the termination of his official existence. But in that case, as in this one, the discharge of the receiver was conditional, and the court there said: "The property had passed from his hands to a purchaser, but upon the express condition that the legal liabilities incurred by him should be discharged by such purchasers. Evidently it was known to the court that actions were pending or obligations existed upon which suit might be brought, and that is why the decree respecting his discharge provided that it should not prevent him from defending actions then pending, or which might thereafter be brought. The court retained jurisdiction for the purpose of enforcing its orders against the purchasers for the payment of the indebtedness of the receiver, with authority in the receiver to defend actions brought against him in his official capacity; so that for the purposes of this action he was still to be regarded as the receiver of the Colorado Midland Railroad Company, and he still had the power under the decrees to which we have referred to satisfy the claim of plaintiff when reduced to judgment out of the property of the railroad company."

Another case cited in the brief which supports this view is that of *Ohio Coal Co.* v. *Whitcomb,* 123 Fed. 359, 59 C. C. A. 487.

(2) Section 6068, Kirby's Digest, conferred the right to sue the Cotton Belt Railway Company in St. Francis County, as it was operating trains through that county. Indeed, the very train which inflicted the injury sued for was operated through that county. *C., R. I. & P. Ry. Co.* v. *Jaber,* 85 Ark. 232.

(3) We think error was committed in submitting the question of liability for punitive damages, and the judgment therefor must be set aside. The testimony warranted a finding of the grossest negligence; but this court is thoroughly committed to the doctrine that negligence alone, however gross, is not sufficient to justify the award of punitive damages. In the case of *St. L., I. M. & S. R. Co.* v. *Dysart,* 89 Ark. 261, the evidence tended to show that an Iron Mountain train ran into a train of the Frisco railroad at a grade crossing. That it did so at a speed of twenty-five miles per hour and that no signals for the crossing were given and that no effort was made to slacken the speed. This was in violation of an unequivocal rule of the company on the subject. In reviewing the judgment of the trial court in awarding punitive damages it was said: "The terms 'wilfulness, or conscious indifference to consequences from which malice may be inferred,' as used in the decisions of this court, means such conduct in the face of discovered peril. In other words, in order to superadd this element of damages by way of punishment, it must appear that the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued in his course with a conscious indifference to the consequences, from which malice will be inferred."

(4) There was in that case, as in this, evidence of gross negligence, but in neither case was there any evidence of any intentional or wilful wrong or conduct from which malice might justly be inferred. It was within the power and it was, therefore, the duty of the railroad companies to advise the operatives of each of these trains of the presence of the other, and the lack of this knowledge which they should have had is negligence which

renders each of the companies liable for the damage flowing therefrom. It was likewise negligence for the operatives of each of these trains not to have taken the precaution which the atmospheric conditions and the rules of both companies required. But such failure is at last only negligence, however gross it may appear to be under the circumstances stated. See also *St. L. Sw. Ry. Co.* v. *Evans,* 104 Ark. 93; *St. L. Sw. R. Co.* v. *Myzell,* 87 Ark. 127; *St. L., I. M. & S. R. Co.* v. *Stamps,* 84 Ark. 241; *Ark. & La. Ry. Co.* v. *Stroude,* 77 Ark. 109.

(5) We are also of the opinion that the judgment for compensatory damages is excessive. The deceased was killed instantly, and was not survived by any children. The recovery of compensatory damages was based entirely upon the loss of contributions to his widow. The proof shows that deceased had worked for about two years at a salary of $125 per month, out of which sum he paid his own expenses in addition to the contributions made to his wife for her support. Following this employment he was engaged at an employment for seventeen months in which his compensation depended upon the commissions earned by him, and while so engaged his earnings averaged about $100 a month. Two weeks before his death he entered the service of the Vacarro-Grobmeyer Lumber Co. at Forrest City under a contract whereby he was paid, at the beginning, the sum of $100 per month, with the understanding that if his services proved satisfactory his salary would be increased after sixty days to the sum of $125 per month. Grobmeyer, his last employer, testified that his services were entirely satisfactory and that the promised increase in salary would have been granted at the time stated. He also testified that the deceased was attentive to business, competent, capable, sober and industrious, and this testimony in regard to the character and capacity of the deceased was such as to fairly warrant the finding by a jury that the deceased would have earned other promotions and increases of salary. The testimony shows that deceased was twenty-nine years of age at the time of his

death and that his expectancy, according to the experience tables, was thirty-four to thirty-five years. His contributions to his wife at that time were about $75 per month, and it was shown that an annuity for that sum for a man of his age could have been purchased for $9,600. The contributions to the widow here are the same as they were to the widow in the case of *St. L., I. M. & S. R. Co.* v. *Freeman,* 89 Ark. 326. In that case, as in this, death was instantaneous and the recovery was based alone upon loss of contributions to the widow. In that case we reduced the judgment for twenty thousand dollars to fifteen thousand dollars and in doing so said: "Making due allowances for the probable increase in his earning capacity, we are of the opinion that the evidence is insufficient to sustain a verdict for more than $15,000. While much latitude is allowed the jury in passing upon what the earning capacity will probably be, the power of the jury in this respect is not unlimited. They should not be allowed to indulge in extravagant speculation, not warranted by the evidence, as to what the increased earning capacity might be. The burden of proof is on the plaintiff to produce evidence which tends to throw light upon the question, in some substantial way, as to what the future earnings will probably be and the present value thereof to those who were dependent on the decedent. *Railway Company* v. *Robbins,* 57 Ark. 384."

It is true the decedent in that case was only twenty-four years of age, whereas the decedent in the instant case was twenty-nine years of age. Still we are of the opinion that the judgment should not be reduced here to a smaller amount than that allowed there, for as was said in the case, with which we are comparing the instant case, much latitude is allowed the jury in passing upon what one's earning capacity will probably be. Regard must be had to the testimony of each particular case; and while we think the testimony fairly warranted the jury in finding that there would have been such increase in earning capacity and contributions as would support a verdict for $15,000, yet a judgment beyond that sum is more or

less speculative and is without sufficient testimony to support it.

The judgment for punitive damages will be reversed and the suit therefor dismissed. If appellee will, within fifteen days, enter a remittitur down to $15,000, the judgment for that amount will be affirmed; otherwise it will be reversed and remanded for a new trial.

BAKER v. MOSAIC TEMPLARS OF AMERICA.

Opinion delivered June 24, 1918.

1. INSURANCE—BENEFIT CERTIFICATE—COMPLIANCE WITH THE RULES OF THE ORDER.—Where the constitution and by-laws of a fraternal insurance order are made a part of a benefit certificate issued by it, it is necessary for the insured to comply with the laws of the order before any liability can accrue on the contract.
2. INSURANCE—BENEFIT CERTIFICATE—COMPLIANCE WITH RULES—DESIGNATION OF BENEFICIARY.—A provision in the by-laws of a fraternal insurance order that a death benefit would not be paid unless the insured had designated a beneficiary, *held* valid and binding.

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

Thomas J. Price, for appellants.

1. The court erred in its declaration of law and in refusing to declare the law as requested by plaintiffs. Appellees were the only heirs at law of Emma Baker, who designated no one as her beneficiary. But such designation was not necessary when deceased left living heirs. Kirby & Castle's Dig., § 2850; 77 Hun, 6; 28 N. Y. S. 276; 29 Oh. St. 557; 24 Oh. Ct. Ct. 717; 114 Ill. 108; Act 462, Acts 1917, § 6.

2. The clause in the policy is against public policy. 98 Ark. 421. It is indefinite and uncertain. The will was a designation of a beneficiary. K. & C. Dig., § 10051.

Scipio A. Jones, for appellee.

1. No beneficiary was designated as provided in the policy. The heirs can not recover. 10 Fed. 227; Acts 1917, Act 462, § 6.

2. The clause is not against public policy. 37 S. W. 966.

3. The clause is not ambiguous, indefinite nor uncertain. 202 Mass. 85.

4. There being no designated beneficiary, the fund lapsed and reverted to the society. 1 Bacon on Ben. Soc. (4 ed.), 310. It was not payable to the heirs, estate or legal representatives, but to no one. 62 N. H. 55; 10 Fed. 227; 44 Md. 429; 42 S. W. 1043; 29 Cyc. 157-9; 143 Mass. 216; 37 S. W. 966; 59 N. J. L. 207; 77 Kan. 284; 60 Miss. 22; 202 Mass. 85; 81 Ark. 512, No breach of contract by appellee is shown.

HUMPHREYS, J. Appellants instituted suit in the Third Division of the Pulaski Circuit Court on the 30th day of March, 1918, against appellee, a fraternal benefit society organized under the laws of the State of Arkansas, to recover an amount alleged to be due them under the terms of an insurance policy issued by appellee on the life of their mother, who died on the 26th day of November, 1917.

Appellee denied any liability on the policy.

The cause was presented to the court, sitting as a jury, upon the pleadings, the policy and an agreed statement of facts, from which the court found that no liability existed under the terms of the policy, as applied to the facts in the case, and rendered a judgment accordingly, from which an appeal has been properly prosecuted to this court.

Appellee is an organization commonly known as a fraternal benefit association, society or order, and the policy issued is what is commonly denominated a beneficiary certificate. The policy contained a clause that the certificate, charter, articles of incorporation, constitution and laws of the society, and the application for membership and medical examination, and all amendments thereof, should constitute the agreement between the society and the member. The agreed statement of facts, upon which the cause was submitted, is as follows: "The plaintiffs, Irene Baker, Walter Baker and Willie Baker,

are the sole heirs at law of Emma Baker, deceased. Emma Baker died a financial member of the Mosaic Templars of America, a fraternal benefit society organized under the laws of the State of Arkansas, on the 26th day of November, 1917, and according to the terms of the certificate set out herein the certificate has a face value of one hundred dollars.

"A paragraph of the policy or certificate and this is Law No. 7, from the constitution and by-laws of the Mosaic Templars of America, states: 'Members holding policies in this order and dying without making some disposition of the same by will or assignment will not, under any consideration, be paid, and said will or assignment must be made in their own writing, or mark thereof, attested by the scribe of their temple, chamber or palace, and must be sent to the national grand scribe on final proof of death.'

"Emma Baker's certificate or policy had no will (or) assignment thereon, when filed with the defendant with the proof of death."

It is insisted by appellant that the failure to designate a beneficiary by will or assignment in the manner provided in the policy can not prevent a recovery. The policy specifically provides that the laws of the order shall become a part of the contract. The clause in question is law No. 7 of the organization. It was, therefore, necessary for the insured to comply with it before any liability would accrue on the contract. 1 Bacon on Benefit Societies, § 81; *Woodmen of the World* v. *Jackson,* 80 Ark. 419; *Supreme Lodge, K. & L. of H.,* v. *Johnson,* 81 Ark. 512.

(2) It is said, however, that a clause of this character is contrary to public policy and void. We know of no statutory provision in the State of Arkansas which is contravened by this clause in the contract. It does not conflict with section 6, Act 462, Acts 1917, as contended by appellant. That section of the statute provides who may become beneficiaries in fraternal benefit organizations and permits the selection of any one in the classes specified

as beneficiaries, and limits the organization in the passage of its laws to classes of beneficiaries specified in the section. The section does not prevent the organization or society from passing a by-law to the effect that unless a beneficiary is designated no liability shall accrue under the policy. In other words, it leaves the organization and its members free to contract against liability unless a beneficiary is designated. We do not see how the suggestion that the rule may work an irreparable injury on members on their dying bed can avail appellants. It is true that the statutes of Arkansas permit another person to sign the testator's name to a will at the testator's request, but this is the very thing that the rule attempts to avoid. The rule recognizes only those designations of beneficiaries in wills and assignments made in the testator's own writing or mark attested by the scribe of their temple, chamber of palace. This rule seems to have been for the purpose of preventing any contest as to the genuineness of wills or assignments designating the beneficiaries to whom the amounts due under the policy should be paid. It was a rule made for the protection of the society and not for the purpose of changing, or attempting to change, conflicting or attempting to conflict with, the laws of Arkansas with reference to the execution of wills.

It is said that the clause is indefinite and that it is uncertain what shall become of the amount due on the policy in case no beneficiary was named, and, for that reason, it should be regarded as property and descend to the heirs under the statute of descents and distributions. We think the clause is very definite. It provides for no liability in case the beneficiary is not designated, as provided in the policy. In other words, it provides that no amount shall be paid to any one unless the beneficiary has been designated. This policy contained no stipulation to pay the estate or personal representative of the insured any sum at his death. By virtue of his membership and certificate he had the power to appoint a beneficiary in the manner prescribed. Having no prop-

erty rights in the policy, the statute of descents and distributions has no application. Having failed to designate the beneficiary under the terms of the policy, no liability against the association accrued to any one. 1 Bacon on Benefit Societies (4 ed.), 310; *Eastman* v. *Provident Mut. Rel. Assn.,* 62 N. H. 555; *Worley* v. *N. W. Mass. Aid Assn.,* 10 Fed. 227; *Maryland Mut. Benev. Soc.* v. *Clendinen,* 44 Md. 429; 29 Cyc. 157-159; *Cook* v. *Improved Order Heptasophs,* 202 Mass. 85.

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

ROACH *v.* A. D. MALONE MERCANTILE COMPANY.

Opinion delivered June 24, 1918.

DEEDS—DEPOSIT WITH THIRD PERSON—AGENT OF GRANTEE—ESCROW.—A grantee, obligee or an agent of either can not act as a depository in an escrow; when a deed is delivered directly to a grantee or his agent, it operates as an immediate and final delivery of the deed.

Appeal from Conway Chancery Court; *Jordan Sellers,* Chancellor; affirmed.

Mehaffy, Reid, Donham & Mehaffy, for appellant.

1. The land was never conveyed by Mrs. Simmons to Bryson. Bryson never acquired title. The deed to Bryson was never delivered. Tiedeman on Real Prop. (3 ed.), § 576-8; 8 R. C. L. 973-4; 24 Ark. 244; 84 *Id.* 610; 77 *Id.* 89; 98 *Id.* 466; 100 *Id.* 427. A deed to pass title must be delivered during the lifetime of the grantor. 93 *Id.* 324; 116 *Id.* 142; 8 R. C. L. 988; 14 Pac. 530; 13 L. R. A. 714.

2. The deed was not even an escrow. 89 Ark. 191; 122 *Id.* 548. Mrs. Simmons never lost control of it; it was not deposited to be delivered absolutely but always subject to recall, and it was recalled. There never was delivery. She paid taxes, collected rents until death, and by her will disposed of the property after she had recalled the deed from her agent and attorney, Moose.

3. There was no privity of contract between Mrs. Simmons and appellee. The agreement with Bryson was not enforceable. 38 N. W. 22. It was not an escrow. 51 Ark. 485; 102 *Id.* 379.

4. The demurrer to the interplea should have been sustained, the court erred in dismissing the answer of Roach; the pleadings and evidence conclusively show that the deed to Bryson was never delivered but was recalled; hence the decree should be reversed.

Edward Gordon, for appellee.

1. Bryson abandoned his suit and failed to appeal; he is eliminated from the case. Appellee relies upon adverse possession, specific performance of the contract and the delivery of the deed in escrow, all of which were proven. Bryson deeded the land to appellee in 1908. Moose was the agent of both Mrs. Simmons and Bryson. Bryson was in open, notorious adverse possession for more than seven years and made valuable improvements. He had a contract to purchase and was entitled to specific performance. 81 Ark. 70; 83 *Id.* 403; 112 *Id.* 565.

2. The deed was delivered in escrow, and Bryson made the payments and performed all the conditions. Mrs. Simmons could not recall the deed. 110 Ark. 401.

3. The deposit of the deed with an agent is in law a delivery. 9 Ark. 36; 16 Cyc. 373; 41 N. J. L. 403; 32 Am. Rep. 225. A delivery in escrow, or upon conditions to grantee or his agent takes effect absolutely, for a delivery in escrow or conditionally can be made only to a stranger. 5 N. Y. 229; 55 Am. Dec. 330; 63 *Id.* 522; 49 N. Y. 107. Moose was Bryson's agent and delivery to Moose was delivery to Bryson. The findings of the chancellor are sustained by the evidence.

HUMPHREYS, J. William Bryson instituted this suit against the appellee on the 9th day of September, 1916, in the Conway Chancery Court, seeking to quiet his title to the possession of the west half of the northwest quarter, section 14, township 6 north, range 16 west, in Conway County, alleging that he had acquired title

thereto either by adverse possession, the possession and erection of valuable improvements thereon under contract of purchase from Sarah A. Simmons, the testatrix of appellant Roach, or by deed from the said Sarah A. Simmons.

Appellant Roach denied that William Bryson had acquired title from his testatrix, as alleged, or otherwise than by acquiring a life estate in such portion of the lands as he might cultivate under will from Sarah A. Simmons, and pleaded that he had acquired title from Sarah Simmons by last will and testament of date August 26, 1910, which was probated March 7, 1913.

Appellee, A. D. Malone Mercantile Company, interpleaded, alleging ownership in the land by purchase and conveyance of said real estate from William Bryson on the 7th day of April, 1908, who had acquired title from Sarah A. Simmons in the manner alleged by him in the original bill. Appellant Roach filed demurrer and answer to the interplea of appellee, A. D. Malone Mercantile Company, and William Bryson filed a reply thereto. William Bryson abandoned his suit and the cause proceeded to trial between the interpleader, A. D. Malone Mercantile Company, who is appellee herein, and John Roach, who is appellant herein. The cause was submitted to the court upon the pleadings and depositions with exhibits thereto, from which the court found that the interpleader, A. D. Malone Mercantile Company, was the owner and entitled to the possession of the lands in controversy. A decree was rendered in accordance with the findings, from which an appeal has been prosecuted to this court.

There is evidence in the record tending to show that Sarah A. Simmons rented the land in controversy to William Bryson for many years for a specified rental of $50 per annum and other considerations in the way of service and furnishings. There is also evidence in the record tending to show that William Bryson purchased the land in controversy on a credit in 1889 from Sarah A. Simmons at an agreed price of $700; that he immediately

went into possession and made valuable improvements thereon; that he paid $500 on the purchase price, and, later, tendered the balance of the purchase money, which was refused; that he was then induced to agree to pay $50 a year and furnish Sarah A. Simmons fire wood during her lifetime, upon the condition that she would execute a deed to the land and place it in escrow to be delivered to him upon her death; that, pursuant to the agreement, a deed was executed and placed in the keeping of W. L. Moose, and the payments made until the death of Sarah A. Simmons by William Bryson or by his grantee at his request, and the request of W. L. Moose, as agent for Sarah A. Simmons. It is in proof that Sarah A. Simmons died on December 20, 1912, and that W. L. Moose died in September, 1915. Some of the evidence tends to show that William Bryson conveyed the land to appellee in 1908, and that the deed to Bryson was returned by W. L. Moose to Sarah A. Simmons at the joint request of herself and William Bryson. There is evidence tending to show that no such request was made and that the deed was in the possession of W. L. Moose when he died in September, 1915. It is disclosed that Bryson went into possession of the land in 1887 under some kind of contract for the purchase of same, and remained in such possession until the year 1900, at which time the deed to him from Sarah A. Simmons was executed and placed in the custody of W. L. Moose; that thereafter he remained in possession until the year 1912; that in the year 1913 he again took possession without the consent of appellant, John Roach, and has since remained in the possession of said real estate. There is a conflict in the evidence as to whether the party who occupied the property in the year 1912 was the tenant of William Bryson or Sarah A. Simmons. It is fairly well established by the evidence that William Bryson paid the taxes from the time he took possession in 1887 until the year 1909; that the taxes were paid by Sarah A. Simmons from that time until the date of her death, and that they were paid by appellant John Roach after that time. It is almost conclusively

established by the evidence that annual payments of $50 were made until the death of Sarah A. Simmons by either William Bryson or appellee, A. D. Malone Mercantile Company, in compliance with the condition imposed by the agreement in which the deed was placed in the custody of W. L. Moose in the year 1909. Three letters appear in the record referring to the deed placed in the custody of W. L. Moose. They are as follows:

"Morrilton, Ark., August 25, 1910.

"Mr. A. D. Malone, Plummerville, Ark.:

"Dear Sir: Some time ago William Bryson gave me a written request to deliver to Mrs. Simmons a deed which I have had in my possession for about ten years, which Mrs. Simmons has executed to Bryson. Mrs. Simmons also asked me to turn the deed over to her.

"I have not done so, but as I view the matter I have no right to refuse, and I shall comply with their request within a short time. As you and I talked about the matter some time ago, I was not willing to deliver the deed without first advising you of my purpose to do so.

"Very truly yours,

"Wm. L. Moose."

"August 26, 1910.

"Mr. W. L. Moose, Morrilton, Ark.:

"Dear Sir: I am in receipt of yours relative to the Simmons and Bryson land matter. Now, Judge, you understand this whole matter, you are her agent as you told me, and which I am sure is a fact. I have been paying her the payments for the last several years, and up to the last payment which I made to you last spring $50 you know I had decided not to make this payment for fear I would lose it as well as what I had paid before.

"You explained to me that you was acting as her agent, and that you had a deed in your possession executed by Mrs. Simmons to Bryson with instructions that if the $50 was paid each year that this deed was to be delivered to Bryson, which you said would be sure to do, and if I kept the payments up that that would make my title good which Bryson had made me so upon all that I

paid the $50. I do not think that Bryson or Mrs. Simmons have a right under what has been done by Bryson and what has been done by you for Mrs. Simmons to change this deal at their option and I think, Judge, if you will explain the whole matter to Mrs. Simmons she would not think of doing it, or wanting to do it.

Judge, I will expect you to be my friend in this matter, and want to retain you if anything comes up. Hoping there will be no jar in the matter, I am,

"Yours truly."

"Morrilton, Ark., August 27, 1910.

"Mr. A. D. Malone, Plummerville, Ark.:

"Dear Sir: I received your letter of the 26th in regard to the Simmons and Bryson matter. The deed Mrs. Simmons left with me was to be kept by me, unless she called for it sooner, until her death, in which event I was to turn it over to William and Rose Bryson. I explained it to you when I had a talk with you and showed you the memorandum I had made at the time on the back of the envelope which contained the deed. Bryson has evidently been talking to some one else since then and some one has advised him that if the deed remains in my possession until after Mrs. Simmons dies, and I turn the deed over to him, the land would go to you. He and Mrs. Simmons have discussed the matter and both of them have requested me to turn the deed over to Mrs. Simmons. I am not the agent of one of them but am the agent for both of them; and when both request me to deliver the deed up, I think I have no discretion but to do so. I discussed the matter with Mr. Reid, and he thinks as I do about the matter.

"If you have any rights in the matter, you will not lose them by my turning the deed over to Mrs. Simmons. There will be no trouble to make proof of all of the facts in the case in case you should decide to take the matter into court.

"Very truly yours,

"Wm. L. Moose."

Appellants' insistance for reversal is that the evidence does not support the finding of the chancellor to the effect that William Bryson, appellee's grantor, acquired title to said real estate under the deed executed by Sarah A. Simmons and placed in the custody of W. L. Moose for William Bryson. Appellant contends that the deed was not an escrow. This court has adopted the following test as to whether an instrument is an escrow:

"When the instrument is placed in the hands of a depositary it should be intended to pass beyond the control of the grantor for all time, and that he should actually lose the control of and dominion over the instrument; for in case the deposit is made in furtherance of a contract between the parties, the contract must be so complete that it remains only for the grantee or obligee or other person to perform the required condition, or for the event to happen, to have the instrument take effect according to its import." *Masters* v. *Clark,* 89 Ark. 191; *Fine* v. *Lasater,* 110 Ark. 425; *Moore* v. *Moye,* 122 Ark. 548; 16 Cyc. 568; 11 Am. & Eng. Enc. of Law (2 ed.), 336.

Having carefully read all the evidence in the instant case, we have concluded it supports the finding of the chancellor to the effect that the deed was to be delivered to William Bryson by W. L. Moose at the death of Sarah A. Simmons, upon the performance of the condition to the effect that Bryson, or his grantee, should pay $50 annually to Sarah A. Simmons or her agent, W. L. Moose. In other words, we are of opinion that the weight of the evidence shows that the deposit of the deed was irrevocable. In this particular case, we do not think there can be any question as to the soundness of our conclusion, because the letter written by W. L. Moose, of date August 27, 1910, to appellee, A. D. Malone Mercantile Company, admits that he was the agent for William Bryson. It seems that, technically speaking, a grantee, obligee or an agent of either can not act as a depositary in an escrow; that when a deed is delivered directly to a grantee or his agent, it operates as an immediate and final delivery of

the deed, and voids the condition contained therein. *Inglish* v. *Breneman,* 5 Ark. 377; *Scott* v. *State Bank,* 9 Ark. 36; *Campbell* v. *Jones,* 52 Ark. 493.

This view of the case renders it unnecessary to discuss appellee's contention that William Bryson acquired title by adverse possession; or that he acquired the right to title and possession of said land under a contract of purchase and improvements made thereon in pursuance of the contract.

The decree is affirmed.

JACOB M. DICKINSON, RECEIVER OF CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* MUSE.

Opinion delivered June 24, 1918.

1. PRINCIPAL AND AGENT—CAUSING ARREST OF THIRD PARTY—LIABILITY OF PRINCIPAL.—When agents or servants of a principal, acting within the scope of their authority, actual or apparent, wrongfully procure the arrest and imprisonment of any one, the principal is responsible for damages resulting from such arrest and imprisonment.
2. PRINCIPAL AND AGENT—CAUSING ARREST OF A THIRD PARTY—RAILROAD STATION AGENT.—Where a railroad station agent or ticket agent called a policeman who arrested plaintiff, the railroad company will not be liable for the act in the absence of a showing that the company had conferred authority upon its agent to cause arrests, or the nature of the agent's duties necessarily implied such an authority.
3. CARRIERS—ACT OF CONDUCTOR—PROCURING ARREST OF PASSENGERS.—The liability of a railroad company on account of an unlawful arrest and imprisonment by the procurement of its conductor is limited to what is said and done by its conductor at the time the passenger is being ejected by him or under his authority, or for only those things said and done that are so closely associated with the act that they may be regarded as a part of the act.
4. CARRIERS—UNUSED TICKET—DUTY OF PASSENGER TO SURRENDER.—One who has an unused railroad ticket can not recover the value thereof without offering to surrender it.

Appeal from Logan Circuit Court, Southern District; *Jas. Cochran,* Judge; reversed.

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.

1. Incompetent testimony was admitted. The testimony is full of irrelevant and immaterial matters.

2. The court erred in submitting to the jury the question of plaintiff's arrest and imprisonment. The city marshal arrested him on his own judgment and without solicitation or instructions from any one connected with defendant. The ticket seller had no authority as an employee to call an officer. He acted outside the scope of his authority. The court erred in its instructions. Defendant was not liable for plaintiff's arrest and imprisonment and it was error to submit the question to the jury. 65 Ark. 144-9; 105 *Id.* 619-625; 87 *Id.* 524.

3. It was error to give plaintiff's instruction No. 9. Plaintiff never tendered the ticket. 99 Ark. 486-8.

Evans & Evans, for appellee.

1. The question of plaintiff's arrest and imprisonment was properly submitted to the jury. 97 Ark. 24; 42 *Id.* 552-3; 78 *Id.* 553. A railway company is liable for the wrongful act of its conductor in procuring the arrest of a passenger. Cases *supra.* He was acting within the scope of his authority.

2. Plaintiff was clearly entitled to recover for the unused ticket. There was no error in giving instruction No. 9. Plaintiff bought and paid for the ticket. It was unused and he ought to recover the price paid for it.

HUMPHREYS, J. This suit was instituted by appellee against appellant in the circuit court for the Southern District of Logan County, to recover damages on account of an alleged failure to hold passenger train No. 42 at Howe, Oklahoma, a sufficient length of time for appellee to debark, buy a ticket to Little Rock, Arkansas, and return to the train; and an alleged wrongful ejection therefrom at Booneville, Arkansas, coupled with an alleged unlawful arrest and imprisonment.

Appellant denied all the material allegations in the complaint.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court. The jury returned a verdict against appellant in the sum of $308.57, upon which judgment was rendered. Proper steps were taken and an appeal has been prosecuted to this court.

The substance of the material facts necessary to a determination of the questions involved on this appeal are as follows: Dr. Muse, a physician residing at Conway, Arkansas, who was returning from a visit to his mother in her last illness, purchased transportation and a sleeping car ticket in the afternoon of the 12th day of February, 1917, from Oklahoma City to Howe, Oklahoma. He was en route home and was advised by the conductor of passenger train No. 42 that the train would stop at Howe long enough for him to buy a ticket to Little Rock. He was feeling badly from the loss of sleep, and, during the day and evening took three drinks of alcohol, diluted to some extent with water, and one dose of morphine. He boarded the train at Oklahoma City about 9:40 o'clock, and, after arranging for a call at Howe, retired. He suffered quite a little during the night and did not sleep much. In response to the call for Howe, he dressed, took his grip and coat and got off for the purpose of getting a ticket to Little Rock and returning to the train. The train started just as he got his ticket, and he got on the train at the first opening that reached him, which proved to be the platform between the express car and blind baggage. The door was locked and he could not get into the car. Due to the loss of sleep and perhaps somewhat to the influence of alcohol and morphine, he went to sleep. Booneville, Arkansas, is a little less than 50 miles from Howe. It took about two hours to make the run. The morning was very cold. The train reached Booneville at about 6:40 a. m. and remained there 25 minutes for the crew and passengers to get breakfast. The crew on the train was changed at that point. Appellee was found sleeping on the blind baggage by a porter who took him off. As he was doing so, the conductor of the train from Shawnee to that point informed him that he had been a

passenger on the sleeper. The porter conducted him along the train until he met A. L. Moore, the conductor in charge from Booneville to Little Rock. At this point in the history of the case, the evidence became quite conflicting.

Appellee's evidence tended to show that he was somewhat bewildered, due to the loss of sleep, and was numb from the cold; that he informed the conductor that he had a ticket to Little Rock; that the conductor disputed his statement and denounced him as a "bum;" that he felt in his vest pocket for his ticket but could not get it on account of the numbness of his hands; that he walked back to the sleeper and got on; that the conductor removed him from the sleeper roughly, and, in doing so, kicked him on the shin; that he afterwards tried to get on the day coach and was refused admittance by the brakeman, until he purchased a ticket; that his money had disappeared during the night in the sleeping car, but he went to the depot and tried to purchase a ticket with his individual check which was refused. He then returned to the platform and was standing there, having given up the idea of getting on the train, when an officer appeared, and, in response to the direction of the conductor, arrested him. He remained in jail until after dinner when, through acquaintances, he cashed a check and started at 8 o'clock p. m. for Little Rock. He purchased another ticket and did not tender the old ticket which he retained and produced in evidence. Sol Moore, ticket agent, testified that he telephoned at the instance of the road master, to the officer about appellant being there drunk and to come and see about it. The officer, conductor and other trainmen denied pointing appellee out and directing his arrest.

The evidence is quite voluminous and many questions as to the competency and relevancy thereof were raised and exceptions properly saved. A number of instructions were asked by appellant. Some of them were refused and appellant saved its exceptions. Some of them were modified and given as modified and appellant saved

its exceptions to the refusal of the court to give the instructions in the form asked and for the modification and giving them as modified. We deem it unnecessary to detail the other phases of the evidence or to set out all the instructions in full for the reason that appellant argues only two alleged errors for reversal.

It is insisted by appellant that the court erred in submitting to the jury the question of appellee's arrest and imprisonment. The contention is that there was no evidence tending to show that the servants of appellant were acting within the scope of their authority when the arrest was procured.

(1) It is a well settled rule of law that where agents or servants of a principal, acting within the scope of their authority, actual or apparent, wrongfully procure the arrest and imprisonment of any one, the principal is responsible for damages resulting from such arrest and imprisonment. *Mayfield* v. *St. L., I. M. & S. R. Co.,* 97 Ark. 24.

The undisputed evidence in this case concerning the arrest is that the ticket agent phoned, at the request of the road master, for the officer who made the arrest. This court held in the case of *C., R. I. & P. Ry. Co.* v. *Nelson,* 87 Ark. 524, that (quoting syllabus 2): "A railroad company is not liable for the wrongful arrest by a policeman of a passenger, though the arrest was made under the direction of the company's station master, if the latter had no authority to direct the arrest to be made."

In that case, under company rule 702, amongst other things, one of the station master's duties was "to preserve order about the station."

And in the case of *Mayfield* v. *St. L., I. M. & S. R. Co.,* 97 Ark. 24, this court said: "A railroad station agent has no authority to prosecute a person who has wrongfully taken property of the railroad company placed in the custody of such agent."

(2) There is no proof in the case at bar that the ticket agent or the road master had any express or implied authority to procure the arrest and imprisonment of passengers or persons seeking passage upon the trains. Unless it was shown that authority to procure arrests was conferred by the company on the ticket agent or road master, or the performance of their duties necessarily implied authority to procure the arrest and imprisonment of a party, their participation in the arrest and imprisonment of appellee would not warrant the submission of his unlawful arrest and imprisonment to the jury. *Little Rock T. & E. Co.* v. *Walker,* 65 Ark. 144; *Mayfield* v. *St. L., I. M. & R. Co., supra.*

No other official of the railroad company participated in the arrest, unless it was the conductor. In speaking with reference to the liability of a railroad company for the act and conduct of its conductor in ejecting passengers, this court has said that (quoting syllabus 3): "A street railway is liable for the wrongful acts of its conductor in ordering a policeman to arrest one of its passengers and remove him from the car in which he was riding; but not for such conductor's subsequent acts in prosecuting the passenger for a breach of the peace, such prosecution not being within the scope of the conductor's authority." *Little Rock Ry. & Electric Co.* v. *Dobbins,* 78 Ark. 553.

And has further said (quoting syllabus 4): "A railroad company is not liable for the wrongful acts of its conductor in swearing out a warrant of arrest against a passenger on the next day after he was ejected from its train." *St. L., I. M. & S. R. Co.* v. *Waters,* 105 Ark. 619.

(3) It seems that the liability of a railroad company, on account of an unlawful arrest and imprisonment by the procurement of its conductor, is limited to what is said and done by its conductor at the time the passenger is being ejected by him or under his authority, or for only those things said and done that are so closely associated with the act that they may be re-

garded as a part of the act. It was said in the case of *Little Rock Ry. & Elec. Co.* v. *Dobbins, supra,* that, "The evidence, so far as it relates to the arrest of the appellee on the car by the policeman at the request and direction of the conductor, was proper, for this was the method adopted by the conductor for the ejection of appellee from the car, and was therefore an act in the scope of the conductor's employment." And what was said and done by the ejected parties and the officials ejecting them on the depot platform immediately after the ejectment was held to be competent evidence in the case of *St. L., I. M. & S. R. Co.* v. *Waters, supra.* In the case at bar, appellee admits that what he thinks the conductor said pertaining to the arrest and imprisonment occurred on the depot platform after he had been ejected and after he had gone to purchase a ticket at the ticket office in Booneville and after he had given up all hope of getting on the car. What was said by the conductor, if said with reference to the arrest, was too remote in time and not sufficiently connected with the ejectment to hold that the procurement of the arrest and imprisonment was a part of the act of ejection. It was therefore error for the court to submit the question of arrest and imprisonment to the jury. There was no competent evidence to support the instruction.

It is also contended by appellant that the court erred in submitting the question of liability of the railroad for the value of the unused ticket from Booneville to Little Rock. The undisputed evidence is that appellee never presented this ticket at any time to the company for passage on its train. For this reason, we think he can not recover. It was said by this court in the case of *St. L., I. M. & S. Ry. Co.* v. *Dare,* 99 Ark. 486: "Even if he were entitled to recover the value of the ticket, he could not do so because he retained it and did not offer to surrender it."

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

McMAHAN v. RUBLE.

Opinion delivered July 1, 1918.

1. ROADS—ORDER ESTABLISHING—RIGHTS OF CITIZEN AND TAXPAYER.—Where the county court made an order establishing a road through certain lands, a citizen and taxpayer owning lands taken by the road may make himself a party to the proceedings and appeal from the orders of the court.
2. APPEAL AND ERROR—NECESSITY FOR AFFIDAVIT—ROADS.—While a taxpayer, who has become a party to the proceedings laying out a road, may appeal from an order of the county court, under section 1, Act 422, Public Acts of 1911, page 365, such appeal will be dismissed where no affidavit for appeal was made and filed.

Appeal from Boone Circuit Court; *Jno. I. Worthington,* Judge; affirmed.

J. M. Shinn, for appellants; *Oscar W. Hudgins,* of counsel.

1. The court erred in dismissing the petition and refusing an appeal. Art 7, § 33, Const.; *Ib.* Art. 7, § 114; Kirby's Dig. § § 1487, 3006, 1492; 53 Ark. 417; K. & C. Dig. § 8988.

2. Although the Act (No. 422, Acts 1911), makes a provision for an appeal the right exists under the constitution and general statutes. 90 Ark. 219; 95 *Id.* 385; 117 *Id.* 4. Appellant was a party to the record and aggrieved.

Shouse & Rowland and *Guy L. Trimble,* for appellee.

The appeal was properly dismissed. Appellant was not a party and the appeal was not properly taken as the statute was not complied with. 53 Art. 417; K. & C. Dig. § 1303; 85 Ark. 304; 2 Cyc. 633; Acts 1911, K. & C. Dig. § 8988; Kirby's Digest, § § 1487, 3006.

SMITH, J. The county court of Boone County made an order establishing a road through the lands of appellant. He filed a remonstrance in the county court to the opening of the road on the ground that it would not be of sufficient importance to warrant the county in making

the necessary expenditure of money to build and maintain the road. An appeal was prosecuted to the circuit court from the order opening the road and assessing the damages, and there the petitioners for the road moved the court to dismiss the appeal insofar as it applied to the order of the county court opening the road. This motion was sustained, and this appeal has been prosecuted to review that order. The proceeding in this case was had under section 1 of Act 422 of the Public Acts of 1911, page 365.

(1) It is first insisted that the appeal was properly dismissed because appellant was not a party aggrieved within the meaning of the law. But that contention can not be sustained. Appellant made himself a party to the record in the county court and he was, therefore, entitled to appeal from an adverse decision. *Sloan* v. *Lawrence County,* 134 Ark. 121.

As a citizen and taxpayer he had the right to be made a party to the proceeding in the county court. *Lee County* v. *Robertson,* 66 Ark. 83, 87; *Casey* v. *Independence County,* 109 Ark. 11, 17; *Nemier* v. *Bramlett,* 103 Ark. 209; *School Dist. No.* 44 v. *Rural Special School Dist. No.* 10, 128 Ark. 383; *Ward* v. *Wilson,* 127 Ark. 266; *Rust* v. *Kocourek,* 130 Ark. 39.

Moreover, he had the special interest in this litigation that the land taken would revert to him if the order of the county court establishing the road was set aside. The decision of this court in the case of *Brown* v. *Frenken,* 87 Ark. 160, turned upon the right of the appellant to appeal, and in defining party aggrieved the court there said:

" 'A party aggrieved is one whose pecuniary interest is directly affected by the decree or one whose right of property may be established or divested by the decree.' *Wiggins* v. *Sweet,* 6 Met. 197. The party aggrieved is the person who would have had the property if the judgment alleged to be erroneous had not been rendered. *Adams* v. *Woods,* 8 Cal. 306; *Veazie Bank* v. *Young,* 53 Maine 560; *Betts* v. *Shotton,* 27 Wis. 667; *Case of Koch's*

Estate, 4 Rawle (Pa.) 267; *Jenkins* v. *International Bank,* 97 Ill. 568."

It is insisted, however, that the section under which this proceeding was had provides only for an appeal from the order of the court assessing the damages and makes no provision for an appeal from the order of the court establishing the road. Such appears to be the fact. But appellant is not thus deprived of his right of appeal. A similar contention was made in the case of *Huddleston* v. *Coffman,* 90 Ark. 219. That was an appeal from an order of the county court fixing the fee of an attorney who had represented petitioners in the establishment of a drainage district. It was said that section 1428 of Kirby's Digest, which was a part of the drainage act under which that proceeding was had, specifically enumerated the matters from which an appeal could be taken from the county court to the circuit court, and omitted to name, among the matters from which an appeal might be prosecuted, the allowance of attorney's fees. But, in disposing of that question, the court said that section 14, article 7, of the Constitution provides that circuit courts shall exercise appellate jurisdiction over county courts and other designated courts and that a right of appeal from the order of the county court in question existed and "that right not having been conferred in the matter of allowing attorney's fees by the Drainage Act, it could be exercised under the general acts governing appeals from county courts." So the right of appeal existed here and should have been permitted under section 1487 of Kirby's Digest.

(2) It is pointed out, however, that even though the right of appeal did exist under this section of the statute the requirements of that statute were not complied with, in that no affidavit for appeal was made. This point appears to be well taken, and the appeal from the county court was, therefore, properly dismissed, and the judgment of the circuit court to that effect will accordingly be affirmed.

LOCAL UNION NO. 313, HOTEL & RESTAURANT EMPLOYEES, ETC., v. STATHAKIS.

Opinion delivered July 1, 1918.

1. LABOR UNIONS—RIGHT OF ORGANIZATION—RIGHT TO STRIKE—RIGHT OF CONDUCT TOWARD PUBLIC.—Laborers have the right to organize into unions for the purpose of bargaining collectively for the betterment of their condition, and, as an incident thereto to strike collectively. They may say for whom and upon what terms they will work, and may act through their unions in the decision of these questions, provided no contracts of employment are broken. And when they fail to agree with any employer and have gone upon a strike, they may apprise the public of that fact, and may solicit the support, not only of members of the union, but of the public generally, in any legitimate attempt to prevail in their controversy. On the other hand, labor unions have no right to resort to force, intimidation or coercion; publicity as well as other means of persuasion may be used, but force, intimidation and coercion may not be used.
2. LABOR UNIONS—PICKETING—PLACARDS.—Striking laborers may inscribe their grievances upon placards to be seen at a distance and to be read by many at the same time, provided the inscriptions are not libelous or otherwise unlawful, but any conduct on the part of pickets which amounts to coercion is unlawful and will be enjoined.
3. LABOR UNIONS—STRIKES—PUBLICITY—PICKETING.—While a labor union, on strike, may give publicity to that fact, and solicit support in its behalf, it has no right, in doing so, to disregard the equal rights of the employer to employ whom he pleases, provided he violates no contract right of employment, and so that the public may bestow its favor and support upon one side or the other free from any coercive molestation. The right to exhibit placards does not give the right to patrol or picket an employer's place of business with the placards so as to interfere with his lawful business.
4. INJUNCTION—PROTECTION OF RIGHT TO CARRY ON BUSINESS.—The right to carry on a lawful business without obstruction is a property right, and one which the courts have never hesitated to protect, and its protection is a proper object for the granting of an injunction.
5. LABOR UNIONS—PICKETING—USE OF PLACARDS—INJUNCTION.—Appellee, a restaurant proprietor, fell into a dispute with a certain labor union, whereupon employees of appellee, members of the union went on strike, and the local union covering laborers of that sort, viz., cooks and waiters and other restaurant employees, undertook to picket appellee's place of business with placards, stat-

ing that appellee was "unfair to union labor," and other legends. *Held,* under the proof that the pickets in exhibiting their placards were not merely notifying the public of their grievance, but were actually engaged in acts of intimidation and coercion, and that an injunction restraining them from picketing appellee's place of business was properly issued.

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

Mehaffy, Reid, Donham & Mehaffy, for appellant.

No force, violence, threats nor intimidations were used. The "picketing" was peaceful and not unlawful. It was error to grant the injunction. 50 L. R. A. (N. S.) 412; 109 S. W. 30; 96 Ark. 618; 162 S. W. 652; 161 N. W. 523; 100 N. Y. S. 292; 16 R. C. L. 454-7; 164 N. Y. S. 522; 159 Fed. 500; 171 Pac. 121; 197 Fed. 221; 163 Pac. 107; 62 S. E. 236; 166 Fed. 45; 238 Fed. 728; 78 N. Y. S. 860; 117 N. E. 582. The charge is not sustained by the proof and the injunction is too broad.

Moore, Smith, Moore & Trieber, for appellee.

1. The picketing was unlawful and the injunction properly granted. 16 R. C. L. par. 33 and notes; 139 Fed. 582; 120 *Id.* 121; No. 748 Ct. Civ. App. Tex. Apl. 20, 1918; 232 Ill. 424; 57 N. E. 1011; 83 *Id.* 940; 214 Pa. St. 348; 16 R. C. L. 16.

2. Large crowds gathered; the sidewalks were crowded and free travel impeded. Stink balls were thrown; employees were threatened and other unlawful acts committed. Plaintiff's business was interfered with and his customers disturbed and patronage lessened. Many unlawful acts were committed tending to excite passion and violence. 156 Cal. 170; 110 Fed. 698; 159 *Id.* 500; 3 Elliott on Roads & Streets (3 ed. par. 500; 11 Barb. (N. Y.) 390; 120 Fed. 215; 47 N. E. 630; 90 Ark. 574; Freund, Police Power, par. 168; 8 Pa. Sup. Ct. 130; 128 Mich. 545; 194 N. Y. 19; 33 N. E. 651; 145 Mass. 384; 90 Fed. 608; 4 Sandf. (N. Y.) 357; 44 N. E. 1077; 139 Fed. 583; 83 N. E. 940; 72 N. J. Eq. 653; 77 *Id.* 219; 39 Wash. 531; 77 N. W. 13; 24 Cyc. 834; 166 Pac. 665-7, 671; 245 U. S. 229, and many others.

SMITH, J. Appellee operates two cafes in the City of Little Rock, one of which is located at 104 West Markham Street and is known as Faust cafe; the other is located at 106 South Main Street and is known as Faust Coffee House. These cafes are located near the corner of Main and Markham Streets and are about one block apart. In the operation of this business appellee employed from seventy to eighty cooks, waiters and helpers, and a disagreement arose between him and his help. It is unnecessary to consider the merits of this disagreement, but it eventuated in a demand on the part of his employees that appellee unionize his cafes. This demand was refused, and the refusal was followed by a strike, which was participated in by most of the employees. This strike was conducted by the officers and employees of Local Union No. 313 of the Hotel and Restaurant Employees' International Union, which is a voluntary association of cooks and waiters and waitresses of the City of Little Rock. As an incident to the strike and in aid of it the Local Union ordered that appellee's places be "picketed." This consisted in having "pickets" patrol the sidewalks in front of the entrances to the cafes exhibiting large placards with the statements printed thereon in large red type that "This cafe is unfair to union labor," and "Look, Faust Cafe is unfair to union labor." One person, and occasionally two, walked continually in front of each of these cafes carrying placards, and at meal times this number was sometimes increased.

The picketing continued for about a month, when suit was brought against the officers of the local union and certain of the pickets to enjoin them from further picketing appellee's places of business. The officers of the union admitted that they employed the pickets and paid them and had supervision over them and had representatives whose business it was to make regular inspections to see that the picketing was continuously carried on. Other restaurants and cafes in Little Rock which refused to unionize were being picketed at the same time.

The demand that the restaurants should unionize meant that they should employ only persons who were members of the labor union. The officers of the union testified that they gave strict directions to the pickets to preserve order, to speak only when spoken to, and then only to answer respectfully questions asked them, and to keep walking the beats assigned them. These beats represented the fronts of the places of business which were being picketed. A number of the pickets testified that they obeyed these directions strictly and in doing so endured insults, derision and abuse in silence, and without resentment. No picket admitted having violated the instructions of the union which employed them.

On the other hand, there was testimony tending to show that such was not the case. Without naming the witnesses, it may be said there was testimony to the following effect. A prospective customer was accosted by one of the pickets, who said, "Don't go in there, brother; it's a scab joint." He disregarded the warning and entered. While eating, a lady and two children undertook to enter. She opened the door, when the picket said, "Don't go in there, lady; it's a scab joint; it's unfair to union labor." She stopped, hesitated, appeared worried, and then turned and went away. Pickets accosted many persons about to enter the cafes, a number of whom turned away and did not enter. A picket said to one of these, "I know his line of business and will remember it." A picket was heard to say, "I would like to get a chance to wait on some of those scabs eating in there." Frequently cooks and waiters who were on a strike at other restaurants joined the pickets and occasionally crowds gathered about the cafes and interfered with the free passage of customers, and the assistance of the police became necessary to clear away the crowds. Persons about to enter were seized by the arm and asked not to enter. Strikers had in some instances threatened employees with personal violence who refused to join the union. A waitress was told that if she did not join the union before the strike was won the house would have

to turn her out when it was forced to recognize the union; but she refused to join the union and continued at work. Pickets inserted the placards in the faces of a number of persons who indicated an intention to enter the cafes, and many were thus deterred from entering. Stink balls were thrown in the cafes while meals were being served. And as a result of the conduct detailed above appellee sustained a loss of business in one month of twenty-eight hundred dollars.

It is very probable that the pickets were not responsible for all this misconduct. Much of it was no doubt attributable to their sympathizers. But if the witnesses for appellee are to be credited the pickets were responsible for numerous acts of coercion and intimidation. And if this be true the officers of the union who employed these pickets must be held responsible for this misconduct, although they, not only did not direct the misconduct, but gave instructions to the contrary; for the misconduct occurred in the discharge of the duties for which the pickets had been employed and in the course of their employment as such. *Bryeans* v. *Chicago Mill & Lumber Co.,* 132 Ark. 282; *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229.

The court entered the following decree:

"* * * * that the defendants, and the agents and employees of each of the defendants, be and they are each restrained and enjoined while on, adjacent or near plaintiff's premises * * * from interfering with plaintiff's business, his customers, prospective customers or employees, and from picketing or patrolling, or causing to be picketed or patrolled the sidewalks or streets adjacent to plaintiff's said premises with placards designating said places of business as unfair to union labor or with placards otherwise so worded as to give said places such designation; and also that the defendants and the agents and employees of each of the defendants be and they are each restrained and enjoined from accosting or detaining or causing to be accosted or detained on the sidewalks or streets adjacent to plaintiff's

premises any person or persons seeking to enter plaintiff's restaurants for the purposes of dissuading them from patronizing or working for plaintiff, or from calling their attention to any alleged unfairness of plaintiff's restaurants to union labor or otherwise undertaking to influence such employees or prospective patrons from entering the service of or patronizing plaintiff's restaurants."

(1) Certain fundamental rights are recognized by each of the parties to this litigation as belonging to the other. It is recognized, and this court has expressly decided, that laborers have the right to organize into unions for the purpose of barganing collectively for the betterment of their condition and, as an incident thereto, to strike collectively. *Meier* v. *Speer,* 96 Ark. 618. They have the right to say for whom and upon what terms they will work, and may act through their unions in the decision of these questions, provided, of course, no contracts of employment are broken. And when they fail, acting thus collectively, to agree with any employer and have gone upon a strike, they have the right to apprise the public of that fact and to solicit the support, not only of members of the union, but of the public generally in any legitimate attempt to prevail in their controversy. Against the law as thus stated there appears to be no dissent. On the other hand, it is equally as well settled and as uniformly held by the courts that the labor unions have no right to resort to force, intimidation or coercion. Publicity as well as other means of persuasion may be used; but force, coercion and intimidation may not be used.

Picketing as an aid to industrial strikes is somewhat of an innovation in the economic life of the nation and the law on the subject is in the formative period. It is a question of first impression in this State and a number of other States, like this one, have no cases on the subject. However, there are a number of cases on the subject in both State and Federal Courts, but these courts are not in harmony on the subject.

(2) Early cases upholding the right of picketing likened that action to the exercise of the right of free speech. This was upon the theory that as a striker might tell an individual citizen his grievance and thereby appeal to him for support in his strike, so he might employ any lawful and proper means which gave the greatest effect to that right and that he might, therefore, inscribe his grievances upon placards to be seen at a distance and to be read by many at the same time, provided the inscription was not libelous or otherwise unlawful. The existence of this right is still generally conceded, and we think such right exists. But it appears in the history of this movement as reflected in the opinions of the courts on the subject that there has been an extension of the rights claimed by the labor unions in this respect, and the differences which appear in the decisions of the courts largely arise out of contrariety of view as to when the assertion of this right by the labor union to give notice of its grievances becomes an infringement on the rights of others by coercing those others into compliance with the demands of organized labor, or, as has been stated, the cases all agree in holding that any conduct on the part of the pickets which amounts to coercion is unlawful and will be enjoined.

(3) But as the cases continued to come before the courts and the law on the subject to be molded, it became more and more apparent that picketing was practiced and resorted to, not alone for purposes of publicity and persuasion, but for coercion and intimidation as well; so that, while the tendency of the earlier cases was to uphold picketing as an exercise of the right of free speech, the tendency of later cases is to restrict that right as an act of coercion in its tendencies, and one which in its practical application tends generally to breaches of the peace and other disorders. This fact is recognized and stated by the author of the note to the annotated cases of *In Re Langell,* 50 L. R. A. (N. S.) 412. The modern and better view on the subject appears to be that, while the labor union which is on a strike has the right to give

publicity to that fact and to solicit support in its behalf, it has no right, in doing so, to disregard the equal right of the employer to employ whom he pleases, provided he violates no contract right of employment, and that the public may bestow its favor and support upon one side or the other free from any coercive molestation.

(4) The labor union or its representatives and employees had the right to exhibit the placards in question to the public; but it is a far different thing to say that the right to exhibit these placards to the public carried with it the right to so patrol or picket appellee's places of business with these placards as to interfere with his lawful business. The cases all agree that the right to carry on a lawful business without obstruction is a property right, and one which the courts have never hesitated to protect, and its protection is a proper object for the granting of an injunction.

(5) The placard itself may be lawful and its display, therefore, not unlawful; yet, with the use of such a placard, or, for that matter, without the use of any placard, one's right to prosecute his own lawful business may be unnecessarily interfered with. The legality of the inscription on the placard, and the right to display such a placard, did not give one the right to make any use he pleases of the placard. It is commonly said that one may do as he pleases with his own; but that is not an exact statement of the law. He can not so use his own as to inflict unnecessary injury upon another. This truth is so just and so apparent that early in the history of our law the maxim grew up, "*Sic utere tuo ut alienum non laedas.*" This maxim was quoted and translated by Mr. Justice Pitney in the case of *Hitchman Coal & Coke Co., supra,* where it was said:

The familiar maxim, '*Sic utere tuo ut alienum non laedas*' literally translated, 'So use your own property as not to injure that of another person,' but by more proper interpretation, 'so as not to injure the *rights* of another' (Broom, Legal Maxims, 8th ed. 289) applies to conflicting rights of every description. For example,

where two or more persons are entitled to use the same road or passage, each one, in using it, is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it."

This quotation was used in the case cited in a discussion of the relative rights of the employer and the employee, wherein the right of the employer was upheld to discharge the employee for joining a labor union. In that case, as in an infinite number of others, it was recognized that rights are reciprocal, and so are duties. For the occasion may arise when rights are conflicting. I have the right to use the sidewalk and any portion thereof and at all hours, subject to necessary police regulations. But so has my neighbor. My right qualifies his; and his right qualifies mine; so that each must exercise his right in a manner not to interfere unnecessarily with the rights of the other. So here the strikers and the union to which they belonged, and the employees thereof, had the right to give notice to the public that appellee's cafes were open shops, and therefore unfair to union labor; but, in doing this, they had no right to exercise coercion resulting from the conduct herein set forth. They were not using the streets in front of appellee's place of business for the ordinary purposes for which streets and sidewalks are intended, but were using them for the avowed purpose of injuring his business, or driving away the patronage which the public might otherwise have given him. Their interference with his business was direct and immediate and was intended so to be.

The conduct of the pickets was manifestly not intended merely to give notice to the public that appellee's cafes were unfair to union labor. The area in which the pickets confined their operation is evidence that such alone was not their intention, as their beat was limited to the frontage of appellee's cafes on the streets. Not many, if any, patrons could enter without being observed, and these would know that they had been observed. The number of pickets was increased at the meal hours when a larger number of people were likely

to enter the cafes for their meals. And can there be any real question as to the meaning of the presence of the pickets? Were they not doing something more than giving notice to the public that they had an undecided issue with the business which they were picketing? Were they not saying, even though it was silently said, "See what we are doing to this man, because he has incurred our displeasure? Beware a similar fate!" And was it not necessarily true that many people who had no knowledge or opinion in regard to the existing controversy, and who felt no interest in the terms of its final settlement, were deterred from according the patronage which might otherwise have been given appellee simply because there was a controversy in which they did not desire to even appear to be parties?

In discussing a similar question in the case of *Jones* v. *VanWinkle Gin & M. Works,* 17 L. R. A. (N. S.) 848, the Supreme Court of Georgia said that conduct which operates upon one's fears rather than upon his judgment or his sympathy is coercive.

In the case of *Pierce* v. *Stablemen's Union,* 156 Cal. 70, 103 Pac. 324, the Supreme Court of California said: "It (picketing) tends, and is designed, to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect; disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business, so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual, peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason."

This question is discussed in Eddy on Combinations, volume 1, section 539, where it is said: "A picket is the agent of a combination, and the legality or illegality of

the maintenance of a picket has absolutely nothing to do with the number of pickets employed, but depends upon the objects of the combination and the means used by the picket to attain the objects. If the object of the combination is simply to notify parties seeking employment that a strike is on, and to persuade them by peaceful and lawful arguments not to take the places of the striking workmen, then the picket is not illegal, and it is quite immaterial whether there be one picket or many. If, however, the object of the combination in maintaining the picket is to intimidate other workmen and thereby prevent their finding employment, the picket is illegal, whether there be one or many.

"In determining the object of the combination the courts will probe deeper than resolutions and mere professions of good will and lawful intentions. It unfortunately happens that there is seldom a case where a picket is maintained that the members of the picket or their hangers-on do not resort to acts of violence, and to jeers, cries, epithets and threats calculated and intended to intimidate workmen who are not members of the combination. So true is this that the very term 'picket' has come to mean in the popular mind threats, violence and intimidation. It is conceivable, however, that a picket entirely lawful might be established about a factory, but such a picket would go no further than interviews and lawful persuasion and inducement. The slightest evidence of threats, violence or intimidation of any character ought to be sufficient to convince court and jury of the unlawful character of the picket, since the picket under the most favorable consideration means an interference between employer seeking employees and men seeking employment."

The decree enjoins picketing at and near appellee's premises and the operation of the injunction is limited to that immediate vicinity. The reason for the limitation is manifest. A presentation of labor's grievances elsewhere gives the member of the public whose support is thus solicited an opportunity for reflection; but when

the picketing is conducted in the small space of the frontage of the business picketed the effect of that conduct is practically immediate. No opportunity for reflection is afforded. One must choose immediately between defying the picket and acceding to his appeal; so that interference necessarily results to the business there being conducted. We conclude, therefore, that the decree of the court enjoining the picketing under the conditions stated is right and proper and should be affirmed.

We have not attempted to collect or cite the numerous cases on this subject. A number of these cases are cited in the excellent briefs of respective counsel, and while it is true as stated above that all of these cases do not support the views which we have here expressed, we are of the opinion that our views are in accord with the better reasoned cases and the soundest principles of natural justice. The following cases on the subject are annotated and present the different views of the courts, and, in addition, collect and cite most of the cases on the subject, and reference is made to these cases for the use of any one who may wish to pursue his inquiry further: *Goldberg* v. *Stablemen's Union,* 9 Ann. Cas. 1219, 8 L. R. A. (N. S.), 460; *Vegelahn* v. *Guntner,* 57 A. S. R. 443, 35 L. R. A. 722; *Iron Moulders' Union* v. *Allis- Chambers Co.,* 20 L. R. A. (N. S.), 315; *Karges Furniture Co.* v. *Amalgamated Woodworkers' Union,* 6 Ann. Cas. 829; *Everett Waddey Co.* v. *Richmond Typo. Union,* 8 Ann. Cas. 798, 5 L. R. A. (N. S.), 792; *St. Louis* v. *Gloner,* 124 A. S. R. 750, 15 L. R. A. (N. S.), 973; *Barnes* v. *Chicago Typo. Union,* 122 A. S. R. 129; *Beck* v. *Railway Teamsters' Protective Union,* 42 L. R. A. 407, 74 A. S. R. 421; *Jensen* v. *Cooks' & Waiters' Union,* 4 L. R. A. (N. S.), 302; *George Jonas Glass Co.* v. *Glass Bottle Blowers' Assn.,* 41 L. R. A. (N. S.), 445; *St. Germain* v. *Bakery & C. Workers Int. Union,* L. R. A. 1917 F 824.

HART, J., (dissenting). There is no difference in judicial opinions in respect to the illegality in the use of any act which is calculated to coerce. The difference of judicial opinions arises in respect to what acts should be

regarded as coercive. The decision of this question must depend, to a large extent, upon the circumstances surrounding each particular case. I do not think that the law is, that picketing in itself, without some other act tending to show coercion, is subject to injunctive relief. There must be taken into account the number of picketers, the extent of their occupation of the sidewalk, or street adjacent to the building or place picketed, and as well what they say and do and how they act. If the purpose of picketing is to interfere with those going into or coming out of the building, or place picketed, an injunction may be granted. On the other hand, if the design of the picketing is merely to give notice to the public that the proprietor of the place picketed is unfair to union labor, or to see who can be made the subject of persuasive argument, such picketing is legal and ought not to be enjoined.

Judge HUMPHREYS concurs with me in this dissent.

MUSTIN v. BRAIN.

Opinion delivered July 1, 1918.

1. LOCAL IMPROVEMENT—PETITION FOR ORGANIZATION—CONSTRUCTION—ASSESSMENT.—Where it is sought to organize a local improvement district under Kirby's Digest, § 5667, as amended by the act of 1913, page 527, no particular form for the petition is prescribed, and in determining whether the property owner's petition is valid, the court will look to the petition, not to find a formal prayer, but to ascertain whether the effect of the petition is to express the consent of the majority of the property owners.

2. LOCAL IMPROVEMENT—ORGANIZATION—PETITION.—In construing the petition filed by the property owners, asking that the improvement be made, *held,* the petitioners meant the same as a request for the assessment of the cost of the improvement against the real property in the district, although such a request was not made in so many words.

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

J. E. Ray, for appellant.

The petition is not sufficient, nor in the form prescribed by statute. K. & C. Dig., 6826; 33 Ark. 497; 71 *Id.* 4; 84 *Id.* 395; Kirby's Dig., § 5667 *et seq.*

Earle W. Moorehead and *Rose, Hemingway, Cantrell, Loughborough & Miles,* for appellees.

The petition was sufficient. K. & C. Dig., § 6826; 47 Ark. 31; Kirby's Digest, § 6091; 97 Ark. 334; 112 *Id.* 254; 125 *Id.* 388; 126 *Id.* 318; 86 *Id.* 231; 95 *Id.* 496; 103 *Id.* 127; 95 *Id.* 575; 103 *Id.* 209, 299; 115 *Id.* 88; 112 *Id.* 254; 122 *Id.* 326; 203 S. W. 33.

McCULLOCH, C. J. By an ordinance duly passed by the city council of Stuttgart on the petition of ten property owners, an improvement district was duly formed in that city for the purpose of constructing a system of sewers for public use in the territory designated, and within three months after the publication of the ordinance as provxided by statute a petition of property owners in the district was presented to the city council, and on that petition the city council passed another ordinance appointing a board of improvement to construct the improvement mentioned in the ordinance creating the district.

In the present suit there is an attack on the validity of the proceedings on the ground that the petition of the property owners was not in the form prescribed by statute.

The statute provides that the city council shall appoint three persons to compose the board of improvement of such a district for the purpose of constructing the improvement when "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." Kirby's Digest, § 5667, as amended by act of March 3, 1913, page 527.

The petition of property owners in this instance reads as follows: "We, the undersigned, being a majority in value of owners of real property situated within the boundaries of the Sanitary Sewer District No. 4 in the city of Stuttgart, Arkansas County, Arkansas, pray that such improvement be made and designate the nature of the improvement to be undertaken to be the building of a septic tank, installing of manholes, flush tanks, wyes, bends, tile and all the necessary appurtenances for the proper construction of said sanitary sewer system with the equipment and materials as may be selected by commissioners to be hereinafter appointed. * * *

"The material to be used in making the improvement and methods of doing work, to be such as the commissioners of said district, to be hereinafter appointed, may select, and at the same time the most substantial, economical and beneficial to said district, and we respectfully pray that the council take the necessary steps towards making said improvements."

The contention is that the proceedings were void because the petition contained no prayer that the cost of the improvement "be assessed and charged upon the real property situated within such district," as required by statute.

The statute was intended to prescribe the substance, and not the precise form, of such a petition. The purpose was to provide a means of expression of the consent or willingness on the part of the property owners that the cost of the improvement should be assessed against the real property in the district so as to comply with the constitutional requirement that "assessments on real property for local improvements in towns and cities" must "be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected." Sec. 27, art. 19, of Constitution of 1874; *Craig* v. *Russellville Waterworks Improvement District,* 84 Ark. 395.

There being no particular form prescribed, the question presented, in determining the sufficiency of the petition in order to give it validity, is not whether it contains a formal prayer for the assessment of the cost of the improvement on the property in the district, but whether or not it expresses, in substance, the consent of the signers of the petition to such assessments in accordance with the constitutional requirement. In other words, we look to the petition, not to find a formal prayer, but to ascertain whether the effect is to express the consent of a majority of the property owners. An examination of the allegations of the petition in this instance shows very clearly that the consent of the property owners is necessarily expressed in the language used, for the petition contains a request to the city council that the improvement be made, designating the nature of the improvement and that the council "take the necessary steps towards making said improvements." The petition shows on its face that the property owners knew that the improvement was to be made through the agency created by the first ordinance and that the commissioners were to be appointed to carry out the purposes of the organization, which, under the law, was to construct the improvement at the expense of the owners of real property in the district. So when that is fully understood it necessarily follows that the persons who signed the petition intended it as a request for the assessment of the cost of the improvement against the real property in the district. Any other interpretation of the language of the petition would disregard its plain meaning, and would be putting form above substance where the law itself does not prescribe a formula.

We are of the opinion, therefore, that the chancellor was correct in holding that the form of the petition constituted sufficient compliance with the statute and that the proceedings were valid.

Decree affirmed.

HOUT v. HARVEY.

Opinion delivered July 1, 1918.

ROADS—CHANGE IN PLANS AND CONSTRUCTION.—Under Act No. 338, Acts of 1915, the commissioners of a road district may change the plans for the road, by slightly changing the width of the road, and increasing the thickness of gravel instead of using a layer of asphalt as originally planned, when the length or route of the road is not changed, and the increase in the cost is not large.

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

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

There was no authority to make the changes. The commissioner had not the power under the act to make the changes. 133 Ark. 491. See also 123 Ark. 205; *Ib.* 298; 124 *Id.* 234; 126 *Id.* 318; 127 *Id.* 310.

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

The changes were authorized by law and within the authority of the commissioners. All the changes were such as "better carry out the improvement as originally contemplated." The original plan was not changed. The complaint is without equity and was properly dismissed. 133 Ark. 491; Acts 1915, Act 338.

McCULLOCH, C. J. Road Improvement District No. 4 of Jackson County was duly organized by an order of the county court of that county upon the petition of a majority in value of the property owners as prescribed by Act No. 338 of the General Assembly of 1915. The preliminary survey and estimate of cost made by the State Highway Department, upon which the petition to the court was based, specified the route and distance of the road, and the character of the improvement as a gravel road, five inches in depth, with a gravel coat of asphalt treatment one inch in depth, the road to be twelve feet wide.

The estimated cost of the improvement was $176,717. The commissioners of the district, upon the recommenda-

tion of the engineers, subsequently decided upon an alteration in the plans and estimates so as to provide for fourteen feet width for the road and the use of gravel seven and one-half inches in depth, omitting the coat of asphalt treatment. It was found that the cost of the improvement according to this change, and the enhanced cost of purchasing the material, will be $229,048.49, an excess of $52,331.49, but it is shown that a considerable portion of the enhanced cost is, on account of changed conditions which require additional cost of material, even in constructing the road according to the original plans. In other words, there is a difference in the two estimates to the extent of the sum of $52,331.49, but the net additional cost on account of the alteration to be made by the commissioners amounts to $26,647.32.

The county court approved the changes, and this action was instituted by appellant against the commissioners of the district to restrain them from departing from the original plans, specifications and estimates in the construction of the improvement.

The contention is that there is no authority for the commissioners and county court to make the changes. This contention is based upon our decision in the recent case of *Rayder* v. *Warrick,* 133 Ark. 491, where we held, in substance, that after the organization of a district there is no authority for a total change in the character of the improvement as prescribed in the plans, specifications and estimates upon which the petition was based. In that case we discussed the effect of the statute which expressly authorized the commissioners to make alterations in the plans and specifications or the route of the road to be constructed, but we held that this authority was limited to such changes as did not wholly change the character of the improvement. In that case the changes involved an additional cost which practically doubled the cost of the improvement as originally estimated. It also made a radical change in the route of the road to be improved and also changed the character of the improvement from gravel to asphalt. In commenting on the stat-

ute authorizing the commissioners to make changes we said that the provisions of this statute "would not in any way safeguard the interests of the land owners if the commissioners could wholly change the plans and specifications so as to make an entirely different improvement and to construct it over an entirely different route," and in summing up the effect of the alterations we said that "the change from a gravel roadbed to an asphalt one was a radically different improvement from the one contemplated in the petition circulated among the land owners" and that the commissioners have "also adopted a wholly different route from that at first contemplated" which they could not legally do. In that opinion we recognized the force and validity of that part of the statute which authorizes the commissioners to make changes, but we construed it in the light of other sections so as to limit the changes as not to totally change the type or character of the improvement. Of course, in each instance it must remain as a question to be determined upon the particular facts, as to whether or not the alterations are such as to fall within the kind authorized by the statute.

In the present case it is seen that there was no change at all in the distance or route of the road to be improved and the changes were limited to the width of the road and the kind of material. If the statute is given any effect at all, it must admit of changes to the extent of slight increase or decrease in the width of the road, and also if it has any effect at all it authorizes such changes in the kind of material which do not amount to a change in the type of the road to be constructed. Of course, the question of additional cost, while not necessarily controlling, is always to be considered in determining whether or not there has been such a radical change from the original plans as to constitute a different type of improvement. Here the asphalt surface treatment was omitted and an additional depth of gravel was substituted in its place, and the engineers who testified as experts stated that this did not constitute a change in the type of the road.

We are of the opinion that these alterations in the plans and specifications did not constitute a total change in the improvements, but that they were such alterations as the statute expressly authorizes the commissioners to make.

We have nothing to do with the policy of the law authorizing the commissioners to make such changes, for it is entirely a matter of legislative control, and we must give effect to the plain letter of the statute which authorizes commissioners to make alterations. A total change in the character of the improvement would not, however, constitute an alteration of the old improvement, but would be a substitution of a type of improvement to which the property owners had not consented, and that is not authorized by the statute.

Decree affirmed.

PATTERSON v. COLLISON.

Opinion delivered July 1, 1918.

1. ROADS—PURCHASE OF TRACTION ENGINE AND ROAD GRADER BY COUNTY JUDGE AND ROAD OVERSEER.—The purchase of a traction engine and road grader by the county judge and the road overseer of a certain district is valid under Kirby's Digest, sections 7324 to 7352, inclusive.

2. APPEAL AND ERROR—ACTS OF COUNTY JUDGE AND ROAD OVERSEER—PURCHASE OF EQUIPMENT—IRREGULARITIES—APPEAL.—When the county judge and a road overseer purchased certain road building machinery, and their acts were approved by the county court, an objection to any irregularity in the proceeding should be made by way of appeal.

3. COUNTY TREASURER—PAYMENT OF FUNDS—MANDAMUS.—Mandamus is not a writ of right, but it is within the discretion of the court to withhold the same; so a county treasurer will not be subjected to an order compelling him to pay out money for a certain road district, in the absence of proof that he has any money in his hands belonging to the said district.

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

J. N. Rachels and *Miller & Yingling,* for appellants.

1. All contracts in excess of the revenue are illegal and there can be no innocent purchaser. 120 Ark. 364; Kirby's Digest, § § 7314, 7318; 118 Ark. 524; 117 S. W. 43; 127 Ark. 474; 122 *Id.* 561.

2. Defendants are officers and limited by the law. They had no authority to make the purchase or bind the district. 54 Ark. 446. Mandamus never lies to compel officers to do an act not authorized by law. 47 Ark. 80; 104 *Id.* 583; 102 *Id.* 484.

3. The commissioners had no authority to O. K. plaintiff's claim, and if so, no such demand was made as required by law and the claims were illegal, being based on void contracts. 9 Ark. 320; 32 *Id.* 676; 47 *Id.* 80; 61 *Id.* 339; 102 *Id.* 407; 104 *Id.* 583; 54 *Id.* 446-8; 122 *Id.* 337.

4. The warrants or orders of a county are not negotiable instruments and no one is an innocent purchaser of them. 98 Ark. 304; 120 *Id.* 481.

5. District 16 no longer existed. The Cotton road law was in force and the purchase was void. K. & C. Dig., § § 9034 to 9067. Any contract in excess of the amount appropriated and to be collected is void. 118 Ark. 532. The road overseer had no authority to incur the indebtedness. 120 Ark. 363.

6. Mandamus is not a legal right, and a judgment will be reversed where great injustice is done. 10 Ark. 428. See also 21 *Id.* 329; 127 *Id.* 323; 77 *Id.* 216; 125 *Id.* 332; 47 *Id.* 80; 122 *Id.* 340; 36 Cyc. 1112-13; 117 U. S. 567.

7. It is not shown that there was any money in the treasury to the credit of the district. 54 Ark. 446.

8. The claims were fraudulent. No legal demand was proven nor that plaintiff had no other legal remedy. The claim was unauthorized, and the contract unlawful. 112 Ark. 95; 118 *Id.* 530.

Culbert L. Pearce and *Brundidge & Neelly,* for appellee.

1. The purchase was made under the amendment No. 5, road law, and was authorized by law. The Cotton law was not in force but under Amendment No. 5 law the

judge and overseer had authority to make the purchase. Kirby's Digest, § § 3340 to 3351; 165 S. W. 631; Kirby's Dig., § § 7337, 7325-7.

2. The machinery was received, accepted and used and the claim properly presented and allowed. 7 R. C. L. 926, § 22; 122 Ark. 557; 127 *Id.* 473.

3. County court allowances are judgments and subject to attack only by appeal. Kirby's Dig., § 1487; *Ib.* § § 1174-9; 118 Ark. 524.

4. Warrants may be issued in excess of appropriations. 34 Ark. 356.

5. Road District 16 was not out of existence because no tax was voted in the September election of 1914. The debts contracted during the period of valid organization remained valid obligations. 7 A. & E. Enc. Law (2 ed.), 947. See also 67 Ark. 236; 81 *Id.* 143; 87 *Id.* 389; 95 *Id.* 26; 122 *Id.* 557.

6. Mandamus was the proper remedy. Kirby's Digest, § § 6065-6; 43 Ark. 66; 45 *Id.* 121; 19 A. & E. Enc. Law (2 ed.), 805.

7. The claim was duly presented and allowed. 84 Ark. 329; 7 R. C. L. 926, § 22, etc.

8. District 16 is identical with Gray township, of which defendants are commissioners. 7 Wall. (74 U. S. L. Ed. 53); 93 U. S. 266.

9. There were funds on hand; if not sufficient all on hand should have been paid and new warrants issued for the balance.

STATEMENT OF FACTS.

On the 6th of July, 1914, the county judge of White County and the road overseer of Gray township, which constituted Road District No. 16, purchased a traction engine and a road grader for use on the roads of that district for which they agreed to pay $2,190.83, evidenced by promissory notes for different amounts payable at different times. One note payable in 1915, one in 1916, and two in 1917. All the notes except the last were presented, audited, examined and allowed by the county court and warrants were issued covering the several

amounts allowed. The last note was for $727.67, due July 6, 1917. This note has not been presented to and allowed by the county court. J. Collison purchased the warrants and the last note for valuable consideration. He presented the warrants and the note held by him to the chairman of the board of commissioners of Road District No. 16, who refused to recognize the validity of the warrants and note. The warrants and the note were then presented to the treasurer for payment and he refused to pay the same. Collison then instituted this action by petition for mandamus in which he set up the above facts, and alleged further that J. V. Crockett, the county treasurer, had in his hands to the credit of Road District No. 16 approximately $2,000; that he refused to pay appellant's warrants and note or any part thereof and that unless restrained until this petition was heard there would be no funds to the credit of the district out of which the petitioner's claims could be paid. He prayed for a writ of mandamus commanding the defendants, the commissioners of Road District No. 16, and the treasurer, to pay the warrants or as much thereof as practicable and issue new warrants for the balance to mature in one and two years and that they be enjoined from paying out the funds in the hands of the treasurer to the credit of the district until a hearing could be had on the merits of the petition.

The defendants responded denying all allegations of the petition and setting up that if the claims had been allowed by the county court that same were a fraud upon the court; that the county judge and the road overseer had no authority to purchase the tractor and road grader for which the debt was incurred. The response further alleged various other reasons why the judgment of the county court, allowing the claims for which the warrants were issued, was void, which it is unnecessary in the view that we have taken to set forth. They alleged that the commissioners, the defendants, had no power or authority to incur, pay, or O. K. any debts of the kind or character set up in the petition.

The testimony on behalf of the petitioner tends to prove substantially the facts set up in his petition, except as to the money in the hands of the treasurer. The warrants and the note in controversy were presented to the chairman of the board of commissioners and also to the county treasurer, and payment was refused .

The county clerk testified that the warrants were issued in the regular way. They were issued for machinery bought by the road district, which machinery the road district received and used.

The records of the county court proceedings for 1913 show that at its October term there was a three mill tax levied for good road purposes. In the year 1914 at the general election there was no road tax voted. The question of road tax was not on the ballot and was not voted on. The three mill road tax was voted at general election of 1912 and was levied in 1913 and 1914.

The attorney for the petitioner called on the county treasurer for the payment of the warrants and the treasurer refused payment, stating that he had written the Attorney General about the matter and that the Attorney General advised that he was not the proper person to pay it; that the road commissioners would have to issue it.

The court made a general finding in favor of the petitioners and entered an order directing the commissioners of Road District No. 16 to draw commissioners' warrants for the sums claimed by the petitioners, including the note for $727.67, which had not been allowed by the county court. The order directed the treasurer of White County to pay the warrants out of any funds he had belonging to the road district and directed him to retain funds in his hands sufficient to pay the warrants and the costs of the suit. From that judgment is this appeal.

WOOD, J., (after stating the facts). (1) The indebtedness, which appellee seeks by this proceeding to have the appellants pay, accrued under the laws passed in pursuance of amendment No. 5 to the Constitution,

designated in Kirby's Digest as "public road tax" and set forth in sections 7324 to 7352 inclusive.

Authority for the purchase is found in sections 7348, 7349 and 7351. The last section provides that the cost of such implements as mentioned herein "shall be paid for out of the county treasury on warrants properly drawn and allowed by the county court out of the money in the treasury to the credit of the road district, in which said tools and implements are purchased and used." While the implements in suit were purchased by the county judge and road overseer and not by a road commissioner, that fact did not invalidate the purchase as it was subject to the approval of the county court and was by the county court approved.

The appellants contend that what is commonly designated as the "Cotton Road Law," set forth in sections 7290 to 7323, Kirby's Digest, was in operation at the time the implements in suit were purchased and that under the limitations of that law the purchase was unauthorized and void.

But, inasmuch as we have concluded that the debt in controversy was not incurred under the provisions of that law, it follows of course, that the limitations and restrictions therein referred to, upon which appellants rely, are not applicable to the facts as we have found them, and we therefore pretermit a discussion of the issue as to whether or not the claim in suit would be valid under the Cotton Road Law. It suffices to say the restrictions upon which appellants rely for invalidating the claim under the Cotton Road Law are not contained under the laws pursuant to amendment No. 5.

(2) The appellants alleged that the claims were allowed by the county court through the fraudulent representations of the appellee or his agents, but there is no proof of any fraudulent practices upon the court. Since the overseer and the county judge with the approval of the county court were authorized to make the purchase, the allowance of the claims by the county court in the absence of fraud practiced upon it was a judgment in

favor of the appellee and impervious to the other errors and irregularities which appellants invoked to overturn same.

These alleged errors and irregularities should have been taken advantage of on appeal. See *Izard County* v. *Vincennes Bridge Co.*, 122 Ark. 557; *Monroe County* v. *Brown*, 118 Ark. 524.

The note, however, for $727.67, at the time this action was brought, had not been presented and allowed by the county court.

But it does not follow that because the appellee holds valid judgments against Road District No. 16 mandamus will lie to compel the appellants as commissioners of the district to issue warrants for the amount of the judgments and to compel the county treasurer to pay those warrants.

(3) "Mandamus is not a writ of right but it is within the judicial discretion of courts to issue or withhold same, and a party to be entitled to the writ must show that he has a clear legal right to the subject matter and that he has no other adequate remedy." *State* v. *Board of Directors of School District of Ashdown*, 122 Ark. 337.

The petition alleged that the road district had to its credit, in the hands of the county treasurer, approximately the sum of $2,000. This allegation is specifically denied in the response. We fail to discover in the abstract of appellants or the appellee any proof whatever of this allegation. The burden was upon the appellee to make the proof.

A county treasurer will not be subjected to an order compelling him to pay out money for Road District No. 16 when there is no proof that he has in his hands any money belonging to such district. An order made under such circumstances is an abuse of the court's discretion.

Under this view of the case it becomes wholly unnecessary to determine whether or not special act No. 33 of 1915, providing for the office of road commissioner of White County, is constitutional. That act has not been

directly challenged here and we refrain from deciding that question.

The judgment is, therefore, reversed and the cause is remanded.

WILKS v. MUTUAL AID UNION.

Opinion delivered July 1, 1918.

1. EVIDENCE—DEATH, WHEN PRESUMED.—Kirby's Digest, section 3081, which provides that a person absenting himself beyond the limits of the State for five years successively shall be presumed to be dead, unless proof is made that he is alive within that time, applies only to residents of the State at the time of their disappearance beyond the limits of the State.

2. EVIDENCE—DEATH—PROOF OF, BY ABSENCE.—In an action to recover under a life policy on the ground that the insured is presumed to be dead under Kirby's Digest, section 3081, it is for the jury to determine first whether deceased was a resident of the State, and, if so, second, had he been absent from the State for five successive years without being heard from?

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

W. S. Floyd and *Vol T. Lindsey,* for appellant.

The residence of deceased was proven to have been at Garfield, Arkansas. His absence from this State for five years, and that no one had seen or heard from him. The presumption is that he was dead. Kirby's Digest, § 3081; 54 Ark. 70; 46 Ill. 230; 92 Am. Dec. 248. The verdict is contrary to the law and the evidence.

The appellee *pro se.*

Wilks was not a resident of Arkansas. The presumption of death by five years absence was not proven. The jury were properly instructed and the evidence sustains the verdict. 14 A. & E. Ann. Cases, 240; 7 *Id.* 570.

STATEMENT OF FACTS.

The appellee, as it name implies, is a mutual aid union or society organized under the statute of this State

for the purpose of life insurance, issuing its policies or certificates of membership under the mutual aid and assessment association plan.

H. M. Wilks became a member of the appellee by the paying of the membership fee and it issued to him its graduated membership certificate or policy insuring his life upon the plans adopted by the appellee.

C. N. Wilks, hereafter designated appellant, was the beneficiary in the policy. The appellant for himself and also as administrator of the estate of H. M. Wilks on the 23rd day of March, 1917, brought this action against the appellee. He set up the policy, alleged that H. M. Wilks left his home and residence at Garfield, Benton County, Arkansas about the 10th of August, 1911, and that he had not been heard from by the appellant or any of his relatives since October 21, 1911; that H. M. Wilks had been continuously absent from the State for more than five years and that under the laws of the State he was presumed to be dead. The appellant alleged compliance on the part of the appellee and H. M. Wilks with all of the conditions of the policy and that appellee after satisfactory proof of the presumption of death had refused to pay the amount due on the policy. Appellant, therefore, prayed judgment against the appellee in the sum of $808.33, the amount due, and for the sum of $96.99, penalty, and the sum of $200 as an attorney's fee together with the sum of $2.94, the amount of the assessment paid by appellant after the alleged presumptive death of H. M. Wilks.

The appellee answered admitting the issuance of the certificate as set up in the complaint. Denied that H. M. Wilks was a resident of the State of Arkansas at the time the certificate was issued to him but alleged that he was temporarily in the State visiting relatives at or near Garfield. The appellee admitted that he left the State on or about August 10, 1911, but denied that he had not been heard from. Denied that he had been continuously absent for more than five years, and denied that relatives had not heard from him within a period of five years.

Denied that H. M. Wilks was dead, that the appellant had made diligent inquiry to ascertain whether he was dead or alive and denied that any sum was due on the policy.

Appellant testified substantially as follows: "That H. M. Wilks was his uncle. Appellant last saw him three miles north of Garfield on the 10th day of August. He had no home of his own but made his home with appellant's father. H. M. Wilks had lived there ever since the death of his mother, about twenty years ago, who lived and died at Exeter, Mo. Witness last heard from Wilks October 8, 1911, by a post card from Parsons, Kansas. Witness exhibited the policy and testified that he had paid all the assessments. Witness applied to the probate court for letters of administration on the estate of H. M. Wilks, and he was duly appointed administrator of his estate. Witness wrote to the chief of police at Columbus, Ohio, and also Indianapolis, Indiana, and testified that he received answers but the purport of these answers is not abstracted. Witness had an advertisement placed in the Kansas City Star. Witness wrote to H. M. Wilks' brother at Snohomish and also to his sister at St. Joseph, Ill. He did not hear from the brother but received an answer from the sister. He did not have the letter and did not know where it is. The purport of the answer is not abstracted. These letters to his relatives were written in 1912. Witness waited four years to write chief of police at Columbus, Ohio. He did not wait five years. He wrote the chief of police in 1916. Witness did not know how long H. M. Wilks had been in Arkansas before he became a member of the appellee. He came to Arkansas and made a visit. He came back most every year and stayed two or three months on an average. He came home about once a year. He might have been away two years before he came back the last time. He told me his occupation was a cook. Witness did not know of his ever following any occupation in Arkansas. H. M. Wilks was a bachelor. His health was good. It was the understanding between witness and H. M. Wilks that witness

should pay the assessments when H. M. Wilks was away. H. M. Wilks told witness that he would not ask witness to be long out of his money. Witness testified that he had received postal cards from H. M. Wilks since 1908 from Oklahoma and other places. Witness could not tell when H. M. Wilks went away whether he stayed more than a month in any one place. Witness could not tell where he went when he left Arkansas the last time, nor whether he left Arkansas or not. Witness could not tell the jury that H. M. Wilks is dead. Witness believed that he was dead. Witness would have heard from him if he had continued to live. He never said anything to witness about going to a foreign land when witness talked to him.

Other witnesses testified tending to corroborate the testimony of C. N. Wilks to the effect that H. M. Wilks made his home when in Arkansas at Garfield with William Wilks, his brother. He had a bed and some dishes and a few clothes there. His sister-in-law Mrs. Mary Wilks, wife of William Wilks, testified that H. M. Wilks made his home at their house; that he left there August 10, 1911, and she had not seen him since, had heard of him through letters to the boys after he left; had not heard from him in the last four or five years.

The court instructed the jury as follows:

"1. The burden is upon the plaintiff to show his right to recover and the extent of his recovery by a preponderance of the evidence."

"2. If you find from a preponderance of the evidence that plaintiff's supposed intestate, H. M. Wilks' home and residence was at and with William Wilks near Garfield, Arkansas, and further find from a preponderance of the evidence that H. M. Wilks left the State and has continuously absented himself beyond the limits of this State for five years successively and in the meanwhile has not been heard from, then the presumption of law is that H. M. Wilks is dead, and you will find for the plaintiff in such sum as you may feel warranted from the proof."

"3. If you find that H. M. Wilks' home and residence was not in Arkansas, as alleged by the plaintiff, at the time of absenting himself from the State, then you will find for the defendant."

The verdict and judgment were in favor of the appellee, and this appeal has been duly prosecuted.

WOOD, J., (after stating the facts). (1) The only contention made by the appellant here is, that the verdict was contrary to the evidence.

Section 3081 of Kirby's Digest provides as follows:

"Any person absenting himself beyond the limits of this State for five years successively shall be presumed to be dead, in any case in which his death may come in question unless proof be made that he was alive within that time."

The phraseology of the statute is somewhat ambiguous but the trial court correctly interpreted its meaning in its instruction No. 2. "Any person" as used in this statute means any person who is a resident of this State and who absents himself from his home or residence beyond the limits of the State for a period of five successive years and who has not been heard from by near relatives, friends, or neighbors, those who would naturally make inquiry concerning his whereabouts and who would most likely receive communication from him and be in a position to know whether or not he was living. If he has not been heard from by these or others, his death will be presumed unless there is proof to the contrary.

(2) In view of the nomadic habits of H. M. Wilks as disclosed by the evidence it can not be said as a matter of law that he had anything like a permanent home or residence in this State. It was a question for the jury under the evidence adduced as to whether or not H. M. Wilks was a resident of the State in the first place, and in the second place as to whether or not, if a resident, he had been absent from the State for a period of five successive years without being heard from by those who would most likely hear from him.

The proof on the part of the appellant did not show either of these facts conclusively.

The issues were, therefore, for the jury, and the judgment is correct, and is affirmed.

J. W. WHEELER & COMPANY v. FITZPATRICK.

Opinion delivered July 1, 1918.

1. INDEPENDENT CONTRACTOR—PERSONAL INJURIES.—Appellee sustained injuries through the alleged negligence of one L. while rafting logs. Appellee was employed by L., but L. was working for appellants. Appellee brought his action for damages against appellants. *Held,* under the evidence that the trial court properly refused to instruct the jury that as a matter of law L. was an independent contractor, the evidence being sufficient to warrant a finding that L. was an agent or servant of appellants.
2. INDEPENDENT CONTRACTOR—DEFENSE OF—PERSONAL INJURY ACTION.—In a personal injury action the defendant claimed that the person under whom plaintiff was working when he was injured, was an independent contractor. *Held,* the finding of the jury that the person was not an independent contractor would not be disturbed on appeal, there being evidence of a substantial character to sustain the verdict; the rule being that it is for the court, as a matter of law, to define the relationship, and for the jury to make a finding of the fact as to its existence.
3. EVIDENCE—PERSONAL INJURIES—INDEPENDENT CONTRACTOR—STATEMENTS OF THE LATTER.—L. was employed by appellants, and appellee, while working under L. sustained personal injuries, and sued both appellants and L. for resulting damages. Appellants sought to escape liability on the ground that L. was an independent contractor. L.'s testimony tended to sustain this plea. *Held,* evidence of a statement by L. out of court, that he had no contract with appellants, was admissible, in the cases of both L. and appellants.
4. DAMAGES—AMOUNT—PERMANENT INJURIES.—In a personal injury action a verdict of $11,285 *held* not excessive, where plaintiff through hard work, mostly with timber, had been earning $2.50 and $3.00 per day, and where his injury reduced his earning capacity to $1 a day, where the injury was to the vertebrae of the neck and spine and skull, and a fracture of the spine, and the injuries sustained were permanent.

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

Hughes & Hughes, for appellants.

1. The undisputed testimony is that Lane was an independent contractor. Appellee was Lane's employee and appellants were not liable for Lane's negligence or that of his employees. 53 Ark. 503; 54 *Id.* 209; 54 *Id.* 424; 55 *Id.* 510; 77 *Id.* 551; 81 *Id.* 195; 111 *Id.* 486; 118 *Id.* 561; 60 S. E. 654; 58 N. H. 52; 30 Atl. 346; 62 S. E. 436; 1 K. B. 851; 124 Pac. 844; 146 N. W. 241; 1 Sweeney (N. Y.) 545; 65 L. R. A. 445-467 M. 469 Q; 17 L. R. A. (N. S.) 375.

2. The court erred in its instructions. Cases *supra.* Also in refusing requests asked by appellants. 14 R. C. L., § 3; 178 Mass. 1.

3. The verdict is excessive and grossly so. The extent of the injuries was grossly exaggerated.

S. W. Dugan and *Chas. T. Coleman,* for appellee.

1. Lane was not an independent contractor but an agent or servant of the appellants. The testimony amply shows this.

2. There is no error in the instructions given or refused. 109 Fed. 732; 154 N. C. 147; 124 Pac. 38; 81 Kan. 765; 76 Mich. 139; 95 Iowa 497; 38 Mont. 341; 23 Tex. Civ. App. 12; 84 Kan. 797; 116 S. W. 320; 1 Thompson on Negl., § 629; 7 *Id.,* § 659; 8 *Id.,* § 659; 124 Pac. 38; 86 Kan. 774; 64 W. Va. 278; 95 Iowa 497.

3. The verdict is not excessive considering the pain and suffering, his diminished earning capacity, expectancy of life, etc.

WOOD, J. Appellant is a partnership, engaged in the manufacture of hardwood lumber.

Appellee brought this action against the appellant and also against George Lane for damages for personal injuries. He alleged that he was in the employ of the appellant and engaged in the work of rafting logs in the St. Francis River; that Lane was the agent of the appellant and that appellee at the time of his injury was under the supervision and direction of appellant's agent, Lane.

The complaint sets forth the acts of negligence which it is alleged caused the injury.

The appellant answered and denied these alleged acts of negligence, and denied that the appellee was in its employ at the time of his injury. It denied that Lane was its agent at any time for any purpose. It admitted that it was the owner of the logs which were being moved at the time the appellee was injured, and alleged that Lane had contracted with it as an independent contractor to raft logs, for whose acts it was in no wise responsible. Appellant set up the defense of contributory negligence and assumed risk on the part of the appellee. There was a verdict in favor of the appellee against the appellant, and also against Lane, in the sum of $11,285. From a judgment in favor of the appellee for that sum appellant brings this appeal.

The only issues presented here are whether or not Lane was an independent contractor and whether or not the verdict was excessive. It is only necessary, therefore, to state the facts bearing on these issues.

The appellee testified that he was hired by Lane to raft timber. Lane was working for Wheeler, who was the foreman.

Another witness testified that he was working at the log raft in which appellee was hurt. He was working for Lane and Lane was working for Wheeler as he understood. Lane was in charge of the work and discharged witness from employment.

Another witness testified that he was working at another camp near by where appellee was hurt and shortly afterwards saw the broken cable. Lane told witness that they did not get good stuff up on that job and they sent worn out stuff up there for them to use. Witness had worked for Lane. About one week before he had inquired at the office of Wheeler & Co. and Wheeler told him to go to Lane and he would hire him. Witness went down there and Lane told witness that he would take him if it was all right with Wheeler, then Lane hired witness and Wheeler paid him. He sent the money to

pay witness by Mr. Lane. Lane went down to Madison after the pay and carried witness' time and got the money. Wheeler never gave witness any money, but he held out witness' pay one time. Witness may have owed Wheeler a little at the time.

Another witness testified that he was at Lane's camp shortly after the accident and Lane showed him the cable that broke. It was an old rotten cable. Lane said it was one they had sent him from the farm that had been used on a stump puller, that Wheeler had sent him. Witness testified that Wheeler came to his place one morning and requested witness to go and help Lane raft timber. Witness told Wheeler he did not want to interfere with Lane's work unless satisfactory with Lane. Wheeler replied that it did not matter a damn whether it was satisfactory with Lane or not, that it was his timber and that he wanted to get it out, that the water was falling.

Another witness testified that in the spring of 1915 he was working on the river for Mr. Wheeler. He worked on the same job that Lane worked on. The river was falling and he helped Lane raft some of the timber that was left there. Mr. Wheeler got him to go up there. Wheeler employed him and paid him for his work and witness did not ask Lane anything about going to work on the job. Witness was paid for his work by the thousand.

Another witness testified to the same effect. The above is substantially the testimony on behalf of the appellee on the issue as to whether or not Lane was an independent contractor.

On behalf of the appellant, C. L. Wheeler testified, that he was one of the partners and had the management of the mill and the outside business. About September 1, 1915, he received a letter from Lane in regard to work. He answered the letter on the 10th making Lane a proposition and he received from him the following letter:

"Will drop you a few lines in answer to yours of the 29th. Will say that I can do the rafting if we can agree on a deal, though I am not able to fit up to do the work by contract, without you would help me. I would have to have a team of some kind to put the logs in the water with, and a house boat, tools, in fact everything most. If you wouldn't want to do that, I would take the job on a salary if that would suit you any better. Would like to do your work if we can agree on a deal at all. You let me hear soon as you can just the best you can do, either way. So I can figure on it. I have several offers to raft but would be out of work soon as the river got down. I would like to have some work all the year if you can fix me up, so will close hoping to hear from you soon."

Wheeler answered the above letter as follows:

"Your letter received and will say that I will give you $1.00 per M. for rafting the oak, and 75c for elm, ash, cypress and gum. The oak is to have two binders and be out of good elm, pecan or oak. The elm and cypress can have only one binder when rafted by itself. May not have enough floaters to carry all of the oak and will have to use float boats. Will pay $1.00 for loading this, same as if rafted. There should be about three million feet and if this suits you, come down and commence building your houseboat. We will furnish you the lumber and tools and take a mortgage on the boat. The binders that you use are to be bored.

"I think that you can make some money out of this job as it will last two or three years, and you should have a boat so you could board your men right on the job. There is a log team and wagon here that we can buy. If this suits you come at once and we will get busy, as water is coming up."

The lumber and tools in the letter referred to lumber and tools for the house boat. Lane accepted appellant's proposition and in a few days came down and went to work and continued to work for about two years under that contract and was operating under it when appellee

was hurt. Witness never made any other contract with Lane. Lane bought a house boat. Appellant sent him money on his rafting contract as the work progressed at so much per thousand feet. Lane paid his own men and bought his own supplies. Appellant would sometimes take supplies to him as it went up after the logs. Appellant loaned Lane a pull boat. Lane supplied the tools for it and kept it in repair. Witness stopped once when the boat was out of repair to see what was the matter with it, but did not undertake to control, supervise, or direct Lane on the job of rafting. Lane ran the job himself. Lane hired the men and discharged them and paid them for their work.

Witness was asked if on one occasion he did not go up there and tell Lane the work was getting along too slow and that witness wanted him to put on another crew. Witness replied that he might have done so.

Wheeler further testified that it did not furnish Lane cable after he took the pull boat. Appellant paid Lane $1 per thousand oak and 75 cents on soft wood as he rafted it. Witness did not know the appellee until after he was hurt and did not know that he was at work on the job. Witness stated that he employed others to assist Lane in putting the logs in the river. But this was done with Lane's consent in order to get the logs in the water before it went down. Witness stated that the letters referred to constituted a written contract with Lane. He had no other contract with him. Lane accepted witness' proposition, but his acceptance was not in writing. Under the contract Lane was to raft about 3,000,000 feet of logs. It was to be done during the rafting season. Witness testified that nearly all of this kind of work was done by the thousand, and the contract that he had with Lane was the same kind that he made with all of his men for this kind of work. Witness testified that it was Lane's practice to notify appellant's office about how much money he would need to meet his pay roll and appellant would send him what he asked for. Witness did not know what men he had on his pay roll.

The testimony of Lane substantially corroborated in all material particulars the testimony of Wheeler. Witness Lane identified what purported to be a statement of his account kept by appellant showing the number of feet of logs that he had rafted and showing that appellant had paid him for the same, at so much per thousand feet.

The testimony of Wheeler and Lane on direct examination was to the effect that everything furnished Lane except the pull boat and its equipment was purchased by Lane, but on cross-examination Lane testified that appellant furnished him money with which to buy certain mules.

Lane was asked if he ever paid for them and answered that he turned a couple of the mules back, and got one of them drowned, and that appellant did not charge him anything for the one that was drowned and the mules that he returned appellant sold to other parties.

The testimony shows that when appellee was injured he was in a boat on the water raising a log to be rafted. That appellee's injury was caused by the breaking of the pull cable which Lane had fastened. It was an old looking piece of cable, showed rust, and some of the wires had been worn and broken.

At appellant's request the jury were required to answer whether or not George Lane was an independent contractor, and they answered that he was not.

Learned counsel for the appellant correctly state the effect of our own and other authorities to be, "That where the defendant lets out work to a contractor and the work is not in itself unlawful and intrinsically dangerous and no negligence is committed in the selection of the contractor, and the company only exercises control over the work to the extent of general supervision and inspection to the end that it may determine whether the work is being done according to requirements and specifications of the contract, but has no other control over the work nor the power to choose, direct and discharge the employees of the contractor, the defendant is not liable

for injuries due to negligence of the contractor or his servants, the relation of master and servant not existing between them and the defendant." *St. Louis, I. M. & S. Ry. Co.* v. *Gillihan,* 77 Ark. 551, 553; *White River Ry. Co.* v. *B. & W. Tel. Co.,* 81 Ark. 195, 200; *Ark. Land & Lumber Co.* v. *Secrist,* 118 Ark. 561. See also other cases in appellant's brief.

Says Judge Elliott: "An independent contractor may be defined as one who, in the course of an independent occupation, prosecutes and directs the work himself using his own methods to accomplish it, and represents the will of the company only as to the result of his work." 2 Elliott on Railroads, p. 863, § 1063.

"An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of the work." 2 Words & Phrases, p. 1034, and many other cases there cited.

(1) This is in accord with the definition given by Judge Elliott and quoted by this court in *Railway Co.* v. *Gillihan, supra.* Applying the definition to the facts of this record, there was no error in the ruling of the court in refusing to grant appellant's prayer for instruction telling the jury that under the uncontradicted evidence Lane was an independent contractor.

The testimony was sufficient to warrant the jury in finding that the relation which Lane sustained to the appellant was that of an agent or servant rather than that of an independent contractor.

(2) It could serve no useful purpose to discuss the evidence in detail. It is set forth in the statement and speaks for itself. It proves circumstances that were proper for a jury to consider on the issue as to whether or not Lane was an independent contractor. Though we may differ with the jury as to the correctness of its conclusion, the issue here is not what we think the verdict of the jury should have been but whether or not there was

substantial evidence to sustain the verdict as rendered. *St. L. & S. F. R. Co.* v. *Kilpatrick,* 67 Ark. 47-62.

Applying the above rule, it can not be said there was no evidence of a substantial character to sustain the verdict.

"The expression, 'an independent contractor,' within the popular understanding which the words import, is wholly descriptive. The expression serves merely to point out one of a class, and when so used it may be conceded that no words of definition are needed. But in the law of negligence the expression is used, not merely in a descriptive sense, but as well to designate a relationship, in the presence of which, when established, the law undertakes to prescribe distinctive rights and liabilities. It is for the court, then, as a matter of law, to define the relationship, and for the jury to make finding of the fact as to its existence." *Overhouser* v. *Am. Cereal Co.,* 128 Iowa, 580.

Appellant's prayers for instruction invaded the province of the jury, and the court did not err in refusing them. Some of these prayers assumed that certain facts had been proved which were in dispute and told the jury that such facts constituted Lane an independent contractor.

Other prayers told the jury that if certain facts were proved such facts did not make Lane a servant of the appellant.

All these instructions were erroneous. They did not ask the court to define the relation and leave the jury to say as to whether or not under the evidence that relation existed.

Appellant contends that the contract between Lane and itself was in the form of a letter written by Wheeler, containing the terms on which he would have Lane do the work, and that Lane accepted these terms. The court in its instruction No. 6 told the jury that if it found such to be the case to render a verdict in favor of Wheeler & Co. No written acceptance by Lane of the terms of the letter of appellant was shown, and the verdict and the spe-

cial finding of the jury on the interrogatory propounded show that the jury found that the letter did not evidence the contract which was orally entered into between them.

The instructions given by the court on its own motion submitting the issue as to whether or not Lane was an independent contractor were as favorable to appellant as it had the right to ask, and fully covered appellant's contention.

The following are instructions Nos. 6 and 7 given by the court on its own motion:

(6) You are instructed that if you find from the evidence that Wheeler & Co. employed Lane to raft the logs at a fixed price per thousand feet, and that the letter in evidence was the contract accepted by Lane, and that the work was done by Lane under that contract substantially, then defendant, J. W. Wheeler & Co., is not liable, notwithstanding the fact that the plaintiff was injured, and notwithstanding the fact that the use of the wire cable around the stump was an act of negligence, if you should so find.

(7) You are instructed that the fact that Wheeler loaned the pull boat and cable to Lane is not enough to render J. W. Wheeler & Co. liable, and if they are not liable under the instructions as stated to you, they would not be liable on account of loaning the boat and its equipment to Lane.

Appellant contends that the court erred in refusing, among others, the following instruction: "The jury are instructed that even if Lane stated out of court that he had no contract, the effect of that evidence must be confined to Lane's case, and that evidence is not to be considered by the jury on the question of the liability of Wheeler & Co."

(3) The court did not err in refusing this prayer for the reason that Lane was a witness as well as a defendant. When he was on the witness stand appellant did not object to his testimony on the ground that no foundation had been laid for his impeachment, but on the contrary permitted his testimony to go to the jury as if such foundation had been laid. Since the testimony tend-

ing to prove Lane's contradictory statements went to the jury without objection from appellant, it was not in an attitude to ask that Lane's statement out of court "that he had no contract" be confined to Lane's case. Such statement was contradictory of his testimony and tended to impeach Lane. He was a very material witness. His credibility was for the jury, and it had a right to consider this testimony in determining the issue of liability not only of Lane but also of appellant.

(4) The appellant contends that the verdict was excessive. The appellee testified that at the time of his injury he was earning from $2.50 to $3 per day. Appellee was forty-six years old, and his expectancy as shown by the evidence was twenty-two years. The testimony of the physician showed that the injury was to the vertebrae of the neck and about the skull, a fracture of the spine. It was a permanent injury, that would affect the appellee in doing labor that would necessitate the use of his neck and shoulders in lifting. Appellee supposed that he could now earn a dollar a day. He had always done hard work, mostly in timber, and could not do that now at all. He had to turn his body when he looked around. Could move his head but little. It was a year after he was injured before he could do anything at all. He was confined to his bed from the time of injury for something like two months and "suffered about as bad as could be." Under such circumstances it can not be said that the verdict for the sum returned was excessive.

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

STONE v. MAYO.

Opinion delivered July 1, 1918.

COURTHOUSE—CONTRACT FOR BUILDING—CONTRACT PRICE.—A contract to build a county courthouse was let to the lowest bidder, the bid reading "* * * * we propose to furnish all labor and materials to build courthouse at Harrisburg, * * * for the sum of $91,000, payment to be made in courthouse warrants at 70-125 base." *Held*, there being no evidence of collusion for fraud, that this was a straight contract for the construction of the courthouse for $91,000.

Appeal from Poinsett Chancery Court; *Archer Wheatley,* Chancellor; affirmed.

H. P. Maddox, for appellant.

The bid, which was the basis of the final contract, was void under Kirby's Digest, sections 1452-3, prohibiting the payment in warrants of a larger sum than would be required in money. 44 Ark. 437.

Lamb & Frierson, for appellees.

The bid and contract are valid, and fix the price at $91,000, and not 70⅛ per cent. of that sum. There was no fraud nor collusion, and the bid was the lowest. The price was fair and reasonable. 103 Ark. 468. The "70-125 base" was a mere notation indicating the price at which warrants could be sold. 44 Ark. 437 is an entirely different case, and does not apply.

STATEMENT OF FACTS.

This suit was instituted by the appellants, the taxpayers of Poinsett County, against the appellee, the county judge, clerk and treasurer of Poinsett County, and the contractor, architect and courthouse commissioners, to restrain them from doing any acts toward the erection of a courthouse in Harrisburg, Poinsett County.

The appellants alleged that proceedings had been regularly conducted in the levying and county courts providing for the erection of a courthouse at Harrisburg. That a contract had been let to the lowest bidder whose bid was as follows:

"T. A. Bettis, Commissioner: We propose to furnish all labor and material to build courthouse at Harrisburg, Arkansas, according to revised plans and specifications prepared by Mitchell Seligman, architect, for the sum of $91,000, payment to be made in courthouse warrants at 70.125 base."

The other bids were in the same form. Appellants alleged that the language of the bid means that the contract price is $63,813.75. They alleged that the contract was void, and prayed that the appellees be restrained from paying out any more than $63,813.75, for the construction of the courthouse.

The answer denied that the bid and contract contemplated that the construction of the courthouse was for $63,813.75, and alleged that the bid and contract contemplated construction of the courthouse for $91,000 in county warrants. They denied that the contract was void and admitted that unless restrained it would be carried out by the final payment of $91,000 upon the completion of the contract.

The provision of the contract challenged here is as follows: "The commissioner agrees to pay the contractor in county warrants of Poinsett County, Arkansas, for the full performance of the contract and its acceptance by the commissioner $91,816.91, subject to additions and deductions as provided for in the general conditions of the contract."

The contractor testified that he bid in the form set out above; that he was to receive $91,000 in county warrants under the terms of his bid. He expected to sell the warrants for 70⅛ per cent. The "70-125 base" meant the best price the bond buyers offered. There was no understanding or agreement with the county court about that. The court was to pay witness $91,000 without regard to the price witness might receive for the warrants whether 60, 75 or 100 cents on the dollar. Witness put the "70-125 base" in the bid more as a record of the proposition that witness had from the bond buyers. It was not a part of witness' dealing with county officials or the commissioners, and there was no such understanding or agreement with any one.

The county judge testified that the contractor submitted a bid to construct the courthouse for $91,000 in county warrants and that the clause "70-125 base" was added. The bid was treated as one of $91,000 for the construction of the courthouse. Nothing was said about issuing warrants for only 70⅛ per cent. of $91,000. There were four bidders. The warrants were to be issued and delivered to the contractor. That is as far as witness had any understanding about it. Witness realized that the contractor had to sell them to get money, but witness had nothing to do with his contract of sale, except

to refer him to certain people who might buy the warrants. The contractor to whom the bid was let was the lowest bidder. Each contractor examined all bids, discussed the matter freely and went away satisfied. The same clause (70-125 base) was in other bids.

The undisputed evidence shows that $91,000 was a reasonable price to pay a contractor and the contract could not be let at the time of the institution of this suit for that price. It was shown that the bid was originally for $91,000, but before the contract was let was raised to $91,806.90, on account of certain changes in the plans that were agreed upon. This was the lowest bid, being $35,000 less than the highest bidder.

The court found that the bid of the contractor for the construction of the courthouse contemplated the issuance of $91,000 in county warrants as the consideration for the contract and did not contemplate the issuance of 70⅛ per cent. of $91,000 or $63,813.75 only.

The court further found that the bid of the contractor was submitted in open competition, and that four contractors bid for such construction and that the bid of the contractor, to whom the contract was let, was the lowest and best bid; and that no bidder nor any officer were misled in any way by the terms of said bid.

The court thereupon entered a decree dismissing the complaint for want of equity, from which is this appeal.

WOOD, J., (after stating the facts). In *Watkins* v. *Stough,* 103 Ark. 468- 471, there was a contract let for the construction of certain bridges to the lowest bidder at public outcry. The facts are very similar to the case at bar. There was testimony tending to show that when the contract was offered at public outcry the county judge made a public announcement that county warrants could be cashed at 50-55 cents on the dollar. The contract was let for the construction of the bridge at $3.40 per linear foot. The contract was attacked on the ground that the bid for the work was based on depreciated county scrip and that a fair cash price for construction of the bridges would have been $2 per linear foot. In that case the trial court found that the contractor used no fraud or decep-

tion in procuring the contract and was the lowest bidder for the contract. In that case we said: "When a contract, free from fraud or collusion, is entered into pursuant to the terms of the statute for the construction of a bridge, and the work is done according to the contract, the stipulated price becomes a valid claim against the county, payable, as are other claims, in warrants on the treasury. If the contract does not disclose on its face an illegal agreement for an increase of price on account of payment in depreciated warrants, or unless the proof establishes collusion to increase the bids on account of payment in depreciated warrants, then the reasons for the successful bidder fixing the amount of his bid can not be inquired into for the purpose of avoiding the contract."

That case controls this. Here was a straight contract for the construction of the courthouse for $91,806.90. There was no evidence of any collusion among the bidders to perpetrate a fraud on the court to have the contract let at a higher price because of the depreciated value of the county warrants, nor is there any testimony to warrant the conclusion that the county court entered into a collusion with the contractor to give him the contract at an increased price because the value of the county scrip was less than par. The fact that the bidders made inquiry and ascertained that the value of the county warrants was less than par and made their bid with such knowledge does not establish that there was a collusion between them to stifle the bidding and to defraud the court by securing a contract at a higher price on account of the depreciated value of the county warrants. There is no allegation that the county court, or its commissioner, or the bidder, in securing the contract, were guilty of any fraud.

The complaint sets out the bid which, strictly construed, on its face calls for the payment of $91,000 in county warrants at "70-125 base," which would necessitate the issuance of county warrants to the amount of about $118,000. If the contract had been expressed in these terms there would be grounds for saying that upon

its face it was a fraud upon the court, but as already stated the contract calls for the payment of $91,000 in county warrants without any increase of the contract price on account of the warrants being below par.

The decree is, therefore, correct and is affirmed.

St. Louis, Iron Mountain & Southern Railway Company v. Road Improvement District No. 1 of Jackson County.

Opinion delivered July 1, 1918.

1. Improvement district—appeal from assessment—railroad—name of property owner.—No error in the name of the owner, or in the description of property will invalidate the assessment of benefits, made under Act 338, p. 1400, Acts 1915, where property in a road district was assessed under the name of one railroad company, but had been bought and was owned by another company.
2. Improvement districts—roads—organization—assessments—who may appeal.—Where a road district is organized under Act 338, p. 1400, Acts of 1915, an appeal from an order fixing the assessment of benefits must be taken by the owner of the property to be effective thereby. Land in a district sought to be so organized had belonged to the S. railway company, but the property of the S. Ry. Co. had been purchased by the M. Rd. Co. *Held,* since the M. Rd. Co. was the owner of the property, it alone could appeal from an order assessing benefits; the S. Ry. is without right to appeal from the order, and where the S. Ry. Co. did attempt to appeal, it will avail the M. Rd. Co. nothing to be made a party to that proceeding.

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

Troy Pace and *Samp Jennings,* for appellant.

1. It was error to dismiss the appeal of the St. Louis, Iron Mountain & Southern Railway Company. It was the owner when the district was formed. The proper affidavit for appeal was filed in time. Acts 1915, § § 11, 25, 14, etc. The affidavit can be waived. 95 Ark. 148; 31 *Id.* 489.

2. The Missouri Pacific Railway Company was entitled to relief under its motion to be made a party. 106 Ark. 418; Kirby's Dig., § § 5976-5982, 6001; 80 Ark. 451; 51 S. W. 662; 10 S. W. 279; 21 Tex. C. C. A. 463; 10 Ky.

L. Rep. 174; 62 S. W. 938; 26 Tex. C. C. A. 148; 90 Ark. 514; 61 So. 39; 132 Ga. 829. See also *Coffman* v. *Road Dist.,* 134 Ark. 411.

Gustave Jones, for appellee.

1. No order of appeal was granted by the county court. 117 Ark. 292. No proper affidavit for appeal was made and filed. The St. Louis, Iron Mountain & Southern Railway Company was in the hands of a receiver. It was not the owner. Smith on Receivers (2 ed.), § 230, subd. 11; *Ib.,* § 231-C; 128 Ark. 448; Kirby's Dig., § 5999.

2. The application of the Missouri Pacific Railway Company came too late. 93 Ark. 609; 94 *Id.* 277; 47 *Id.* 411; 28 *Id.* 478. It did not appeal from the judgment in the county court.

STATEMENT OF FACTS.

On the 28th day of August, 1916, a petition was filed in the county court of Jackson County, asking for the organization of Road Improvement District No. 1 of Jackson County, Arkansas, for the purpose of constructing and improving the public roads in said county. On September 21, 1915, the county court heard the petition, and finding that the petitioners had in all respects complied with the statute, ordered the district established. The petition and the order establishing the district described about six miles of the right-of-way of the St. Louis, Iron Mountain & Southern Railway Company's main line of railroad as a part of the district. A board of assessors was appointed by the county court and said board made an assessment of benefits as required by the statute. The board of assessors described the railroad property in the district as belonging to the St. Louis, Iron Mountain & Southern Railway Company. Notice as required by the statute was published, fixing a time when the county court should hear and determine the justness of any assessment of benefit. On the 7th day of September, 1917, the county court confirmed the assessment of benefits made by the board of assessors of the district. The order recites that no one appeared or made objections to any of the assessments. On the 17th day of September,

1917, the St. Louis, Iron Mountain & Southern Railway Company by its attorney duly filed its affidavit and prayer for appeal from the judgment of the county court confirming the assessment of benefits made by the board of assessors. The affidavit for appeal states that the St. Louis, Iron Mountain & Southern Railway Company is the owner of the railroad property in the district against which the board of assessors made an assessment of benefits. The grounds of complaint on the part of the railway company are also stated in the petition. On the 25th day of February, 1918, the attorney for the road improvement district filed in the circuit court a motion to dismiss the appeal of the St. Louis, Iron Mountain & Southern Railway Company. On the 28th day of February, 1918, the Missouri Pacific Railroad Company filed a petition in the circuit court in which it stated that at the time the board of assessors made the assessment of benefits of the railroad property within the improvement district, that such property had been surrendered by the St. Louis, Iron Mountain & Southern Railway Company to it and had become the property of the Missouri Pacific Railroad Company. The prayer of the petition was that the Missouri Pacific Railroad Company be allowed to become a party defendant in the proceedings. The court overruled the motion on the same day and the Missouri Pacific Railroad Company prayed an appeal to the Supreme Court. On the 28th day of February, 1918, the motion of the road improvement district to dismiss the appeal of the St. Louis, Iron Mountain & Southern Railway Company also came on to be heard in the circuit court and the court found that said railway company at the time it made and filed its affidavit for appeal was not the owner of any property in said road improvement district. It was therefore ordered and adjudged that the appeal of the St. Louis, Iron Mountain & Southern Railway Company be dismissed. Both railroad companies filed a motion for a new trial and have duly prosecuted an appeal to this court.

HART, J., (after stating the facts). The decision of the circuit court was correct. The road improvement

district in question was formed under Act 338 of the Acts of 1915. See Acts of 1915, page 1400. The provisions of the act were complied with in organizing the district. No complaint on that account is made. About six miles of the right-of-way and the property situated thereon of the St. Louis, Iron Mountain & Southern Railway Company were embraced within the limits of the improvement district.

Section 11 of the act provides that the board of assessors shall enter all lands embraced in the district upon the assessment books showing, if the property be a railroad, the name of the owner thereof, the supposed mileage in the district, the present assessed value of the railroad and other property belonging to the company and the amount of assessed benefits per mile, and the total amount of the benefits assessed against said railroad. But the section also provides that no error in the name of the owner or description of the property shall invalidate the assessment if sufficient description is given to identify the same.

Section 25 provides for collecting delinquent taxes in the improvement district. It provides that the board of commissioners shall institute proceedings in the chancery court to enforce the collection of delinquent taxes and that the judgment shall provide for the sale of the delinquent land by a commissioner. It further provides that said proceedings and judgment shall be in the nature of proceedings *in rem,* and that it shall be immaterial that the ownership of said land be incorrectly alleged in said proceedings; and that said judgment shall be enforced wholly against the land and not against any other property of the defendant.

Section 13 provides that the county court shall hear and determine the justness of the assessment of benefits made by the board of assessors and is authorized to equalize, lower or raise any assessment upon a proper showing to the court.

(1) Section 14 provides that the judgment of the county court at the hearing shall have all the force and effect of a judgment against all of the real property in

the district. It further provides that any owner of real property within the district may appeal from the judgment fixing the assessment of benefits, within ten days, by filing an affidavit for appeal and stating therein the special matters appealed from. Thus it will be seen that the proceedings are in the nature of proceedings *in rem.* The statute expressly provides that no error in the name of the owner or description of the property shall invalidate the assessment if sufficient description is given to identify the same.

(2) At the time the assessment was made in the present case, the record shows that the property did not belong to the St. Louis, Iron Mountain & Southern Railway Company. The statute in express terms provides that the appeal shall be taken by the owner of the real property to be affected thereby. Inasmuch as the St. Louis, Iron Mountain & Southern Railway Company did not own the property at the time the judgment confirming the assessment of the board of assessors was rendered by the county court, it did not have the right to appeal from that order. The appeal should have been made by the company owning the property at that time. Therefore, the circuit court properly dismissed the appeal of the St. Louis, Iron Mountain & Southern Railway Company.

The Missouri Pacific Railroad Company on the same day filed a petition asking to be made a party defendant to the proceedings on the ground that it was the owner of the property at the time the order of the county court confirming the assessment of the board of assessors was made. If it was the owner of the property at that time it had the right under the statute to file an affidavit and take an appeal from the order of the county court. Not having done so, it had no right to come into the circuit court and ask to be made a party there. It lost its right of appeal when it failed to file its affidavit therefor in the time and manner prescribed by the statute.

It follows that the judgment must be affirmed.

KABLE v. CAREY.

Opinion delivered July 1, 1918.

1. MALICIOUS PROSECUTION—ADVICE OF JUSTICE OF THE PEACE.—It is no defense to an action for malicious prosecution that the defendant acted upon the advice of a justice of the peace. However, the advice given by the justice may be proved in mitigation of damages, and as a circumstance to show the absence of malice.
2. MALICIOUS PROSECUTION—MALICE—INFERENCE.—Malice can not be inferred where there is a lack of probable cause, and it can not be inferred when all the facts disclosed lead to a different conclusion; so when defendants, believing that plaintiff was guilty of taking property to which he was not entitled, and had him arrested, upon the statement of justice of the peace as to the nature of plaintiff's supposed crime, malice can not as a matter of law be inferred.

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

Killough, Lines & Killough, for appellants.

1. The trial court did not properly make the distinction between false improvement and malicious prosecution. 11 R. C. L. 791-2; 18 *Id.* 11, 12-20, 21; 64 Ark. 453; 32 *Id.* 166. There was no legal prosecution here and no crime charged. 15 L. R. A. 707; 58 Iowa, 447. See 2 Blackf. 259; 32 Pa. 168; 39 Am. Dec. 124; 30 Pa. 344; 35 S. E. 558; 4 Car. & P. 456; 27 S. E. 680; 36 L. R. A. (N. S.), 230.

2. It was error to give instruction No. 2. 100 Ark. 320. No. 8 is also error. It was error to refuse No. 8 for defendants. Also to refuse No. 12. See cases *supra.*

3. Neither malice nor want of probable cause were shown. *Supra.*

Basil Baker and *A. B. Shafer,* for appellee; *C. L. Marsilliot,* of counsel.

1. Defendant's affidavit charged appellee with a serious crime—grand larceny. A clear case of malicious prosecution is made.

2. There is no error in the instructions given or refused. The verdict is sustained by the evidence. Both

malice and want of probable cause were shown. The advice of a justice of the peace was no defense.

STATEMENT OF FACTS.

This is an action for malicious prosecution brought by Gregory Carey against C. W. Kable and I. N. Deadrick. All of the parties lived at the town of Parkin in Cross County, Arkansas, during the time of the transactions involved in this lawsuit. C. W. Kable was a planter and Prince Jackson, colored, raised a crop on his place during the years 1913, 1914 and 1915. I. N. Deadrick was a ginner and Gregory Carey was a lawyer. In the latter part of the year 1915 there was a dispute between Kable and Jackson as to the amount owed the former by the latter for rent and supplies. Jackson employed Carey to represent him in a settlement with Kable and transferred to Carey his interest in a bale of cotton, grown on the farm of Kable, which was at the gin of Deadrick. A share cropper of Jackson also transferred his interest in the bale of cotton to Carey. Kable forbade Carey and Jackson from taking the cotton away from Deadrick's gin, claiming that he had a lien on it for supplies furnished Jackson during the years 1913 and 1914. Carey moved the bale of cotton from the gin and notified Deadrick and Kable that he had done so and told them what interest he claimed in the bale of cotton. On the 6th day of January, 1916, Kable and Deadrick made an affidavit before a justice of the peace in which they charged that Carey and Jackson did on the 5th day of January, 1916, take one bale of cotton from the platform of the Parkin Gin Company of Parkin, Arkansas, without the permission of I. N. Deadrick and prayed a warrant for the arrest of the said Carey and Jackson. A warrant of arrest was duly issued by the justice of the peace and Carey and Jackson gave bond for their appearance before him. At the examining trial the affidavit was changed to one charging the defendants with grand larceny. At the examining trial before the justice of the peace Carey and Jackson were held to await the action of the grand jury and gave bond

for their appearance in the circuit court. The grand jury ignored the charge against them and they were discharged from custody.

According to the evidence adduced in favor of the plaintiff the affidavit was changed during the examining trial charging the plaintiff with the crime of grand larceny and as changed was read over to the defendants, who at the time were sworn to the affidavit as amended by the justice of the peace. They adopted the signatures they had made to the original affidavit as their signatures to the affidavit as amended.

According to the testimony of the defendants themselves, they did not make oath to the affidavit as amended in which Carey and Jackson were charged with grand larceny. The amendment was made at the suggestion of the deputy prosecuting attorney who was representing the State. They stated that when the matter first came up, they went to the justice of the peace and stated the facts to him with regard to the dispute between themselves and Carey and Jackson; that the justice of the peace advised them that Carey and Jackson had been guilty of trespass, and that they had intended to make an affidavit charging them with trespass; that they merely stated the facts to be in that affidavit, that Carey and Jackson did, on the 5th day of January, 1916, take one bale of cotton from the platform of the Parkin Gin Company at Parkin, Arkansas, without permission of I. N. Deadrick.

Other evidence was introduced by the plaintiff tending to show malice on the part of the defendants in swearing out the warrant against him before the justice of the peace.

On the other hand, testimony was introduced by the defendants tending to show that they were not actuated by malice in instituting the prosecution before the justice of the peace. It will not be necessary to set out this testimony in detail in order to pass upon the assignments of error presented for a reversal of the judgment.

The jury returned a verdict in favor of the plaintiff for the sum of $1,000 and from the judgment rendered the defendants have appealed.

HART, J., (after stating the facts). Counsel for the defendants assign as error the action of the court in refusing to instruct the jury that the defendants could justify their action in instituting the prosecution by showing that they relied in good faith upon the advice of the justice of the peace after making a full and fair disclosure of all the facts to him. The court not only refused to give this instruction but gave the converse of it. The jury were instructed, in effect, that while the fact that the defendants detailed all the facts to the justice, if done in good faith, could not be considered by it as a defense to the action, it was proper to go to the jury as a circumstance tending to show the absence of malice in suing out the warrant for the plaintiff's arrest and in mitigation of damages.

(1) The court was right in refusing the instruction asked for by the defendants and also in giving the one just referred to for the plaintiff. We have held that proof that defendants acted upon the advice of counsel learned in the law or upon the advice of the public prosecutor given, after a full and fair statement of all the known facts, will be a complete defense to an action for malicious prosecution because it is conclusive evidence of the existence of probable cause. *Price* v. *Morris,* 122 Ark. 382. The reason is, probable cause depends upon the facts and the law. A complainant may know the facts but not the law. Therefore he may obtain advice upon the latter from one learned in the law and be protected though a mistake be made by the legal adviser. Besides attorneys at law are in a sense officers of the court, and upon grounds of public policy, where a complainant has acted upon the advice of competent counsel in good faith, after a full disclosure of all the facts, he should not be mulcted in damages for instituting a prosecution, although the party accused may be innocent of the crime alleged against him. There is, however, no policy

of the law to be served by permitting the complainant to accept and rely upon the opinion and advice of a justice of the peace. It is not the duty of a justice of the peace to advise prospective litigants. They are not usually learned in the law and on that account can not be safe advisers on important legal questions. While the advice of the justice of the peace under such circumstances is not a defense to an action for malicious prosecution, it may be shown in evidence in mitigation of damages and as a circumstance tending to show the absence of malice on the part of the complainant. *Catzen* v. *Belcher*, 64 W. Va. 314, 16 A. & E. Ann. Cas. 715 and case note. Numerous decisions of courts of last resort of the various States are cited in support of the rule laid down. See also Cooley on Torts (3 ed.), vol. 1, pp. 329 and 330.

It is next insisted that the court erred in giving instruction No. 2 at the request of the plaintiff. The instruction reads as follows: "Malice used in these instructions does not necessarily mean hatred, or ill will—that is to say, it is not necessary for the plaintiff to prove that the defendants prosecuted him on account of any hatred or ill will which they bore towards him. Malice, as used here, means any unlawful or improper motive, so that if you find from the evidence that the defendants prosecuted the plaintiff not in good faith and for the purpose of vindicating the law and punishing crime, but on account of some improper or unlawful motive, then you are instructed that the plaintiff has made out a cause of action in this respect. Malice as here used may be inferred from the want of probable cause—that is to say, if the defendants prosecuted the plaintiff without any reasonable or probable cause therefor, you would be justified in concluding that they did it maliciously."

(2) Counsel for the defendants insists that the giving of this instruction constitutes error calling for a reversal of the judgment. In this contention we think counsel are correct. A similar instruction was condemned and held to be reversible error in the case of *L. B. Price Mercantile Co.* v. *Cuilla,* 100 Ark. 316, and in

Dare v. *Harper,* 101 Ark. 37. To justify an action for malicious prosecution, both want of probable cause and malice must be shown. Where there is want of probable cause, the jury may infer malice, but they can not properly do so if all the facts disclosed lead to a different conclusion. If the law imputed malice from want of probable cause alone, then there would be no distinct requirement of malice, but want of probable cause would be the sole element necessary.

Counsel for the plaintiff, however, insist that the instruction was not prejudicial because the undisputed facts show that the defendants acted maliciously in procuring the arrest and prosecution of the plaintiff for taking the cotton from the gin lot of Deadrick. We do not think counsel are correct in this contention.

According to the testimony of the defendants they made a full and fair disclosure of all the facts to the justice of the peace. They told him about the respective claims of Kable and Carey and Jackson to the bale of cotton. After they had stated the facts to him the justice of the peace told them that Carey and Jackson had taken property that did not belong to them and that they were guilty of trespass. They said they did not know what head the charge would come under and acted in good faith on the advice of the justice of the peace, believing that they were signing an affidavit only charging him with taking property that did not belong to him from the gin platform without the permission of Deadrick, who had the cotton in his charge. It is true it turned out that Carey was not guilty of any crime, but the defendants, according to their testimony, believed him to be guilty of a crime when they made the affidavit to procure a warrant for his arrest, and according to their testimony they acted in good faith and relied upon the opinion and advice of the justice of the peace in aid of their own judgment. Under these circumstances, it could not be said as a matter of law, that they were guilty of malice in instituting the prosecution against Carey.

Again it is insisted by counsel for the defendants that the judgment should be reversed because the original affidavit signed by them did not contain a criminal charge and could not therefore be made the basis of an action for malicious prosecution.

In answer to this argument, it is only necessary to say that the plaintiff does not base his action on the original affidavit. It is based entirely on the affidavit as amended in which he claims that the defendants charge him with grand larceny. According to his testimony the defendants made oath to the affidavit after it was changed so as to charge him with grand larceny. He stated in positive terms that the justice of the peace asked them to stand up and be sworn; that the justice read the affidavit to them with the words "grand larceny" in it, that he then asked them if the signatures to the affidavit were their own signatures and that the defendants admitted them to be their own; that in their testimony the defendants charged him with grand larceny by stealing a bale of cotton from the platform of the gin of Deadrick. Therefore the court did not err in this respect.

For the error in giving instruction No. 2 at the request of the plaintiff as indicated in the opinion the judgment must be reversed and the cause will be remanded for a new trial.

THOMPSON v. MAYO.

Opinion delivered July 1, 1918.

1. COUNTIES—EXPENSES—CONSTRUCTION OF COURT HOUSE.—The act governing the building of court houses, Kirby's Digest, § § 1009 to 1025 inclusive, is not repealed or affected by the act of March 18, 1879 (Kirby's Digest, § § 1499, 1500), which latter act relates to and governs only the current or ordinary expenses of the county.

2. COURTHOUSE—CONSTRUCTION—POWER OF QUORUM COURT—COST.—Act 217, Acts of 1917, invests the quorum court with power to make an appropriation for building a court house in any sum it may deem proper regardless of the amount of taxes which may be levied in any one year in the county.

Appeal from Poinsett Circuit Court; *Benj. Harris,* Special Judge; affirmed.

Hawthorne & Hawthorne, J. G. Waskom and *J. F. Gautney,* for appellants.

1. Under Act 217, Acts 1917, the quorum court is vested with exclusive jurisdiction to make appropriations for all county purposes and can not make an appropriation which exceeds ninety per cent. of the taxes levied in any one year. The $100,000 appropriation is, therefore, excessive and void. Act 217, Acts 1917; Kirby's Dig. § 1494, as amended by Acts 1911, p. 188; Kirby's Dig. § § 1510-11-12, 1502.

2. Sections 1510 and 1511, Kirby's Digest, are repealed by Act 217. 63 Ark. 397; 68 *Id.* 340; 73 *Id.* 523; 91 *Id.* 11.

3. Kirby's Digest, § 1500, is a limitation upon the power of the quorum court to appropriate money to build a court house or for any other purpose. *Ib.,* § § 1009-10-12, 1025; 40 Ark. 548; 47 Cal. 488; 34 Ark. 307; 80 *Id.* 280; 97 *Id.* 465.

4. This is a direct proceeding, and, in view of the amendments in Act 217, the quorum court can not appropriate for all purposes an amount in excess of 90 per cent. of the total taxes levied in any one year. Kirby's Dig. § § 1510, 11-12, etc., were repealed by the Act 1917. Prior to the act the county court could appropriate money for building court houses, etc., but now it has no authority until after the quorum court has appropriated money for the purpose and can not contract for an amount in excess of such appropriation. There is a limit on the power of the quorum court. Kirby's Dig. § 1500; 31 L. R. A. 794; 62 Cal. 641; 87 Ill. 395; 13 L. R. A. 247; 32 U. S. (L. ed.) 1060.

5. An appropriation to build a court house is not a public necessity, under § 1500, Kirby's Dig; 31 L. R. A. 794; 62 Cal. 641; 74 *Id.* 258. See also 23 L. R. A. 402-7; 35 *Id.* 686; 68 *Id.* 300; 13 *Id.* 244; 105 Ill. 138, 215; 51 Iowa, 385; 26 Mo. 272; 87 *Id.* 246; 80 S. W. 263; 37 L. R. A. (N. S.) 1045; *Ib.* 1054; *Ib.* 1054-8.

6. The appropriation is void as being in excess of the limitation prescribed by law. 117 S. W. 301; 12 N. W. 437; 72 *Id.* 35; 36 Ia. 396; 81 N. W. 476; 10 W. Va. (14 S. E. 279); 59 N. W. 488; 76 N. W. 850; 113 S. W. 824; 248 Fed. 93. The amendment of sections 1494 and 1502, together with the repeal of sections 1011-12, etc., did not repeal section 1500. It still limits the appropriation to build a court house. It is not repealed by implication. 10 Ark. 588; 31 *Id.* 17; 57 *Id.* 508; 65 *Id.* 508; 80 *Id.* 411; 82 *Id.* 302; 112 *Id.* 437; 17 L. R. A. 685 (690).

Lamb & Frierson, for appellees.

1. Act 217, Acts 1917, p. 1184, is a special act and repeals section 1011, Kirby's Dig. The limitation to 90 per cent. does not cover nor affect permanent improvements, but only applies to ordinary expenses and not to building court houses. Acts 1879, Act 67, p. 112; Kirby's Dig. § 1011, etc.; Rev. St. ch. 36, and Act April 16, 1873; 63 Ark. 397; 68 *Id.* 340, 347; 73 *Id.* 523-7; 93 *Id.* 11.

2. Repeals by implication are not favored. § 1011 is not expressly repealed nor by implication necessarily. The only limitation of chapter 35 by the act of 1917 is that before the county court can contract for a court house the quorum court must approve by making an appropriation and that the contract must not exceed the appropriation. There is no limitation on the amount.

3. A court house is not a current expense within the limitation. 68 Ark. 480; 1 Words & Phr. 1180; 2 *Id.* 1792; 21 Kan. 308; 49 Pac. 228; 53 Atl. 236; 78 Pac. 220; 47 Cal. 448-510; 87 Mo. 247.

4. The cases cited by appellant are not in point. There is no limitation to the amount to be appropriated for building a court house.

HUMPHREYS, J. On July 2, 1917, pursuant to call, the quorum court of Poinsett County met at Harrisburg, the county seat of said county, and in regular session appropriated $100,000 for the purpose of rebuilding and furnishing the courthouse at Harrisburg, Poinsett County, Arkansas, and made a levy upon all the taxable

property in Poinsett County for said purpose in accordance with law. Appellants, citizens of said county, were made parties to the proceeding and prosecuted an appeal from said order to the circuit court of said county.

Upon hearing in the circuit court, the judgment of the quorum or levying court was in all respects affirmed. Proper steps were taken and an appeal has been prosecuted to this court.

Appellants are citizens and taxpayers of Poinsett County. The total revenue collected in Poinsett County in the year 1917 for the year 1916 was $34,971.77. The total assessed valuation of all property in said county for the year 1917 was ten million dollars. This assessment would produce a revenue for county purposes of $50,000.

It is insisted by appellant that the appropriation was void for the reason that the quorum court appropriated more than 90 per cent. of the taxes levied in the year 1916 or 1917 for the construction of the courthouse. It is said that section 1500 of Kirby's Digest is a limitation upon the power of the quorum court to appropriate money to build a courthouse or for any other purpose. Said section of the Digest reads as follows:

"The court shall specify the amount of appropriations for each purpose in dollars and cents, and the total amount of appropriations for all county and district purposes for any one year shall not exceed 90 per cent. of the taxes levied for that year."

(1) This section was section 7 of Act 67, Acts 1879. By reference to the original act, it is quite apparent that section 1500 of Kirby's Digest, or section 7 of Act 67, Acts 1879, had reference and related to the taxes levied for the purposes specified in section 1499 of Kirby's Digest, or section 6 of Act 67, Acts 1879. In construing subdivision sixth of section 6, Act 67, Acts 1879, or subdivision sixth of section 1499 of Kirby's Digest, this court held that the expenditures provided for therein had reference to only current and ordinary expenses of the county for the year. This court is irrevocably com-

mitted to the construction that current and ordinary expenses of the county for the year do not include expenditures for building a courthouse; and that the limitations placed upon the quorum court and county court and the agents of the county, by Act 67, Acts 1879, do not affect contracts for building courthouses under sections 1009 to 1025 inclusive, of Kirby's Digest. In other words, it has been decided by this court that the special act governing the building of courthouses, as digested in Kirby's Digest as sections 1009 to 1025 inclusive, remains intact and was not repealed by the subsequent act of March 18, 1879, which latter act related to and concerned only the ordinary or current expenses of the county and did not relate to or concern the extraordinary expenses, such as building courthouses. *Durrett* v. *Buxton,* 63 Ark. 397; *Hilliard* v. *Bunker,* 68 Ark. 340; *Bowman* v. *Frith,* 73 Ark. 523; *Sadler* v. *Craven,* 93 Ark. 11.

(2) It is asserted, however, that since the passage of Act 217, Acts 1917, the limitation placed upon levying or quorum courts in section 1500, Kirby's Digest, applies not only to appropriations for current expenses of the county, but to appropriations for building courthouses. As we understand the contention of appellants, the effect of the passage of Act 217, Acts 1917, was to prevent a county in which the assessed wealth is $10,000,000 from building a courthouse unless the cost thereof can be limited to one item in a current expense account of $50,000 or less. In other words, that a county possessing $10,000,000 assessed wealth can not build and furnish a courthouse at a cost of $100,000. We do not think the plain wording of the act warrants such a construction. The only purpose of section 1, Act 217, Acts 1917, was to permit the county court to call a meeting of the quorum court on account of any emergency that might arise, whereas, prior to that time, a special term of the quorum court could be convened only in cases where public buildings, belonging to a county, were destroyed and it was necessary to immediately rebuild or repair same. The purpose of section 3 of said act was to with-

draw from the county court the power to make an order to build a courthouse if deemed expedient and if the circumstances of the county would permit a levy of taxes for that purpose. The power to make an appropriation for building a courthouse, to fix the cost thereof and to levy a tax for that purpose, was transferred from the county court to the quorum court. This transfer of power was effected by the repeal in express terms of section 1011 of Kirby's Digest and the enactment in lieu thereof of section 3, Act 217, Acts 1917. There is nothing in the plain wording of Act 217, Acts 1917, and no language contained therein from which it might be inferred that the Legislature intended by this transfer of power to limit the quorum court in fixing the cost of a courthouse or the appropriation therefor. The sole purpose seems to have been the transfer of the power from a court composed of one person to a court composed of the county judge with a majority of the justices of the peace in the county. There being no express language or language from which it is necessarily inferable that the Legislature intended to place a limitation on the quorum court as to the maximum cost and appropriation for building a courthouse, we do not feel warranted in extending the limitation contained in section 1500 of Kirby's Digest to the court which has heretofore been held by this court to apply to current appropriations for county expenses only. Our construction of Act 217, Acts 1917, is that the act invests the quorum court with power to make an appropriation for building a courthouse in any sum it may deem proper, regardless of the amount of taxes which may be levied in any one year in the county.

Therefore, the judgment of the circuit court in this case is affirmed.

OATES v. CYPRESS CREEK DRAINAGE DISTRICT.

Opinion delivered July 1, 1918.

1. DRAINAGE DISTRICT—ORGANIZATION—NOTICE.—In the organization of a drainage district, only one notice is required to be given preliminary to the organization of a district; that notice must be published by the circuit clerk after the report of the engineer, appointed for the district, has been filed, calling upon all land owners in the district to appear before the court to show cause for or against the creation of the improvement district.
2. DRAINAGE DISTRICT—ORGANIZATION—PETITION.—In the organization of a drainage district only one petition is required under Act 279, Acts of 1909, as amended by Act 221, Acts of 1911.
3. DRAINAGE DISTRICTS—ORGANIZATION—REPORT OF ENGINEER.—In the organization of a drainage district, *held*, the preliminary report of the engineer as to the character and expense of the district was properly made and filed.
4. DRAINAGE DISTRICTS—COMMISSIONERS MUST BE LAND OWNERS—WHEN.—Under § 6, Act 117, Acts of 1913, amending Act 221, Acts of 1911, and Act 279, Acts of 1909, the commissioners of a drainage district lying in more than one county, must be owners of real property within the said district.
5. DRAINAGE DISTRICTS—ORGANIZATION—ASSESSMENT OF BENEFITS.—In the organization of a drainage district, *held*, that the assessment of benefits upon the property in the district was made and filed by the commissioners, and notice thereof published, as required by law.
6. IMPROVEMENT DISTRICTS—ASSESSMENT OF BENEFITS—FUTURE BENEFITS.—The amount of benefit which an improvement will confer upon particular land, and whether it is benefited at all, is a matter of forecast and estimate, and *held*, that there was sufficient evidence to show a benefit to the property of a railway company, from the construction of a drainage ditch.
7. DRAINAGE DISTRICTS—APPORTIONMENT OF BENEFITS.—In the organization of a drainage district, *held*, that the evidence was sufficient to sustain the apportionment of benefits made.
8. DRAINAGE DISTBICTS—ORGANIZATION—RAILROAD PROPERTY—APPORTIONMENT OF BENEFITS.—In the organization of a drainage district, *held*, it was proper in assessing the property of railway company within the district, to make a total assessment of the entire benefit to the whole property of the railway company within the district.

Appeal from Perry Circuit Court; *G. W. Hendricks*, Judge; affirmed.

W. P. Strait, for appellants.

1. The assessment of benefits made by the assessors is void, being a violation of the constitutional and statutory provisions requiring equality and uniformity of assessment because of the different methods used and the arbitrary manner of making same. The assessments were arbitrary and without regard to benefits. Three different methods of assessing benefits were made. The methods must be uniform and the same basis fixed for all. 32 Ark. 38. Uniformity and equality according to benefits must be had. 48 Ark. 252; *Ib.* 383; 49 *Id.* 202; 52 *Id.* 112; 56 *Id.* 356; 63 *Id.* 584; 99 *Id.* 504. See also 50 *Id.* 116; 68 *Id.* 376; 86 *Id.* 1; 98 *Id.* 543.

2. The commissioners failed to assess their own property though directly benefited.

3. The general improvement to the county at large is not a special benefit. 89 Ark. 518; 67 *Id.* 30; 3 Am. Rep. 615; 50 Ark. 116; 98 *Id.* 543; 50 *Id.* 116; 18 Am. Rep. 729; 28 L. R. A. (N. S.) 1168, and notes. The uplands were not benefited and the assessments were arbitrary. They were not drained nor improved. 25 A. & E. Enc. L. 1185; 86 Ark. 1; 65 Pac. 186; 14 Am. Rep. 440; 8 *Id.* 225; 46 Am. St. 723.

4. Benefits were not assessed upon each tract. 86 Ark. 1.

5. A levee was also constructed. Two specific characters of improvements were made, only one of which could benefit the lands. 118 Ark. 294; 89 *Id.* 513; 92 *Id.* 93.

6. Legal petitions were not filed nor were proper estimates by the engineer filed. These were jurisdictional. On account of the many defects, the entire proceedings were without authority and void. The assessments were illegal and arbitrary.

T. S. Buzbee and *H. T. Harrison,* for the Ch. O. & G. and Chicago, Rock Island and Pacific Railway Company.

1. The assessment is void because based on an estimate of benefits conjectural and general instead of peculiar and special. 89 Ark. 518; 118 *Id.* 300; 64 *Id.* 555;

70 Pac. 1085; 18 L. R. A. (N. S.) 185; 115 N. E. 836; 197 Ill. 344; 64 N. E. 364; 114 *Id.* 585; 100 *Id.* 996; 104 *Id.* 282; 105 *Id.* 731; 48 *Id.* 492.

2. The assessment was unequal and discriminatory. The method of assessing the railroad property was different from that used in assessing other lands. The railroad was assessed as a business; the acreage basis was discarded. A greater burden was placed upon the railroads than others. 48 Ark. 252; 52 *Id.* 112.

3. 113 Ark. 496 does not lay down the rule that increase in traffic is a proper benefit to be considered.

4. There is no evidence of any benefit to accrue to the railroad property. There was no physical or direct benefit to the railroad property. 239 U. S. 485; *Bush* v. *Branson,* U. S. Ct. Ct. App., 8th Circuit, Mss. No. 485, Dec. 1917.

Charles C. Reid and *John L. Hill,* for appellees.

1. The assessments were properly made. The assessors followed the law. 39 N. J. 656. They were made according to the amount of benefits accruing. 86 Ark. 1.

2. The assessments of property in Perry were properly made—as also those against the Fourche River Lumber Co. The assessments were not arbitrary but fair and just. 64 Ark. 258. The question of benefits is largely one of opinion. Lands above overflow may be benefited. 99 Ark. 100; 64 *Id.* 258.

3. The benefit need not be a direct physical benefit, but may result from increased health and value, etc. 121 Ind. 99; 19 Am. Rep. 257.

4. The original petition mentions the construction of a levee and flood gate. The Act 177, Acts 1913, § 5, provides that a "ditch" may include a levee and flood gate.

5. All the lands were benefited and none of the assessments were arbitrary or unjust. The court below so found.

6. The railroads received direct physical benefits, besides the drainage made available for cultivation many

acres of land, increased the lands in value and benefited the health of the community. The traffic on railroads was increased, etc. 113 Ark. 496.

7. The proper methods of ascertaining benefits were adopted. Future benefits is largely a matter of estimate and to some extent speculative. The assessment on the railroads is just and fair and they have no cause to complain. The tracks, buildings, etc., could not be assessed on an acreage basis, but the "railroad" was assessed equitably and fairly.

HUMPHREYS, J. This is an appeal by about forty property owners and the Chicago, Rock Island & Pacific Railway Company from the circuit court of Perry County, attacking the validity of the organization and assessment of benefits on their lands in the Cypress Creek Drainage District in Conway and Perry Counties, Arkansas. The district, as organized, contains 18,000 acres of land lying in the two counties.

It is contended that the orders organizing the district were made by the circuit court when not legally in session. An examination of the complete record of the proceedings shows that all court orders for the organization of the district were made by the circuit court either at a regular or adjourned term thereof.

(1-2) It is next contended that legal notice and legal petitions for the formation of the district were not filed. Only one notice is required to be given preliminary to the organization of a district. That notice must be published by the circuit clerk after the report of the engineer, appointed for the district, has been filed, calling upon all land owners in the district to appear before the court to show cause for or against the creation of the improvement district. The record shows that such a notice was given by the clerk in both Perry and Conway Counties by publication in the "Perry County News" of Perry County and the "Morrilton Headlight" of Conway County. Likewise, only one petition is required in order to form a drainage improvement district under

Act 279, Acts 1909, as amended by Act 221, Acts 1911. This is the initial and preliminary petition required to be signed by three or more property owners in the district, calling upon the court to establish a drainage district to embrace their property, describing generally the region which it is intended shall be embraced within the district. The record shows that such a petition was filed on August 11, 1916. Some contention is made by appellants that the petitions, purporting to show that a majority of the property owners in number and acreage forming the district, were not marked "filed." Such a petition was not necessary under section 2, Act 221, Acts 1911, amending section 2, Act 279, Acts 1909; but if that were necessary, the record shows that a petition was filed December 4, 1916, purporting to have been signed by a majority in number and acreage of all property owners in the district; and that said petition was considered by the circuit court in creating the district.

(3) It is again contended that the maps, profiles, estimates, etc., required to be filed by the engineer, preliminary to the formation of the district, were not filed in the manner provided by law. The law requires that the engineer shall make a survey ascertaining the limits of the region benefited by the proposed drainage system and shall file with the circuit clerk a report showing the territory which shall be benefited by the improvement, giving a general idea of its character and expense, and making such suggestions as to the size of the drainage ditches and their location as he may deem advisable. The record shows that the preliminary report and estimate of the cost of the improvement, as required by section 1, Act 221, Acts 1911, amending sec. 1, Act 279, Acts 1909, was filed on October 16, 1916.

(4) It is insisted that the commissioners are disqualified on account of being land owners in the district. Section 6, Act 117, Acts 1913, amending Act 221, Acts 1911, and Act 279, Acts 1909, requires the commissioners of a drainage district lying in more than one county to be the owners of real property within said district. It

it mandatory that the commissioners be interested in a material way in the district, so the argument that the district should be invalidated and that the assessment should be canceled because the promoters of the district and the commissioners making the assessments were interested can not avail appellants in this case. The further fact that John S. Harris, commissioner, purchased an interest in timber on lands in the district, contingent upon the organization of the district, is not sufficient to invalidate the district for fraud. The evidence is not sufficient to show that the commissioners improperly assessed benefits against the lands on account of Harris' contingent interest in timber on a large tract of land included in the district.

(5) It is also insisted that the assessment of benefits to the property in the district was not made and filed by the commissioners and notice thereof published, as required by law. The manner of making and filing an assessment of benefits to the lands and improvements thereon, and the notice to be given thereof, is particularly set out and designated in section 7, Act 117, Acts 1913, amending section 7, Act 279, Acts 1909. These requirements were literally complied with. The assessment book was prepared, as required, subscribed by the commissioners, and filed on March 29, 1917. Notice to property owners that the assessment of benefits to be filed was published in the "Perry County News," Perry County, and the "Morrilton Headlight" of Conway County, calling on all property owners to appear before the court on April 24, 1917, and present objections, if any, to the assessments. Appellants are therefore in error in this contention.

(6) It is insisted by appellants that no benefits will accrue to their property by reason of the improvements and that the benefits assessed are excessive. The chief reason urged is that their lands are high, and not subject to overflow and distant from the canal and laterals.

This court has committed itself to the doctrine that, "The amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is a matter of forecast and estimate." *Louisville & Nashville Ry. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430.

In adopting this doctrine, this court said: "The assessment of future benefits is largely a matter of estimate and to some extent speculative. We must depend largely upon the opinions of men of sound judgment and reasonable information on the subject to determine what the future benefits will probably be. If it were necessary to find an exact standard, a measure of benefits in advance would be impossible. That view of the matter would necessarily lead to the conclusion that benefits must be enjoyed before there can be an assessment to pay for the improvement, which would be a contradiction in itself." *St. Louis & S. F. Rd. Co.* v. *Ft. Smith & Van Buren Bridge Dist.*, 113 Ark. 493. This court has also said that "a tract within the district may be above overflow without the levee and, yet, in various ways, greatly benefited by the levee." *Carson* v. *St. Francis Levee Dist.*, 59 Ark. 514; *Memphis Land & Timber Co.* v. *St. Francis Levee District*, 64 Ark. 258; *Butler* v. *Board of Directors of Fourche Drainage District*, 99 Ark. 100.

A number of the appellants testified that their lands were above overflow, either from rains or from backwater; that no lateral of the system would come in contact with their lands; that their lands needed no drainage; that they would receive no health benefits; and that their lands would not be enhanced in value by reason of the improvement.

W. J. Parkes, engineer for the district, in substance, testified that every tract of land embraced in the district would receive a benefit by reason of the construction of the improvement on account of increased value of the land and better health conditions. Dr. M. E. Howard, health officer of Perry County and a physician of forty years' experience, who was familiar with the topography

of the country included in the district, testified that, ordinarily, the country north of the ditch was a flat, level country, interspersed with swamps and lakes, and that the construction of the drainage would be a wonderful benefit to the health of the community, as it would eradicate the mosquito pest completely. T. S. Carl and T. E. Holmes, owners of upland in the northern part of the district, similarly situated to the lands of appellants, gave testimony to the effect that although their lands received no direct physical benefit, the improvement would increase them materially in value. H. W. Birch and John S. Harris, likewise owners of upland north of the ditch, near the lands of appellants, testified that all the lands in the district would be materially increased in value on account of the improvement. A large portion of the lands belonging to B. G. White, Mrs. M. L. White, G. O. Breeden, Mrs. M. J. Breeden, L. T. Oates and Mrs. A. J. Patterson, are located near the system of canals and it is quite obvious that much of their lands will be drained and protected from overflow. It is apparent that a large part of the lands of each of these appellants will be materially benefited. There is evidence in the record tending to show that the railroad property of the Chicago, Rock Island & Pacific Railway Company will receive little or no direct benefit and no indirect benefit, but John S. Harris and W. J. Parkes testified that during high-water periods water stood against the dump of the railroad at many places, and John S. Harris further testified that the railroad would receive the same benefit that the property in the town of Perry would receive.

The drainage improvement district law specifically authorizes the assessment of benefits against railroad property within improvement districts, and this court has said that "benefits may be assessed against the property of a railroad company by reason of the construction of a bridge by a bridge improvement district, and although the result of the construction of the bridge is to create competition for the railroad company." *St. Louis & S. F. Rd. Co.* v. *Bridge Dist, supra.*

It was also announced in the case just cited that in assessing benefits to accrue to railroad property it was proper to consider the probable increase in traffic due to estimated growth in population. It was in evidence that the construction of this system of canals would tend to increase the population because it would make available for cultivation large bodies of lands. The evidence strongly tended to show that the improvement would greatly improve health conditions which would benefit all the property in the district, including railroad property.

The circuit court reviewed the assessments placed upon the property by the commissioners or assessors. He had before him numerous witnesses who expressed their opinions with reference to whether the lands were benefited and the extent thereof. In addition to hearing the evidence, he made a personal inspection of the district in company with one of the commissioners and one of the appellants in this cause. After a full consideration of the case, he made many reductions in the assessments, and reduced the assessment of the railroad company from $10,000 to $4,500. The testimony heard by him was conflicting. After a full examination of the record, we think that all the property in the district will receive some benefit and that the amount of benefits adjudged against each tract of land is a fair measure of the benefits that will accrue to it. It is not necessary, however, for us to do more than find that there is sufficient legal evidence to sustain the finding of the court. It is not the province of this court on appeal to pass upon the weight of the evidence. We think there is sufficient legal evidence in the case to support the finding of the court.

(7) It is said that if any benefits will accrue to the lands they have been unequally apportioned to the respective tracts. In other words, that there is an inequality in the assessment of benefits. John S. Harris testified that in making the assessment he used a zone map, prepared by W. J. Parkes, and that from the map,

together with his personal knowledge and inspection of the land, the assessment was made. Upon examination, we find that this zone map disclosed the location of each tract of land with reference to the proposed system of canals, and also shows, in a certain degree, the topography of the country, in that the cypress brakes and streams are located definitely. The character of the lands and their proximity to the canals must necessarily have aided the commissioners in determining the relative benefits which would accrue to the various tracts of land. In fact, W. J. Parkes testified that the maps showed the relative benefits that the lands would receive—not in dollars and cents—but with relation of the tracts to each other. The commissioners assessed benefits accruing to swamp lands, which will be reclaimed by the system, at $15 per acre and ranging as the benefits decreased downward to as low as $1.50 per acre on the high lands most distant from the canals. Again, John S. Harris testified that in order to properly apportion and equalize the assessment of benefits they took into consideration every element of benefit that would accrue to the different character of lands; for example, that they estimated the lands in the town of Perry would receive $10,000 in total benefits; that the lands in the country, aside from the railroad lands, would receive $72,800 in total benefits, and that the lands of the railroads would receive $10,000 in total benefits. It seems to us that every effort was made by the commissioners to fairly and justly apportion and equalize the assessment of benefits. The assessment of benefits apportioned by the commissioners to appellants' lands, except as to the lands immediately in swamps and in close proximity to the main canals, were reduced by the circuit court materially. The court also reduced the railroad assessment to about $500 a mile. The same rule must be applied to the finding of the court upon this issue as in the first issue discussed. We think there is sufficient legal evidence in the record to sustain the apportionment of benefits.

(8) Lastly, it is contended that the basis of the assessment is illegal because an acreage basis was applied to country property, a valuation basis to town property and a unit basis to the railroad property. As we understand the evidence in this case, the assessors adopted a uniform basis for making the assessment on all the lands. They uniformly used a benefit basis. For example, they ascertained that the total benefit to accrue to the lands in the town of Perry would be $10,000, after taking into consideration every element going to make up the total benefit. In order to apportion equitably the total benefit assessment on the town lands to the several tracts therein, a valuation basis was adopted. Likewise, they ascertained that the total benefit to accrue to the lands in the country would be $72,800, and, in order to equitably apportion the benefit assessment to the several tracts lying in the country, they adopted as a basis of apportionment the relative benefit received by each forty-acre tract. The ordinary description of railroad property is neither in lots nor acreage. The railroad property in question all belonged to one company. A total assessment of the entire benefit to the whole property was entirely feasible and practical and an apportionment of the benefits on any basis was unnecessary.

The judgment of the circuit court is, therefore, affirmed.

LOWERY v. STATE.

Opinion delivered May 20, 1918.

1. LIQUOR—ILLEGAL MANUFACTURE—SUFFICIENCY OF THE PROOF.—In a prosecution for the illegal manufacture of whiskey, where defendant was discovered with a sour mash made up, and all the instruments used in the primitive manufacture of whiskey, the evidence was sufficient to sustain a verdict of guilty.

2. LIQUOR—ILLEGAL MANUFACTURE—TIME.—In a prosecution for the illegal manufacture of whiskey, where the testimony showed that the whiskey was manufactured after January 1, 1916, it is not necessary to instruct the jury, that in order to convict that they must find that it was manufactured after January 1, 1916.

3. LIQUOR—ILLEGAL MANUFACTURE—CIRCUMSTANTIAL EVIDENCE.—In a prosecution for the illegal manufacture of whiskey, the state relied for conviction solely upon circumstantial evidence. *Held,* the court properly told the jury that if the circumstances could be explained in any reasonable way inconsistent with guilt, that defendant should be acquitted.

4. LIQUOR—ILLEGAL MANUFACTURE—EVIDENCE OF SALE.—In a prosecution for the illegal manufacture of whiskey, testimony of one B. *held,* admissible, that he, B., had purchased whiskey from defendant, at a certain time, although defendant had, in another prosecution, been acquitted of the crime of selling liquor to B.

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

Richard M. Ryan and *Arthur Cobb,* for appellant.

1. There is a total failure of evidence to support the verdict. There is no evidence that appellant was engaged in the manufacture of liquor.

2. No violation of law since January 1, 1916, was proven.

3. Austin Brown's testimony was improperly admitted. The time was too remote and appellant had been acquitted of the crime of selling whiskey.

4. The State's case rested wholly upon circumstantial evidence, and it was error to refuse appellant's requests upon the weight to be given such evidence. 76 Ark. 227; 77 *Id.* 201, 247, 261; 71 *Id.* 475.

5. The evidence shows that the liquid found could not be used as a bevarage. It was simply hog feed. The liquor was not alcoholic nor intoxicating.

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

1. The evidence was sufficient. All the evidence and circumstances warrant a conviction.

2. The court did not err in failing to instruct the jury as to the necessity of proving the making of the liquor since January 1, 1916. This was not assigned as a ground in the motion for new trial. No request was made for such an instruction. 86 Ark. 360, 456; 71 *Id.* 475; 87 *Id.* 528; 102 *Id.* 588.

3. Austin Brown's testimony was competent. 59 Ark. 431; 93 *Id.* 260; 32 Me. 429; Wharton, Cr. Ev. (8 ed.), § 484.

4. Instruction No. 2, requested by appellant, was properly refused. It does not correctly state the law. But it was covered by other instructions given.

5. No. 8 was properly refused. The law was properly declared in No. 3, given by the court on its own motion. The making of alcoholic liquor is prohibited if the liquor so made is such as *may be* used as a beverage.

HART, J. Ed Lowery prosecutes this appeal to reverse a judgment of conviction against him for the crime of manufacturing spirituous or fermented liquors. The principal contention made by counsel for appellant is that the evidence is not legally sufficient to support the verdict.

(1) Ed Lowery lives out in the country from Hot Springs, in Garland County, Arkansas, and in the fall of 1917 was suspected of making whiskey. In November of that year a search was made of his premises by the officers, and five barrels of mash were found in a little house back of his dwelling house. The mash was composed of sprouted corn, meal and sugar or molasses with water. The barrels were bubbling and popping, a process which the mash went through with while souring. A watch was kept over appellant's premises for several hours each night for about a week. He was not discovered making the whiskey, but one of the officers, who saw the contents of the five barrels, stated that he was familiar with the process of manufacturing whiskey and that the barrels contained what is called beer or singlings; that the meal, water and other ingredients in the barrel had arrived at that degree of fermentation where it was ready to be run off for use; that a small furnace was found near by which was covered with freshly cut pine tops; that a worm such as is used in primitive stills was also found hidden in a pile of logs near by and fresh pine tops were piled upon it; that they also found a container concealed in a pile of logs; that it was customary to run the

mash or beer twice through a primitive still of this kind before it was ready for use as finished product; that the mash was of a sweetish taste when they first found it but it became sourer as the process of fermentation went on; that the mash or beer was much thinner than mash which is usually ground up for hogs.

Appellant denied having either made or sold any whiskey. He testified that he kept a number of hogs and that the mash had been prepared for their use. He said that it consisted of bran, chops and water; that he had the furnace out there for the purpose of cooking the mash for the hogs; that he took the container out of the furnace after he was through cooking the mash and put some pine tops over it to keep the hogs from getting into the fire; that he did not know anything about the worm which was found near there; that he had no idea how the worm came to be covered with pine tops as was the case with the furnace. Other witnesses corroborated the testimony of appellant.

The Legislature of 1915 made it unlawful for any person to manufacture or to be interested in the manufacture of spirituous or fermented liquors after January 1, 1916. Acts of 1915, page 98.

The testimony of the State, if believed by the jury, was sufficient to warrant a verdict of guilty. According to the testimony of the State a furnace, a container and a worm which might be used in the distillation of liquors out of corn was found on appellant's premises near his dwelling house. It also appeared that five barrels containing corn meal, molasses or sugar and water undergoing the process of fermentation were found on appellant's premises in a little house near to his dwelling house. One of the witnesses, who was familiar with the process of distilling fermented liquors from corn, said that this beer or singlings had been run through the still once, but that it was necessary to run it through the still of the kind found there twice before it was ready for use as a finished product. Although the liquor may be improved by running it through the still twice, that is not necessary in

order to make it spirituous or fermented liquor within the meaning of the statute. To run beer through the process of distillation once is a violation of the statute; for spirituous or fermented liquors are thereby distilled out of the corn. *State* v. *Summey*, 60 N. C. 496.

(2) It is next insisted that the court erred in failing to instruct the jury that it was necessary to prove that the liquor had been made since January 1, 1916. Our statute makes it unlawful to manufacture spirituous or fermented liquors after January 1, 1916. It was not necessary, however, to instruct the jury that the liquor must have been made after that time for the undisputed evidence shows this to be a fact. The only dispute is as to whether or not appellant was making a mash for his hogs or was distilling spirituous or fermented liquors.

(3) It is next insisted that the court erred in refusing to give an instruction stating the law applicable to circumstantial evidence requested by appellant. We do not deem it necessary to set out the instruction. On its own motion the court instructed the jury on this phase of the case as follows:

"Before you can convict defendant all the facts and circumstances when taken together must be inconsistent with any reasonable hypothesis except that he is guilty. In other words, if all the facts and circumstances proved may be true, and they can be explained in any reasonable way consistent with defendant's innocence, he is entitled to an acquittal. But if they can not be explained in any reasonable way consistent with the defendant's innocence, he should be convicted." This instruction fully covered the law on this point.

(4) Finally it is insisted that the court erred in permitting Austin Brown to testify that during the summer of 1917 he had purchased a quart of whiskey from appellant. There was then exhibited to Brown a sample of the liquors which the officers had found on the premises of appellant and he was requested to smell and taste it. After doing so, he testified that it was about the same kind of liquor as that purchased by him from ap-

pellant. Appellant objected to the introduction of this testimony on the ground that he had been acquitted of selling liquor to Austin Brown and that the charge embraced the sale about which Brown was testifying. The testimony was competent. The witness testified that he had purchased from appellant liquor of the same kind as that which he was charged with making. This was a circumstance to be considered by the jury in determining whether or not the appellant was manufacturing liquor. *Larkin* v. *State,* 131 Ark. 445, and *Turner* v. *State,* 130 Ark. 48.

Moreover, the appellant testified in his direct examination that he had neither sold nor manufactured whiskey. Of course, the selling of whiskey was a collateral matter, but, having testified about that matter himself, appellant could not complain that the State was allowed to contradict him by evidence showing to the contrary. *Adams* v. *State,* 93 Ark. 260.

The judgment will be affirmed.

BURTON v. STATE.

Opinion delivered May 27, 1918.

CRIMINAL LAW—PEREMPTORY INSTRUCTION OF GUILTY.—In a criminal prosecution, the trial court is without power to peremptorily instruct a verdict of guilty, where the crime charged is punishable by fine or imprisonment or both.

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

Brundidge & Neelly, for appellant.

It is error to direct a verdict in a criminal case where the offense is punishable by fine and imprisonment. 130 Ark. 234.

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

Confess error. 84 Ark. 564; Act 13, Acts 1917, § 19; 131 Ark. 572; *Parker* v. *State,* 130 Ark. 234.

HUMPHREYS, J. On the 15th day of October, 1917, information was filed by the deputy prosecuting attorney of White County in a magistrate's court against appellant, charging him with shipping and bringing alcoholic liquors into White County, Arkansas, on or about the 11th day of October, 1917.

On the same date and at the same time, in the same court, the deputy prosecuting attorney filed information against appellant, charging him with unlawfully bringing and causing to be brought alcoholic liquors into the State of Arkansas, on or about the 11th day of October, 1917.

Appellant pleaded not guilty to each charge, and, at his request, the causes were tried together.

Appellant was convicted on both charges, from which judgment of conviction he appealed to the circuit court.

It appears that the causes were tried as a consolidated case in the circuit court before a jury upon the affidavits filed in the magistrate's court and the testimony of witnesses.

At the conclusion of the evidence, the court instructed the jury to find the defendant guilty, and, in response to the court's peremptory instruction, the jury returned the following verdict: "We, the jury, find the defendant guilty as charged, and place the fine of ($400) four hundred dollars. I. R. Pence, Foreman." A judgment was rendered against the appellant in accordance with the verdict, from which verdict and judgment an appeal has been prosecuted to this court.

Appellant is charged with a violation of the liquor laws under Act 13, Acts 1917, of the General Assembly of Arkansas. The punishment imposed for a violation under said act is found in section 19 thereof, which is as follows:

"That any person, firm or corporation violating any of the provisions of this act, except otherwise expressly provided herein, shall upon conviction be fined not less than one hundred dollars, and not more than one thousand dollars, for each offense, and may be confined not

less than thirty days nor more than ninety days in the county jail."

It is insisted by appellant and conceded by the Attorney General that the trial court erred in directing a verdict of guilty for the reason that the trial court is without power to peremptorily instruct a verdict of guilty where the crime charged is punishable by fine or imprisonment or by both. The insistance of error by appellant, and the confession thereof by the Attorney General, is in keeping with the adjudications of this court in like cases. *Roberts* v. *State,* 84 Ark. 564; *Wylie* v. *State,* 131 Ark. 572.

We deem it unnecessary to consider the second assignment of error.

The judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

STATE v. BROWN.

Opinion delivered June 3, 1918.

1. CRIMINAL LAW—APPEAL FROM JUSTICE COURT—COST BOND.—Upon an affidavit filed in justice court, one B. was convicted of larceny. B. appealed to the circuit court. *Held,* where no motion was made to require a bond for costs to be given in the justice court, the law does not require the prosecuting witness to give a bond for costs in the circuit court on appeal.
2. CRIMINAL LAW—JEOPARDY—SELECTION OF JURY.—In a criminal case, until the entire jury is selected and sworn, jeopardy does not attach.

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

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

1. No request was made in the justice's court for a cost bond. By going to trial without demanding a cost bond appellee waived his right. Kirby's Digest, § 2476; 111 Ark. 51; 124 *Id.* 20; 37 *Id.* 405.

2. Appellee has never been in jeopardy, as the jury had not been sworn. **48 Ark. 36.**

HART, J. On July 7, 1917, Fred Brown filed an affidavit before a justice of the peace in Fulton County, Arkansas, charging R. W. Brown with the crime of petit larceny. The defendant was convicted before the justice of the peace and appealed to the circuit court. There a motion by the defendant to quash the judgment of the justice of the peace was sustained and the State appealed to this court. The court held that the circuit court erred in quashing the judgment because under the statute it should have tried the case anew as if no judgment had been rendered in the justice court. Therefore the judgment of the circuit court was reversed and the cause remanded for a new trial. *State* v. *Brown,* 131 Ark. 127.

After the case had been remanded and had been called for trial in the circuit court, but before the jury had been impaneled and sworn to try the case, the defendant made a motion to dismiss on the ground that no bond for costs had been filed as required by section 2476 of Kirby's Digest. The motion of the defendant was sustained by the circuit court and the State has again appealed to this court. The circuit court erred in dismissing the prosecution for the failure of the prosecuting witness to file a cost bond. No motion was made to require a bond for costs to be given in the justice court and the law does not require the prosecuting witness to give a bond for costs in the circuit court. A failure to give bond under the statute is a matter to be pleaded in abatement in the justice court and the issue can not be raised in the circuit court for the first time. *Jones* v. *State,* 111 Ark. 51, and *Payne* v. *State,* 124 Ark. 20.

This court has held that, until the entire jury is selected and sworn, jeopardy does not attach. *Whitmore* v. *State,* 43 Ark. 271, and *State* v. *Ward,* 48 Ark. 36.

In the present case the jury had not been impaneled and sworn and the court dismissed the prosecution.

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

STATE v. ESMOND.

Opinion delivered June 10, 1918.

1. LARCENY—ALLEGATION OF OWNERSHIP—SPECIAL OWNERSHIP—A special ownership which entitles one to the exclusive possession and control of the stolen property is sufficient to support an allegation of ownership.
2. LARCENY—SPECIAL OWNERSHIP.—An indictment charged the larceny of certain oats growing on the farm and soil of one M. M. was not the owner but rented the land from D., the true owner, but M., by his tenancy was entitled to the possession of the oats, and the indictment held valid.

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

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

It was error to direct a verdict. There was no fatal variance. It is true the land was owned by Dozier, but Montgomery had such special ownership or interest as entitled him to the custody and possession of the growing crops. The proof was sufficient to sustain the allegations as to ownership. 80 Ark. 495; 42 *Id.* 73; Kirby's Digest, § 1900.

SMITH, J. Appellees were indicted for the crime of larceny, alleged to have been committed by stealing "a certain quantity of oats growing on the farm and soil of W. H. Montgomery." The indictments were returned under section 1900 of Kirby's Digest, and testimony was introduced tending to show that appellees were guilty as charged except that Montgomery was not the owner of the land from which the oats were cut and removed. The land belonged to John Dozier, and Montgomery was a tenant of Dozier, and under his contract was to pay as rent for the land "one-third of the oats harvested." But

Montgomery had the exclusive possession of the land on which the oats were growing, and it was his duty under his contract with Dozier to harvest the oats, and he had the exclusive possession of the land for this purpose.

The court directed the jury to return a verdict of not guilty, upon the theory that there was a variance between the testimony and the allegations of the indictment, and the State has prosecuted this appeal.

The court erred in directing a verdict of not guilty. It has been several times held by this court that a special ownership which entitles one to the exclusive possession and control of the stolen property is sufficient to support an allegation of ownership. It is true the land was owned by Dozier, and not by Montgomery, but Montgomery had such special interest in the land by virtue of his tenancy as entitled him to the custody and possession of the crops growing thereon, and it is the purpose of the statute to protect such possession. Montgomery's tenancy and possession of the land gave him such an interest in the oats, until they had been harvested and a division thereof made, as entitled him to their exclusive possession, and such ownership and possession sufficiently supports the general allegation of ownership. *Merritt* v. *State,* 73 Ark. 32; *McCowan* v. *State,* 58 Ark. 17; *Cook* v. *State,* 80 Ark. 495; *Scott* v. *State,* 42 Ark. 73; *Blankenship* v. *State,* 55 Ark. 244.

The court was, therefore, in error in directing a verdict of not guilty.

CARTY v. STATE.

Opinion delivered June 10, 1918.

LIQUOR—ILLEGAL SALE—DEFENSE OF INSANITY.—Under the statutes, the sale of liquor, and not the intent with which it is sold, constitutes the offense. Voluntary intoxication to the extent that one can not comprehend the criminality of the act of selling liquor is not a defense to the crime; one must indulge in drink until it produces a permanent or periodical insanity before the insanity caused thereby can be pleaded as a defense to this character of crime.

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

W. P. Smith, for appellant.

The court erred in refusing instruction No. 1, asked by appellant, and in giving No. 6 for the State. 100 Ark. 189; 76 *Id.* 286; 40 *Id.* 511.

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

1. Instruction No. 6 for the State correctly states the law as to the defense of insanity in a case of this kind. 50 Ark. 511; 120 *Id.* 530; 100 *Id.* 189; 133 Ark. 38.

2. Voluntary drunkenness is not a defense for any crime. 40 Ark. 511; 43 *Id.* 331; 54 *Id.* 283; 110 *Id.* 300; 34 *Id.* 341.

3. It is the sale of liquor that constitutes the crime. Specific intent is not the gist of the crime. The offense is the sale. 91 Ark. 503; 34 *Id.* 469.

4. Instruction No. 1 for appellant was properly refused. Cases *supra.*

HUMPHREYS, J. Appellant was indicted in the Eastern District of Lawrence County for selling liquor on the 1st day of January, 1918, and was thereafter convicted of said crime. From the judgment of conviction he has prosecuted an appeal to this court.

Appellant's main defense to the charge was insanity. The uncontradicted evidence showed that in the year 1914 appellant became insane for several months on account of continuous drinking; that he was placed in the Hospital for Nervous Diseases for treatment; that he remained there some three or four months, after which time he was taken to his brother's home at Walnut Ridge; that he recovered, but thereafter the slightest intoxication would produce temporary attacks of insanity; that on several occasions he returned from the State hospital, and prior to the time of the alleged sale of the liquor he had several temporary attacks of insanity caused by drinking; that he was under his brother's care about a week prior to the alleged sale, on account of drinking.

Appellant's evidence tended to show he was not conscious of having sold liquor to the State's witnesses.

The evidence for the State tended to show that most of the time appellant was able to work and look after his own affairs and that he was sober and not under the influence of liquor and not insane at the time he sold the liquor to the State's witnesses.

It is contended by appellant that the court committed reversible error in giving instruction No. 6 over the objection of appellant and in refusing to give instruction No. 1, requested by appellant.

Instruction No. 6, given over the objection of appellant, is as follows: "To establish this defense of insanity, the defendant must show by a preponderance of the evidence that at the time of the alleged sale or sales he was insane to such an extent as to render him incapable of distinguishing right from wrong in respect to the sale of liquor; or, that if he knew that he made such sale or sales that his insanity was such that he was ignorant that it was wrong. The mere fact, however, that the defendant may have been drunk at the time of the alleged sales in this case would not excuse him, for under the laws of this State voluntary drunkenness is not an excuse for any crime or misdemeanor."

Instruction No. 1, requested by appellant and refused by the court, is as follows: "If you believe from the evidence that the defendant has a diseased and infirm mind, even though it was caused by drunkenness, and that such infirmity or disease so affected his mind that he had temporary spells of loss of mind, and that he was suffering from such infirmity to the extent that he did not appreciate the criminality of his act at the time he sold the liquor, if you find he sold it, to the prosecuting witness, he would not be guilty of any offense and you should acquit."

Under our law, the sale of liquor, and not the intent with which it was sold, constitutes the offense. Voluntary intoxication to the extent that one can not comprehend the criminality of the act of selling liquor is not a

defense to the crime. One must indulge in drink until it produces a permanent or periodical insanity before the insanity caused thereby can be pleaded as a defense to this character of crime. One of our cases describes the condition of mind resulting from continuous drinking, which may be pleaded as a defense to crimes requiring no specific intent, as a "fixed insanity." *Byrd* v. *State,* 76 Ark. 286; *Alford* v. *State,* 110 Ark. 300.

Instruction No. 6, given by the court, in its broadest interpretation announced the law. It carried the idea that one temporarily bereft of reason on account of voluntary drunkenness could be convicted of selling liquor, while one insane on that account could not. The idea might have been more aptly and accurately expressed, and perhaps should have been, because the province of instructions is to state and apply the law to facts in a particular case so that it may be readily understood by the mind untrained in the law. We find no reversible error in instruction No. 6. If appellant desired a declaration of law more definitely conveying the idea that periodical insanity produced by the continuous use of liquor would constitute a defense to the crime if committed during an insane interval, he should have requested an instruction clearly and definitely embodying that idea. Instruction No. 1, requested and refused, is misleading in this regard. The jury might have inferred from it that the "temporary spells of loss of mind" caused by voluntarily getting drunk would excuse him. Nearly every man who gets drunk has a "temporary spell of loss of mind" while under the influence of the intoxicant. As before stated, a fixed insanity must result from continued drinking, which prevents one from knowing whether the act committed was right or wrong, either permanently or at intervals, before it can be interposed as a defense to such crimes.

No error appearing, the judgment is affirmed.

PATRICK v. STATE.

Opinion delivered June 17, 1918.

1. SEDUCTION—TESTIMONY OF PROSECUTRIX—CORROBORATION.—In a prosecution for seduction, *held* the testimony of the prosecuting witness was sufficiently corroborated by that of her sister and father as to defendant's promise to marry the prosecutrix, and that the evidence was sufficient to warrant a conviction.

2. SEDUCTION—PROOF OF PROSECUTRIX' REPUTATION—HARMLESS ERROR.—In a prosecution for seduction, where neither the chastity nor the veracity of the prosecutrix has been brought into question, it is error to permit the state to introduce testimony to establish these facts, but since such fact was presumed the error of admitting the testimony was harmless.

3. EVIDENCE—FACT PRESUMED—HARMLESS ERROR.—The admission of incompetent evidence to prove what the law would otherwise presume, is harmless.

4. SEDUCTION—PROOF OF PROSECUTRIX' REPUTATION—FORM OF OBJECTION.—An objection to the introduction of testimony as to the chastity and veracity of prosecutrix in a seduction case must be made specifically.

5. VENUE, PROOF OF.—Venue is an issue to be proved by a preponderance of the evidence.

Appeal from Pulaski Circuit Court; *John W. Wade,* Judge; affirmed.

Gardner K. Oliphint, for appellant.

1. The first act of intercourse completes the offense and subsequent acts do not constitute seduction. The first act was at Fort Logan H. Roots within the jurisdiction of the United States. The State court had no jurisdiction. The courts take judicial knowledge of the fact that Fort Roots is a fort of the United States, jurisdiction over which was ceded by the State to the United States. Kirby's Digest, § § 3469, 3478-9-80-81, etc.; 90 Ark. 292; 81 Pac. 450; 106 *Id.* 337; 29 Ark. 293; 53 *Id.* 46; 87 *Id.* 406; 16 Cyc. 859; 110 Ark. 595; 24 L. R. A. (N. S.), 404; 146 U. S. 325; 209 *Id.* 36; 2 Crawford's Dig. 1355, 1951, and many others.

2. The offense was complete on the first act and subsequent acts can not be relied upon for conviction. Kir-

by's Dig., § 2043; 113 Ark. 520; 40 *Id.* 482-6; 33 Mich. 112; 46 N. E. 1040-2; 1 Parker, 474, 480; 26 N. Y. 203, 207; 8 Barb. 603; 49 Ia. 531; 46 So. 708; 113 Ark. 520; 93 Va. 815; 21 S. E. 502; 21 S. W. 764; 157 Pac. 704; 132 N. W. 431; 30 L. R. A. (N. S.), 173.

3. It was reversible error to permit the State to prove, in its main case, the general reputation of prosecutrix in the community for chastity and morality, before the chastity or veracity of the prosecutrix was questioned The chastity was presumed, and the State was under no duty to allege or prove it. 40 Ark. 482; 71 *Id.* 62; 84 *Id.* 69. The error was prejudicial. 62 Ark. 270; 40 *Id.* 482; 59 *Id.* 431; 73 *Id.* 139; 104 N. W. 722. See also 111 Ark. 134; 73 Fed. 774; 167 U. S. 624.

4. The testimony is insufficient to sustain the verdict. The prosecutrix was not sufficiently corroborated. 77 Ark. 16; 40 *Id.* 482; 73 *Id.* 265.

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

1. The State court had jurisdiction. The testimony only shows that the first act was "on that hill" on which Fort Roots was located. The jurisdiction of the State courts is not defeated by the sections of the Digest quoted by appellant. The mere ceding jurisdiction to the United States is not sufficient—an acceptance must be shown. On question of jurisdiction, see 209 U. S. 37; 146 *Id.* 329; 114 *Id.* 542, and others.

2. It was not reversible error to prove the good reputation of prosecutrix, as part of the main case. The admission of incompetent evidence to prove what the law would otherwise presume is harmless. 8 Ark. 423; 87 *Id.* 243.

3. The evidence is ample to sustain the verdict. The testimony of the prosecutrix is corroborated as to the promise and first act by the sister, by circumstances, letter, etc. 77 Ark. 468; 40 *Id.* 482.

WOOD, J. Appellant was indicted, tried and convicted of the crime of seduction and duly prosecutes this

appeal. The prosecutrix testified that defendant began keeping company with her in November, 1916. At that time she was not yet seventeen years of age. He visited her every week or two from November until May. Defendant lived at Vilonia, Faulkner County, Arkansas. He is the only man she kept company with from November to May. Defendant began to have sexual intercourse with witness in February or March, 1917. The reason she permitted the defendant to have sexual intercourse with her was because he promised to marry her. She would not have done so had it not been for such promise. She never had sexual intercourse with any other man. Her baby was born December 26, 1917, and the defendant is its father. Defendant had intercourse with witness three or four times. The first time was at Fort Logan H. Roots; that was when he promised to marry witness.

On cross-examination the prosecutrix was asked: Q. The first intercourse was committed at Fort Logan H. Roots? She replied, "On that hill."

The testimony of the prosecutrix shows that after the first act of intercourse defendant continued to have sexual intercourse with her in February or March up to May, 1917. She was asked, "Where did the intercourse occur?" and answered, "We were coming from town." She was asked, "Was that in North Little Rock, Pulaski County, State of Arkansas?" and answered, "Yes." She also testified that she received a letter from defendant after the acts of sexual intercourse in which he promised to marry her. She had burned the letter.

Witness Effie Wright was about fifteen years old and a sister of the prosecutrix. Effie testified corroborating the testimony of the prosecutrix as to her associations with the defendant. She stated that they were engaged to be married; that she overheard a conversation in February or March in which defendant told the prosecutrix that he loved her better than any other girl and wanted her to be his wife. She testified that she saw the letter which her sister received from the defendant, in which he said that he would marry her. Effie also testified that

next to the last Saturday in March she had a conversation with the defendant as follows: "He asked me how I would like to be his sister-in-law, asked me how much I would take for sister."

Albert Wright, the father of Belle, testified to the frequent associations of defendant with his daughter Belle. Witness had a good opinion of defendant. Defendant took his meals at witness' house. He let his daughter go with defendant. He thought defendant was going to marry her. When he discovered that his daughter was pregnant he asked her who the man was and she told him that defendant was the man. Witness had the defendant arrested.

(1) Appellant contends that there is no evidence to corroborate the prosecutrix as to the alleged promise of marriage, and the alleged act of sexual intercourse, and that therefore there is no evidence to sustain the verdict. In *Lasater* v. *State,* 77 Ark. 468, we held that the testimony of the prosecutrix in a seduction case may be corroborated by circumstances as well as direct evidence. In that case, page 472, we quoted approvingly from the opinion in *Armstrong* v. *People,* 70 N. Y. 43, as follows: "The promise of marriage is not an agreement usually made in the presence or with the knowledge of third persons. Hence the supporting evidence possible in most cases is the subsequent admission or declaration of the party making it; or the circumstances which usually accompany the existence of an engagement of marriage, such as exclusive attention to the female on the part of the male, the seeking and keeping her society in preference to that of others of her own sex, and all those facts of behavior toward her which, before parties to an action were admitted as witnesses in it, were given to the jury as proper matter for their consideration on that issue."

Under the doctrine of the above case the testimony of the prosecutrix was corroborated by both the direct evidence of her sister tending to prove the subsequent admissions and declarations of the defendant of the promise of marriage as shown by his conversation and

also by his letter. The prosecutrix was corroborated as to the promise of marriage and also as to the act of sexual intercourse by the testimony of her sister and father tending to prove the circumstances which usually accompany an engagement of marriage, and the opportunities thus afforded for sexual intercourse.

(2-3) On the main case several witnesses called on behalf of the State testified that they were acquainted with the general reputation of the prosecutrix in the community where she lived for chastity and morality, and that such reputation was good. The appellant objected to this testimony on the ground that "same was incompetent, irrelevant, immaterial, prejudicial, and an effort on the part of the State to bolster the testimony of the prosecutrix, her reputation for chastity, morality or anything else not having been attacked or assailed."

It was error to permit this testimony to go to the jury at that juncture of the proceedings, because neither the chastity nor the veracity of the prosecutrix had been questioned by the appellant. In the absence of proof to the contrary, the presumption is that prosecutrix was chaste at the time of the alleged act of sexual intercourse under promise of marriage. Therefore, the State was not called upon to affirmatively establish such fact by evidence to that effect before appellant had attempted to prove that she was unchaste. The majority of the court, however, are of the opinion that the obvious purpose of the above testimony was to prove that the prosecutrix was chaste and that since such fact would have been presumed anyway, it was at most only harmless error to permit the State to prove it. The admission of incompetent evidence to prove what the law would otherwise presume, is harmless. *Braddock* v. *Wertheimer,* 68 Ark. 423.

(4) Furthermore, the majority have reached the conclusion that the language in which the objection was couched constituted only a general objection to the testimony; that in the form presented it was only an objection to testimony tending to prove the general reputation of

the prosecutrix for chastity, morality, etc., and that this was not sufficient to present the specific objection that the court erred in permitting evidence of the good character of the prosecutrix for veracity before her general character as a witness had been assailed. See section 3140, Kirby's Digest. The majority, therefore, conclude that there was no prejudicial error in admitting the above testimony as has been shown.

The writer dissents from the above view, being of the opinion that the language used in making the objection was sufficient to call the attention of the court specifically to the fact that the State was attempting to "bolster the testimony of the prosecutrix." In other words, that the State was introducing evidence of the good character of the prosecuting witness before her general reputation had been impeached, which, under section 3140 of Kirby's Digest, *supra*, can not be done. Furthermore, the writer is of the opinion that, even if the language only presented a general objection, it was sufficient to present the question of the competency and relevancy of the testimony. *Vaughan* v. *State*, 58 Ark. 353-373. The statute itself, *supra*, renders the testimony incompetent.

The important and interesting question as to whether the United States had exclusive jurisdiction over the offense charged against the appellant is ably presented in briefs of counsel for the appellant and also for the State. But the facts as to the venue do not call for a decision on the question of jurisdiction, and we therefore pretermit a discussion of that issue until it is squarely raised by the facts and a decision becomes necessary.

(5) Venue is an issue to be proved by a preponderance of the evidence. *Douglass* v. *State*, 91 Ark. 492. The testimony tended to prove that the first act of sexual intercourse under promise of marriage was "on that hill," meaning the hill upon which Fort Logan H. Roots is located, that it was in Pulaski County and the State of Arkansas. While the prosecutrix on direct examination testified that the first act of sexual intercourse was at Fort Logan H. Roots, yet on her cross-examination, in

answer to the question, "The first intercourse was committed at Fort Logan H. Roots?" she answered, "On that hill." Taking the testimony of the witness as a whole, the jury were warranted in finding that the first act of sexual intercourse occurred, as already stated, on the hill on which Fort Logan H. Roots is situated in Pulaski County, in the State of Arkansas.

There was no testimony that the identical place on that hill where the first act of sexual intercourse took place was covered by buildings, walls, or that it was within any permanent inclosure belonging to the United States. Therefore, no issue as to the jurisdiction is presented and the venue is established to give the Pulaski County Circuit Court jurisdiction.

A majority is of the opinion that there is no reversible error, and the judgment is, therefore, affirmed.

SISEMORE v. STATE.

Opinion delivered June 24, 1918.

1. PANDERING—SUFFICIENCY OF INDICTMENT.—An indictment charged that defendant did "transport and cause to be transported and did unlawfully and feloniously aid and assist in obtaining transportation for Julia Howard, a female person, through, across * * * the State of Arkansas, and through and across Madison County in the State of Arkansas, for the purpose of prostitution and with the intent and purpose to induce, entice and compel such female person to become a prostitute." *Held,* the indictment sufficiently charged a crime under § 5 of the Act of 1913, p. 407.
2. PANDERING—INTERSTATE JOURNEY.—The Act of 1913, page 407, denouncing the crime of pandering, *held* not an exercise of control over interstate commerce, in its provision over the bringing of a female person into, through or across the State for purposes of prostitution.
3. PANDERING—CONSTRUCTION OF ACT—PROSTITUTION.—In the act of 1913, p. 407, making it a crime to transport a female person into, across or through the State for purposes of prostitution, the word prostitute means a woman given to indiscriminate lewdness, and the word "prostitution" means a state of existence for that purpose, and does not include merely the act of a woman occupying the relation of concubinage with one man.

Appeal from Madison Circuit Court; *Jos. S. Maples,* Judge; reversed.

Sullins & Ivie, for appellant.

1. The indictment is bad on demurrer. It does not state facts sufficient to constitute a public offense under Act 105, Acts 1913, 407. The State had no power to pass the act under the Interstate Commerce law. Const. U. S., § 8, clauses 3 and 18, and the Mann Act, 8 U. S. Comp. St. 1916, § 8813; 16 Fed. 193; 223 U. S. 1; 227 *Id.* 308; 48 Mont. 456; Ann. Cas. D 1915, 1017; 136 La. 658.

2. Incompetent testimony was admitted. The wife was disqualified. Kent's Comm. 179; Wigmore on Ev., § 2227 *et seq.* It was prejudicial. Underhill on Ev., § 185; Wigmore on Ev., § 2246; 40 Fla. 216; 137 U. S. 496; Underhill, Cr. Ev. 185; 57 Miss. 243; 119 Mo. 485; 127 Tenn. 355; 186 S. W. 95; 63 Atl. 317.

3. The court erred in instructing the jury and there is no proof of the crime charged under the law. 126 Ark. 188; 111 *Id.* 214. The defendant was erroneously convicted.

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

1. The statute is valid so far as it affects this case. The statute is severable and the constitutional portion will be enforced. 6 R. C. L. 131, § 130; 91 Am. Dec. 262; 105 U. S. 305; 65 Kan. 240; 6 R. C. L., § § 121, 130. Appellant violated the Mann act and our pandering statute by transporting a woman *through* or *across* the State for purposes of prostitution.

2. There was no error in requiring the wife to testify. Acts 1913, Act 105, § 7; 3 Wigmore on Ev., § 2196.

3. There was prejudicial error in the instructions. 126 Ark. 188; 71 *Id.* 86; 88 *Id.* 99; 102 *Id.* 302. The proof is sufficient to sustain the conviction.

McCULLOCH, C. J. The indictment in this case is founded on an alleged violation of the act of February 26,

1913, against pandering (Acts 1913, page 407), and reads as follows:

"That the said T. J. Sisemore, in the county of Madison, in the State of Arkansas, on the 15th day of March, 1917, did unlawfully and feloniously transport and cause to be transported and did unlawfully and feloniously aid and assist in obtaining transportation for Julia Howard, a female person, through, across and out of the State of Arkansas and through and across Madison County, in the State of Arkansas, for the purpose of prostitution and with the intent and purpose to induce, entice and compel such female person to become a prostitute, and for the purpose of having sexual intercourse with her, the said Julia Howard, he, the said T. J. Sisemore, not being the husband of her, the said Julia Howard, against the peace and dignity of the State of Arkansas."

The language of the indictment is slightly confusing, but it was obviously the purpose of the pleader to frame the indictment under section 5 of the statute referred to above, which reads as follows:

"Any person who shall knowingly transport or cause to be transported or aid or assist in obtaining transportation for, by any means of conveyance into, through or across this State, any female person for the purpose of prostitution or with the intent and purpose to induce, entice or compel such female person to become a prostitute, shall be deemed guilty of a felony, and upon conviction thereof be sentenced to the penitentiary for not less than two nor more than ten years; any person who may commit this crime in this section mentioned may be prosecuted, indicted, tried and convicted in any county or city in or through which he shall so transport or attempt to transport any female person as aforesaid."

(1) There is no attempt to charge an offense under section 1 of the statute, which makes it unlawful for any person "by promises, threats, violence, by any device or scheme, by fraud or artifice, or by duress of person or goods, or by use of any position of confidence or authority, or having legal charge," to "inveigle, entice, per-

suade, encourage or procure any female person to come into this State or to leave this State for the purpose of prostitution," or, not being married, for the purpose of having sexual intercourse. *Holland* v. *State,* 111 Ark. 214.

After eliminating, as surplusage, the confusing allegations in the indictment, we find enough left to constitute a charge of violating section 5, for there is a distinct allegation that the defendant did "transport and caused to be transported and did unlawfully and feloniously aid and assist in obtaining transportation for Julia Howard, a female person, through, across * * * the State of Arkansas, and through and across Madison County in the State of Arkansas, for the purpose of prostitution and with the intent and purpose to induce, entice and compel such female person to become a prostitute." The words "and out of" may be eliminated because they are not embraced in the statute, and also the words "and for the purpose of having sexual intercourse with her, the said Julia Howard, he, the said T. J. Sisemore, not being the husband of her, the said Julia Howard," may be eliminated for the same reason. Section 1 makes it unlawful, as before stated, for a person to entice or persuade a female by promises, threats, violence, etc., to come into this State or leave this State for the purpose of prostitution or for the purpose of sexual intercourse, where the guilty party is not the husband of such female; but section 5 has no reference to the transportation of a woman merely for the purpose of having sexual intercourse with her, whether or not the parties occupied toward each other the relation of husband and wife.

There was a demurrer to the indictment, but we think the charge is sufficient to constitute an offense under this statute.

(2) It is also contended that the statute is void for the reason that it is an interference with interstate commerce, a subject over which the Congress of the United States has exclusive control. This subject was dealt with at length by the Supreme Court of the United States in

a case passing on the validity of the act of Congress commonly known as the White Slave Traffic Act. *Hoke* v. *United States,* 227 U. S. 308. The statute was upheld as a proper exercise of the powers of the general government in the control of interstate commerce, but the court in the opinion clearly recognized the police powers of the State governments in the regulation of their internal affairs, and it was said that the exercise of the powers by the general government does not encroach upon the jurisdiction of the States. The instrumentalities of transportation between the States, including the transportation of passengers, is interstate commerce, and the control of Congress over this subject is supreme and exclusive, but men and women are not articles of merchandise, so as to make their own conduct a matter of interstate commerce, and the purpose for which they are brought into the State may be controlled by the State in the exercise of its police power. Our statute makes the purpose for which a woman is transported into the State the controlling element of the offense, and not the transportation itself. Therefore, the State has a right to impose the penalty without burdening interstate commerce.

We are of the opinion, therefore, that the power of the Legislature has not been exceeded in the enactment of this statute. The demurrer to the indictment was properly overruled.

There is no dispute about the facts of the case, and we are of the opinion that the testimony fails to make out a case of violation of the statute.

The parties resided in Madison County. Julia Howard was a widow. Defendant was married, but he and his wife had separated and a suit for divorce was pending. The defendant and Mrs. Howard began having sexual intercourse under a promise made by him to her that as soon as he obtained a divorce they would intermarry. Those relations continued between the parties, and during that time they left Madison County and went to Oklahoma, and after remaining there a while they

came back into Madison County. The proof shows that the defendant aided Mrs. Howard in procuring transportation and that after returning to the State he furnished her means of transportation into Madison County. They resided in Madison County for a time, still continuing the acts of illicit intercourse, but as soon as defendant procured the divorce from his former wife he and Mrs. Howard intermarried. There is no proof in the record at all tending to show any acts of intercourse on the part of Mrs. Howard with other men or that she held herself out or was held out by any one as being a lewd woman. The testimony simply presents a case of a man and woman living in illicit relation and having sexual intercourse without being married.

This brings up for consideration a definition of the words of the statute which makes it unlawful to transport a woman "into, through or across this State * * * for the purpose of prostitution, or with the intent and purpose to induce, entice or compel such female person to become a prostitute." The lexicographers are unanimous in defining a prostitute to be "a female given to indiscriminate lewdness." Most of them include the element of "gain" in the definition, but some of the authorities hold that indiscriminate lewdness, even without gain, constitutes prostitution. There are many cases on the subject in which this definition is referred to.

Our statute was perhaps prompted by the enactment of the White Slave Traffic Act, but the latter act is much broader in its terms, as it declares it to be unlawful for a person to transport "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice." The Supreme Court of the United States construed that statute in the case of *Caminetti* v. *United States,* 242 U. S. 470, and held that the language was not confined in its operation to commercialized vice, but embraced an act of transporting a woman

by the instrumentalities of commerce from one State into another for the purpose of having sexual intercourse with her by her permission and without any sort of coercion. In the opinion in that case a former opinion of the same court in the case of *United States* v. *Bitty,* 208 U. S. 393, was referred to, and it shows that the court recognized the true definition of the word "prostitution," but held that the language of the White Slave Traffic Act contained a much broader definition. In the Bitty case, *supra,* the court dealt with a statute which declared to be unlawful "the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose," and it was held that while the importation of a woman for the purpose of sexual intercourse or concubinage did not come within the definition of the word "prostitution," it came within the other definition of immoral purpose. A former statute had merely used the word "prostitution," but the act construed in that case amended the former statute and added the words "or for any other immoral purpose." The court said: "There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of prostitution. It refers to women who for hire or without hire offer their bodies to indiscriminate intercourse with men."

The statute now under consideration is so strikingly similar to the one in force in the State of Louisiana that it is evident that the framer of our statute, when he prepared it, had the Louisiana statute before him. The only difference between section 5 of our statute and the Louisiana statute is that the latter omits the word "into" and used the words "any woman or girl" instead of the words "female person," used in our statute. The Supreme Court of Louisiana, in construing the statute, held that the word "prostitution" means "the practice of a woman submitting to indiscriminate sexual intercourse with men for pay as distinguished from illicit sexual intercourse with one man. A woman who submits to illicit sexual intercourse with one man, not for pay, is not a prostitute

within the meaning of a statute that prohibits transporting a woman through or across the State 'for the purpose of prostitution or with the intent to induce her to become a prostitute.' " *State* v. *Thibodeaux,* 67 So. 973.

In the case of *Carpenter* v. *The People,* 8 Barb. 603, the New York court gave the following definition of the word prostitution: "All lexicographers agree substantially with Mr. Webster in his definition of the word prostitution, as heretofore stated. It is uniformly defined as being the acts or practice of a female offering her body to an indiscriminate intercourse with men. A prostitute is a female given to indiscriminate lewdness; a strumpet." The Kentucky Court of Appeals, in *Van Dalsen* v. *Commonwealth,* 89 S. W. 255, said that a woman was not a prostitute merely because she lived with a man without being married to him. Other cases on the subject, giving the same definition are: *State* v. *Porter,* 130 Ia. 690; *State* v. *Stoyell,* 54 Me. 24; *Haygood* v. *State,* 98 Ala. 61; *State* v. *Thuna,* 59 Wash. 689; *Commonwealth* v. *Cook,* 12 Metc. (Mass.), 93; *State* v. *Gibson,* 111 Mo. 92; *People* v. *Rice,* 277 Ill. 521, 115 N. E. 631.

There seems to be no contrariety of opinion whatever in the definition of this word, and we must assume that the Legislature used it in its ordinary sense as meaning a woman given to indiscriminate lewdness, and that the word "prostitution" meant a state of existence for that purpose and does not include merely the act of a woman occupying the relation of concubinage with one man.

There is not a particle of proof in the present case that the woman mentioned was ever guilty of any act of intercourse with a man other than the defendant himself, or that she was brought here for such purpose. All that the proof shows is that they occupied improper relations with each other until they could legally intermarry. The judgment is, therefore, reversed, and the cause is remanded for a new trial.

HOLMES v. STATE.

Opinion delivered July 8, 1918.

CRIMINAL LAW—BREACH OF PEACE—USE OF PROFANE AND ABUSIVE LANGUAGE TO ANOTHER.—Defendants *held* not guilty of the crime denounced in Kirby's Digest, section 1648, which prohibits the use of any profane, violent, abusive or insulting language toward another person, which is calculated in its common acceptation to arouse anger in the person addressed, where under the evidence the defendants continually applied to one H., a street vendor of potatoes, the title of "Taters."

Appeal from Craighead Circuit Court, Jonesboro District; *R. E. L. Johnson,* Special Judge; reversed.

J. F. Gautney, for appellants.

1. There is no evidence to connect Louis Holmes with the offense charged.

2. The court erred in its instructions and the evidence is not sufficient to warrant a conviction. The language was neither profane, vulgar nor abusive, nor was it insulting or calculated to produce anger. 99 Ark. 142; 9 C. J. 388; 15 Porto Rico, 198.

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

1. Admit that as to Louis Holmes the evidence is not sufficient.

2. There is no error in the instructions. 33 Ark. 140. The language used was insulting and abusive and calculated to arouse anger.

McCULLOCH, C. J. Appellants, Clifford and Louis Holmes, are lads 13 or 14 years of age, and were arrested and convicted before a justice of the peace of Craighead County for violation of the statute which provides that if any person "shall make use of any profane, violent, abusive or insulting language toward or about another person, in his presence or hearing, which language in its common acceptation is calculated to arouse to anger the person about whom or to whom it is spoken or addressed, or to cause a breach of the peace or an assault, every such

person shall be deemed guilty of a breach of the peace," etc. Kirby's Digest, sec. 1648.

The case was tried in the circuit court on appeal and the trial resulted in the conviction of appellants. It appears from the evidence that Fred Hatch, the prosecuting witness, was a street vendor of potatoes at the town of Bay, Craighead County, and in crying his wares was accustomed to announce the sale of potatoes by calling out "taters" in a tone of voice which excited merriment on the part of those who heard him, and the boys in the neighborhood gave him the nickname of "Taters," to which Hatch took serious offense. This had been going on for nearly two years according to the testimony, and Hatch had frequently shown irritation at the use of the nickname in connection with himself, and had indicated to the boys that its use was offensive to him. The evidence shows that the boys sometimes applied other nicknames to him, among other things calling him "Flashlight" and "Sixshooter," and also "Chicken" and "Pumpkin." The judgment of conviction is, however, sought to be upheld upon the use of the nickname "Taters," which seems to have been especially offensive to Hatch.

It is contended that the evidence wholly fails to connect one of the appellants, Louis Holmes, with the use of the alleged offensive language towards Hatch, and the Attorney General concedes that the evidence is insufficient to convict him.

There was sufficient evidence, however, to warrant the conclusion that Clifford Holmes used the nickname towards Hatch, together with other boys about his own age, and that Hatch was very much offended at the conduct of the boys in frequently calling him by the nickname "Taters."

The court, among other instructions, gave one to the jury submitting to them for determination the question whether or not the language used was such as in its common acceptation was calculated to arouse a person to anger and cause a breach of the peace. Counsel

for appellant insist that the instruction should not have been given and that the evidence was not sufficient to warrant a conviction, in that the language used by the boys does not come within the statute. It will be observed that the statute defines the character of language constituting the offense as "profane, violent, abusive or insulting language * * * which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace," etc. The language used must be in its nature "profane, violent, abusive or insulting" and it must be of that character which "in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault." It is not sufficient that the language used gives offense to the person to whom or about whom it is addressed, but it must be that which in its ordinary acceptation is calculated to give offense and to arouse to anger.

In *State* v. *Moser,* 33 Ark. 140, the defendant was accused of directing toward another person the language "go to hell, God damn you," and in passing upon the question of the guilt of the defendant, this court said that the language used was certainly profane, but that it was a question for the jury to determine whether the words were used under such circumstances as was calculated to arouse to anger the person to whom the words were addressed. In the present case the word used towards Hatch was neither profane, violent, abusive nor insulting, and was not in its common acceptation calculated to arouse a person to anger. The fact that Hatch became offended at the application to him of the nickname does not make the language such as is insulting according to its common acceptation. The nickname was used by the boys in a spirit of fun, doubtless because they ascertained that it irritated Hatch. It did not carry the implication of unlawful conduct or moral turpitude on the part of the person toward whom it was used. It was undoubtedly offensive to him and he showed his irritation

repeatedly, but the statute was not intended to reach cases where persons by the use of harmless nicknames or in a spirit of fun make use of nicknames or expressions which, although they are not calculated in their common acceptation to arouse anger, do in fact give offense because of the peculiar sensibilities of the person to whom or about whom the words are used. It may be considered bad taste for men or boys to indulge in such practice, but the law was not intended to reach such cases. We know that even innocent amusement at the expense of others sometimes brings about a breach of the peace, but those are not the things which the law meant to reach by this statute. It is only the language of the kind referred to which is calculated in its ordinary acceptation to arouse to anger or cause a breach of the peace that the statute denounces.

Our conclusion is, therefore, that the testimony in the case, given its strongest force, does not establish an offense under the statute. The judgment of the circuit court is reversed and the charge against each of the defendants is dismissed.

SMITH, J., (dissenting). If the only effect of the opinion in this case was to relieve the three boys of the five dollar fine imposed by the judgment of the court below, I would be constrained to pass it by without recording my dissent. But such is not its effect. The law as here announced applies to "grown-ups" as well as to boys, and it requires no stretch of the imagination to forecast some of the results which may flow from this decision, if the doctrine here announced is applied to a real, sure-enough lawsuit. The statute quoted from in the majority opinion has long been known as the peace-and-tranquility statute, and possibly no law in the books has been more wholesome. One can easily conjecture the quarrels and feuds and murders which the existence of this law, and its enforcement, has prevented, and its wholesome provisions should not be impaired.

Here the testimony was to the effect that Hatch discovered appellants and some other fifteen-year-old boys

in the act of cutting the stay-ropes of the tent of a little show which was being exhibited in the village of Bay, and he reported their conduct to the constable, who caused the boys to desist. Hatch testified that thereafter these boys "picked" on him. The boys say he called them Bohemians, but this Hatch denied. That, if true, however, would not have excused their conduct, because, as this court said in the case of *Moore v. State,* 50 Ark. 27, "Violent words can not excuse like violent words."

Hatch testified that this conduct continued for nearly two years until it became intolerable, and that he went to the boys and told them he did not want to slap them and did not want to compel their parents to pay fines, but that he would have them arrested if they did not stop their practice. The boys continued to apply these various nicknames to him, and he caused their arrest, and they were convicted in both the justice of the peace court and in the circuit court on appeal.

Hatch testified that the boys would halloo at him at various times and places and would follow him to the post office and poke their heads in at the door and call him the various nicknames they had given him. A Mr. Davis testified that the conduct of the boys finally "got on to Mr. Hatch," and Hatch himself testified that the conduct of the boys became unendurable.

In the case of *Moore* v. *State, supra,* in a discussion of the kind of language against the use of which the penalty of the statute was denounced, this court said:

"Whether language was in its nature calculated to arouse to anger or to provoke a breach of the peace, must be left to the jury, depending as it does upon the manner of the speaker, the relations of the parties, and the circumstances under which it was spoken."

These questions were submitted to the jury and the jury was told that a conviction could not be had unless they found the language used was, in its common acceptation, calculated to arouse Hatch to anger or to cause a breach of the peace, and the verdict of the jury should be conclusive of that fact.

Webster's New International Dictionary defines the verb "insult" as follows: "To treat with insolence, indignity, or contempt, by word or action; to affront wantonly."

The noun is defined as: "Gross indignity offered to another, either by word or act; an act or speech of insolence or contempt; an affront."

And the adjective "insulting" is defined as: "Containing, or characterized by, insult or indignity; tending to insult or affront; as, *insulting* language, treatment, etc." And the words "insolent," "impertinent," "impudent," "abusive," and "offensive," are given as synonyms of the word "insulting."

In view of these definitions it occurs to me that it was at least a question for the jury to say whether the language used under the circumstances was insulting.

There is in the life of most men something of which they are ashamed and would like to forget. It may be only some folly or indiscretion; or a personal peculiarity; or a physical defect. One might be reminded of this thing and know that others were also reminded by the use of some simple word or phrase or nickname which, standing by itself, would be innocuous, but which was used to insult, and accomplished the effect of producing great mental distress.

I am of the opinion that a wiser, sounder policy would be to permit the jury to say in a particular case, in accordance with the rule announced in *Moore* v. *State, supra,* whether the language used, under the circumstances under which it was used, was calculated, in its common acceptation, to insult the person to whom it was so spoken; and I, therefore, dissent from the opinion of the majority in this case.

RIX, ADMINISTRATOR, v. PETERS.

Opinion delivered July 8, 1918.

MORTGAGE—DESCRIPTION—DESCRIPTION OF THREE SIDES OF A CITY LOT.—A mortgage *held* valid which described three sides of the mortgaged premises, and where there was a sufficient description to establish the fourth side by reasonable intendment. *Held* further that the court properly reformed the description by adding the words "thence to the place of beginning," which was the description obviously omitted.

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

L. E. Sawyer, for appellant.

The description in the deed was not sufficient and was not notice to a subsequent innocent purchaser and it was error to reform the deed. 131 Ark. 107; 119 Ark. 301. Courts can not supply an omitted description. 137 Cal. 105; 42 Ore. 521. See also 13 Cyc. 606 (2), 549, and note 95; 17 N. Y. 620; 95 Ga. 163; 13 Cyc. 543, (11); 89 Ark. 489; 41 *Id.* 50; 30 *Id.* 654; 40 *Id.* 241; 170 Ala. 499; 53 Ark. 55.

A. J. Murphy, for appellees.

1. The description was sufficiently definite to identify the lots and where a call is plainly omitted by mistake the courts will supply the omission. 12 Ballard Real Est. 79; 10 *Id.* 159. See 130 Mass. 70; 17 N. Y. 620; 83 S. W. 550; 2 Devlin on Deeds (3 ed.), § § 850, 629a, 1012-13, 1031a; 2 S. W. 47; 43 *Id.* 378; 30 *Id.* 704; 27 Mo. 478; 48 *Id.* 194; 82 *Id.* 529; 94 *Id.* 676; 21 S. W. 1085; 51 Ark. 390; 8 R. C. L. 1073, § 128, p. 1049, § 103; 2 Devlin Deeds (3 ed.), § 1000; 100 S. W. 1188; 91 *Id.* 286; 11 Am. Cas. 163; Am. Cases, 1912b, 1065; 83 S. W. 550; Tiedeman, Real Prop. (2 ed.), § 830; 12 Cyc. 549; 22 S. E. 190; 8 R. C. L. 1073, 1049; 91 S. W. 286.

2. Lewis had notice by the provision in his deed. 2 Devlin on Deeds (3 ed.), § 1000; 43 Ark. 464; 29 *Id.* 650; 37 *Id.* 571; 60 *Id.* 595; 50 *Id.* 323; 108 *Id.* 490; 35 *Id.* 100.

McCULLOCH, C. J. This is a suit to foreclose a mortgage on real estate in the city of Hot Springs, which is described in the mortgage as follows:

"The following real estate, situated in the County of Garland, State of Arkansas, towit: Part of lots one (1) and eight (8) in block sixty-one (61) of the Hot Springs Reservation, according to the official plat of the United States Hot Springs Commissioners, more particularly described as follows: Commencing at the northeast corner of said lot 8; thence southerly on the east line of said lots 8 and 1 at Pleasant street one hundred and forty-four (144) feet; thence westerly on a line parallel with the north line of said lot 8 at Garden street fifty (50) feet; thence northerly in a straight line one hundred and forty-four (144) feet to a point on said north line of said lot 8 at Garden street sixty (60) feet west from the place of beginning."

It is alleged in the complaint that the description is incomplete in that it omits at the conclusion the words "thence to the place of beginning," but it is alleged that the words of the description are sufficient to constitute notice of the correct boundaries of the land intended to be conveyed, and the prayer is that the mortgage be reformed so as to embrace the omitted words completing the description, and that the mortgage, as thus reformed, be foreclosed.

The mortgagor had subsequently conveyed the property under correct description to another person who was made defendant in the case, and he claims to be an innocent purchaser without actual notice of the mortgage. The chancellor held that the description was sufficient to indicate the correct boundaries of the property sought to be conveyed, and he entered a decree foreclosing the mortgage.

It will be observed from the language used in the description that there is proper reference to and identification of the plats showing the particular lots and block out of which the property in controversy was carved. The plat was introduced in evidence and shows that lot 8

lies adjoining lot 1 on the north and abuts on Garden street on the north, and that lots 8 and 1 abut on Pleasant street on the east. The description used confines the property to be conveyed to a part of lots 1 and 8 of block 61, commencing at the northeast corner of lot 8, which is at the intersection of Garden street and Pleasant street, thence running in a southerly course 144 feet with the east line of lots 8 and 1 as they abut on Pleasant street, thence west 50 feet on a line parallel with the north line of lot 8 on Garden street, and thence north 144 feet to a point on the north line of lot 8, 60 feet west to the place of beginning.

This description gives the four corners of the property conveyed and in express language describes three sides. The omitted words refer to the fourth side of the lot, but we are of the opinion that even without the use of those words there is a clear implication that the line of Garden street between the two corners described was intended as the north boundary of the property conveyed. This is the necessary implication from the words used. It has been said by a text writer on this subject that, while it is generally necessary in a description of land to state all four sides of the tract to be conveyed, yet "where three are given, and there is sufficient description as to their courses and distances to establish the fourth by reasonable intendment, the deed will not be void." Tiedeman on Real Property, sec. 830. A very apt illustration of this doctrine is found in the case of *Commonwealth* v. *City of Roxbury,* 9 Gray, 451, where the court said: "The obvious and legal course, we think, is to lay down a plan on the land, according to ascertained boundaries, abuttals and monuments on these three sides, and thus see where the fourth would come; if it terminate on the sea or salt water, on a highway or public common, or on a well established line of private property, such deficient line will be supplied by necessary intendment, and the instrument be read as if it were so expressed."

There are many other authorities cited on the brief of counsel which sustain this rule. Applying it to the

case in hand, it is a clear inference from the description given of the three sides that the line of Garden street was intended to mark the north boundary of the lot to be conveyed. There is no ambiguity in the words of description, although there is a patent omission in the words necessary to expressly describe one of the four sides of the property in controversy. The incorporation of the omitted words "thence to the place of beginning" was not essential to the proper description, but it was not improper for the court to reform the instrument by incorporating those words so as to carry out the intention of the parties, and to make a description which would be sufficient on its face without indulging inferences.

Decree affirmed.

WAPPONOCCA OUTING CLUB v. ROAD IMPROVEMENT DISTRICT No. 3.

Opinion delivered July 8, 1918.

IMPROVEMENT DISTRICTS—ROADS—ORGANIZATION—RIGHT OF COMMISSIONERS TO APPEAL FROM ORDER OF COUNTY COURT.—Section 40 of Act 338, Acts of 1915, applies to all orders of the county court, and provides that the county court shall be open at all times for the purpose of making any such orders or entering any judgment in carrying forward the organization of the road district, and confers the right of appeal upon the property owners and upon the board of commissioners, from any order or judgment of the court.

Appeal from Crittenden Circuit Court, First Division; *W. J. Driver,* Judge; affirmed.

Berry & Wheeler and *T. K. Riddick,* for appellant.

1. It was error to refuse to dismiss the appeal of the commissioners. No appeal is allowed in the act (Act 138, Acts 1915, § § 14, 40) to the commissioners except for refusal to *enter* judgment refusing or rejecting assessments. Sec. 40 does not enlarge the scope of appeals allowed in sec. 14. See 26 Enc. Law (2 ed.) 608-10; 36 Cyc. 1119-20; 61 Ark. 494.

2. Jurisdiction of the circuit court on the Heafer appeal was confined to the land owned by Heafer. Act 1915, § 39.

J. V. Neely and *J. T. Coston,* for appellee.

1. There is no bill of exceptions and the only question is the right to appeal. The right to appeal is clearly given. Acts 1915, p. 1414, § § 14, 39-40; 118 S. W. 1010.

2. The commissioners had the right to appeal. Acts 1915, p. 1436, § § 14, 40.

McCULLOCH, C. J. A certain road improvement district was duly formed in Crittenden County pursuant to Act No. 338 of the General Assembly of 1915, an assessment of benefits was made in accordance with the terms of the statute and reported to the county court for approval or rejection. Notice was given and at the hearing the county court made and entered an order confirming the assessments, from which order appeals were duly prosecuted to the circuit court by property owners and also by the commissioners of the district. When the cause was reached for hearing in the circuit court, motions to dismiss each of the appeals were presented, and the court overruled the same, and proceeded to hear the cause on both appeals, and an appeal has been prosecuted to this court by appellant, one of the property owners, from the judgment of the circuit court.

There was no bill of exceptions filed bringing upon the record the testimony and other oral proceedings, and it is conceded by counsel for appellant that there is nothing for this court to review with respect to the alleged errors of the court on the appeal of the property owners. That concession is, of course, correct, for there is no error on the face of the record in that particular, inasmuch as there is no bill of exceptions, and we must indulge the presumption that the finding of the court as to the correctness of the assessments was sustained by sufficient evidence.

It is contended, however, that the alleged error of the court in refusing to dismiss the appeal of the com-

missioners is one which appears upon the face of the record itself without a bill of exceptions and is properly before us for review. Appellant contends, in other words, that the circuit court erred in refusing to dismiss the appeal of the commissioners, it being contended that the statute does not authorize an appeal on the part of the commissioners, except for a refusal of the county court to *enter* its judgment approving or rejecting the assessments. If counsel for appellant are correct in their contention as to the state of the law on this subject, the question is properly before us for review, for the error of the court in refusing to dismiss the appeal, if it was an error, is one which appears on the face of the record.

Section 13 of the statute in question provides that after the assessors have completed their work they shall certify a list of the assessments to the commissioners, who shall in turn file the same with the county clerk and that notice of a public hearing before the county court shall be given, and that the county court shall "hear and determine the justness of any assessment of benefits, or damages, and is hereby authorized to equalize, lower or raise any assessment upon a proper showing to the court."

The next section reads as follows:

"Section 14. At the hearing provided for in the preceding section and after the county court shall have considered the assessment of benefits, it shall enter its findings thereon, either confirming the assessment of benefits against said property, increasing or diminishing same, and the order made by the county court shall have all the force and effect of a judgment against all real property in said district, and it shall be deemed final, conclusive, binding and incontestable except by direct attack on appeal.

"Any owner of real property within the district may appeal from the judgment fixing the assessment of benefits or damages within ten days by filing an affidavit for appeal and stating therein the special matter appealed from, but such appeal shall affect only the par-

ticular tract of land or other real property concerning which said appeal is taken, and on appeal only the special matters set up in said affidavit shall be considered by the circuit court.

"If no appeal is taken within that time such judgment shall be deemed final, conclusive and binding upon all real property in the district, and the owners thereof, and said assessment of benefits shall not be subject to collateral attack.

"The Board of Commissioners on behalf of the district, or any owner of real property therein may likewise appeal from any order of the county court refusing to enter such judgment, and said county court may be compelled by mandamus to enter such judgment."

Counsel for appellees defend the ruling of the court in sustaining their appeal on the ground that section 13 authorizes an appeal by the commissioners from all orders and judgments of the county court, but we do not think that their contention is sound in this respect. The language of the statute is a little peculiar when read literally, in allowing appeals merely from the refusal of the court "to enter such judgment," but such is indeed the language of the statute, and we are not authorized to depart from it and extend this provision so as to allow an appeal from judgments which the court in fact enters. The second paragraph in the section clearly gives the property owners the right to appeal from any order of the court affecting the assessments, and the fact that their right to appeal is renewed in another form in the last paragraph coupled with the right of the commissioners to take an appeal, shows that the law-makers meant something else, and that the right of appeal under the last paragraph was intended to reach only to the refusal of the court to enter a judgment on the assessments. That paragraph gives a remedy either to the commissioners or to property owners in the district by appeal or by writ of mandamus to compel the court to enter a judgment approving or rejecting the assessments.

There is another section, however, which we are of the opinion does give the right of appeal to property owners and to the commissioners alike from any and all judgments of the court. That is section 40, which reads in part as follows:

"That the county court shall be open at all times for the purpose of making an order or entering any judgment necessary for carrying forward the work of improvement contemplated by this act. To that end the county court may at any regular, special or adjourned term, make any and all orders and judgments when called upon by the Board of Commissioners, and said orders and judgments shall have the same force and effect as if entered at a regular term of said court.

"Any owner of real property, or the Board of Commissioners, may appeal from the orders and judgments of the county court within ten days after it is entered by filing an affidavit for appeal to the circuit court, and stating therein the special grounds on which said appeal is taken, and unless said affidavit is so filed within said time all of the orders and judgments so entered shall be final, binding and conclusive, and shall not be subject to collateral attack, but only on direct attack by appeal taken within said time.

"If the county court fails or refuses to make any necessary orders or judgments when called upon by the Board of Commissioners, or any officer of said district, the county court may by mandamus be required to enter said order or judgment. To this end the circuit court having jurisdiction is hereby vested with authority to hear and determine any mandamus, injunction, or other legal proceedings relative to said district, in vacation, and the ruling made by the circuit judge in vacation shall have the same force and effect as if made in term time, and shall not be questioned thereafter, either in law or equity; provided, however, any landowner or the Board of Commissioners may appeal from said order or ruling to the Supreme Court of Arkansas, upon the terms and conditions now prescribed by law."

It is very earnestly argued by counsel for appellant that this section does not enlarge the scope of appeals allowed in section 14, but we think that counsel are mistaken in this. Section 40 is too broad in its terms to be ignored, and unless it enlarges the right of appeal it would be given no effect at all. It might be argued with some degree of plausibility that this section referred to orders of the county court made subsequently to the final approval of the assessments concerning the further progress of the work of improvement, but when the section is carefully analyzed it is seen that the law-makers intended to make it apply to all orders of the county court, from first to last, and to provide that the county court shall be open at all times for the purpose of making any such orders or entering any judgments in carrying forward the purposes of the organization, and to confer the right of appeal upon the property owners and the Board of Commissioners from any order or judgment of the court.

Our conclusion is that the circuit court properly construed the statute and was correct in refusing to dismiss the appeal of the commissioners.

Judgment affirmed.

RUSHING v. HORNER.

Opinion delivered July 8, 1918.

1. APPEAL AND ERROR—REVERSAL AND REMAND FOR A NEW TRIAL.—When a cause is remanded broadly for a new trial, all the issues in the case are open for trial anew, the same as if there had been no trial; the case stands as if no action had been taken by the lower court.

2. APPEAL AND ERROR—APPEAL IN CHANCERY—REVERSAL AND REMAND FOR A NEW TRIAL.—Upon appeal, a decree in chancery may be reversed and remanded with directions to grant a new trial, and the cause stands for trial in the chancery court the same as if it had not been tried before.

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

Hogue & Heard, for appellants.

The court erred in permitting the appellees to file a disclaimer after the cause had been reversed and remanded on the first appeal with directions for further proof as to rents, etc. 73 Ark. 513. It was too late to file the disclaimer. 76 Ark. 423; 79 *Id.* 185-193. There was no leave to amend the pleadings. Only leave to take further proof was given. 82 Ark. 51; 89 *Id.* 450; 94 *Id.* 329-332. See also 13 Ark. 253-6; 56 *Id.* 170; 57 *Id.* 500; 63 *Id.* 141; 60 *Id.* 50; 72 *Id.* 446-450; 128 *Id.* 76; 6 Enc. Pl. & Pr. 721; 44 N. J. Eq. 61; Story Eq. Pl., § 840.

STATEMENT OF FACTS.

This is the second appeal in this case. On the first appeal*, the plaintiff below sought to set aside the sale of their father's homestead which was made by their guardian during their minority, and to recover a sum of money as rent. They alleged that the property had been purchased by John J. Horner, who had since died, leaving Sudie A. Horner, his widow, and John J., Louise and Zena Horner, his children and only heirs at law, who were made defendants. They prayed that the sale be set aside and that they be awarded possession of the land, and asked for a judgment for its rental value since the date of the sale and for such other and further equitable relief. The defendants, the widow and children of John J. Horner, filed a joint answer, in which they denied all the specific allegations of the complaint, and among other things denied that the proceedings of the probate court by which plaintiffs' lands were sold were void and alleging reasons why the sale was valid, which it is unnecessary, under the view we have taken, to set up at length. The trial court in this cause dismissed the complaint for want of equity and upon a former appeal, this court reversed the decree and remanded the cause, using in the concluding paragraph of the opinion the following language:

"There is some evidence in the case to the effect that extensive improvements were made upon the prop-

*130 Ark. 21 (Reporter).

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

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

After the cause had been remanded the defendants, Louise, John H, and Zena Horner, filed a disclaimer, in which they stated that by the terms and conditions of the last will and testament of their father, John J. Horner, he devised the property in question to his wife, Sudie A. Horner, their co-defendant, who assumed control of the property in controversy, and that neither of said defendants had ever claimed any interest in the property and had never received any of the profits or benefits from the same and they asked that the complaint be dismissed as to them and that they be discharged and for all proper relief. Plaintiffs filed a motion to strike the disclaimer, alleging that it set up new matters and treated issues of law and fact that were not tried and reviewed by the Supreme Court on appeal. They alleged, among other things, that the defendants, after the suit was filed, were allowed to collect large sums of money, as rent, for the property involved, upon a bond given by the defendant, Sudie A. Horner, with two sureties; that the defendant, Sudie A. Horner and the sureties are claimed to be insolvent, but that the other defendants were all solvent and able to pay the rents which they had collected; that they would have filed an objection to the bond had it not been for the known solvency of the defendants who were asking to disclaim; that the disclaimer was inconsistent with the issues in the former trial of the cause and that such trial was *res adjudicata* of the issues raised by the disclaimer and

the motion to strike same. The court heard the evidence on the issue raised by the disclaimer and the motion to strike, which consisted of the proof upon which the case was formerly tried, the introduction of the will of John J. Horner, and the agreed statement of facts concerning the rental value and the value of the betterments, upon which the court found that "John J. Horner died May —, 1915; that suit was filed herein on May 11, 1911, and that the defendant, Sudie A. Horner took possession of said property, as owner thereof, at the death of said John J. Horner, under the will of said Horner, by which she was devised said property in fee simple; that by said will, which was duly probated, she took possession of said property as the owner thereof and under color of title she held uninterrupted possession of same and proceeded to improve same until the filing of this complaint."

Then follows the findings as to the rental value and improvements, upon which findings the court entered a decree which recites among other things that: "This case being submitted to the court upon the original pleadings, decision and exhibits, and upon the mandate and opinion of the Supreme Court, and upon the amended pleadings of the defendants, the motion and replies of plaintiffs to these amended pleadings and upon the agreed statement of facts; and the court being well and sufficiently advised in the premises, finds for plaintiffs as to the land sued for, as hereinafter described, and that plaintiffs are entitled to recover the rental value of said land in its improved condition from May 20, 1908."

Then follows a recital, showing the amount found by the court as the rental value of the land in its improved condition, and taxes, etc., as follows: "The court finds that the defendants, John J., Louise and Zena Horner have never had any claim or interest in said property and that said John J., Louise and Zena Horner are indebted to the plaintiffs for the rents and profits on said property in no sum whatever." The decree fol-

lowed in accordance with the finding, from which decree is this appeal.

WOOD, J., (after stating the facts). The only question presented by the appellant on this appeal is that the court erred in permitting appellees, John Horner, Louise Horner and Zena Horner to file a disclaimer after the cause was remanded under the directions contained in the mandate of this court. They say that the directions given "were in effect for the court to ascertain the amount of money that should be decreed to plaintiffs, if any, upon an adjustment of the rights of the parties as to the rent and betterments and for that purpose to permit further proof to be taken by either party."

We can not agree with appellants in their construction of the opinion of this court on the former appeal and the direction given to the trial court, as contained in the mandate. The directions were, "for a new trial with privilege to either party to make further proof." While this court found that "the cause was not fully developed with reference to rental value, net profits and betterments," it did not direct the court to require the parties to limit the proof to these matters only, nor was there any direction as to what decree the trial court should render on the issue as to the ownership, the right of possession, rental value, profits, betterments, etc.; but on the contrary the direction was for a new trial.

When a cause is remanded broadly for a new trial, all the issues in the case are open for trial anew, the same as if there had been no trial. "The case stands as if no action had been taken by the lower court." *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 479; *Schofield* v. *Rankin,* 86 Ark. 86-90.

Our statute defines a new trial as "A re-examination in the same court of an issue of fact, after a verdict by a jury or a decision by the court." Kirby's Digest, sec. 6215. While this is generally held to apply to actions at law, and while under the chancery practice a new trial is seldom directed, yet there is nothing in our code

of practice prohibiting this court from directing a new trial in a chancery case as well as in a trial before a law court. On a reversal of a cause by this court it seldom occurs that the same is remanded for a new trial, but when such is the direction of this court, then the case stands for trial precisely the same as if there had never been any trial. The court correctly interpreted the opinion of this court on its former appeal and followed the directions contained in its mandate. There is no error in the decree and it is therefore affirmed.

HOLLOWAY v. EAGLE.

Opinion delivered July 8, 1918.

1. ADMINISTRATION—SALE UNDER ORDER OF COURT—ADMINISTRATOR CAN NOT PURCHASE.—An executor or administrator can not lawfully become the purchaser of the property of the deceased, where the same is sold by a commissioner, under order of the court; and such a sale is voidable at the instance of the heirs of the deceased.

2. ADMINISTRATION—SALE OF LANDS—PURCHASE BY ADMINISTRATOR.—The lands of deceased were sold by a commissioner under order of the court; *held*, a finding by the chancellor that the administrator of deceased's estate became the purchaser at said sale was not against the preponderance of the evidence.

3. TRUSTS—LIABILITY OF PURCHASER FROM TRUSTEE OF EXPRESS TRUST. One who purchases property from the trustee of an express trust is liable to the *cestui que trust* only when he purchases with knowledge that the trustee was deeding trust property.

4. ADMINISTRATION—PURCHASE OF LAND OF ESTATE BY ADMINISTRATOR—SALE TO INNOCENT PURCHASER.—One W. was the administrator of the estate of H. and purchased lands belonging to the estate at a commissioner's sale. W. then sold the lands to J. J. dealt openly with the lands, occupying them for many years, and making extensive improvements thereon. *Held*, the heirs of H., who were of age at the time of the sale, except the married women, were barred by the seven and five years statutes of limitations, and that the female heirs, who were alive and married at the time of the sale, and their children, were barred by the five-year statute of limitations; *held*, also that all the parties were barred by laches.

5. SAME—SAME—MINOR HEIR.—Under the facts in the preceding syllabus, *held* an heir of H., who was a minor at the time of the sale to W., and who instituted suit before the expiration of the three-year limit after reaching his majority, was not barred by limitations, neither was he barred by laches, because he was not *sui juris* at the time of the sale. Laches will not be imputed to him until the period of limitations has expired after the minor heir has reached his majority.

6. CHANCERY PRACTICE—FINDING OF MASTER—EVIDENCE TO BE CONSIDERED.—C., the minor heir of one H., sued J. as trustee for an interest in the estate of H. H. died, owing money to W. and J. W. was administrator of the estate of H. and purchased lands which belonged to H. at a sale under foreclosure of his claim with J. against H. J. purchased from W. A master was appointed to ascertain the account between the parties. *Held,* in arriving at his report in determining the amount of interest to be charged, that the judgments in the foreclosure matters were competent evidence to be considered by the master, together with all other evidence taken in connection therewith.

7. CONSTRUCTIVE TRUSTS—VALUE OF IMPROVEMENTS.—Where a constructive trust is decreed, the trustee will be charged with the rental value of the land during the period of his possession, and will be allowed credit for the purchase money paid, with interest, and the value of improvements made.

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

Rhoton & Helm and *Carmichael, Brooks & Rector,* for appellants.

1. W. H. Eagle was a trustee and Joe P. Eagle should be treated as a trustee for plaintiffs. An administrator can not buy at his own sale, directly or indirectly. 87 Ark. 142; 85 *Id.* 140; 95 *Id.* 434. Nor at an execution sale. 75 *Id.* 184. Nor at a commissioner's sale, tax sale, or any other public or private sale without creating a trust. 102 Ark. 65; 55 *Id.* 85. There was no confirmation of the sale. 105 *Id.* 261; 23 *Id.* 41; 10 Oh. St. 557. Plaintiffs were not barred by limitation. Kirby's Digest, § 5056-7, 5060; 55 Ark. 85; 87 *Id.* 238. Nor by laches as to at least infants and married women. W. H. and Joe P. Eagle were both trustees for plaintiffs. 2 Perry on Trusts (6 ed.), § § 860-863; 39 Cyc. 600.

2. The judgments rendered upon which the account was based, were of no validity. A man can not sue himself; he can not be both plaintiff and defendant as here. 12 Am. Dec. 684; 11 *Id.* 556; 55 *Id.* 142; 17 *Id.* 569. The master should have started the account with the mortgages and not with the judgments with interest and costs added.

3. The beneficiaries should not have been charged with permanent improvements. 160 acres was a homestead. Nor should they be charged with a mule, salary of overseer, cook, personal services of a trustee, etc. 68 Ark. 534; 23 *Id.* 622; 101 *Id.* 18; 78 *Id.* 111; 96 *Id.* 281; 84 *Id.* 160; 52 *Id.* 381; 49 L. R. A. (N. S.) 125, and note; 97 Ark. 397; 18 *Id.* 34.

4. It was error to charge 10% interest and for all classes of losses, as shown by the master's report, such as quitclaim deeds, surveying lands, pumps, houses, fences, salary manager, cook, horse and feed, mule killed, building bridge, cutting out road, etc. Appellants also specifically excepted to the finding in favor of W. H. Eagle as to the judgment in favor of W. H. Eagle & Son, Nov. 21, 1894, for $1,508.08 and 10% interest and to the judgment of $3,277.07 and 10% interest.

5. A beneficiary, especially in infant, can not be improved out of his estate. 95 Ark. 168; 115 *Id.* 572; 2 Perry Trusts (6 ed.), § § 526, 546, 606; 42 Ark. 120.

The improvements must be in good faith. 14 R. C. L. 22, § 11.

6. Appellants have the right to follow the funds as well as the property itself in the same suit. 96 Ark. 281.

Thos. C. Trimble, Jr., and *Ross Williams*, for appellees.

1. The mortgage sales were not void. They were made by the court through a commissioner. The lands brought their fair value. The foreclosure decrees can not be attacked collaterally. All the Holloway heirs were parties to the foreclosure proceedings. The sales were

duly confirmed and approved. 23 Ark. 41; 113 *Id.* 341. All irregularities were cured by confirmation. 74 Ark. 475.

2. On collateral attack all defects amendable will be considered as amended. 56 Ark. 191; 32 *Id.* 278; *Ib.* 407; 34 *Id.* 682.

3. The court had jurisdiction and the decrees were not void, but merely voidable and not subject to collateral attack. 105 Ark. 5. No fraud was shown. 90 *Id.* 167. Confirmation cured all defects and irregularities. 65 Ark. 152; 145 U. S. 349; Rorer on Jud. Sales, § 132. See also 124 Ark. 219.

4. There are exceptions to the rule that the administrator can not be interested in his own sale. 33 Ark. 585; 18 Cyc. 770. The sale was not void but voidable only. Only void sales can be attacked collaterally. 55 Ark. 85; 87 *Id.* 142; 56 *Id.* 187; 105 *Id.* 5. See also 117 Ark. 544; 102 *Id.* 68. All the heirs were parties to the suit and the infant properly represented by guardian. No prejudice is shown. 42 *Id.* 22; 44 *Id.* 236. The judgment was not void. 49 Ark. 398.

5. All the appellants are barred by limitation and laches. 55 Ark. 93; Kirby's Digest, § 6248; 113 Ark. 332; 103 *Id.* 67. The married women are barred. Kirby's Digest, § 5060; 46 Ark. 37; 47 *Id.* 562; 61 *Id.* 541. The sales were judicial sales. 111 Ark. 164. They are barred by the seven-year statute and nonclaim. K. & C. Dig., § 110. The statute applies to trustees. 58 Ark. 90; 47 *Id.* 468.

6. Improvements were properly allowed. 70 Ark. 488; 95 *Id.* 167; K. & C. Dig., § 2976. There are no reversible errors in the master's account.

WOOD, J. This is an action brought by the heirs of E. H. Holloway against Joe P. Eagle and the Union Trust Company, as executors of the last will of W. H. Eagle, deceased, and Joe P. Eagle. E. H. Holloway died August 8, 1893 or 1894; his heirs were A. J. Wade, John and C. V. Holloway, Edna, Elvin and Shelby Miller, who were the children of Sarah Miller, deceased, Mary, Tom

and Roy Mason, who were the children of Allie Mason, deceased, Mrs. M. E. Naylor and LeMay Holloway Lewis. Sarah Miller and Allie Mason were the daughters of E. H. Holloway.

Action was first brought by C. V. Holloway, who was afterward joined by the other heirs, as parties plaintiff. They alleged in substance that E. H. Holloway died in possession of certain lands (describing them); that a suit was brought by W. H. Eagle & Son (a firm composed of W. H. Eagle and Joe P. Eagle), against W. H. Eagle, as administrator of the estate of E. H. Holloway; that the land described in the complaint was sold to W. H. Eagle & Son; that W. H. Eagle, a member of the firm who purchased the land, was appointed administrator of the estate of E. H. Holloway; that he was also trustee at the time of the sale, and at the time the conveyance was made by the commissioner under such sale; that the estate of W. H. Eagle, deceased, and Joe P. Eagle should be held to account for the rents and profits since the date of the sale, May 23, 1895, and they prayed that a master be appointed to state an account of this, and if it be found that the land was subject to an encumbrance due W. H. Eagle & Son, that they be allowed to redeem same.

The answer denied specifically all the allegations of the complaint and set up as a bar all the statutes of limitation and the statute of nonclaim and pleaded laches. After a great deal of testimony had been taken, the chancellor appointed L. P. Biggs, master, who was satisfactory to both parties, and directed him to examine the testimony already taken and to take further testimony; to ascertain the amount of the original indebtedness due by E. H. Holloway to W. H. Eagle & Son, the amount of rents collected, taxes paid and interest charged, and then report to the court. After the testimony was taken and the report of the master filed, many exceptions to the report of the master were filed by plaintiffs, and the court, after considering the entire record in the case, dismissed the complaint for want of equity, as to all the plaintiffs, except C. V. Holloway.

The court found that the defendant, Joe P. Eagle, was guilty of no actual fraud, but held him accountable as trustee, because he had acquired title to the lands through a purchase by W. H. Eagle & Son, and that such purchase of the lands belonging to the estate of E. H. Holloway, by its administrator, W. H. Eagle, rendered the sale voidable.

The court affirmed the finding of the master, that Joe P. Eagle was due the estate of E. H. Holloway the sum of $4,960.53, and that the plaintiff, C. V. Holloway, was entitled to one-ninth interest in said sum, towit, $551.17, with interest thereon from December 31, 1916, until paid, and rendered a decree in favor of C. V. Holloway for such sum.

From this decree C. V. Holloway prosecutes this appeal. The other heirs also prosecute the appeal from the decree dismissing their complaint for want of equity, and Joe P. Eagle cross-appealed in this court.

E. H. Holloway was indebted to W. H. Eagle & Son, and to secure such indebtedness he mortgaged to them all his personal property and real estate in Lonoke County; the mortgage covered the real estate lying north and south of what is called in the record "Bayou Meta." The lands south of Bayou Meta were subject to a prior mortgage executed by Holloway to the Arkansas Loan & Trust Company. Prior to the death of Holloway the trust company had brought suit to foreclose its mortgage; that suit was contested and found its way to the Supreme Court. After Holloway's death the case was revived in the Supreme Court in the name of W. H. Eagle, as administrator of the estate of E. H. Holloway, deceased, and the heirs of E. H. Holloway. A receiver was also appointed in this suit. The decree of the lower court was affirmed by the Supreme Court.

While suit was pending in the Supreme Court, W. H. Eagle & Son filed suit to foreclose their mortgage, and made W. H. Eagle administrator of the Holloway heirs, and the receiver appointed in the suit of the trust company, parties to that suit.

A decree of foreclosure was rendered, but no procedure was had against the lands that lay south of the bayou, they being covered by the mortgage of the trust company. The decree was rendered against the land north of the bayou and the clerk of the court was appointed commissioner to sell those lands. A decree of foreclosure was also rendered in the suit of the trust company against the lands south of Bayou Meta, and Max Frolich was appointed commissioner to make the sale of these lands. As shown in his report, "W. H. Eagle and Joe P. Eagle, composing the firm of W. H. Eagle & Son, being the highest and best bidders, became the purchaser at that sale." A report of this sale was made to the court on November 19, 1895, and a deed in pursuance to that sale was of the same date. This deed was made to J. P. Eagle, and the acknowledgment of the deed contains this recital: "On this day, Max Frolich, appointed to execute the decree rendered in this case, produces to the court here his deed to Joe P. Eagle, the purchaser of the lots and premises mentioned and described in said deed, and upon examination of said deed the same is in all things approved." In the foreclosure sale of W. H. Eagle & Son of the lands north of Bayou Meta, the deed was duly executed, and the acknowledgment was taken in open court, This deed conveyed the lands to W. H. Eagle & Son. The personal property of E. H. Holloway was foreclosed under special power conferred upon the trustee in the mortgage and was purchased by various parties at such sale, and the proceeds credited on the indebtedness of E. H. Holloway to W. H. Eagle & Son.

Joe P. Eagle conveyed the lands south of Bayou Meta to W. H. Eagle & Son on December 13, 1895, by warranty deed, the consideration expressed therein being $3,654.46. On March 3, 1900, Joe P. Eagle and wife conveyed all the lands which had been purchased at both foreclosure sales to W. H. Eagle, and on June 14, 1900, W. H. Eagle and wife conveyed the lands to Joe P. Eagle for the consideration of $5,000, $2,500 cash and $2,500 as an advancement to Joe P. Eagle.

W. H. Eagle died in 1906 and Joe P. Eagle and the Union Trust Company were named as executors of his will. No claim was filed against his estate by the heirs of E. H. Holloway; the firm of W. H. Eagle & Son and Joe P. Eagle took possession of the property, after the deeds under the foreclosure sales had been executed and made many extensive and valuable improvements thereon.

While the evidence in the trial court took a wide range and the record of it here is exceedingly voluminous, we will only discuss such of it as we deem necessary to the issues, which in our view are reduced here to a comparatively narrow compass.

First. The appellants seek to hold J. P. Eagle liable, as trustee, for their benefit. Joe P. Eagle did not occupy any trust relation himself to appellants, but he was cognizant of the relation which his father, W. H. Eagle, sustained to them, as administrator of the estate of E. H. Holloway. Therefore, the principal question is, was W. H. Eagle a purchaser at the foreclosure sales, and if so, did such purchase render those sales voidable? W. H. Eagle, as administrator of the estate of E. H. Holway, was party defendant in both foreclosure suits at the time the final decree was rendered.

(1) In *Eagle* v. *Terrell*, 95 Ark. 434-437, we held broadly that, "Where property of a decedent is sold by a commissioner under order of the court, the executors or administrator can not lawfully become the purchaser at such sale. It is wholly immaterial whether the sale at which the trustee purchases is brought about at his own instance or whether it is made at the instance of another, provided he has a duty to perform with reference to the property to be sold that may be in conflict with his interest as purchaser." See the many cases cited therein.

Such sales are voidable at the instance of the heirs of the testator or intestate. See other authorities cited in 2 Crawford's Digest, p. 2185, § 147.

Joe P. Eagle testified that at the sale of the real estate belonging to the Holloway estate he bid it in to protect his debts; that he and W. H. Eagle were equal

partners; that the debts for which the land were sold were obligations to W. H. Eagle & Son; that witness had no conversation with W. H. Eagle with reference to the conveyance of the land by Max Frolich, commissioner, to W. H. Eagle; that he was the real purchaser at the sale and there was no agreement that he would purchase it and then resell or deed it to W. H. Eagle or W. H. Eagle & Son. When he deeded it to W. H. Eagle & Son the consideration was $2,500; he conveyed to W. H. Eagle & Son because he preferred that they carry the land as at that time $2,500 was a good deal of money. He bought the land in his own name. On cross-examination his attention was called to the fact that he had testified that he had purchased the land in his own name for the use of W. H. Eagle & Son, and was asked if that was a mistake and he answered, "I bought it in my own name." The report of the commissioner, which was introduced in evidence, showed that "the firm of W. H. Eagle & Son was the highest and best bidder; that he, as commissioner, did accept and take from said W. H. Eagle & Son as such purchaser, their joint and several bonds," etc. The deed was made to Joe P. Eagle and the acknowledgment recites that he was the purchaser at the sale.

The report of the commissioner for the sale of the lands north of the bayou shows that the sale was made to W. H. Eagle & Son as the highest and best bidder and the deed was executed to them. Joe P. Eagle as a member of the firm of W. H. Eagle & Son was the agent for the firm and also of his partner, W. H. Eagle, in making the purchase, and the purchase was as much the purchase of W. H. Eagle as it was for Joe P. Eagle.

(2) It can not be said in view of the above testimony that the finding of the chancellor to the effect that W. H. Eagle was the purchaser at the foreclosure sale is against a clear preponderance of the evidence.

(3) *Second.* The next question is, were the plaintiffs barred by any of the statutes of limitations? Joe P. Eagle was not himself the administrator of the estate of E. H. Holloway and was not therefore trustee of an

express trust; he can only be held liable on the theory that he acquired property from the trustee of an express trust with the knowledge of all the circumstances going to show that the trustee was deeding the trust property, and therefore had no title he could convey. Upon this theory and this alone can Joe P Eagle be held as trustee with reference to the property of the estate. This is the theory upon which the court rendered its decree. See *Matthews* v. *Simmons*, 49 Ark. 468-475.

Perry, in his work on Trusts, volume 2, section 860, lays down the doctrine that, "If a trustee, in breach of his trust, conveys the land to a third person, such third person, if he is an innocent purchaser, for value, without notice, will hold the estate discharged of the trust. But if he received the conveyance with notice, or without paying any consideration, he will be holden as a trustee; for the *cestui que trust* may enforce the trust against him by proceeding in equity. * * * It may be said, that the relation between such holder of the legal title and the *cestui que trust* is that of trustee and *cestui que trust,* and that the same principles apply, respecting the application of the statute, as apply between trustee and *cestui que trust* in an express trust."

(4) The same author in section 863 says: "As between trustee and *cestui que trust,* in the case of an express trust the statute of limitations has no application, and no length of time is a bar. Against an express and continuing trust time does not run until repudiation or adverse possession by the trustee and knowledge thereof on the part of the *cestui.*" See also 39 Cyc., p. 600.

In *Bland* v. *Fleeman,* 58 Ark. 84-90, we said: "The rule, we believe, is universally established that the statute will not bar an express trust. 'But this doctrine,' says Chief Justice COCKRILL, in *McGaughey* v. *Brown,* 46 Ark. 34, 'is subject to two qualifications, namely, that no circumstances exist to raise a presumption of the extinguishment of the trust, and that no open denial or repudiation of the trust is brought home to the knowledge of

the parties in interest which requires them to act as upon an asserted adverse title.' "

By analogy, courts of equity take the same limitation for their guide that governs courts of law. *McGaughey* v. *Brown, supra.*

Immediately after the sales W. H. Eagle and Joe P. Eagle commenced to deal with the lands as their individual property; they made conveyances of the lands back and forth, the one to the other; they went into possession and made valuable improvements, enjoying the rents and profits. After the death of W. H. Eagle in 1906, administration was immediately had upon his estate, and the same was practically fully administered before this suit was brought in 1913. No demand was made by any of the heirs of E. H. Holloway upon W. H. Eagle or Joe P. Eagle. They all lived in the community and were cognizant of the facts, or had notice of facts and circumstances that would put a man of ordinary prudence and intelligence on inquiry, which in law is tantamount to knowledge of the facts to which such inquiry might lead. *Bland* v. *Fleeman, supra.* All the heirs of E. H. Holloway who were of age at the time of the sales, except the married women, would be barred by the seven years as well as the five years statute of limitations. Secs. 5056 and 5060, Kirby's Digest. The female heirs, who were alive and married at the time of the sales and their children would be barred by the five-year statute of limitations, because that statute does not except married women, and foreclosure sales are judicial sales. *McGaughey* v. *Brown, supra; Garland County* v. *Gaines,* 47 Ark. 558; *McKneely* v. *Terry,* 61 Ark. 541; *Gibson* v. *Herriott,* 55 Ark. 85; *Nash* v. *Delinquent Lands,* 111 Ark. 164.

It follows that all the appellants, except C. V. Holloway, are barred by the statute of limitations. They are also barred, under the same facts by laches, although in the latter case the rule as to limitation is not necessarily a criterion—the time may be longer or shorter, depending upon the particular facts and circumstances in each case. *Gibson* v. *Herriott, supra.*

(5) C. V. Holloway is not barred by the statute of limitation for the reason that he was a minor at the time of the sales, and he instituted this suit one day before the expiration of the three years limit after reaching his majority. Kirby's Digest, § 5056. Neither is he barred by laches, because he was not *sui juris* at the time of the sales. While laches could not operate to give him any additional rights, yet a court of equity during the continuance of his minority will not impute to him laches and thus deprive him of the right to sue for his inheritance before the period of limitation applicable to him had expired. *Gibson* v. *Herriott, supra,* page 97. See also *Stuckey* v. *Lockard,* 87 Ark. 232-240, on rehearing.

Third. This brings us to a consideration of the amount of the decree in favor of C. V. Holloway. The master's report shows that "all the attorneys agreed with him that the account which he was directed to make should be stated upon the theory that Joe P. Eagle was a trustee," and that was the theory he adopted. His report shows that he made an exhaustive examination of the evidence that was taken both prior to and after his appointment and made an elaborate report after reviewing the items of the account as rendered in the statement of the expenditures made by Joe P. Eagle in connection with the lands belonging to the estate of E. H. Holloway with which he charged the estate, and of the rents, profits and proceeds of the sale of the land, with which he credited such estate.

It would be wholly impracticable to set out and discuss in detail in this opinion all the evidence bearing upon this issue. The appellants specifically excepted to the finding of the master, charging 10 per cent. interest on the judgments rendered in favor of W. H. Eagle & Son, from November, 1894, to July, 1916, principal and interest amounting in the aggregate to $10,367.43. They also specifically excepted to the finding of the master, charging them with any permanent improvements.

In regard to the interest item, the master's report is as follows: "Plaintiffs claim credit by way of error

against them in the computation of interest in the decree of November 21, 1894. It is apparently true that the amount of the debt and interest does not coincide with the amount of the judgment, but on account of certain credits mentioned one can not be positive to the calculation. Since the decree stood the scrutiny of the court and plaintiffs' counsel, we ought to assume that they knew what they were doing, and since we do not know what circumstances may have entered in the calculation of this decree I hesitate to correct the seeming error, even if I had the legal right. While I have charged and credited the estate with all the items practically as set forth in the statement filed by Mr. Eagle, I differ with his account as to the method of figuring interest. In his statement Mr. Eagle charges the estate the judgments with interest at 6 per cent. and 10 per cent. from the date thereof until date of payment; all the judgments bear 10 per cent. interest, except $407.94."

In their brief in regard to these specific exceptions, the counsel for appellees say that "the master charged the plaintiffs (appellants here) with the highest rate of interest, towit, 10 per cent. in rendering all statements, and gave appellees credit for commissions on sales of land, etc. * * * It would take too much space to set out all the items, but we think we have covered the different classes of items."

(6) Appellants contend that the judgments awarding interest at 10 per cent. should not have been considered at all, but that the master should have gone back to the original mortgage and calculated the interest on that. Appellants have not brought into the abstract any evidence tending to prove that the master's computation of interest was incorrect. The master's report shows that he had before him the debt, and while there was apparently a discrepancy between the amount of the debt and interest and the amount of the judgment, yet on account of certain credits mentioned he could not be positive of the calculation, and he assumed that the court and counsel for both parties knew what they were about in per-

mitting the decrees to be rendered bearing 10 per cent. interest. Counsel are mistaken in saying that these judgments should not have been considered at all. Since appellants have elected to treat J. P. Eagle as trustee, the judgments were competent as evidence to be considered by the master in making up his report; he had before him the mortgages which formed a basis for these judgments and it was competent for him to consider them together, and all the evidence taken in connection therewith in ascertaining what was the correct amount of interest to be charged.

The testimony of Judge Thos. C. Trimble, who as attorney was connected with all the suits, and thoroughly familiar with all the transactions, shows that the judgments were based on debts that bore interest at the rate of 10 per cent. His testimony was also based upon the papers that were exhibited to him, which counsel for appellant abstract by saying, "As these things are all set out in the master's report we think it unnecessary to abstract them further." Counsel for appellants in their abstract of the master's report do not set out any of these papers which the master had before him as evidence. Appellants therefore do not make it appear that there was any error in the findings of the master allowing Joe P. Eagle 10 per cent. interest on the judgments in favor of W. H. Eagle & Son. The chancellor did not find any error in this respect, and the finding of the chancellor is sustained by a preponderance of the evidence. Indeed, there is no evidence in the abstract to the contrary.

(7) *Fourth.* The other specific exception of appellants to the finding of the master is that he erred in charging C. V. Holloway with any improvements whatever, their contention being that C. V. Holloway could only be charged with the expense of the necessary repairs in making the crops, but not with any permanent improvements. To support their contention, appellants cite and rely upon cases dealing with the trustee of an express trust created by contract or operation of law. Such, for exam-

ple, as administrators, executors, guardians, etc., or such as a trustee under a deed or other instrument declaring an express trust, or such as a tenant in common in possession or a mortgagee in possession, or any one in possession of lands which he knows he does not own. But this case is controlled by a different doctrine from that applicable to any of the above cases. Joe P. Eagle, as we have seen, is not the trustee of an express trust. None of the duties of such a trustee devolved upon him. As is said in *Matthews* v. *Simmons, supra,* "he only becomes a trustee by construction of law," and is only liable because of that ancient maxim, *ignorantia legis neminem excusat.* The chancery court found that he was guilty of no fraud. One witness testified that Joe P. Eagle asked him not to bid at the sale. Another testified that she went to Lonoke on the day of the sale, arriving between 8 and 9 o'clock, and that when she arrived the sale had already been held. She intended to bid on some of the land and asked Joe P. Eagle "if he didn't have the sale rather early, and he said yes, but there was nobody else coming in to bid." He also said he would let witness have what land she wanted at the price for which he bought it in. He did not let her have the land she wanted, but some other land. Joe P. Eagle in his testimony denied categorically the above statements. We are unable to determine where the preponderance lies in this issue, and will therefore treat the finding of the trial court as persuasive and adopt it as our own. *Leach* v. *Smith,* 130 Ark. 465.

Therefore, since Joe P. Eagle was guilty of no actual fraud, but purchased the land in good faith, doubtless in absolute ignorance of the legal effect of such purchase, and believing he was acquiring a perfect title, he must be dealt with in making the settlement, as the rule of equity and good conscience demands in such cases. After a careful reading and consideration of the master's report as contained in the record itself, and the testimony as abstracted, we are convinced that the master did not depart from the above rules, but on the contrary observed

the same according to the doctrine announced in *Stubbs* v. *Pitts,* 84 Ark. 160: "Where a constructive trust was decreed, credit will be allowed for the purchase money paid, with interest, and the value of improvements made, and will be charged with the rental value of the land during the period of such possession."

The decree is correct and it is affirmed.

OAKES v. STATE.

Opinion delivered July 8, 1918.

1. CRIMINAL LAW—INDICTMENT—ALLEGATION OF TIME OF COMMITTING THE OFFENSE.—An indictment is not fatally defective and not demurrable, which alleges that the offense was committed "on the ..... day of ....., 191....." In a criminal prosecution, the State must prove that the offense was committed within the period of the statute bar, or else that the running of the statute has been suspended.
2. SEDUCTION—VENUE.—Where, in a prosecution for seduction, the testimony as to venue is conflicting, it is the province of the jury to reconcile the conflicts and to determine the issue on the preponderance of the evidence, under correct instructions.
3. SEDUCTION—PROMISE OF MARRIAGE.—In a prosecution for seduction, proof of a promise of marriage made in 1912, and continuing to 1915, when the first act of intercourse was had, is sufficient to sustain a conviction.
4. SEDUCTION—PROMISE OF MARRIAGE—LETTERS OF DEFENDANT.—In a prosecution for seduction, letters of the accused are admissible to corroborate the testimony of the prosecuting witness, as to his promise of marriage.
5. CRIMINAL LAW—WITNESSES UNDER THE RULE—ATTORNEY AS WITNESS.—Whether any or all witnesses shall be put under the rule is a matter addressed to the sound discretion of the trial court, and where, in a prosecution for seduction, the witnesses have been put under the rule, it is not error for the court to permit an attorney, specially employed to assist the prosecution, to testify.
6. SEDUCTION—PROMISE OF MARRIAGE.—In a prosecution for seduction, the testimony *held* sufficient to sustain a finding that appellant had sexual intercourse with the prosecutrix upon an unconditional express promise of marriage.

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

W. N. Ivie, for appellant.

1. The indictment is defective. It contains no date when the crime is alleged to have been committed. No date within the statutory period is alleged. 92 Ark. 413; 99 *Id.* 126; 65 *Id.* 559; 110 *Id.* 170.

2. The promise of marriage was conditional on pregnancy. 113 Ark. 520, 169 S. W. 341; 25 Ore. 172; 17 L. R. 151.

3. There was no corroboration of the prosecutrix's testimony as to the promise of marriage. 113 Ark. 520; 112 Ga. 871. No designated time for marriage was fixed, and the promise, if any, was conditional. 51 L. R. A. (N. S.), 809; 41 App. D. C. 359; 25 Ore. 172; 132 Mich. 58; 48 S. W. 192; 29 Tex. App. 454; 97 Mo. 668; 77 Ark. 16.

4. The court erred in its instructions to the jury. There was no evidence of an expressed or unconditional promise of marriage. 15 Ann. Cas. 221. Defendant's theory of the case was not properly presented by the instructions.

5. The venue was not proven.

6. The testimony of the attorney for the State was incompetent. The trial was not fair and impartial.

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

1. The demurrer was properly overruled. It is not necessary to allege the date within which the crime was committed. 92 Ark. 413; 99 *Id.* 126; 110 *Id.* 170. Proof is sufficient.

2. The promise of marriage was sufficient. 113 Ark. 520.

3. Instruction No. 8, asked by appellant, was properly refused. There was no evidence upon which to base it. 102 Ark. 170; 88 *Id.* 269; 114 *Id.* 391.

4. The venue was sufficiently proven.

5. Requested instruction No. 3 was properly refused. The prosecutrix's testimony was corroborated. Defendant's letters were competent and corroborated her testimony. 77 Ark. 16.

6. Allowing Duty to testify was not error. Kirby's Digest, § 3142; 56 Ark. 381; 77 *Id.* 603; 90 *Id.* 135.

WOOD, J. (1) Appellant was convicted of the crime of seduction and appeals. The indictment charged that, "The said George Oakes in the said county of Benton, in the State of Arkansas, on the ..... day of....., 191....., then and there being a single and unmarried man, unlawfully and feloniously did obtain carnal knowledge of one Myrtle Glass, a single and unmarried female, by virtue of false and feigned expressed promise of marriage previously made to her by the said George Oakes."

Appellant contends that the indictment is defective because it contains no date when the crime is alleged to have been committed. "Under the statute of this State, an allegation in the indictment concerning the time of the commission of the offense is immaterial except when the time is a material ingredient in the offense, but the State must allege and prove the commission of the offense within the statutory period of limitation." Kirby's Digest, § 2234. *James* v. *State,* 110 Ark. 170. Counsel rely upon the above language to support his contention that the indictment must allege a date, within the statutory period of limitations when the offense was committed. The word "allege" as quoted seems to sustain counsel. But when this word is considered with reference to the issue for decision in that case and the cases cited to sustain the opinion, it is plain that the word "allege," in the connection used, is a *lapsus pennae,* or *linguae.* In *James* v. *State, supra,* it was alleged that the offense charged therein was committed on a certain day, which was stated, and the date specified was within the statutory period of limitations for prosecution of the offense charged. The defendant James admitted that he had given whiskey to the minor (which was the charge against him), but testified that the act had occurred more than a year prior to the indictment. The trial court instructed the jury that the burden was on the defendant to show that the act was committed more than one year prior to the finding of the indictment. We held that the instruction was erroneous

and that the burden was on the State to prove that the offense was committed within the period of the statute bar for the prosecution of such offense. The issue was not before us as to whether it was essential for the indictment to allege the date of the offense so as to show that it was within the statutory period. The court did not mean to hold that such an allegation was essential to the validity of the indictment. Such holding was not necessary, not germane to the issue, and would "have been out of harmony with the cases cited in the opinion to support what was only intended to be decided. See *Scoggins* v. *State,* 32 Ark. 205; *State* v. *Gill,* 33 Ark. 129; *Gill* v. *State,* 38 Ark. 524; *State* v. *Reed,* 45 Ark. 333. Such holding would also have been in direct conflict with *Grayson* v. *State,* 92 Ark. 413, and *Threadgill* v. *State,* 99 Ark. 126, where we held that an indictment is not fatally defective and not demurrable, which alleges that the offense was committed "on the ..... day of ....., 190....."

If the court, in the case of *James* v. *State, supra,* had intended to overrule all these cases, it would have so stated in express terms. We conclude, therefore, that the use of the word "allege" in the opinion in *James* v. *State, supra,* was *obiter* and a mere inadvertence upon the part of the judge who prepared, as well as the judges who approved the opinion. Such inadvertence was but natural, since the court did not have for decision in that case an issue involving the above statute and for the moment did not have it in mind. But for the statute, it would be correct, generally, to say that the State must allege and prove that the offense was committed within the period of limitations for the prosecution of such offenses. What the court intended to decide in *James* v. *State, supra,* is correctly set forth in the syllabus, as follows: "In a criminal prosecution, the State must prove that the offense was committed within the period of the statute bar, or else that the running of the statute has been suspended."

Miss Myrtle Glass was about twenty-one years of age when she first met appellant in the winter of 1911.

Her sister, Mrs. Field, resided at Grove, Oklahoma, and Miss Myrtle and her widowed mother lived with Mrs. Field. Appellant at that time was about twenty-three years of age. He then worked in an abstract office, but was a prospective student of the law at the University of Oklahoma, where he went in September, 1912. It was a four years course at the university. After they met, he went to see her regularly on Sunday and Wednesday nights. After two or three visits he asked her to kiss him and she refused, telling him that her mother had always told her not to kiss a man unless he was going to be her husband. He replied that he could not marry an Indian, that his parents objected to that. She told him she was an Indian. He then went away, and in a few days she received a letter from him asking permission to visit her again, which she granted. He came and told her he had changed his mind and thought of his future happiness in the end, and was willing to marry an Indian in spite of the objection of his parents. They then became engaged to be married as soon as he had finished school. She had a tract of land and it was understood that when he had finished school they would mortgage the land and then get married. He went to school from the fall of 1912 to the fall of 1915. She gave him financial assistance while he was in school when he made a plea that he needed it. During the summer vacation of the years 1912-13-14-15 they were frequently in each other's company. During the summers of 1912-13 and 1915 they made frequent pleasure drives together, some in Oklahoma and some in Arkansas. On one of these occasions he had sexual intercourse with her. He promised to marry her if she would submit, told her that if she loved him she would do this, and if she did not she did not care very much for him. He told her that nothing would happen, and if anything did happen he would marry her and nothing would be said about it, anyway. He told her he would marry her right away. Even if things did not happen, they were going to be married anyway. She yielded on that promise and had sexual intercourse with

him, but would not have done so if he had not promised to marry her. This was the first act of sexual intercourse, and it occurred in Benton County, Arkansas, before the latter part of July, 1915. After that he had sexual intercourse with her in Arkansas and Oklahoma. She had never had sexual intercourse with any other. She became pregnant. Appellant was the father of her child.

Mrs. Field and Mrs. Glass testified that they overheard the conversation between the prosecutrix and appellant in 1912 when they were engaged to be married, and these witnesses fully corroborated the testimony of the prosecutrix as to the promise of marriage made at that time. The prosecutrix testified that the date of the marriage fixed by the promise made at that time (towit, "when he had finished school") had never been changed. Several letters that were sufficiently identified by the admission of appellant as his letters to the prosecutrix were introduced over the objection of appellant. These letters were written to prosecutrix both before and after the alleged first act of sexual intercourse, and tended to prove that a close and affectionate relation existed between them.

Appellant testified that there was never any promise of marriage. He admitted that he had sexual intercourse with the prosecutrix, but denied that it occurred in Arkansas, and contends that, even if it did occur here and as stated by the prosecutrix, there was no corroboration of her testimony as to the promise of marriage when the act took place, and that the promise itself was but a conditional one. Hence appellant insists that there is no testimony to sustain the verdict, and that the court erred in not giving his prayer for instruction to find him not guilty.

(2) We must say that the testimony of the prosecutrix is very conflicting on the issue of venue. But it was the province of the jury to reconcile these conflicts, and to determine that issue on the preponderance of the evidence under correct instructions. *Douglass* v. *State,* 91

Ark. 492; *Patrick* v. *State, ante* p. 173. The instructions on venue were more favorable to appellant than he had the right to ask, because they required the State to prove the venue beyond a reasonable doubt. The court correctly instructed the jury that if the first act of sexual intercourse was committed in Oklahoma, and not in Arkansas, to "find the defendant not guilty." The verdict of the jury is conclusive on the issue of venue.

(3-4) Learned counsel for appellant in his excellent brief treats the alleged promise of marriage as if it were susceptible of division under the evidence into what he designates as the "first marriage contract" of 1912, and as the second, "the promise of marriage at the time it was alleged the offense was committed in 1915." So treating it, he argues that the latter promise was not corroborated, and that at most it was a promise of marriage only upon the condition that pregnancy resulted from the intercourse. Counsel wholly misapprehend the effect of the testimony. If the promise to marry was made in 1912, as the jury found, then there was no evidence to warrant a finding that such promise had ever been abandoned and another promise made. While appellant denies that there was any promise of marriage at all, he does not claim that there was any break in the intimate relation that existed from the time of the alleged promise of marriage in 1912 to the time of the alleged first act of sexual intercourse in July, 1915. The testimony of both the prosecutrix and of the appellant, and the letters in evidence, show that the relation of intimacy begun in 1912 continued without interruption until long after the alleged act of sexual intercourse in 1915. If there was a promise of marriage, as the jury were justified in finding, then the undisputed evidence shows that there was only one promise which continued to the time of the alleged act of intercourse. The testimony of the prosecutrix as to the promise of marriage is corroborated not only by the testimony of Mrs. Field and Mrs. Glass, but also by the letters of appellant to the prosecutrix. These letters were introduced before appellant had admitted the act

of sexual intercourse. It is unnecessary to set them out in detail. In the first letter, soon after he had entered school, he begins with, "Dear Sweetheart," and evidently answering a proposal on her part to sell her land and render him financial assistance, he writes with reference to this: "My, you are getting good all at once—the idea of us selling the farm. I told you repeatedly that I refuse to sign the deed, ha, ha," etc. Again referring to the same subject, "It seems to me that being a law student I ought to be able to work at least half enough to live out of you and my dady and my bud and possibly a few others that I could work on in the meantime." Further: "But, dear, it is awfully sweet of you to be so generous. * * * Of course, if you should strike oil and get oodles of money and did not need it all, I could take it from you and never feel the pangs of self reproach. But you, a sweet, unselfish little girl, making your own way—not yet, ha, ha! But thanks, just the same, sweetheart, and don't change your mind when the call comes." In the next he begins: "Dear, Girl, your oil letter received," etc. Then after congratulating her on the prospective discovery of oil on her land and giving suggestions as to how to proceed with reference thereto, in the course of his letter he says: "I guess I'll have to come home and see about you, oil makes it easy to do lots of things, ha, ha! And somebody else right there trying to beat me, too. * * * Let me know if you need anything else. We will make an inspection trip when I get home—if you want—and try to have a well drilled. With love." In the letters received by prosecutrix from appellant after she had informed him of her condition of pregnancy he addresses her in some of them as "Dear Girl" and in others as "Dear Walleah." The Indian nickname of prosecutrix is "Walleah." In these letters there are many veiled expressions which the testimony of the prosecutrix tends to explain, and which in connection with her explanation tend to prove that appellant knew and acknowledged that he was the author of her shame. The prosecutrix testified that he told her to destroy the child,

which she refused to do, and he was scolding her for not doing as he told her. Without pursuing the subject further, it suffices to say that the letters were competent, both for the purpose of corroborating the prosecutrix as to the promise of marriage, and the act of sexual intercourse. While as to the intercourse, prosecutrix after appellant's admission, was fully corroborated, yet at the time the testimony was offered, there had been no such admission, and the testimony was therefore competent. Appellant did not afterwards ask to have it excluded, or else have it confined to the issue of the promise of marriage. *St. L., I. M. & S. Ry. Co.* v. *Raines,* 90 Ark. 482. See *K. C. So. R. Co.* v. *Leslie,* 112 Ark. 305-329. The court did not err in admitting the letters. They are well within the rule announced in *Lasater* v. *State,* 77 Ark. 468, and *Patrick* v. *State, ante* p. 173, as to the character of evidence that may be adduced in corroboration of the testimony of the prosecutrix as to the promise of marriage. We conclude, therefore, that the court did not err in refusing appellant's prayer for peremptory instruction. Nor in refusing appellant's prayer for an instruction telling the jury that the letters of appellant were no corroboration of the testimony of prosecutrix.

(5) The court did not err in admitting the testimony of Claude Duty, who was one of the active attorneys specially employed to aid in the prosecution. He had not been put under the rule as other witnesses had been. The question as to whether any witness, or all the witnesses, shall be put under the rule is one that addresses itself to the sound discretion of the court, and that discretion was not abused in permitting Duty to testify. Kirby's Digest, § 3142; *Vance* v. *State,* 70 Ark. 272; *Hlass* v. *Fulford,* 77 Ark. 603; *St. L., I. M. & S. Ry. Co.* v. *Pate,* 90 Ark. 135.

(6) Did the prosecutrix permit appellant to have sexual intercourse with her upon a promise to marry only on condition that pregnancy resulted from such intercourse? Recurring to the testimony on this phase of the case, he told her if she loved him she would do this, if she

did not she did not care very much for him. He told her nothing would happen, if it did he would marry her immediately and nothing would be said about it any way. If things did not happen they were to be married anyway. She would not have allowed him to have intercourse with her had it not been for his promise to marry.

Pregnancy resulted. She informed him. He tried to get her to destroy the unborn child. She refused to do this. He then went away. She pursued him for a time, begging him to marry her in order that "the baby might have a name." He ignored her appeals.

Thus according to her testimony, which the jury believed, "with too credent ear she list his promise, lost her heart, and her chaste treasure opened to his unmastered importunities." When the resultant pregnancy was discovered, instead of hastening the marriage as he had promised, he "slipped the noose and sailed away." She "still loved him and thought of him tenderly as the father of her child," and followed him with pathetic entreaties to redeem his promise. He turned a deaf ear and she turned to the law. The verdict and judgment herein are in response to the prosecution instituted by her, and it occurs to us that the testimony adduced on behalf of the State is amply sufficient to sustain a finding that appellant had sexual intercourse with the prosecutrix upon an unconditional express promise of marriage.

The appellant, in his testimony, denied categorically that there was a promise of marriage. The jury resolved this issue against him. He did not in his testimony raise the issue that there was a promise of marriage only upon condition that pregnancy resulted from their intercourse. The testimony of the prosecutrix does not of itself raise such issue. The most that can be said of it when viewed in the strongest light for appellant is that she permitted him to have sexual intercourse with her upon condition that he would fulfill his promise to marry her, and, to marry her right away, if pregnancy resulted, in order to camouflage their illicit commerce.

So far as the application of the law to the facts is concerned, it is impossible, without super-refinement of reasoning, to distinguish this case in principle from *Taylor* v. *State,* 113 Ark. 520, except that the facts in the instant case are more favorable to the State's contention than in that case. In *Taylor* v. *State* we held: "Defendant will be held guilty of the crime of seduction, where he and the prosecutrix were engaged to be married, and while engaged he induced the prosecutrix to haxe sexual intercourse with him by promising that if she became pregnant he would marry her immediately, and when she submitted to him because of her engagement and promise, provided that prior to said intercourse she was chaste." Nor can it be distinguished from the case of *Davie* v. *Padgett,* 117 Ark. 550. The latter case was an action for damages for breach of promise of marriage, seduction being alleged in aggravation of the damages claimed. The precise question here was under review there and we disposed of it as follows: "According to the plaintiff's testimony, there was an unconditional promise of marriage, and on the other hand the defendant testified that there was no promise at all. Therefore, there was no issue as to there being a conditional promise or one based upon the consideration of sexual intercourse. The instruction therefore submitted a matter foreign to the issues, and was properly refused by the court." The same must be said here as to the ruling of the court in refusing appellant's prayer for instruction No. 8, by which appellant sought to have the issue presented as to whether the sexual intercourse was based on a conditional promise of marriage.

The court's instructions in the instant case were in conformity with the law as announced in *Taylor* v. *State,* and *Davie* v. *Padgett, supra.* The trial court correctly applied the law to the facts of this record.

Since the appellant challenged the evidence, urging that it is insufficient to sustain the verdict, we have made a full statement of the facts from the viewpoint of the State. It should be said, however, in justice to appel-

lant, that his testimony presented another side to the controversy, which, unfortunately for him, the triers of fact, under proper instructions, did not see proper to uphold.

The record presents no error in the trial of the cause, and the judgment is therefore affirmed.

STATE v. TAYLOR.

Opinion delivered July 8, 1918.

1. EVIDENCE—TITLE—RECORDS IN OFFICE OF STATE LAND COMMISSIONER—EJECTMENT.—In an action in ejectment, an ancient record in the office of the State Land Commissioner, showing the disposition of certain sixteenth section lands, *held* admissible in evidence, the records being of ancient origin, with the appearance of being genuine, and appearing to have been made by some one connected with the State Land Office.

2. TITLE—GRANT OF LAND FROM THE STATE RECORDS IN STATE LAND OFFICE—PRESUMPTION.—In an action in ejectment brought by the State against defendants, who claimed title from the State to certain sixteenth section lands, the proof held sufficient to warrant a finding that the defendants held under a conveyance from the State, it appearing that the defendants and their grantors had been in possession of the lands many years, had paid taxes thereon continuously since 1858 and 1859, and that under the head of "Remarks" on the plat of said lands as it now appears of record in the State Land Office was the following: "This section was sold to P. and H. in 1859 (except lot 16), transferred to T. and A. (in the defendant's chain of title). They, T. and A., claim to have a deed to said land from the county court. * * *" These facts *held* sufficient to raise the presumption of an actual grant of the lands to the defendants from the proper State officers.

3. STATE—STATE LANDS—PURCHASE—DUTY TO MAKE DEED.—Where A. purchased lands from the State, and paid the consideration therefor, the State can not later object and seek to recover the lands on the ground that the deed to the purchaser was not executed by the proper officer.

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

John D. Arbuckle, Attorney General, *J. W. House, Jr.,* and *Gordon Frierson,* for appellant.

1. Congress by act June 23, 1836, vested the title to the school lands in the State as trustee. It is incumbent therefore for appellees to deraign title from the State. 19 Ark. 308.

2. Appellees do not claim to own the lands by virtue of any patent issued by the State. The notations and excerpts from the register of school lands, sold and unsold, plats, etc., show, if anything, payment in Confederate money bought at five cents on the dollar. These records serve no useful purpose and are irrelevant and incompetent.

3. The various acts of the Legislature as to sixteenth section lands are unconstitutional and void. Acts 1905, page 472; Acts 1911, page 5, etc. They are an effort to dispose of the lands without any consideration, which it could not do. Const., art. 14, § 2; 95 Ark. 65; 63 *Id.* 56; 106 Ind. 270; 6 N. E. 623. The sheriff had no power to sell and the purchaser acquired no title. 29 La. Ann. 77; 31 *Id.* 175; 40 Neb. 298; 58 N. W. 966; 42 N. Y. 404. As to the unconstitutionality of the acts impairing the school fund, see 5 Neb. 203; 64 N. J. Eq. 584; 22 N. E. 255; 51 Pac. 112; 72 Ky. (9 Bush), 259; 74 Ky. (11 Bush), 74; 94 Ky. 177; 19 S. W. 405; 15 L. R. A. 825; 59 N. W. 907; 24 S. W. 272; 49 Mo. 236; 54 Ark. 468; 34 Pac. 274; 62 Fed. 417; 3 N. E. 165; 15 Mo. 412; 18 Col. 195; 29 La. Ann. 77; 40 Neb. 298; 56 Miss. 758; 13 Barb. 400; 73 Md. 521; 126 N. C. 689; 6 Ind. 83; 116 *Id.* 329; 16 Miss. 773; 31 La. 175; 73 Neb. 104, etc.

4. The acts of the Legislature violate section 10, art. 1, Const. U. S.; 19 Ark. 208; 4 Wall. 143-155; 2 Yerger, 543; 1 Head (Tenn.), 172.

Hawthorne & Hawthorne and *Lamb & Frierson,* for appellees.

1. Review the legislation of Arkansas regarding school lands. The ancient records introduced were competent and prove a sale by officers authorized to sell and the act of 1911 is not a present grant but simply a cura-

tive act constitutional and valid. Act 80 of 1875 is also a curative act. None of the cases cited by appellant concern curative acts, and most of them are decided upon provisions of State Constitutions differing from ours. The history of legislation as to school lands is found in act February 3, 1843; act January 1, 1861, p. 288; Acts 1875, No. 80; Manf. Dig., § § 1198, 1200, 6291, 6298, 6301; act of 1853, "Revised Statutes of Arkansas," 994-8; chap. 145, p. 926, Digest of Statutes of Arkansas, p. 927; Gantt's Digest, § 5570, etc. The collector is authorized to make deeds, etc.

2. Grady's title is valid. 49 Ark. 172; act of 1869. The collector was authorized to make the deed and the land was paid for. The sale was valid. 71 Ark. 484; 85 *Id.* 25; *Ib.* 372; 21 *Id.* 240.

3. The notations under the head of "Remarks" of the original plat book are ancient records and admissible in evidence. 73 Ark. 27; 17 *Id.* 203, 218-19. See also 27 Fed. 160; 1 Greenl. Ev. (16 ed.), 575-B; 33 Ga. 565; 2 Howard, 496; 27 So. 259; 11 Ala. 1028; 61 S. W. 695; 10 R. C. L., p. 1097, § 299.

4. Upon the subject of ancient records. See 50 U. S. (L. ed.), 125; 9 *Id.* 1137; 29 Atl. 376; 5 Tex. Civ. App. 650; 6 Vt. 170; 114 N. W. 133; 4 Watts & S. 378; 1 Dallas, 20; 28 Mich. 521; 26 Atl. 58; 57 Pa. St. 13; 32 Vt. 183; 12 Wheaton, 69; 3 Watts, 9; 10 Sar. & R. 383; 11 Eng. R. C. 349; 2 Metc. (Mass.), 83; 54 So. 415; 56 Fed. 483; 99 U. S. 660; 25 U. S. (L. ed.), 306-7; 1 Greenl. Ev., § 483.

5. The act of 1911 is valid and constitutional and perfects the title of Taylor and Armstrong. It is simply a curative act. 3 Ark. 285; 25 *Id.* 101; 27 *Id.* 419; 48 *Id.* 307; 122 *Id.* 82; 100 *Id.* 175; 122 *Id.* 291; 86 *Id.* 231; *Ib.* 412; 71 So. 270; 73 S. W. 700; 47 Mo. 189; 15 Cal. 575; 16 *Id.* 221. Adverse possession, paying taxes, etc., applies to school lands. 232 U. S. 168; 38 Ala. 600; 63 Ark. 56. The statute runs against the State. 38 Ala. 600; 26 So. 245; 12 *Id.* 233; 57 Pac. 324; 24 So. 962; 56 Pac. 513.

The act is not unconstitutional. 18 How. 173; 232 U. S. 168. It is simply a curative act. 71 So. 270; 57

Id. 967; 118 N. W. 415; 115 Pac. 687; 2 Col. 411; 15 Cal. 530; 16 *Id.* 220; 133 U. S. (33 L. E.), 631; 103 Ark. 446.

6. Act No. 80, December 14, 1875, is a valid curative act, and confirms the title in Taylor and Armstrong. Cases *supra.*

7. None of the cases cited by appellant are in point.

8. The curative acts do not violate the United States Constitution. 19 Ark. 308, and cases cited *supra.*

Counsel for appellants, in reply.

1. Spires' testimony is not material. A sale for worthless bonds or scrip of no value is void. 64 N. J. Eq. 584. If the memorandum is competent, appellees are bound by it and shows payment in worthless Confederate money.

2. These ancient memoranda do not bind the State, and do not show valid payment or deeds made. The State is not estopped. 93 Ark. 401. The proof of these memoranda is not sufficient. 56 Fed. 483; 99 U. S. 660; 64 Ark. 100.

3. The act 183, 1905, as amended by Act No. 10, Acts 1911, is not valid and constitutional even as a curative act. 43 Ark. 421. It is beyond the power of the Legislature. See 106 Ind. 207; 43 Ark. 156; 60 *Id.* 269; 43 *Id.* 420; 76 A. S. R. 322; 41 Md. 533; 80 N. W. 171; 50 Col. 388, etc.

STATEMENT OF FACTS.

On the 13th day of June, 1917, the State of Arkansas for the use of the common schools brought separate suits in ejectment in the circuit court against F. W. Taylor W. B. Armstrong, N. H. Grady and D. J. Darr to recover certain lands in Craighead County, Arkansas. The lands in question were sixteenth section lands and were held by the parties under a claim of ownership by purchase from the State.

On motion and by consent of all parties the causes were consolidated and tried together before the court sitting as a jury. After the commencement of the suit Darr sold his interest in the lands held by him to the defendant, Armstrong, and the cause of action as to Darr

was dismissed. The circuit court made a general finding of law and fact in favor of each of the defendants, Taylor, Armstrong and Grady.

From the judgment rendered the State has appealed. The facts necessary for a determination of the issues raised by the appeal are sufficiently stated in the opinion.

HART, J., (after stating the facts). The majority of the court is of the opinion that the question of whether or not the State has granted these lands to the defendants is a judicial one, dependent upon the facts, and that the finding of the circuit court in favor of the defendants can be sustained on the doctrine of presumptions of grants as announced in *Carter* v. *Goodson,* 114 Ark. 62. The principle upon which this doctrine rests arises from the general infirmity of human nature, the difficulty of preserving muniments of title, and the policy of supporting long and uninterrupted possession of lands. *Ricard* v. *Williams,* 7 Wheaton (U. S.), 59.

In *Beall* v. *Lynn,* 6 Harris & Johnson (Md.), 236, the court, in the discussion of this doctrine, said: "The grant of incorporeal hereditaments is often presumed from the undisturbed user thereof for a length of time. Grants from the Crown, in England, are presumed, from length of possession, and here even proprietary grants, under certain circumstances, are presumed. In general these presumptions are bottomed upon the existence of certain facts, which can leave but little doubt upon the mind of the truth of the fact which we are called upon to presume. They frequently, too, derive their force and efficacy from that vigilance with which the law guards ancient possessions, which, sooner than they should be disturbed, presumes that they had in contract a rightful commencement."

In that case it was held that a patent or grant for land in case of a peaceable and uninterrupted possession of upwards of sixty years, together with the payment of quit-rents or taxes, may be presumed to have been formerly issued, and it was also held that such presumption

was one of fact and not of law. See also *Mathews* v. *Burton,* 17 Grat. (Va.), 312.

In *State* v. *Wright,* 41 N. J. L. 478, it is said that the doctrine of presumption against the Crown, where the adverse claims could have had legal inception is recognized in many cases. This doctrine has been also recognized in cases in which the United States was a party. *United States* v. *Chaves,* 159 U. S. 452; *Hays v. United States,* 175 U. S. 248. In the latter case the court recognized that such presumptions are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession. Consequently the court held that such presumptions may be rebutted by contrary presumptions; and never fairly arise where all the circumstances are perfectly consistent with the nonexistence of a grant. The court also held that the presumption is subject to the limitation that where title is claimed from a deed which is shown to be void, it will not be presumed that there was an independent grant, or where surrounding circumstances are inconsistent with the theory of the grant. So in that case the court said there was no evidence to justify it in believing that a legal grant could ever have been made. In that case Hays produced oral testimony tending to show a grant of lands by the Governor of New Mexico and an order upon the alcalde to put him in possession; and also gave evidence tending to show that this document was afterwards lost. Hays also produced a grant by the alcalde in which no reference whatever was made to a prior grant by the government. The court held that the grant of the alcalde was inconsistent upon its face with the alleged grant by the Governor and held that no grant arose under the facts because of the inconsistency which was incompatible with the existence of a grant. In that case there could be no presumption of the grant from the alcalde because he had no power to make the grant and where a void grant is shown it affords no presumption

that another valid grant was made. Here the facts are essentially different. There is no evidence which is conclusively incompatible with the existence of a grant. Neither does the record conclusively show that if a grant was made that it was made by an officer who had no authority to execute it.

In this case it is urged that the possession of the various defendants is not of such a character that, taken in connection with the surrounding circumstances, a presumption could justifiably be founded upon it. Before considering the legal sufficiency of the evidence tc support the finding of the circuit court, it may be well tc consider an objection made to the introduction of evidence.

(1) It is strongly insisted by counsel for the State that the notations under the head of remarks, hereinafter stated, on the books of the land office are not competent in this case. We do not agree with counsel in this contention. It is true that there is no showing when the notations were made, nor is there any statute providing that they shall be evidence in the course of the matters contained in them. If this were true, the record would be conclusive proof of what it contains. Although the record has no force as a record, still the entries are not wholly without probative force. Prior to the act of April 12, 1869, school lands were sold upon a petition of the inhabitants of the township to the common school commissioner of the county in which the land was situated. The commissioner made the sale and gave to the purchaser a certificate of purchase. The terms were on a credit of not less than one, nor more than five years. Upon payment of the money a patent was required to be made out by the Secretary of State from returns made to him by the common school commissioner. The patent was signed by the Governor and countersigned by the Secretary of State and contained a description of the land granted. The Secretary of State was required to keep a list of the sale and the date of each patent. Sections 49-56 of chapter 154, Gould's Digest of the Arkansas statutes. Under

the act of April 12, 1869, the collector was substituted for the common school commissioner in making the sale. Acts of 1869, page 190. The office of Commissioner of Immigration and State Lands was created by the act of July 15, 1868. Acts of 1868, page 61. There is now in the office of the State Land Commissioner a register of the school lands. This record shows the names of the purchasers of the lands and the dates when the patents were issued to them. There is nothing to show when these records came into the possession of the State Land Commissioner. The earlier records show entries prior to the date of the creation of the office of State Land Commissioner. One of these records has posted on its front page a printed opinion from the Attorney General to the Secretary of State in regard to certain school lands. This opinion bears the date of August 15, 1853. The records contain notations of the sale of school land for several years prior to this date and up until several years later than 1860. As we have already seen, it was the duty of the Secretary of State during these years to keep a registry of the sales of the school lands together with the date of the issuance of the patents to the purchaser. This tends to show that these records were turned over to the Land Commissioner by the Secretary of State. Other records found in the State Land Office relating to the disposition of the school lands during the same period of years are called the plat books. These books contain a plat of the sixteenth section lands together with a description of them according to the United States surveys. The notations hereinafter referred to are recorded on these plats. The lands in controversy are shown on page 71 of one of the plat records. Numerous other pages of the record contain notations in the same ink and in the same handwriting in regard to the sale of the school lands. In many instances reference is made to the record of the register of school lands for information as to the date of the issuance of the patents. Observation of the entries on this record show it to be an ancient one free from suspicion, and made at a

time when the officer had information before him with reference to which the notations were made. It appears from the testimony that these records are constantly used and acted upon by the State Land Commissioner and those seeking information in regard to these lands. It will be observed that the lands were placed upon the tax books and assessed for taxation at once. The record shows that the defendants and their predecessors in title have paid taxes on them since the date of purchase shown by the entries on the plat books of the State Land Commissioner. We think the entries on this record may be given in evidence because they are of ancient origin, appear to be genuine, and to have been made by some one connected with the State Land Office. They may be considered in connection with the other facts and circumstances proved. Such entries or notations are admissible upon the ground that they appear to be acts having a necessary or natural connection with other official acts, all pointing to the execution of deeds to the purchasers of the school lands. See *Townsend* v. *The Estate of Downer,* 32 Vt. 183.

In *Carter* v. *Tinicum Fishing Company,* 77 Penn. 310, the court, speaking through Chief Justice Agnew, said: "Presumptions arising from great lapse of time and nonclaim are admitted sources of evidence, which a court is bound to submit to a jury as the foundation of title by conveyances long since lost or destroyed." The learned Chief Justice also quoted from the opinion of Justice Sergeant in *Foulk* v. *Brown,* 2 Watts (Pa.), 209, as follows: "The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice can not be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away; and a new generation has appeared on the stage of life, unacquainted with

affairs of a past age, and often regardless of them. Papers which our predecessors have carefully preserved, are often thrown aside, or scattered as useless by their successors. It has been truly said that if families were compelled to preserve them, they would accumulate to a burthensome extent."

In discussing presumptive evidence, Professor Greenleaf said: "Thus, also, though lapse of time does not of itself, furnish a conclusive legal bar to the title of the sovereign, agreeably to the maxim, "*nullum tempus occurrit regi,*" yet, if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement, after many years of uninterrupted adverse possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long continued peaceable enjoyment, accompanied by the usual acts of ownership." Greenleaf on Evidence (16 ed.), vol. 1, par. 45.

(2) In regard to the Taylor land there is a stipulation that the defendant and his predecessors in title have paid the taxes on said land continuously from the year 1859, to and for the year 1916, inclusive, and that such taxes amounted to the sum of $937.42; that prior to the year 1911 said lands were wild and unimproved, that the owner began to clear and put the land into cultivation in the year 1911, and that about 135 acres are now cleared and in cultivation; that the rental value amounts in the aggregate to $1,200 per annum. Under the head of remarks on the plat of said lands as now appears of record in the State Land Office is the following: "This section was sold to Pollard & Hillis in 1859 (except lot 16); transferred to Taylor & Armstrong. They, Taylor and Armstrong, claim to have a deed to said land from the county court of Craighead County. Payment made in Confederate money, bought for the purpose of making the payment at five cents on the dollar."

It is, also, shown that the improvements made on said lands by the defendant and those under whom he claims title amount to $5,446 and that they consist of

clearing the land for cultivation, fencing the same and erecting a dwelling house and other buildings thereon.

In the Armstrong case the defendant and those under whom he claims title have paid the taxes continuously upon part of said land from the year 1860 to and including the year 1916, and upon a part of it from the year 1858 to and for the year 1916, and that said taxes amount to $561.72. The notations in the land office in regard to this land are also as follows: "This section was sold to Pollard & Hillis in 1859 (except lot 16); transferred to Taylor & Armstrong. They, Taylor and Armstrong, claim to have a deed to said land from the county court of Craighead County. Payment made in Confederate money, bought for the purpose of making the payment at five cents on the dollar."

The value of the improvements on this land consisting of clearing the land and fencing the same and buildings erected amounted to $3,800. In testing the legal sufficiency of the evidence to support the finding of the court, it must be considered in the light most favorable to the defendant, and when so considered it is substantially as stated above. The cases were consolidated and tried before the court sitting as a jury. When all the facts and circumstances just recited are considered together, it was sufficient to raise the presumption of an actual grant of the land from the proper State officers to the defendants.

As stated in *Townsend* v. *The Estate of Downer, supra*: "It is the characteristic of circumstantial evidence that while the circumstances taken singly and separately, prove little or nothing, all of them together harmonize and point to a result which the mind must adopt as necessarily following the coincidence of all the facts, all so coinciding that they can not reasonably be accounted for without the result."

(4) With reference to the Grady land, but little need be said. The sale of this land was made on February 12, 1881, by the sheriff and collector of the county. At that time the sheriff was the proper officer to make

the sale and the land could be sold on deferred payments. Under the law as it then existed, it was the duty of the Secretary of State to make out the patent which was to be signed by the Governor and countersigned by the Secretary of State. Gantt's Digest (1874) Statutes of Arkansas, sections 5560-5571. By the Act of March 22, 1881, it was made the duty of the county collector to execute the deed. Acts of 1881, p. 154.

The deed in the present case was made by the sheriff and collector on December 31, 1885. Grady and his predecessor in title have paid all the taxes from 1881 to 1916, inclusive, amounting to $603.14. Grady and his grantor have cleared and put into cultivation thirty-eight acres of said land and the improvements put on the land by them are of the value of $1,520.

It is the contention of the State that the deed should not have been made by the collector but should have been made by the officers whose duty it was to make the deeds under the law as it existed on the date of the sale. We need not decide that question. The record shows that the person from whom Grady purchased the lands bought from the purchaser at the sale, and a preponderance of the evidence shows that the purchase money has been paid. Therefore, it was the duty of the State, through its proper officers, to make the purchaser a deed to the land, and it could not take advantage of its default in this respect to recover the lands.

It follows from the views expressed by a majority of the court that the decree in all three of the cases will be affirmed.

McCULLOCH, C. J., and SMITH, J., concur in the judgment.

GRAMLICH v. STATE.

Opinion delivered July 8, 1918.

1. CRIMINAL LAW—ILLEGAL MANUFACTURE OF LIQUOR—CHARGE OF TWO CRIMES.—When defendant was charged in one indictment with the crimes of manufacturing and being interested in the manufacture of liquor (if they are two crimes), defendant's remedy is by motion to require the State to elect.

2. LIQUOR—ILLEGAL MANUFACTURE.—The evidence held sufficient to warrant a conviction of the crime of the illegal manufacture of intoxicating liquor.

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

I. S. Simmons, for appellant.

1. The demurrer should have been sustained. It was defective—did not state facts sufficient to charge a public offense but charges two separate felonies.

2. The court erred in refusing the instructions asked by defendant. *Douglas* v. *State,* ms., August, 1917.

3. The liquor was not intoxicating. It contained no alcohol when seized.

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

1. The demurrer was properly overruled. Acts 1915, Act 30, § 2. It follows the language of the statute. It does not charge two offenses. The charge is conjunctive. The motion was made to elect. 37 Ark. 408; 84 *Id.* 136.

2. Instruction No. 2 for appellant was properly refused. It was fully covered by others given.

3. No. 3 was properly refused, as the substance was given in others. 128 Ark. 35.

4. The evidence is ample to sustain the verdict. The liquor was alcoholic and intoxicating.

SMITH, J. Appellant was convicted under an indictment which, omitting the caption and signature, reads as follows:

"The grand jury of Sebastian County for the Fort Smith District thereof, in the name and by the authority of the State of Arkansas accuse the defendant, Joe Gramlich, of the crime of manufacturing intoxicating liquor, committed as follows, towit: The said Joe Gramlich, in the county, district and State aforesaid, on the 28th day of January, 1918, unlawfully and feloniously did manufacture, and unlawfully and feloniously was

interested in the manufacturing of alcoholic, vinous, malt, spirituous, fermented and intoxicating liquors, against the peace and dignity of the State of Arkansas."

The prosecution was based on an alleged violation of section 2 of Act No. 30 of the Acts of 1915, page 98, which provides that it shall be unlawful to "manufacture, sell or give away, or be interested, directly or indirectly, in the manufacture, sale or giving away, of any alcoholic, vinous, malt, spirituous, or fermented liquors, or any compound or preparation thereof commonly known as tonics, bitters, or medicated liquors, within the State."

A demurrer to this indictment was filed and overruled, and it is now said that the indictment was defective in that it "does not state facts sufficient to constitute a public offense." And it is also objected that the indictment charges appellant with two separate felonies.

The indictment follows the language of the statute and so describes the offense charged as to apprise the appellant of the charge he is to meet, and it is, therefore, sufficient.

(1) The objection that two offenses were charged was raised only by demurrer, and the objection is that the indictment charges that appellant manufactured liquor and that he was interested in the manufacture of of liquor. If it be conceded that manufacturing and being interested in the manufacture of liquor are separate offenses, and that appellant is charged with a violation of both of them, he was charged conjunctively, and not disjunctively, and no motion was made to require the State to elect. The indictment was not defective because it charged two offenses conjunctively. And the proper motion to raise the question that more than one offense is charged is one to require the State to elect. *Thompson* v. *State,* 37 Ark. 408; *Mears* v. *State,* 84 Ark. 136; *Rogers* v. *State,* 201 S. W. 845.

Appellant complains of the action of the court in refusing to give instructions numbered 2 and 3 requested by him which declared the law on the subject of reason-

able doubt. If it be conceded that both of these instructions were correct, it does not follow that error was committed in refusing to give them. Other instructions given by the court fully declared the law on that subject, and no error was committed in refusing to multiply instructions upon a question which had already been fully covered.

It is insisted that the evidence is not sufficient to support the verdict of the jury. Appellant testified that he was engaged only in making vinegar for his own use and that the liquid which he was preparing was not alcoholic and that it was not adapted for use as a beverage. The officers who made the arrest, however, testified that the liquor which they found was known as Choctaw beer and was made out of hops, malt and bran. They found parts of two kegs, neither of which was full, and they testified that it was the custom of persons who drank this liquor to have one keg making while they drank the other, as it has to be made a few days before it is ready to drink. They testified that the liquor was drunk as a beverage and would make one intoxicated who drank a sufficient quantity.

(2) It is finally insisted that the liquor was not alcoholic or intoxicating and that if it did in fact at any time become alcoholic that this chemical change resulted from an exposure of the liquor to the action of the air after it was taken from his possession. But one of the instructions given by the court took care of this question of fact by charging the jury as follows:

"The court further charges you that you must find that the liquid contained alcohol at the time it was received from the possession of the defendant. Unless you so find beyond a reasonable doubt you should return a verdict in his favor and acquit."

The officers testified that they drew off a pint bottle of the liquor from each of the kegs and carried these samples to a chemist for examination and poured the remainder of the liquor on the ground. This chemist testified that he made an analysis of the samples and

found that they contained alcohol, by volume, 2.8 per cent., and, by weight, 2.33 per cent., and that a liquor containing this quantity of alcohol was intoxicating. He also testified that if a sufficient quantity of sugar had been added the liquor would have gone to between 9 and 14 per cent. of alcohol. This testimony was sufficient to support a finding that appellant was manufacturing liquor which was both alcoholic and intoxicating. And as no error appears in the record the judgment is affirmed.

HAWTHORNE v. STATE.

Opinion delivered July 8, 1918.

1. EVIDENCE—CRIMINAL LAW—PROOF OF ALIBI.—An instruction held proper which told the jury that where the defendant sought to prove an alibi, the burden was upon him to do so, but "that this burden is discharged if the proof raises a reasonable doubt in your mind as to whether he was at the place where the crime was committed or at some other place, because if he was not there he could not be guilty. * * * If the proof raises a reasonable doubt as to whether he was there, that raises a reasonable doubt of his guilt."
2. CRIMINAL LAW—RAPE—PENALTY—INSTRUCTION.—In a prosecution for rape, it is proper for the trial court to tell the jury that if they found the defendant guilty, and in their verdict said nothing about punishment, that the court would have to fix the punishment at death; but that the jury might fix the punishment at death or life imprisonment.
3. EVIDENCE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—In a prosecution for rape, defendant was convicted, but sought a new trial on the ground of newly discovered evidence to the effect that a certain street car conductor would testify that he was on a certain street car near the time of the alleged commission of the crime. *Held,* the motion was properly overruled upon the ground that the testimony was merely cumulative of other testimony, and also that if defendant was upon the car, as alleged, he should have called the conductor to testify in the first instance.

Appeal from Pulaski Circuit Court; *Jno. W. Wade,* Judge; affirmed.

John D. Shackelford, for appellant.

1. The evidence is conflicting and very unsatisfactory. There is no positive testimony against defendant except the girl's. The jury did not believe him guilty or they would have found the death penalty. The proof of identity is very uncertain—the girl was mistaken. The evidence fails to identify defendant as the criminal. The description is conflicting and uncertain.

2. An alibi was proven.

3. A new trial should have been granted for newly discovered evidence.

4. The court erred in instructions 13 and 20. They were prejudicial.

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

1. The evidence is ample to support the verdict.

2. A new trial is not warranted because of newly discovered evidence. It is cumulative merely and due diligence was not shown. 17 Ark. 404; 15 *Id.* 395; 66 *Id.* 523; 100 *Id.* 203; 99 *Id.* 407; 96 *Id.* 400; 45 *Id.* 328; 40 *Id.* 445; 97 *Id.* 92; 111 *Id.* 640; 39 *Id.* 221; 55 *Id.* 323; 72 *Id.* 404, 37 *Id.* 91; 38 *Id.* 514; 85 *Id.* 179; *Ib* 333; 104 *Id.* 212; 13 *Id.* 360.

3. There was no error in giving instruction No. 13, 59 Ark. 379. 102 *Id.* 627.

4. There was no error in giving No. 20. Acts 1915, Act 187; 133 Ark. 261.

SMITH, J. Appellant prosecutes this appeal to reverse a judgment of the trial court sentencing him to life imprisonment for the crime of rape, alleged to have been committed upon the person of Carl Bowman, a seventeen year old girl, on the night of February 11, 1918. Miss Bowman had gone on an automobile ride on the West 12th street pike out of the city of Little Rock with Gladys Terhune, her companion, a girl of her own age, and two young men about grown. After driving several miles out of town they turned around to return, when a report was heard, which the occupants of the car mistook

to be a blowout of a tire, and they stopped to examine the tire and while so engaged a young negro man approached the car with a pistol in his left hand and who, when asked if he wanted money or jewelry, answered that he did not; that he wanted the girl on the rear seat who was Miss Bowman. The negro stepped on the running board of the car, seized hold of Miss Bowman's hand and dragged her from the car. She testified that either or both of her male companions could have seized the negro and that either was larger than the negro, but that they, were too cowardly to do anything in her defense, and she was compelled to leave the car and was taken a short distance from the road and ravished. The other occupants of the car left Miss Bowman to her fate and drove rapidly to the city, where they gave the alarm, and then returned to the scene of the crime with the officers who had been notified of its commission. Miss Bowman and the other occupants of the car positively identified appellant as the guilty man, although he proved to be a smaller man than they in their fright had taken him to be. One or more of the occupants of the car had the impression that Miss Bowman's assailant was cross-eyed or had some defects in his eyes which made them peculiar; but in this they were also mistaken. Notwithstanding this discrepancy the witnesses were positive in their identification, and there can be no question about the legal sufficiency of the testimony to support the verdict.

Appellant denied his guilt and undertook to prove an alibi. His theory of the case is that Jack Padgett, one of the occupants of the car and the man who drove it, had carried the young ladies out the pike pursuant to an understanding to that effect between him and Miss Bowman's assailant; but no substantial testimony was offered in support of that theory.

The court gave an elaborate charge which fully and fairly covered all the issues presented by the testimony.

(1) It is insisted by appellant, however, that instruction numbered 13, which dealt with the defense of an alibi, was erroneous, in that it told the jury that the

burden of proof on this issue was upon the appellant. It is true the instruction so stated; but it also stated "that this burden is discharged if the proof raises a reasonable doubt in your mind as to whether he was at the place where the crime was committed or at some other place, because if he was not there he could not be guilty." The instruction also stated that "if the proof raises a reasonable doubt as to whether he was there, that raises a reasonable doubt of his guilt." The instruction as given was a correct declaration of the law. *Ware* v. *State,* 59 Ark. 379; *Wells* v. *State,* 102 Ark. 627.

(2) Exception was saved to the action of the court in giving to the jury an instruction numbered 20, which reads as follows: "Gentlemen of the Jury: If you go out and say 'We, the jury, find the defendant guilty of rape as charged in the indictment,' and do not say anything about the punishment, the court will have to fix his punishment at death. I submit to you that in the event you find him guilty you will realize that under the law you have the right to fix his punishment yourself at death, or life imprisonment; but unless you do that it is the duty of the court to fix it at death."

The basis of the objection to this instruction appears to be that it was given under circumstances which might have caused the jury to attach special significance to it. It is recited in the record that after the first nineteen instructions had been given to the jury the "court and counsel for the State and the defendant retired to the judge's chambers, and upon their return to the court room, the judge resumed the bench and gave the instruction set out above." We think the objection made is not tenable. It is true that the instruction numbered 19, which had already been given, told the jury that if they found the defendant guilty they might fix his punishment at death or at life imprisonment in the State penitentiary; but they had not been instructed, prior to the giving of instruction numbered 20, as to the effect of a verdict merely finding the defendant guilty as charged in the indictment. In giving this instruction numbered 20

the court evidently had in mind the opinion of this court in the case of *Kelley* v. *State,* 133 Ark. 261. The opinion in that case was handed down just a short time before appellant's trial in the court below, and we there construed section 1 of Act No. 187, of the Acts of 1915, page 774. In the Kelley case, *supra,* the jury had found the defendant guilty of murder in the first degree as charged in the indictment but had not fixed the punishment to be imposed, and it became necessary to construe the act of 1915 to determine the correctness of the action of the trial court in that case in imposing the death sentence upon the rendition of that verdict. The language of the Act of 1915 is set out in that opinion and reads as follows: "That the jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor."

In construing that statute we said that it was the legislative intent to extend a privilege or right to the jury to impose a lighter punishment than death; but that in the event this clemency was not extended by the jury the punishment fixed by law would follow the verdict, and that, therefore, the death sentence was the proper one to be imposed in that case. The trial judge no doubt had in mind that the jury here might return a verdict similar to the one returned in the Kelley case, in which event it would become his duty to impose the death sentence, and the court accordingly told the jury that the punishment would be death unless the jury fixed the punishment at life imprisonment. We think the instruction was clearly given in the interest of the appellant and was prompted by the humane impulse of the trial judge to give the jury an opportunity to save appellant's life if they so desired, and the verdict returned would indicate that the instruction given might have been instrumental in accomplishing that result.

(3) It is finally insisted that error was committed by the trial court in refusing to grant appellant a new trial upon the ground of newly discovered evidence. But

in opposition to this contention it is insisted on behalf of the State that the testimony is cumulative of other testimony in the case, and that a lack of diligence was shown by appellant in discovering this testimony prior to his trial. The most important of this testimony was that of a street car conductor, and it is illustrative of the other testimony referred to in the motion. It is pointed out in the brief of the State that there are certain inconsistencies in the recital of the statement of what the testimony of this witness would have been which would have caused the jury to wholly disregard it had it been heard at the trial. So far as that contention is concerned, however, it may be said that the witness at the trial might have explained these apparent contradictions, and we do not, therefore, base our decision of this question on that ground. The testimony of this conductor would have tended to show that appellant was a passenger on a Highland car at a time when it would have been very difficult, if not impossible, for him to have thereafter been at the scene of the crime at the time of its commission. But, as has been said, this testimony was cumulative to much other testimony on the alibi. Moreover, defendant knew that he was a passenger on the street car, if such was the case, and he should, therefore, before his trial, have inquired of the conductor what knowledge he had concerning the case. *Russell* v. *State,* 97 Ark. 92; *Adams* v. *State,* 100 Ark. 203; *Young* v. *State,* 99 Ark. 407; *Osborne* v. *State,* 96 Ark. 400. Judgment affirmed.

HELDMAN CLOTHING COMPANY v. OATES.

Opinion delivered July 8, 1918.

1. EVIDENCE—SALE OF STOCK OF GOODS—PAROL PROOF THAT MORTGAGE WAS INTENDED.—Where parties entered into a written contract, which on its face purported to be a sale of a stock of merchandise, as against a third party, parol testimony is not admissible to show that the transaction was intended to be a mortgage.

2. MORTGAGE—CHATTELS—SALE.—The difference between a mortgage and a sale is that in a sale title passes absolutely, whereas the mortgagor may pay the debt and disencumber the property.

3. BULK SALE—INTENTION OF THE PARTIES.—Under the Bulk Sales law, the purchaser who has not complied with the statute, becomes a receiver of the stock of goods and is liable *pro rata* to the seller's creditors; and this rule is not affected by the fact that the buyer and seller acted in good faith with no intent to defraud.

Appeal from Pope Chancery Court; *Jordan Sellers,* Chancellor; reversed.

J. G. Wallace & Son, for appellant.

1. The contract was a sale, not a mortgage, and is void under the Bulk Sales Act No. 88, 1913. The sale was complete and consummated before the contract was reduced to writing. It has all the elements of a sale; it passes title and possession and is unconditional, and Ross is to act only as agent of Oates. 222 Mass. 587; 127 Ga. 454.

2. If a mortgage it is void as to appellant as in fraud of creditors. 23 Ark. 262; 7 Ark. 269.

3. Oates should be held as receiver under the act. Acts 1913, No. 88; 123 Ark. 285; 127 *Id.* 296.

U. L. Meade, for appellee.

1. In the light of all the surrounding circumstances, their acts and the evidence the contract was a mortgage and so intended. It was not a sale under the Bulk Sales Act. Parol testimony was admissible that the writing was a mere security for a debt. 38 Ark. 264; 13 *Id.* 116; 40 *Id.* 146; 51 *Id.* 433; 78 *Id.* 527; 18 *Id.* 24; 70 *Id.* 299; 88 *Id.* 299; 105 *Id.* 314.

2. But if a sale notice was waived and within the act. 70 *Id.* 401. See also 59 Ark. 344; 71 *Id.* 556. Appellant and other creditors had due notice.

SMITH, J. J. B. Ross was engaged in the mercantile business at Russellville, and he incurred obligations amounting to something over six thousand dollars. He realized his inability to pay this indebtedness and he had

a friend to interview his creditors and submit to them a proposition to take fifty cents on the dollar in satisfaction of their demands. All of the creditors assented to this proposition except the Heldman Clothing Company, of Cincinnati, Ohio, which company had an account amounting to $585. To raise the money required to make the settlement proposed Ross entered into an agreement with R. M. Oates, which was reduced to writing and reads as follows:

"Know all men by these presents: That I, J. B. Ross, has this day sold to R. M. Oates his stock of merchandise, fixtures, and all goods in bulk in the store house situated on the east side of Jefferson street in the city of Russellville, Arkansas; said sale is for cash and for $3,000, this day paid by the said R. M. Oates to the said J. B. Ross, the receipt of which is hereby acknowledged. And on the same day, towit, January 15, 1917, the said J. B .Ross delivers the possession and title to said stock of goods and fixtures to R. M. Oates, provided, that the said J. B. Ross, as the agent of the said R. M. Oates shall have the privilege of selling said stock of goods and fixtures for the said R. M. Oates any time within thirty-five days from this date, for a better price and at a profit if he can do so.

"And should said J. B. Ross or R. M. Oates find a purchaser and sell said stock and fixtures at a better price and profit, then in that event said J. B. Ross is to have the benefit of said profit, after paying back to the said R. M. Oates said $3,000 with ten per cent. interest thereon, per annum, from the 15th day of January, 1917, until paid.

"It is further understood and agreed that the said J. B. Ross shall continue in possession of said stock of goods and fixtures as the agent of R. M. Oates for thirty-five days unless sooner sold to any other, and sell for cash at retail said stock and merchandise as before, but is to keep a correct account of all daily sales and cash received by him on said sales, beginning with the 15th day of January, 1917, and deposit each day's sales or

cash taken in before the bank closes each day, in the People's Exchange Bank, of Russellville, Arkansas, in the name of R. M. Oates, provided further, that the said R. M. Oates is not chargeable with or liable for store house rent or clerk hire or any other expense, in conducting the business during said thirty-five days; said stock of merchandise is to be sold at retail or until sooner sold.

"It is further understood and agreed to that said stock of goods and fixtures are to be insured against loss by fire for at least $2,000, payable to R. M. Oates at the cost and expense of J. B. Ross, and if said stock and fixtures are already insured for said amount or more then said insurance policy be and the same is hereby transferred and assigned to the said R. M. Oates, as his interest might appear.

"This sale is unconditional and the title and possession to said stock of goods and fixtures, herein mentioned, have this day passed from J. B. Ross to R. M. Oates, and the said J. B. Ross is acting only as the agent for the said R. M. Oates in the further conducting and management of said business.

"It is further understood and agreed to that said R. M. Oates takes said stock of goods and fixtures free from debts for the purchase price for any part of said goods, and the said R. M. Oates assumes no liability whatever for any of the debts or liabilities of the said J. B. Ross connected with the merchandise business or otherwise.

"Given under our hands in the city of Russellville, Arkansas, on this 15th day of January, 1917.

"R. M. Oates,
"J. B. Ross."

After executing this agreement Ross negotiated a sale of the goods to Darr & Darr, of Atkins, Arkansas, for 67½ cents on the dollar of the invoice price, and this sale netted Ross about $5,000. The clothing company then brought suit to have Oates declared a receiver of the stock of goods under the provisions of Act No. 88 of the

Acts of 1913, page 326. This is the act commonly designated as the Bulk Sales Law.

The provisions of the act were not complied with by giving the notice to creditors there provided for; but it is earnestly insisted that the transaction between Ross and Oates did not constitute a violation of the act, in that no sale of the goods was made to Oates. The court below so found and dismissed the complaint as to Oates, but rendered a personal judgment against Ross, and the clothing company has duly prosecuted this appeal.

(1) The writing set out purports to evidence a sale and the transaction throughout is designated as a sale and it is recited that "This sale is unconditional * * *." But it is contended that the agreement between Ross and Oates which was in fact made was a mortgage, and not a sale, of the property, and Oates and Ross gave testimony which evidently convinced the chancellor of that fact. Was the parol testimony admissible to vary the terms of the writing set out above? A similar question was involved in the case of *Appolos* v. *Brady*, 49 Fed. 401, which was a decision by the Court of Appeals for this circuit. There a writing was in form an assignment, but the parties to it undertook, as against an attaching creditor, to show that it was in fact a mortgage, the instrument being void as an assignment under the laws of the Indian Territory because it directed the assignee to sell at a private sale and no bond was filed as required by the statute. As stated, the case arose in the Indian Territory, and as it involved a construction of the Arkansas statute on the subject of assignments, which had been adopted by the Congress of the United States for that territory and which was then in force, the court followed the Arkansas cases which are there cited. The court held that parol testimony was inadmissible for the purpose of showing that the parties to the instrument had in fact intended to execute a mortgage, and not a deed of assignment, and in doing so said:

"The point of the inquiry is, what was the purpose of the party in executing a given instrument? and, as

against persons not parties thereto, the intent must be held to be that which is properly derivable from the language of the instrument, applied to the subject-matter and read in the light thrown thereon by the attending circumstances and the acts done in carrying the contract into effect. Where the rights of the parties to the instrument are alone involved, and they agree upon the meaning thereof, a court would be justified in assuming their construction to be correct, without close scrutiny of the legal effect of the language used in the written instrument, but when the parties to the instrument rely thereon, as a means of defeating action taken by third parties, and limiting rights acquired in or to the subject-matter of the contract, then such third parties have the right to insist that, as against them, the written instrument can not be held to mean or intend anything other or different from the purpose which the language of the instrument, read in the light of its attending circumstances, shows to have been the intent of the parties in executing it. * * *.

"* * * To defeat the attachment, it was proposed to show, not the acts of the parties done in connection with the possession and sale of the property, but the intent existing in the minds of the parties, or the belief they entertained that the instrument was, in legal effect, a mortgage, and not a deed of assignment.

"It was not error to reject evidence of this nature. Had it been admitted, it would have been the duty of the court to instruct the jury that, as against third parties, who can have no knowledge of secret purposes existing in thought only, and who have the right to regulate their action by that which the parties cause to appear in an open and usual manner, no weight could be given to evidence of this character as against that afforded by the written instrument and the acts of the parties in connection therewith, and that, therefore, it must be held that the instrument under which the intervener claimed the property was a deed of assignment, and as such was

void under the provisions of the statute regulating assignments."

See, also, *Box* v. *Goodbar*, 54 Ark. 6; *Richmond* v. *Mississippi Mills*, 52 Ark. 30.

Having concluded that the character of the instrument as against the creditor must be determined by its recitals and the acts of the parties done in connection with the possession and sale of the property, rather than from a consideration of any private understanding between Oates and Ross, we turn to a consideration of the legal effect of the instrument itself.

(2) Does the writing evidence a mortgage or a sale? An almost indefinite number of cases have discussed the difference between a sale and a mortgage, and many of these cases are found in our own reports. *Dicken* v. *Simpson*, 117 Ark. 304; *American Mortgage Co.* v. *Williams*, 103 Ark. 484; *Hays* v. *Emerson*, 75 Ark. 551; *Hershey* v. *Luce*, 56 Ark. 320; *Harmon* v. *May*, 40 Ark. 146; *Gibson* v. *Martin*, 38 Ark. 207. The cases cited cite other Arkansas cases to the same effect. These cases recognize the fundamental difference between a mortgage and a sale to be that the title passes absolutely in a sale, whereas a mortgagor has the right to pay the debt and disencumber the property. Here the instrument expressly recites that "This sale is unconditional," and it contains no clause of defeasance. It is true that it does allow Ross to remain in possession of the goods, and does give him the right to resell them, but the instrument expressly recites that he does so as agent for Oates. It only gave Ross an agency to resell property belonging to Oates, and the value of this agency was dependent upon the price he could obtain for the goods. But the goods became and remained the property of Oates until they were resold by Ross for Oates. Ross' possession of the goods was that of an agent or a broker with the right to take as compensation for his services any profits accruing from a resale of the goods. And a transaction of that character is not a mortgage.

(3) Section 1 of the Bulk Sales Act provides that a sale, transfer or assignment in bulk of any part of or the whole of a stock of merchandise otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller shall be void as against the creditors of the seller unless the provisions of the act in regard to the giving of notice to the creditors are complied with. And the liability of the purchaser is not made to depend upon the good or bad faith of his purchase. It is not necessary to consider whether the debtor is attempting to defraud his creditors and the purchaser participates in that purpose. If there is a sale, transfer or assignment under the circumstances stated, the purchaser becomes a receiver of the stock of goods and liable *pro rata* to the creditors. *Stuart* v. *Elk Horn Bank & Trust Co.,* 123 Ark. 285.

So that, although Ross and Oates may have acted in entire good faith and with no purpose to defraud Ross' creditors, still the legal effect of their transaction, as disclosed by the writing which evidenced it, was to transfer the absolute legal title to the stock of goods, and that transaction is within the purview of our Bulk Sales law. It follows, therefore, that the decree of the court below must be reversed, and it will be so ordered, with directions to the court to proceed in accordance with the opinion of this court in the case of *Stuart* v. *ElkHorn Bank & Trust Co., supra,* in the distribution of the proceeds of the sale of the stock of goods. See, also, *Ledwidge* v. *Arkansas National Bank, post,* p. 420.

WARD *v.* STATE.

Opinion delivered July 8, 1918.

APPEAL AND ERROR—CRIMINAL APPEAL—BILL OF EXCEPTIONS—SIGNATURE OF JUDGE—FELONY CASE.—It is necessary that the bill of exceptions, in a case where defendant has been convicted of a felony, shall be signed by the trial judge.

Appeal from Pike Circuit Court; *J. S. Lake,* Judge; affirmed.

J. C. Pinnix, for appellant.

1. Appellant was indicted as a principal but on the trial adopted the theory that he was present aiding and abetting, etc., under Kirby & Castle's Digest, § 1646. The evidence does not prove the crime and the burden was on the State. It failed. He was not shown even to have aided and abetted.

2. The court erred in refusing instructions 3, 6 and 8 asked by defendant. They state the law. 81 Ga. 592; 8 S. E. 450; 14 Wash. 527; 45 Pac. 145; 53 Am. St. 883; 164 U. S. 361.

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

1. The evidence is ample to support the verdict.

2. There is no error in refusing instruction No. 3. While the law is perhaps sound the language is argumentative and improper. But the doctrine of reasonable doubt and burden of proof was fully covered in other instructions given.

3. The court did not err in refusing No. 6. Kirby's Digest, § 1563. It was defective and does not state the law. But the substance of it was given in others.

4. Instruction No. 8 was properly refused. It is improper to single out the evidence of good moral character and comment upon it. 62 Ark. 286, 302.

5. There is no bill of exceptions. This was a felony and the bill of exceptions was not signed by the judge.

HUMPHREYS, J. By Act 30, Acts of Arkansas, 1915, it was made a felony for any person to manufacture, or be interested, directly or indirectly, in the manufacture of any alcoholic, vinous, malt, spirituous or fermented liquors. Appellant was indicted, tried and convicted in the Pike circuit court, for the crime of manufacturing liquor under the aforesaid act. His penalty was fixed at one year in the State penitentiary. From the verdict and judgment of conviction, he has prosecuted an appeal to this court.

It is insisted that the judgment is erroneous on account of an alleged insufficiency of evidence to support the verdict, and of alleged errors on the part of the court in refusing to give instructions Nos. 3, 6 and 8 requested by appellant. This court will not reverse a judgment on account of an insufficiency of evidence to support it unless brought into the record by a proper bill of exceptions. *Norman* v. *Cammack,* 105 Ark. 121. Neither will this court consider instructions which were refused in the course of the trial if they are not included in a proper bill of exceptions. *O'Neal* v. *Parker,* 83 Ark. 133; *Ark. La. & Gulf Ry. Co.* v. *Kennedy,* 87 Ark. 50; *McKinley* v. *Broom,* 94 Ark. 147. It is thus seen that the assignment of errors in the instant case consisted of such errors as must be brought into the record by a proper bill of exceptions.

The attention of the court has been called to the fact that the bill of exceptions in the instant case was not signed by the trial judge. On inspection of the record it appears that the bill of exceptions was signed by the prosecuting attorney and counsel for appellant. Since the passage of Act 218, Acts 1911, a bill of exceptions may be agreed upon when signed by one of counsel for the respective parties, and when filed shall become a part of the record in a cause, except in felony cases. Prior to the passage of said act, it was necessary for the trial judge to sign the bill of exceptions in all cases before it became a part of the record. *Routh* v. *Thorpe,* 103 Ark. 46. It is still necessary that the trial judge sign the bill of exceptions in a felony case before it can be admitted as a part of the record. It was not permissible to authenticate the bill of exceptions in the instant case by counsel for the respective parties, as it was a felony case, and, since the bill of exceptions was not signed by the judge, as required by law, it can not be treated as a part of the record. It follows that there are no errors before this court for review.

The judgment is therefore affirmed.

STATE v. EMBREY.

Opinion delivered July 8, 1918.

1. CRIMINAL LAW—OBSTRUCTING PROCESS—SUFFICIENCY OF INDICTMENT.—In drawing an indictment under section 1960 of Kirby's Digest, charging the crime of obstructing process, it is not necessary to allege that the officer seeking to arrest certain parties had a warrant for their arrest.

2. CRIMINAL LAW—OBSTRUCTING PROCESS—SUFFICIENCY OF THE INDICTMENT.—An indictment held sufficient which charged that the sheriff was attempting to arrest C. and A. for the commission of a felony, on a certain day, and that defendant did unlawfully, knowingly and wilfully obstruct and resist him when attempting to make the arrest.

3. CRIMINAL LAW—FRAMING INDICTMENT—STATUTORY CRIMES.—An indictment charging the commission of a statutory crime is sufficient if it states all the ingredients necessary to constitute the offense charged.

Appeal from Polk Circuit Court; *W. C. Rodgers,* Special Judge; reversed.

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

The indictment alleges facts sufficient to constitute a public offense. Kirby's Digest, § § 1960-1. It was not necessary to allege that the sheriff had a warrant. Kirby's Digest, § 2119; 96 Ark. 477; 107 *Id.* 99.

Minor Pipkin and *J. I. Alley,* for appellee.

The indictment does not state facts sufficient to constitute a public offense. The particular circumstances of the offense charged are not set forth. Kirby's Digest, § 1960, 2119-20, 2227; 47 Ark. 552; 43 *Id.* 693; 80 *Id.* 310; 93 *Id.* 81; 111 *Id.* 186; Kirby's Digest, § 2227, etc.

HUMPHREYS, J. Appellee was indicted in the Polk circuit court on the 11th day of December, 1917, under section 1960 of Kirby's Digest for obstructing process.

A demurrer was filed to the indictment on the following grounds:

(1) That the indictment does not state facts sufficient to constitute a public offense.

(2) That the particular circumstances of the offense charged, necessary to constitute a complete offense, are not set forth in the indictment.

The demurrer was sustained by the trial court, from which ruling an appeal has been prosecuted to this court.

Omitting caption and signature, the indictment is as follows: "The grand jury of Polk County, in the name and by the authority of the State of Arkansas, accuse Jack Embrey of the crime of obstructing process committed as follows, towit: The said Jack Embrey, in the county and State aforesaid, on the 16th day of November, 1917, did unlawfully, knowingly and wilfully obstruct and resist H. W. Finger, sheriff of Polk County, in his, the said H. W. Finger's attempt to arrest Julius Carden and Bettis Alston for a felony against the peace and dignity of the State of Arkansas."

The section of the statute under which the indictment was framed is as follows:

"If any person shall knowingly and wilfully obstruct or resist any sheriff, or other ministerial officer, in the service or execution of, or in the attempt to serve or execute any writ, warrant or process, original or judicial, in discharge of any official duty, in case of felony, or any other case, civil or criminal, or in the service of any order or rule of court, in any case whatever, he shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than fifty dollars, and may also be imprisoned not exceeding six months."

(1) The question to be determined on appeal is whether it was necessary to allege in the indictment that the sheriff had a warrant for the arrest of Julius Carden and Bettis Alston. It is said that it is not a crime under this section to resist an officer in making an arrest unless he had a writ, warrant or process, original or judicial, or an order or rule of court at the time he was making or attempting to make the arrest. If this is the correct interpretation of the section, the words "in discharge of

any official duty," contained in the section, have no meaning whatever. A sheriff serving or executing, or attempting to serve or execute, an original writ, warrant or process is necessarily in the discharge of his duty. The construction of the section contended for by appellee would not be changed in the least if the words just mentioned were excluded from the section. In construing a statute, some meaning should be given to every word contained therein, if possible. By holding that the Legislature intended to make it a crime to resist an officer in the service of a writ, warrant, process, order or rule of a court, or in the discharge of any official duty, the words in question will be given their ordinary, natural meaning. It is obvious that the Legislature either left out the word "or" between the words "judicial" and "in" or placed a comma, instead of a semicolon, after the word "judicial." By reading the section with a semicolon after the word "judicial," or reading it with the word "or" inserted between "judicial" and "in," the section will carry the meaning clearly intended by the Legislature. This intention is made manifest by reading section 1961 in connection with section 1960. The word "or" was inserted in section 1961 so as to give the words "in discharge of any official duty" their actual meaning. If the words "in discharge of any official duty" had been omitted from section 1960, then the fact that they were inserted in section 1961 would argue that the Legislature did not intend to make it a crime to resist an officer in the discharge of his official duty, unless he had a writ; but since the same words were used in both sections, it is apparent that the word "or" was omitted from section 1960 through an oversight. Our construction of the statute is reinforced by the fact that it is provided by statute that a peace officer may make an arrest without a warrant where he has reasonable grounds for believing that the person arrested has committed a felony. Kirby's Digest, sec. 2119. The construction placed upon this section by the court is in keeping with the construction placed upon it in the case of *Drifoos v. City* of *Jonesboro*, 107 Ark. 99.

It was said in that case that, "A city policeman is a ministerial officer within the meaning of this section, and as such had a right to make the arrest for a felony committed in his presence, even though he had no warrant."

(2-3) It is insisted that the indictment is defective because it does not charge the particular circumstances of the offense. The indictment charges that H. W. Finger, who was sheriff of Polk County, was attempting to arrest Julius Carden and Bettis Alston in said county for a felony on the 16th day of November, 1917, and that appellee did unlawfully, knowingly and wilfully obstruct and resist him when attempting to make the arrest. The indictment stated all the ingredients essential to constitute the offense of obstructing a peace officer in an attempt to arrest a party for a felony. This is all that is required in charging statutory crimes The manner and mode of resisting the officer is a matter of evidence. *Putman* v. *State,* 49 Ark. 449; *Houpt* v. *State,* 100 Ark. 409.

The demurrer to the indictment should have been overruled.

For the error indicated, the judgment is reversed and the cause remanded with instructions to overrule the demurrer to the indictment.

RAYMOND *v.* BOYD.

Opinion delivered July 8, 918.

TRUST—JURISDICTION OF EQUITY.—Where, pending a will contest, trustees appointed to carry into effect the provisions of the will creating a trust applied to chancery for instruction to defend the will in the contest and to incur necessary expenses in doing so, and subsequently the contest was sustained and the will declared invalid, the chancery court has no jurisdiction to allow the trustees attorney's fees or compensation for their services as trustees, since the jurisdiction to enforce the trust failed when the will was declared invalid.

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

Ira D. Oglesby, for appellant.

1. The chancery court had no jurisdiction nor authority to make the order. It was void. There was no trust. The estate was not liable for attorneys' fees, trustees' fees, costs, nor expenses. 125 Ill. 64; 104 *Id.* 64; 53 S. W. 197; 66 N. J. L. 37; 177 Ill. 82; 76 N. W. 418; 120 Cal. 447; 52 Pac. 804; 134 Mass. 240; 163 Pa. St. 35; 62 N. W. 557; 60 *Id.* 843; 112 Cal. 447; 76 N. W. 418; 18 Pac. 499.

2. When the order was made the will had been vacated and the property belonged to appellant. If there were any costs, they should have been allowed in the probate court. The contestants and trustees should pay their own attorneys' fees and expenses. The chancery court had no jurisdiction to make the allowance. 110 Ark. 468; Woerner on Adm. etc., § § 516-17; 2 *Id.* 529.

Hill, Fitzhugh & Brizzolara, for appellees.

The trustees defended the trust, employed counsel and incurred expenses and costs. The chancery court had jurisdiction and properly made the order of allowance. 2 Perry on Trusts, § § 474, 476; 1 *Id.* § 433; 2 Beach on Trusts, etc., § 463; 97 Ark. 588; 110 *Id.* 468; 2 Perry on Trusts, § 891; Page on Wills, § 345; 81 Ky. 329; 74 Iowa, 358; 32 Neb. 191; 98 Tenn. 330; 3 Wash. C. C. 122; 4 Gill 55; 113 U. S. 340; 76 N. W. 418. Trustees are entitled to compensation. 2 Perry on Trusts, § 917; 2 Beach on Trusts, etc., § 735; Remsen on Wills, 334-5.

McCULLOCH, C. J. E. C. Brogan, a citizen of Sebastian County, died in the year 1910, leaving an instrument purporting to be his last will and testament whereby he devised and bequeathed his large estate, consisting of property both real and personal, to his daughter, Mary F. Raymond, with contingent remainder over to her issue, if any survived her and attained the age of twelve years, and, if none, then to trustees for certain charitable purposes. Three executors were named, who were also designated as trustees under the will. Mrs. Raymond in-

stituted a contest, and while the cause was pending in the circuit court she entered into an agreement with the trustees, acting under the directions of the chancery court, to compromise the suit on the terms then agreed upon. The trustees filed their petition in the chancery court for advice and directions concerning the consummation of the compromise which was by decree of the chancery court duly approved.

The charity specified in the will was the establishment of a college for young men under the direction of the Roman Catholic church with the approval of the bishop of the diocese. The Catholic bishop objected to a confirmation of the settlement, and he was made a party to the chancery proceedings, and prosecuted an appeal to this court. We decided on that appeal that the chancery court had no jurisdiction to render the decree, and we reversed the same with directions to dismiss the petition of the trustees. *Morris* v. *Boyd,* 110 Ark. 468. The will contest was then reinstated and proceeded to a final judgment in the circuit court sustaining the contest and declaring the will to be not the will of Brogan. In the meantime the trustees had applied to the chancery court for directions concerning the contest of the will, and that court had entered an order directing them to defend the will in the contest, and to incur the necessary expenses in doing so. No appeal was prosecuted from that order. The judgment in the will contest case was appealed to this court and was affirmed, the appeal being prosecuted by the Catholic bishop. *Morris* v. *Raymond,* 132 Ark. 450. Thereupon the trustees presented their petition to the chancery court for an allowance of attorneys' fees as expenses of the will contest and also an allowance of compensation to the trustees themselves for their services. The chancery court allowed the sum of $1,000 as attorneys' fees in addition to the sum of $500 already paid, and also allowed the trustees the sum of $1,000 as compensation for themselves for their services, and declared both sums liens on the estate.

Mrs. Raymond was the sole heir at law of E. C. Brogan, and she has prosecuted this appeal from the decree of the chancery court just referred to.

The authorities cited in support of the court's ruling relate to the duty of executors to defend the will of a decedent and the right of the probate court to allow them their atorneys' fees and compensation for their services while handling the estate, but none of them reach to the question of the jurisdiction of the chancery court to take control of the trust estate during the pendency in the probate court of a contest over the will which created the trust and to charge the estate with expenses incurred by the trustees. In fact, we are unable to find any authorities which tend to sustain the jurisdiction of the chancery court to make such a decree, and we think that the case of *Morris* v. *Boyd, supra,* conclusively decides that the chancery court is without jurisdiction. In that case we said: "No trust was created except upon a definite failure of issue of the testator's daughter, and unless the will is valid no trust can ever arise. The question of the validity of the will purporting to create the trust rests upon the decision of another court of exclusive jurisdiction. It is not contended that the court of equity has jurisdiction over the contest of a will, nor is there any ambiguity in the terms of the instrument which calls for construction. This proceeding merely involves a compromise of the will contest by the contesting heirs and the trustees, whereby the estate is to be divided according to their judgment; and the court's approval or authority with respect to that compromise is sought."

If the court had no jurisdiction to authorize trustees to compromise the contest and divide the estate, which was entirely dependent upon the validity of the will, then it necessarily follows that, since the will had been broken and was as if it had never been executed, the court had no jurisdiction to incumber the property with a charge for the expenses of the contest or for the services of the

trustees. There being no valid will, no trust was ever created, and the property became vested in Mrs. Raymond as the sole heir of the decedent immediately upon his death.

We have no question presented here of the authority of the executor under the direction of the probate court to resist the contest of the will and to pay the expenses of the contest out of the estate under his control. It is conceded that the individuals who acted as executors were allowed their statutory commissions on the estate which they administered, but the question presented here is whether the chancery court had jurisdiction, under the guise of administering a trust, to charge the expenses of a contest against the property of the heirs. Chancery courts have jurisdiction to enforce trusts, but no authority to create them; and when it turns out that a will or other instrument which creates a trust has no legal existence, then the jurisdiction of chancery to enforce the trust fails. We think that there is no such jurisdiction in the chancery court, and that this necessarily follows from the decision in *Morris* v. *Boyd, supra.*

The decree is, therefore, reversed and the cause remanded with directions to dismiss the petition.

HART and HUMPHREYS, JJ., dissent.

BURTON *v.* WILSON.

Opinion delivered July 8, 1918.

BROKERS—COMMISSION FOR SALE OF LAND—CUSTOM.—Where a broker was employed to sell land at a certain price net to the vendor, oral testimony was inadmissible to prove a local custom between land owners and real estate brokers that when a tract of land is listed with a broker for a designated price per acre net to the owner the broker gets as his commission all that he sells the land for in excess of the list price; the words of the contract having a settled legal meaning which can not be altered by proof of a local custom.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. H. Dudley,* Judge; affirmed.

STATEMENT OF FACTS.

Appellant sued appellees to recover commissions alleged to be due him for selling certain real estate belonging to appellees. The facts necessary to present the issues raised by this appeal, briefly stated, are as follows:

A. O. Burton, appellant, is a real estate broker in Mississippi County, Arkansas, and had been for eight or ten years prior to the transaction involved in this suit. He had negotiated sales of lands in different parts of the county. During the fall of 1916, he went to see R. E. Lee Wilson about certain lands in Mississippi County. During their conversation Mr. Wilson gave him the description of sections 33 and 34 in Mississippi County, which belonged to himself and the other appellees, and of which he had charge. Burton asked Wilson to give him the lowest prices on these sections and Wilson replied "I want $20 an acre net to me; one-fourth cash and the balance in 1, 2 and 3 years, with interest at 6 per cent. per annum." Appellant accepted the agency for the sale of these lands, and nothing was said about the commissions which should be paid him. Appellant procured purchasers who were ready, willing and able to purchase the lands at $30 per acre. Wilson refused to make deeds to the purchasers, or to complete the sale, claiming that he had revoked appellant's authority before he found the purchasers for the land. On the other hand, evidence was adduced by appellant tending to show that he found the purchasers before his authority was revoked by Wilson. Hence this suit.

On the trial of the case appellant offered to prove by several witnesses that when an owner of real estate offered to list his lands with a real estate broker at $20 per acre net to the owner, that such language has a generally and universally accepted meaning among land owners and real estate brokers in Mississippi County,

Arkansas, and that each witness in answer to the question would have said:

"When a piece of land is listed with a broker for twenty or forty or fifty dollars an acre net to the owner, the broker gets as his commission all he sells the land for in excess of the list price. This is the universal custom between owners and brokers of real estate in this county."

The court instructed the jury that when appellant was directed to make a sale of the land for not less than $20 per acre net to appellees, this was only a limitation upon the authority of the appellant in undertaking to make a sale of the land, and that it did not, and was not intended to mean that appellant should sell the land for a price in excess of that sum, without accounting to appellees for the difference. In other words, the court told the jury that before appellant would be entitled to recover the difference between $20 and $30 per acre as a commission for making the sale, appellant would have to show by a preponderance of the evidence that there was an express agreement by Wilson to pay appellant this difference as his commission. The court submitted to the jury also the question of whether or not appellant had procured purchasers ready, willing and able to purchase the land before Wilson revoked his authority, and told the jury that if it found for appellant in these respects he would be entitled to a fair and reasonable compensation for the services rendered by him. It was agreed between the parties, (and the court so told the jury), that if it should find for the appellant a commission of 5 per cent. would be a fair and reasonable compensation.

The jury found for the appellant in the sum of $960, and the case is here on appeal.

A. G. Little and *P. A. Lasley,* for appellant.

1. Appellant was entitled, as his commission, to all he sold the land for in excess of $20 an acre. The contract was a parol one, "at $20 net to Lee Wilson & Co.," and the court erred in refusing to allow appellant

to prove by witnesses that the universal custom in Mississippi county was, between land owners and real estate brokers, that when land was listed at a designated price per acre net to the owner the broker was entitled to all the land sells for in excess of the list price. Oral testimony was admissible to explain the meaning of the words used and it should be submitted to the jury to determine in what sense they were used. 106 Ark. 409; 113 *Id.* 330; *Ib.* 560; 23 How. 63; 69 Ark. 313. The cases in 70 Ark. 56, and 126 *Id.* 63, are easily distinguished from this.

2. The parol testimony as to the custom was competent. 3 Jones on Ev. 239-240; Wigmore on Ev. 57; 15 Am. Rep. 234; 2 Elliott on Ev. par. 1723; 118 Mo. 548.

3. In construing a contract the object is to arrive at the intention of the parties as shown by all the circumstances surrounding the making of the contract, the situation and relation of the parties and the sense in which the words were used. 105 Ark. 421; 114 *Id.* 416. The parties themselves interpreted the contract to mean that appellant was entitled to all in excess of $20 per acre. 114 Ark. 415. The court erred in its instructions. 84 Ark. 466; Mechem on Ag., par. 966; 114 Ark. 415, and authorities, *supra;* 100 U. S. 692.

Chas. T. Coleman, for appellee.

1. There is no dispute as to the language used. Not one word was said about commissions. Wilson only stated his lowest price net. So there is no controversy about the meaning of the contract which the law supplies from the language used, that is to sell at the best price obtainable, not less than $20 per acre. A reasonable compensation is implied. Similar contracts are construed in 70 Ark. 56; 76 *Id.* 395; 126 *Id.* 61; 130 Ga. 713. See also Gross on Real Estate Brokers, § 215.

2. Plaintiff's testimony that though nothing was said about commissions he *understood* that he was to have all over the lowest price. This was clearly inadmissible and properly excluded. 20 How. 447; 17 Wall.

(U. S.) 19, 28; 28 Fed. 639, 648; 1 Elliott on Cont., p. 4; 3 Jones on Ev., § 456.

3. Proof of a local custom changing, varying or altering a contract, or its legal meaning, was not admissible. 55 Ark. 347; 10 *Id.* 9; 24 *Id.* 210; 50 *Id.* 393; 2 Elliott on Cont., 1628, 1688; 64 Ark. 650; Tiffany on Agency, 422-3-4; Remhart on Agency, 244; 106 Ark. 410; 111 *Id.* 263; 25 N. E. 901; 5 Wall. 663; 1 Lawson on Cont., § 125; 100 U. S. 686; 1 E. D. Smith (N. Y.) 619; 201 Mass. 312; Clarke's Brown on Usages and Customs, § 57; Gross on Real Estate Brokers, § 216.

4. The instructions were correct. 70 Ark. 56; 126 *Id.* 61; 106 *Id.* 536; 84 *Id.* 462; 102 *Id.* 203; 204 U. S. 226; 87 Fed. 167.

5. The court ought to hold that Burton's contract was such as to forfeit all right to commissions. 76 Ark. 395; 126 *Id.* 61; Walker on Real Estate Agency, § 412. He made a false statement to his principal.

HART, J., (after stating the facts). The chief reliance of counsel for appellant for a reversal of the judgment is, that the court erred in refusing to allow him to prove by witnesses that the universal custom between land owners and real estate brokers in Mississippi county, is, that when a tract of land is listed with a broker for a designated price per acre net to the owner, the broker gets as his commission all that he sells the land for in excess of the list price. Counsel for appellant admit that generally it is the duty of the court to construe a written contract and declare its terms and meaning to the jury. But they invoke the rule that where commercial terms are used which by custom are used in a sense other than the ordinary meaning of the words, oral testimony is admissible to explain the meaning of the words used and that it should be submitted to the jury to determine in what sense they were used. They rely upon the principles of law decided in *Paepcke-Leicht Lbr. Co.* v. *Talley,* 106 Ark. 400. In that case the parties entered into a written contract for the sale and delivery of lumber at

a designated price per thousand feet "board measure." The court held that it was competent to show by parol evidence that the phrase "board measure" was a commercial term, and that it was the well-nigh universal custom in the lumber trade for sales to be made in accordance with its commercial meaning. There is no difficulty of this kind in the contract here. The words have a settled and definite legal meaning. In *Boysen* v. *Robertson,* 70 Ark. 56, the court in construing a similar contract held that the words used were only a limitation upon the power of the agent to sell and that it was still his duty to sell the land for the highest price obtainable, and to account to his principal for the proceeds, less a compensation not greater than the excess of the purchase money over the designated price per acre net, and at the same time not exceeding a reasonable compensation. This rule was reaffirmed in the later case of *Bennett* v. *Thompson,* 126 Ark. 61. It was there said that the duty rests upon a real estate broker, the same as upon any other agent, to make disclosure to his principal of the terms of a negotiation so that the principal may act advisedly in determining whether or not the proposal is satisfactory. The court held that the broker may make a contract whereby he will be entitled to the difference between the price the seller agrees to accept and the amount the purchaser agrees to pay, regardless of what that amount is; but that such a contract must be plainly expressed in order to relieve the broker of the duty he owes to his principal to make a full disclosure concerning the terms of the negotiation. In the case above cited the words under consideration had a meaning peculiar to the lumber trade and that meaning was understood by all lumber men. Here the words used in the contract had a well defined legal meaning, and, in the absence of any showing in the contract that the parties intended them to have a different meaning, they must be presumed to have used them in their legal meaning. In all cases where evidence of custom or usage is received the rule

must be taken with the qualification that the evidence be not repugnant to or inconsistent with the contract. No usage or custom can be incorporated into a contract which is inconsistent with its terms. It is clear that local usages or customs can not defeat the express terms of a contract; nor can they contravene settled principles of law. This principle is clearly recognized in the case above cited as well as by other opinions of this court. Although usage may be resorted to to explain the meaning of a commercial term, it can never be received to contradict the express terms of a contract, nor to give words a meaning different from their settled legal interpretation. Hence the court did not err in refusing the offered testimony.

The contract under consideration does not fix what compensation appellant was to receive for selling the land. It was agreed by the parties that, in the absence of a contract to the contrary, 5 per cent. is a reasonable commission for the sale of the land. The jury found for appellant and fixed his compensation at $960. This finding eliminates from our consideration the other assignments of error, for the reason that the finding of the jury being in favor of appellant, he could not be prejudiced by the instructions given to the jury.

It follows that the judgment must be affirmed.

LAMB v. STATE.

Opinion delivered July 8, 1918.

1. PERJURY—CORROBORATION OF PROSECUTING WITNESS.—A conviction of perjury may be had upon the evidence of one witness supported by proof of corroborating circumstances going to material testimony adduced by the State.

2. PERJURY—SUFFICIENCY OF CORROBORATION.—Evidence *held* to sufficiently corroborate prosecuting witness in perjury case.

3. NEW TRIAL—TESTIMONY OF JUROR.—The testimony of a juror is incompetent to impeach a verdict in which he has joined.

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

Arthur Cobb, for appellant.

1. Argues the merits of the case which are not decided.

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

There is no bill of exceptions in the case. It is not shown when it was filed or signed. A bill of exceptions is necessary to enable the court to consider and decide the questions raised. 72 Ark. 264; 96 *Id.* 175; 117 *Id.* 118.

HART, J. E. J. Lamb prosecutes this appeal to reverse a judgment of conviction against him for the crime of perjury. The indictment charges him with having committed perjury when testifying for the defendant in the case of the State of Arkansas against George Bean charged with unlawfully keeping liquor for sale.

The officers had searched the hotel owned by George Bean and a room in which he and the defendant and two other persons were sitting, for whiskey. A grip containing a number of bottles of whiskey was found by one of the officers on the window ledge just outside the room.

Bean was charged with unlawfully keeping intoxicating liquors for sale, and the defendant was sworn and testified in the case. He testified that he was in the room on the occasion in question, but that none of the parties there raised the window or put any whiskey outside of the window on the sill. The sheriff, Row Brown, a deputy sheriff, and a policeman of the city of Hot Springs went to the hotel of George Bean in the city of Hot Springs in Garland County, about one o'clock at night to search it for whiskey. The sheriff and Row Brown went into the building towards the room occupied by George Bean, the defendant, and two other persons.

Brown testified that he went into a front room next to the one occupied by these parties; that about the time he got into the room he heard a window being raised in

the next room; that he raised the window in the room where he was and saw a suit case being eased out on the cornice in the next room; that he went out on the window ledge and got the suit case; that the parties had put the window down after they had put the suit case out; that he heard the sheriff talking in the room from which the suit case had been put out and he then again raised the window and went into the room; that the suit case was opened and found to contain a number of quarts of whiskey in cartons; that he saw an empty carton in the room which was similar to the cartons on the whiskey bottles in the suit case and was marked the same way; that each bottle of the liquor in the suit case was incased in a carton labeled Old Timer's Whiskey; that the empty carton found in the room bore the very same label as those in the suit case.

The sheriff testified that in a minute or two after he left the deputy sheriff Brown he knocked on the door of the room occupied by Bean and after a brief pause the door was opened and he entered the room; that he found in the room George Bean and his wife, the defendant and another person; that these parties appeared to be excited; that in a few minutes Brown came into the room through a front window from the coping outside the window; that he was carrying a suit case; that they opened the suit case and it contained a number of quart bottles of whiskey; that each bottle of the whiskey was incased in a carton and each carton was labeled Old Timer's Whiskey; that they found an empty carton in the same room of the same kind and bearing the same label. The defendant denied that any of the parties in the room placed the whiskey on the coping outside the window on the occasion in question. His testimony was corroborated by that of the other parties in the room.

It is earnestly insisted by counsel for the defendant that the testimony of Row Brown was not sufficiently corroborated to warrant the jury in finding the defendant guilty. We do not agree with counsel in this contention.

The old rule that to convict of perjury, two witnesses are necessary has been relaxed; and a conviction may be had upon any legal evidence of a nature and amount sufficient to outweigh that upon which perjury is assigned. In other words, it is now well settled in this State that such a conviction may be had on the evidence of one witness supported by proof of corroborating circumstances. Of course, the corroborating evidence must go to material testimony adduced by the State, and not to testimony on some immaterial matter. *Marvin* v. *State,* 53 Ark. 395, and *Grissom* v. *State,* 88 Ark. 115. Tested by this rule, the corroborating testimony was sufficient to warrant the jury in finding the defendant guilty. The testimony of Row Brown, if believed by the jury, shows that some person in the room about to be searched by the officers, raised the window and placed the suit case containing the whiskey on the coping outside the window while the officers were approaching. This was the material matter upon which the perjury was assigned. The defendant had testified that none of the parties in the room had placed the liquor out there.

The sheriff testified that he came into the room in a few minutes after he separated from Brown; that he found George Bean, the defendant and two other persons in the room, and that they appeared to be excited; that in a minute or two Brown opened the window from the outside and came into the room bearing a suit case containing a number of quarts of whiskey; that each bottle of wihskey was incased in a carton bearing a label. An empty carton was found in the room of precisely the same kind and bearing the same label. The record shows that the room searched was on the second floor of the building. The testimony of the sheriff sufficiently corroborated the testimony of Brown to warrant the jury in convicting the defendant.

The defendant also seeks to reverse the judgment by impeaching the verdict of the jury by the testimony of one of the jurors. It is well settled in this State that

the testimony of a juror is not competent to impeach a verdict in which he has joined. *Turner* v. *State,* 130 Ark. 48; *Capps* v. *State,* 109 Ark. 193. The reasons for the rule are given in *Barnett Bros.* v. *Western Assurance Co.,* 126 Ark. 562.

The case was submitted to the jury under proper instructions and, finding no prejudicial error in the record, the judgment will be affirmed.

SMITH *v.* SPILLMAN.

Opinion delivered June 24, 1918.

1. DRAINS—TAX SALE—COLLATERAL ATTACK.—Where land has been sold for drainage taxes under a decree of the chancery court, and the sale has been confirmed, the title of the purchaser at the tax sale is not open to collateral attack upon the ground that the taxes had been paid.
2. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT—REDEMPTION FROM TAX SALE.—The provision for a redemption from a drainage tax sale within a year from the sale, contained in Acts 1911, page 28, § 1, is a matter of contract, and to construe Acts 1915, page 123, which took effect more than a year after such a sale, but before its confirmation, as extending the period of redemption would violate Const. Ark., art. 2, § 17, and Const. U. S., art. 1, § 10, ch. 1, prohibiting the Legislature from passing laws impairing the obligation of contracts.
3. CONSTITUTIONAL LAW—VESTED RIGHT—PURCHASE AT TAX SALE.—A purchaser at a drainage tax sale, even before confirmation, acquires a vested right to the land purchased which can not be affected by a statute passed before confirmation extending the period of redemption.
4. TAXATION—TAX SALE—STATUTE APPLICABLE.—A purchaser at a judicial tax sale acquires contractual rights as soon as the property is struck off to him as the highest bidder, and these rights must be determined according to the law existing at the time they accrue.
5. CONSTITUTIONAL LAW—VESTED RIGHTS—REMEDIES.—The right of redemption from a judicial sale for delinquent drainage taxes is not a mere remedy in which the purchaser has no vested rights, but affects substantial rights.

Appeal from Greene Chancery Court; *Archer Wheatley,* Chancellor; reversed.

R. P. Taylor, for appellant.

1. Under Acts 1911, page 28, appellees had only one year within which to redeem. Act 43, Acts 1915, can not extend the time because it could not be retroactive nor defeat nor impair nor divest vested rights. 127 Ark. 341; 112 *Id.* 6; 63 *Id.* 573; 117 *Id.* 606.

2. After the year expired the time could not be extended. The act is not retroactive nor can not it affect vested rights. 29 Fla. 79; 30 Am. St. 95; 194 U. S. 415; 40 Ark. 423; 51 *Id.* 453. The limitation expired before the Act of 1915 passed. Cooley on Taxation, (2d ed.) 544-5; 33 Pa. St. 94. Appellees had vested rights which could not be impaired by subsequent legislation. 6 Ark. 484; 112 *Id.* 6; 128 *Id.* 31.

3. The taxes had not been paid, but if they had the plea can not avail. 50 Ark. 188. The chancery decree can not be thus attacked collaterally.

4. Due notice was had and given. The presumption is that due service was had. Kirby's Dig. § 760; 101 Ark. 390; 105 *Id.* 5; 49 *Id.* 397; 200 S. W. 1008.

5. As to the necessity of confirmation of sale, see 99 Ark. 327. See also 86 Ark. 255; 33 Pa. St. 94. Gault's appeal has long since been discredited. See also 23 Ark. 39. Appellees had lost their right to redeem. The right is purely statutory and must be asserted in time. Hence it was lost. 99 Ark. 327; 132 Ark. 309.

R. E. L. Johnson, for appellee.

1. Appellant had no vested rights secured by contract or otherwise under the sale by the commissioner. The Act of 1915 provides that "in *all* cases," etc., the right is extended to five years. The sale was never confirmed. The offer was a mere bid. 24 Cyc. 33; 53 Ark. 307; 23 *Id.* 39; 32 *Id.* 391; 34 *Id.* 346; 45 *Id.* 41; 51 *Id.* 338; 54 *Id.* 480; 105 *Id.* 265; 62 *Id.* 215.

2. Redemption statutes are liberally construed. 99 Ark. 328; 37 Cyc. 1383; 33 Pa. St. 94. The act is retroactive but not unconstitutional. See 3 Phila. 333; 69 Ark. 539; 34 *Id.* 353.

3. Appellees had vested rights and the act is not unconstitutional. It extended their time of redemption. The right of redemption was not under a statute of limition or non-claim. 115 U. S. 620; 33 Pa. St. 94. There is no impairment of the rights by contract or obligations thereof.

4. As to the distinction between mortgage sales and straight tax sales and commissioner's sales, see 51 Ark. 453; 30 Am. St. 95; Cooley on Taxation, 1053-4; Freeman on Ex. § 315; 3 So. Dak. 586; 105 Ark. 261.

5. All the equities of this case are with the appellees and the chancellor so found. The statutory period of redemption may be extended. 27 A. & E. Enc. L., 855; 36 N. D. 331; L. R. A. (N. S.) 1917 E. 137; 36 N. D. 177. Appellant had no vested rights to be divested. The act is a valid act. *Hogg* v. *Nichols,* 134 Ark. 280, does not apply, nor does *Collier* v. *Smith,* 132 Ark. 309.

McCULLOCH, C. J. The controversy in this case involves the right of appellees to redeem a certain lot or tract of real estate from sale under decree of a chancery court enforcing a lien for drainage assessments. The chancery court upheld the appellees' asserted right to redemption, and an appeal has been prosecuted from the decree allowing the redemption.

Appellees were the owners of the land in controversy, and the same was assessed for taxation for drainage purposes in a district designated as "Eight Mile Drainage District No. 2," organized under the general statute authorizing the organization of such districts and the levying of special taxes for the purpose of constructing that kind of improvement. Acts 1907, p. 276. In a suit in the chancery court to foreclose the lien for unpaid assessments the chancery court of Greene County rendered a decree in the year 1913 condemning this tract

of land for sale to raise funds to discharge the lien for unpaid assessments, and the sale was made by a commissioner of the court on January 14, 1914. Appellant became the purchaser of this tract at the commissioner's sale, which was reported to and confirmed by the chancery court on November 3, 1915, and the commissioner executed a deed to appellant, which was approved by the court. Appellees remained in possession of the land, and this action was originally instituted at law by appellant to recover possession. Appellees filed an answer in the action on March 5, 1917, asserting the right to redeem the land from said sale pursuant to the terms of a statute enacted by the General Assembly and approved February 9, 1915. On motion of appellees the cause was transferred to the chancery court, and a final decree was rendered, as before stated, allowing appellees to redeem. Appellees also alleged in their answer that the drainage taxes on the land in controversy had been paid prior to the rendition of the decree, and they asked that the decree of the court and the sale thereunder be set aside on that account, but the court refused to grant relief on that ground.

The statute in force at the time of the sale provides that "at any time within three years from the date of the sale of said lands, as aforesaid, the owner of the lands may file his petition in the court, rendering the decree, alleging the payment of the amount for which the lien was decreed against said land in said suit, and upon proving the same, the court shall vacate and set aside said decree and sale." Acts 1911, p. 28. The answer of appellees alleging the payment of taxes for which the land was sold was not filed within three years after the date of the sale by the commissioner. Therefore, the statute quoted above was not applicable, and the attack on the validity of the sale on the ground that the taxes had been paid was purely collateral. The court was, therefore, correct in refusing to set aside the decree and

sale on that ground. *McCarter* v. *Neil,* 50 Ark. 188; *Collier* v. *Smith,* 132 Ark. 309.

The right of redemption turns solely upon the validity and effect to be given to the Act of 1915, p. 123, which was approved and went into effect on February 9, 1915, more than a year after the commissioner's sale at which appellant purchased the land, and after the expiration of the period of redemption prescribed by the statute in force on the date of the sale. The statute in force on the date of the sale contained a provision that "any land owner shall have the right to redeem any and all lands sold at such sale within one year thereafter, which shall run from the day when the lands are offered for sale, and not from the day when the sale is confirmed." Acts 1911, p. 28. The sale in question was not an ordinary tax sale, but was one made by a commissioner of the chancery court in a suit authorized by statute to enforce a tax lien. The statute in question authorized the court to render a decree declaring the lien for taxes and ordering the land sold by commissioner at public outcry for cash to raise funds to discharge the lien.

The statute enacted in 1915, *supra,* under which the present redemption is sought extends to five years the period of redemption under decrees of courts for foreclosure of delinquent assessments. The language of the statute is that "any person, firm or corporation, or the heirs, assigns or legal representatives of any person, firm or corporation, who would have been permitted to redeem had the sale been by the collector for State and county taxes, or who was in possession under color of title at the time of said decree of sale, shall have the right to redeem from said sale at any time within five (5) years," by payment of the prescribed amount to the commissioner. We have, therefore, before us a case where, after confirmation by the court of a judicial sale, the right of redemption is asserted under a statute enacted after the expiration of the time for redemption prescribed in the statute in force at the time of the sale,

but before the confirmation in this instance, and the question presented on this state of facts is whether or not it was within the power of the Legislature under such circumstances to enlarge the period of redemption.

We pretermit any analysis of the statute for the purpose of determining whether or not, according to the interpretation of the language used, it was intended by the lawmakers to give retroactive effect to the statute, and we go at once to a consideration of the question as to the power of the Legislature, under the circumstances, to pass such a statute giving it that effect.

We have dealt with this statute in two decisions involving the assertion of the right to redeem from sales of the character involved in the present litigation. *Collier* v. *Smith, supra; Hogg* v. *Nichols,* 134 Ark. 280. In the first of the cases just referred to there was involved an attempt to redeem under this statute from a confirmed sale made more than a year before the passage of this statute, the law as it existed at the time of the sale allowing one year within which there could be a redemption, and we decided that the Act of 1915 had no application under those circumstances, but that the rights of the parties concerning the redemption must be determined in accordance with the law as it existed at the time of the sale. The doctrine of that case was reiterated in the other case referred to above, but the facts were materially different in that the sale was made less than a year before the passage of the Act of 1915. But we again held that the statute had no application for the reason that the law as it existed at the time of the sale controlled the rights of the parties, and that the Legislature could not thereafter change it so as to affect existing rights. The present case differs from each of the other cases in that the sale was not confirmed until after the passage of the Act of 1915, but it also differs from the last case in the fact that the period of redemption required by the statute in existence at the time of the sale had expired before the present statute was enacted. The subject was very

thoroughly discussed in *Hogg* v. *Nichols, supra,* and the law as announced there absolutely controls, in appellant's favor, the decision of the present case. In the opinion in that case it was said: "We have examined the authorities carefully and find that the law regards and treats a judicial sale as contractual; and the laws of redemption in force at the time of the sale are a condition attached to the sale. In other words, the authorities seem practically unanimous in holding that the right to redeem from a tax sale is governed by the statute in force and effect at the time the sale was made." Many authorities were cited in support of the court's declaration of the law.

The only additional question which concerns us in the present case is the distinction found here in the fact that the sale had not been confirmed, but we are of the opinion that when the sale is viewed in the light of the rights which this court has frequently declared arise in favor of a purchaser at a judicial sale, it necessarily follows that to give this statute a retroactive effect so as to extend the right of redemption beyond the period under the law as it stood at the time of the sale would be an impairment of the obligation of the contract, which is expressly forbidden, not only by the Constitution of this State (art. II, sec 17) but likewise the Constitution of the United States. It was stated in that opinion that the authorities are practically unanimous in holding that the right of redemption from a tax sale must be determined according to the law in force at the time of the sale, and that the lawmakers can not extend the period of redemption by a statute passed after the sale takes place. In addition to the authorities cited in the opinion, we call attention to a decision of the Supreme Court of South Dakota expressly holding that a sale of lands for delinquent taxes constitutes a contract between the purchaser and the State, and that a statute extending the period of redemption can not be enacted so as to apply to a sale already made. *State* v. *Flypaa,* 3 S. D. 586.

The same rule was stated by Judge Cooley in this work on Constitutional Limitations, (7th ed. p. 412) as follows: "So a law is void which extends the time for the redemption of lands sold on execution, or for delinquent taxes, after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is, that he shall have title at the time then provided by the law; and to extend the time for redemption is to alter the substance of the contract, as much as would be the extension of the time for payment of a promissory note."

In Freeman on Executions, sec. 315, the same rule is stated with reference to redemption from execution sales, and the author states the rule unequivocally that the Legislature can not pass a law extending the period of redemption so as to apply to a sale already made.

The case of *Thompson* v. *Sherrill*, 51 Ark. 453, which we cited in *Hogg* v. *Nichols, supra,* declared the law to be that "the right to redeem lands from a tax sale depends upon the statute in force at the date of the sale," and in that case the sale was one made by a commissioner of the chancery court under an overdue tax decree. In other words, there was involved, as in this case, the right of redemption under a judicial sale, and the court held that the right must be determined according to the statute in force at the date of the sale. The rule has been frequently declared by this court to be that a purchaser at a judicial sale acquires something more than a mere option to purchase at the price specified in his bid, that he acquires a right to an acceptance and confirmation of his bid which is consummated by the approval of the court, and that he has a right to insist upon such a confirmation where the sale has been regularly and fairly made in accordance with the law as it existed at the time of the sale.

It has been said that some of the earlier decisions of this court declare a different rule, but we do not find that to be true. An examination of the whole line of decisions of this court on that subject shows them to be in

complete harmony. For instance, in the case of *Sessions* v. *Peay,* 23 Ark. 39, which is claimed to be in conflict with the rule just stated, the court said: "The theory of sales of this character is, that the court is itself the vendor, and the commissioner or master is a mere agent in executing its will. The whole proceeding, from its incipient stage up to the final ratification of the reported sale, and the passing of the title to the vendee, and the money to the person entitled to it, is under the supervision and control of the court. The court will confirm or reject the reported sale, or suspend its completion, as the law and justice of the case may require." The same statement is found in the later case of *Thomason* v. *Craighead,* 32 Ark. 391; *Wells* v. *Rice,* 34 Ark. 346.

That statement of the rule concerning the control of the court over sales made by its commissioners does not imply that a purchaser prior to confirmation has acquired no substantial right. On the contrary, the rule is stated in those decisions to be that the court must pass upon the sale and approve or reject it "as the law or justice may require," meaning, of course, the law as it stood at the time the sale was made. Again in the case of *Greer* v. *Anderson;* 62 Ark. 213, we said that "no purchaser at such a sale has the right to rely absolutely upon the order of the court directing the sale, and the fact that the agent of the court has pursued the terms prescribed in making the sale." That statement, too, is in harmony with later decisions because the court retains control of the sale for the purpose of determining whether it has been made in accordance with the law, and the purchaser, though he has acquired a right to confirmation subject to the approval of the court according to the law at the time of the purchase, has no absolute right to his purchase, and must await the action of the court in approving the sale. The subject was fully reviewed by Judge Battle in the case of *Colonial & United States Mortgage Co.* v. *Sweet,* 65 Ark. 152, and the old English rule of allowing interested parties to raise the bid at any time be-

fore confirmation of judicial sales was rejected, and the rule was in substance stated to be that where the sale was fair and regular in all respects it should be confirmed by the court.

In the case of *Banks* v. *Directors of St. Francis Levee District,* 66 Ark. 490, which was a case involving confirmation of a sale of lands under decree for delinquent taxes, the owner having appeared before the confirmation and offered to redeem, we held that "where a judicial sale of land has been conducted fairly, and in substantial compliance with the law and the orders of the court directing the same to be made, it is error to permit the original owner to redeem before confirmation." In *George* v. *Norwood,* 77 Ark. 216, we again discussed the question of the rights of a purchaser at a judicial sale, and we held that the purchaser upon the acceptance of his bid at the sale acquired a right to have the sale confirmed "in the absence of fraud, irregularity or misconduct affecting the validity of a judicial sale," and we reversed the chancellor for refusing to confirm a sale.

In *Robertson* v. *McClintock,* 86 Ark. 255, the subject was again fully discussed and the law in this State was stated to be as follows: "In some jurisdictions the commissioner is treated as a mere agent to take bids to be reported to the court. The highest bidder acquires no rights by his bid, and it is customary to open the bidding and to award the property to the man who will offer the highest price after the sale has been reported. The language employed in some of our earlier cases would indicate that this system was in the mind of the judge delivering the opinion, though the point was not decided. It is now, however, the settled law of this State, as it is of most of the States, that the highest bidder at a judicial sale, to whom the property has been struck off by the commissioner, acquires vested rights, which must be respected by the court."

The following rule was announced by this court in the case of *Brasch* v. *Mumey,* 99 Ark. 324: "The right

of the owner to redeem from a judicial sale exists, therefore, only in those cases which fall within the statute giving such privilege, and can be asserted within the time and manner prescribed by the statute, and not otherwise."

The case of *Groves* v. *Keene,* 105 Ark. 40, is especially in point here for the reason that it came here on appeal from an order confirming a sale of lands sold under a delinquent tax decree, the original owner having appeared before the court before confirmation and offered to redeem by paying the taxes. We quoted with approval from the cases cited herein, and said: "There was nothing in the facts of this record that would have justified the chancery court in refusing to approve and confirm the report of the commissioner who made the sale of the lands under the decree of the court. Appellee, therefore, acquired by his purchase at that sale vested rights. * * * These rights are created by statute, and a court of chancery can not annul them."

The last case on the subject is *Gailey* v. *Ricketts,* 123 Ark. 18, and the doctrine is again stated in harmony with that so frequently announced by this court, as follows: "It is settled that, until confirmation by the court, a sale made by a commissioner, under a decree of court, is not final and complete so as to pass the title to the property sold, and that such sale may be set aside before confirmation thereof, upon good and valid grounds. Still the purchaser at such a sale does not acquire a mere option, but a right to a deed, which becomes perfect upon the confirmation of his purchase, and which, if confirmed, relates back to the time of his purchase, and the deed to him conveys such interests as he would have acquired if he had received his deed at the time of his purchase."

It would seem, therefore, to be just as well settled as a rule of law can be settled by repeated declarations of this court that a purchaser acquires a vested right by his bid accepted at a judicial sale, and it necessarily follows that if a right is thus acquired it is one which must be

respected by the courts and by the lawmakers, and that any effort on the part of the lawmakers to change the law so as to disturb those rights would operate as an impairment of the obligations of the contract. The protection of the Constitution extends to inchoate interests as well as to consummated rights and makes no distinction as to the magnitude or value of contracts but shields the obligation of them all from impairment.

In all the vast array of judicial authority and exposition of the law by text writers, the only discordant note that has been sounded is in the one decision of the Supreme Court of Pennsylvania in the case of *Gault's Appeal,* 33 Pa. St. 94. That case stands alone against the great weight of authority in holding that the Legislature had the power to extend the right of redemption under a sale already made, and the court based its conclusion on the control of the Legislature over the whole matter of taxation. The reasoning of the court is, we think, unsound, as the legislative control over the matter of taxation, or any other subject, does not imply the power to disturb vested rights in the exercise of that control. However, that decision related to a statute passed before the expiration of the period of redemption under the statute in force at the time of the sale, and for that reason it has no application to the present case. But aside from that, we think the case was decided wrong, and is in conflict with the great weight of authority, and in conflict with what we have often said and decided here.

It is argued that the question of redemption relates merely to the remedy, and a litigant can have no vested right in a mere remedy. Our view of the matter is that a right of redemption does not come within the limits of a mere remedy, but that it affects substantial rights, and where those rights are acquired before the passage of the statute they can not be disturbed.

There is an effort also to liken statutes conferring rights of redemption to those creating periods of limitation upon the institution of an action, but we find no

analogy between the two classes of statutes. Under a statute of limitations there is no vested right until the statute bar has attached, but a sale, either a judicial sale or a tax sale, as soon as the property is struck off to the highest bidder, creates contractual rights which vest immediately, and those rights must be determined according to the law existing at the time they accrue.

After careful consideration of the whole subject, a majority of the court has reached the conclusion that the Act of 1915 can have no application to sales already made at the time the statute went into effect. The decree of the chancellor is, therefore, reversed, and the cause is remanded with directions to enter a decree in appellant's favor in accordance with this opinion.

HART and SMITH, JJ., dissent.

AMERICAN SURETY COMPANY v. VANN.

Opinion delivered July 1, 1918.

1. SUBROGATION—SURETY DISCHARGING TRUST OBLIGATION.—Where a guardian, with funds of his wards, purchased an automobile for his personal use, and his surety was compelled to reimburse the wards for the funds so misappropriated, the surety will be subrogated to the wards' right to sue the vendors of the automobile where such vendors at the time of sale knew of such misappropriation.
2. TRIAL—MISTAKE AS TO FORUM—WAIVER.—The mistake of bringing an equitable suit at law is not ground of demurrer, and is met by motion to transfer to equity, and in the absence of a motion to that effect the objection will be deemed waived.

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

George W. Dodd, for appellant.

1. The complaint stated facts sufficient to constitute a cause of action, and it was error to sustain the demurrer. Vann took trust funds with notice of the trust and subject to the trust and is liable. 96 Ark. 573; 89 *Id.* 168; 69 *Id.* 43; 68 *Id.* 71.

2. The Surety Company was entitled to be subrogated to all the rights of Hamilton's wards. 37 Cyc. 434, and par. C; 39 *Id.* 549, 557, 572.

SMITH, J. The appellant is engaged in the business of executing surety bonds, and executed a bond as surety for Alonzo Hamilton, as guardian of certain minors. With the funds of his wards Hamilton purchased an automobile from Vann & Sons for the sum of $750. Upon the final settlement of the guardian's accounts a judgment was rendered against him and his surety for about two thousand dollars. This sum was paid by the surety company, whereupon it sued Vann & Sons for the money misappropriated by the guardian in the purchase of the automobile. The complaint alleged that the automobile was purchased by the guardian for his own personal use and paid for with the funds of his wards, and that these facts were known to Vann & Sons at the time of the sale. A demurrer was sustained to the complaint, and, the surety company electing to stand thereon, the cause of action was dismissed, and this appeal has been duly prosecuted to reverse that action.

This cause is ruled by the opinions in the cases of *Carroll County Bank* v. *Rhodes,* 69 Ark. 43, and *Boone County Bank* v. *Byrum,* 68 Ark. 71. It was held in those cases that a surety who pays a sum of money for his principal is subrogated to the rights of the beneficiary to maintain an action for the money so paid. Those cases are also to the effect that one who receives trust funds from a trustee with knowledge of the fact that the trustee has wrongfully converted these funds to his own use becomes liable therefor to the beneficiary of the trust. Under the allegations of the complaint Vann & Sons became parties to the conversion of these trust funds, and were liable to the minors for the sum so received, who could have maintained an action therefor. The surety upon the bond of their guardian is subrogated to this right, and the court should not have sustained the demurrer.

The judgment of the court below is, therefore, reversed with directions to overrule the demurrer.

If, upon the remand of the cause, the relief prayed is of an equitable nature and that objection is made, it can be met by the transfer of the cause to the chancery court, for, in the case of *Moss* v. *Adams*, 32 Ark. 562, it was held that a mistake as to the kind of action is no ground for sustaining a demurrer to a complaint and dismissing it. In such a case the pleadings should be amended and the cause transferred to the proper docket, and, in the absence of a motion to this effect, the objection will be deemed waived. *Rowe* v. *Allison*, 87 Ark. 211; *Grooms* v. *Bartlett*, 123 Ark. 258; *Ford* v. *Collison*, 128 Ark. 123.

CAIN v. COLLIER.

Opinion delivered September 23, 1918.

1. REFORMATION OF INSTRUMENTS—GROUNDS.—Equity will reform a written instrument where there is a mutual mistake or where there has been a mistake of one party accompanied by fraud or other inequitable conduct.
2. SAME—ADMISSIBILITY OF EVIDENCE.—Parol evidence is admissible in a suit to reform an instrument.
3. SAME—SUFFICIENCY OF EVIDENCE.—To warrant reformation of an instrument, the evidence must be clear, unequivocal and convincing.

Appeal from Faulkner Chancery Court; *Jordan Sellers*, Chancellor; affirmed.

STATEMENT OF FACTS.

This is a suit in equity for the reformation of a deed. The plaintiff, P. C. Cain, alleges that he bought several parts of lots of ground in the city of Conway from J. D. Collier, and that by a mistake on his part, coupled with fraud on the part of Collier, a part of the ground so purchased by him was omitted from the deed.

According to the testimony of the plaintiff himself, sometime in August or September, 1915, he purchased a

wagon yard in the city of Conway from J. D. Collier for the price of $3,500. Before purchasing the property, Collier took him through the wagon yard, in the presence of Tom Davis and Arthur Brown, and showed him the boundary lines. The ground purchased, according to the way Collier pointed it out to Cain, was 75 feet wide and extended from East Oak street on the south to Van Ronkle street on the north. Collier told Cain that the ground purchased extended from street to street. The deed executed by Collier to Cain conveying the ground did not embrace a small triangular strip on the north side which lies between the parcel of ground embraced in the deed and Van Ronkle street. Collier put Cain in possession of this little triangular strip, and he used it for sometime before he discovered that it was not embraced in the deed. The first Cain knew of not having a deed to this little strip was when Collier served notice on him to vacate it. Cain first talked with Collier's wife about purchasing the wagon yard and offered her $3,500 for it. She told him that she could not close the trade until her husband came home. When Collier came home he wrote Cain a letter to come down and look at the land. Tom Davis and Arthur Brown both corroborated the testimony of the plaintiff, Cain. They stated they were present when Collier pointed out the boundary lines of the wagon yard to Cain, and that Collier told Cain that he was selling him everything from street to street; that the wagon yard extended from East Oak street on the south to Van Ronkle street on the north. Davis is a brother-in-law of Cain and Cain is on the bond of Brown to a medicine company for $600. The bond is for medicine purchased by Brown of the company.

It was also shown by these witnesses that the property was used as a wagon yard, and would be damaged about $2,000 to have the triangular strip in controversy cut off from the tract and that end of it closed up. Collier only had a lease for ninety-nine years to the triangular

strip, and they said this would damage it from $500 to $1,000.

C. B. Cain, a son of the plaintiff, testified that Collier came to his father's house in the summer of 1915 to see about trading his father a wagon yard in Conway for his farm. Collier described the wagon yard to the plaintiff, saying that it extended from Holt's wagon yard on one side to Hartley's wagon yard on the other and from street to street. This conversation occurred before plaintiff purchased the wagon yard. Joe Hovis, a son-in-law of the plaintiff, was present and heard this conversation. He testified to the same state of facts as were testified to by C. B. Cain. At that time Hovis had not married the daughter of plaintiff, but was at plaintiff's house visiting his daughter. These two witnesses also testified that they came to Conway the day Collier turned the wagon yard over to plaintiff and heard a conversation between them in which Collier stated to the plaintiff that he was turning over the possession of the yard from street to street and from Holt's to Hartley's.

On behalf of the defendant, J. D. Collier, his wife testified that, as his agent, she negotiated with the plaintiff in regard to the sale of the wagon yard on the property in question; that she agreed to sell the property to him for $3,500 subject to the approval of her husband, who was then in the State of Alabama; that she only agreed to sell him the property that was afterwards deeded to him, and that nothing was said about the boundary lines.

According to the testimony of the defendant himself, the triangular strip of land in controversy was never a part of the wagon yard, and he never represented to the plaintiff that he owned it and never agreed to sell it to him. He purchased the wagon yard in 1912 and used or rented it as a wagon yard for over two years before he leased the little strip in controversy from the city of Conway. The lease was for a term of ninety-nine years and the consideration was $15. The defendant put a mule

pen on the triangular strip of ground in controversy which he used himself and rented out the wagon yard. The mule pen had no connection with the wagon yard. The defendant furnished the plaintiff an abstract of title to the property before the deed was made. The abstract showed the property to be 75 feet wide by 150 feet long. The property embraced in the abstract is the property described in the deed.

According to the testimony of L. M. Sales, he was running the wagon yard at the time Collier sold it to Cain. The yard was 75 feet wide and 150 feet long. At the time Sales rented the wagon yard from Collier, Collier told him that the little triangular strip in controversy did not go with the wagon yard, but that he might use it when he, Collier, was not using it. Sales told Cain before he purchased the wagon yard that this little triangular strip did not go with the wagon yard, at the time he was showing Cain the boundary lines at his request. W. H. Gibbs was present when this conversation was had between Sales and Cain, and he corroborated in every respect the testimony of Sales. Gibbs formerly owned the wagon yard and operated it. He bought it from Collier and afterwards sold it back to him. Collier, Sales and Gibbs, all testified that the strip in controversy had never been regarded as part of the wagon yard, and was not necessary for its operation as a wagon yard, and had never been used as a part of it. According to the testimony of Sales and Gibbs, Sales expressly told Cain that the triangular strip of ground in controversy did not go with the wagon yard, and that Collier only had a lease on it.

The chancellor found the facts in favor of the defendant and entered a decree dismissing the plaintiff's complaint for want of equity. The case is here on appeal.

J. C. & Wm. J. Clark, for appellant.

1. There was a mutual mistake and fraud and reformation should have been granted. The evidence is strong, clear and decisive. 132 Ark. 227.

2. The doctrine of *caveat emptor* does not apply. 39 Cyc. 1282.

Robins & Clark, for appellee.

1. There was no fraud and no mutual mistake, nor is the evidence strong, clear and conclusive. 200 S. W. 139. An abstract was furnished and the contract was in writing. 71 Ark. 185; 78 *Id.* 177.

2. Appellant had ample opportunity to examine the description of the property, and failing to do so he can not complain. 89 Ark. 309; 104 *Id.* 475, 487; 15 *Id.* 184, 194.

3. The proof offered by appellant does not measure up to the standard required. 71 Ark. 614; 200 S. W. 139; 104 Wis. 29; 80 N. W. 91.

HART, J., (after stating the facts). The law of the case is settled by the opinion in *Welch* v. *Welch,* 132 Ark. 227, 200 S. W. 139, in which most of our earlier decisions on the question are cited. In that case we held that equity will reform a written instrument where there is a mutual mistake or where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the other party. We also held that parol evidence is admissible in a suit to reform an instrument in cases like this but that the evidence to warrant reformation must be clear, unequivocal and convincing. Tested by these well known principles of law, we are of the opinion that the decree should not be reversed.

It is true a greater number of witnesses testified that Collier pointed out the boundary lines of the wagon yard saying that they extended from street to street and that this would include the little triangular strip of ground in controversy. They also stated that the wagon yard could not be successfully operated without this strip because a wagon could not be turned around in it. It was shown, however, that the wagon yard was 75 feet wide and 150 feet long and it is fairly inferable that wagons could be turned around in a yard of this size. Be-

sides that, three witnesses, including the defendant, testifie that they had operated the wagon yard without the triangular strip and that wagons had been turned around in it. Two of these witnesses testified that one of them told the plaintiff, before he purchased the wagon yard, that the little triangular strip in controversy was not a part of the wagon yard and that Collier only had a lease on it. Collier furnished Cain an abstract of title to the property sold him and this showed the property to be 75 feet wide and 150 feet long. The abstract itself conveyed to the plaintiff notice that the strip of ground was in the form of a rectangle and excluded the idea that the small triangular strip was a part of it. Moreover, it was not likely that the plaintiff would have agreed to give a warranty deed to the strip of ground to which he only had a lease. When all the testimony in the case is read and considered together, it can not be said that the plaintiff has proved his case by testimony of such a clear, unequivocal and convincing character as to justify a reformation of the deed, and, especially, when to do so would require us to reverse the findings of fact on that issue made by the chancellor.

The decree will, therefore, be affirmed.

RICKMAN v. STATE.

Opinion delivered September 23, 1918.

1. FORGERY—INTENT.—The fraudulent intent is an essential ingredient in the crime of uttering a forged instrument.
2. FORGERY—INSTRUCTIONS.—Where, in a prosecution of defendant for forgery of his father's name to a check, there was testimony that defendant had an interest in the fund in bank and authority to sign checks in his own name, but not in his father's name, instructions to the effect that unless defendant had express authority from his father to sign his name his act in doing so was a forgery were erroneous, since he was not guilty if he honestly believed that he had authority to sign his father's name to the check.
3. CRIMINAL LAW—APPEAL—REVERSAL.—Where defendant was indicted for forgery of a check and for uttering a forged check, and

the evidence showed that defendant wrote the check, signed his father's name thereto, and thereafter uttered the check, and the jury acquitted him of the forgery and convicted him of uttering a forged instrument, the judgment will be reversed, and the prosecution dismissed.

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

J. F. Gautney and *Fred C. Mullinix,* for appellant.

1. The court invaded the province of the jury in giving instruction No. 6.

2. The verdict on the second count is contrary to the evidence.

3. The evidence shows that Rickman wrote, signed and endorsed the check in the presence of Koonce. The jury found that defendant was not guilty of forgery and hence was not guilty of uttering a forged check.

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

Confess error in giving the 6th instruction.

WOOD, J. Appellant was indicted in one indictment under two separate counts; first, for forgery, and second, for uttering a forged instrument. The appellant was convicted for uttering the check but acquitted of the charge of forgery. The check alleged to have been forged was drawn on the Bank of Nettleton in favor of Olyn Rickman for the sum of $2.50 and was signed, J. W. Rickman.

J. W. Rickman, the father of appellant, testified that his name had been signed to the check and that he had not signed it himself, nor authorized any one else to do so; that his wife had deposited some money in the bank in his name, and that the money belonged to the family.

Mrs. Rickman, appellant's mother, testified that she deposited money in the Bank of Nettleton in the name of her husband, J. W. Rickman; that it belonged to the family, and that appellant had an interest in the money; that she told him he could write checks on it. There was

testimony to the effect that appellant wrote the alleged forged check and signed his father's name to same, uttered the check, indorsed and delivered the same to one Koonce, who paid him the sum named in the check. Koonce presented the check to the Bank of Nettleton, and the bank refused to cash it.

The court, among other instructions, gave the jury the following: "5. If you find the defendant here had authority to sign the name of J. W. Rickman to the check testified about, it would be sufficient for the purposes of this case, and the jury should acquit him."

"6. The authority you will consider is the authority from the person in whose name the money was deposited in the bank. Authority from any one else would not be of any value in this case."

The Attorney General confesses that the court erred in giving instruction No. 6. The confession of error is well taken. Forgery is the fraudulent making or alteration of any writing to the prejudice of another man's rights. 2 Bish. New Cr. Law, secs. 523, 605; *Van Horne* v. *State,* 5 Ark. 349.

The fraudulent intent is an essential ingredient in the crime of uttering a forged instrument. *Elsey* v. *State,* 47 Ark. 572; *Holloway* v. *State,* 90 Ark. 123; *Maloney* v. *State,* 91 Ark. 485.

Instructions 5 and 6 were misleading. From these the jury were justified in concluding that, unless the appellant had express authority from his father to sign the latter's name to the check, his act in so doing was a forgery, and likewise that the uttering of the instrument so signed constituted the crime of uttering a forged instrument. These instructions were calculated to make the jury believe that they had a right to disregard the testimony of both the father and mother of appellant to the fact that the money deposited in the bank by the mother was regarded as the money of the family, in which appellant, as a member of the family, had an interest. The testimony of the mother to the effect that

appellant had authority to sign checks in his own name was competent, as tending to show that the appellant, in signing his father's name to the check and in uttering the check after signing same, did not have any fraudulent intent. Although the appellant's father testified that he had not authorized any one to sign his name to the check, yet his testimony as a whole tended to prove that while the money was deposited in his name it belonged to the family, and that appellant had an interest in the same. Even though appellant may not have had any actual authority from his father to sign checks, yet if, under the circumstances, he honestly believed that he had such authority and signed his father's name to the check and afterwards uttered the check without any fraudulent intent, he was not guilty of either crime in the indictment.

Appellant was on trial for both offenses. The evidence showed that appellant himself wrote the check, signed his father's name to same and thereafter uttered this check. The jury acquitted appellant of the crime of forgery. Since the jury thus determined that appellant was not guilty of forgery of the instrument, it necessarily follows under the proof in this case, that they could not convict him of the crime of uttering a forged instrument. As appellant wrote and signed the instrument himself, if in so doing he did not commit a forgery, then he could not be guilty of uttering the forged instrument when he sold the same to Koonce. For the error indicated the judgment is reversed and the cause is dismissed.

GREENE COUNTY v. CLAY COUNTY.

Opinion delivered July 8, 1918.

1. COUNTIES—REDUCTION OF AREA—VALIDITY OF STATUTE.—Under Const. 1874, art. 13, § 1, providing that "no county now established shall be reduced to an area of less than six hundred square miles nor to less than five thousand inhabitants," a statute reducing the area of a county may not be declared void by the courts upon proof *aliunde* that the attempted change of boundaries reduces the area of the county to less than 600 square miles.

2. EVIDENCE—JUDICIAL NOTICE—GEOGRAPHICAL FACTS.—The courts may take judicial notice of the plats of public surveys and of the general system of government surveys with base lines, meridians and ranges, and the relative positions of the sections in the township, and also the principal geographical features of the State, and the general location and course of rivers.

3. SAME—JUDICIAL NOTICE—GEOGRAPHICAL FACTS.—While the courts take notice of the plats of public surveys, they do not take notice of the condition of the land disclosed on the plats, nor the extent of the area embraced therein except as disclosed by the plats themselves.

4. COUNTIES—REDUCTION OF AREA—VALIDITY OF STATUTE—EVIDENCE.—Acts 1895, page 244, detaching a township from Greene County and attaching it to Clay County, can not be held unconstitutional as reducing Greene County below the constitutional limit of six hundred square miles, inasmuch as the public surveys in existence at the time of passage of such act did not show the area of Greene County, the rule being that when there is a question of fact to be ascertained by the Legislature outside of those matters of which both courts and law makers must take cognizance, the courts can not inquire into those facts for the purpose of overturning legislation.

Appeal from Greene Chancery Court; *Archer Wheatley;* Chancellor; affirmed.

R. P. Taylor and *Huddleston, Fuhr & Futrell,* for appellants.

1. The act reduced the territory of Greene County to less than 600 square miles and is unconstitutional and void. The suit was properly brought and in the names of the proper parties. Const. Art. 13, § 1. Proof *aliunde* was admissible. The section is self-executing and mandatory and the infraction thereof is addressed to the judiciary. 34 Ark. 224; 27 *Id.* 202; 33 *Id.* 497; 35 *Id.* 56; 80 S. W. 443.

See also 17 R. C. L. 972, § 345. Also cite many cases as to usurpation, laches, limitation, etc., but these points are not decided in the opinion.

The court takes judicial knowledge of the fact that since the act Greene County has less than 600 miles of territory. The area does not have to be proved, but the field notes, plats, maps, etc., show this.

G. B. Oliver, for appellees.

1. The Legislature settled the question by its act and that is binding on the courts. 28 Ark. 378; 4 W. Va. 11; Cooley on Const. Law, 227, 257, 236, 254, etc.; 44 Ark. 536; 76 *Id.* 197; 48 *Id.* 370.

2. The presumption is that the Legislature found the necessary facts to uphold the act. *Supra;* 103 Ark. 127, 529; 97 *Id.* 473; 48 *Id.* 370; 59 *Id.* 513, and many others.

3. Argue the questions of laches, acquiescence, usurpation, limitation, etc., citing many cases.

McCULLOCH, C. J. The General Assembly of 1895 enacted a statute detaching the territory constituting Blue Cane township from Greene County and attaching the same to Clay County as a part thereof, the area being properly described by metes and bounds in the statute, which provided also that the township officers should continue in office until their successors were elected and qualified, and that Clay County should be liable to Greene County "for the *pro rata* amount of the indebtedness of said Greene County existing at the time of the passage of this act equal in proportion to the amount of taxable property of the territory detached." Acts 1895, p. 244.

The present suit, which is one instituted in the chancery court of Clay County on behalf of Greene County against Clay County and its acting officers, challenges the constitutionality of the act transferring the territory in question from one county to another on the ground that it leaves Greene County with less than 600 square miles of territory, which is prohibited by sec. 1 of Art. XIII of the constitution of 1874 providing that "no county now established shall be reduced to an area of less than six hundred square miles nor to less than five thousand inhabitants; nor shall any new county be established with less than six hundred square miles and five thousand inhabitants."

At the hearing of the cause testimony was introduced tending to show the actual number of square miles left in

Greene County exclusive of the detached township, but the defendants expressly reserved the right to object to the consideration of such testimony on the ground that the statute is conclusive on the question of the proper exercise of legislative power, and that such testimony was not admissible. The chancellor rendered a decree dismissing the complaint, and plaintiffs have appealed.

The question is squarely presented whether or not a statute which reduced the area of a county by a change in the boundary lines should be declared void by the courts upon proof *aliunde* that the attempted change of boundaries reduces the area of the county to less than 600 square miles.

There are two views of the question: One that when the constitutionality of such a statute is challenged it becomes a judicial question for the courts to determine, from legal evidence adduced, whether or not the facts exist upon which the power of the Legislature to act is based; and the other view is that the determination of the facts upon which the power of the Legislature to enact the statute exists is a legislative question, and that the courts must respect that determination unless the statute is void on its face.

The authorities bearing directly on the question are not as numerous as might be expected and they are not in harmony. One of the cases which holds to the first view stated above is *Zimmerman* v. *Brooks,* 118 Ky. 85, 80 S. W. 443, where the subject is thoroughly discussed, and the authorities reviewed, and the court reached the conclusion that it is a judicial question "for the courts to determine whether the General Assembly, in creating a new county, has violated constitutional section 63, providing that no county shall be created by the General Assembly which will reduce the county or counties, or either of them, from which it shall be taken, to less area than 400 square miles, nor shall any county be formed of less area."

Another leading case on the subject which reached the opposite conclusion is *Lusher* v. *Scites,* 4 W. Va. 11, where the authorities are also discussed at length and the court announced the following rule with respect to the conclusiveness of the exercise of legislative power:

"To exercise the power thus conferred the Legislature must inform itself of the existence of the facts prerequisite to enable it to act on the subject. How it shall do so, and on what evidence, the Legislature alone must determine; and when so determined, it must conclude further inquiry by all other departments of the government. And the final action terminating in an act of legislation in due form, must of necessity presuppose and determine all the facts prerequisite to the enactment."

We must, however, regard the question as settled by the decision of this court in the case of *State v. Dorsey County,* 28 Ark. 378, which approved the doctrine of the West Virginia case cited above, and announced the rule that "when the constitutionality of an act of the Legislature creating a new county is questioned because its area is less than the constitutional requirement, or that some county or counties out of which it has been organized has been reduced below six hundred square miles, to determine this fact, the courts can not look beyond the act itself, or some other official record of like grade and character, or official survey or maps of which they are bound to take judicial notice."

This was but another way of saying that a legislative determination of any disputed fact is conclusive upon the courts in any inquiry on that subject unless the act shows on its face that the facts necessary to call the power into exercise do not exist, for the statute must be read and considered by the courts in the light of facts of which they have judicial knowledge, and when it is thus disclosed that the essential facts do not exist then the courts must declare the statute void. An appropriate example of this rule would be that where the act itself discloses the exterior boundaries of the county by courses

and distances in such a way that the extent of the area is a mere matter of mathematical calculation, then the statute would be void on its face if the extent of the area thus ascertained is less than the requirements of the constitution.

This case then brings us to the question whether there are facts of which we take judicial notice in connection with the boundaries of Greene County as set forth in the statute originally creating it and the several statutes changing those boundaries, which show that the transfer of territory in this instance reduced the area of Greene County to less than 600 square miles, and if it is thus seen that it does reduce the area of the county to that extent it is our duty to declare the act unconstitutional.

It is settled by our decisions that the courts may take judicial notice of the plats of public surveys and of the general system of government surveys with base lines, meridians and ranges, and the relative positions of the sections in the township, and also the principal geographical features of the State and general location and course of rivers. *State* v. *Dorsey County, supra; Bittle* v. *Stuart,* 34 Ark. 224; *Little* v. *Williams,* 88 Ark. 37; *Stephens* v. *Stephens,* 108 Ark. 53; *Beck* v. *Anderson-Tully Co.,* 113 Ark. 316; *McCall* v. *North Pine Bluff Realty Co.,* 125 Ark. 553.

We take notice of the plats themselves, but not of the condition of the land disclosed on the plats nor the extent of the indicated area except what the plats themselves show. In other words, we can not take knowledge of the extent of any given area. *McCall* v. *North Pine Bluff Realty Co., supra.*

Greene County was created under the territorial government by a statute approved November 5, 1833, and the territory comprising the county was described as "all that portion of the county of Lawrence, lying east of a line beginning where the southern boundary line of said county of Lawrence crosses the River Cache, thence up

the middle of the main channel of said Cache, to the place known as the three forks of Cache, thence a due north course till it intersects the constitutional line dividing the State of Missouri from the Territory of Arkansas." Acts of 1833, p. 35.

A portion of the original territory of the county was detached in the creation of Craighead County by the act of February 19, 1859, and again by the act creating Clay County in the year 1873. The St. Francis River, where it forms the boundary line between Missouri and Arkansas, is the eastern boundary line of Greene County, and it is conceded to be a fact that the area between the meandered line of St. Francis River and the middle thread of the stream has never been ascertained by any official survey up to the time of the passage of this statute. It is also conceded that there were large bodies of unsurveyed lands in the county at the time this statute was passed. We must, however, determine the validity of the statute as of the time it was enacted, and any official survey made since that time could not be determinative of the validity of the statute. It is easily seen that the ascertainment of the extent of the area constituting Greene County is not a mere matter of mathematical computation based either upon the exterior boundaries described in the statute fixing them nor of the plats which we notice judicially. In short, it was, when the statute was passed, merely a question of fact to determine the extent of this area to which the county was to be reduced and the only question we have here remaining is whether that question of fact should be inquired into by the courts for the purpose of upholding or overturning the statute.

That question is, we think, clearly settled by the decision of this court in the Dorsey County case, *supra,* and a majority of the court are of the opinion that the conclusion there reached is correct in principle, for where a power is committed to the Legislature to exercise under a given state of facts it is necessarily implied that the Legislature must first ascertain the existence of those

facts, and that its determination is conclusive upon the courts. Any other rule would lead to the utmost confusion in the efforts of the courts to review legislative action upon the ascertainment of the existence of facts which may or may not appear to be conclusive. The only sound rule is, we think, to say that when there is a question of fact to be ascertained outside of those things which both courts and lawmakers must take cognizance of, the courts can not inquire into those facts for the purpose of overturning legislative action.

It follows from what we have said that the chancery court was correct in refusing to declare the statute void.

Decree affirmed.

WOOD and HART, JJ., dissent.

ROBINSON v. CITIZENS' BANK OF PETTIGREW.

Opinion delivered June 17, 1918.

1. EQUITY—SETTING ASIDE DECREE.—The chancery court loses control of a decree with the ending of the term at which it was rendered, and could not vacate it at a subsequent term except on the grounds specified by Kirby's Dig., § § 4431-4437.
2. APPEAL AND ERROR—APPEALABLE JUDGMENT—ORDER SETTING ASIDE DECREE.—A decree in chancery vacating a decree rendered at a previous term was final and appealable.
3. EQUITY—DECREE—VARIANCE.—A decree canceling a mortgage as a cloud upon title was responsive to allegations and prayer of the complaint where the complaint stated that the mortgage debt had been paid, and the prayer was that the mortgage be canceled, although it was doubtful whether the complaint sought a discovery of property subject to execution, under Kirby's Dig., § 3308 *et seq.*, or a cancellation of the mortgage.
4. PROCESS—SUFFICIENCY OF SUMMONS.—Where a summons was directed to the sheriff, commanding him to summon the defendant named therein to answer the complaint filed, under penalty of being confessed, it was sufficient, under Kirby's Dig., § 6034, to put the defendant on notice of the charges made in the complaint, although it contained inappropriate recitals in the nature of interrogations which might properly have been propounded in the complaint.

5. APPEAL AND ERROR—AMENDMENTS REGARDED AS MADE.—Where a writ of summons, in addition to the statutory requirements, contained matter of surplusage, the court below could have amended the writ by striking out such superfluous matter, and on appeal on collateral attack the record will be treated as if the amendment had been made.

6. EQUITY—PLEADING—INTERROGATORIES.—In an action to cancel a mortgage on the ground that it had been satisfied, interrogatories as to the property in the hands of the mortgagee belonging to the mortgagor and as to what amount had been received in payment of the mortgage debt were properly propounded in the complaint under Kirby's Dig., § 6154, relating to interrogatories.

7. JUDGMENT—SETTING ASIDE DECREE—FRAUD.—The fact that defendant misconceived the purpose of a summons in a former action and treated it as a garnishment and answered it as such did not constitute a fraud or casualty which would justify the court in setting aside a decree by default therein rendered against the plaintiff in the present action.

8. APPEAL AND ERROR—PARTY IN INTEREST.—Where the complaint alleged that defendant purchased land at his own execution sale, but that the deed was made out to another, a statement in the answer that defendant was the purchaser at the execution sale and is the owner thereof, although not a direct denial of plaintiff's allegation, was sufficient to show that defendant had such an interest in the land as would warrant an appeal from an adverse decision.

Appeal from Johnson Chancery Court; *Jordan Sellers,* Chancellor; reversed.

G. O. Patterson, for appellant.

1. The summons served on defendant was sufficient to support the decree rendered in the cause. 20 Enc. Pl. & Pr., 1145; 163 U. S. 454; 40 Md. 210; 19 Ark. 253.

2. It was amendable to conform to the complaint and should be treated as amended if necessary. 32 Cyc. 534D; 71 Ill. 354; 8 Ind. 354; 5 *Id.* 192; Moor. 230; 7 Mo. 173; 14 Abb. Pr. 364; 1 Tex. 481; 40 Cent. Dig. 230.

3. But if defective or insufficient the defect was waived by defendant filing an answer. The filing of the answer was a general appearance. 95 Ark. 302; 2 Enc. Pl. & Pr. 632, 646-9; 95 Ark. 615; 56 *Id.* 45. The process was good and duly served and defendant by appearing

and filing an answer waived all irregularities. It was error to cancel the decree.

W. N. Ivie, for appellee.

1. Appellant's abstract is wholly insufficient. 200 S. W. 132.

2. The appellant is not properly in court. The complaint was filed in Johnson county and the summons was to Madison county. Our statutes specifically prescribe the method and manner of proceedings by discovery to enforce execution. K. & C. Dig. § § 3622, 3624, etc.

3. The summons was not amended and not so treated and the decree was void. The statutes were not complied with. The summons was only in the nature of a writ of garnishment and the decree cancelling the security was void.

McCULLOCH, C. J. Appellant Robinson obtained judgment against one Stewart before a justice of the peace of Johnson County, Arkansas, for the recovery of a certain sum of money, and, after filing a transcript of the judgment in the office of the clerk of the circuit court in accordance with the statute so as to make it a judgment of the circuit court, he instituted an action in the chancery court of that county against Stewart and appellee Citizens' Bank of Pettigrew to cancel a certain mortgage which had been executed by Stewart to appellee on lands in Johnson County owned by Stewart. Appellee is a domestic corporation domiciled in Madison County, and process was served on it in that county. The chancery court of Johnson County rendered a final decree in that action on November 5, 1914, in accordance with the prayer of the complaint, cancelling the mortgage on the ground that the same had been fully paid and discharged. Subsequent to the rendition of the decree, appellant sued out a writ of execution on the judgment from the office of the clerk of the circuit court and caused the land to be sold under the execution. The mortgage of Stewart to appellee embraced certain lands in Madison

County in addition to the lands in controversy situated in Johnson County, and in the year 1915 appellee instituted suit in the chancery court of Madison County against Stewart to foreclose the mortgage. A decree was rendered in that cause directing foreclosure sale by a commissioner of the court, and appellee purchased the Johnson County lands at the sale.

The present action is one instituted in the chancery court of Johnson County by appellee to set aside the former decree in appellant's favor cancelling the mortgage. Appellant and J. N. Sarber were joined as defendants, it being alleged in the complaint that Sarber had purchased the lands at a void tax sale, and the prayer of the complaint is, not only to set aside the judgment in appellant's favor, but to cancel the tax sale under which Sarber asserted title and to quiet appellee's title to the land under its purchase at the foreclosure sale. On the final hearing of the cause, the court rendered a decree cancelling the tax sale to Sarber and setting aside the former decree of the court cancelling appellee's mortgage. Sarber has not appealed, and this appeal is prosecuted solely by Robinson.

An attack is made upon the sufficiency of appellant's abstract, but we find that enough of the record has been presented in the abstract to enable us to discover the material proceedings.

The branch of the case which affects the interest of appellant Robinson was tried on the record of the former proceedings in which the decree sought to be set aside was rendered, and it is evident that the court based its conclusion in the present case entirely upon the insufficiency of the writ served on appellee in the former case. The complaint in that case set forth the facts concerning appellant's claim against Stewart and his judgment and alleged that Stewart was the owner of the land and executed the mortgage in question to appellee which had been fully discharged and satisfied, but that appellee as the holder of the mortgage was still hold-

ing it "solely for the purposes of hindering and defeating the creditors of said defendant, Stewart, including plaintiff in the collection of their debt against him." The prayer of the complaint was that the Citizens' Bank of Pettigrew be required "to appear and answer herein what sums or sum, chattels or property, belonging to defendant, Stewart, which it has in its hands or possession, and what sum or amount if any is yet due under the mortgage above described, and that it be required to pay or deliver into court any property of said defendant in its possession to satisfy and discharge the record of said mortgage."

The writ issued in that case and served on appellee is as follows:

"State of Arkansas, to the Sheriff of Madison County: You are commanded to summons the Citizens' Bank of Pettigrew to answer in twenty days after the service of this summons upon it, a complaint in equity filed against it in the Johnson Chancery Court by A. L. Robinson for the purpose of discovery and it is required to answer upon oath what property, money, credit, chattels or effects belonging to J. T. Stewart or in which he may have an interest, it holds or has in its possession or what sums or sum, if any, it is indebted to the said J. T. Stewart and for the purpose of fixing a lien upon any such money, credit, chattels and effects or indebtedness in favor of A. L. Robinson for the purpose of satisfying an indebtedness due by the said J. T. Stewart to the said A. L. Robinson and warn it upon its failure to answer the complaint will be taken for confessed."

Appellee made no appearance in that cause except to file the following answer, which appears to be an answer as garnishee:

"State of Arkansas

"County of Madison.

"To the Hon. Chancery Court of Johnson County:

"The Citizens' Bank, by Chas. E. Crawford, President, on oath states that J. T. Stewart has neither

money, chattels, or anything to his credit, in this bank, but to the contrary owes this bank sums that he is not able to pay at this time.

"Citizens' Bank,
Chas. Crawford, President."

The court lost control over the former decree with the ending of the term at which it was rendered and could not vacate the decree at a subsequent term except on the grounds specified by statute. Kirby's Digest, secs. 4431-4437. The subsequent decree of the court vacating the former decree was final and in that sense an appealable one. *Ayers* v. *Anderson-Tully Co.*, 89 Ark. 160.

The allegations of the complaint in the former proceedings were unskillfully drawn and are to some extent ambiguous so that it is difficult to determine whether the real intention of the pleader was to set forth a cause of action for discovery of the property to be subjected to execution under Kirby's Digest, sec. 3308 *et seq.*, or whether it was a bill to cancel the mortgage containing interrogatories propounded by the plaintiff in the case to be answered by the mortgagee. The complaint, however, contained a distinct and unqualified statement that the mortgage debt had been paid and the mortgage discharged, but that the mortgagee was still holding the security for the purpose of cheating and defrauding creditors of the mortgagor, and the prayer of the complaint was that the mortgage be cancelled as an impediment against the subjection of the real estate described therein to the satisfaction of appellant's judgment. The decree was, therefore, responsive to the allegations and prayer of the complaint.

The summons was also inartificially drawn and was ambiguous, but it contained all the language required by statute to be embraced in a summons. The statute (Kirby's Digest, sec. 6034) provides that original process "shall be directed to the sheriff of the county and command him to summon the defendant or defendants named

therein to answer the complaint filed by the plaintiff, giving his name, at the time stated therein, under the penalty of the complaint being taken for confessed," and the writ served on appellee contained all this. There is no requirement in the statute that the nature of the cause of action must be stated in the writ.

The other recitals of the writ requiring appellee to answer upon oath what property it had belonging to its co-defendant, Stewart, was responsive to the allegations of the complaint asking that the appellant be required to make disclosure of what property it had in its hands belonging to Stewart and what amount had been received in payment of the mortgage debt. Those allegations were in the nature of interrogatories which appellant had a right to propound in his complaint in accordance with the terms of the statute. Kirby's Digest, sec. 6154. But, even if those recitals in the writ were inappropriate under the pleadings, they might be treated as surplusage, as the writ was subject to amendment under orders of the court. The writ contained, as before stated, all the recitals required by statute and was sufficient to put appellee, as a defendant in the cause, upon notice of the charges made in the complaint. The court could have amended the writ, and upon collateral attack we must treat the record as if such an amendment had been made. *McNutt, Admx.* v. *State,* 48 Ark. 30; *Lowenstein* v. *Gaines,* 64 Ark. 499.

The fact that appellee misconceived the purpose of the writ and treated it merely as a garnishment and answered it as such, does not of itself constitute fraud or casualty which would justify the court in setting aside the decree. It was appellee's duty to take notice of all the allegations of the complaint and was in default in failing to answer those allegations. It could not suffer the decree to go against it and afterwards ask that the decree be vacated.

It is finally contended by counsel for appellee that appellant is not prejudiced by the decree and can not ap-

peal for the reason that the complaint alleges that appellant purchased the land at his own execution sale, but that the deed was made by the sheriff to Sarber. It is true that the answer contains no direct denial of that allegation, but the answer does contain a statement that appellant and George Patterson were the purchasers of the land at the execution sale and are the present owners thereof. No proof was introduced at all on that issue and there was no allegation in the complaint concerning the method by which Sarber acquired the rights of appellant under the purchase at the execution sale. It is manifest, therefore, that under the pleadings a decree vacating the former judgment of the court directly affects appellant's interests, and he is entitled to appeal from it.

The decree to that extent was erroneous and the same is reversed and the cause is remanded with directions to dismiss the complaint to the extent that it seeks to vacate the former decree.

BOTTRELL v. HOLLIPETER.

Opinion delivered July 8, 1918.

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—LIMITATION OF COST.—Two distinct improvement districts, coterminous in extent, may be organized, the one for the purpose of grading and paving certain streets in a town and the other for the purpose of curbing, guttering and storm-sewering the same streets, although the combined cost of the two improvements exceeds 20 per cent. of the value of the real property within the district.

Appeal from Mississippi Chancery Court; *Archer Wheatley,* Chancellor; affirmed.

STATEMENT OF FACTS.

The appellant brought this action against the appellees, who were commissioners of Street Improvement District No. 1, and of Storm-sewer, Curbing and Guttering District No. 1, of the city of Blytheville, Ark. He alleged that he was the owner of the real property situated within the districts; that the two districts were coter-

minous and embraced a portion of the city of Blytheville; that Street Improvement District No. 1 was created for the purpose of grading and paving certain streets and that Storm-sewer District No. 1 was created for the purpose of curbing, guttering and storm-sewering the same streets; that the improvements were in fact but one improvement, the guttering being a portion of the street and the curbing being an essential part of the pavement, while the storm-sewers were required to carry off the rain water which would fall upon the paved streets; that the organization of the two districts for the purpose of making the one improvement was in violation of the law; that the cost of the improvement would be in excess of 20 per cent. of the value of the real property within the districts. And appellant prayed that appellees be enjoined from issuing bonds and from proceeding with the work of improvement.

The appellees answered denying that the improvements contemplated were essentially one improvement; they alleged that storm-sewers are not an essential part of the pavement, but that they are separate; that the pavement could be made without the storm-sewer, but that, on account of the flat configuration of the city of Blytheville, the water would stand upon the street unless there were storm-sewers to carry it off; that the curbing is no part of the pavement, as the pavement would be as useful without it; that the guttering is an essential part of the storm-sewer and no part of the pavement; that the guttering and storm-sewers are beneficial and necessary to the adjoining property owners, enabling them to drain off the rain water falling upon their lots; that without these storm-sewers the water would accumulate and does so to the great inconvenience, detriment to the health and welfare of the public.

Appellees demurred to the complaint and appellant demurred to the answer and the court sustained the demurrer to the complaint and overruled the demurrer to the answer. Appellant declined to plead fur-

ther and a judgment was entered dismissing the complaint from which is this appeal.

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

The two districts constitute only a single improvement district and the double assessment is in direct violation of law. Hamilton on Assessments, § 545; 75 N. Y. 354; 105 Ark. 65; 115 *Id.* 88-95.

Little, Lasley & Adams, for appellees.

There were two separate and distinct districts, one for paving and the other for curbing and guttering and storm-sewers. 102 Ark. 306; 87 *Id.* 85; 80 Pac. 114; 96 S. W. 702; 28 *Id.* 776.

WOOD, J., (after stating the facts). The complaint and answer disclosed the fact that a majority of the owners of real property within the districts created desired to pave the streets within said districts, and also desired to build storm-sewers, curbs and gutters; that if the work were undertaken by one improvement district and were therefore considered as a single improvement, the cost of same would exceed 20 per cent. of the value of the real property in the district, as shown by the last county assessment, and would therefore be in violation of section 5683 of Kirby's Digest, which provides that: "No single improvement shall be undertaken which alone will exceed in cost twenty per centum of the value of the real property in such district, as shown by the last county assessment."

The ruling of the court, therefore, on the demurrer to the complaint and answer presents the issue as to whether or not two separate improvement districts could be created—the one for the purpose of grading and paving certain streets and the other for the purpose of curbing, guttering and storm-sewering the same streets.

Property owners may elect to include different improvements that are entirely dissimilar in character into one improvement district. When the improvements are

thus undertaken by one improvement district, they must be treated as a single improvement and their cost, considered as a single project, must be brought within the statutory limit for a single improvement. *Wilson* v. *Blanks,* 95 Ark. 496; *Bateman* v. *Board of Commissioners Improvement District No.* 1 *of Clarendon,* 102 Ark. 306.

But, it does not follow conversely from these decisions that the statute authorizes the creation of more than one district for the purpose of making what is in fact but a single improvement. In other words, under the above decisions, more than one and different improvements can be united and treated as but one and undertaken by the creation of an improvement district for that purpose. But on the other hand, where there is really but one improvement, it can not be divided into separate parts and improvement districts created for the completion of the work of these separate parts. This, as we construe it, would be a palpable evasion, and in violation of the statute which is intended to limit the cost of any one or single improvement to 20 per cent. of the assessed value of the real property in the district where the improvement is contemplated. See *Harnwell* v. *White,* 115 Ark. 95.

In the case of *Board of Improvement Paving District No.* 7, *Fort Smith* v. *Brun,* 105 Ark. 65, we held that, "The power given to an improvement district to pave a certain street, included the power to furnish and to do all that is necessary, usual or fit for paving, including the construction of the improvement in a way that will also successfully drain the street." That case shows that where the commissioners are not specifically limited or restrained by the petition for, and the ordinance creating the district, under the power to pave it would be within the discretion of the board to construct curbing, gutters and even storm-sewers in the absence of the allegations showing such curbing or guttering or storm-sewers were not necessarily incident to the construction of the improvement contemplated.

In that case it was alleged in the petition seeking to restrain the commissioners from making the improvement, that the ordinance creating the district contemplated the paving of Garrison avenue in the city of Fort Smith and that the commissioners were undertaking, as a part of such paving, to construct storm-sewers. The contention of the petitioners was that the construction of the storm-sewers, or underground drainage system, was not within the power conferred upon the commissioners to pave the street. In answer to the contention we said: "It can not be said as a matter of law that they (the commissioners) have exceeded their powers under the authority given them of paving the streets by providing that the surface waters shall be carried off by underground drainage, instead of by gutters. This is the extent of the allegations made in the complaint. * * * The mere allegation that storm-sewers are not incident to a pavement improvement is not sufficient to show that its construction is unauthorized. The power to pave a street may include the power to construct drainage thereunder, and it will be considered incident thereto when exercised by the board of improvement, unless it is alleged and proved that the surface waters can be as successfully carried off by gutters."

Appellant cites and relies upon the case of *Improvement District* v. *Brun, supra,* as authority for his contention, that the districts herein challenged were created to complete what was in fact but a single improvement. The case does not support appellant's contention. There was no allegation that the underground drainage was unnecessary and not incident to the work of paving. But here the allegations of fact in the answer are that "the storm-sewers are not an essential part of the pavement but are entirely separate." That "the pavement could be made without the storm-sewer." * * * That "the curbing is no part of the paving, * * * nor is the gutter an essential part of the pavement." These allegations were properly pleaded and the demurrer to the an-

swer admitted the truth of them. Moreover, in the case of the *Board of Commissioners* v. *Brun, supra,* only one improvement district was created and the work of paving and storm-sewering, which was held to be incident thereto, was being done as a single improvement; and, as we have already seen, no matter how dissimilar the improvements may be, if undertaken by the creation of one district and as a single improvement, the same will be valid, unless the cost thereof exceeds the statutory limit. While the power to pave will apply to and include the cost of curbing and guttering, where the latter are necessary and incident to the paving, as shown in the case of *Commissioners* v. *Brun, supra,* and the cases therein cited, and while curbing and guttering, even though not necessarily incident to the paving may be very appropriately included in an improvement district for paving, yet it is easy to see that they are not convertible terms and do not necessarily include each other and therefore constitute a single improvement.

The petition of the property owners for, and the ordinance pursuant thereto creating the two districts, are at least *prima facie* evidence that the petitioners and the town council considered that the improvements provided for did not constitute a "single" improvement, as designated in the statute. The facts stated in the answer and admitted by the demurrer of appellant to be true show that they were not essentially one improvement.

The case of *Harnwell* v. *White, supra,* also relied upon by appellant is not applicable here, for the reason that an improvement district was created upon the petition of property owners for the purpose of grading, curbing, guttering and macadamizing the streets within the town of Pulaski Heights. After the creation of the district commissioners were appointed, they reported that the improvements could not be constructed at a cost within the statutory limits. Thereupon the council undertook to create four separate improvement districts for doing the different parts of the work upon the original petition.

We held, under those circumstances, that the ordinances for the establishment of the different districts were without authority and therefore void.

The ruling of the court was correct and its decree dismissing appellant's complaint is therefore affirmed.

HART and SMITH, JJ., dissenting.

HARGIS v. LAWRENCE.

Opinion delivered June 24, 1918.

1. ACTION—JOINDER OF CAUSES.—Where one piece of land was conveyed to one as trustee for a church, and an adjoining piece was conveyed to another as trustee for same church, causes of action by the two trustees to quiet title to both tracts, and to reform a deed as to one of them, were properly joined.
2. QUIETING TITLE—JOINDER OF PARTIES.—Where one tract of land was conveyed to one as trustee for a church, and an adjoining piece was conveyed to another as trustee for the same church, an action to quiet title to both pieces and to reform the deed to one of them was not objectionable for misjoinder of parties.
3. QUIETING TITLE—EFFECT OF CONFIRMATION AS TO PARTIES IN POSSESSION.—Where title is sought to be confirmed under general notice by publication provided for by the confirmation act, under Kirby's Digest, § 656, a decree under the confirmation act shall not bar or affect the rights of any person who was an adverse occupant of the land at the time the petition was filed; and the rights of such parties are not affected by Kirby's Digest, § 657, providing that any person may within three years appear and set aside the decree, if he offer a meritorious defense.
4. REFORMATION OF INSTRUMENTS—PARTIES.—Where the grantor in a deed is dead, and his heirs have conveyed all their interest in the land, such heirs are not necessary parties in a suit to reform the grantor's deed.
5. DEED—CONSIDERATION.—A conveyance of land in consideration that the grantee build a structure for church and school purposes, which was done, is supported by a consideration.
6. ADVERSE POSSESSION—EXTENT.—One in possession of a portion of a tract of land under color of title is in actual possession of all the land within the calls in his deed.
7. ADVERSE POSSESSION—CONSTRUCTIVE NOTICE.—Where a church was given a deed for three acres out of a forty-acre tract, but the deed misdescribed the forty-acre tract, one who purchased the forty

acres which the church understood it had bought, and upon which it had built, had sufficient constructive notice to put him on notice as to the extent of possession claimed by the church.

8. ADVERSE POSSESSION—PAYMENT OF TAXES.—Payment of the taxes on land by a grantee thereof will not avail him as constructive adverse possession thereof as against a person in actual adverse possession thereof.

Appeal from Carroll Chancery Court, Western District; *Ben F. McMahan*, Chancellor; affirmed.

Festus O. Butt, for appellant.

1. Appellees are barred by the decree of confirmation in 1903. Kirby's Dig. § 656-7; 188 S. W. 810.

2. The cause should have been dismissed because of want of capacity in appellees to sue. The proof wholly fails to show any individual interest in the two individuals named as plaintiff. Bradley *had* been a trustee, but Lawrence was not; neither had he any individual interest.

3. The decree is erroneous as to the three acre tract because it was in effect a reformation of a deed of gift, to which neither the grantor nor his heirs were parties and because the preponderance of the evidence does not show any legal adverse possession by appellees. 200 S. W. 797; Kirby's Dig. § 763; 30 Ark. 640; 89 *Id.* 453; 40 *Id.* 237.

4. It was erroneous as to the one acre tract because appellees' title, under its deed had been lost through adverse possession by appellant. 118 S. W. 414; 201 *Id.* 118; 200 *Id.* 1014.

5. It was erroneous as to the road sought because the court had no jurisdiction of that question since it was at the time pending in the county court.

C. A. Fuller, for appellees.

1. Appellees were not barred by the decree of confirmation in 1903. Appellees were in the open, notorious, adverse and peaceable possession of the cemetery and church house and ground. Kirby's Dig. § 656. Cemetery, school and church property is not subject to taxation and was not taxed since 1878. Appellant's grantor

therefore could not have the title confirmed in 1903 on the theory that he had paid seven years' taxes and appellees were not parties to the suit, but were in adverse possession.

2. Appellees had the capacity to sue as trustees and individuals as the evidence shows.

3. The description in the deed was properly reformed to speak the truth, and appellees are entitled to have the title vested in them because of adverse possession for 35 years.

4. Appellees were and had been in adverse possession, under color of title, for more than the statutory period, 20 years. 30 Ark. 640.

5. There is no evidence that any petition for the road was pending in the county court. The land was donated by Bradley in 1878 and appellees had complied with the terms of the gift. The possession extended to the limits of the boundaries of the grant. 74 Ark. 484; 96 *Id.* 606. Adverse possession for more than seven years under a void deed for want of proper description is sufficient to invest title. 85 Ark. 4. Possession is equivalent to notice. 76 Ark. 25. The decree is right.

HUMPHREYS, J. W. H. Lawrence and Alfred M. Bradley, as trustees for Carmel Baptist Church, and in their individual capacities, brought suit against Abe Hargis in the chancery court for the Eastern District of Carroll County to reform an alleged misdescription of the land in a deed executed by B. K. W. Bradley and A. J. Bradley, to Anderson Cox, Spencer B. Hulsey and Alfred M. Bradley on the 29th day of October, 1887; and an alleged error in designating the grantee in a deed executed by the heirs of B. K. W. Bradley, deceased, to W. H. Lawrence on the 3rd day of January, 1899; and to quiet the title to the lands in them as trustees for said Carmel Baptist church, and to prohibit appellant from interfering with the organization's possession of said tracts of land and the use of the road leading from the county road to the church and cemetery. The alleged erroneous

description in the first deed consisted in conveying the lands in the S. W. quarter of the N. W. quarter, instead of the S. W. quarter of the N. E. quarter, and in specifying in the metes and bounds description by full chains instead of half chains. The alleged error in the second deed consisted in conveying the land to W. H. Lawrence individually, instead of as trustee for the Carmel Baptist Church. The complaint alleged ownership of the lands in appellees as trustees for the Carmel Baptist Church, and that appellant was claiming ownership therein and was attempting to interfere with their possession of the three-acre tract intended to be conveyed by the first deed, and the one-acre tract conveyed by the second deed, and that the Carmel Baptist Church, through its trustees, had been in the actual, adverse possession of the one-acre tract for graveyard purposes and the three-acre tract for church purposes since 1887. Appellant filed answer denying ownership of either tract of land in appellees and claiming title himself to both tracts under deed of conveyance from W. H. Wells of date March 12, 1906. The cause was submitted to the court upon the complaint of appellees, answer of appellant and depositions of witnesses, from which the chancellor found that appellees, as trustees, were owners of both tracts of land for the Carmel Baptist Church, and, in accordance therewith quieted the title to said real estate in appellees. An appeal has been lodged in this court and the cause is before us for trial *de novo*.

The facts, in substance, are as follows: In the year 1872, certain citizens residing about five miles northeast of Green Forest in Carroll County organized the Carmel Baptist Church. In 1887 B. K. W. Bradley agreed to convey to the trustees of said organization three acres of land in the southwest quarter of the northeast quarter in section, township and range aforesaid, with the understanding that the commissioners would erect thereon a building for church and school purposes. In keeping with that understanding, a conveyance was attempted but the tract was misdescribed and placed in another 40

acre tract and described by metes and bounds as a 12 acre tract instead of a three acre tract, due to the use of full chains instead of half chains in the description. Such a building was immediately placed upon the three acres agreed upon by the organization and was used continuously for church and school purposes for the organization until some five or six years ago, and since that time, for said purposes at intervals. The reason it has not been used continuously for the last five or six years was on account of a disagreement in the organization. The organization is intact, having never disorganized. Alfred M. Bradley, now 82 years of age, helped build the church and is still a trustee for the organization. W. H. Lawrence is commissioner by succession to Anderson Cox who was one of the original trustees. At about the same time, B. K. W. Bradley agreed to convey a part of the S. W. quarter of the N. E. quarter of section 26, township 20 north, range 23 west, containing, within definite metes and bounds, one acre of land for cemetery purposes. The acre tract was marked off and large stones set up at each corner. The organization began to use the tract for burial purposes. It has been used for a community burial ground since that time. B. K. W. Bradley died before he executed the deed to the acre tract, but all of his heirs joined in a deed on the 3rd day of January, 1899, particularly describing said tract, to W. H. Lawrence, who testified that while the deed was made to him individually, the intention was that he should receive it as trustee for the Carmel Baptist Church. Lawrence agreed with B. K. W. Bradley to pay the expense of making the deed and recording same, which he did. The deed was misplaced and not recorded until after appellant purchased the entire tract of land. During the period from the execution of the deed until the institution of this suit, thirteen people had been buried in the graveyard covering a portion of the tract to the extent of 14 by 40 feet. That portion of the acre had been fenced and had been cleaned off from year to year. About two years before the institution of this suit, a two-wire fence was

built around the entire three-acre tract. A road branching off of the main road leading to the church and graveyard had been used by the community generally from the time the church was built and the graveyard established until a short time before the institution of this suit. This road had been obstructed by Abe Hargis, and appellees had an application pending in the county court for the establishment of a public road along the route of the old road leading to the church at the time they instituted this suit. In the year 1906, appellant, without actual notice that appellees claimed the graveyard and church property, purchased the entire tract of land, of which the one-acre and three-acre tracts composed a part, from W. H. Wells, who had obtained his title through mesne conveyances from B. K. W. Bradley, who was the common grantor. In 1903 W. H. Wells had his title to the entire tract quieted under the confirmation act, but neither appellees nor the organization which they represented were made parties to the confirmation suit. Immediately after purchasing the entire tract, he began to pay the taxes on the whole tract and continued thereafter to do so, and put up a notice to the public on the acre tract not to use same for burial purposes, and asserted a claim to the graveyard and church properties and the road passing over the tract leading to said properties, but did nothing further in the way of taking actual possession of the graveyard and church tracts of land. The notice was immediately torn down by W. H. Lawrence and he testified that the public continued in the future as in the past to clean the graveyard off yearly and that about two years before the institution of this suit he put a two-wire fence around the entire one-acre tract. Some five or six years before the institution of the suit, a dissension arose in the organization and it dispensed with the regular pastor, but the building was used at intervals for school purposes, and occasionally for church purposes up to about two or three years before the institution of the suit. The church building at the time of the institution of the suit was in a dilapidated condition. The

roof was leaking, the windows were broken out and a part of the ceiling had fallen. On account of a quarrel in the organization, the building had not been used some two or three years before the institution of the suit for church or school purposes.

Appellant contends that appellees were without capacity to institute this suit. It is said that the church must have had some method of choosing successors to its trustees. It was testified by the church clerk that the church possessed a minute book. It is surmised that the minute book would have contained the election of trustees in succession and that it was the best evidence to establish that Lawrence was a trustee in succession. The record does not disclose how the trustees were elected or what record was kept of the election, but we deem it unnecessary to go into that feature of the case as W. H. Lawrence was the grantee in the deed to the one-acre tract and Alfred M. Bradley was the trustee in the deed intended to convey the three-acre tract. The lands are adjoining, are claimed by the same party, and, had the suits been prosecuted in the same court separately, it would have been proper, under our broad consolidation statute, to have consolidated these cases. Hence we do not think that there was a misjoinder of parties or causes of action.

It is contended that appellees were barred from their action by the decree of confirmation obtained in 1903 under the general act for the confirmation of titles. Appellees were in actual, adverse possession of both tracts of land, claiming title, at the time the confirmation suit was instituted and were not made parties to the suit. The title was confirmed under general notice by publication provided by the act. It is provided in section 656, Kirby's Digest, that a decree under the confirmation act shall not bar or affect the rights of any person who was an adverse occupant of the land at the time the petition was filed. Appellant contends that because it is provided in section 657 of Kirby's Digest that any person may appear within three years and set aside the decree

if he shall offer to file a meritorious defense, and because appellees did not appear within that time and file their defense, they are barred. Section 657 does not have reference to the parties mentioned in section 656, who are occupying the lands adversely at the time a confirmation suit is instituted. The parties referred to in section 657 are parties other than those mentioned in section 656 who might have a meritorous defense. It is contended that the court erred in indirectly reforming the deed to the three-acre tract so as to describe the land intended to be conveyed, because the grantor or his heirs were not made parties. The grantor is dead and can not be made a party, and his heirs conveyed all their interest in both tracts of the real estate after his death, so they have no interest in the land and are not proper parties. The only parties claiming any interest in the lands involved in the suit are appellant and appellees, and, consequently, are the only necessary parties in the suit for a reformation. It is insisted, however, that no reformation can be had to the three-acre tract because it was a deed of gift. The contention is not sound because there was a consideration for the gift. The consideration was that the donee should build a church building for church and school purposes, which was fully executed. It is said that no reformation could be had in any event so as to include more land than was actually covered by the house on the three-acre tract and by the graveyard on the one-acre tract, because, it is said, appellant was an innocent purchaser. As to the one-acre tract, the donees were in actual possession of a part of the tract, to-wit: 14 by 40 feet, under deed properly and correctly describing the entire acre tract. One in possession of a portion of a tract of land under color of title is admitted to be in actual possession of all the land within the calls in his deed. *Crill* v. *Hudson,* 71 Ark. 390; *Haggart* v. *Ramney,* 73 Ark. 344; *Moorehead* v. *Dial,* 134 Ark. 548.

It is true that the donee in the three-acre tract did not have a deed which constituted color of title for the reason that it did not sufficiently describe the land and

that the organization had not done more than construct a church building on the tract. If this were an attempt on the part of the donees to establish title by adverse possession alone, appellant would be correct in his contention. Appellees were in possession in the instant case, claiming title under contract from a grantor in the chain of appellant's paper title. They had built a church building under contract that if they would build such a building appellant's grantor would convey them a fee title to three acres. This building was built in accordance with the contract and was being used by appellees for church and school purposes, as provided in the contract, when appellant purchased the entire tract upon which the three-acre tract is located. Appellees' possession was constructive notice to appellant and sufficient to put him upon inquiry as to the character of title and extent of possession claimed by appellees. It was his duty to see the building at the time he purchased the land, and, treating him as seeing the building, he must have known that a church building located on land in a country community carried a claim to more land than the building itself actually occupied. It was notice to him that in all probability the owners of the school and church building claimed a reasonable amount of land around it for school and church purposes. If he had made inquiry, he would have discovered that the owners of this particular building claimed three acres of land around it. The evidence is insufficient to show that appellant took actual possession of either the one or three acre tract, and therefore, his contention that he has acquired title by adverse possession can not be sustained. Nor will his deed to the whole tract covering the one and three acre tracts, and payment of taxes thereon, avail him as against a person in actual, adverse possession.

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

ATHLETIC MINING & SMELTING COMPANY v. SHARP.

Opinion delivered July 8, 1918.

1. STATUTE—MISTAKE IN ENROLLMENT—EFFECT.—The words included in brackets in the fourth and fifth lines of section 2 of act 175 of Acts 1913 were properly inserted in the printed act, being a part of the act as passed and inadvertently omitted by the enrolling clerk.
2. MASTER AND SERVANT—STATUTORY PROVISION—CONTRIBUTORY NEGLIGENCE.—Under Acts 1913, c. 175, § 2, the defense of contributory negligence is eliminated from all actions by employees for personal injuries received while employed by corporations not engaged in interstate commerce, and is not confined to injuries in death cases only.
3. MASTER AND SERVANT—ASSUMED RISK.—In an action for personal injuries to an employee alleged to be due to the negligence of the employer in starting a rabble rake without giving notice to such employee, it can not be said as a matter of law that employee in working where the rabble rake moved assumed the risk of danger therefrom by voluntarily standing in its proximity, in view of evidence that the work the employee was directed to do could not have been done elsewhere.
4. SAME—ASSUMED RISK.—It can not be said as matter of law that an employee assumed risk from being caught by a revolving rabble rake because he knew that the rabble rakes would begin to move in a minute or two where there was evidence that the rabble rakes had not been in operation for a considerable time, and there was a custom in such cases to give notice before starting the rabble rakes.
5. SAME—ASSUMED RISK.—The fact that the rabble rake which injured plaintiff was hot did not tend to prove that it was actually in operation at the time plaintiff took his position in its proximity and that therefore plaintiff knew and assumed the risk from its movement, as the rake was of metal and might have retained heat for a considerable length of time.
6. SAME—ASSUMED RISK.—It can not be said as matter of law that plaintiff assumed the risk of being injured by the movement of a rabble rake because he was in a position to see its approach and knew of the dangers incident to same where evidence tended to prove that his work engrossed plaintiff's attention, that the operation of the rabble rake was without noise, and that he depended upon notice or warning in case the rabble rakes should be put in motion.
7. SAME—NEGLIGENCE—INSTRUCTIONS.—Where a complaint seeking recovery for personal injuries alleged three different acts of neg-

ligence as grounds of recovery, but the evidence narrowed the issue to one of the alleged grounds, instructions to the effect that if plaintiff established any one of the allegations of negligence the jury might find for plaintiff were erroneous and calculated to mislead the jury.

8. SAME—ASSUMED RISK—INSTRUCTION.—An instruction to the effect that if the plaintiff acted with ordinary care in working where he did, he did not assume the risk in so doing *held* to confuse the defenses of contributory negligence and assumed risk and to be misleading.

9. SAME—ASSUMED RISK—INSTRUCTION.—An instruction, in an action by an employee for personal injuries, which told the jury that plaintiff assumed the ordinary risk and hazard incident to the employment, but not the dangers resulting from the negligence of the employer, was erroneous, as the employee assumed the risk of the employer's negligence if he knew of such negligence and appreciated the danger therefrom.

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

James B. McDonough, for appellant.

1. There is no substantial evidence of negligence and plaintiff assumed the risk as matter of law. A peremptory instruction should have been given for defendant. 122 Ark. 445. But plaintiff was guilty of negligence and assumed the risk. No negligence of defendant or its employees was proven. The rabble rake was in operation. The physical facts show this. 79 Ark. 608. There was no duty to warn, plaintiff knew the circumstances. Plaintiff can not recover as a matter of law. The master did not know of the danger. 35 Ark. 602. No could it have been foreseen. 708 *Id.* 488; 113 *Id.* 60; 84 *Id.* 377; 71 *Id.* 445; 118 *Id.* 49. No structural defect is shown. Plaintiff gave no notice that he would place himself in a dangerous place. 100 *Id.* 156.

2. Plaintiff assumed the risk. 101 Ark. 197; 98 *Id.* 202; 106 *Id.* 436; 102 *Id.* 631; 104 *Id.* 489.

3. The court erred in admitting evidence that it was customary to have a man stand at the north end of the kiln to give warning. 168 S. W. 129; 108 Ark. 483; *St. L., I. M. & So. Ry.* v. *Steed,* 105 Ark.

4. It was error to give instruction No. 1. There was no evidence of negligence because the bull wheel was so near the form. It was the duty of the court to state the issues as to the three allegations of negligence and this instruction did not.

5. It was error to give No. 2. It is abstract and misleading and did not submit the proper issue as to the duty to give warning. It instructs that defendant owed plaintiff the duty of using ordinary care to maintain a reasonably safe place for him to work.

6. It was error to give No. 4. It is an attempt to define assumed risk. It is an erroneous declaration of law. As to the similarity and dissimilarity between contributory negligence and assumed risk, see 88 Ark. 243; 77 *Id.* 367; 99 *Id.* 377; 105 *Id.* 533; 104 *Id.* 489; 98 *Id.* 211; 159 Pac. 1132.

7. There was error in giving Nos. 7 and 8 as to negligence and contributory negligence. Acts 1913, p. 734; 181 S. W. 290. The Secretary of State had no authority to insert the words used after the word "injuries." It was the intention of the Legislature to take away the defense of contributory negligence only in death cases.

8. It was error to refuse No. 4 for defendant. It properly presented the question of assumed risk and there was evidence to support it.

Oglesby, Cravens & Oglesby, for appellee.

1. Whether defendant was negligent in not exercising ordinary care to furnish and keep the place where plaintiff worked in a reasonably safe condition, and whether negligent in its operation of its rabble rake was for the jury and they have settled it, unless there is no testimony to support it. The evidence shows negligence. If plaintiff's evidence is true, and the jury so found, the verdict should stand. Plaintiff did not voluntarily put himself in a place of danger, he could not do the work in any other way. No warning was given. Plaintiff was put to work by the foreman in a place of danger.

2. There is nothing upon which to base the defense of assumed risk. This question was properly submitted

to the jury and their verdict settles this question. No new principle of law is found in the cases cited by appellant.

3. The motion for new trial is not set out in appellant's abstract, and this court will not consider the errors, if any, as to the admission or exclusion of testimony, etc.

4. There is no error in giving or refusing instructions. The objections are without merit. If the issues were not sufficiently stated, proper requests should have been made. The questions of negligence, contributory negligence and assumed risk were properly submitted. 75 Ark. 76; 98 *Id.* 211; 84 *Id.* 74; 77 *Id.* 367; 111 *Id.* 83. No prejudicial error appears. The verdict is amply sustained by the evidence.

James B. McDonough, for appellant in reply.

1. Sets out in full the motion for new trial and reviews the evidence and contends that plaintiff voluntarily took a place of danger and assumed the risk. 202 S. W. 824.

2. On error in instructions cites 98 Ark. 211; Thompson on Negl., § 4611, 4634; *Ib.* 4608; 20 Am. & Eng. Enc. Law, 109; 26 Cyc. 1177; 116 Ill. Rep. 296; 126 Fed. 495; 63 L. R. A. 551.

3. The doctrine of contributory negligence is not destroyed in Arkansas as to corporations except in cases of death. Acts 1913, p. 174; 122 Ark. 491. The Secretary of State was unauthorized to amend the act.

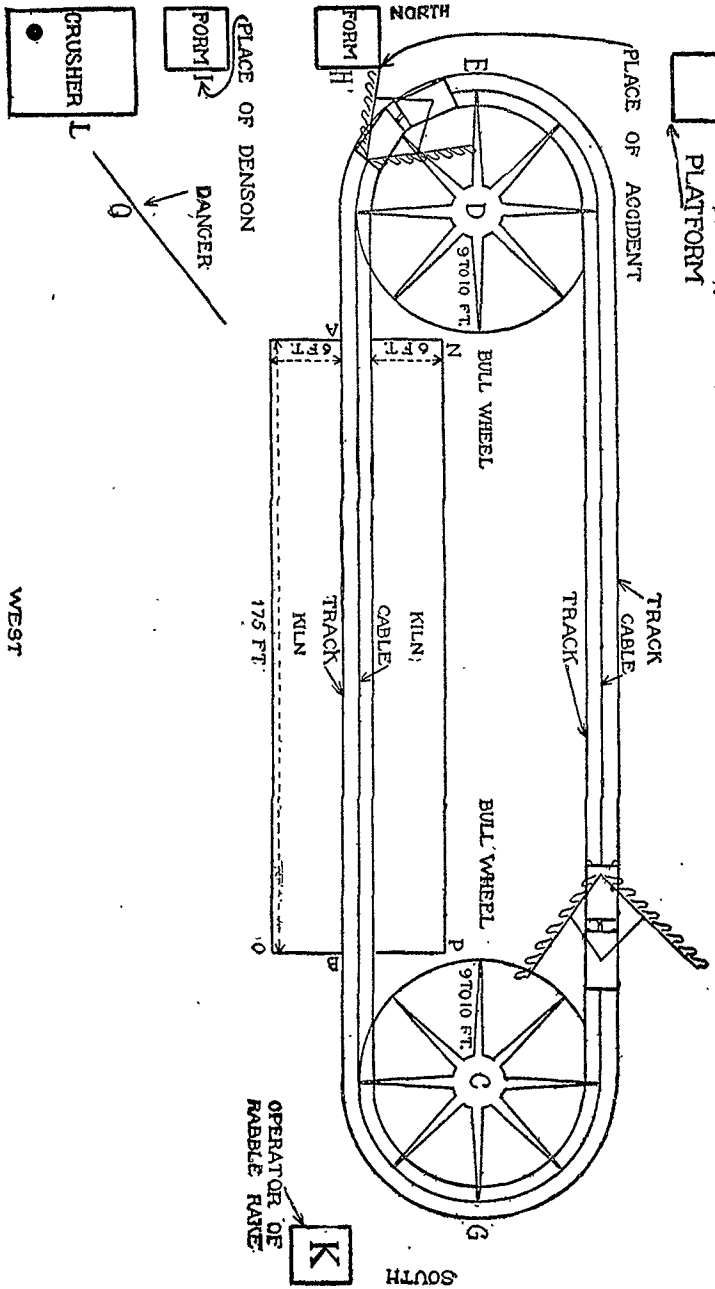
HUMPHREYS, J. Appellee instituted suit against appellant in the circuit court of the Fort Smith District of Sebastian County to recover damages in the sum of $3,000 for an injury received, due to the alleged negligence of appellant in constructing a track and bull wheel for its smelter in such close proximity to a supporting form for a pier of an ore dryer as to make it necessarily dangerous and hazardous for its employees to construct a pier; in operating the rabble rake and bull wheel; and in starting the rabble rake without giving notice or warning to appellee.

Appellant answered, denying that appellee received the injury through its negligence and pleaded an assumption of the risk and contributory negligence by appellee.

The cause was submitted to the jury upon the pleadings, evidence and instructions of the court. The jury returned a verdict in favor of appellee against appellant in the sum of $2,750, and a judgment was rendered in accordance therewith, from which an appeal has been duly prosecuted to this court.

At the time the injury occurred, appellant was constructing a smelting plant in South Fort Smith. The particular part of the plant where the injury occurred, consisting of bull wheels, rabble rakes, a track, cable, kiln, forms, crusher, controller platform, etc., was described by several of the witnesses, and, from their descriptions, appellant diagrammed the various parts of the machinery and the immediate surroundings. The correctness of the diagram, as descriptive of the wheels, rabble rake and immediate surroundings, is not questioned by appellee, so we incorporate it in this opinion as it is an aid to understanding the situation and operation of the machinery where the injury occurred.

The rabble rakes moved from north to south through the kiln for the purpose of stirring the hot ore. When in operation, the rakes moved slowly, taking five or six minutes to make a complete revolution. In making the revolution, and included in this time, two minutes were invariably consumed in stopping the rabble rake immediately after it passed through the kiln for cooling purposes. The molten mass of ore in the kiln heated the rakes to a red heat when they were passing through it. The rakes were made of metal and would hold the heat imparted to them when in the kiln. Form "H" was a hollow construction, eighteen by twenty inches square, five feet high, braced on the north and west sides, and was made for the purpose of receiving and holding in shape the soft cement until it hardened into a supporting pier for the ore-dryer, which was to rest upon this and other


CONTROLLER PLATFORM
EAST
PLACE OF ACCIDENT
TRACK
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9 TO 10 FT.
D
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piers of the same character. Rods or bolts were to be imbedded in the cement piers, and for the purpose of accomplishing this, it was necessary to hang the bolts or rods in the forms before putting the soft cement in them. Appellee was a carpenter, experienced in the construction of plants of this character, and had worked prior to this time in this capacity for appellant. On the morning of the injury, he was working on the controller platform north and east of the north bull wheel when he and R. V. Denson were directed by the foreman to hang the rods or bolts in forms "H" and "I" to the northwest of the north bull wheel. R. V. Denson went to form "I" and appellee to form "H" to do this work. Form "H" was within two or three inches of the track upon which the trucks supporting the rabble rakes moved, and a person standing either on the east or west side of the form would be in danger from the right wing of the rabble rake when passing. Appellee knew the close proximity of this form to the track and the dangers incident to the performance of this labor if standing either on the east or south side of the form when the rabble rakes were in motion. He also knew that if the rabble rakes were not being operated no danger could result to him from them while standing on either the east or west side of said form to perform the labor. In order to hang the rods or bolts in the form, he stood on two stakes at the southeast corner of the form with his back to the track, looking down into the hollow form. There was evidence tending to show that he could have taken his position on the north or west side of the form to do this work, but there was evidence tending to show that he could not do so on account of braces on those two sides. A crusher located a short distance to the west of the forms was being operated at the time the injury occurred. This crusher, when in operation, made a great noise. The rabble rakes in operation made little or no noise. The operator of the rabble rakes was operating the machinery from point "K" to the southwest of the south bull wheel and could not see one who was working at form "H." Ordinarily,

the operator would have stood at the controller platform to the northeast of the north bull wheel, but this platform had not been completed. Appellee knew of this fact. The evidence was conflicting as to how long appellee had been working at form "H" before the injury occurred. It ranged over a period of thirty minutes. Plows were attached to the wings of the two rabble rakes equidistant in the circle, and it was not shown how long they would retain heat after passing through the kiln. These plows were for the purpose of stirring the molten mass of metal in the kiln. There was evidence tending to show that the kiln had been in operation for thirty days, and that the rabble rakes were in operation night and day, and had been in operation during the entire night preceding the injury, and were in operation during the morning the injury occurred. There was evidence also tending to show that the rabble rakes had not been in operation during the morning the injury occurred. Appellee's clothing was not burned, but his body was burned to some extent. There was evidence tending to show that when the rabble rakes were stopped for any considerable time, beyond the two minutes they were always stopped in the course of operation, that a notice or warning was given before starting them again. While appellee was thus engaged in hanging the rods or bolts, he was caught by the right wing of a rabble rake and held and pressed against the form by it. He could not extricate himself, and, in order to get him out, the workmen had to tear down the form.

It is impractical to set all the facts out in this opinion, so we have endeavored to set out what we regard as a summary of the facts after a careful reading of the record. It may be necessary in the course of the opinion to refer to and set out other facts which have been omitted from this statement.

Based upon this state of fact, appellant contends that under the undisputed facts appellee was guilty of contributory negligence and that he assumed the risk incident to the work he was doing at the time he received the

injury. It is said by appellant that contributory negligence on the part of appellee in the instant case is a complete defense because the statute on comparative negligence, removing contributory negligence as a complete defense to a cause of action, applies to injuries resulting in death only. It is said that the words included in brackets in the fourth and fifth lines of section 2, Act 175, Acts 1913, were placed in the act by the Secretary of State without authority and that when the section is read, eliminating those words, it is clear that the Legislature intended to take away the defense of contributory negligence only in death cases brought against corporations for damages. Eliminating those words from the section, appellant is perhaps correct in his contention that the act would apply only in death cases, but, upon examination of the original act in the office of the Secretary of State, we find that those words, inserted by the Secretary of State, were a part of the act, and were inadvertently omitted from the enrolled bill by the enrolling clerk. Without the use of the words inclosed in brackets, the section is almost meaningless or at least quite ambiguous. The failure to insert the words was an obvious omission or misprision of the enrolling clerk. The Secretary of State therefore properly inserted them in the printed act. The act, therefore, applies to all injuries inflicted by a corporation and is not confined to injuries in death cases only.

It is said by appellant that appellee assumed the risk because the undisputed facts show that he voluntarily placed himself in a dangerous position by standing on the east side instead of taking a position on the north or west side of the form where the rabble rake could not have touched him. This position is unsound because the undisputed evidence does not show that appellee could have stood on either the north or west side and performed this work. The braces holding the form were on those sides, and it is not certain that he could have stood between the braces and the form or on the outside of the braces to do the work.

It is further said by appellant that appellee took his position where he did knowing that the rabble rake was in operation or would begin to move in a minute or two and fully appreciated that the wing of the rabble rake must necessarily catch and crush him if he remained in that position until it reached him. This position is not well taken for the reason that the evidence tends to show that the rabble rakes were not in operation and had not been for a considerable time, and that there was a custom to give notice or warning to all employees when the rabble rakes had been stopped beyond the period of two minutes for cooling purposes.

But appellant says that the evidence to the effect that the wing of the rabble rake was hot was proof conclusive that the rabble rakes were in operation at the time appellee took his position at the form to place the bolts. It does not necessarily follow that because the wing of the rabble rake that struck him was hot that they had not been stopped for a considerable length of time beyond the ordinary stop of two minutes for cooling purposes. They were composed of metal and might have retained heat for a considerable length of time. The evidence was conflicting as to how hot the wing was when it pinned him to the form.

It is further said that because appellee was in a position where he could see and should have seen the approach of the rabble rake and was fully cognizant of the dangers incident to its approach, and because of the further fact that he did not depend upon notice or warning in case the rabble rake should start, that he necessarily assumed the risk incident to the performance of the work. The undisputed evidence does not show this state of case. There is some evidence to the effect that it was necessary for him to look down into the form in order to place the bolts; that the crusher was being operated with great noise; that the operation of the rabble rake was without noise; and that the appellee did depend upon a notice or warning in case the rabble rakes should be put in operation.

It is insisted that the court erred in telling the jury in instructions Nos. 1 and 2 that if appellee established any one of the allegations of negligence alleged in the complaint they might find for appellee. The facts in this case narrowed the issue of negligence to the sole question of whether appellant was guilty of negligence in starting the rabble rakes without giving notice to appellee. There was no substantial evidence introduced tending to show that appellant was negligent in constructing form "H" near the track, or in the operation of the machinery. The instructions were abstract in so far as the first and second grounds of negligence alleged in the complaint were concerned. There is no proof upon which to present them as issues to the jury. There might be some force in the suggestion of counsel for appellee that the error complained of in the first instruction was a matter of form and that it was the duty of appellant to specifically object to the instruction because it submitted all the issues of negligence alleged in the complaint to the jury, if the erroneous submission of those issues had not again been reiterated and reaffirmed in instruction No. 2. We think where the error appeared in both instructions and was specially emphasized in the second instruction that it was calculated to mislead the jury.

It is insisted by appellant that the court erred in giving instruction No. 4, requested on motion of appellee. Said instruction is as follows:

"4. If the jury believe from the evidence that a man of ordinary prudence and caution for his own safety, situated as was the plaintiff, and having his knowledge and information, or such knowledge and information as the evidence shows by ordinary care he should have had, and being engaged in his occupation, would have gone to the place where the evidence shows he was working to perform the work he was called upon to do, then this would not constitute assumption of risk on his part."

We think this instruction told the jury in so many words that if the appellee exercised due care he did not

assume the risk. Putting it in another form, we think the instruction was to the effect that if appellee was not guilty of contributory negligence he could not assume the risk. This instruction was inherently wrong because this court has committed itself to the doctrine that an employee may assume the risk incident to his employment, though not guilty of contributory negligence in the performance of the work. There is a well-defined distinction between contributory negligence and assumed risk, and it is misleading to tell a jury that they are one and the same thing.

"The defenses of assumed risk and contributory negligence are separate and independent; the former arising out of contract, while the latter does not." *St. Louis. I. M. & S. R. Co.* v. *Brogan,* 105 Ark. 533; *E. L. Bruce Co.* v. *Yax,* 135 Ark. 480.

Instruction No. 5, given on motion of plaintiff, is also erroneous. Instruction No. 5, in effect, told the jury that appellee assumed the ordinary risk and hazard incident to the employment, but that the assumption did not include the dangers resulting from the negligence of appellant. This is error because such assumption of risk would include the negligence of appellant if appellee knew of the negligence and appreciated the danger incident to the service.

It will not do to say that errors contained in these instructions were cured by other instructions correctly defining the doctrines of "assumed risk" and "contributory negligence." These errors were calculated to bewilder the jury and mislead it.

The instructions should have limited the issue to the alleged negligence in starting the machinery without giving notice or warning to the employees, and should have correctly defined the law on assumed risk.

The cause must be reversed on account of errors pointed out, so we deem it unnecessary to discuss the other assignments of error.

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

SMITH, J., dissenting.

ZINN AND CHENEY v. STATE.

Opinion delivered July 8, 1918.

1. CRIMINAL LAW—EVIDENCE—PHOTOGRAPHS OF SCENE OF CRIME.—Where, in a prosecution for rape, the acts of intercourse are admitted, and there is no controversy about the place, it was not error to admit photographs of the *locus in quo* which correctly reproduce the scene of the alleged crime, and which may have had some probative value on the question of consent.

2. RAPE—INSTRUCTION.—An abstract instruction that "proof of actual penetration into the body shall be sufficient to sustain an indictment for rape" was not prejudicial upon the ground that there was no controversy about penetration, and that the jury would likely infer that if there was penetration the offense charged had been committed where other instructions dealt with the question of force and lack of consent and told the jury that no crime was committed if the act of intercourse was had with the consent of the prosecuting witness.

3. RAPE—INSTRUCTIONS.—An instruction in a rape case that if the jury find from all the evidence beyond a reasonable doubt that the defendants "raped" the prosecuting witness, they should find the defendants guilty, and assess their punishment accordingly, was not prejudicial as being too general where other instructions declared the whole law of the case.

4. CRIMINAL LAW—INSTRUCTIONS.—An instruction in a prosecution for rape which told the jury "if, after hearing all the evidence in the case, you are convinced beyond a reasonable doubt that the defendants committed the crime as charged in the indictment, you will find them guilty," was not objectionable as permitting the jury to take into account in arriving at their verdict anything except the evidence heard at the trial.

5. RAPE—DUTY OF PROSECUTRIX TO RESIST—INSTRUCTION.—In a prosecution for rape an instruction requested by defendants that it was the duty of the prosecutrix to give alarm and make an outcry "when she first learned of defendants' design to have sexual intercourse with her" was properly modified by adding after the words "design to" the words "forcibly and against her will."

6. RAPE—DUTY OF PROSECUTRIX TO RESIST—INSTRUCTIONS.—Instructions asked by the defendant in a rape case that the resistance of the prosecutrix must be carried to the uttermost were properly modified by substituting the requirement that she use all the means within her power for that purpose, consistent with her safety.

7. CRIMINAL LAW—TRIAL—APPLAUSE OF BYSTANDERS.—Where a large crowd attended the trial of a rape case and applauded the prosecuting attorney during his closing speech, whereupon, on objection by defendants, the court reprimanded the audience, and cautioned the jury not to allow it to influence them in their verdict, and there was no further recurrence of the applause, it will be presumed that the admonition cured any prejudicial effect therefrom.

8. SAME—MISCONDUCT OF JURORS.—The fact that, during the trial of a prosecution for rape, members of the jury held conversations with outsiders will not be ground for new trial where officers accompanied these jurors and it was shown that the conversations were casual and not related to the trial.

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

J. S. Abercrombie and *Mehaffy, Reid, Donham & Mehaffy,* for appellants.

1. It was error to give the State's instruction No. 2 that proof of actual penetration, etc., was sufficient. There was no issue as to penetration and it is misleading. The penetration was admitted. Other elements are also necessary. 33 Cyc. 1504; 11 S. W. 106; 3 *Id.* 784.

2. The State's instruction No. 8 is too general. The elements of rape should have been mentioned.

3. No. 9 as to reasonable doubt was error. It permits the jury to consider other matters than the evidence. 81 Ark. 16.

4. The court erred in modifying No. 3 for defendant by adding forcibly and against her will. 110 Ark. 152.

5. The court erred in giving No. 6 for defendant by eliminating the words that "opposition by mere words is not sufficient." There was testimony that there was no resistance at all and the prosecutrix was not hurt or injured.

6. It was error to refuse No. 7 for defendant, as to resistance, outcry, etc. 92 Ark. 71.

7. The photographs were not admissible in evidence. 91 Ark. 175.

8. It was prejudicial error to fail to reprimand the audience when it cheered and applauded the closing ar-

gument of the prosecuting attorney. 104 Ark. 162. Doubtless the jury were also unduly influenced by the presence and disposition of the large crowd.

9. The jury was talked to by outsiders; were permitted to separate and pass among the crowd and talk to guests of the hotel. They were also threatened and mob spirit was manifest. All these had undue influence.

10. The evidence was not sufficient to support the verdict. There was no resistance and she was unbruised and unhurt. 110 Ark. 152.

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

1. No error in giving instruction No. 2. It follows the statute. Kirby's Digest, § 2006. All the elements of rape were set out in other instructions given. *Ib.* § § 2345, 4506-8; 59 Ark. 422; 58 *Id.* 353; 85 *Id.* 179; 80 *Id.* 360; 82 *Id.* 64; 91 *Id.* 582; 123 *Id.* 583; 109 *Id.* 378; 110 *Id.* 402.

2. No error in giving No. 8. It is not too general. All the necessary elements of rape were repeated in other instructions. 110 Ark. 402; cases *supra.*

3. No error in the 9th for the State. 109 Ark. 378.

4. The court did not err in modifying No. 3 for defendants. 92 Ark. 71.

5. There was no error in modifying No. 6 for defense. 63 Ark. 470; 66 *Id.* 523; 52 S. C. 488. The whole instruction might well have been refused. Proper instructions were also given otherwise.

6. No error in refusing No. 7. It singles out particular facts and directs the attention of the jury to them. 95 Ark. 48; 103 *Id.* 21; 109 *Id.* 391; 114 *Id.* 398; 172 S. W. 1025; 100 Ark. 330; 37 *Id.* 333; *Ib.* 215.

7. No error in refusing No. 12 The photographs were admissible in evidence. 93 Ark. 313; 112 *Id.* 236; 80 *Id.* 528.

8. No prejudicial error in admitting the testimony of prosecutrix that she thought defendants were going to drown her. On objection the court included the testi-

mony as to what she thought. Nor was there error in admitting testimony as to the height of the bank and depth of water. It is merely descriptive of the surroundings. Nor was it error to permit witness to describe the places where the assaults were made. It was competent. 130 Ark. 471; 90 *Id.* 435.

9. There was no reversible error in connection with the cheering and applause. The audience was duly reprimanded. The admonition was sufficient and cured any possible error. 104 Ark. 162.

10. No error in permitting the crowd to assemble nor in the conduct of the jury nor others toward the jury. The evidence of the jurors was not competent and no prejudice is shown. 130 Ark. 48; 109 *Id.* 193; 126 *Id.* 562; 127 *Id.* 254; 101 *Id.* 51; 35 *Id.* 118; 95 *Id.* 428; 102 *Id.* 356.

1. The evidence amply sustains the verdict.

SMITH, J. Appellants seek by this appeal to reverse a judgment in the court below imposing a life sentence in the penitentiary upon a conviction of the crime of rape. The crime was alleged to have been committed upon Mrs. Olive Brummett, and, according to her testimony, the crime was one of revolting bestiality.

Appellants admit the act of intercourse but say that Mrs. Brummett fully consented and that she thereby compensated them for services in attempting to carry her from the city of Benton to the hamlet of Grape, in Saline County. Mrs. Brummett and her husband were moving back to this State, after having lived for a time in Oklahoma, and they were making the trip in a wagon when one of the mules died, and they were unable to proceed further with the wagon, and Mr. Brummett remained with the wagon and sent his wife on to Grape to see his brother-in-law, who lived there, about getting another mule or horse with which to proceed on his journey. Mr. Brummett had told his wife that an acquaintance of his named Will Dodson lived at Grape and came frequently to Benton, and that upon her arrival at that

place to inquire for Dodson, who would carry her to her destination. Upon her arrival at Benton she inquired for Dodson, but he was not in the city, and she was told that he would not be in town until three or four o'clock in the afternoon. She did not know Dodson and was anxious to be on her way, so she inquired of others about getting to Grape, but could find no one to take her there until she met appellant Cheney, who offered to perform that service. She left in a buggy with Cheney and Zinn, who commenced drinking shortly after leaving town. They invited her to drink but she declined. They commenced taking liberties with her person, which she repelled. Finally they drove to a point where the road lost its identity in the woods and appellants stated that they had lost the road to Grape and didn't know how to proceed further. They then announced their intention to have sexual intercourse with Mrs. Brummett when she struck the horse with the whip and ran the buggy into a tree. She struck Cheney with the whip and made such resistance as she could by screaming, but no one heard or answered her call for help. She was taken from the buggy and ravished by first Cheney and then by Zinn. She says that in resisting Cheney she bit one of his fingers, but appellants smothered her cries by placing their hands over her mouth. She finally ceased to resist because she thought they were going to drown her in the river, and Cheney had intercourse with her for the third time. Appellants finally drank all their whiskey, but before doing so Cheney proposed to Zinn to drench Mrs. Brummett with some of it if she would not drink voluntarily, but Zinn refused to assist and this was not done. Mrs. Brummett made her escape and ran down the road to the home of a Mr. Starnes, but in doing so she had to leave her suitcase in the woods. Mrs. Starnes testified that Mrs. Brummett arrived at her house late in the afternoon. She was walking. Her clothing was wet and her hair full of sticks. She was excited and had been crying. Cheney followed Mrs. Brummett, and when he arrived he went into an outhouse, where he remained for

about thirty minutes and then departed. Shortly after his departure Mr. Starnes returned home, and Mr. and Mrs. Starnes accompanied Mrs. Brummett in her search for her suitcase, which was found on the bank of the river. A photograph was offered in evidence showing the place where the grip was found; and other photographs were also offered in evidence showing the scene of the alleged offense. The accuracy of the photographs was established, but they were offered in evidence over appellants' objections.

Appellants testified that they had an understanding with Mrs. Brummett before they left Benton, and that they were only prevented from having intercourse with her in the courthouse, where they went for that purpose, by finding the room locked which they had intended to use. They left town together, and unrestrained liberties were taken with Mrs. Brummett's person as they drove along until finally they realized they had lost their road. They then stopped and selected the most suitable place for the acts of sexual intercourse in which they then indulged.

Cheney accounted for his lacerated finger by stating that he and Zinn disagreed over the road to take to Grape and in the fight which followed Zinn bit his finger.

Over appellants' objection the court gave an instruction reading as follows: "2. You are instructed that proof of actual penetration into the body shall be sufficient to sustain an indictment for rape."

This instruction was objected to specifically upon the ground that there was no controversy about penetration and the jury would likely infer that if there was penetration the offense charged had been committed.

An instruction numbered 8 reads as follows:

"You are instructed that in determining the guilt or innocence of the defendants, you will take into consideration all the facts and circumstances as testified to by the witnesses in the case, and if from all the evidence in the case you find beyond a reasonable doubt that the defend-

ants raped the said Mrs. Olive Brummett, it will be your duty and you are instructed to find them guilty and assess their punishment at death in the electric chair or imprisonment for life."

This instruction was objected to on the ground that it was too general and might permit the jury to lose sight of the elements necessary to constitute the crime of rape.

Instruction numbered 9 reads as follows:

"You are instructed that a reasonable doubt is not an imaginary, captious or fictitious doubt, but it is such a doubt as a reasonable and prudent person would have after hearing all the evidence in the case; and if, after hearing all the evidence in the case, you are convinced beyond a reasonable doubt that the defendants committed the crime as charged in the indictment, you will find them guilty."

A general objection was made to this instruction, and it is now insisted that it permits the jury to take into consideration other matters than the evidence in the case in arriving at their conviction of guilt.

An instruction numbered 3 was requested by appellants which told the jury that it was Mrs. Brummett's duty to give an alarm and make an outcry "when she first learned of defendants' design to have sexual intercourse with her." The court modified this instruction by adding after the word "design" the phrase "to forcibly and against her will."

Other instructions were asked which told the jury that it would be essential to find that Mrs. Brummett resisted and that such resistance was carried to the uttermost. These instructions were given after having been amended by striking out the requirement that the resistance must be carried to the uttermost and inserting the phrase that she must have used all the means within her power.

During the closing argument of the prosecuting attorney the audience cheered him. This incident occurred just before the closing of his argument. And the attor-

ney was not then reprimanded. He proceeded with his argument, when the audience applauded a second time, when counsel for appellants requested the court to reprimand the audience for their applause. Thereupon the court said: "There has been a big crowd present all during this trial, and I have requested the audience each time we assembled, to keep very quiet, and the audience has been extremely quiet and courteous, and we have gotten along mighty nicely, except this cheering, I have noticed that such occurs in other places sometimes. It is improper, and I hope that it won't occur again, it must not occur again because such conduct might prove fatal under certain conditions. Gentlemen of the jury, this cheering was improper and should not have taken place. You will not consider it or allow it in any way to influence you in your verdict. The only thing you should consider is the evidence and the law."

The trial consumed several days, and it is insisted that during that time the jury was subjected to improper influences, and a new trial was asked on that account.

And it is finally insisted that the evidence is insufficient to support the verdict.

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

It is very earnestly argued that the second instruction should not have been given for the reason stated. It must be conceded that the instruction was abstract and should not have been given; but it is inconceivable that it could have been prejudicial. The jury could not have understood that proof of penetration alone was sufficient to constitute the crime of rape when the large number of other instructions dealt with the question of force and lack of consent and told the jury in the most unmistakable terms that no crime was committed if the act of intercourse was had with Mrs. Brummett's permission. There were twenty other instructions in the case, and these would all have been immaterial if proof of penetration alone was sufficient to constitute the crime, and the jury

could not have understood that all of these other instructions were meaningless, and that the question of force and lack of consent was unimportant provided only there was a penetration. The instruction given was in the language of the statute, and by it the court meant no doubt only to say that proof of penetration was sufficient without proof of emission. And while, as we have said, it should not, under the issues of this case, have been given, we feel certain that no prejudice resulted from having given it.

No prejudicial error was committed in the introduction of the photographs, as the acts of intercourse are admitted, and there is no controversy about the place. Nor is it contended that the photographs do not correctly reproduce the *locus in quo*. They reproduced the scene of the alleged crime and may have had some probative value on the question of consent. The jury might or might not have regarded the place as one which would likely be voluntarily selected for assignation purposes.

Instruction No. 8 might be said to be too general if it stood by itself. But it was one of a number of other instructions, and the court had not attempted in this or in any other instruction to declare the whole law of the case. It was the province of this instruction to declare the punishment fixed by the law, and it was correct in that respect, and it was not otherwise prejudicial.

We do not think instruction No. 9 is open to the objection now made to it. And we think it is not fairly susceptible to the objection that it permits the jury to take into account in arriving at their verdict anything except the evidence heard at the trial. Upon the contrary, its language is that "if after hearing all the evidence in the case you are convinced beyond a reasonable doubt" to return a verdict of guilty. We think it a strained and unwarranted construction of this language to say that it authorizes the jury to consider anything except the testimony in the case.

Appellants complain of the modification of their instruction numbered 3, set out above, and in support of

their contention say that the instruction as asked was copied from the opinion of this court in the case of *Threet* v. *State,* 110 Ark. 159, where it had been approved. An inspection of that case, however, discloses the fact to be that the instruction there set out had been asked by the appellant in that case, according to which the jury would have been told that it was the duty of the woman assaulted "to use all the means within her power" to resist the assault. The court amended the instruction by adding the words "consistent with her safety" and the instruction was given in that case as modified. We there said that no error was committed in the modification made. We were not called upon to decide whether the instruction as given was a correct declaration of the law to be given in any case in which it might be asked. So we now say that the modification which the court here made to the instruction which was there given was not improper but was a modification which should have been made. The effect of the modification in the case now before us was to relieve Mrs. Brummett of the duty to give alarm and make outcry until she first learned of appellants' design "to forcibly and against her will" have sexual intercourse with her. In other words, under the instruction as modified, she was not required to give this alarm or make this outcry until she realized that appellants intended to have intercourse with her, without regard to her consent.

Other instructions were correctly modified by striking out the requirement that Mrs. Brummett's resistance must be carried to the uttermost and the substitution for that requirement that she use all the means within her power for that purpose. The law does not require of the woman, who seeks to protect her chastity, that she shall resist as long as either strength endures, or consciousness continues. It is essential that she shall not at any time consent, but none of the cases on the subject hold that she has consented because, through fear for her life or bodily safety, she has ceased to resist or fails to make an outcry. And in this connection we

copy the instruction which as modified was given by the court, and we dispose of appellants' contention in this respect by saying that they had no right to ask a more favorable declaration of the law than that given by the court:

"5. You are instructed that a mere pretense at resistance by the prosecutrix is not sufficient, but that resistance on her part must be in good faith, and she must use all the means within her power, consistent with her safety, and unless you find from the evidence, beyond a reasonable doubt, that the prosecutrix used all the means within her power, consistent with her safety, up to the time when the act of sexual intercourse was actually accomplished, it will be your duty to find the defendants not guilty."

We do not know what the remarks of the prosecuting attorney were which occasioned the applause on the part of the audience. The first applause may have been in response to some thought or sentiment expressed by the prosecuting attorney, to which no one could object except that it was, of course, improper to have any applause at any time to any part of the trial. This first applause, however, was evidently not regarded by learned counsel for appellants as significant or prejudicial, because no objection was made to it. Objection was made, however, when the applause was repeated, and the court admonished the audience that it must not occur again. It is insisted that the reprimand given was apologetic in its terms and that it should have been firmer and more emphatic. It appears, however, to have been sufficient for the purpose intended, as there was no further recurrence of the applause, and the jury was expressly told not to consider it or to allow it in any way to influence the verdict, and that the only thing which they could consider was the evidence and the law. We conclude, therefore, that the admonition given was sufficient to cure any prejudicial effect resulting from the misconduct on the part of the audience.

It is shown that one or more members of the jury spoke to persons who were not members of the jury. But there was an affirmative showing that these conversations had no relation to, or connection with, appellants' trial. It is affirmatively shown that an honest attempt was made to preserve the integrity of the trial by keeping the jury together and that this was done as nearly as possible under all the circumstances. A large crowd of people attended the trial and crowded the courthouse and the hotel where the jurors slept and took their meals. An officer remained in constant attendance upon the jury, and while it was not possible at all times to prevent casual conversations which were shown to have occurred when some of the jurors left their fellows to go to the toilet, yet officers of the court accompanied these jurors, and it was shown that the conversations had were casual and in no way related to the trial.

What we have already said disposes of the contention that the evidence is insufficient to support the verdict of the jury. The only question that can arise in that connection is that of the truthfulness of Mrs. Brummett's story, and that was a question exclusively for the jury.

Finding no prejudicial error the judgment is affirmed.

WALLACE v. HILL.

Opinion delivered May 20, 1918.

1. TAXATION—LAND OF THE UNITED STATES—HOMESTEAD.—Land of the United States becomes subject to taxation by the State when a final certificate is issued under the homestead act of Congress, entitling the holder to a patent.
2. SAME—OVERDUE TAX DECREE—PRESUMPTION.—Since the overdue tax act (Acts 1881, p. 63) did not require the proof of publication of the warning order to be entered by the clerk upon the record, the presumption will be indulged, on collateral attack upon a decree rendered thereunder, that the proof of publication of the warning order was made in the manner required by the statute.
3. SAME—OVERDUE TAX DECREE—PRESUMPTION.—Where an overdue decree recited that the warning order was published by two in-

sertions in a certain newspaper published in the county before the first day of the term of the court which rendered the decree, it will be presumed on collateral attack that such newspaper had a *bona fide* circulation in the county for a period of one month before the day of the first publication of the warning order, as required by the statute.

4. SAME—OVERDUE TAX SALE—PRESUMPTION OF REDEMPTION.—Where lands were sold to the State under the overdue tax sale, and for thirty-four years thereafter the State, through its county officers, assessed, levied and collected the taxes on such lands in the names of the original owners and their successors, it will be presumed that such lands had been redeemed from the Commissioner of State Lands by the original owners.

5. EJECTMENT—CONFLICTING PRESUMPTIONS—BURDEN OF PROOF.—Where the plaintiff in an action to recover land relies upon the presumption of regularity from a deed executed by the Commissioner of State Lands, conveying lands sold to the State under the overdue tax act (Acts 1881, p. 63), and the defendant upon the presumption of redemption from such sale arising from the payment of the taxes for more than thirty-four years, the presumptions stand in equilibrium, and the plaintiff must show that he has the real title.

Appeal from Benton Chancery Court; *Ben F. McMahan,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellant brought three separate actions in the Benton Circuit Court; one against E. C. Hill; one against G. W. Wilmoth; one against A. P. Ash. Appellant alleged that he was the owner of the particular tract of land, described in each of his complaints, and that each of the defendants named in the respective complaints was in the wrongful possession of the land described. Appellant in each complaint alleged that he was the owner by virtue of a deed executed for valuable consideration by the Commissioner of State Lands, on the 21st of March, 1916; that the lands thus deeded to appellant by the commissioner were forfeited for taxes and sold to the State on the 1st of February, 1882, under an overdue tax decree rendered by the Benton Chancery Court. That the commissioner appointed to execute the decree of the Benton Chancery Court did so according to law and made

his report to that court which was duly confirmed and executed a deed to the State which was approved by that court. Appellant exhibited with his complaint a deed from the State Land Commissioner for the land described in the respective complaints, and in response to a motion from defendants in each of the respective cases he exhibited as muniments of title the decree of the Benton Chancery Court under which the lands were sold and the report of the commissioner and the order of the court showing the approval and confirmation thereof.

The respective defendants in each of the separate suits answered denying all material allegations of the complaint and set up title in themselves to the lands claimed by plaintiff, and exhibited with their answers their muniments deraigning title through various mesne conveyances from the United States Government. Each alleged that he and those under whom he claimed had been in possession more than thirty years. Answers of each of the defendants also set up exceptions to the deed of the State Land Commissioner, and to the decree of the Benton Chancery Court, and the report of the commissioner which it is unnecessary, in view of the conclusion we have reached, to set forth here at length. We will refer to such of these as we deem necessary in the opinion.

Each of the answers was made a cross-complaint in the respective suits and set up a claim for improvements made by each of the respective defendants. They alleged that the taxes had been paid, and that the owners held receipts from the collector showing that same had been paid; and that there were no taxes due on the land at the time the suit for the overdue taxes was filed; and that the returning of said lands as delinquent for certain years was by mistake of the county clerk. They alleged that the decree of the Benton Chancery Court declaring the land forfeited for the non-payment of taxes was void and a cloud upon their title, and prayed that the same be canceled.

The appellant here, plaintiff below, in each of those suits filed a general demurrer to the answer and cross-complaint and also a reply denying the allegations and also exceptions to each of the defendant's muniments of title. In the reply plaintiff alleged that the matters and things set forth by the respective defendants in defense of plaintiff's claim were passed upon and settled against them in the overdue tax decree of the Benton Chancery Court above mentioned, from which there was no appeal, and that said decree was *res judicata* on the issues that the defendants attempted to raise in this case, and that their alleged defense was but a collateral attack on that decree.

Each cause on motion of the defendant therein was transferred to the chancery court. In that court each defendant was permitted, over the objection of the plaintiff, to amend his answer in which it was set up that officers of the State, the assessor, and the clerk of the county, caused said lands to be placed on the tax books for the years 1882 and 1883, and every year subsequent to the sale under the decree in the overdue tax suit, and that all taxes since said date have been duly paid; that State, county, school and road districts have received all taxes due on said lands which in equity is an abandonment of all rights of the State under and by virtue of the decree of the sale in overdue tax suits.

The undisputed evidence on behalf of the appellant proved that the lands in controversy were embraced in the overdue tax decree rendered by the Benton Chancery Court at its fall term, 1881, against certain lands in Benton County, and the report of the sale by the commissioner of those lands under the decree of the court, which report was duly approved and confirmed, shows that the lands were stricken off to the State. The appellant also introduced in evidence deed from the State Land Commissioner, conveying to appellant the lands in controversy, reciting that the lands were forfeited to the State for non-payment of the taxes and appeared on the records in the office of the State Land Commissioner as vacant

and subject to sale and that Lewis Wallace applied to purchase the same and paid into the treasury the sum of $50, the amount required to purchase the same under sections 4802 and 4803, Kirby's Digest; that the commissioner, by virtue of an act authorizing him to make deeds in certain cases, granted, bargained, conveyed, *et cetera,* all the right, title, and interest of the State to the land, describing it. This deed was executed on the 21st of March, 1916, and was filed for record in Benton County on the 27th of March, 1916.

Appellant introduced the deposition of W. F. Etman, who was the receiver of the U. S. Land Office at Harrison, Ark., and had in his custody the records of the original entries of lands in Benton County, Ark. These records show that the final certificate of entry of the lands in controversy had been issued before the filing of the suit for overdue taxes against these lands.

The testimony of Etman and the testimony of the county clerk of Benton County and the tax books and the muniments of title of the appellees show conclusively that the lands in controversy were listed, and were subject to taxation for the years the overdue tax suit was brought against them under which they were sold.

The testimony in the case of appellant against appellee Ash showed that the taxes had been paid by Ash and his predecessors in title on the land in controversy in that case every year since 1878. In the case of appellant against appellee Hill the testimony showed the taxes had been paid continuously since 1868, and in the case of appellant against appellee Wilmoth it was proved that the taxes had been paid continuously since 1872. In the latter case Wilmoth testified that he had been in possession of the land about fifteen years and had placed improvements on it which he valued at over $900.

The court rendered a decree in each case in favor of the defendant, dismissing plaintiff's complaint for want of equity. From the decree in each case an appeal was taken. Because of the precise similarity of the issues involved in these three cases, the same have been

consolidated here for the purpose of briefing and will be disposed of under one opinion. Other facts stated in the opinion.

W. T. Selby and *J. G. Wallace & Son,* for appellant.

1. These lands became subject to taxation when the final certificates were issued under the U. S. Homestead Act. 55 Ark. 398. This was long prior to the overdue tax suit. They were included in the overdue tax decree and sold, and the confirmation under that decree puts at rest all questions not affecting the jurisdiction of the court. 50 Ark. 188. That decree can not be attacked collaterally except for jurisdictional defects. 49 Ark. 336; 91 *Id.* 95. See also 55 *Id.* 30; 66 *Id.* 44, 398, 539; 53 *Id.* 445; 45 *Id.* 530; 57 *Id.* 423; 108 *Id.* 515.

2. The court had jurisdiction under Act. No. 39, Acts 1881. The court found that taxes were overdue and ordered the lands sold. They were sold and the report of the sale confirmed. That decree can not be attacked collaterally as the court had jurisdiction. Cases *supra.* The record discloses that due notice was given by publication in the "Weekly Advance" as required by law. All presumptions are in favor of the jurisdiction of the court. Overdue Tax Act, § 18, etc.; 50 Ark. 188, etc.

3. Appellant has *prima facie* title to the lands. Kirby's Digest, § 4807; 50 Ark. 190; 49 *Id.* 266; *Ib.* 336; 53 *Id.* 430. This *prima facie* presumption will stand until overthrown by a preponderance of the evidence. The policy of the law is to uphold overdue tax titles when the sale is regular as here.

4. The Betterment Act does not apply. 59 Ark. 474; 95 *Id.* 70; 10 *Id.* 460; 14 *Id.* 290; 23 *Id.* 19.

Duty & Duty and *W. S. Floyd,* for appellees.

1. The "Overdue Tax Act" was a special statute conferring special jurisdiction and there is no presumption in favor of the regularity of the proceedings, and the record itself must show jurisdiction as nothing is taken by intendment. Waples, Proceedings in Rem, § 89, p.

126; 2 Wall, 313; 8 How. 495; *Ib.* 336; 103 Ark. 446; 59 *Id.* 483; 123 *Id.* 189.

2. No notice was given as prescribed by the act. § § 2, 3, etc.; 65 Ark. 90; Mansf. Dig., § § 4356, 4359; 72 Ark. 101. Only two insertions were published in the "Advance" and not for thirty days as required by law. The court had no jurisdiction. 97 U. S. 444; 117 *Id.* 255; 57 Ark. 49; 56 *Id.* 1. The jurisdictional facts must appear of record. No presumptions are indulged. 55 Ark. 30; 105 U. S. 404; 74 S. W. 13; 48 Ark. 238; 18 Wall, 350; 51 Ark. 51. All of the proceedings here show want of jurisdiction. No notice. No entry of record showing that the complaint was filed. No record of warning order nor publication according to law. No record showing report of commissioner filed, nor that the report was open for inspection for thirty days, or that the lands were stricken off to the State or certified to county clerk and by him to the State. All these objections are more than irregularities, but they all go to the jurisdiction and the decree is null and void. 94 Ark. 122; 83 *Id.* 234; 97 *Id.* 76.

3. The deed from the land commissioner is void and not *prima facie* evidence of title. 37 Ark. 643; 37 Cyc. 1436; 14 Pac. 479; 49 Mo. 307; 31 Ark. 314; 99 Pac. 57; 27 Ark. 226.

4. Appellant is estopped. 72 Ark. 101; 140 U. S. 634; 120 Fed. 819; 134 Wis. 197.

WOOD, J., (after stating the facts). The records show that the lands in controversy between appellant and appellee Hill were entered as a homestead in 1872, and that final certificate was issued in 1879; that the lands in the case of appellant against appellee Ash were entered as a homestead in 1873, and that final certificate was issued on this land in 1878; and that the lands in the case of appellant against appellee Wilmoth were entered by cash entry August 22, 1860, and the evidence shows that the final certificate would bear that date. These lands were, therefore, subject to taxation before the overdue

tax decree of the Benton Chancery Court (December 12, 1881) was rendered against them. *Burcham* v. *Terry,* 55 Ark. 398.

The lands in controversy here were embraced in that decree. If the court had acquired jurisdiction to render the decree against them under the statute, then a title based on such a decree is invulnerable to collateral attack and must prevail here unless the appellant is estopped, or has failed to comply with the rule as to the burden of proof.

(1) Did the court have jurisdiction?

The overdue tax decree of Benton Chancery Court against these lands recites: "The court doth further find that, after filing of the complaint by the plaintiff in this cause in the office of the circuit clerk of Benton County, said clerk caused an order to be made of record in said cause on the filing of said complaint, warning all persons having any right or interest in said lands herein described to appear within this court within forty days from the date of said order, which was dated August 9, A. D., 1881, and then and there show cause, if any they could, why lien should not be declared on said lands for unpaid taxes and why said land should not be sold for the payment thereof, and the court doth further find that the clerk of this court caused a copy of said order to be published by two insertions in the "Weekly Advance," a newspaper printed and published in Benton County before the first day of this term of court."

The undisputed proof shows that a warning order, in the exact language prescribed by the statute and describing the lands in controversy, was duly entered on the record of the chancery court of Benton County, by the clerk of that court, as required by section 2 of the overdue tax law approved March 12, 1881.

In *Clay* v. *Bilby,* 72 Ark. 101, we held that "a defect in an affidavit made in proof of the publication of the warning order required by the overdue tax law was a mere irregularity which does not affect the jurisdiction of the court or the validity of its decree in such pro-

ceedings." In so holding this court overruled the case of *Gallagher* v. *Johnson,* 65 Ark. 90, which had decided to the contrary. While the overdue tax act requires the warning order to be entered of record, there is no such provision as to the proof for publication. In *Clay* v. *Bilby, supra,* we said: "No statute forbidding, parol evidence may be received to prove publication of notice; and if the decree or judgment does not exclude the conclusion, the presumption is that sufficient and competent evidence was before the court to sustain its findings as to the publication of the notice." See also, *Fiddyment* v. *Bateman,* 97 Ark. 76.

It was within the power of the Legislature to prescribe what facts should appear of record in order to give the court jurisdiction. The Legislature provided that the warning order should appear of record, (section 2, Act 39, Acts 1881) hence this was essential to give the court jurisdiction, as was held in *Gregory* v. *Bartlett,* 55 Ark. 30.

It is a well established rule that has been often adhered to by this court that where a court exercising general jurisdiction under the Constitution has been given special statutory jurisdiction in certain matters, and the manner in which such jurisdiction is to be exercised is pointed out by the statute, the record of such court must show the jursdictional facts. The statute in such cases must be strictly pursued and the jurisdiction must be made to appear in the mode pointed out by the statute. No presumption as to jurisdiction in such cases will be indulged. *Reeves* v. *Conger,* 103 Ark. 446; *Oliver* v. *Routh,* 123 Ark. 190, and cases there cited.

But the Legislature did not see fit to require that the proof of publication of the warning order should be entered by the clerk upon the record. On the contrary, the Legislature provided as follows: "The strict rules of law relating to the jurisdiction of courts in special statutory proceedings shall not be applied to proceedings under this act; but all presumption shall be in favor of the jurisdiction of the courts in which they are had, and

of their regularity in all respects." Sec. 18, Acts 1881, p. 72. Thus by express provision the Legislature enacted that the above rule should not apply to overdue tax proceedings.

Therefore, since the statute does not require that the proof of publication be entered of record, the presumption will be indulged, on collateral attack upon the decree of the court, that the court found that the proof of publication of the warning order was made in the manner required by the statute. The recitals of the decree show that the court found that the warning order was published by two insertions in the "Weekly Advance," a newspaper printed and published in Benton County, before the first day of the term of the court which rendered the decree. It will be presumed that the court also found that the "Weekly Advance" had a *bona fide* circulation in Benton County and had been regularly published in that county for a period of one month next before the day of the first publication of the warning order.

Learned counsel for the appellees are mistaken in saying that the recitals of the decree show that the court found otherwise. There are no recitals in the decree showing what the court found in this respect, and it must therefore, be presumed that the court found the facts to exist which were essential to the court's jurisdiction to render its decree. *Scott* v. *Pleasants,* 21 Ark. 364; *Porter* v. *Dooley,* 66 Ark. 1; *Clay* v. *Bilby, supra; Fiddyment* v. *Bateman, supra;* see also *Applegate* v. *Lexington and Carter Mining Co.,* 117 U. S. 802 (Lawyers Ed.).

We conclude, therefore, that the Benton Chancery Court had jurisdiction to render the decree in the overdue tax suit against the lands in controversy and that its decree is impervious to collateral attack. The matters set up in appellees' answer and cross-bill constitute a collateral attack upon that decree and do not render it void.

(2) Is appellant estopped?

Appellant under his deed of March 21, 1916, acquired all the title and rights incident thereto which the

State had to the lands in controversy. The issue here, therefore, involves an inquiry as to whether or not the State, at the time she sold the lands to appellant, could have maintained a suit against the appellees for the possession of these lands. These lands had been entered as homesteads and the appellees and their predecessors in title had paid the taxes continuously, from the time that the final certificates of entry were issued to the institution of these suits, on one of the tracts 56 years, on another 38 years, on the other 37 years. The presumption in the absence of proof to the contrary is that the appellees and those under whom they claimed had been in possession continuously from the time of their homestead entry. It had been thirty-four years from the date when the lands were stricken off to the State at the sale under the overdue tax decree until the appellant obtained his deed from the State Land Commissioner.

The State through her taxing officers placed these lands, or permitted them to remain, on the tax books of Benton County and assessed and collected taxes thereon. Section 11 of the Overdue Tax Act, among other things, provides that: "The owner of any lands thus sold may redeem from the purchaser at any time within the period fixed by law for the redemption of lands sold for taxes," etc. Section 13 provides: "The owner, in case of a sale to the State, may redeem within the time prescribed by section eleven of this act, by making the payment therein required to the Treasurer of the State, who shall thereupon give him a certificate showing the amount of such payment, and the purpose for which it is paid, which shall be by him filed with the Commissioner of State Lands, who shall issue to him, under his seal of office, a certificate showing the fact of such redemption" *et cetera.*

The State could only act through her taxing officers. These officers, the clerk, assessor and collector, had no authority to place and keep these lands on the tax records for the assessment, levy and collection of taxes unless the same had been redeemed from the State as required

by the statute. While there is no proof in the record that the lands had been redeemed, yet under the above undisputed facts it will be presumed that the lands had been redeemed. After a lapse of thirty-four years during all of which time the State each year through its officers had assessed, levied and collected the taxes in the names of the owners listed upon the tax books, the State will not be heard to say that the acts of her officers were unauthorized and that the lands had not been redeemed as authorized by the overdue tax act. As is said in *Martin* v. *Barbour,* 140 U. S. 646, "No more manifest case for the interposition of a court of equity can be imagined. The State is bound by the acts of her officers in placing the lot on the tax books for the years 1885 and 1886, and receiving from the appellees the taxes for those years. Equity will treat the transaction as a waiver of the prior supposed forfeiture, and will regard the tax paid for 1885 and 1886 as so much paid toward redemption, and will permit the payment of the rest. The appellant took his deed for the land in the same condition in which the State held it, and subject to the same equities and defenses. The State, having created its bureau of taxes, is bound to see to it that its officers impart correct information to parties dealing with it and do not mislead them."

The presumption that the lands were redeemed from the State and that the Land Commissioner had issued a certificate to the owners showing redemption under the statute is supported in principle by the doctrine announced by this court in the recent case of *Carter* v. *Goodson,* 114 Ark. 62, where we held: "The presumption of a grant from long continued possession is one of fact, and it is for the jury or court trying the case to determine the effect of the evidence in support of the presumption."

After a period of thirty-four years of continuous possession and a payment of taxes, during all of which time the State received her portion, in the absence of affirmative proof that the lands had not been redeemed,

the State should not be permitted to repudiate these acts of her officers. To do so would enable her to take advantage of her own wrong.

It is a well established doctrine, and one consistently adhered to by this court, that the State is not estopped by the unauthorized acts of her officers. The State is only liable to the extent of the power actually given to its officers and not to the extent of their apparent authority. This doctrine was announced by this court in one of its later cases as follows: "It is settled by decisions of this court that the State can not be estopped to assert title to its lands on account of unauthorized acts of its officers." *Woodward* v. *Campbell,* 39 Ark. 580; *Pulaski County* v. *State,* 42 Ark. 118. In one of these cases the court said: "The State is liable only to the extent of the power actually given to its officers, and not to the extent of their apparent authority, and all who deal with a public agent must at their peril inquire into his real power to bind his principal." *Board of Directors St. Francis Levee District* v. *Fleming,* 93 Ark. 495. In this case the Board of Directors of the St. Francis Levee District had foreclosed a lien for the levee taxes on lands in the district and had purchased the lands at the sale. Afterwards its officers assessed and collected levee taxes on the same lands from the former owner. It was contended by such owner that the acceptance of the taxes by the officers of the levee district estopped the district and those claiming under it from asserting title under the foreclosure sale. But in that case there was no redemption from the foreclosure sale for levee taxes and could not be, for, as stated in the opinion, "at that time the statute provided no period for the redemption of lands sold for levee taxes for that district." The levee district in that case at the foreclosure sale having acquired the absolute title, of course neither it nor its subsequent grantee could be estopped by the acts of the officers in thereafter assessing and collecting the levee taxes from the former owner of the lands for the reason that their acts in so doing were wholly unauthorized.

That case is distinguished from the case at bar in the fact that here the State by sale under the overdue tax act acquired a title which under that statute was subject to redemption, and its title did not become absolute until the period of redemption had expired. In the meantime the tax officers placed the lands back upon the tax books in the name of the former owners and proceeded thereafter to assess and collect the taxes, which as we have seen they were only authorized to do in case of redemption.

The case of *Martin v. Barbour, supra,* was cited and relied on in the brief of counsel for appellee in the case of *Levee Dist.* v. *Fleming, supra,* to sustain the doctrine of estoppel against the district. The case was not discussed or even referred to in the opinion, showing that the court rested its opinion in the Fleming case upon the ground that under the statute which governed that case there could not be any redemption. Hence it was unnecessary to decide the question now under consideration.

Inasmuch as the lands could have been redeemed under the statute which applies here, it will be presumed from the conduct of the officers through all these years that they were redeemed, and that the officers were therefore acting within the express scope of the authority given them. That the State can be and will be estopped by the conduct of its officers acting within the express scope of their authority is a doctrine as well settled as the converse thereof.

(3) Did appellant show by a preponderance of the evidence that he had the real or superior title to appellees?

Since the undisputed evidence shows that the appellees and their predecessors in title have been in possession of these lands through all these years paying the taxes thereon, the burden was certainly upon the appellant to show that the lands had not been redeemed. The appellant had to recover upon the strength of his own title, and the burden of showing title in him is not discharged by the exhibition of a deed from the State Land

Commissioner which does not overcome the undisputed proof above mentioned, raising the presumption of redemption. The Land Commissioner's deed was *prima facie* evidence of title in the appellant, carrying with it the presumption that the lands had not been redeemed. But the tax records of Benton County showing that these lands had been continuously listed for taxation in the names of the former owners since the overdue tax decree and that appellees and their grantors had paid the taxes and been in possession for all these years raised the presumption that the lands had been redeemed.

It occurs to us that the presumption in favor of the appellees under the circumstances is of a higher nature than the conflicting presumption in favor of appellant. Mathews, Presumptive Evidence, p. 59. The presumption is that public officers do as the law and their duty require them. Lawson on Presumptive Evidence, rule 14, p. 67, and cases cited. But even if it could be said that the presumption of no redemption arising from the State Land Commissioner's deed was of equal dignity with the presumption of redemption arising from the tax records of Benton County, and the possession and payment of taxes by the appellees, and that these conflicting presumptions neutralized each other, then, the burden being upon appellant to show real title in himself and a better right to possession than had the appellees, he must necessarily fail. Such by analogy, at least, is the doctrine announced by this court in *Winn* v. *Whitehouse,* 96 Ark. 42, where we said: "Between these conflicting presumptions of equal statutory dignity and probative power, the one who has the burden must fail unless he brings forward proof to overcome the presumption that stands in the way of his contention. The presumptions stand in equilibrium, so to speak, and appellants could only 'turn the scale' in their favor by proof. Therefore, appellee being in possession under a *prima facie* title, appellants, if they succeed in ousting him, must overcome his *prima facie* title by showing not only that they also have *prima facie* title, but that they have more than this, i. e., the real title."

It follows that the decrees of the chancery court dismissing appellant's complaint for want of equity are correct and they are, therefore, affirmed.

McCULLOCH, C. J., (dissenting). This court is thoroughly committed to the rule that the State in its sovereign capacity is not estopped to assert claim to its own property by the unauthorized acts of its officers. *Woodward* v. *Campbell,* 39 Ark. 580; *Pulaski County* v. *State,* 42 Ark. 118; *Board of Directors* v. *Fleming,* 93 Ark. 495.

Indeed the force of this wholesome rule is recognized in the opinion of the majority in this case, but its application to the facts now before us is denied upon grounds that seem to me to be entirely untenable. In other words, the majority try to distinguish the line of cases cited above, but I think there is no sound distinction. It is true that in the case of *Board of Directors* v. *Fleming, supra,* there existed no right of redemption from the sale to the levee district, whilst in the present case there was a statutory right of redemption from the State, but this does not prevent the application of the rule, for the title to the land had passed to the State under the overdue tax sale, and it was merely a privilege of redemption which was conferred by the statute, and that privilege could only be exercised after the forfeiture to the State had been certified by an application to the Commissioner of State Lands, and it depended upon an ascertainment by that officer of the applicant's right of redemption. Kirby's Digest, secs. 4879-4886.

The right of redemption given under the Overdue Tax Act of 1881 (p. 63) was limited to a fixed period, and was to be exercised by payment to the commissioner who made the sale. In no event were the local assessing officers authorized to perform any act in the redemption of the lands from the overdue tax sale. Their acts in putting the lands on the tax books were wholly unauthorized, and the State was not bound thereby if any force at all is to be given to the rule on that subject so

well established by decisions of this court. Neither is there any place in this case for the exercise of presumptions that the title obtained by the State under the overdue tax sale ever passed out of the State or was in any manner restored to the original owners. The facts are undisputed and are matters of record, and there is no circumstance upon which to build a presumption except the bare fact that the owners continued in possession of the lands after the overdue tax sale and paid taxes thereon. The doctrine of *Carter* v. *Goodson,* 114 Ark. 62, does not apply.

In this case it would be a great hardship, apparently, to deprive the original owners of their lands which they have occupied so long, but it seems to me that in order to give them any relief it would be necessary to disregard settled rules of law, and this I am unwilling to do. I dissent, therefore, from the conclusion announced by the majority, and I am authorized to say that Mr. Justice SMITH shares my views on the subject.

MOORE *v.* FIRST NATIONAL BANK OF JONESBORO.

Opinion delivered September 23, 1918.

PLEDGE—DISCHARGE.—Where certain land-purchase notes were assigned to a bank as collateral to secure an indebtedness of the vendor to the bank, the fact that the latter's debt to the bank was discharged while the collateral notes were retained will not entitle the vendee to a discharge of his indebtedness to the bank as the vendor's assignee.

Appeal from Clay Chancery Court, Eastern District; *R. P. Taylor,* Special Chancellor; affirmed.

F. G. Taylor, for appellant.

The court erred in sustaining the finding of the special commissioner.

Huddleston, Fuhr & Futrell, for appellee.

The evidence sustains the finding and decree. The debt has never been paid and the equities of Sachs were

transferred to Weil. Weil and the bank have the right to sue in the name of Sachs and the bank. Kirby's Digest, § 6001.

HUMPHREYS, J. Lewis Sachs instituted suit against appellant on September 10, 1914, in the Eastern District of the Clay Chancery Court, on two notes of $300 each with interest, and for foreclosure of a vendor's lien retained on lands in Clay County, conveyed on November 5, 1910, to J. N. Moore by Lewis Sachs and Theresa, his wife.

On November 18, 1914, appellant answered claiming damages on account of a breach of warranty for possession contained in said deed of conveyance.

On December 10, 1915, Lewis Sachs was adjudged a bankrupt, and, on motion, his trustee in bankruptcy, J. M. Jarman, was made a party plaintiff.

On April 18, 1916, for interest shown in the notes the First National Bank of Jonesboro was made a party plaintiff in the action.

On November 22, 1916, the cause was submitted to the court upon the pleadings and evidence, from which the court found that the two notes in question, together with other property, had been hypothecated for value before maturity to the First National Bank of Jonesboro; that the amount of $954.99 was then due on said notes, and that said bank was entitled to a lien on the real estate so conveyed for the amount. Accordingly a lien was declared on the land for $954.99 in favor of said bank. Also found that the covenant for possession was breached, to the damage of J. N. Moore, in the sum of $500, and rendered judgment for said amount in favor of J. N. Moore against J. M. Jarman, trustee in bankruptcy of Lewis Sachs. In order to enable J. N. Moore to reach Sachs' equity in the collateral notes held by said bank, foreclosure of the lien and sale of the land was postponed until the collateral securities held by the bank could be marshaled. C. M. Spraggins was appointed master to ascertain the value of the other collateral securities held by the bank to secure the indebtedness.

The master heard evidence and reported the total indebtedness of Lewis Sachs to the bank on the 29th day of December, 1916, to be $8,900 and the value of the securities pledged to the bank to secure said indebtedness to be $8,371.43.

Exceptions to the master's report were filed by J. N. Moore. On January 26, 1918, J. N. Moore and Sylvia V. Moore filed petition for a bill of review, seeking to set aside the decree rendered in the cause on November 22, 1916. Other evidence was taken, and the cause was submitted to R. P. Taylor, special chancellor, upon the complaint, answer, decree of date November 22, 1916, bill of review, master's report, exceptions thereto and depositions of certain witnesses, from which the court found the issues for the First National Bank of Jonesboro and decreed a foreclosure of the lien for $954.99, and interest in favor of said bank against the land and ordered a sale of said land to satisfy said lien.

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

It is insisted by the appellant that the undisputed evidence disclosed that, after the master took the evidence upon which he based his report, Sachs' indebtedness to the bank was paid, and the two collateral notes sued upon released either to Sachs or his trustee, J. D. Jarman. It is true the evidence showed that Sachs' notes evidencing his indebtedness to the bank were stamped paid, but the evidence disclosed that they were paid by the substitution of Herbert Weil's note, who had purchased the assets of Lewis Sachs at the sale in bankruptcy, and also disclosed that Weil pledged the same collateral to secure his note which had been pledged to secure Sachs' note. The bank never lost its interest in the collateral notes, for the effect of the transaction was to transfer to Herbert Weil Sachs' equity only in the securities theretofore pledged by Sachs to the bank.

The decree of the chancellor is therefore sustained by the evidence and is affirmed.

HOLLAND v. DOKE.

Opinion delivered July 1, 1918.

1. EXECUTORS AND ADMINISTRATORS—SETTLEMENT—ALLOWANCE FOR UNCOLLECTIBLE CLAIMS.—Under Kirby's Dig., § § 133, 134, providing that, on the examination of each account current of an administrator or executor, the probate court "shall allow such executor or administrator for all debts with which he stands charged which such court shall be satisfied could not be collected," the fact that an account current is approved without allowing a credit for uncollected items does not constitute a final adjudication that such items are collectible nor preclude an order allowing credit therefor upon the examination of a subsequent account current when it is found that such items are uncollectible.
2. SAME—SETTLEMENT—ALLOWANCE FOR INSURANCE PREMIUMS PAID.—In settlement of an administrator's account current, it was not error to allow the administrator credit for five insurance premiums paid in good faith in order to protect the property of the estate from injury or loss, even though the policy was taken in the name of the administrator as such and provided for a forfeiture if the interest of the insured "be other than unconditional and sole ownership."
3. SAME—SETTLEMENT—EXPENSES.—It was not error to allow an administrator for necessary travelling and other expenses incurred by him in attending to the business of the estate.
4. SAME—SETTLEMENT—EXPENSES.—It was not error for the probate court to direct an administrator to complete a building left unfinished by decedent at his death, and to pay certain claims therefor if found to be just claims for expenses of administration.
5. SAME—SETTLEMENT — CLAIMS FOR EXPENSES — LIMITATION.—The statute of nonclaims, as well as the general statute of limitations, has no application to claims for expenses of administration where the administration is still pending.

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

Ira D. Oglesby, for appellants.

1. It was error to allow credit for the Strode debt. It was charged to the administration in a former account which was approved, and that is an adjudication of his liability.

2. It was error to allow credit for the insurance premiums paid on the policy, as the policy was void.

3. It was error to allow the credit for traveling expenses, in addition to commissions and expenses of administration.

4. The court erred in adjudicating the liability of the estate for the cost of completing the hotel building.

5. The claims are barred by non-claim and limitation. 114 Ark. 1; 123 *Id.* 211, 218, 225.

The personal estate was sufficient to pay the debts of the estate. The findings of the court are against the law and evidence. The court erred in allowing cost of the credits objected to.

L. H. McGill and *F. G. Lindsey,* for appellee.

1. The traveling expenses incurred by the administrator were properly allowed. 8 Ark. 241, 258; 14 *Id.* 76; 30 *Id.* 312; *Ib.* 520; 34 *Id.* 204; 51 *Id.* 415.

2. The insurance premiums were properly allowed. The policy was valid and binding. 52 Ark. 11; 62 *Id.* 204; 100 *Id.* 9; 128 *Id.* 92; 19 Cyc. 812, 814; 19 *Id.* 566-7-8; *Ib.* 583-4-5, and note 11.

3. The Strode note was uncollectible and credit was properly allowed. Kirby's Digest, § 134.

4. The order directing the administrator to complete the hotel was properly made and was *res adjudicata.* 123 Ark. 211; 91 *Id.* 394; 168 U. S. 1; 23 Cyc. 1302-9; 83 Ark. 545; 98 *Id.* 274; 198 *Id.* 574, 578; 120 Ark. 216, etc.; 23 Cyc. 1291.

5. All the credits were properly allowed. None were barred. 114 Ark. 1; 123 *Id.* 224-5.

McCULLOCH, C. J. This is an appeal from a judgment of the circuit court of Benton County on appeal from the probate court approving the third annual account current of appellee as administrator of the estate of R. D. Massey, deceased. Appellants are heirs and distributees of the estate of said decedent, and filed exceptions to the account current of the administrator in the probate court, which exceptions were overruled by that court, and an appeal was duly prosecuted to the circuit court. There were exceptions to numerous items

in the account not pressed here on appeal, and we will only notice those exceptions which are presented in the argument, treating all others as having been abandoned.

The first item discussed here by counsel for appellant concerning which it is alleged the court erred is the credit taken by the administrator in the sum of $208.50 for an uncollected debt due the estate by one Strode. The basis of the argument of counsel in alleging error on the part of the court is that this claim against Strode was charged to the administrator in a former account which was approved, and that the former order of the court approving the account constituted an adjudication of the liability of the administrator for this item. The claim against Strode was included in the adminstrator's inventory, and he charged himself with the amount in a former settlement which was approved, but there was no specific order of the probate court adjudging the liability of the administrator for this item further than an order approving the settlement account which included a charge against the administrator of all uncollected claims.

The statute provides that at the first term of the court, after one year from the date of letters of administration, or letters testamentary, "and at the corresponding term of said court every year thereafter until the administration be completed," every executor or administrator shall present to the court "a fair written statement or account current, in which he shall charge himself with the whole amount of the estate according to the sales-bill and appraisement, including all debts due on the estate and money on hand at the death of the deceased," and that on examination of such account "the court shall allow such executor or administrator for all debts with which he stands charged which such court shall be satisfied could not be collected." Kirby's Digest, secs. 133, 134.

The practice prescribed in the statute is for an executor or administrator to charge himself in each settlement with the full amount of uncollected claims against debtors of the decedent and that the court may from time

to time allow credit when it is found that such claims can not be collected. It is not essential that the court shall make a specific finding in each settlement account as to such items of credit, and the fact that credit is not given in the first account current for an uncollected claim against a debtor does not preclude an order allowing such credit upon the examination of a subsequent account current when it is found that the claim is uncollectible. In other words, such charges in the account current of an administrator or executor may be passed along from one account to another until on final adjudication it is found that the claim is uncollectible and the fact that an account current is approved without allowing a credit for uncollected items does not constitute a final adjudication as to the administrator's liability for the amount of the item.

It is not contended that there was any error in the court's finding of the fact that the account against Strode was uncollectible and should not be credited in the administrator's account unless the order of the court on former settlement constituted an adjudication of the question.

It is next contended that the court erred in allowing the administrator a credit for an amount paid out for insurance premium on the hotel building owned by the decedent. The court found that the building was in the hands of the administrator for the payment of debts and that the administrator had the building insured and paid the premium. It is shown that the building was insured in the name of "W. J. Doke, Administrator of the estate of R. D. Massey," and the contention is that the policy was void because of a clause therein declaring a forfeiture if the interest of the insured "be other than unconditional and sole ownership" and that the administrator should not be allowed credit for premiums paid on void policies. There is no question involved in this case as to the liability of the insurance company under a loss, and it is not shown that the company would have been in an attitude to dispute liability in case of loss by fire, the policy having been written in the name of the administrator,

which was of itself sufficient to put the company on notice that the insured only had a qualified interest. That, however, is a matter entirely collateral to the present issue, and it can not be said that the court erred in allowing the administrator credit for insurance premiums paid in good faith in order to protect the property of the estate from injury or loss.

Error is assigned in allowing the administrator a credit of $114 for traveling expenses in addition to commissions and certain other expenses of administration. We find no statutory limitation upon the authority of the probate court in allowing items of expense of administration, and it appears that this item was to cover necessary expenses incurred by the administrator in attending to the business of the estate and for the benefit of the estate, and it was not error for the court to allow it.

Again it is claimed that the court erred in adjudicating the liability of the estate for certain claims aggregating the total sum of $4,699.84, and directing the administrator to pay them. These claims were for the cost of completing a hotel building, the erection of which had been commenced by decedent and left unfinished at the time of his death. It is said in the first place that it was improper for the court to adjudicate this liability in advance, but we think it was not improper for the administrator to ask and for the court to give direction in advance concerning the payment of these claims if found to be just claims for expenses of administration. It is unnecessary to decide now the extent to which such approval and directions constituted an adjudication of the correctness of the claim so far as concerns the amount. That question will arise on any subsequent account current in which the administrator claims credit. There is no error shown in the court's order giving the direction, for the items were for cost and expenses incurred in completing the hotel building under order of the probate court, which has by this court been adjudged to be a valid order of the probate court, and that decision constitutes a final adjudication of the question as between the administrator and the dis-

tributees of the estate. *Massey* v. *Doke,* 123 Ark. 211. The present order constituted no more nor less than a renewal of the directions of the probate court to pay the cost of complying with the former order. Of course, the question will be open in any subsequent settlement accounts as to the correctness of the amount of the claim.

It is finally urged that these claims are barred by the statute of non-claims and the statute of limitations because they have not heretofore been presented to the administrator. Neither of the statutes referred to apply where the administration is still pending and the claims are for expenses of administration.

There is no error found in the judgment of the court, and the same is, therefore, affirmed.

JOHNSON v. STATE.

Opinion delivered September 23, 1918.

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to support a conviction of assault with intent to kill.
2. CRIMINAL LAW—EXTRAJUDICIAL CONFESSION—CORROBORATION.—An extrajudicial confession of defendant that he shot the prosecuting witness on a certain night is sufficiently corroborated by evidence of the prosecuting witness that some one shot him on that night.
3. HOMICIDE—INSTRUCTIONS—HARMLESS ERROR.—Though the evidence in a prosecution for assault with intent to kill tended to prove that defendant was guilty of that offense or nothing, it was not prejudicial error to instruct as to aggravated assault and assault and battery where the jury found defendant guilty of an assault with intent to kill.

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

D. B. Sain, for appellant.

1. The evidence is not sufficient to sustain the verdict. The extrajudicial confession was not supported by any other proof. Kirby & Castle's Digest, § 2555; 94 Ark. 343; 73 *Id.* 407; 115 *Id.* 566; 117 *Id.* 539.

2. It was error to refuse to give instruction No. 4 and other instructions.

3. The remarks of the prosecuting attorney were prejudicial.

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

1. The evidence is ample to support the verdict. The confession was corroborated and accompanied by other proof. Kirby's Digest, § 2385.

2. The requested instruction No. 4 was properly refused and there was no error in instructions as to lesser offenses. But error, if any, was cured by the verdict. 77 Ark. 247; 59 *Id.* 431; 60 *Id.* 76; 54 *Id.* 4; 58 *Id.* 513; 73 *Id.* 280; 102 *Id.* 195; 91 *Id.* 224.

3. There was no error in the remarks of the prosecuting attorney. If error, it was invited. 75 Ark. 350; 104 *Id.* 162; 19 *Id.* 25; 61 *Id.* 157; 122 *Id.* 509.

HART, J. William Johnson was indicted, tried and convicted of the crime of assault with intent to murder Hugh Dixon, his punishment being fixed by the jury at the term of one year in the State penitentiary. From the judgment of conviction he has duly prosecuted an appeal to this court.

It is first earnestly insisted by counsel for the defendant that the evidence is not sufficient to warrant the verdict; but in this connection we can not agree with counsel.

According to the testimony of the prosecuting witness he was shot at his home in Hempstead County, Arkansas, about dark on the 28th day of February, 1918. At the time he was sitting by the fire in his house with his children and had just told one of them to shut the door when a gun was fired. It sounded like it was in the corner of the yard in front of the door, a short distance from where he was sitting. Four buckshot fired from the gun came through the open door and struck him in the back, seriously wounding him. The door was open at the time

the shot was fired and the prosecuting witness had not heard any noise prior to the shooting.

According to the testimony of Alec White, he was not related to either Hugh Dixon or William Johnson. A few days after the shooting, Johnson admitted to him that he had shot Hugh Dixon. He said that he was standing in the corner of the yard when Dixon came in the back way and went into the house and sat with his back to the front door which was open. The defendant then fired his gun and shot Dixon in the back. He further stated to White that he was sorry for what he had done and that what he had been told about Hugh Dixon before the shooting was not the truth.

The defendant testified for himself and denied that he shot the prosecuting witness. He testified that he was at home playing cards with his three brothers at the time Dixon says he was shot. His testimony was corroborated by that of his three brothers. His parents also testified that he ate supper at their house and went home right after supper. It was also proved by the defendant that Alec White had stated that if it took swearing to send the defendant to the penitentiary that he was going to do it. In rebuttal it was proved by the State that, after the defendant had been arrested, he asked a second cousin of the prosecuting witness to testify that he was at the defendant's house the night of the shooting.

Thus it will be seen that the testimony for the State and for the defendant is in direct and irreconcilable conflict. The testimony for the State, however, if believed by the jury, was sufficient to warrant the conviction. It was proved that some one shot the prosecuting witness in the back and that the defendant in a few days thereafter admitted that he fired the shot. This testimony was sufficient to warrant the conviction.

It is true that we have held many times under section 2385 of Kirby's Digest that a confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such offense was committed. The defendant confessed to Alec White

that he had shot the prosecuting witness on the night in question. It was proved by the prosecuting witness that some one shot him on that night. Thus it will be seen that the requirements of the statute were fully met by the State in this case.

The court instructed the jury that the crime of aggravated assault and simple assault were included in the indictment, and also instructed the jury on the law governing these offenses. It is insisted by counsel for the appellant that under the testimony the defendant was guilty of an assault with intent to kill or nothing, and that the court erred in instructing the jury on the lesser offense. We need not decide this question for the reason that, even if the court erred in giving the instructions complained of, it is manifest that they resulted in no harm to the defendant. The jury found him guilty of an assault with intent to kill, and this conclusively shows that the jury was not influenced by the instructions on the lesser offenses. Hence it is certain that the same verdict would have been rendered by the jury if the court had not instructed on the lesser offenses. *Jones v. State,* 102 Ark. 195.

It is next insisted that the judgment should be reversed because the court allowed the prosecuting attorney in his closing argument to use the following language:

"He says if William Johnson told Alec White or confessed to him, that he had shot Hugh Dixon, he ought to be sent to the lunatic asylum. Why, gentlemen, if you will allow me to state it, men have come before this court, not last year, not last month or last week, but this very week, and without any testimony against them, have confessed their crimes and——"

The record shows that the language of the prosecuting attorney was uttered in response to a statement which had been made by counsel for the defendant in the course of his argument to the jury which is as follows:

"A man who would commit a crime and then confess it ought to be in a lunatic asylum. I never heard of a case like that in my life and the prosecuting attorney never heard of one."

Hence it will be seen that the language of the prosecuting attorney was used by him in response to the statement made by counsel for the defendant and was, if error at all, invited error. *Rhea* v. *State,* 104 Ark. 162. Besides this the remarks were not calculated to influence a jury of sensible men to disregard the oath they had taken to try the case according to law and the evidence. The remarks were more in the nature of an expression of an opinion by the prosecuting attorney as to the circumstances under which defendants would confess the crimes with which they were charged. *Blackshare* v. *State,* 94 Ark. 548, and *Cravens* v. *State,* 95 Ark. 321.

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

TURNER v. STATE.

Opinion delivered September 23, 1918.

1. CONTINUANCE—ABSENCE OF WITNESS.—It was not error to refuse a continuance in a criminal case on account of the absence of a witness where defendant did not exercise due diligence in asking for a subpoena for the witness, where the witness was beyond the jurisdiction of the court and not amenable to its process, and where the court permitted the motion for continuance to be read as evidence in defendant's behalf.
2. CRIMINAL LAW—NECESSITY OF BILL OF EXCEPTIONS.—Remarks of the prosecuting attorney in argument can not be assigned as error on appeal where no reference is made to them in the bill of exceptions, though they are set forth in the motion for new trial.
3. CRIMINAL LAW—INSTRUCTIONS—EXCEPTION.—Where the court instructed the jury: "3. Credibility of witness—this is the same that I have been giving you all along, gentlemen," no error is shown where it does not appear what instruction the court had been giving and where the record does not show that appellant preserved any exceptions to such instruction.

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

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

1. The evidence is sufficient to sustain the conviction.

2. The motion for continuance was properly overruled. Due diligence was not shown and no prejudice is shown. There was no showing that the presence of the absent witness was reasonably expected at a future term of court. 62 Ark. 543; 103 *Id.* 509. Besides appellant had the benefit of the testimony of this witness as his testimony was read to the jury. 90 Ark. 384.

3. The remarks of the prosecuting attorney are not shown in the bill of exceptions. 131 Ark. 445; 126 Ark. 300; 121 *Id.* 269.

4. . There is no error in the instructions, but no objections were made or saved to them. 73 Ark. 407; 103 *Id.* 505; 104 *Id.* 397.

5. Appellant failed to request any instructions as to the credibility of witnesses. 45 Ark. 539; 47 *Id.* 196; 75 *Id.* 373; 77 *Id.* 455; 86 *Id.* 360; 67 *Id.* 416.

WOOD, J. Appellant was convicted under Act 30 of the Acts of 1915, p. 98, of the crime of selling spirituous liquors and sentenced to one year in the penitentiary. The indictment was valid. It was returned by the grand jury on the 5th day of June, 1918. Appellant was put upon trial on June 12, 1918. The testimony tended to prove that appellant, on the 3rd of September, 1917, in Fort Smith, Sebastian County, Arkansas, sold to one Skelton, for the sum of $5, two pints of whiskey. The testimony was sufficient to sustain the verdict.

When the case was called, appellant moved to continue on account of the absence of Tom Thurston. He set up that Thurston was a material witness in his behalf and would testify, if present, that the prosecuting witness, Skelton, did not buy any liquor from defendant; that the liquor was sold to Skelton by another person.

And he set forth in his motion, in detail, the facts which he expected to prove by the absent witness, which tended to show that appellant did not sell any liquor to Skelton. The motion set up that Thurston lived in Oklahoma; that subpoena had been issued for him but was not served for the reason that the witness was out of the State; that the witness had promised appellant and his attorney to be present, and that he was not absent on account of any negligence or connivance of appellant or his attorney; that if the cause were continued to another day or term the deposition of the witness could be taken.

The court overruled the motion, but permitted appellant to read the facts set up in his motion as the testimony of the witness. The court did not err in overruling the motion. The motion showed that the witness lived in Oklahoma. The appellant was indicted on the 5th of June, but did not ask for a subpoena until the 12th. The motion shows that the absent witness lived within two miles of the courthouse.

The appellant did not exercise due diligence in asking a subpoena for his witness; furthermore, the witness was out of the jurisdiction of the court and not amenable to its process. See *McCarthy* v. *State,* 90 Ark. 384; *C., R. I. & P. Ry. Co.* v. *Harris,* 103 Ark. 509.

The appellant complains of certain remarks made by the prosecuting attorney, which he set forth in his motion for a new trial, but no reference is made to these purported remarks in the bill of exceptions. There is, therefore, nothing in this assignment of error which we can consider. *Jones* v. *Hunter,* 126 Ark. 300; *Larkin* v. *State,* 131 Ark. 445.

Among other instructions, the court gave the following: (3) "Credibility of witness, this is the same that I have been giving you all along, gentlemen." The bill of exceptions does not show what instruction the court had been giving. The record does not show that the appellant preserved any exceptions to the giving of instruction No. 3. Appellant, therefore, fails to show that there was any error in the ruling of the trial court in the giving of

instructions. See *Manasco* v. *State,* 104 Ark. 397; *Alexander* v. *State,* 103 Ark. 505.

There were no errors at the trial, and the judgment is, therefore, affirmed.

LANE v. JACKSON.

Opinion delivered September 23, 1918.

1. BROKERS—COMMISSION FOR PROCURING PURCHASER—TIME.—Where a contract of employment of a real estate broker specified the time for making a sale, it is the duty of the broker to comply with the terms of the contract in that respect, in order to be entitled to a commission on the sale.
2. VENDOR AND PURCHASER—OPTION—TIME.—Where, by the terms of a contract for an option, the exercise thereof is limited to a specified and definite time, it is necessary that the option be exercised before the expiration of such time; otherwise the right is lost.
3. BROKERS—RIGHT TO COMMISSION—INSTRUCTION.—An instruction to the effect that a real estate broker was entitled to his commission for procuring a purchaser willing and able to buy the defendants' land where the trade fell through because the defendants failed to furnish an abstract of title showing title to the land to be fully vested in them was properly refused where there was evidence tending to prove that such broker failed to call defendants' attention to the defects in the abstract in time to enable defendants to complete the abstract or perfect the title.

Appeal from Ouachita Circuit Court; *C. W. Smith,* Judge; affirmed.

Powell & Smead and *Etter & Monroe,* for appellants.

1. Plaintiff's instructions 1, 2 and 3 should have been given and defendant's Nos. 2, 3 and 4 should have been refused. Plaintiffs earned the commission, and it was defendant's duty to furnish a good marketable title when a willing purchaser was found. 112 Ark. 566.

2. The owner of the land did not act in good faith; the purchaser was secured within the time limit and the failure to make the trade was the owner's fault. Plaintiffs produced a purchaser ready, able and willing to buy on the terms proposed. 24 L. R. A. (N. S.) 1182; 130 Ill. App. 97; 118 S. W. 770; 121 N. W. 875.

3. The commission was duly earned, as plaintiffs had no notice of any defects in title. 86 Ala. 146; 50 So. 473; 93 Cal. 144; 28 Pac. 857; 3 L. R. A. (N. S.) 576; 163 Pac. 112; 29 Atl. 796; 17 Tex. Law App. 300; 42 S. W. 647; 43 *Id.* 929.

4. Even if defendant's title was good, if the record did not show it, this would not affect the broker's rights. 144 Mich. 395; 108 N. W. 382; 6 L. R. A. (N. S.) 855.

Gaughan & Sifford, for appellees.

1. A purchaser was not found within the time specified. 112 Ark. 232. The question was properly submitted to the jury by instruction No. 4.

2. The evidence fully sustains the verdict and there is no error in the instructions. Cookman was not ready, able and willing to purchase within the time. 112 Ark. 227.

McCULLOCH, C. J. This is an action instituted by appellants, W. B. Lane and F. S. Horton, against appellees to recover commissions alleged to have been earned in the sale of a tract of land containing 1,575 acres, the property of appellees, situated in Ouachita County, Arkansas. Appellants were separately engaged in the real estate business, and Lane secured a contract from appellees allowing him to sell the land and to receive as his commission all above a certain stipulated net price. Horton heard that the land was for sale through Lane, and he found a purchaser and he and Lane joined in negotiating the sale to one Cookman, who lived in Colorado.

The contract between Lane and appellees was executed in December, 1913, and it provided that any sale made thereunder must be closed up by December 1, 1914. Under the terms of the negotiated sale to Cookman, the latter was to pay $2,800 in cash, and execute five notes, each for $2,800, and convey to appellees his equity in certain real estate in Leadville, Colorado. The sale to Cookman was negotiated in August, 1914, and, pursuant to the terms of the sale, appellees executed a warranty deed and deposited the same in escrow with one of the banks in the city of Hope, Arkansas, and also delivered

to the bank at the same time an abstract of title, and the deed was to be delivered to Cookman upon his delivery of a deed conveying to appellee the Colorado property and the notes and the cash payment. Cookman delivered the deed to the bank, but did not make the cash payment. An addition was made to the abstract in September, and immediately thereafter the abstract was forwarded to Cookman. On the last day of November, 1914, one of the appellants telegraphed appellee, J. R. Jackson, to come to Hope, and when the latter reached there certain objections to the abstract were made known to him. The abstract was not, however, returned to him until December 24, and in the meantime he instructed the bank to return the deed and refused to proceed any further with the negotiations. The evidence tends to show that there were certain defects in the title to some of the lands, but according to the testimony of appellees those defects were not called to their attention until the last day of November, 1914, which was one day before the expiration of the time for closing the deal.

It is alleged in the complaint, and the testimony tends to establish it, that if a sale to Cookman had been consummated appellants would have earned a cash commission of $1,125 and that the equity in the Colorado property, which they were to receive as a part of their commission, was of the value of $4,000, making the total commission which they were to receive the sum of $5,125.

The first instruction requested by appellant, and which the court refused to give, was a peremptory one, in substance telling the jury that under the evidence adduced appellants were entitled to a verdict for the recovery of $1,125 and the reasonable cash market value of the equity in the Colorado property. This instruction was properly refused, for the reason that the evidence did not establish beyond dispute appellant's right of recovery. It is true that they proved their contract with appellee under which they operated, and they also proved the unconsummated sale to Cookman, but according to the testimony their right of recovery was de-

pendent upon the deal being closed up by a certain date, i. e., December 1, 1914, and it was a question for the jury to determine whether appellants or the purchaser they produced, acted in good faith in waiting until the last day to point out objections to the abstract of title. Under a contract specifying the time for making a sale, it is the duty of the party claiming the commission to comply with the terms of the contract in that respect, otherwise the commission is not earned. *Murray* v. *Miller,* 112 Ark. 232.

Cookman paid nothing on the purchase price and did not bind himself in any way to accept the deed. He had at most only an option to purchase, and in order to take advantage of the option it was necessary for him to comply with the terms of the sale within the specified time. *Indiana & Arkansas Lumber & Manufacturing Co.* v. *Pharr,* 82 Ark. 573.

Another instruction requested by appellants recited the terms of the contract between them and appellees, and also recited the facts concerning the negotiations with Cookman, and then proceeded as follows:

"Now you are told that under defendant's contract of December 31, 1913, and after the plaintiffs had procured a purchaser for said 1,575 acres of said land, it became and was the duty of the defendants to furnish to the purchaser, Cookman, an abstract of title to said lands, showing the title to said lands to be fully vested in them, and if you find from the evidence that they failed to do so, or that said defendants failed or refused thereafter to furnish such abstract of title, and while the said Cookman was ready, willing and able to buy the said lands on the conditions named in the deed of the defendants of August 28, 1914, then it will be your duty to return a verdict for the plaintiffs."

The objection to this instruction is that it left out of consideration entirely the question of good faith on the part of Cookman and appellants in failing to call attention to defects in the abstract at an earlier period in the negotiations than the last day before the expiration of

the specified time. Under this instruction the jury would have been warranted in finding in favor of appellants, notwithstanding they had withheld the objections until it was too late to complete the abstract or perfect the title before the expiration of the time for consummating the sale. According to the undisputed evidence adduced, appellees furnished the abstract more than three months before the date for closing the deal, and it was the duty of appellants or the proposed purchaser, Cookman, to examine the abstract and point out defects in apt time. We think the court did not err in refusing to give this instruction.

The instructions given by the court submitting the case to the jury were free from objection and correctly presented the law of the case.

We fail to discover any error in the record.

Judgment affirmed.

BLACKBURN v. STATE.

Opinion delivered September 23, 1918.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a verdict of guilt of murder in the second degree.
2. HOMICIDE—ADMISSIBILITY OF THREATS.—Proof of threats made by decedent which were communicated to defendant is admissible only for the purpose of throwing light on the question as to who was the aggressor in the encounter, or for the purpose of determining whether or not defendant acted under a reasonable belief that he was in danger.
3. HOMICIDE—INSTRUCTION—SELF-DEFENSE.—An instruction that if "the words and conduct of the deceased were of such a hostile nature as to lead the defendant, acting as a reasonably prudent person, to believe that the deceased was then and there attempting to carry his threats into execution by going home to get a gun to kill defendant, then you are told defendant was not required to retreat from the fight and had a right to kill deceased" *held* erroneous as taking from the jury the question of the imminence of the danger.

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

Asa C. Gracie, for appellant.

1. Evidence of threats was admissible. 16 Ark. 568; 29 *Id.* 261; 69 *Id.* 148; 55 *Id.* 593; 72 *Id.* 436; 76 *Id.* 493; 79 *Id.* 594.

2. It was error to refuse appellant the right to prove the reputation of deceased for being dangerous and quarrelsome. 29 Ark. 348-262; 13 R. C. L. 916; 108 Ark. 104.

3. It was error to refuse instruction No. 10. 108 Ark. 104; 13 R. C. L. 821.

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

1. There was no imminent danger impending and evidence of threats and of the violent and dangerous character of deceased was properly excluded. There was no hostile demonstration or overt act to arouse belief of imminent peril. 13 R. C. L., p. 918, § 221; *Ib.* § 225; 27 Ala. 39; 28 Fla. 113; 6 Col. 452; 90 Ga. 310; 200 Ill. 494; 47 La. Ann. 182; 189 Mass. 257; 17 Mich. 9; 26 N. C. 409; 59 Cal. 243; 72 N. J. L. 515; 45 La. Ann. 842.

2. Instruction No. 10 was properly refused, as there was no evidence on which to predicate it. From appellant's own testimony he is clearly guilty and the judgment is therefore correct. 14 Ark. 114; 100 *Id.* 139; 104 *Id.* 317; 26 N. C. 409.

McCULLOCH, C. J. Appellant was convicted of the crime of second degree murder in the killing of one Clayton Hunter. He killed Hunter by stabbing him with a knife, and the tragedy occurred at or near appellant's own premises and in the presence of several witnesses.

The testimony adduced by the State tended to show that appellant and Hunter got into a quarrel out in the public road in front of appellant's yard; that appellant walked into his yard and deceased followed to the gate and seized the latch on the gate and threw it at appellant and then started to run off down the road, when appellant pursued him for a distance of about one hundred yards and stabbed him with a knife. The dying declara-

tion of Hunter, which was introduced by the State, was to the effect that, as Hunter ran away down the road pursued by appellant, he fell down and appellant ran up and stabbed him. Hunter lived about thirty minutes after he was stabbed by appellant. All the testimony tended to show that when Hunter ran away from appellant's premises he declared that he was going home to get his gun and that he would kill appellant. Hunter's home was about one-quarter of a mile distant from appellant's yard, where the difficulty began.

Appellant himself testified that he stabbed Hunter before the latter left the yard, but just as he was turning to go out of the gate. He testified that Hunter threw the gate latch at him and then turned to go out at the gate saying: "You stay here until I come back, you black son-of-a-bitch, and I will kill you," and that just as Hunter started out the gate he (appellant) ran up and grabbed him with one hand and stabbed him with the other.

It is needless to say, upon this state of the proof, that the verdict of the jury convicting appellant of second degree murder was fully warranted. According to the State's testimony, he followed Hunter at least one hundred yards down the road and stabbed him to death. According to his own statements, he grabbed Hunter as the latter was about to run away and stabbed him. The testimony was sufficient to warrant a conviction of either second degree murder or voluntary manslaughter. The facts, even according to appellant's own narrative, afforded no justification for the killing.

It is insisted that the court erred in refusing to permit appellant to introduce testimony tending to establish prior threats on the part of Hunter which were communicated to appellant. Proof of threats in homicide cases are admitted only for the purpose of throwing light on the question as to who was the aggressor in the encounter or for the purpose of determining whether or not the defendant acted under a reasonable belief that he was in imminent danger. *Carter* v. *State*, 108 Ark. 124.

The state of the proof in the present case left no doubt on those points and the court was correct in refusing to permit the testimony to be introduced.

The court properly refused instruction No. 10, requested by appellant, which reads as follows:

"You are instructed that if you find from the evidence that prior to the killing of Clayton Hunter by defendant, the deceased had made threats against the life of defendant and that these threats had been communicated to the defendant before the fight in which the deceased was killed, then the defendant had a right to protect his own life from such threatened assault if you find deceased attacked defendant; and if you find from the evidence that after a knowledge of these threats, the defendant was attacked in his own front yard by the deceased, he being without fault in provoking the assault, and at that time the words and conduct of the deceased were of such a hostile nature as to lead the defendant, acting as a reasonably prudent person, to believe that the deceased was then and there attempting to carry his threats into execution, by going home to get a gun to kill defendant, then you are told defendant was not required to retreat from the fight and had a right to kill deceased."

Even under proof more favorable to appellant than this record discloses as to the danger to which he was subjected, the instruction should not have been given for the reason that it told the jury that merely because of previous threats and the declaration of deceased that he was going home to get a gun to kill appellant, the latter had the right to kill deceased. The question of imminence of the danger should have been left to the jury, and this instruction would have taken it away from the jury and declared the law to be that the danger was so imminent that the accused had a right to slay his adversary.

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

DALTON v. BRADLEY LUMBER COMPANY.

Opinion delivered September 23, 1918.

INFANTS—REMOVAL OF DISABILITIES.—The statute which authorizes the removal of the disabilities of minors applies only to such minors as are capable of attending to their own business, and an order of the probate court removing the disabilities of a minor under the age of fourteen years is void on collateral attack.

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

John Baxter and *R. W. Baxter,* for appellants.

The order was void as the plaintiffs were under fourteen years of age. It was void on its face. Kirby's Digest, § 1309; 54 Ark. 627; 123 Ark. 389; 185 S. W. 798; 48 Ark. 305.

D. A. Bradham, for appellee.

The order was not void on collateral attack. The court had jurisdiction. 100 Ark. 69; 47 *Id.* 413.

SMITH, J. The complaint in this cause alleged that on January 23, 1907, the Calhoun Circuit Court made an order removing the disability of minority of four infants, all of whom were, at the time, under the age of fourteen years, for the purpose of enabling them to convey their interest in a tract of land which they had inherited from their father.

A demurrer to this complaint was sustained on the ground that the judgment of the court removing the disabilities of the minors was not subject to the collateral attack here made on it, and this appeal questions the accuracy of that decision.

The exact point was decided by this court in the case of *Doles* v. *Hilton,* 48 Ark. 305, the syllabus of which case reads as follows: "The statute which authorizes the removal of the disabilities of minors applies only to such minors as are capable of attending to their own business; and an order of the probate court removing the disabilities of a minor under the age of fourteen years is void."

In construing the statute (section 1309, Kirby's Di-

gest) under which the order removing the disability in that case, as well as in this one, was made, Judge Battle, speaking for the court, said:

"It is obvious that the act authorizing the removal of disabilities of minors was only intended to apply to such minors as are capable of transacting their own business."

And he further said: "It is contrary to all reason to suppose that the intention of the act in question was to authorize any court to empower a minor under fourteen to do an act requiring a higher qualification to do than an act he is presumed, under the statute, to be incompetent to perform. Construing all the statutes on the subject together, and governed by the manifest intent of the act in question, we conclude that no court has or had the authority, under the act in question, to remove the disabilities of a minor under fourteen years of age."

The necessary effect of this decision is that no testimony could have been heard or showing made, which would have authorized the court to remove the disabilities of these minors, and the action of the court in doing so was *coram non judice*. The proceeding is as void as if there had been no statute on the subject, because the statute has no application to minors under the age of fourteen.

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

HINE v. BROWN.

Opinion delivered July 8, 1918.

GARNISHMENT—OWNERSHIP OF MONEY.—Where, in a garnishment proceeding, it appeared that money in the garnishee's hands was loaned to defendant debtor by intervener for a specific purpose which failed, upon condition that if the money was not so used it should be returned to the intervener, such money can not be reached by garnishment proceeding by a creditor of such debtor.

Appeal from Fulton Chancery Court; *G. T. Humphries,* Chancellor; reversed.

STATEMENT OF FACTS.

On the 10th day of October, 1916, the Citizens' Bank instituted this action in the circuit court against J. W. Brown and R. W. Brown, administrator of the estate of T. J. Brown, deceased, defendants, and Taz D. Hunt, garnishee. The complaint alleged that the Citizens' Bank was a corporation organized under the laws of the State and doing business in the city of Mammoth Spring, Arkansas; that on the first day of January, 1914, T. J. Brown became indebted to the Fulton County Bank in the sum of $367.50, and executed his promissory note therefor; that said note was assigned by the Fulton County Bank to the Citizens' Bank; that, to secure the payment of said note, T. J. Brown delivered to the Fulton County Bank a promissory note executed to him by J. W. Brown for the sum of $2,126; that T. J. Brown departed this life in Fulton County in November, 1915, and that R. W. Brown was appointed administrator of his estate; that the plaintiff, Citizens' Bank, filed its claim against the estate of T. J. Brown, deceased, and the same was duly allowed; that the estate of T. J. Brown, deceased, is insolvent, and that the note of J. W. Brown and T. J. Brown has never been paid; that John W. Brown was a non-resident of the State of Arkansas. The complaint further alleged that Taz D. Hunt had in his possession the sum of $630 belonging to the defendant, J. W. Brown; that there was due on the note sued on the sum of $360 and the accrued interest.

A writ of garnishment was duly issued in accordance with the prayer of the complaint, and service was duly had upon Taz D. Hunt as garnishee. The defendant, J. W. Brown, filed an answer alleging the payment of the note executed by him to T. J. Brown and denying that he was indebted to T. J. Brown in his lifetime or to the administrator of his estate. He alleges that payment was made before the note was assigned by T. J. Brown

to the Citizens' Bank. His answer also alleges that the money garnished in the hands of Taz D. Hunt was placed in his hands as clerk of the chancery court for the purpose of redeeming certain lands in which the defendant, J. W. Brown, had an interest.

J. L. Hine filed an intervention in which he claimed that $630 was in the hands of Taz D. Hunt and asked that it be released from the garnishment and adjudged to be his own. On motion of the plaintiff, this cause was transferred to the chancery court. On the 10th day of October, 1916, R. W. Brown, as administrator of the estate of T. J. Brown, deceased, instituted an action in the circuit court against J. W. Brown to recover the principal and interest on a note for $2,126 executed by J. W. Brown to T. J. Brown. An amendment was filed to this complaint in which it was alleged that J. W. Brown was a non-resident of the State and Taz D. Hunt had in his possession, belonging to said defendant, $630. A writ of garnishment was duly issued and served upon Taz D. Hunt. J. W. Brown filed an answer in which he admitted that at one time he had given a note to his father, T. J. Brown, but that they had later become partners in a business venture, and that the note had been paid in the settlement of the partnership affairs. He asked that the cause be transferred to equity. Hine filed an intervention in this case in which he claimed the $630 which was garnished in the hands of Taz D. Hunt as being the money of the defendant, J. W. Brown. This case was also transferred to the chancery court. The cases above referred to were consolidated and tried together in the chancery court. The principal point of dispute between the parties was as to whether or not the $630 garnished in the hands of Taz D. Hunt belonged to the intervener, J. L. Hine, or to the defendant, J. W. Brown. The evidence on this point will be stated in the opinion.

The chancellor found that T. J. Brown was indebted to the Citizens' Bank in the sum of $450 and that Brown before his death delivered to the Citizens' Bank a promissory note executed to him by J. W. Brown for $2,126

as collateral security; that the Citizens' Bank has a lien on the proceeds of said note to secure the indebtedness due it by the estate of T. J. Brown, deceased. The chancellor also found that the $630 in the hands of Taz D. Hunt belonged to J. W. Brown and that the Citizens' Bank was entitled to $450 of this amount, and that R. W. Brown, as administrator of the estate of T. J. Brown, deceased, was entitled to the balance. It was therefore decreed that the petition of the intervener, J. L. Hine, be dismissed for want of equity, and that Taz D. Hunt, the garnishee, be directed to pay to the Citizens' Bank the sum of $450 out of the funds garnished, and to pay the balance of said funds to R. W. Brown, as administrator of the estate of T. J. Brown, deceased. The intervener, J. L. Hine, has appealed to this court.

J. M. Burrow and *Ponder, Gibson & Ponder,* for appellant.

1. The fund in the hands of the chancery clerk was not subject to attachment or garnishment. 12 R. C. L. 776; 96 Ark. 568; 5 *Id.* 135; Kirby's Digest, § 358; Rood on Garnishment, § § 8-9; 74 N. Y. 148; 18 Ark. 213; 21 Iowa, 537; 49 Am. St. 495; 11 Paige, Ch. (N. Y.) 129; 39 Ark. 253; 80 *Id.* 1. The money was deposited to redeem certain lands. This purpose was never accomplished.

2. The statute was not followed and the attachment should not have been sustained. No copy of the attachment was served on the clerk, nor notice served.

3. Appellees can not maintain garnishment proceedings on the record. 12 R. C. L. 821; 8 L. R. A. 722; 20 Cyc. 1071; 36 Ark. 298.

4. The money belonged to Hine. It was deposited for a specific purpose never accomplished and hence was his.

C. E. Gilmore, Ellis & Jones and *Lehman Kay,* for appellees.

1. The money was not *in custodia legis.* 2 Words and Phr., 1801; 8 Am. & E. Enc. L. (2 ed.) 532.

2. The money was Brown's and he has not appealed. It was not Hine's money.

3. The garnishment proceedings were proper and Hunt was duly served. This case is different from 36 Ark. 298 and § 344, Kirby's Digest, does not sustain appellant's claim. It was Brown's money and he not having appealed, Hine can not complain.

4. The money was not Hine's and he has no legal right to it. He is not even the real party in interest. Kirby's Digest, § 5999. The finding of the chancellor is sustained by the evidence.

HART, J., (after stating the facts). The chancellor found that J. W. Brown owed the Citizens' Bank $450 and that the $630 in the hands of Taz D. Hunt belonged to J. W. Brown. The garnishee, Taz D. Hunt, was therefore directed to pay to the Citizens' Bank the sum of $450 out of the $630 in his hands. The intervener, J. L. Hine, alone has appealed. Therefore the decree is conclusive as to the amount due the Citizens' Bank by J. W. Brown. This brings us to the question as to whether the $630 in the hands of Taz D. Hunt belonged to J. W. Brown; for, if the money does not belong to the defendant Brown, the plaintiff Citizens' Bank is not legally or equitably entitled to it. On this point the testimony is as follows: Andrew Jackson obtained a mortgage foreclosure on the home place of T. J. Brown, deceased. Taz D. Hunt, the clerk of the chancery court and the garnishee herein, testified that J. W. Brown delivered to him the $630 involved in this suit and informed him that he was seeking to redeem his father's home place in behalf of himself and the other heirs, except Fred Brown. Hunt at first refused to take the money on the ground that the land had been already redeemed on the same day by Fred Brown, also one of the children of T. J. Brown, deceased. Later on during the day, upon the advice of the chancellor, Hunt accepted the money and gave to J. W. Brown the following receipt for it:

"Salem, Ark., Sept. 23, 1915.

"Received of J. W. Brown the sum of $630 in a certain draft on the Peoples Bank of Springfield, Mo., given to J. W. Brown, said amount is tendered by the said J. W. Brown for the use and benefit of all the heirs of the late T. J. Brown, except Fred Brown. The said amount is for the redemption of certain lands foreclosed by Andrew Jackson on the following described lands, to-wit: (The lands were then described)

"This draft is held subject to the order of the chancery court and if not used for the redemption of said lands to be returned to the said J. W. Brown."

J. W. Brown testified that he had arranged with Mr. Hine and Mr. Jackson for Mr. Hine to take up the mortgage on his father's home place; that, before the assignment of the mortgage indebtedness was made from Jackson to Hine, some of Mr. Jackson's relatives died, and this delayed the matter. During this time the redemption of a part of the lands came up. J. W. Brown went to Mr. Hine and stated the circumstances to him. Hine as a matter of accommodation to Brown furnished him with a cashier's check for $630, which was the amount estimated to be necessary to redeem the land. J. W. Brown told Hine that he and the other heirs, except Fred Brown, wanted to redeem the land, and that the money was to be used for this purpose only. If the money was not used to redeem the land, it was to be returned to Hine. Pursuant to the agreement, Hine gave to J. W. Brown a cashier's check, and Brown made a note to the bank for the amount at the suggestion of Hine.

According to the testimony of J. L. Hine, he agreed with J. W. Brown to put up the money to take up the mortgage on his father's home place for $2,126. $630 was to be put up, at first, to redeem a part of the land, and this money was furnished by Hine to J. W. Brown, who represented all the other heirs, except Fred Brown. The $630 was given to Brown with the understanding that it was to be placed with the clerk of the court for the purpose of redeeming a part of the land and if it was not

used for that purpose, it was to be returned to Hine. Hine was to be secured by a mortgage on whatever part of the real estate that was redeemed.

According to the testimony of Hine the transaction was not a loan to Brown. He stated that the money was advanced by him for the purpose of redeeming the land; that he simply took the note of Brown for the amount so that if there should be any loss it would fall on him and not on the bank of which he was an officer.

We have not set out the testimony of these witnesses on this point in full, but have stated the substance of it as it appears to us after a careful reading of their whole testimony. It is true there are some circumstances tending to contradict this view, but we think a clear preponderance of the evidence shows that the money was furnished by Hine to J. W. Brown to redeem a part of the lands from a mortgage of Jackson and that the money was to be used for no other purpose. Jackson had agreed to assign his mortgage to Hine, but some of his relatives had died and this delayed the matter. The question of redeeming a part of the land from the mortgage came up in the interval, and Hine let J. W. Brown have the $630 for the sole purpose of redeeming a part of the land. The claim of the Citizens' Bank did not originally accrue upon the faith and credit that the money on deposit with Hunt belonged to J. W. Brown. Brown's debt to the bank accrued long before that transaction. The money belonged to Hine, and was delivered by him to Brown to be used by the latter to redeem a part of the mortgaged land and for no other purpose. The general rule is, that the creditor has no greater right against the garnishee than the defendant had before the writ was served; that he steps into the shoes of the defendant and prosecutes for him in order that the credit or property of the latter may be subjected to the payment of such judgment as may be obtained against him. *Ard* v. *Bowie,* 125 Ark. 169. It is true that J. W. Brown would have had the right to withdraw this money from Taz D. Hunt for the purpose of paying it back to Hine. But, if J. W.

Brown had commenced an action against Hunt to recover the money in his own right and Hunt had interposed as a defense that the money belonged to Hine, and was held by Brown in trust for him, and had introduced the evidence which was presented in this case, J. W. Brown would have been defeated in his action. This is so because the money belonged to J. L. Hine, and J. W. Brown could not legally recover it in his own right.

We think the facts bring this case within the principles decided in *Home Land & Loan Co.* v. *Routh,* 123 Ark. 360. It was there held that money deposited in a bank by a party as agent of the principal can not be reached by garnishment proceedings by a creditor of such agent. It was also held that a creditor can not have the debt satisfied out of the property held in trust by the debtor for another, no matter how completely the debtor may have exercised apparent ownership over it, unless it was upon the face of such ownership that the credit was given. We think that a clear preponderance of the evidence shows that the funds garnished in the hands of Hunt belonged to the intervener, Hine, and that the court erred in holding that it was the property of the defendant Brown, and subject to garnishment at the hands of the plaintiff, the creditor of Brown.

It follows that the decree must be reversed, and the cause will be remanded with directions to the chancellor to release the fund from the garnishment proceedings and direct that it be paid over by the garnishee to the intervener, Hine. It is so ordered.

MAY v. STATE.

Opinion delivered September 23, 1918.

1. LARCENY—WEIGHT OF EVIDENCE.—Proof of possession by defendant of the head of an animal recently stolen *held* sufficient to sustain a conviction of defendant as principal in the commission of the crime where the jury might have found that his explanation of such possession was insufficient.
2. CRIMINAL LAW—ADMISSION OF EVIDENCE—EXCEPTION.—Error of the court in the admission of improper testimony is not available on an appeal where no exceptions were saved, and where, after admitting the testimony, the court excluded it from consideration of the jury.

3. SAME—IMPROPER ARGUMENT—PREJUDICE.—The prosecuting attorney in his closing argument said: "Mr. Steel in his speech to you said that this man had a good reputation. Mr. Steel knows, and every attorney at this bar knows, that, under the fixed rules of law, I had no right to attack this man's character and reputation * * * unless that was first put in issue by the defendant himself. *Held*, that the statement, while erroneous, was not prejudicial.

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

Will Steel, for appellant.

1. Appellant was indicted as principal but convicted as an accessory after the fact. The judgment is not sustained by the evidence. 109 Ark. 498; 37 *Id.* 274; 41 *Id.* 173; 96 *Id.* 58; 109 *Id.* 389; 34 *Id.* 632.

2. Improper evidence was admitted and the argument of the prosecuting attorney was improper and prejudicial. 101 Ark. 153; 55 *Id.* 598; 96 *Id.* 8; 58 *Id.* 481; 70 *Id.* 305.

3. Evidence as to the head of the steer was hearsay. 70 Ark. 562. Good or bad character can not be proved by specific acts. 120 Ark. 459. The court's rulings can not remove the prejudice of improper evidence and argument. 61 Ark. 130; 95 *Id.* 238; 71 *Id.* 416; 58 *Id.* 481.

4. The evidence failed to establish the crime. 85 Ark. 360; 97 *Id.* 159; 68 *Id.* 529, 533.

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

1. The evidence is ample to support the verdict.

2. There is no error in the admission of testimony. No proper exceptions were saved and the objections were waived. 73 Ark. 407; 38 *Id.* 221; 39 *Id.* 221; 105 *Id.* 82. The testimony admitted was harmless, as other witnesses testified to the same facts without objection. 103 Ark. 315; 58 *Id.* 374; 76 *Id.* 276. Moreover, appellant admitted that the heads were there and that he had put them there and had butchered the cattle. 66 Ark. 264; 77 *Id.* 453.

3. There was no error in the exclusion of evidence, nor in the remarks of the prosecuting attorney.

McCULLOCH, C. J. Appellant was convicted of the crime of grand larceny, alleged to have been committed by stealing a steer, the property of one Vickers.

The principal contention of learned counsel for appellant is that the testimony was not sufficient to sustain the verdict—conceding that there was enough evidence to establish appellant's guilty participation in the commission of the crime—he was indicted as principal, and that there is no proof tending to show that he stole the animal himself or was present when the animal was stolen. The proof is uncontradicted that Vickers owned the steer mentioned in the indictment; that the animal was stolen from the range and was butchered in the woods a few hundred yards from appellant's house. Witnesses introduced by the State testified that they found the butchering place with several heads of butchered animals there, and among them the head of the Vickers steer, and that they hid in a place nearby and saw appellant take the head down and carry it off and put it in a hole in the ground and cover it up, and also saw him take down the chain used in lifting the butchered animals. Afterwards appellant produced the head of the animal at the trial in the examining court, and there is no dispute about the fact that it was the head of the steer which had been stolen from Vickers. Appellant testified that the steer was butchered by Henry Schuflin, one of the tenants on his farm, and that he let Schuflin have his wagon and team to haul the meat to market. He admitted that he went down to the butchering place and took down the head and chain, and stated that he put the head in the hole and covered it up so that the dogs could not get hold of it and thus destroy its indentity. The testimony of the State's witnesses tended to show that this occurred the next morning after the steer had been butchered in the early part of the previous night.

Appellant's possession of the head of the recently stolen animal, if not satisfactorily explained, was sufficient to warrant the jury in concluding that he was guilty of stealing the animal, and it was properly left to the jury to determine whether or not appellant's explanation of the possession of the stolen property was satisfactory and reasonable and consistent with his innocence. Appellant himself produced the testimony tending to show that the animal was butchered by Schuflin alone, but the jury were not bound to accept his version of the matter and may have concluded, from the fact of his possession of the head and his suspicious conduct in removing it and and secreting it, that the belief was warranted that he had stolen the animal himself.

We are of the opinion, therefore, that the evidence is sufficient to sustain a finding of the guilt of the defendant as a principal in the commission of the crime.

Error of the court is assigned in admitting improper testimony, but that assignment is not available for the reason that no exceptions were saved and also for the reason that the court excluded the testimony from the consideration of the jury.

It is contended that the judgment should be reversed on account of the following remark of the prosecuting attorney in his closing argument:

"Mr. Steel in his speech to you said that this man had a good reputation. Mr. Steel knows and every attorney at this bar knows that, under the fixed rules of law, I had no right to attack this man's character and reputation, that my hands were tied and I could not go into his past record, unless that was first put in issue by the defendant himself."

Appellant testified in his own behalf and the prosecuting attorney might have introduced testimony attacking his reputation by way of impeachment as a witness, and the statement in the argument was, therefore, erroneous, but we fail to see any possible prejudicial effect resulting from the controversy between counsel as to the reason for not introducing proof of that character.

The remarks do not bear the necessary inference that testimony could have been produced successfully attacking the reputation of appellant, and it did not amount to a statement of fact by the prosecuting attorney.

We fail to discover any prejudicial error in the record, and, the evidence being sufficient to sustain the verdict, the judgment must be affirmed, and it is so ordered.

BARKER v. STATE.

Opinion delivered September 23, 1918.

1. LARCENY—INTENT—INSTRUCTIONS.—The refusal of correct instructions in a larceny case embodying the defense that the property alleged to have been stolen was taken by mistake was not prejudicial where the court instructed the jury that the intent to steal is the gist of the offense, and that before the jury can convict they must find that defendant took the property with intent to steal.
2. CRIMINAL LAW—INSTRUCTION—REASONABLE DOUBT.—Defendant in a larceny case requested the court to charge the jury as follows: "The court instructs the jury that the burden is on the State to prove the defendant guilty as charged in the indictment; and if the evidence fails to satisfy your minds beyond a reasonable doubt of the guilt of the defendant, then it is your duty to give him the benefit of the doubt and acquit him. *If any reasonable view of the evidence is or can be adopted which admits of a reasonable doubt of the guilt of the defendant, then it is your duty to adopt such view of the evidence and acquit the defendant.*" The court struck out the sentence italicized, and told the jury further: "If you entertain a reasonable doubt as to his (defendant's) intent, you will give him the benefit of that doubt and acquit him." *Held,* no error.

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

Pratt P. Bacon, for appellant.

1. Appellant honestly believed that the steer was the one he owned and had bought from Williams. This phase should have been submitted to the jury on proper instructions, but the court refused. 98 Ark. 149; 97 *Id.* 153.

2. The court erred in amending No. 2. 71 Ark. 459; 128 *Id.* 35.

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

The evidence is ample and there is no error in the instructions. 78 Ark. 490; 89 *Id.* 24; 73 *Id.* 407; 26 *Id.* 334; 128 *Id.* 35, 38.

HUMPHREYS, J. Appellant was indicted, tried, convicted and sentenced to one year in the penitentiary in the Miller Circuit Court, June Term, 1918, for the crime of grand larceny.

The evidence on behalf of the State tended to show that in May, 1918, appellant took a steer owned by R. M. Pool out of the range on Beech Creek in Miller County, and sold it for $60.

The evidence on behalf of appellant tended to show that at the time he took the steer and sold it he believed it was a steer he had previously bought from E. P. Williams.

Appellant insists that the court erred in refusing to give instructions Nos. 5 and 6 requested by him for the reason that these instructions presented his phase of the case to the effect that he took and appropriated the steer through an honest mistake. Each instruction embodied a correct statement of the law as applied to appellant's phase of the case, but the substance of each was contained in the second paragraph of the general instruction given by the court which is as follows: "The court will further tell you, gentlemen of the jury, that the intent to steal is the gist of the crime charged against the defendant, and before you can convict him you must find from the evidence beyond a reasonable doubt not only that the steer in question was the steer of the witness R. H. Pool, but that the defendant at the time he took it did so with the intention of stealing it. * * *"

Appellant also insists that the court erred in refusing to give instruction No. 2 on reasonable doubt in the form requested by him. As requested it was as follows:

"The court instructs the jury that the burden is on the State to prove the defendant guilty as charged in the

indictment; and if the evidence fails to satisfy your minds beyond a reasonable doubt of the guilt of the defendant, then it is your duty to give him the benefit of the doubt and acquit him. If any reasonable view of the evidence is or can be adopted, which admits of a reasonable doubt of the guilt of the defendant, then it is your duty to adopt such view of the evidence and acquit the defendant."

The court struck out the last sentence and gave the instruction as modified. The sentence stricken out is a reiteration in different language of the subject matter embodied in that part of the instruction given; and a repetition in substance of the instruction on reasonable doubt contained in the general instruction given by the court. The court told the jury in the general instruction that, "If you entertain a reasonable doubt of his (appellant's) guilt *growing out of the evidence in the case,* you will give him the benefit of the doubt and acquit him." And also instructed the jury in the latter part of the general instruction as follows: "If you entertain a reasonable doubt as to his (appellant's) intent, you will give him the benefit of that doubt and acquit him."

The case of *Tanks* v. *State,* 71 Ark. 459, cited by appellant to support his contention that the modification of instruction No. 2 had the effect of rendering negative the rule on the subject of reasonable doubt, is not in point. In the case at bar, the court simply modified the instruction by striking out the last sentence. In the case cited, the court not only struck out the last sentence but modified it by an addendum which had the effect of rendering negative the rule on the subject of reasonable doubt.

We think the rule on the subject of reasonable doubt in the instant case was sufficiently presented to the jury, and that no harmful or prejudicial error was committed by striking out the last sentence of instruction No. 2 and giving the instruction as modified.

The judgment is affirmed.

MONTEITH v. HONEY.

Opinion delivered September 30, 1918.

1. WATERS AND WATERCOURSES—OBSTRUCTION OF FLOW OF NATURAL STREAM.—At common law the waters of a natural stream or watercourse may not be so obstructed by a lower proprietor as to flow back to the detriment of those above him.
2. SAME—CONSTRUCTION OF DITCH—ABANDONMENT OF OLD CHANNEL.—The fact that a drainage ditch has been constructed to straighten the channel of a creek does not justify the inference that the old bed of the creek was abandoned where its situation and relation to the drainage ditch show that it was intended that it should be a lateral of the drainage ditch and continue to be a natural watercourse.
3. SAME—DITCH AS PART OF WATERCOURSE.—Where a ditch or cut-off is by consent of the landowners affected dug to shorten the channel of a natural watercourse, such ditch becomes a part of such watercourse.
4. SAME—EFFECT OF AGREEMENT TO DIG DITCH.—Where the adjacent proprietors, by agreement, construct a ditch in order to straighten the flow of a natural watercourse, such agreement, when executed, is binding upon the parties and their privies, and the ditch cannot be subsequently closed.

Appeal from Greene Chancery Court; *Archer Wheatley,* Chancellor; affirmed.

STATEMENT OF FACTS.

This is a suit in equity by J. C. Honey against John Monteith to enjoin the latter from maintaining an embankment across a watercourse and causing the water usually flowing therein to set back upon plaintiff's land and overflow it. The watercourse in question is called Johnson Creek. It is a very crooked stream and flows generally in a southeasterly direction. Before entering the plaintiff's land, Johnson Creek flows in a southerly direction and then turns and flows eastward. It flows in an easterly direction through the plaintiff's land and on the eastern boundary line thereof, it flows northward for a short distance on the plaintiff's land and then enters the land of the defendant and flows in an easterly direction for a while and then commences to flow south. About ten years before the institution of the present action, the owners of the land in that neighborhood, whose lands

drained into Johnson Creek, by common consent, made up a sum of money to be used in straightening the channel of the creek. They commenced to straighten the creek on the boundary line between the lands of the plaintiff and the defendant and by the use of scrapers constructed a ditch 383 feet long to a point where it would again intersect Johnson Creek. Subsequently Johnson Creek Drainage District was established, and a ditch was constructed whose general course was in a southeasterly direction. Johnson Creek is crossed several times by this drainage ditch. The defendant constructed an embankment on the western boundary line of his land so that the water could not flow through the ditch or cut-off which had been constructed as above stated.

It is the contention of the defendant that the cut-off or scraper ditch which was constructed by the land owners by common consent, was not a part of Johnson Creek after the construction of the drainage ditch. He contends that the natural drainage to the drainage ditch was through the old bed of Johnson Creek as it existed before the cut-off or scraper ditch was constructed. The old bed of Johnson Creek turned northward at the boundary line between the land of the plaintiff and defendant and runs north for 253 feet. It then turns eastward through the land of the defendant, and at a point 188 feet distant intersects the drainage ditch. Evidence was adduced by him to show that this was the most practical route and the natural drainage for the land of the plaintiff.

On the other hand, it was shown by the witnesses for the plaintiff that the cut-off or scraper ditch was only 383 feet long, and that it, on account of being much straighter, carried the water from plaintiff's land to the drainage ditch in a much quicker space of time and afforded better drainage for both the plaintiff and the defendant. In the spring of 1917 there was an excessive rainfall which caused the water to set back and overflow the lands of the plaintiff. The plaintiff then tore away the dam which the defendant had constructed, so that the waters of Johnson Creek would flow through the cut-off or

scraper ditch into the ditch dug by the improvement district.

The court entered a decree perpetually enjoining the defendant from again constructing and maintaining the dam, or from in any manner obstructing said cut-off or scraper ditch so that the water from Johnson Creek might not flow through it in its accustomed way.

The defendant has appealed.

W. S. Luna and *Jeff Bratton,* for appellant.

1. When the drainage district was created and the ditch cut, then the old channel was no longer the channel of Johnson Creek. 3 Farnham on Waters, etc., p. 2618, § 891.

2. Johnson Creek ceased to be a natural watercourse when the cut-off or scraper ditch was constructed.

3. The law governing the use and control of surface water is settled in this State. 39 Ark. 463; 30 A. & E. Enc. Law (2 ed.), 334; 6 Lawson Rights, Redemies & Practice, 4801, § 2944; 66 Ark. 276; 95 *Id.* 349. The damages here were caused by an unprecedented flood or rainfall, and there was no negligence of appellant contributing to the overflow. 13 A. & E. Enc. Law, p. 700; Farnham on Waters, etc., vol. 2, pp. 1839 to 1842; Lawson, Rights, Rem. & Pr., vol. 6, § 2919.

4. Appellant had the right to build the dam to protect his land from surface water and overflow, provided it did not unnecessarily cause Johnson Creek to overflow appellee's land. 95 Ark. 245; 93 *Id.* 46; 95 *Id.* 345. The evidence here shows clearly that the water on appellee's land was surface water and overflow water.

5. The scraper ditch gave appellee no right of easement or servitude to discharge water flowing over his land onto appellant's land. This ditch was abandoned and all rights waived. 29 A. & E. Enc. Law (2 ed.), p. 1107V.

6. No property right was acquired by appellee to the scraper ditch. It was a mere license and revoked. 30 A. & E. Enc. Law (2 ed.), 345; 7 *Id.* 114-5; 90 Ark.

504; 83 *Id.* 149; Tiedeman on Real Prop., § 616. This ditch was an artificial channel and necessary for the protection of appellant's land.

7. The old Johnson Creek channel furnishes a sufficient outlet for all suface and overflow water. The chancellor granted relief in excess of the issues raised and this court has no jurisdiction to grant such.

Huddleston, Fuhr & Futrell, for appellee.

1. Johnson Creek was a natural watercourse, and the drainage district did not abrogate appellee's easement and rights. There was no abandonment by appellee of any rights.

2. The doctrine of surface water does not apply here. This case is ruled by 19 Ark. 23. See also 18 Am. St. 387; 8 *Id.* 797; 48 Cyc. 58 *et seq.* The court applied the principles announced in 19 Ark. 23 and granted no more relief than necessary to protect appellee.

HART, J., (after stating the facts). It is a well settled rule of the common law that the waters of a natural stream or watercourse may not be so obstructed by a lower proprietor as to flow back to the detriment of those above him. In *Taylor* v. *Rudy,* 99 Ark. 128, we recognized this rule of the common law, and held that every owner of land through which a stream of water flows is entitled to the use and enjoyment of the water and to have it flow in its natural and accustomed course without obstruction, diversion, or corruption. It was also held in that case that equity would grant relief in the case of the raising of the water in a watercourse by means of a dam to the injury of upper riparian lands, where the injury is substantial and permanent, even though the rights have not been established at law.

It is first contended by counsel for the defendant however, that Johnson Creek ceased to be a natural watercourse when the drainage district was established and constructed. There is nothing in the record, however, which shows that there was any intention that Johnson Creek should be abandoned as a watercourse by

the construction of the drainage district. On the other hand its situation and relation to the drainage ditch show that it was intended that it should be used as a part of the laterals of the drainage ditch and should continue to be a natural watercourse.

Again, it is contended by counsel for the defendant that Johnson Creek ceased to be a natural watercourse on the defendant's land when the cut-off or scraper ditch was constructed. The record shows that Johnson Creek was a very crooked stream and drained about 800 acres of land in this neighborhood. The land owners whose lands were drained by Johnson Creek raised a fund by subscription for the purpose of straightening the creek on the defendant's land, and by common consent the money raised for that purpose was applied in constructing what the parties called the cut-off or scraper ditch. This was done about ten years before the institution of this suit, and was used by the parties as a part of the channel of Johnson Creek for several years. The cut-off in question was dug at the joint expense of the owners of the land, and by common consent was used as a part of the channel of Johnson Creek and remained open as a watercourse for several years thereafter. It has been held in such cases that the same rule governs that applies in the cases of other watercourses. *Freeman* v. *Weeks* (Mich.), 7 N. W. 904; *Meir* v. *Kroft* (Iowa), 80 N. W. 521; *Brown* v. *Honeyfield* (Iowa), 116 N. W. 731, and *Rait* v. *Furrow* (Kan.), 10 A. & E. Ann. Cas. 1044.

Johnson Creek had a well defined channel with bed and banks in which there was running water. The testimony on both sides shows that Johnson Creek was a natural watercourse before the cut-off or scraper ditch was constructed.

In the application of the principles above announced we think that the cut-off became a part of Johnson Creek and was therefore a part of the natural watercourse. It is true the plaintiff and defendant were not owners of the land at the time the cut-off was constructed, but they are bound by the agreement of their predecessors in title.

The principle of law above announced was recognized and applied by this court in the case of *Wynn* v. *Garland,* 19 Ark. 23. There parties in possession of contigous unsurveyed public lands entered into an agreement to dig certain ditches for the purpose of draining their lands. The ditches were dug according to their agreement and a main ditch was constructed to be the boundary line between them. Afterwards the land was surveyed by the government, and the lines of the public survey differed from those agreed upon. One of the parties entered the lands and, disregarding the boundaries agreed upon, closed the ditch and threw up embankments so as to obstruct the water and back it upon the land of the other party. It was held that the agreement between the parties to construct the ditch was in the nature of a license which, having been accepted and acted upon, could not be disregarded. It was further held that, though the agreement was for an interest or privilege in land and rested in parol, the performance on the part of the plaintiff constituted it an executed contract, and that the defendant had no right to close the ditch.

Therefore, the decree will be affirmed.

DAVIS v. SPARKS.

Opinion delivered July 1, 1918.

1. APPEAL AND ERROR—LIMITATION ON APPEALS.—Where, under Acts 1913, p. 318, a decree in chancery was rendered in vacation, an appeal therefrom prosecuted within six months thereafter, though not within six months from the last previous term of court, is within time.
2. WILLS—DEVISE IN FEE SIMPLE—EFFECT OF REMAINDER OVER.—Where a will devised land in fee simple, a contemporaneous written contract between the devisor and devisee whereby it was recited that the property was devised in fee simple, and that the devisee should have the right to use and control the property and sell it if be so desired, but that in the event he did not dispose of it, or should exchange or sell it, he should devise the property itself, or the proceeds on hand to the devisor's mother, was void as an attempt to provide for an estate by way of remainder over after a devise in fee simple.

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

John M. Henderson and *Eugene Lankford,* for appellants.

1. The appeal was taken within the six months. The decree was rendered November 12, 1917, and the transcript filed April 5, 1918.

2. All the testimony as to the alleged lost contract was incompetent. Besides it was contradictory of the will. The case in 102 Ark. 30 is not in point. Parol evidence was not admissible to establish a trust or vary the terms of a written will. The alleged contract is vague and indefinite if established. Alexander on Wills, 158-168; K. & C. Dig., § 3997; 57 Ark. 636; 34 Atl. 909; 19 Col. 168; 156 Ind. 60; 32 *Id.* 104; 75 N. J. Eq. 305; 139 Ia. 159; 141 Ia. 144; 244 Ill. 297; 99 Ark. 218; 103 *Id.* 273; 101 *Id.* 541; 104 *Id.* 37; 110 *Id.* 393; 113 *Id.* 36; 116 *Id.* 370.

C. E. Condray and *John W. Moncrief,* for appellees.

1. The transcript was not lodged within the six months allowed by law and the appeal should be dismissed. The decree was rendered September 24, 1917.

2. The contract did not conflict with the will. Parol evidence was admissible to prove it. 45 Ark. 81; 96 *Id.* 171. The admissions of an ancestor may be proved against the heirs to prove the contents of a lost instrument. 1 Elliott, Ev., § 267; 101 Ark. 409; 97 *Id.* 568; 96 *Id.* 190; 51 *Id.* 533; 1 Elliott, Ev., § 533, 625; 66 Am. St. 224-9; *Ib.* 220-2. The lost instrument was duly proven by competent evidence.

3. Appellees are parties in interest and have the right to defend their possession under the contract. 110 Am. St. 911; 120 *Id.* 1038; 102 *Id.* 223; *Ib.* 799-804; 16 N. E. 590; 95 Ark. 438; 85 *Id.* 59; 31 *Id.* 155; 102 *Id.* 41. See also 30 Cyc. 34; 89 S. E. 749; 15 L. R. A. 447, etc.; 115 Ark. 154.

4. The testimony shows a trust. Cases *supra.* The statute of frauds does not apply and it was not pleaded.

The contract was in writing. 96 Ark. 184; 105 *Id.* 638; 96 *Id.* 184. See also 116 *Id.* 370.

5. The findings of the chancellor are not against the clear preponderance of the evidence. 101 Ark. 368; 91 *Id.* 69.

6. See 36 Cyc. 736, and note and cases cited as to validity of the contract proven. 13 N. E. 753.

McCULLOCH, C. J. Appellees contend that the appeal in this case was not taken within six months after the rendition of the decree, and that the appeal should, for that reason, be dismissed.

In the transcript before us the decree follows the opening order of the court on the first day of the term, September 24, 1917, which would indicate on its face that the decree was rendered on that day, but appellees have supplied additional parts of the record which show that the court adjourned over to the next day and then adjourned for the term. At the foot of the decree in the transcript it is dated November 12, 1917, and the decree itself recites that there was an agreement of the parties that the chancellor should hear the cause and render decree at the time it was then heard. Considering the records before us altogether, we think that it shows that the decree was rendered on November 12, 1917, in vacation and that this was done by express consent of the parties. The statute provides that a chancellor may, by consent of all parties, try cases and "deliver opinions and make and sign decrees in vacation" with the same effect "as if made, entered and recorded in term time, and appeals may be had therefrom as in other cases." Acts 1913, p. 318. The appeal was granted by the clerk of this court on April 5, 1918, which was within six months from the date of rendition of the decree, and was, therefore, within the time specified by statute.

The real estate in controversy, four lots in the incorporated town of DeWitt, Arkansas, was originally owned by Mrs. Lena Davis, now deceased, who was the daughter of Mrs. Mattie Sparks, one of the appellees, and by her last will and testament duly executed and published, and

which was duly admitted to probate after her death, she devised the said property in fee simple to her husband, Lude Davis. The will of Mrs. Davis was executed on January 29, 1914, and she died the same year, the will being admitted to probate shortly after her death. Lude Davis died intestate in the year 1915, leaving appellants his heirs at law, and they claim title to the property in controversy through the devise by Mrs. Davis to her husband, Lude Davis, and by inheritance as the heirs of the latter. Mrs. Sparks was in possession of the property, and appellants instituted this action at law against her to recover possession. The cause was transferred to the chancery court and proceeded there to final decree in favor of Mrs. Sparks.

Mrs. Sparks claims the property under an alleged contract between Mrs. Davis, the testatrix, and her husband whereby the latter agreed, in consideration of the execution of the will by Mrs. Davis, to devise the property to Mrs. Sparks, the mother of Mrs. Davis, in the event that he should not dispose of it during his lifetime, or to devise to her the proceeds of sale of the property or any other property received in exchange therefor. It is alleged that the contract was in writing, but has been lost, and evidence was adduced at the trial to establish the execution of the contract and the contents thereof. The chancellor found that a contract of that nature had been executed contemporaneously with the execution of the last will and testament of Mrs. Davis, and decreed in favor of Mrs. Sparks in accordance with the terms of the contract.

After careful consideration of the testimony in the cause we are of the opinion that the findings of facts made by the chancellor are not against the preponderance of the testimony.

The will of Mrs. Davis on its face conveyed the title in fee simple to the property in controversy to Lude Davis. It was a devise in plain terms, and there is nothing in the language of the will to create any uncertainty or ambiguity as to the real intention of the testatrix. It

was proved at the trial that a written contract was entered into between Mrs. Davis and her husband at the time of the execution of the will, reciting, in substance, that the property in controversy should be devised to Lude Davis in fee simple in order not to impair his credit before the public and that he should have the right to use and control the property and sell it if he so desired, but that in the event he did not dispose of it, or in the event he should exchange the property for other property, or sell it, he should devise the property itself or the property taken in exchange, or any part of the proceeds left on hand to Mrs. Sparks, the mother of the testatrix.

The execution of the contract was proved, but it is shown to have been lost, probably destroyed by Lude Davis after the death of his wife, but the attorney who testified in the case stated its contents and attached to his deposition a copy of the contract which he had rewritten from his recollection of what the original contained. The substance of the contract, as shown by the deposition of the attorney, was that Lude Davis should have the exclusive control of the property with the right to incumber or to sell it, but that in the event he did not otherwise dispose of it he should devise it to Mrs. Sparks, if living, or to her heirs, and that, in the event of the exchange of the property or the sale thereof, he should so devise any of the remaining proceeds.

This is not an attempt to vary the terms of the will by oral testimony but it is to establish a written contemporaneous contract between the testatrix and the devisee concerning the disposition of the property or the unused portion of the proceeds in the event of a sale or exchange thereof by the devisee. The question presented is whether or not the written contract, treating it as fully proved by the evidence, which we do, was sufficient to change or limit the estate devised under the will of Mrs. Davis. If the substance of the contract, as proved by the witnesses, had been incorporated in the will itself in connection with

the language there used devising the property to Lude Davis, it is clear that the limitation expressed by the language of the contract would have been repugnant to the devise to Lude Davis in fee simple and would have been void. That necessarily follows from the decision of this court in the case of *Bernstein* v. *Bramble,* 81 Ark. 480. In that case the language of the will under consideration was as follows:

"All the rest, residue and remainder of my estate, real as well as personal, and wheresoever situated, I hereby devise, give and bequeath to my beloved wife, Minna Elle, to have and to hold the same in fee simple forever. But in the case of the death of my beloved wife it is my will that all the estate then remaining and not disposed of by her by a last will or other writing shall pass to my said brother, Moritz Elle, and my sister, Henrietta Bernstein, or their heirs in equal parts."

We decided that the granting clause conveyed the title to Minna Elle in fee simple and that the succeeding clause providing for a remainder over after the death of the first taker was void. The cases on that subject were fully reviewed by Judge Battle in the opinion, and among other authorities cited was the following quotation from Page on Wills, section 684, which is peculiarly applicable to the case in hand:

"It not infrequently happens that a testator disposes of property in fee, and then attempts to provide for the disposition of the property after the death of the devisee in fee simple. A provision of this sort is to be carefully distinguished from the cases where a fee simple is cut down to a life estate by a devise over after the death of the first taker. The distinction between the two classes of cases, though not strongly marked, is well recognized by the courts. If the devise over upon the death of A is intended to pass entire property, it is evident that the testator contemplated that A should take only a life estate. without any power of disposing of his property for a longer term than his own life. But where the devise over upon the death of A shows that A was vested with a

fee simple estate, and that testator wishes him to have such an estate, but to direct the course of its descent upon his death, the limitation over after the fee is repugnant to the nature of the estate and void. * * * A condition that, if devisee does not dispose of his property in any way during his lifetime, it shall pass to certain named persons is held to be void."

That case was followed by the later case of *CarlLee* v. *Ellsberry,* 82 Ark. 209, which involved a limitation upon the grant of title in fee simple in a deed, and the correctness of the doctrine thus announced was again expressly recognized by this court in the more recent case of *Archer* v. *Palmer,* 112 Ark. 527, which involved, principally, the question of the effect of a separate clause in a will conferring the absolute power of disposition of property which had been devised to the extent of a life estate in another clause in the same instrument.

The contemporaneous contract proved in this cause is entirely consistent with the granting clause of the will to the extent that it conveys the title to the devisee in fee simple with absolute power of disposition, and the obvious purpose of the contract was merely to control the course of descent in the event of the death of the devisee without having disposed of the property, or the proceeds in the event of a sale or exchange, if any of the proceeds remained in the hands of the original devisee. Surely the attempt to do this by a separate contemporaneous contract can not be more efficacious for the purpose of limiting the estate conveyed under the will than if it had been incorporated in the instrument which contained the grant in fee simple.

We are not unmindful of the line of cases which hold in substance that where a bequest or devise is induced by a promise made by the legatee or devisee to the testator to devote the property to a certain use for the benefit of other parties, a court of equity will declare a trust in favor of the person or persons to whom the use is to be devoted, treating an attempted violation of the promise to so devote the property to the intended use as a fraud

upon the testator. The principal case on that subject is the Amherst College case decided by the New York Court of Appeals where the authorities on the subject were fully reviewed by Judge Vann, and the following rule established thereby:

"When it clearly appears that no trust was intended, even if it is equally clear that the testator expected that the gift would be applied in accordance with his known wishes, the legatee, if he has made no promise, and none has been made in his behalf, takes an absolute title, and can do what he pleases with the gift. Whatever moral obligation there may be, no legal obligation rests upon him. On the other hand, if the testator is induced either to make a will or not to change one after it is made, by a promise, express or implied, on the part of a legatee that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel him to apply property thus obtained in accordance with his promise. * * * The rule is founded on the principle that the legacy would not have been given or intestacy allowed to ensue unless the promise had been made; and hence the person promising is bound in equity, to keep it, as to violate it would be fraud." *Trustees of Amherst College* v. *Ritch,* 151 N. Y. 282, 37 L. R. A. 305.

Another interesting case on this subject is an opinion of the New York Court of Appeals by Judge Finch in the case of *O'Hara* v. *Dudley,* 95 N. Y. 403, 47 Am. Rep. 53, where the same rule was forcefully stated by that learned judge. It was said in each of those cases that the theory upon which a court of equity proceeded was not that the will itself was affected by the promise of the devisee but that the trust was fixed by the court on equitable principles upon the property after it came into the hands of the devisee in order to prevent a fraud being perpetrated on the testator by a violation of the promise.

That principle does not, however, apply to the present case, for no trust was created under the contract except by way of a limitation upon the fee simple title which is clearly devised under the will. In the line of

cases referred to the promise of the devisee was to devote the use of the property to the benefit of other persons who were the intended objects of the testator's bounty, and the evidence of this was admitted, not for the purpose of limiting the fee simple title, but to show that there was a trust created in favor of those for whose benefit the promise was made. In the present case the facts are different, for, accepting the contract as contended by appellees, and as clearly shown by the evidence, it was not intended that the property was to be taken under the will by Lude Davis as trustee to devote the use thereof for the benefit of some one else, but on the contrary, under the contract he was to have absolute use of the property for his own benefit, and it was only the course of descent which was to be controlled. The effect is the same whether the so-called contract be viewed as a contract executed for the benefit of third persons or whether it be treated merely as a promise to the testatrix which induced her to execute the will, for it constituted an attempt to provide for an estate by way of remainder over to a third person in spite of devise of the fee simple in the will, and as this is repugnant to the devise, it is void under the decisions of this court hereinbefore referred to, which are abundantly sustained by the great weight of authority in the interpretation of wills.

Our conclusion is, therefore, that the chancellor erred in his decree, and the same will be reversed and the cause remanded with directions to enter decree in favor of appellants for the recovery of the property in controversy.

LEDWIDGE v. ARKANSAS NATIONAL BANK.

Opinion delivered July 8, 1918.

1. ACCORD AND SATISFACTION—PART PERFORMANCE.—Where an accord is performed in part only, there is no satisfaction, and the original right of action remains, and the party to be charged is allowed what he paid in diminution of the amount claimed.

2. FRAUDULENT CONVEYANCE—BULK SALES LAW—LIABILITY OF PURCHASERS.—One who purchases a stock of goods in violation of the bulk sales law becomes liable as a receiver of the stock of goods to all creditors of the seller *pro rata* merely, and not for the full amount of all claims.

3. APPEAL AND ERROR—SUPERSEDEAS BOND—EFFECT.—Where a merchant sold to his wife a stock of goods in violation of the bulk sales law, and judgment was entered against her for the full amount of a claim against him, instead of for the *pro rata* amount payable to the claimant, the error was immaterial on appeal where husband and wife executed a joint supersedeas bond, and the judgment against the husband was affirmed.

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

Hogue & Heard and *C. T. Cotham,* for appellants.

1. Appellant compromised his indebtedness with the bank and paid $2,250 in full satisfaction of all its claims and demands, and the bank accepted it in full payment and issued its receipt. If a mistake was made, this would not affect the composition and settlement. Appellant offered to correct the mistake, if made. The appellees' claim was satisfied. 85 Ark. 439; 89 *Id.* 385.

2. An accord was made and agreed to and a tender of satisfaction made. If a mistake was made it only fixed appellants' liability for the amount of the error. 34 Wash. 166-172; 101 N. Y. 591.

3. There was an accord and lawful agreement for satisfaction. 75 Ark. 354; 18 N. Y. S. C. 208. By accepting the amount appellee accepted satisfaction. When the bank accepted the deposit the title passed to it. 124 Ark. 532-6. Full satisfaction of the accord was made, and the accord and satisfaction was complete. 124 Ark. 552-6-8; 115 *Id.* 392; 118 *Id.* 176. The drawee and payee may be one and the same person. Brennan, Neg. Inst. Law, p. 11, § 8. If a mistake was made it was simply an overdraft. 76 C. J. 682; 90 Atl. 409; 2 Michie on Banks, etc., 1250. The payment by the bank constituted a loan for the amount of the overdraft. 242 Mo. 138; Am. Dig., Dec. ed, vol. 3, § 150. See also 2 Michie, Banks & B., 1252, 908, § § 124, 150; 88 Ill. 152. The composition

agreement was fully performed and the accord fully satisfied.

4. The sale to Mrs. Ledwidge was not fraudulent. It was made for a good consideration. 56 Ark. 259; 46 *Id.* 542. It was not made to defraud creditors but to aid in paying them.

5. Restitution and estoppel. Restitution should be made. The bank accepted the money and not having made or offered restitution is estopped. 24 N. Y. Sup. 19; 108 N. Y. 470.

6. It was error to render a personal decree against Mrs. Ledwidge for $2,475.

7. Under the Bulk Sales Law, if the sale was void Mrs. Ledwidge was only liable for all the debts on a *pro rata* basis and not for appellants' entire debt to the bank. On the whole case there is reversible error and the complaint should be dismissed.

Rector & Sawyer, for appellee.

1. The learned and able opinion of the chancellor fully sets forth the law of this case. His findings of fact are correct and will be sustained as the evidence sustains them. The burden is on appellant to establish error and he has failed.

The issues are plain and simple. Ledwidge owed the bank $2,475 and fraudulently conveyed to his wife an undertaking business which is void because made with intent to defraud creditors, and because it was contrary to the Bulk Sales Law. The release and receipt was obtained through a mistake. 17 Cyc. 632, (111); 17 *Id.* 631 (B), p. (11). Thus the way is opened to impeach the release. The receipt is not binding as it was an error. 30 Cyc. 1226, note 3.

2. This was a cash transaction. There was a failure to comply with the agreement and there was no accord and satisfaction, no compromise or composition settlement. 8 Cyc. 436; 12 Peters, 191; 70 Ark. 215; 78 *Id.* 304; 88 *Id.* 473. There was no satisfaction of an accord. 12 Peters, 191; 1 C. J. 533 (21); *Ib.* 532. The

original debt was recoverable. 8 Cyc. 442; 12 Peters, (9 L. ed.) 1046.

3. There was no performance of the composition settlement. 8 Cyc. 841. The composition was avoided. 130 Pa. St. 619; 18 Atl. 1065; 29 How. Pr. 11; 8 Cyc. 442. A breach avoids the composition and the creditor may sue for the whole debt. 12 Peters, 178. The failure to pay after the mistake was discovered was wilful.

4. To constitute accord and satisfaction there must be full compliance on the part of the debtor. 1 Cyc. 314; 12 Peters, 178; 143 Mass. 42; 8 Cyc. 422; Ann. Cases, 1914, A. 845. Appellee had the right to recover the full debt. 16 Vesey, 374.

5. The sale was fraudulent as to creditors and without consideration. The testimony shows it and the chancellor so found.

6. In all cases of accord and satisfaction and compositions, where there is a breach by the debtor, the creditor can apply the amount actually paid to the debt and sue for any balance. Our court is in line with this doctrine. Cases *supra.*

7. The decree was correct as to Mrs. Ledwidge. 20 Cyc. 821; 61 Am. St. 625; 83 Ala. 274. The property was personal property and disposed of by her.

8. The sale was void under the Bulk Sales Law. Mrs. Ledwidge became a receiver of the assets and liable for the value to the creditors. K. & C. Dig., § 3987. The decree should be affirmed in all respects.

SMITH, J. The Arkansas National Bank sued C. J. Ledwidge and Maude Anna Ledwidge, his wife, and for cause of action alleged that C. J. Ledwidge was indebted to it in the sums of $2,250 and $225 and while so indebted had made a voluntary conveyance to his wife of an undertaking business which he owned in the city of Hot Springs, and which said conveyance rendered him insolvent. An amendment to the complaint was filed which alleged the sale was made in violation of the Bulk Sales Law of this State, in that the notice there

required was not given to creditors. The answer denied these allegations and set up an accord and satisfaction of the demand sued on.

The record is a voluminous one and various matters of more or less relevancy were developed in the testimony. But the relevant facts may be summarized as follows: Ledwidge was largely indebted to numerous creditors and was in fact insolvent. The bank was his principal creditor, and he had long been one of its customers and the relation between Ledwidge and the managing officers of the bank was close and cordial. The bank undertook to assist Ledwidge in settling with his other creditors and to that end prepared a letter which was sent them advising an acceptance of fifty cents on the dollar in full settlement of their demands. The officers of the bank testified, however, that there was no agreement on its part to accept less than the full amount due it. This Ledwidge denied, and the court in effect found with Ledwidge on this issue. Ledwidge was at the time indebted to the bank in the sum of $4,500, and according to his version he discharged this indebtedness by a payment to the bank of fifty cents on the dollar as agreed. It appears that other creditors were paid fifty cents on the dollar of their indebtedness pursuant to the proposal to that effect.

The bank executed to Ledwidge a receipt for $2,250, which recited that it was "Payment in full of all demands and claims to this date, and in consideration of said sum the said C. J. Ledwidge is hereby released of and from any and all other demands and claims of every kind and nature to this date."

At the time the payment recited was made Ledwidge had some cash items and a good note for about $250, which the bank was willing to take, but offered to credit only the proceeds of the note after discounting it. This Ledwidge agreed to, and he was then directed to prepare a deposit slip showing his items and to draw a check for the amount thereof, and this he did, whereupon the receipt was executed. The transaction detailed

occurred after banking hours, and the cashier placed all the papers in his private box and on the following morning gave them to the teller to enter on the books of the bank. In doing this it was discovered that Ledwidge had been given credit on his deposit slip for the face of the note and also for the proceeds thereof after discounting it. The bank assumed that the mistake would be corrected, as it was apparent, and the transaction was entered on the books of the bank by a proper entry of the items in question and Ledwidge was notified of the mistake the day it was discovered. He denied that any mistake had been made, but promised to correct it if such was the case. The mistake was not corrected, and Ledwidge took the position that no mistake had been made, and it is now argued that the bank accepted Ledwidge's check for the sum recited and issued the receipt in consideration thereof, and that if there was a mistake its effect was only to permit an overdraft of Ledwidge's account at the bank. This contention is based upon the theory that the deposit by Ledwidge of his items was one transaction, and that the bank became his debtor for the amount thereof, and that drawing the check to the order of the bank for the amount of these items was an entirely different transaction, and that as a result of both transactions Ledwidge had satisfied the accord which he had made with the officers of the bank but in doing so had overdrawn his account. A complete answer to this contention is that there were not two transactions as contended. There was only one. Depositing the items and drawing the check against them was a simultaneous transaction. For convenience it was the method adopted of giving Ledwidge credit for the payment recited in the receipt.

We have, therefore, an accord, but the question is whether there was a satisfaction, and this appears to be the real question in the case. We do not have before us the question whether an accord can be defeated by a mutual mistake made in its satisfaction, although it may be conceded that the mistake at the time it was made

was a mutual one; but it was soon discovered, and its existence was so patent that there could be no question about Ledwidge having failed to pay the sum of money which he had agreed to pay and which the receipt recited he had paid. He was called upon frequently to rectify the mistake and failed to do so. His position was that no mistake had been made and that he had received a receipt which was a full acquittance. It is true that he stated that if a mistake had been made he would give his note to correct it, but he never gave the note nor was there any agreement to accept a note in lieu of the cash payment which should have been made. The matter remained in this unsettled condition for several months, when finally after suit had been threatened Ledwidge proposed to give the note or to pay the cash, but the proposition was conditioned upon the acceptance of the payment then to be made as full settlement of the original indebtedness. The bank declined to receive the sum thus tendered and brought this suit to recover the amount of its original debt less the sum paid.

There is no dispute in this case about the amount of the original debt, and there has never been. And the court below held in effect that there had been an accord without satisfaction and rendered judgment for the amount of the original debt less the sum paid.

It will be borne in mind that the original debt sought to be settled was not unliquidated. There was no question about its amount. A settlement of fifty cents on the dollar was promised but was not made. The entire sum promised was not paid. Upon the contrary, $225 of that amount has never been paid. It was to have been paid in cash and before the execution of the receipt and the receipt was executed under the mistaken belief that the sum recited had been paid. There was no satisfaction of the accord. The bank was entitled to a cash payment but did not get it. Ledwidge stood upon the proposition that no mistake had been made and refused to correct it after repeated demand so to do, and he can

not by his belated tender claim the benefit which would have inured from a prompt correction of the mistake.

The cases of *Whipple* v. *Baker,* 85 Ark. 439, and *Hill-Ingham Lumber Co.* v. *Neal,* 89 Ark. 385, are cited in opposition to the views here expressed. But the doctrine of those cases is not applicable here. In those cases the minds of the parties had fully met, and a new agreement made which was accepted in satisfaction of the demand compromised. The instant case is ruled by the case of *St. L. S. W. Ry. Co.* v. *Mitchell,* 115 Ark. 339. In that case we quoted from 1 Corpus Juris the following statement of the law:

"In 1 Corpus Juris, sec. 20, page 363, it is said: 'Mere readiness to perform is insufficient, and while there are a few decisions which seemingly hold an accord, with tender of performance and refusal to accept, is equivalent to satisfaction, and may be so pleaded in bar of the action on the original claim, the great weight of authority is directly to the contrary. The majority of decisions are to the effect that tender of performance is in no case equivalent to performance and, therefore, not a satisfaction of the original obligation. Nothing short of actual performance, meaning thereby performance accepted, will suffice. But this rule, as is elsewhere shown, would not apply in a case where a new agreement or promise, instead of the performance thereof, is accepted in satisfaction.'

"And sections 21 and 22, page 364, of the same authority read as follows:

" 'Sec. 21. Accord and part performance do not constitute satisfaction. It is merely executory so long as to its terms something remains to be done in the future. If performed in part only, the original right of action remains, and the party to be charged is allowed what he has paid in diminution of the amount claimed.'

" 'Sec. 22. Performance of part and readiness to perform the balance, or performance in part and tender of performance of the balance, are likewise insufficient to constitute a satisfaction.' "

These cases are reconciled by the statement of the law contained in the first quotation from Corpus Juris set out above that "Nothing short of actual performance, meaning thereby performance accepted, will suffice. But this rule, as is elsewhere shown, would not apply in a case where a new agreement or promise, instead of the performance thereof, is accepted in satisfaction."

Here the accord was not satisfied because the consideration on which it was based failed in part and nothing was accepted in lieu thereof. Many cases are cited in the notes to the text quoted in support of the text.

The chancellor prepared an elaborate opinion on the trial of this cause and announced substantially the view we have here expressed and rendered judgment in favor of the bank for the amount of the original debt less the sum paid.

The court also held that the sale of the undertaking business constituted a violation of the Bulk Sales Law; and we think that finding should also be sustained. We held in the case of *Stuart* v. *Elk Horn Bank & Trust Co.*, 123 Ark. 285, that the purchaser of a stock of merchandise and fixtures in bulk who failed to comply with the Bulk Sales Law became liable as a receiver of the stock of goods to all the creditors *pro rata.* The court below gave judgment in favor of the bank against Mrs. Ledwidge for the full value of the goods she received, and in this respect error was committed. The court should have ascertained the full amount of indebtedness due by the business which Mrs. Ledwidge purchased and the per cent. to which each would have been entitled had their claims not been otherwise settled and judgment rendered in favor of the bank for that sum only. It does not appear that we can make this calculation from the record before us, and the cause will be remanded to the court below to hear such testimony as is deemed necessary to enter a decree in accordance with this opinion.

SMITH, J., (on rehearing). A judgment has been entered on the supersedeas bond which renders it unnecessary to remand the cause for the purpose stated in the original opinion. A bond superseding the entire judgment was executed by both Mr. Ledwidge and his wife together with their surety, and, as the judgment has been affirmed, it becomes immaterial to determine the portion of the indebtedness for which Mr. Ledwidge and his wife were respectively liable. Under the bond they became jointly liable for the entire judgment.

It is conceded that such is the effect, *prima facie,* of the bond, but it is urged that no such intention existed in executing it, and that it was desired to supersede the judgment only as against Mrs. Ledwidge. The bond is unambiguous, and we can afford no relief.

The decree rendering judgment on the bond is therefore affirmed, and the motion for rehearing is overruled.

McCULLOCH, C. J., (dissenting). This is a suit in equity, and we are called on to enforce rights upon equitable principles, and I am unable to discover any principle upon which appellee can rightfully insist upon payment of more than was agreed should be paid in the composition of creditors. To do so is to violate the agreement which appellee entered into with the other creditors of Ledwidge to accept fifty per centum of its claim in full satisfaction; and on the other hand, a mere correction of the mistake in the settlement would give to appellee just what it agreed to accept, and would result in the enforcement of all its rights. Appellee endeavored to prove that it had a secret agreement with Ledwidge that the latter was to execute his note for the other half of the debt notwithstanding his composition of creditors, but learned counsel of appellee concede in their brief that such secret agreement was wholly void and unenforcible because it operated as a fraud on the other creditors. That is undoubtedly the law on the subject. 2 Pomeroy's Equity Jurisprudence, sec. 967; 1 Corpus Juris, 547, sec. 56; *Willis* v. *Morris,* 63 Tex. 458, 51 Am. Rep. 655; *Howe* v. *Litchfield,* 3 Allen (Mass.)

443; *Harvey* v. *Hunt,* 119 Mass. 283; *Kullman* v. *Greenebaum,* 92 Cal. 403, 27 Am. St. Rep. 150; *Hayes* v. *Davidson,* 70 N. C. 573.

Prof. Pomeroy states the prevailing rule very fully and correctly as follows:

"Where a composition is made by a debtor with his creditors upon the basis of his payment to all who join in the transaction the same proportionate share of their claims, and of being therefore discharged by them from all further liability, a secret agreement by the debtor with one of these creditors, expressly or impliedly as a condition for the latter's joining in the composition, whereby the debtor pays or secures to the favored creditor a further sum of money or amount of property, or greater advantage than that received and shared alike by all the other creditors, is a fraud upon such other creditors, and is voidable. The agreement, if executory, can not be enforced against the debtor in equity or at law; the security may be set aside by a court of equity, and the amount paid by the debtor in pursuance of the contract may be recovered back by him. The relief, defensive or affirmative, thus given to the debtor does not rest upon any consideration of favor due and shown to him, but wholly upon motives of policy, to protect the rights of the other creditors and to secure them against such fraud."

The same rule is stated in Corpus Juris, as follows:

"The consideration which supports the agreement of each creditor is the undertaking of the creditors to release their common debtor from a portion of their respective claims. The agreement of each creditor with the other creditors of the common debtor constitutes a good and valid consideration. After a creditor has thus agreed to relinquish part of his claim and induced others to become parties to the composition, it would be a fraud on them to annul the agreement and collect the full amount of his claim."

Now, the facts of the case are that appellee agreed, as did the other creditors of Ledwidge, to accept one-half of its debt in full, and Ledwidge paid the other creditors said proportion of their respective debts, and, pursuant to the agreement, went to appellee's place of business and paid to the latter's cashier what was supposed to be the amount of its proportion, and received a full acquittance, but it was afterwards ascertained that a mistake of $225 had been made in the payment. There was, and still is, a controversy between the parties as to whether or not a mistake has been made in that respect, but the chancellor has found in accordance with what appears to be a preponderance of the testimony that there had been a mistake in the amount paid and that Ledwidge still owes appellee the sum of $225 on the composition agreement, but the occurrence of that mistake, and even Ledwidge's failure or refusal to correct it, does not enlarge appellee's rights under the new contract.

It seems to me that a decree in appellee's favor for recovery of $225, with interest, would do complete justice between the parties and that a recovery of more than that amount would result indirectly in the perpetration of fraud on the other creditors. A court of equity should, in other words, merely correct the error in the settlement and put the parties in the same position they would have been in with reference to the settlement as if no mistake had been made. *Russell & Co.* v. *Stevenson,* 34 Wash. 166; *Carpenter* v. *Kent,* 101 N. Y. 591.

I think that the majority missed their mark entirely in deciding this case on the doctrine of accord and satisfaction, and in holding that it is an ordinary case of partially unexecuted accord. The consideration for the agreement to accept in full satisfaction a less sum than the whole of the debt was, as has already been shown by quotations from the authorities, the mutual agreement of creditors of Ledwidge to accept that same proportion.

That being true, there was a valid consideration for the agreement and the partial payment on the stipulated sum to be paid brings the case squarely, I think, within the rule laid down by this court in former decisions. *Whipple* v. *Baker,* 85 Ark. 439; *Hill-Ingham Lumber Co.* v. *Neal,* 89 Ark. 385.

I can see no distinction between the cases, and it seems to me that the court has in effect disregarded them. There was, in other words, an independent consideration, *i. e.,* the mutual agreement of the creditors, to support the new contract. An acceptance of a partial payment left the creditors with no remedy except to enforce the new contract by suit for recovery of the balance due under that contract. Such is the effect of our decisions, and the case of *Russell & Co.* v. *Stevenson, supra,* is directly in point on this subject. In the New York Court of Appeals case cited above, that court speaking upon a state of facts calling for application of the same principles as the present case said:

"We do not think that the defendants had the right to have the whole account opened, but that they were bound by the account actually settled, unless they could show some mistake or fraud in the settlement. * * * Where an account has thus been adjusted by the parties, if any mistake is subsequently discovered, the whole account need not be opened and readjusted, but the mistake can be corrected and the rights of the parties readjusted as to such mistake. Here, leaving everything to stand just as the parties actually adjusted and settled the items of the account, there still remains due to the plaintiffs the sum which they claim in this action, and that sum they were entitled to recover without opening the account."

I, therefore, record my dissent from the conclusion of the majority, as I think that not only has violence been done to settled principles of law, but that the decision brings about a miscarriage of natural justice.

CAMPBELL-THORPE GROCER COMPANY *v.* WATKINS.

Opinion delivered September 30, 1918.

JUDGMENT—CONCLUSIVENESS OF ORDER SETTING APART EXEMPTIONS.—An order of the bankruptcy court setting aside personal property in this State as exempt to a bankrupt residing in another State under the laws of that State is *res judicata* in the courts of this State as to all creditors properly notified of the bankruptcy proceeding.

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

John H. Caldwell, for appellant.

1. The statement of facts was all the evidence before the court and it was error to go beyond the record and consider any pleading or contention not raised by the complaint.

2. The court erred in refusing appellant judgment for its debt although the attachment was wrongfully sued out.

3. Appellee was a non-resident and entitled to no exemptions in this State. 190 U. S. 294-9, 104 Ark. 234-5; 1 Loveland on Bankruptcy, § § 428, 890; 196 U. S. 149.

SMITH, J. This action was tried in the court below on an agreed statement of facts consisting of twelve paragraphs, but we recite here only such facts as we regard essential to a decision of the case, and they are as follows: Watkins was a resident of Missouri, but owned a mercantile business at Smithville, in this State, and on October 13, 1916, filed a voluntary petition in the bankruptcy court for the Southern Division of the Western District of Missouri, which was the district of his residence, and accompanying his petition was a schedule of his Arkansas stock of goods, which he claimed as exempt from the claims of his creditors. The appellant company was one of his creditors.

It was agreed "Seventh: That a trustee was elected and as such filed an itemized list of these goods in question as property exempt to defendant with the Federal referee and that creditor plaintiff filed objec-

tions to said property being held exempt to defendant, but contended that said property was not exempt to defendant, but was within the jurisdiction of said bankrupt court, and thus being within its jurisdiction should be sold and the proceeds thereof distributed for the benefit of defendant's creditors. Agreed further that upon final hearing of the issues raised on this point the Federal referee held that defendant's goods herein attached were exempt, and therefore not subject to that court's jurisdiction, so as to be sold and distributed to creditors and overruled plaintiff's objection thereto, and issued an order delivering said goods herein attached to this defendant."

It was also further agreed: "Twelfth: That all these points were raised, submitted to, considered, decided and passed upon by the bankrupt court at Springfield, Missouri, on the 8th day of February, 1917, at which time and place the said bankrupt court held that the goods attached herein were exempt to defendant and overruled plaintiff's objections and that said goods were accordingly delivered to defendant as exempt goods in said court."

Thereafter, on February 12, 1917, appellant instituted this suit in the Lawrence Circuit Court—the county in which the stock of goods was situated—and caused the same to be attached. On the final submission of this cause in the court below, it was ordered that "the attachment herein should be dissolved for the reason that the stock of goods attached herein had, at the time of the issuance of the said attachment, been adjudged as exemptions belonging to defendant, Joe B. Watkins, in the bankruptcy proceeding in the Federal Court of the State of Missouri as shown by said agreed statement of facts, to which said bankruptcy proceeding in Federal Court plaintiff was a party, present and protesting against the allowance of said exemptions." This appeal questions that order, and counsel for appellant call attention to the fact that the agreed statement of facts does not recite that Watkins has received his discharge in bankruptcy. The record is silent in this respect, but it does disclose the

fact that the bankruptcy court allowed appellee's claim of exemptions to the goods here attached.

Appellee's exemptions were governed, of course, by the laws of the State of Missouri, but no contention is made that the stock of goods could not have been claimed as exempt under the laws of that State. At any rate, the right to claim the exemptions allowed has been passed upon by the bankruptcy court, and the decision of that court is not reviewable by us. In 1 Remington on Bankruptcy, Sec. 1086, it is said:

"The order of the bankruptcy court setting aside, or approving the report of the trustee setting aside property as exempt is *res judicata* in the State courts as elsewhere as to all creditors properly notified of the bankruptcy."

See, also section 373 and section 428 of Loveland on Bankruptcy; *Evans* v. *Rounsaville,* 8 Am. Bankruptcy Reports 236; *In re McCrary Bros.,* 169 Fed. 485.

The judgment of the court below is affirmed.

MARKER *v.* EAST ARKANSAS LUMBER COMPANY.

Opinion delivered September 30, 1918.

1. CONTRACTS—WAIVER.—An agreement by appellee to furnish money to appellant to purchase logs to supply a shingle mill during the winter months was waived by a subsequent agreement to shut down the mill during the winter months.
2. SAME—CONSIDERATION.—An agreement on appellee's part to indorse appellant's notes for advances is a sufficient consideration for a waiver of a prior agreement by appellee to furnish such advances to appellant.

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

A. S. Irby for appellant; *L. B. Poindexter* and *J. H. Townsend,* of counsel.

1. In addition to the amounts allowed by the court below appellant is entitled to credit for $200 expended during the overflow and $90.50 for shingles lost.

2. On the counterclaim set up in the cross-bill appellee is liable for damages for failure to advance money to pay for logs necessary to keep the mill running, the profits on which would be $2,400.

3. Appellee breached the contract and became liable for unliquidated damages by way of recoupment: 98 Ark. 125; 12 *Id.* 702; 16 *Id.* 103; 17 *Id.* 245; 27 *Id.* 491.

4. Appellant's plea is properly a counterclaim for damages liquidated or unliquidated. 27 Ark. 491; 66 *Id.* 406; 40 *Id.* 78; 64 *Id.* 223; Kirby's Digest, § § 6099, 6869; *Futrell,* for appellee.

5. Loss of profits as damages are properly recoverable. 71 Ark. 408; 56 *Id.* 450; 93 *Id.* 447; 80 *Id.* 228; 78 *Id.* 336; 91 *Id.* 427.

6. Prospective profits are also allowed. 111 Ark. 483; 69 *Id.* 219; 95 *Id.* 63, 522; 103 *Id.* 584.

7. The court had jurisdiction to determine all the matters at issue. 111 Ark. 336.

8. There was no waiver of damages by the agreement of December 18, 1914. This agreement only modifies the original by suspending temporarily the period of performance, and was not a waiver of any damages.

Ponder, Gibson & Ponder and *Huddleston, Fuhr & Futrell,* for appellee.

1. The contract was never breached by appellee by failure to make advances on logs, but if so appellant acquiesced and waived all damages. The money advanced for logs was used by appellant to pay running expenses of the mill.

2. The endorsement on the notes to the bank was made in response to an agreement and in pursuance of a waiver by appellant of further advances on logs.

3. During the time appellant contends the contract was broken and the damages occurred, he had agreed to shut down and cease operations. When one party with knowledge to a breach of contract by the other party suffered the latter to continue in performance of the contract he waives the right to insist on a forfeiture. 102 Ark. 79; 105 *Id.* 421.

4. Appellant is entitled to no credit for work done during the flood in saving shingles. He was saving his own property and appellee never agreed to pay him.

5. The question of unliquidated damages and loss of probable profits cannot enter in this case. The evidence is too indefinite and they are too uncertain.

6. Any breach of contract by appellee was waived by appellant's agreement to suspend on December 8, 1914.

SMITH, J. Appellee brought suit to foreclose a mortgage which had been assigned to it by the Bank of Black Rock, and obtained a decree of foreclosure. Appellant filed an answer admitting the existence of the debt secured by the mortgage except certain items which were named, and, by way of counterclaim, alleged that he had been damaged in a large sum by reason of appellee's failure to advance the money with which to acquire, in good weather, a supply of logs to be manufactured during the bad weather.

The parties made a contract under which appellant built a shingle-mill, and appellee agreed to take the entire output of shingles and to make certain advances as the shingles were manufactured, and also to make advances for the purchase of logs. In the construction of his mill it became necessary for appellant to borrow from the Bank of Black Rock a thousand dollars, which loan was evidenced by two notes, each for $500, and secured by a mortgage on the mill. The original contract was dated July 3, 1914, and by its terms was to last for one year from that date.

In the fall of 1914 the shingle market became unsettled, and appellee became anxious for appellant to discontinue the manufacture of shingles, and announced its inability and unwillingness to finance appellant's operations. It is said that this action constituted a breach of the contract and entitled appellant to recover as damages on his counterclaim the loss of profits he sustained during the time his mill was shut down for the lack of timber to manufacture into shingles. The briefs discuss this ques-

tion, but we do not stop to consider it, as we dispose of the case on another proposition.

Appellee furnished appellant $433 with which to buy logs, but refused to furnish any more money for that purpose, but offered to indorse appellant's paper at a bank if he could raise money in that way. About this time the bank requested that additional security for appellant's notes be given, and appellee indorsed the notes and finally paid them and took an assignment of the mortgage securing them, and this is the mortgage here sought to be foreclosed.

On December 18, 1914, the parties entered into the following supplemental agreement:

"This is to be an agreement between Otto Marker and East Arkansas Lumber Company in connection with a former shingle contract. It is agreed that the said Marker close his mill or shut down until April 1, 1915, at which time he may resume operation. Should it be agreeable to both parties, the mill may resume operations before this date. Three months' time shall be added to the original shingle contract on account of this shut down, unless it is mutually agreed to resume operations earlier than April 1st, in which event such time shall be added to the contract as the mill has been shut down during this agreement."

On March 31st, another agreement was made for appellant to shut down his mill for another month and to have an additional month added to the time of his original contract.

Appellant testified that, under the terms of his original contract in which appellee had agreed to furnish the money to buy timber, he had expected to accumulate, during the summer and fall, the timber necessary to operate the mill, which could not be hauled during the months of January, February, March and April, and that because of the lack of this timber he was not able to operate his mill to its full capacity after the month of September, and that he thereby sustained a loss of profits which he would otherwise have made.

We pretermit a discussion of this question because we think the testimony warranted the finding made by the court below "that any breach of contract on the part of plaintiff (appellee) was waived by defendant's (appellant's) agreement to suspend on December 18, 1914." The agreement to shut down the mill covered the period of time during which appellant says the profits would have been earned, and it must necessarily follow that there could be no liability for profits which might have been earned during the period of time when it was agreed that the mill should not be operated at all. It may be true, as appellant contends, that he was practically compelled to execute the agreement of December 18th, because of appellee's failure to make advances of money; but it cannot be said that the agreement was without consideration, nor that it was void as not having been voluntarily made. Appellant did not stand on his right to have advances made him. He was told that additional advances could not be made after the $433 were advanced on September 1, 1914. He was told, however, that appellee would indorse for him if he could raise money in this way, and appellee's manager testified that he indorsed appellant's notes above mentioned for his company as an advancement. This was a sufficient consideration to support the agreement of December 18th.

Appellant's mill yard was overflowed during August, 1915, and he claims to have expended the sum of $200 in caring for shingles held on his yard at the risk of appellee, and also to have lost shingles of the value of $90.50, with which appellee should be charged. The court below found that appellant was not entitled to either of these credits, and therefore refused to allow them. The testimony does show that appellant was put to considerable expense on account of this overflow; but this expense appears to have been as necessary for the preservation of appellant's own property as for that of appellee. No claim was made on this account during all the correspondence of the parties in their attempts to adjust their differences, and the claim was not made at all until the dep-

ositions were being taken for the trial of the cause; and we cannot say that the action of the court in disallowing this item is clearly against the preponderance of the evidence.

In regard to the lost shingles, however, we do think the chancellor's finding is against the preponderance of the evidence. The evidence shows that shingles of this value were lost, and that they had been on appellant's yard for a period of more than four months and that under the contract any loss of shingles which had been on the yard for more than four months should be sustained by appellee. This credit of $90.50 will therefore be allowed, and the judgment in appellee's favor reduced to that extent. In other respects the decree is affirmed.

PRICE v. HARTZELL.

Opinion delivered September 30, 1918.

1. APPEAL AND ERROR—PRESUMPTION AS TO SERVICE OF PROCESS.—Where the transcript on appeal shows that service was had upon appellant who was an infant defendant, and the decree recites that appellant was duly served with process, and that the cause was heard upon the complaint, answer of the guardian *ad litem*, original note and mortgage *and other evidence*, and the other evidence is not set out in the transcript, it will be presumed either that appellant was over 14 years of age or, if under that age, that a copy of the summons was served upon her father, guardian, mother, or person having control over her or with whom she lived, as required by Kirby's Dig., § 6049.
2. INFANTS—SUFFICIENCY OF ANSWER.—The statute requiring a specific denial by guardian of all the allegations of a complaint prejudicial to an infant defendant (Kirby's Dig., § 6107) is not complied with by a denial of "each and every allegation of the complaint not specifically admitted, qualified or denied."
3. APPEAL AND ERROR—PRESUMPTION—FAILURE TO SET FORTH EVIDENCE.—Where the transcript on appeal in a chancery case does not purport to set forth all the evidence, a failure of a guardian *ad litem* of an infant defendant to deny all the material allegations of the complaint prejudicial to such defendant will not be presumed to be prejudicial.
4. INFANTS—DUTY OF GUARDIAN TO PRESERVE EVIDENCE.—Kirby's Dig., § 6023, providing that "no judgment can be rendered against an infant until after a defense by a guardian," and *Id.*, § 6107,

making it the duty of a guardian *ad litem* of an infant defendant "to file an answer denying the material allegations of the complaint prejudicial to such defendant," do not require such guardian to preserve the evidence in the record.

5. APPEAL AND ERROR—HARMLESS ERROR.—Where several mortgages were being foreclosed, the failure of an infant defendant's guardian to ask for a marshaling of assets to protect the property of such defendant was not prejudicial error where it does not appear that the whole of the property mortgaged did not exceed the indebtedness in value.

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

Geo. C. Lewis, for appellant.

1. Appellant was only ten years old when the summons was delivered to her and no copy was served on her father, guardian, mother or other person in control of her. The court acquired no jurisdiction although the record recites that each of the defendants was duly served with process. 22 Cyc. p. 680 § 7; 83 Ark. 201; 124 *Id.* 331; 96 Pac. 1005; 18 L. R. A. (N. S.) 405. See also 22 Cyc., note 50; 1 Duv. (Ky.), 251; 115 Ark. 220, 64 *Id.* 500; 22 *Id.* 342; 35 *Id.* 502; Rose's Dig., 847, 51; 30 Ark. 437; 42 *Id.* 18; 34 *Id.* 682; 126 *Id.* 120; 39 *Id.* 237.

2. Lack of service on an infant in the statutory manner, is a jurisdictionally fatal defect that cannot be cured by the appointment and defense of a guardian *ad litem.* 14 R. C. L. 285; 22 Cyc. 678; Black on Judgm., § 194.

3. The guardian made only a perfunctory defense. 44 Ark. 244; 107 *Id.* 6.

4. The guardian should have asked for a marshalling of assets. 72 Ark. 412. It was the duty of the chancellor to see that proper defense was made. 60 Ark. 532; 107 *Id.* 7.

John L. Ingram, for appellee.

1. The record shows proper service on the minor in the manner prescribed by law. 72 Ark. 256; 63 *Id.* 513; Kirby's Digest, § § 4424-5, 6049. The record does not show that appellant was under 14 years of age. Due serv-

ice may have been shown by "other evidence." 63 Ark. 513.

2. The judgment is presumed to be right unless affirmatively shown to be erroneous. 124 Ark. 388.

3. A proper defense was made by the guardian. Kirby's Digest § § 6023, 6107. He filed an answer and evidence was heard. *Ib.* § 6107.

4. It does not appear that marshaling of assets was necessary or would have aided appellant.

HUMPHREYS, J. Appellee instituted suit against appellant, a minor, and others, in the Arkansas Chancery Court to recover a judgment against W. M. Price and to foreclose two mortgages on certain real estate in Arkansas County, executed by W. M. Price and wife to secure an indebtedness of $3,000 and interest. The complaint alleged the execution of the note and mortgages, the breach of the conditions thereof, and that appellant claimed an interest in a part of the lands as alienee of W. M. Price, but that the conveyance was in fact subsequent to the mortgage and made subject to it. Summons was issued against all the defendants, and return made thereon by the sheriff showing that he delivered a copy of the writ and stated the substance thereof to certain of them, including appellant. A guardian *ad litem* was appointed for appellant, who made denial of the indebtedness and execution of the note and mortgages. The answer also included the following clause, "And denies each and every allegation of the complaint not specifically admitted, qualified or denied." Thereafter a judgment was rendered against W. M. Price for $3,800.54, and a foreclosure of the mortgage lien and a sale of the lands was decreed to pay the amount. The decree contained a recital that appellant was duly and legally served with process of the court by summons for the time and in the manner required by law; also that the cause was heard upon the complaint, the answer of the guardian *ad litem,* original note and mortgages, and *other evidence.* One of the findings in the decree was to the effect that appellant

acquired an interest in a certain parcel of the land described in the mortgage by conveyance from W. M. Price subsequent to and subject to the mortgage.

An appeal from the decree has been prosecuted to this court by Ernest R. Price, appellant's father and natural guardian.

It is insisted that appellant was only ten years of age when summons was delivered to her, and that the court acquired no jurisdiction over her because a copy of the summons was not served on her father, guardian, mother or person having control of her or with whom she lived. It is true that a copy of a summons must be served, not only upon a minor if under 14 years of age, but also upon the father or guardian; and, if neither can be found, upon the mother, or, if she cannot be found, then the person having control of or with whom the minor at the time lived. But it is also provided in the same section that "where the infant is over 14 years of age service on him shall be sufficient." Kirby's Digest, sec. 6049. This case came to us on appeal, and must be decided on the record made below. The record is silent as to the exact age of appellant. There is a recital in the decree to the effect that appellant was served in the manner provided by law. There is also a recital to the effect that the cause was heard upon "other evidence." This evidence has not been brought into the record. It must be presumed either that appellant was over 14 years of age or that the minor was under 14 years of age and that a copy of the summons was served upon her father or guardian, her mother, if they could not be found, or, in case she could not be found, upon the person who had control of her, or with whom she lived at the time, else the court could not have found that the appellant had been served in the manner provided by law. This recital in the decree must control on appeal where there is nothing in the record contradictory thereof. Section 4425, Kirby's Digest; *White* v. *Smith*, 63 Ark. 513.

It is also urged as a cause for reversal that the guardian did not deny all the material allegations of the com-

plaint prejudicial to appellant. The only allegation contained in the complaint prejudicial to appellant not specifically denied is the one alleging that the conveyance by which she acquired an interest in a portion of the mortgaged land was subsequent in point of time and subject to the mortgage. No denial was made of this allegation unless put in issue by that clause quoted above denying every allegation of the complaint not specifically admitted, qualified or denied. This language within itself amounts to no denial at all, but it was treated by the court in this case as putting that material allegation in issue. The court made a specific finding to the effect that appellant acquired that portion of the mortgaged property described in her deed after the execution and delivery of the note and mortgage and that the conveyance was made to her subject to the mortgage liens. The cause was heard upon evidence not brought into the record by bill of exceptions, and we must presume in favor of the findings of the court contained in the decree. It has been laid down as a salutary rule by this court that "every judgment of a court of competent jurisdiction is presumed to be right unless the aggrieved party will make it appear affirmatively that it is erroneous." *McKinney* v. *Demby*, 44 Ark. 74; *Young* v. *Vincent,* 94 Ark. 115; *Clow* v. *Watson,* 124 Ark. 388.

It is complained that the guardian *ad litem* did not take steps to preserve the evidence adduced at the trial.

It is provided in section 6023 of Kirby's Digest that "no judgment can be rendered against an infant until after a defense by a guardian;" and in section 6107 of Kirby's Digest that it is the duty of a guardian "to file an answer denying the material allegations of the complaint prejudicial to such defendant." There is nothing in either provision of the statute requiring the guardian to preserve the evidence in the record.

It is also insisted that the guardian *ad litem* should have made application to marshal the assets covered by the mortgages. It is true that under judgments of this court it is the duty of guardians to make real earnest de-

fenses for their wards, and not merely perfunctory and formal ones. This does not imply, however, that guardians are required to make defenses not founded in fact. If the record had shown that the property in this case exceeded in value the indebtedness, then it would perhaps have been the duty of the guardian to suggest, and the duty of the court to marshal the assets and to sell the lands first which had not been conveyed to the appellant by the mortgagor. There is no showing in the record that it would not require all the mortgaged property to pay the debt, interest and costs in the foreclosure suit, and we can not, therefore, say that it was the duty of the guardian *ad litem* to suggest that the assets covered by the mortgage be marshaled.

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

CADY v. PACK.

Opinion delivered September 30, 1918.

1. JUDGMENT—OPENING OR VACATING—CASUALTY OR MISFORTUNE.—Under Kirby's Dig., § 4431, providing that a court in which a judgment or final order has been rendered shall have power, after the expiration of the term, to vacate or modify such judgment or order "for unavoidable casualty or misfortune preventing the party from appearing or defending," a petition to set aside a judgment by default alleging that an answer setting up a meritorious defense had been filed in apt time by petitioner in the case wherein default judgment was taken and was thereafter lost or mislaid, alleges a casualty or misfortune within the above statute.
2. APPEAL AND ERROR—CONCLUSIVENESS OF JUDGE'S FINDING.—Where the law makes the trial judge the trier of facts in cases to which the constitutional right of jury trial does not apply, the same presumption of conclusiveness attends his finding as when a jury is waived by the party.
3. FORCIBLE ENTRY AND DETAINER — MERITORIOUS DEFENSE. — An answer in an action of forcible entry and detainer which alleges that defendant was in possession under a three years' lease executed by a former owner of the land and that plaintiff purchased with notice of defendant's rights, states a meritorious defense.

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

Rowell & Alexander, for appellant.

1. The court erred in setting aside the judgment. No fraud is shown, nor unavoidable casualty or misfortune. Kirby's Digest, § 4431, par. 7; *Ib.* § 4433; 39 Ark. 107; 93 *Id.* 462. Mere negligence of one's attorney is not sufficient. 104 Ark. 45.

2. The party must show that he was not guilty of negligence or carelessness. 114 Ark. 493. Due service was had and notice given. 106 *Id.* 230.

3. While the court has power to vacate a judgment after expiration of term, under Kirby's Digest, § § 4431-3, there was a sufficient showing made here. 122 Ark. 75; 5 *Id.* 186; 129 *Id.* 143.

4. This is not an appeal from a motion for new trial but from an order setting aside a judgment by default. 105 Ark. 524; 104 *Id.* 45; 89 *Id.* 160. The showing by appellee was not sufficient.

H. K. Toney, for appellee.

1. The court has power to set aside judgments by default. 63 Ark. 325.

2. A proper showing was made and a meritorious defense set up. 112 Ark. 562; 117 *Id.* 501; 125 *Id.* 398. The judgment was properly set aside and the judgment below should be affirmed. Kirby's Digest, § 1188.

HUMPHREYS, J. This proceeding was instituted in the Jefferson Circuit Court to vacate a default judgment rendered against appellee in favor of appellant on the 25th day of February, 1918, in a suit in forcible entry and detainer of certain real estate wherein appellant was plaintiff and appellee was defendant. Appellee alleged in the complaint to vacate the default judgment that prior to the rendition thereof he filed an answer setting up a meritorious defense with the clerk of the court which was misplaced or lost and not noted on the docket, and that through this unavoidable casualty and misfor-

tune he was prevented from appearing and defending against the judgment; that the lost or misplaced answer contained a denial of all the material allegations in the original complaint for forcible entry and unlawful detainer of said real estate, and, in addition thereto, alleged that in January, 1916, appellee entered into a contract with R. M. Oats, who at the time owned said property, for the rent of said lands for a period of three years in consideration of appellee agreeing to clear and put in a state of cultivation said lands, and that in keeping with said agreement appellee entered upon said lands and performed his agreement by clearing and putting into cultivation said lands; that appellant purchased said real estate with full notice of and subject to the rights of appellee.

In apt time appellant filed his response to the complaint to set aside said judgment, in which he placed in issue all the allegations therein.

On April 26, 1918, the cause was submitted to the court upon the pleadings and affidavits filed by the respective parties which were treated as evidence, upon which the court rendered a decree setting aside the default judgment of date February 25, 1918.

Proper steps were taken, and an appeal has been prosecuted to this court seeking to reverse the judgment of the court setting aside said default judgment.

The substance of the testimony offered by appellee was that, immediately upon being summoned in the forcible entry and unlawful detainer suit, he employed H. K. Toney to file an answer for him; that H. K. Toney dictated the answer to his stenographer, Miss Isabel Woodard, in appellee's presence, and that after the answer was prepared his attorney, H. K. Toney, carried it to the courthouse and filed it in the clerk's office within the time required by law.

The substance of the evidence offered by appellant was that no answer was filed by appellee in the forcible entry and unlawful detainer case prior to the rendition of the default judgment therein.

The power to vacate or modify judgments after the expiration of the term at which judgments are rendered is conferred upon courts in this State by sections 4431-3, Kirby's Digest, for reasons set out in the several subdivisions contained in said section 4431. The seventh subdivision of said section authorizes the court in which a judgment has been rendered to vacate it "for unavoidable casualty or misfortune preventing the party from appearing or defending."

It is insisted by appellant that appellee did not show an unavoidable casualty or misfortune which would prevent him from defending the cause. Had an answer been present in court at the time of the rendition of the decree, no default judgment could have been rendered. The absence of an answer enabled appellant to procure the default judgment. The loss or misplacement thereof prevented appellee from defending the suit upon the issues joined. The court is of opinion that the loss thereof was a casualty or misfortune within the intent of the statute aforesaid.

But it is said by appellant that appellee utterly failed to prove that he filed an answer. We think appellant is mistaken in this assertion as the attorney for appellee testified that he dictated the answer to his stenographer and after same was prepared he at once carried it to the courthouse and filed it in the clerk's office. It is said that filing an instrument in the clerk's office does not necessarily mean that it was given to the clerk or one of his deputies in the office for the purpose of filing same. We think the only natural conclusion from the language used by the witness is to say that his testimony was to the effect that he placed it in the hands of the clerk or one of his deputies to file it. It is true that the clerk and all of his deputies gave quite positive testimony to the effect that no such answer was filed in the case of appellant against appellee, but this court is not called upon to pass upon the weight of this evidence. Where circuit courts are required by law to pass upon questions of fact, the findings are as conclusive on appeal as the verdicts of juries. In

rendering the judgment setting aside the default judgment, the court necessarily found on conflicting evidence that appellee filed an answer in the suit for forcible entry and unlawful detainer in which the default judgment was rendered. The finding of the court is sustained by sufficient substantial evidence and is conclusive on appeal under the well established rule in this court to the effect that "where the law makes the trial judge the trier of facts in cases to which the constitutional right of jury trial does not apply, the same presumption attends his finding as when a jury is waived by the party." *Jones* v. *Glidewell,* 53 Ark. 161; *Schuman* v. *Sanderson,* 73 Ark. 187; *Williams* v. *Buchanan,* 86 Ark. 259; *Matthews* v. *Clay County,* 125 Ark. 136.

Again, it is contended by appellant that appellee failed to set up a meritorious defense to the cause of action. The answer denied that appellee forcibly entered and unlawfully held the land in question, but asserted the fact to be that R. M. Oats owned the land in January, 1916, and leased it to him for a period of three years in consideration of appellee agreeing to put same into a state of cultivation and that, in pursuance of said agreement, he entered upon said land and performed his agreement by putting same in cultivation and that thereafter D. B. Niven purchased the land from R. M. Oats and that T. F. Cady purchased same from D. B. Niven, both of whom at the time of their respective purchases had notice of the rights of appellee in the land by virtue of his lease of said lands from R. M. Oats.

These allegations constitute a meritorious defense to the cause of action for forcible entry and unlawful detainer of said lands.

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

BOWMAN v. SIMS.

Opinion delivered September 30, 1918.

JUDGMENT—RES JUDICATA.—Where an issue sought to be litigated in a pending action was litigated and decided in a former action, the issue is *res judicata.*

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

Tellier & Biggs and *Manning, Emerson & Donham,* for appellant.

The issue raised here was never raised or passed on by the chancery court or by the Supreme Court. The matter was never *res adjudicata.* 66 Ark. 366; 124 *Id.* 435; 18 *Id.* 142; 24 A. & E. Enc. Law (2 ed.), 784.

Sam Frauenthal, for appellee.

1. The parties are the same as well as the subject matter. The same transaction is involved and the matter is clearly *res adjudicata.* 15 Ark. 555; 19 *Id.* 62; 39 *Id.* 531; 47 *Id.* 31.

2. The former judgment is conclusive. 65 U. S. 24; 7 Wall. 619; 94 U. S. 477, 485; 23 Cyc. 1295; 15 R. C. L. 438; 52 Ark. 411. See also 108 Ark. 574; 114 *Id.* 14; 23 Cyc. 1223; 15 R. C. L. 970. The parties are concluded by the first judgment as to all questions actually put in issue and adjudicated. 23 Cyc. 1297; 15 R. C. L. 973, § 450, also p. 958; 16 Cyc. 799; Am. Cas. 1912, D. 414.

HUMPHREYS, J. On the 12th day of September, 1916, appellant brought suit against appellee in the Southern District of the Prairie Circuit Court to recover $15,900 damages on account of an alleged breach of a contract entered into between appellant and appellee in July, 1905, alleged in substance to be that they purchased a large tract of land in Prairie County, Arkansas, at a total cost of $31,800; that appellant should have the exclusive right to fix the sales price and sell the land and divide the net profit between them equally; that appellee would join appellant in a general warranty deed in conveyance of same to such purchaser as appellant might

designate. It was also alleged in the complaint that pursuant to the agreement appellant found a purchaser on the 19th day of June, 1914, who was willing to pay $63,600 for said tract; that appellee refused to join in the deed to the purchaser, thereby breaching the contract, to appellant's damage in one-half of the net profit, or in the sum of $15,900.

The issue upon which the case went off arose on a plea of *res adjudicata* filed by appellee. The plea set forth that in a foreclosure suit between the same parties in the Northern District of Prairie Chancery Court, appellant, by way of cross-bill, set up as a defense in the foreclosure proceeding the same matters set up by him as a basis of his suit for breach of contract, that appellee filed a response to the cross-complaint in that case; that testimony was introduced on the issues joined by the cross-complaint and answer; that final decree was rendered in that case at the April term, 1915, of the Prairie Chancery Court, dismissing the cross-bill for want of equity.

The court heard the plea of *res adjudicata* upon the pleadings in this case and the transcript in the foreclosure case of *Bowman* v. *Sims* and sustained appellee's plea of *res adjudicata* and rendered judgment for appellee. From this judgment an appeal has been properly prosecuted to this court.

The question to be determined upon appeal is whether or not the issue joined on appellant's cross-bill and appellee's reply thereto in the foreclosure suit of *Sims* v. *Bowman,* which was styled in the Supreme Court "*Bowman* v. *Sims,*" No. 3935, is the same issue in substance presented by the pleadings in this suit.

On or about the first day of June, 1905, appellant and appellee purchased 1,590 acres of land called the Letchworth land. John Sims advanced the purchase money necessary to buy the tract and took a mortgage on this tract and an additional 200 acre tract, from C. L. Bowman and wife, to secure the notes executed to him for one-half of the purchase money. The notes were not paid,

and the foreclosure suit, styled "*Bowman* v. *Sims*" in the Supreme Court, was instituted to recover on the notes and enforce the mortgage lien against both tracts of land. The damages claimed in the instant suit grew out of the alleged refusal of John Sims to join with C. L. Bowman in the execution of a warranty deed to the purchaser alleged to have been procured by Bowman. The cross-bill filed by appellant in the foreclosure suit in part alleged in substance that by agreement the notes executed by Bowman to Sims for one-half of the purchase money should not be paid until the land was sold; that this agreement was the inducement which led appellant to execute the notes and mortgages to appellee; that appellant should have the exclusive right to fix the sales price and to sell said land; that said appellee agreed to convey to such purchaser as the said Bowman might find and at the price fixed by said Bowman; that on or about the 19th day of June, 1914, appellant found a purchaser who was able and willing to buy said land, but appellee declined to execute a deed to said land as agreed. The cross-complaint contained other matters unnecessary to set out in this opinion as they do not bear directly upon the plea of *res adjudicata* presented by the pleadings in this case. The prayer of appellant's cross-bill not only requested special relief but asked that appellee's bill, seeking a recovery on his notes and mortgages, be dismissed, and for all other just and proper relief.

Appellee, in reply to the cross-bill, denied these allegations.

Evidence was introduced on both sides as to the nature and character of the contract entered into by appellant and appellee.

Upon final hearing, judgment was rendered dismissing the cross-complaint for want of equity and the court rendered judgment in favor of appellee on his note and mortgages. An appeal was prosecuted in that case to the Supreme Court, where the decree of the chancellor was affirmed.

It is insisted by appellant that the contract was pleaded in the foreclosure proceeding for the sole purpose of determining whether or not the notes sued upon were due; also that the evidence introduced, pro and con, as to the nature and character of the contract was for the same purpose. We can not agree with learned counsel in this contention. The scope of the pleadings and evidence, as well as the prayer in the foreclosure proceeding, authorized the court in granting to appellant, C. L. Bowman, all the relief to which he was entitled growing out of his alleged contract, if established, and any breach thereof. He clearly put the nature, character and effect of his contract in issue in his cross-bill in the foreclosure proceeding. Appellant, C. L. Bowman, did not admit his liability on the notes and defend solely on the ground that they were not due, but went further, and asked the court to grant him all the relief to which he was entitled under the allegations in his cross-complaint. One of the allegations was that he was induced to sign the notes and execute the mortgages by a contract to the effect that appellee, Sims, would join him in a conveyance to a purchaser in case he found one who would pay a profit for the land, and that he did find one who was able and willing to purchase the land at a large profit and that appellee Sims refused to execute a deed to him. This allegation, if it had been established by the evidence, would have warranted the court in allowing Sims any damage he might have sustained by reason of the breach of the contract. We think the issue presented by the pleadings in the instant case clearly within the matters, issues and points of controversy litigated and necessarily decided in the foreclosure proceeding.

Our findings bring this case clearly within the rule governing *res adjudicata* laid down by the following authorities: *Shall* v. *Biscoe,* 18 Ark. 142; *Harris* v. *Townsend,* 52 Ark. 411; *McCombs* v. *Wall,* 66 Ark. 336; *Edwards* v. *Wallace,* 108 Ark. 574; Vol. 24 (2 ed.) Am. & Eng. Enc. of Law, p. 784.

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

HUGHES v. SPECIAL SCHOOL DISTRICT NO. H OF HAYNES.

Opinion delivered September 30, 1918.

1. SCHOOLS AND SCHOOL DISTRICTS—DISSOLUTION OF DISTRICT—PETITION.—The county court, under Kirby's Dig., § 7548, has no authority to dissolve a school district except upon a petition of a majority of the electors residing in such district.
2. SAME—DISSOLUTION OF DISTRICT—DISCRETION OF COURT.—Although a petition of a majority of the electors residing within a certain district has been filed in the county court asking for its dissolution, the county court in the first instance, and the circuit court on appeal, has a discretion in the matter which is to be exercised for the best interests of the citizens of the district to be affected.
3. SAME—DISSOLUTION OF DISTRICT—DISCRETION OF COURT.—In exercising its discretion in regard to the dissolution of a school district the court could take into consideration all the circumstances which would affect the territory and the inhabitants thereof within the district proposed to be dissolved as well as the adjoining districts.
4. SAME—DISSOLUTION OF DISTRICT—DISCRETION OF COURT.—The judgment of the trial court refusing to dissolve a school district will not be reversed unless it clearly appears that it has abused its discretion.

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

H. F. Roleson and *Mann, Bussey & Mann*, for appellants.

This case was before this court in 119 Ark. 592 and 128 *Id.* 129. The petition contained a majority of the electors in the district. The petitions here were accepted and acted upon as genuine. There is no showing that the signatures are not genuine. The petitions are jurisdictional. 49 Ark. 18; 51 *Id.* 48; 70 *Id.* 449. The judgment should be reversed and the district dissolved as a clear majority petitioned.

D. S. Plummer and *Daggett & Daggett*, for appellee.

1. The trial in the circuit court was *de novo*. 104 Ark. 145; 117 *Id.* 541. It was incumbent on petitioners to show (1) that a majority of the electors had signed the petition, and (2) that due notice had been given. Kirby's Digest, § 7548-9. The petitions do not state that

they contain a majority, nor was it proven. 104 Ark. 145; Kirby's Digest, § 7549.

2. The petition filed in the county court for reorganization of District No. 39 was properly not admitted as evidence. 119 Ark. 162; 111 *Id.* 79.

3. Remonstrating petitions were properly filed and considered. 119 Ark. 149; 63 *Id.* 543.

4. The petition for dissolution does not contain a majority of electors. The court found that it did not. The discretion lodged in the trial court is not abused and the finding and judgment should stand. 104 Ark. 145; 117 *Id.* 531; 119 *Id.* 595.

WOOD, J. This action was instituted under section 7548 of Kirby's Digest, authorizing the county court to dissolve any school district "whenever a majority of the electors residing in such district shall petition the court so to do." Petitions were filed in the county court of Lee County in the following form: "We, the undersigned, citizens and electors residing within the territory of Special School District No. H, of Haynes, Arkansas, respectfully petition the court and pray that Special School District No. H, of Haynes, Arkansas, be dissolved and its powers and duties be declared void and no longer existing, and that the indebtedness due by it and the funds on hand to its credit be apportioned according to law."

The trial court entered a judgment which contains the following recital: "The court, after having heard the evidence adduced, finds that the petitions filed herein are not sufficient nor in such form as to enable the court to make an intelligent disposition of the territory embraced within such Special School District and attach the same to adjoining districts and proportion the indebtedness due by said Special School District in the manner required by law. The court further finds that said petitions filed herein do not contain a majority of the qualified electors residing in the territory of said Special School District at the date of the filing of said petitions, and further finds that it would not be to the

best interests of such districts, or the districts to which the territory thereof would be attached, to dissolve said Special District and proportion the indebtedness thereof as required by statute." Then follows the judgment dismissing the petitions, from which judgment is this appeal.

In *Stephens* v. *School District No.* 85, 104 Ark. 149, we said: "But in a proceeding of this nature the court is only warranted in making an order upon the petition of a majority of the electors residing on such territory consenting to, or requesting the formation of a new school district. That fact must be made to appear by the petitioners." The above was said with reference to the formation of new school districts under sec. 7544 of Kirby's Digest, which provides: "The county court shall have the right to form new school districts or change the boundaries thereof upon a petition of a majority of all the electors residing upon the territory of the districts to be divided." The rule announced in *Stephens* v. *School District No.* 85, *supra,* is applicable as well to the statute (§ 7548) now under review.

In *Hughes* v. *Robuck,* 119 Ark. 592, the issue was whether or not this same district should be dissolved. In that case, speaking of the petition, we said: "but the court has no authority to dissolve any particular district except upon the filing of a petition conforming to the requirements of the act above quoted," referring to § 7548 of Kirby's Digest, *supra* (Act April 1, 1895).

In the opinion (*Hughes* v. *Robuck,* p. 595) we further said: "This act of 1895 does not require the county court to dissolve the district upon the filing of a proper petition therefor. It merely confers upon the county court the authority to do so. A discretion abides with the court in passing upon the petition." In *Rural Special School District No.* 17 v. *Special District No.* 56, 123 Ark. 570-573, we said: "We have held in several cases that the county court exercises discretion with respect to change of the boundaries of common school districts. *Hale* v. *Brown,* 70 Ark. 471; *Stephens* v. *School District No.* 85, 104 Ark. 145; *Carpenter* v. *Leatherman,* 117 Ark.

531; *School District No.* 45 v. *School District No.* 8, 119 Ark. 149. The same reason would apply for holding that the county court has discretion in annexing territory to a single school district." It will thus be seen that the effect of our decisions is that, in the matter of forming, annexing territory to, changing boundaries of, and dissolving school districts, the statutory requirements as to the petition therefor must be met. And further, when the statutory requirements are fulfilled, the county court in the first instance, and the circuit court on appeal and upon trial *de novo*, still "has a discretion in the matter which is to be exercised for the best interests of the citizens of the district to be affected."

The petitions praying for the dissolution of Special School District No. H of Haynes, Arkansas, do not recite that the signers to such petitions constitute a majority of the electors residing in the district. The petitions, therefore, do not show on their face that they contained a majority of the electors residing in the district. The issue as to whether or not the various petitions, considered as one, contained a majority of the electors residing in the district was purely one of fact. Appellants contend that their proof shows that at the time the petitions for the dissolution of Special School District No. H of Haynes, Arkansas, was filed, there were 156 electors residing in the territory. Special School District No. H of Haynes was composed of what was formerly the territory embraced in District No. 39 and a part of District No. 1. There was testimony tending to show that at the time the Special District No. H was created there were 156 electors residing in District No. 39, but there is no evidence showing, or tending to show the number of electors that resided at that time in that portion of the territory of Common District No. 1, which had been taken from that district and included in Special District No. H.

One of the witnesses named 17 electors as residing in that portion of the territory of District No. 1 which went to form Special District No. H, but he also testified that such number was "not near all the people that lived

on that part of Special District No. H at that time." He was sure that such number "was not all, but he could not tell how many there were." But if it were conceded that the proof showed the territory comprising Special District No. H contained no more than 173 electors at the time the petition for dissolution was filed, still it can not be ascertained from the evidence set forth in the record with certainty that the petition for dissolution contained a majority of such electors.

The appellants presented petitions on which appeared 150 names, but as we have seen there was no *prima facie* showing that these were electors of Special District No. H, and the burden was upon appellants to show that they were. The court properly eliminated from its consideration a petition that was circulated by one Ross Hughes, because there was no competent testimony that the purported names thereon were genuine signatures of electors residing within the district.

But it could serve no useful purpose as a precedent to set out and discuss further in detail the evidence bearing upon the issue as to whether a majority of the electors residing within the Special District No. H signed the petition of dissolution thereof. The court found that such was not the fact and we are not convinced from a careful examination of the record that this finding was erroneous. But even though we were mistaken as to this and the testimony in the record showed conclusively that a majority of the electors residing in Special District No. H had signed and filed a petition to the county court asking for the dissolution of the district, still we would be unwilling to hold that the trial court abused its discretion in refusing to dissolve the district. In exercising its discretion the court could take into consideration all the circumstances that would affect the territory and the inhabitants thereof within the district proposed to be dissolved, as well as the adjoining districts. See *School District No.* 45 v. *School District No.* 8, 119 Ark. 149; also *Hale* v. *Brown, supra.*

To this end it was proper for the court to consider the petitions of remonstrance, and the court might also properly have taken into consideration the fact that the qualified electors residing in what was formerly District No. 39, if such were the fact, had petitioned the county court to include that territory in another district. But, even though the court might have erred in not considering this testimony, the error is not one for which the judgment should be reversed, because we do not deem it prejudicial.

While all the matters affecting the district sought to be dissolved and the districts adjoining were germane to the issue involved, nevertheless, under the authorities above cited, the court has a discretion in determining the issue, and its judgment thereon should not be reversed unless it clearly appears that it has abused its discretion and committed an error that is prejudicial to the rights of the party complaining thereof. As was said in *School District No.* 45 v. *School District No.* 8, *supra*: "The county court is not bound to grant the petition merely because the prerequisites are complied with, but that court, or the circuit court on appeal, may exercise a discretion in regard to making the change."

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

KINDRICKS v. MACHIN.

Opinion delivered September 30, 1918.

1. MUNICIPAL CORPORATIONS—SALARY OF MAYOR—MODE OF FIXING.—Under the statutes which provide that the mayors of cities of the first class shall receive such salary as their city councils may designate or fix, and "when once fixed the same shall not be increased or diminished during the term to which they may have been elected (Kirby's Dig., § § 5483, 5599 and 5617), the particular manner in which the council shall act in so doing is not prescribed and the council may, in its discretion, exercise its power in any usual and appropriate manner.

2. SAME—SALARY OF MAYOR—MODE OF FIXING.—By an ordinance of March 31, 1908, the city of Argenta fixed the salary of the mayor at $125 per annum. By an ordinance of January 18, 1916, it was provided that the mayor should assume general supervision and control of the electrical and commercial light department. From that time the mayor was allowed "an expense account" the monthly sum of $150, which was the amount previously paid to the manager of the electrical department. *Held*, that the purpose of such appropriations was to increase the salary of the mayor, and that such appropriations were valid.

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

STATEMENT OF FACTS.

This action was instituted by two residents and tax payers of the city of Argenta against the clerk and treasurer of the city, respectively, to enjoin the payment of the sum of $150, a monthly sum allowed the mayor of the city of Argenta by resolution of its council, which, so far as is pertinent here, reads as follows:

"That there shall be, and is hereby appropriated out of any moneys now on hand, or that may hereafter accumulate in the general funds of the city, the sum of $150 per month, from July 1, 1917, for the current and incidental expense of the mayor's office." This resolution was passed July 16, 1917.

The plaintiffs alleged that the purpose of the resolution was to allow the mayor extra compensation for his services as mayor, and that its effect was to increase the salary of the mayor, contrary to the statutes in such cases provided.

The defendants did not answer, but D. M. Pixley intervened and set up that he was elected mayor of the city of Argenta on the first Tuesday of April, 1917; that he qualified on the following Monday and had been in office since that time; that the clerk and the treasurer of the city, respectively, had no real interest in the controversy, and that he, being the real party in interest, was entitled to defend the action. He stated that the city council, by formal vote, had allowed Mord Roberts, who was acting mayor *pro tem* for the city of Argenta from December,

1915, to November, 1916, the sum of $150 per month as expense account during such time, and had allowed to J. P. Faucette, who had resumed the office, the same monthly sum from November, 1916, to April 9, 1917, the latter being the date when intervener Pixley qualified as mayor.

He alleged that if the allowance thus made be deemed the salary or compensation, instead of expense, that the city council had increased the salary of the mayor and had fixed it at the sum of $1,925 per annum, before intervener was elected and entered upon the duties of his office. He further set up, that prior to January, 1916, the city of Argenta, by ordinance, employed a manager of its municipal electric light plant and fixed his salary at the sum of $150 per month; that on January 18, 1916, the duties of said manager were, by ordinance imposed upon the mayor, and that such duties were not ordinarily incident to the office of mayor; that the sum of $150 per month allowed to J. P. Faucette, was paid by Faucette to Roberts for services performed by Roberts as manager of the lighting plant, and not for his services as mayor; that these services rendered by intervener and his predecessors in office as manager of the electric light plant, were such as to entitle them to additional compensation therefor in the sum of $150 per month. Intervener prayed that the complaint be dismissed for want of equity.

Plaintiffs, to sustain their contention, introduced an ordinance of March 31, 1908, of the city of Argenta which provides as follows: "That salary shall be paid commencing April 1, 1908; mayor's salary, per annum, $125; members of the city council, for each regular meeting, $1."

Also an ordinance of January 18, 1916, which provides as follows: "That the mayor shall have and assume general supervision and control for the maintenance and management of the electrical and commercial light department of the city, and all employees in said department shall be subject to his orders, and all matters pertaining to purchasing materials and supplies, and mak-

ing repairs, fixing rates and adjusting matters of disagreement between consumers and the city, and all other matters pertaining to the management of the said department shall be under the direct control, and subject to the orders and approval of the mayor."

Plaintiffs then introduced the resolution of July 16, 1917, as set forth in their complaint.

Evidence on behalf of the intervener which was undisputed, proved that after the passage of the ordinance of January 18, 1916, the office of manager of the electric light department was abolished, and his duties were imposed upon the mayor. Predecessors of the intervener in the office of mayor had regularly been paid a monthly allowance which is designated in the record as "expense account." The allowance between December, 1915, and October, 1916, amounted to $150 per month except for the months of February and October. The allowances for those months were, respectively, $179.10 and $174.10. Beginning with November, 1916, and ending April 9, 1917 (the date when the intervener was inducted into office), there was a monthly allowance of expenses for the mayor's office of $150, except in November, 1916, when the allowance was for $166 and in January, 1917, the allowance was $164, and the amount to April 9, 1917, was $200.

Mord Roberts testified that he was elected mayor *pro tem* of the city of Argenta during the absence of J. P. Faucette, the regular mayor. Prior to witness' incumbency, Argenta had a manager of its electric light department. The city furnished that department, and it did a big business. It paid the manager of that department $150 per month. After he assumed the duties of manager of the electric department, he installed a new lighting system. He had to make rates, and it took a good deal of his time. The sum of $150 per month was allowed him as compensation. The city paid the manager of the electric department the sum of $150 per month.

After Mayor Faucette returned and assumed his duties as mayor, he was in bad health, and witness con-

tinued to discharge his duties as manager of the electric light department, and the mayor gave witness his personal check every month for the sum of $150. This amount was paid by virtue of an allowance made by the council each month. The extra amount over that sum for the months mentioned, represented expenses for witness' railroad fare and hotel expense in going to Huntington, Arkansas, and in going to St. Louis, Missouri.

The intervener testified that he went into office April 9, 1917. He knew that his predecessor had received a compensation for the previous two years which amounted to $150 per month in addition to the annual salary of $125. He had been in control of the municipal light plant. Practically all lights in Argenta were furnished by it. It made a profit of $9,000 or $10,000 per year. The duties of the manager of the plant, which the witness was performing, were "to fix the rates, adjust all disagreements and get new business, confer with electricians in regard to running new lines, see that the department was kept up—all the wiring and poles—and receive their reports." Witness had received no other compensation for his services than that above mentioned.

Upon the above testimony the court found in favor of the intervener and entered a decree dismissing the complaint for want of equity. From that decree is this appeal.

Gardner K. Oliphint, for appellants.

1. The payment is an increase of the mayor's salary during the term and contrary to law. Kirby's Digest, § § 5483, 5599; 52 Ark. 541, 547; 53 *Id.* 205, 208; Throop on Public Officers, § 500; Kirby's Digest, § § 5638, 5643; 2 Abbott on Mun. Corp., § 685-6, pp. 1628-29-30; 15 Wend. 44; 29 Barb. 204; 34 Ark. 303; 21 N. W. 333.

2. Intervener can not justify the increase because he was manager of the light plant. That was a part of his duties as mayor. Kirby's Digest, § § 5616-17.

3. Parol testimony was improperly introduced. 88 Ark. 265.

Cockrill & Armistead, for intervener, Pixley.

1. The salary or compensation was fixed before Mayor Pixley was elected to office. Kirby's Digest, § § 5599, 5617; 28 Cyc. 275; 34 Ark. 303; 83 Minn. 3, 85 N. W. 717; 50 Mich. 260.

2. The additional compensation was for extra services as manager of the light plant, etc. 28 Cyc. 454; 33 Mich. 61; 57 N. E. 96; 80 N. W. 608; 22 U. S. Ct. Ct. 126; 4 Mackey, (D. C.) 281; 2 Cliff. (U. S.) 325; 47 Mich. 236; 19 *Id.* 376; 64 Me. 249; 85 Ga. 734; 49 N. Y. 280; 56 Neb. 657; 63 Mich. 271; 19 La. Ann. 274; 104 Iowa, 625; 21 How. (U. S.) 463; 35 N. J. Eq. 442.

3. In any event Pixley is entitled to the increase as manager of the electric light department. 98 Ark. 39; 61 *Id.* 397.

WOOD, J., (after stating the facts). The statutes of the State provide that the mayor of cities of the first class shall receive such salary as their council "may designate" or "fix," and, "when once fixed the same shall not be increased or diminished during the term to which he may have been elected, by way of fees, fines or perquisites." Secs. 5483, 5599 and 5617 of Kirby's Digest.

It is clearly shown by a preponderance of the evidence that it was the intention of the city council of Argenta, especially after the office of manager of its electric light department was abolished and the duties of that position were imposed upon the mayor, to allow the mayor in addition to the salary of $125 per annum which had been fixed in 1908, the sum of $150 per month, or an annual salary amounting in the aggregate to the sum of $1,925.

Mord Roberts assumed the duties as acting mayor in October or November, 1915, and "expense accounts" appear in the record which show that from December 20, 1915, allowances were approved by the city council consecutively and continuously thereafter, in the sum of $150 per month up to April 9, 1917, when the appellee, Pixley, was inducted into office. Roberts testified that when he

went in as acting mayor, it was understood between him and the city council that he was to receive as compensation the sum of $150 per month. This monthly amount the city council approved as long as he acted as mayor.

The allowances were made under the designation "expense account" including the month prior to December 20, 1915, and continuing to October 20, 1916. After Mayor Faucette returned, the monthly allowance was continued under the same designation ("expense account"), until his term of office expired April 9, 1917.

Now, it is wholly immaterial that these monthly allowances were designated as "expense account." The undisputed evidence shows that the purpose in such allowance was to increase the salary or compensation of the mayor on account of the additional duties that had been imposed upon him in managing the electric light department. It is true that a more direct and appropriate method of increasing the salary of the mayor of the city of Argenta would have been by ordinance or resolution, naming the aggregate amount per annum to be paid monthly, but the fact that such increase was not made in this particular manner does not render the action of the city council in increasing the salary of the mayor, void.

The statute authorizing the city council to fix the mayor's salary does not prescribe the particular manner in which the council shall act in so doing. In the absence of any mode prescribed by law, the council may in its discretion, exercise its power in any usual and appropriate manner. 28 Cyc. 275, and cases cited. See also *State* v. *Nichols,* 83 Minn. 3; *Fountain* v. *Mayor,* 50 Mich. 260.

The proof shows that the monthly allowances were made by vote of the city council, and it is not contended by appellants that these allowances were made in any but the usual and appropriate way. It was not alleged, nor is there any proof that the action of the city council in fixing the salary of the mayor in the manner indicated was an actual fraud or resorted to for the sinister purpose of evading the law prohibiting a mayor's salary from

being increased or diminished during the term for which he is elected.

Taking the testimony as a whole, we are convinced that the action of the city council, as shown by the testimony of Mord Roberts and the regular monthly allowance of "expense accounts" and the ordinance of January 18, 1916, was tantamount to fixing the salary of the mayor at the sum of $150 per month in addition to the annual salary of $125, and that such was the amount of the salary or compensation of the mayor as fixed by the council at the time that appellee, Pixley, qualified as mayor. Therefore, so far as the intervener was concerned, this action of the council did not fall within the provisions of the law forbidding the salary or compensation of a mayor to be increased or diminished during the term for which he may have been elected. Secs. 5483 and 5617 of Kirby's Digest.

The resolution of July 1, 1917, appropriating the sum of $150 per month out of the general revenue of the city "for the current and incidental expenses of the mayor's office," when viewed in connection with the action of the council prior to the time when Mayor Pixley qualified as mayor, showed that it was the purpose of the city council to continue to make appropriations for the salary of mayor the same as it had been fixed before, and as it existed at the time when Mayor Pixley entered upon the discharge of the duties of his office.

It follows that the court did not err in entering a decree dismissing the complaint for want of equity, and such decree is therefore affirmed.

WELLS v. SHEPARD.

Opinion delivered September 30, 1918.

1. NEGLIGENCE—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.—It was a question for the jury whether one who was injured by an automobile driven on the wrong side of the street while he was standing behind a watermelon wagon within three feet of the curb, was guilty of contributory negligence.

2. SAME—QUESTION FOR JURY.—Plaintiff was injured while standing behind a wagon which was violently struck by defendant's automobile, which was being driven on the wrong side of the street. The evidence tended to prove that if the chauffeur had had his automobile under control he could have stopped before striking the wagon, and also that he was negligent in turning his car too far, while endeavoring to avoid striking a horse and buggy being driven on the opposite side of the street. *Held,* that defendant's negligence was for the jury.

3. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.—Where the testimony showed that plaintiff's injuries were painful, though not permanent; that he had a cut over his eye, and his right shoulder bruised; that both legs were bruised from the knees down and the skin was off all around; that at the time of trial, three months after the accident, he could not bend his knee nor walk fast; that he lost a month from work, and had been earning 33½ cents an hour for nine hours a day at the time he was struck. *Held* that a verdict of $500 was not excessive.

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

STATEMENT OF FACTS.

Will Shepard sued Charles E. Wells to recover damages for injuries inflicted by an automobile which he alleges was at the time driven by a chauffeur of the defendant in a negligent manner. The facts as proved by the plaintiff are substantially as follows:

On the morning he received the injury, plaintiff was walking north on Spring Street on the sidewalk on the east side thereof. Between Seventh and Eighth Streets he saw a watermelon wagon standing about two and a half or three feet from the curb on the west side of the street, with the team headed south. He walked across the street and was standing behind the wagon looking at the watermelons when he was struck by the car. The automobile was on the east side of the street going north and was being driven by a one-armed man. There was a one-horse buggy being driven south on Spring Street between Seventh and Eighth Streets which was also on the east side of the street. The driver of the automobile turned to the left to avoid colliding with a buggy and, also, two pedestrians who were crossing the street. He missed the horse and buggy and the two negroes crossing the

street, but his car struck the back end of the watermelon wagon with great force and knocked it up against the curb. At the same time the plaintiff was also knocked over on the sidewalk and severely bruised. When found, he was lying in the street where he had been knocked down by the force of the car striking the watermelon wagon. The plaintiff was oblivious of the approach of the car.

According to the testimony of the chauffeur, he turned to the left to avoid the horse and buggy and the two men who were crossing the street. The plaintiff stepped out from behind the wagon without looking towards the street, and the fender of the automobile struck him. The car was running slowly at the time, and the chauffeur stopped it as quick as he could after striking the plaintiff. He stated that he cut the car to keep it from running over the plaintiff and did not hit the watermelon wagon at all. The chauffeur blew his horn when he got to Eighth Street and kept blowing it until after he struck the plaintiff. He turned to the left or west side of the street to keep from running over the horse and buggy and pedestrians that were on the right hand side or the east side of the street.

The jury returned a verdict for the plaintiff for $500, and the defendant has appealed.

Thomas S. Buzbee, George B. Pugh and *H. T. Harrison,* for appellant.

1. This was purely an accident and appellant was not liable. The evidence does not justify the verdict.

2. The verdict is excessive. 89 Ark. 9; 101 *Id.* 90; 117 *Id.* 47.

Fred A. Isgrig and *Fred A. Snodgress,* for appellee.

1. The testimony sustains the verdict. Negligence was proved.

2. The verdict is not excessive but extremely reasonable. 13 Cyc. 123; 112 S. W. 177; 86 Ark. 587; 13 Cyc. 121, 122, 123; 35 Ark. 492; 89 Ark. 58; 20 L. R. A. (N. S.) 458; 60 Ark. 481; 15 L. R. A. (N. S.) 779; 114

S. W. 230; 88 Ark. 12; 90 *Id.* 64, 108; 74 Ark. 610; 86 S. W. 804.

HART, J., (after stating the facts). It is first insisted by counsel for the defendant that the evidence is not sufficient to warrant the verdict.

The jury might well have found that the plaintiff himself was not negligent. The evidence shows that he was standing on the west side of the street between a watermelon wagon and the curb looking at the watermelons with the view of purchasing one; that the wagon was about two and a half or three feet from the curb. He was lawfully there, and had no reason to suppose that he would be run down by the negligence of the driver of an automobile running north on the opposite side of the street.

The negligence of the defendant was also a question for the jury. The automobile was going north, and it was the duty of the driver to have kept the automobile to the right of any vehicle he was approaching. It is claimed by the defendant that the chauffeur turned the automobile to the left to avoid striking a horse and buggy which was being driven south on the wrong side of the street and also to avoid striking two persons who were walking across the street. The situation of these persons, it is contended, created an emergency, and that the chauffeur was not negligent under the circumstances in turning his automobile to the left.

According to the testimony of the chauffeur himself, his brakes were not working well. In the first place, the jury might have found that he negligently turned his car too far to the left without checking its speed. The jury, too, might have found that if the chauffeur had had his automobile under perfect control, as he should have had on a public street, such as the one in question here, he might have stopped his vehicle before striking the wagon and have prevented the injury. The testimony for the plaintiff shows that the automobile struck the watermelon wagon with such force as to knock it over against the curb two and a half or three feet away. One

can not shield himself behind an emergency created by his own negligence.

It is next insisted that the verdict is excessive. The verdict was for $500. Dr Snodgrass testified that he dressed the wounds of the plaintiff, and that his injuries were not permanent; that the plaintiff had a cut over his eye and that his right shoulder was bruised; that both legs were bruised from the knees down and the skin was off all around; that the plaintiff was not seriously hurt, but had a rather painful injury; that he was dirty and muddy from top to bottom; that he was laid up two weeks before he got well.

According to the testimony of the plaintiff, himself, he could not bend his knee for almost three months after the injury and his knee was badly sprained; he had two cuts on his legs and he was cut pretty well all over; he was laid up for eighteen days and then went back to work but had to go home again for about nine days. The accident occurred in August, 1917, and at the date of the trial, November 2, 1917, the plaintiff could not walk fast on account of his injuries. He was making 33 1-2 cents per hour for nine hours per day at the time he was struck. He suffered severe pain on account of his injuries.

The testimony must be considered in the light most favorable to the plaintiff, and, when that is done, it can not be said that the verdict is excessive.

The judgment will therefore be affirmed.

LACEY v. STATE.

Opinion delivered September 30, 1918.

1. INTOXICATING LIQUORS—BRINGING INTO STATE.—Under Act 13, § 1 Acts of 1917, making it unlawful to transport into this State any alcoholic, vinous, malt, spirituous or fermented liquors, etc., for another person, a person is not prohibited from transporting liquor into this State or from one point to another in the State for his own use, whether that use be lawful or unlawful.

2. SAME—BRINGING INTO STATE—SUFFICIENCY OF EVIDENCE.—Proof that defendant was arrested while transporting 71 pints of whiskey is not sufficient to sustain a conviction under Acts 1917, c. 13, § 1, making it unlawful to transport alcoholic liquors for another person, there being no evidence that he was transporting the liquor for some other person.

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

Hawthorne & Hawthorne, for appellant.

1. The indictment does not charge a crime under the "Bone Dry" Act. 47 Ark. 488.

2. The court erred in the instructions, and the evidence fails to show any violation of law. Mere suspicion is not proof. There was no proof that appellant was transporting liquor for another. 202 S. W. 39; 16 Ark. 499; 13 *Id.* 712; 80 *Id.* 94; 68 *Id.* 529; 85 *Id.* 360; 100 *Id.* 184.

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

This indictment is good under the statute, and there is no error in the instructions. 202 S. W. 39.

HART, J. Joe Lacey prosecutes this appeal to reverse a judgment of conviction against him for the crime of unlawfully transporting intoxicating liquors along the highway in Craighead County, Arkansas.

The facts are undisputed, and are as follows:

Joe Lacey lived at Truman in Poinsett County, Arkansas. He left Truman in an automobile one night about ten o'clock. On the next night at about half past ten o'clock, he was arrested on the highway in Craighead County, between the towns of Lunsford and Truman. He and his wife were in the automobile at the time, and he had in his possession, under the back seat, seventy-one pints of whiskey. The automobile in which the defendant had the liquor was being pulled out of some holes in the road by a horse just before the defendant was arrested. He was traveling along the road towards Truman, and no one was in the automobile except the de-

fendant and his wife. The machine belonged to the defendant and his brother.

A deputy sheriff testified that he had never known the defendant to drink whiskey and that the defendant had told him at different times that he never drank. He stated further that he saw the defendant drunk one time the year before, but that he was drunk on Jamaica ginger.

The principal contention of the defendant is that, under the evidence that is disclosed by the record, the jury was not warranted in finding him guilty. The defendant was indicted under an act to prohibit the shipment of intoxicating liquors into this State and to prevent shipments of the same from one point in the State to another point in the State. Acts of 1917, p. 41. Among other things sections 8 of the act provides that it shall be unlawful for any person to convey or transport over or along any public street or highway any of the liquors referred to in section 1 of the act for another.

In construing section 1 of this act, in *Rivard* v. *State,* 133 Ark. 1, 202 S. W. 39, we held that the act applies to persons who carry for others only, and not to the personal transportation of an individual's own intoxicating liquor into the State from another State. This construction was followed in the case of *Winfrey* v. *State,* 133 Ark. 357. It will be noted that section 8 is directed against any one conveying or transporting along any public street or highway any of the liquors referred to in section 1 for another. The language of the act does not prohibit a person from transporting liquor into this State, or from one point to another in the State for his own use, whether that use be lawful or unlawful. It devolved upon the State to prove the guilt of the defendant. Of course, guilt may be proved by direct evidence, or by the proof of facts from which the inference of guilt may be legitimately drawn by the jury. To warrant the jury in finding the defendant guilty under the statute in question, the State must prove that he brought the liquor into the State for another, or transported it from one point to another in the State for another person. From the

quantity of liquor found in the defendant's automobile and the circumstances under which it was found, the jury might have legitimately inferred that the defendant was not transporting the liquor to his home to be there drunk by himself or used by his family; but whether the defendant was transporting the liquor for himself with the intention of selling it to other persons, or was transporting the liquor for another person is uncertain and wholly a matter of conjecture.

Under the evidence as disclosed by the record, it could only be a matter of mental speculation as to which of these purposes the defendant was transporting the liquor and conjecture can not be allowed to supply the place of the proof required to show the guilt of the defendant. It is not enough to show that one conjecture is as probable as another. The State must prove facts or circumstances from which the jury must find that the defendant was transporting the liquor for another.

From the evidence as disclosed by this record the jury might have equally inferred that the defendant brought the liquor in for his own use intending to sell it again, as that he was transporting it for some other person. One theory was as probable as the other, and the jury was left to guess at the true theory. This could not be done. The burden was upon the State to show that the defendant was transporting the liquor for another person. If he was transporting it for himself with the intention of selling it again to other persons, he was not guilty under the statute in question. There are other statutes directed against the sale or keeping for sale intoxicating liquors. *Andrews* v. *State,* 100 Ark. 184; *Jones* v. *State,* 85 Ark. 360, and *France* v. *State,* 68 Ark. 529.

The distinction we have pointed out is recognized in negligence cases. Where an employee is injured while at work for his employer, there is no presumption of negligence on the part of the employer, but it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. It is not sufficient

in such cases for the employee to show that the employer may have been guilty of negligence, but the evidence must point to the fact that he was. Where the testimony leaves the matter uncertain and shows that two or more things may have brought about the injury, for one or more of which the employer is responsible and for one or more for which he is not, it is not for the jury to guess between these two or more causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion.

It follows that the judgment must be reversed and the cause will be remanded for a new trial.

SMITH, J., (dissenting). In addition to the facts recited in the majority opinion, there was testimony to the effect that appellant left Truman Monday night in his car, at about 10:00 p. m., and was arrested on Tuesday night following, at about 11:00 p. m. The constable had observed the departure of the car, and had a lookout kept for it, and searched the car on the return trip, with the result stated in the majority opinion. It was also shown that appellant and his brother were engaged in making trips to Truman in their car, although there was no testimony that any one had hired the car to make a trip when the liquor was found.

There is nothing conjectural about the whiskey being in the car, nor that appellant was transporting it, until the car stuck in the mud.

We think the jury had the right to find from the testimony that appellant was not transporting the liquor for his own use. He did not drink; therefore, he did not need seventy-one pints of whiskey for his own use. And, was it mere speculation or conjecture for the jury to find that, if the appellant had been transporting the liquor for his own use, he would not have had it put up in seventy-one packages? We think not. The inference that the liquor had been put into pint bottles to be

sold, and thus delivered, is so highly probable that a finding to that effect comports with the conclusion any one would likely reach who did not exclude from his consideration the common knowledge of all men on this subject.

Now, who was going to sell this liquor? The only uncertainty in the case would appear to arise out of the answer to this question. Appellant's departure after night, and his return the next day after the night had fallen, are circumstances which indicate a purpose to clandestinely unload his cargo. It was a felony to sell the liquor, while it was only a misdemeanor to deliver it to another. We must, of course, presume, as the jury was directed to do, that the appellant was innocent until his guilt was established beyond a reasonable doubt. But does this presumption require us to presume that appellant was about to commit a felony, or, possibly, seventy-one felonies? Was it not more reasonable and plausible for the jury to find as it must have done that appellant was not about to commit one or more felonies but was only committing a misdemeanor by transporting the liquor for delivery to another? At any rate, must we say to the contrary, as a matter of law? We think not, and, therefore, we dissent.

Mr. Justice HUMPHREYS concurs in the views here expressed.

MOBLEY v. STATE.

Opinion delivered September 30, 1918.

1. INTOXICATING LIQUORS—EVIDENCE—POSSESSION OF LIQUOR.—Where defendant was being tried for a sale of intoxicating liquors made on September 6, 1916, proof that on June 6, previous, he had three dozen bottles of beer and some whiskey on ice was properly admitted.
2. SAME—EVIDENCE—RECEIPT OF LIQUOR.—Proof that three months before defendant is charged with having sold whiskey a 60-pound cask of whiskey was shipped to his order and received and delivered to another "on an order" was admissible.
3. CRIMINAL LAW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.—Exclusion of evidence, in a prosecution for the sale of intoxicating liquors, that a woman who testified for the State had habitually

hung around saloons when they were licensed was not prejudicial to defendant where she admitted on cross-examination that during the time saloons were operated she went there frequently and bought what she wanted.

4. SAME—IMPEACHMENT OF ONE INTERESTED IN PROSECUTION.—Evidence offered to show that a certain person had been convicted of selling liquor illegally was properly rejected when he did not testify, though it was proved that he worked for the prosecution, and put up a portion of the money with which the whiskey was purchased from defendant.

5. SAME—EVIDENCE.—An offer to have defendant exhibit his hands to the jury for the purpose of showing that he earned his living by the labor of his hands was properly refused where he had testified in the presence of the jury, and the jury had an opportunity to determine whether he presented the appearance of a laboring man.

Appeal from Pulaski Circuit Court, First Division; *J. W. Wade,* Judge; affirmed.

Philip McNemer, for appellant.

1. Hobbs' testimony is too remote and disconnected and is irrelevant. 23 Cyc. 250, note 24; 124 S. W. 107; 110 S. W. 900; 44 *Id.* 494; 111 *Id.* 412.

2. Dixon's testimony fails to connect appellant with the sale.

3. Holloway's testimony should have been admitted as to Mattie Foster's character. 1 Wigmore on Ev., 655, 749; 69 N. C. 75.

4. Luke Wesson was convicted of crime and the records showing this should have been admitted.

5. It was error to refuse to permit appellant to exhibit his hands to the jury, to show that he was a laboring man and earned his living by toil.

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

1. No error in admitting the testimony of Hobbs. Proof is not limited to a single sale, but proof tending to show any sale within the period of limitation is admissible. 127 Ark. 289; 130 *Id.* 322; 129 *Id.* 106.

2. No error in admitting the testimony of the express agent. The consignment was delivered to White on an order and the package was addressed to appellant.

3. No error in excluding testimony of Holloway. The method of impeachment is not proper. Kirby's Digest, § 3138; 99 Ark. 604; 130 *Id.* 365.

4. No error in refusing to permit appellant to exhibit his hands. He testified in his own behalf and the jury saw him. If error, it was harmless.

5. Wesson was not a witness and the records were properly not admitted as evidence.

SMITH, J. Appellant seeks by this appeal to reverse the judgment of the court below imposing a sentence of a year in the penitentiary upon a charge of selling intoxicating liquors.

It is first insisted that error was committed in permitting a deputy sheriff named Hobbs to testify that he raided appellant's home on June 6, 1916, and found three dozen bottles of beer and some whiskey on ice, but the witness was not as positive about the whiskey as he was about the beer; and he also testified that he saw a boy coming out of appellant's house at the time of the raid with a bottle in his hands.

The indictment was returned on October 6, 1916, and alleged the sale of the intoxicating liquors to have been made on September 26, 1916, and it is argued that this sale was too remote in point of time from the date of the raid for the facts there discovered to have any relevancy to the crime charged. It is true the State's testimony showed a sale of intoxicating liquors on September 26, the date alleged in the indictment; but the State was not limited to the proof of a sale made on that date. A conviction could have been had on proof of a sale made at any time after the sale of intoxicating liquors became a felony and within three years of the date of the indictment. As was said, in answer to the same contention now made, in the case of *Springer* v. *State,* 129 Ark. 110, the testimony showed that appellant had provided himself with large quantities of intoxicating liquor, and he had the beer cold and in condition to sell. And we have also said that the State, to secure a single

conviction, may offer proof of more than one sale. *Dean* v. *State,* 130 Ark. 322; *Mason* v. *State,* 127 Ark. 289. The testimony on the part of the State showed the sale of two one-half pints of whiskey, one of which sales had been made at appellant's home, and the other half pint was sold and delivered near there. The place of these alleged sales is identical with the place testified to by the witness Hobbs, and we can not say that the time was so far removed as to have no relevancy, as showing the business in which appellant was engaged.

Exceptions were saved to the action of the court in permitting an express agent to testify that in June, 1916, a sixty-pound cask of whiskey was received at the express office consigned to appellant, and delivered to Francis White. Objection is made that the testimony does not connect appellant with the receipt of this liquor. It was shown, however, that the package was addressed to appellant and that it was delivered to White "on an order."

The court refused to permit one Holloway, a witness for appellant, to testify that Mattie Foster, a witness for the State, habitually hung around the Argenta saloons. It appears, however, that witnesses who claimed to know this witness well testified that she was a bad woman and that from her general reputation for truth and morality they would not believe her on oath; and she herself admitted on her cross-examination that during the time saloons were operated in Argenta she went there frequently and bought what she wanted. The testimony of the impeaching witness shows that Mattie Foster was a woman of bad character, and her own admissions on cross-examination showed that she was addicted to the use of intoxicating liquors, and no attempt was made by the State to controvert either of these facts, and no error was committed in refusing to admit testimony to the effect that Mattie Foster had hung around saloons in Argenta during the period of their operation. Moreover, the impeaching testimony was properly limited to

general reputation and not extended to proof of specific instances of bad conduct.

The court refused to permit appellant to introduce in evidence circuit court records tending to impeach one Luke Wesson by showing that Wesson had been convicted in the circuit court of Hempstead County at the April term, 1913, for three illegal sales of liquor. A witness for the State had testified that Wesson worked for the prohibition people, and that Wesson put up a portion of the money with which the last half pint of whiskey was purchased. In support of this assignment of error, it is argued that the jury might have found that Wesson was interested in obtaining a reward for procuring a conviction, and that the women who testified against appellant were interested in assisting Wesson to earn this reward, and that proof of Wesson's conviction for selling liquor illegally would show the character of man he was and make it appear more plausible to the jury that the appellant was the victim of a frame-up. A sufficient answer to this contention is that Wesson did not testify at the trial of this case, and had nothing to do with the purchase of the liquor except to furnish a portion of the money with which the last half pint was purchased; and there was no testimony to the effect that Wesson would have received any reward or derive any advantage from a conviction in this case.

It is finally insisted that error was committed in refusing to permit appellant to exhibit his hands to the jury, his counsel having stated, at the time this offer was made, that they were hard, rough and full of corns. This offer was made for the purpose of showing that appellant was a laboring man and earned his living by honest toil. He testified that he worked for a transfer company in the city of Little Rock, and had not missed a day from his work in nine years except when he was sick.

The majority of the court is of the opinion that no error was committed in the exclusion of this testimony, for the reason that the witness had testified in the presence of the jury and the opportunity had been thus af-

forded for the jury to determine whether appellant presented the appearance of a laboring man or not. Moreover, the State made no attempt to show that appellant was not a laboring man, and it was not denied that he had worked regularly at his employment, and the excluded testimony would have had no relevancy concerning defendant's guilt.

No error prejudicial to the appellant appearing in the opinion of the majority, the judgment of the court below is affirmed.

E. L. BRUCE COMPANY v. YAX.

Opinion delivered December 17, 1917.

1. MASTER AND SERVANT—QUESTIONS FOR JURY.—In an action by an employer in a hardwood mill for personal injuries received when the drive belt slipped off a pulley of his machine, struck him, knocked him down and dragged him under the machine, issues of negligence, contributory negligence and assumed risk were for the jury, under the evidence.
2. SAME—SCOPE OF EMPLOYMENT.—When a servant acts without reference to the service for which he is employed, and not for the purpose of performing the work of the employer, but to effect some independent purpose of his own, the master is not responsible for either the acts or omissions of the servant; but when the servant acts with reference to the services for which he is employed and for the purpose of performing the work of his employer, the acts so done are within the scope of his employment.
3. SAME—SCOPE OF EMPLOYMENT OF FELLOW SERVANT—QUESTION FOR JURY.—In an action for injuries to plaintiff operating a machine in a hardwood mill, whether a fellow servant in enlarging the pulley which drove plaintiff's machine to speed up the machine to make up for lost time was acting within the scope of his employment *held* a question for the jury.
4. SAME—SCOPE OF EMPLOYMENT—INSTRUCTION.—In an action for injuries to an employee for injuries alleged to be due to the negligence of a fellow servant in wrapping a belt around the pulley which drove plaintiff's machine, an instruction was properly refused which told the jury in effect that defendant would not be liable if the fellow servant in wrapping such pulley was acting on his own accord and without the instructions or knowledge of the defendant and without authority, express or implied, since the defendant would be liable if the fellow servant was acting within the scope of his employment, although without the instruction or knowledge of the master.

5. SAME—SCOPE OF EMPLOYMENT—EVIDENCE.—In determining whether a fellow servant was acting within the scope of his employment on a certain occasion, it was proper for the jury to consider testimony tending to show that such action was without the instruction or knowledge of the master.

6. SAME—EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE AND ASSUMED RISK.—Neither contributory negligence nor assumed risk is a defense, under the Employers' Liability Act (Acts 1913, p. 734), where a corporation employer, by violating any statute enacted for the safety of its employees, thereby contributed to the injury or death of such employees; in other cases assumption of risk is a complete defense, but contributory negligence only reduces the damages in proportion to the amount of negligence attributable to the employee.

7. SAME—EMPLOYERS' LIABILITY ACT—INSTRUCTIONS.—Under the Employers' Liability Act, it is important that the instructions should distinguish between the defenses of assumed risk and contributory negligence, and it is prejudicial error, where the evidence warrants it, for the court to refuse to submit the defense of assumed risk, even though it may have correctly instructed the jury on the defense of contributory negligence.

8. SAME—EMPLOYERS' LIABILITY ACT—NEGLIGENCE OF FELLOW SERVANT.—Under the Employers' Liability Act, a servant does not assume the risk of the negligence of the employer or of any of his agents, servants or employees, unless the servant had knowledge of such negligence and appreciated the dangers therefrom.

9. SAME—ASSUMED RISK—QUESTION FOR JURY.—In an action against a mill company for injuries caused when the driving belt of a machine slipped from its pulley, where there was evidence that plaintiff knew of the alleged negligence of a fellow servant in enlarging the driving pulley, the question whether he understood and appreciated the risk, and therefore assumed it, was for the jury, and it was error to refuse to submit same to the jury.

10. SAME—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.—In an action against a corporation under the Employers' Liability Act, it was error to instruct the jury that if the danger to which plaintiff was subjected was not an ordinary and usual risk incident to the employment, and if the servant, knowing and appreciating the danger incident thereto, continued to work, he was guilty of contributory negligence; the court should have allowed the jury, under proper instructions to say as to whether or not the plaintiff was guilty of contributory negligence, and whether he assumed the risk.

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

STATEMENT OF FACTS.

The appellee who was near 35 years of age, was employed by the appellant, a corporation, having a hardwood mill and doing business in Arkansas. His duties were to feed flooring into what is known as an American flooring machine. The machine was the best that could be obtained in the hardwood business. Appellee represented to appellant that he had had experience as a machine man, and doing inside finishing work. Appellee stood at a table at the rear of the machine, placed the lumber on the table and shoved the same towards the machine, which caught it into an automatic feed, and thus the lumber was pulled through the machine. The machine was driven by a main feed belt that ran from the main shaft underneath the mill and drove the entire machinery.

One Sanders was in the employ of appellant as machine man, and it was his duty to look after the machine and see that it was properly operated. The superintendent of appellant told Sanders that he was expected to get 30,000 square feet of flooring through the machine in ten hours. They considered that a normal output, but there was nothing compulsory about it.

On the day appellee received his injuries, the plant had been shut down about an hour, and Sanders, in order to make up for lost time and to produce, if possible, the average 30,000 square feet, conceived the idea of enlarging the pulley on which the belt that operated the machine worked in order to make the machine run faster. Sanders wrapped an extra belt, about twelve feet long, and about one-fourth of an inch thick, around the pulley, which increased the diameter of the pulley about two inches. This would cause the machine at which appellee was working to run faster, and get the lumber through faster. When the belt was wrapped around the pulley it was laced and some brads driven through to hold it in place. The appellee was present and assisting in getting the belt around the pulley. After the pulley was wrapped Sanders instructed appellee to go ahead and

feed the machine which appellee did and in a few moments the belt slipped off of the pulley and struck appellee in the chest, knocking him down, dragged him under the front end of the machine and injured him severely.

Neither the superintendent nor other managing officers of the appellant had instructed Sanders to increase the size of the pulley in the manner indicated and they knew nothing about it until after the accident. Sanders did this of his own volition.

The appellee sued the appellant, alleging that his injuries were produced by the negligence of appellant's servants in the manner of wrapping the belt around the pulley, and in negligently operating the pulley when so wrapped at an excessively high rate of speed.

The answer denied the negligence, as alleged, and set up affirmatively that the appellee assumed the risk and was guilty of contributory negligence.

The above presents the issues and the salient features of the evidence upon which the cause was sent to a jury under instructions by the trial court, resulting in a verdict and judgment in favor of the appellee in the sum of $2,500, from which this appeal comes. Other facts stated in the opinion.

Sherman & Landon and *Roscoe R. Lynn,* for appellant.

1. The court erred in refusing to direct a verdict for defendant and in refusing to give instruction No. 1 requested. Kirby's Digest, § 5482; 10 Bing. 385; 26 S. W. 360; 24 L. R. A. 363; 86 S. W. 503; 144 Pac. 63; 13 S. W. 1042; 138 Pac. 621; 47 L. R. A. (N. S.) 1116; Labatt on Master & S., § § 1642-4; 85 Ark. 600; 93 *Id.* 397; 86 Mo. App. 601; 193 Mo. 299, etc.

2. It was error to refuse No. 2 requested by appellant. Cases *supra;* 26 Cyc. 1526; 29 *Id.* 1533.

3. It was error to give No. 8 for plaintiff. And the court erred in giving and refusing instructions on the defense of assumption of risk by appellee. 233

U. S. 492; 155 S. W. 638; 43 Ark. 88; 105 *Id.* 533; 96 *Id.* 387; 95 *Id.* 560-562-3; 77 *Id.* 367; 89 *Id.* 424; 220 Ill. 522; 77 N. E. 147; 4 L. R. A. (N. S.) 848.

4. The court improperly charged the jury as to matters required to be proven by appellee to entitle him to recover and assumption of risk. Cases *supra.*

Rhoton & Helm, for appellee; *Gardner K. Oliphint,* on the brief.

1. Sanders was acting within the scope of his authority in wrapping the pulley. 96 Ark. 358; 93 *Id.* 397.

2. There was no error in giving or refusing instructions. 98 Ark. 227; 122 *Id.* 232; 124 *Id.* 597; 98 Ark. 218; 93 *Id.* 573.

3. The instructions as to assumed risk and contributory negligence were not error. 77 Ark. 367; 90 *Id.* 567; 83 *Id.* 567; 88 *Id.* 243; 18 L. R. A. (N. S.) 698; 196 S. W. 439; 1 Thompson on Negl. (2d ed.) § 180; 67 Ark. 209; 146 Pa. St. 67; 187 S. W. 177; 88 Ark. 258; 112 S. W. 985; 101 *Id.* 142; 125 *Id.* 751; 61 S. E. 79; 18 *Id.* 584; 73 N. W. 573; 37 Mich. 205; 91 *Id.* 624; 74 Ind. 440; 35 W. Va. 500; 53 Oh. St. 43; 20 Col. 320; 177 Ill. 324; 100 S. W. 971; 86 Ark. 515; 82 *Id.* 537; 4 Thompson on Negl. (2d ed.) § § 3721 to 5318, 4618, p. 638; Labott M. & S. 3310, 3326; 98 Ark. 211, 219, and cases cited; 86 Ark. 515; 90 *Id.* 568; 71 *Id.* 518, 578, and many others.

See also 92 Ark. 502; 124 Ark. 597; 122 *Id.* 232; 97 *Id.* 489; 30 *Id.* 376; 90 *Id.* 531; 191 S. W. 236, etc. No prejudicial error is shown.

WOOD, J., (after stating the facts). (1) The evidence was sufficient to warrant the court in sending the issues of negligence, contributory negligence and assumed risk to the jury.

(2) Appellant's principal contention is that the act of Sanders in wrapping the pulley in the manner alleged and proved was not within the scope of his employment and in the line of his duty at the time, and that therefore, under the uncontradicted evidence, the appellant was not liable, and that the court should have so in-

structed the jury. This contention of appellant is not sound.

The duty of Sanders was to take charge of the machine, to look after it and see that it was operated rightly. He was requested by the superintendent to make the machine, which was one of the best of its kind, make an average of 30,000 square feet in a ten hours' run, which was the normal output for such a machine.

On the day of the injury over an hour's time had been lost and Sanders was endeavoring to make up this lost time by enlarging the pulley so as to increase the speed of the machine. Sanders was an experienced machinist, and he was placed in charge of this machine, without any specific directions however as to what he should do to make the machine produce the usual output in case there was any loss of time. No instructions upon that subject were given him one way or the other. No hard and fast rule has been or can be prescribed by which to determine what acts are within the scope of a servant's employment. Each case is governed by its own particular facts, under certain general rules of law.

Cooley says: "Where a servant acts without reference to the service for which he is employed, and not for the purpose of performing the work of the employer, but to effect some independent purpose of his own, the master is not responsible for either the acts or omissions of the servant." Cooley on Torts, 1032; 26 Cyc. 1536. Conversely, when the servant acts with reference to the services for which he is employed and for the purpose of performing the work of his employer, and not for any independent purpose of his own, but purely for the benefit of his master, it is generally held, under such circumstances, that the acts so done are within the scope of the servant's employment.

In *Sweeden* v. *Atkinson Imp. Co.*, 93 Ark. 397, 402, we said: "The act of the servant for which the master is liable must pertain to something that is incident to the employment for which he is hired, and which it is his duty to perform, or be for the benefit of the master.

It is therefore necessary to see in each particular case what was the object, purpose and end of the employment and what was the object and purpose of the servant in doing the act complained of. The mere fact that he was in the service generally of the master or that the servant was in possession of facilities afforded by the master in the use of which the injury was done would not make the act attributable to the master. The act must have been done in the execution of the service for which he was engaged." See also *Tillar* v. *Reynolds,* 96 Ark. 358; *Arkansas Natural Gas. Co* v. *Lee,* 115 Ark. 288. See also the well considered case of *Marlowe* v. *Bland,* 154 N. C. 140, 9 S. E. 752, 47 L. R. A. (N. S.) 1116.

Now, applying these general principles to the facts of this record, it was an issue for the jury to determine as to whether or not the acts of Sanders in wrapping the pulley were within the scope of his employment. The court did not err in refusing to take this issue from the jury, and did not err in refusing to grant appellant's prayer for instruction No. 2 on this issue.* This prayer was argumentative, abstract and calculated to mislead the jury, because, even though appellee may have acted without the instruction or knowledge of the defendant and wholly of his own accord, he might still be acting within the scope of his employment, provided the act was done for the benefit of the master and in the line of appellee's duty to operate the machine so as to produce, if possible under the circumstances, the quantity of finished flooring that the appellant's superintendent had requested in the day's run of ten hours.

In determining the issue of whether or not the machinist was acting within the scope of his employment it was proper for the jury to consider the testimony on behalf of the appellant tending to show that the machinist,

*No. 2. The court instructs the jury that if you find and believe from the evidence in this case that Sanders in wrapping the belt about the pulley was acting without the instructions or knowledge of the defendant and wholly of his own accord, and that he had no authority, either express or implied, from the defendant to wrap such pulley, then the defendant is not liable for the acts of Sanders, and your verdict will be for defendant.

in wrapping the pulley, was acting without the instructions or knowledge of the appellant, but this is as far as the instruction should have gone. It was still for the jury to decide, after considering such testimony in connection with the other facts, as to whether or not the machinist was acting within the scope of his employment.

(3) At the request of the appellee the court granted the following prayer for instruction: "You are instructed that plaintiff assumed all the risks and hazards ordinarily and usually incident to his employment, and that he will be presumed to have contracted with reference to such risks and hazards, if known and appreciated by him. He will be presumed to have assumed the risks incident to all dangers and defects which were apparent and obvious, if any. If he knew and appreciated the danger of the conditions complained of in this case, and you find such was a usual and ordinary risk, you must find for the defendant. But if you find the danger complained of was not an ordinary and usual risk incident to his employment, and plaintiff continued to work, knowing and appreciating the danger, he was guilty of contributory negligence."

This suit was instituted under our statute commonly known as the employers' liability act, Act 175 Acts of 1913, p. 734. The first section of the act provides, in substance, that every corporation, except while engaged in interstate commerce, shall be liable to its employees for personal injuries sustained by them resulting in whole or in part from the negligence of the corporation or any of its officers, agents or employees.

Neither contributory negligence nor assumption of risk is a defense under the statute where the corporation by violating any statute enacted for the safety of its employees thereby contributed to the injury or death of such employees. In all other cases contributory negligence is not a complete defense, but assumption of risk is. There is a clear distinction in the statute between the defenses of assumption of risk and contributory negli-

gence. Except in cases where a violation of the statute by the corporation caused or contributed to the injury, contributory negligence does not bar a recovery, but only diminishes the damages in proportion to the amount of negligence attributable to the employee; but except in such cases where a violation of the statute by the corporation caused or contributed to the injury, assumption of risk is a complete defense.

Our statute is modeled after the Federal Employers' Liability Act, and the Supreme Court of the United States, in *Seaboard Air Line Ry.* v. *Horton,* 233 U. S. 492, clearly recognizes the distinction drawn in the Federal statute between the defenses of contributory negligence and assumption of risk as follows: "Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his own safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risk may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and

risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arises out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man, under such circumstances, would rely upon such promise."

In *Carter* v. *Kansas City So. Ry. Co.*, 155 S. W. 638, the Supreme Court of Texas says: "Assumed risk is founded upon the knowledge of the employee, either actual or constructive, of the hazards to be encountered, and his consent to take the chance of injury therefrom. Contributory negligence implies misconduct, the doing of an imprudent act by the injured party, or his dereliction in failing to take proper precaution for his personal safety. The doctrine of assumed risk is founded upon contract, while contributory negligence is solely a matter of conduct."

Mr. Justice Riddick, speaking for the court in the thoroughly considered case of *Choctaw, Okla. & Gulf Ry. Co.* v. *Jones,* 77 Ark. 367, after defining the distinction between the defenses of assumption of risk and contributory negligence, said: "But, though the defenses of contributory negligence and assumed risk are separate and distinct, yet it frequently happens that they are both available in the same case and under the same state of facts. For instance, as we have stated, a servant assumes all the risks ordinarily incident to the service in which he is employed, and it is also true that he can not recover for an injury caused by his own negligence. Now,

it may turn out that the injury of which the servant complains was not only due to one of the ordinary risks which the servant assumed, but that it was also caused in part by his own negligence. In dealing with such a case it is, so far as results are concerned, immaterial whether it be disposed of by the courts on the ground of assumed risk or contributory negligence, for either of them make out a good defense. * * * If he (the servant) is injured by such negligence, he can not be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger; for, as we have before stated, the doctrine of assumed risk rests on consent; but if the injury was caused in part by his own negligence, he may be guilty of contributory negligence. On the other hand, if he realizes the danger, and still elects to go ahead and expose himself to it, then, although he acts with the greatest care, he may, if injured, be held to have assumed the risk."

The leading case of *Choctaw, Okla. & Gulf Ry. Co.* v. *Jones, supra,* defining the defenses of contributory negligence and assumption of risk, and showing the distinction between them, has been followed by this court in numerous cases. In the comparatively recent case of *A. L. Clark Lumber Co.* v. *Johns,* 98 Ark. 211, 217, we recognized the fact that, where the facts justified it, both the defenses of contributory negligence and assumed risk were alike available. In that case we said: "Where the servant is aware of the defect, and the danger is so imminent and obvious that a person of ordinary prudence would not continue in the work, he not only assumes the risk, but is guilty of contributory negligence. This is where the doctrine of contributory negligence and of assumed risk approximate so that they are indistinguishable. * * *

"We do not mean to say that in all cases it is sufficient to give an instruction on contributory negligence, and that that includes assumption of risk. On the contrary, it may be said that a servant often is held to have assumed the risk of a danger, though he is not guilty of

contributory negligence, for, in the absence of a promise on the part of the master to repair a defect, if the servant is aware of the defect and appreciates the danger therefrom, he assumes the risk by proceeding with the work, even though to do so might not be an act of negligence on his part."

Before the passage of the employers' liability act, in cases where, under the evidence, the defenses of contributory negligence and assumption of risk approximate so closely as to become indistinguishable, then it would not have been prejudicial error in any case for the court to have failed to draw the distinction between the two defenses, for the defendant's rights in such cases were fully protected if it got the benefit of either, for at that time either of these defenses was a complete defense, that is, barred recovery. But, since the passage of our employers' liability act, it does become all important for the court, in its instructions, to draw the distinction which is made by the statute, and to so frame its instructions to the jury as to allow the defendant the benefit of the defense of assumption of risk in any case where the evidence warrants it, even though the same evidence may justify an instruction on the defense of contributory negligence. For, as above stated, if the jury should find under the evidence that the employee was guilty of contributory negligence that would not be a complete defense, while a finding that he had assumed the risk under the same state of facts would be.

It is necessarily, therefore, prejudicial in any case where the evidence warrants it for the court to refuse to submit the defense of assumption of risk, even though it may have correctly instructed the jury on the defense of contributory negligence.

Now, under our employers' liability act, the injured employee does not assume the risk, and the master is liable for an injury caused by the negligence of the employer or of any of his agents, servants or employees. "By virtue of the statute the negligent act of the fellow servant is, as far as the rights of the injured servant are

concerned, the same as if it was the negligent act of the master." *St. Louis S. W. Ry. Co.* v. *Burdg*, 93 Ark. 88.

Under the statute an injury caused by the negligence of the master or fellow servant is not one of the ordinary risks incident to the employment which the servant assumes when he enters the service of his employer. The effect of the statute was to make the negligent act of the individual servant the negligent act of the master. Except in the particulars named in the statute, the defense of assumption of risk remains the same as it was at the common law.

The statute was not intended to and does not deprive the employer of the right to set up the defense of assumption of risk by the injured employee where such injury was the result of the negligent acts of a fellow servant of which the injured employee had knowledge and the dangers of which he appreciated. Speaking to this point in *Western Coal & Mining Co.* v. *Corkille,* 96 Ark. 387, it was said by this court: "The rule is well settled that while a servant does not assume the unusual risks of the service and of which he is ignorant, he does by his contract of employment assume all the ordinary and usual risks of the service and the dangers incident thereto, and he assumes further all the risks which he knows to exist. If the danger arises from the negligent act of the master, and he becomes aware of such negligence, and has sufficient intelligence to know the effects of such negligence, then he assumes the danger arising therefrom." See, in addition to *Choctaw, Okla. & Gulf Rd. Co.* v. *Jones, supra,* and *Clark Lumber Co.* v. *Johns, supra,* and cases cited therein, *Graham* v. *Thrall,* 95 Ark. 560, and *St. L., I. M. & S. Ry. Co.* v. *Brogan,* 105 Ark. 533.

Now the court, in the above instruction, virtually told the jury that the appellee only assumed such dangers as were the usual and ordinary risks of the employment and such as were obvious, if any; that he would not assume the risk of dangers that were not ordinarily and usually incident to his employment, even though he had knowl-

edge of and appreciated the risk; that in the latter case he would be guilty of contributory negligence.

The evidence tended to prove that the wrapping of the pulley in the manner set forth in the statement created an unusual risk; but the evidence also tends to show that the appellee was present when the pulley was wrapped in this manner and assisted in bringing the belt around. He therefore had knowledge of the alleged acts of negligence which resulted in his injury, and it was for the jury to say, under all the circumstances, as to whether he understood and appreciated the danger. If the issue of assumed risk as to unusual or extraordinary dangers had been submitted under proper instructions there was testimony from which the jury might have found that the appellee assumed the risk. The failure therefore of the court to submit this issue was highly prejudicial to the rights of the appellant.

The court erred, under the evidence in the case, in telling the jury as matter of law that if the danger was not an ordinary and usual risk incident to the employment, and if appellee, knowing and appreciating the danger incident thereto, continued to work that he was guilty of contributory negligence. The court should have allowed the jury, under proper instructions, to say as to whether or not appellee, under such circumstances, was guilty of contributory negligence, or whether or not he assumed the risk. If appellee was guilty of contributory negligence, as we have already shown, the appellant would still be liable, but if he assumed the risk the appellant would not be liable.

Several other errors were assigned in the rulings of the court in the giving and refusing of instructions, but what we have already said, it is believed, will furnish the court a correct guide as to its charge on a new trial. We do not deem it, therefore, important to discuss the various other assignments of error. The court erred in so framing its charge as to deny appellant the defense of assumption of risk, in the manner above indicated, and for this

error the judgment must be reversed and the cause remanded for a new trial.

LARAMORE v. RADFORD.

Opinion delivered October 7, 1918.

APPEAL AND ERROR—PRESUMPTION.—Where the record of an appeal by a plaintiff from a justice of the peace shows that the defendant moved to dismiss the case, and that after hearing the evidence the court sustained the motion, and dismissed the case, and that plaintiff filed neither a motion for new trial nor a bill of exceptions, it will be presumed on appeal that such ruling was supported by sufficient evidence.

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

The appellant, *pro se.*

The inventory required by statute was filed. Kirby's Digest, § 56-7. The estate was exempt. *Ib.* § 72-4. The estate was not insolvent. The widow had a right to the horses and could dispose of them. *Ib.* § 74. She was not barred by failure to make appraisement or file the list in time. 67 Ark. 283.

C. H. Herndon, for appellee; *Jerry Witt,* of counsel.

No motion for new trial was filed nor is there any bill of exceptions. There is nothing before this court. 11 Ark. 190; 111 *Id.* 529; 90 *Id.* 316; 200 S. W. 132, and many others.

HART, J. This suit was commenced before a justice of the peace. There are no written pleadings contained in the record, but the transcript of the justice of the peace shows that on the 16th day of June, 1917, M. C. Laramore filed an affidavit against O. M. Radford, Public Administrator, for the replevin of two horses. On the 7th day of July, 1917, the parties appeared and evidence was heard on a motion of the defendant to dismiss the case. After hearing the evidence, it was ordered that the motion be overruled, and that the plaintiff recover of the defendant the property involved in the

action. The defendant filed an affidavit for appeal to the circuit court which was granted by the justice of the peace. The record shows that in the circuit court the following proceedings were had:

"In the Montgomery Circuit Court.

"February Term, 1918. (Feb. 5, 1918.)

"M. C. Laramore, Plaintiff,

vs.

"O. M. Radford, Public Admr., Defendant.

"Comes defendant and demurs to the jurisdiction of the court, and moves the court to dismiss the case. After hearing the evidence, the motion is sustained and the case is dismissed, to which ruling of the court the plaintiff excepts and prays an appeal to the Supreme Court, which is granted and plaintiff given 60 days to file bill of exceptions."

So far as the record discloses, the plaintiff neither filed a motion for a new trial nor a bill of exceptions. The record recites that the court, after hearing the evidence on the motion of the defendant to dismiss the case, sustained it. In this state of the record, we must assume that the ruling of the court upon the motion to dismiss was supported by sufficient evidence. The record does not show upon what particular ground the defendant asked the court to dismiss the case, but we must assume that if the court had authority to dismiss the action on any ground the evidence was sufficient to support the finding of the court upon the issue of fact presented by the motion. *Heard* v. *McCabe,* 130 Ark. 185; *Billingsley* v. *Adams,* 102 Ark. 511; *Armstrong* v. *Lawson,* 128 Ark. 39; and *James* v. *Dyer,* 31 Ark. 489.

It follows that the judgment must be affirmed.

McLAIN v. KEEL.

Opinion delivered October 7, 1918.

1. APPEAL AND ERROR—FINDING OF CHANCELLOR—CONCLUSIVENESS.—On appeal in a chancery case the chancellor's finding will be affirmed where the testimony is in direct conflict upon an issue of fact, and leaves the appellate court in doubt as to where the preponderance lies.
2. ROADS AND HIGHWAYS—RIGHTS OF ORIGINAL OWNER OF HIGHWAY.—The right which the public acquires in a public highway, whether by order of the county court or by open continuous and adverse user without such order for a period of more than 7 years, is only an easement, the original owner or his privies retaining the fee with all rights not inconsistent with the public use.
3. SAME—ABANDONMENT BY NONUSER.—The right to a public highway, once established by prescription or limitation, may be abandoned by nonuser, and if so abandoned for a period of more than 7 years, the right of the owner of the fee to re-enter and exclude the public from the use of the highway is restored.

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

Gustave Jones, for appellants.

The road was never abandoned as a highway. The only way to abolish a road established by order of court, or prescription is the way prescribed by statute. 42 Minn. 391; Kirby's Digest, § 3008; 10 Ark. 241; 65 N. Y. 57; 103 *Id.* 77; 16 Wend. 531; 83 Ky. 608; 83 Ark. 336-8; 35 *Id.* 495. The decree is without evidence to support it.

S. D. Campbell, for appellees.

1. The road was established by "user" and was only an easement and had long been abandoned and ceased to be a public road. 24 Ark. 102; 50 *Id.* 471; 51 *Id.* 497; 69 *Id.* 448.

2. This road was never established by order of court and this is not a collateral attack. 83 Ark. 236; 16 Wend. 531; 83 Ky. 608; 64 S. W. 411. The road was clearly abandoned.

WOOD, J. This action was instituted by the appellees against the appellants to enjoin the latter from open-

ing up a certain road through appellees' premises. The appellees alleged in substance that they were the owners of certain lands (describing them) over which there was an old road from Newport to Old Grand Glaize in Jackson County, Arkansas; that the road had been abandoned as a public highway about 30 years ago; that the land over which the road formerly passed had been enclosed by appellees and held by them openly, adversely, and continuously for more than 15 years; that appellant Frank Nelson, as road overseer, acting under orders of appellant W. D. McLain, the county judge of Jackson County, was threatening to destroy appellees' fence and crops in order to open up the road to the public; that no viewers had been appointed and no proper orders made by the county court relating to the opening up of said road. Appellees prayed that appellant be perpetually enjoined. Appellants answered, admitting that the road had been once established as alleged, but denied that it had ever been abandoned.

It could serve no useful purpose as a precedent to set up and discuss in detail the testimony bearing upon the issues of fact as to the establishment of the alleged highway in controversy and the alleged abandonment thereof. There is no record evidence that the road in controversy had ever been laid out and established as such by order of the county court in the manner provided by law. We are convinced from the testimony that the road was established at least by user. The record of the county court and other evidence tends to prove that the right of the public to use the road as a highway was recognized by the county court some 25 years before this action was brought; that a road overseer was appointed who worked the road with free labor at that time.

But there was testimony tending to prove that for a long interval between that time and down to the year 1903, when appellees fenced the lands in controversy, the public generally had ceased to use the road. There is also testimony tending to show that the road had not been abandoned by the public. The court found that the

road in controversy had been abandoned and entered a decree perpetually enjoining appellants, as prayed in appellee's complaint. The testimony is in direct conflict on this issue and leaves us in doubt as to where the preponderance lies. The finding of the chancellor therefore, on the issue of fact will not be disturbed. *Leach* v. *Smith,* 130 Ark. 465, 470; *Holloway* v. *Eagle, ante* p. 205.

The right which the public acquires in a public highway, whether by order of the county court or whether by open, continuous and adverse user without such order, for a period of more than seven years is only an easement. The original owner or his privies in title still retain the fee; together with all rights not inconsistent with the public use. See *Taylor* v. *Armstrong,* 24 Ark. 102; *Packet Co.* v. *Sorrels,* 50 Ark. 467, 471; *Reichert* v. *Ry.,* 51 Ark. 491. See also *Kendall* v. *J. I. Porter Lumber Co.,* 69 Ark. 448.

It is well settled that where a highway is used by the public for a period of more than seven years, openly, continuously and adversely, the public acquires an easement by prescription or limitation of which it can not be dispossessed by the owner of the fee. *Patton* v. *State,* 50 Ark. 53; *District No.* 2 v. *Winkler,* 102 Ark. 553. But it is also equally well settled that the right to a public highway once established by limitation or prescription may be abandoned by non-user, and if so abandoned for a period of more than seven years, the right of the owner of the fee to re-enter and to thereby exclude the public from the use of the highway is restored. See *Phillips* v. *Lawrence,* 23 Ken. Law Rep. 824-825, where the facts were very similar to the facts of this record. In *Corning* v. *Gould,* 16 Wend. 531, it is held that, in order to prove an abandonment, the enjoyment must have totally ceased for the same length of time as was necessary to create an original presumption.

Under our statute the right by limitation or prescription is established by adverse user for a period of seven years. *Johnson* v. *Lewis,* 47 Ark. 66; *Clay* v. *Penzel,* 79 Ark. 5. See also *State* v. *Parker,* 132 Ark. 316. Non-user for the same length of time abandons the right. In

the absence of a statute, the doctrine of "once a highway, always a highway" has no application.

The decree is correct, and it is therefore affirmed.

DEQUEEN & EASTERN RAILROAD COMPANY v. PIGUE.

Opinion delivered October 7, 1918.

1. APPEAL AND ERROR—MODE OF SAVING EXCEPTIONS.—Exceptions to the action of the court in giving or refusing instructions must be made during the trial and brought into the record by a bill of exceptions, and cannot be reserved by merely assigning them as grounds for a motion for new trial.
2. SAME—CONCLUSIVENESS OF JURY'S FINDING.—A jury's finding upon a disputed question of fact will not be disturbed on appeal.
3. RAILROADS—DUTIES TO PERSONS WORKING ON CARS.—It is the duty of a railroad company to exercise ordinary care in moving its cars to prevent injury to owners of freight and their employees rightfully engaged in loading or unloading cars.

Appeal from Howard Circuit Court; *J. S. Lake,* Judge; affirmed.

D. B. Sain, for appellant.

1. The court erred in its instructions to the jury. Appellee was a mere trespasser. 83 Ark. 300; 88 *Id.* 172; 57 *Id.* 461; 99 *Id.* 422.

2. The verdict is not supported by the evidence.

W. P. Feazel, for appellee.

1. No exceptions were saved to the instructions. 114 Ark. 300; 88 *Id.* 505.

2. Appellee was not a trespasser and he was entitled to the exercise of ordinary care on the part of appellant's servants not to injure him. 104 Ark. 409; 93 *Id.* 15.

3. The testimony is abundantly sufficient to sustain the verdict.

HART, J. Harmon Pigue was injured while unloading freight from one of the cars of the DeQueen & Eastern Railroad Co. at Dierks, Arkansas. He alleged that the injuries were sustained on account of the negli-

gence of the railroad company and sued it to recover damages. The case was tried before a jury which returned a verdict in favor of the plaintiff for $350 and from the judgment rendered this appeal is prosecuted.

It is first insisted that the judgment should be reversed because the court erred in giving certain instructions for the plaintiff. No exceptions were saved to the action of the court in giving or refusing instructions, but the alleged errors now complained of were made grounds of the defendant's motion for a new trial. This was not sufficient. Exceptions to the action of the trial court in giving or refusing instructions must be made during the trial and brought into the record by a bill of exceptions, and can not be reserved by merely assigning them as grounds for a motion for a new trial. *Arkansas-Denning Coal Co.* v. *Yocum,* 128 Ark. 291; *Kentucky Military Institute* v. *Cohen,* 131 Ark. 121, and *Cammack* v. *Southwestern Fire Ins. Co.,* 88 Ark. 505.

The only question presented for review on this appeal is the sufficiency of the evidence to sustain the verdict. The circumstances attending the injury as proved by the plaintiff are substantially as follows:

On the day the plaintiff was injured he was engaged in driving a public dray for Ike Garrison. He drove his wagon to the depot at Dierks for the purpose of unloading from the railroad company's cars some angle irons for lintels over some windows. The freight checker of the railroad company pointed out the car in which this freight was and directed them to enter the car and unload the freight. The plaintiff backed his wagon up against the door of the car and got in his wagon for the purpose of receiving the freight and loading it in the wagon as it was handed to him from the car. The consignee of the freight was in the car handing the freight to the plaintiff in the wagon. The car which they were unloading was attached to a local freight train and while they were unloading it the engineer backed the train which caused the wagon in which the plaintiff was standing to turn over and throw him from it whereby he was

painfully injured. The freight train had been backed from the main track onto the house track before they commenced to unload the car. The car however, was still attached to the train. The plaintiff and the consignee of the freight knew that the car was still attached to the train but they were directed to unload it by the freight checker as above stated. The custom was for the consignee or drayman to go to the station agent and pay the freight bill. The station agent would then turn the freight bills over to a helper, called the freight checker, with directions to go and check out the freight. The helper or freight checker would then show the consignee or drayman in what car the freight was and direct them to go in there and unload it. This course was followed on the occasion in question, and the car from which the freight was being unloaded was moved without any warning or signal being given by the employees of the railway company.

It is true that evidence was adduced by the railway company to show that the conductor of the train alone had authority to give persons permission to enter a car attached to his train for the purpose of unloading freight therefrom, but, as we have already seen, this testimony was contradicted by evidence adduced for the plaintiff to the effect that it was the universal custom for the freight agent in person, or through the freight checker, to give persons coming to the depot for freight the right to enter cars for the purpose of unloading the freight, even though such cars were still attached to a freight train. The jury found this disputed question of fact in favor of the plaintiff, and under the settled rules of this court its verdict will not be disturbed on appeal.

The car was moved without any signal or warning to those engaged in unloading the freight from it. It is well settled in this State that it is the duty of the carrier to exercise ordinary care in moving its cars to prevent injury to owners of freight and their employees rightfully engaged in loading or unloading cars. *Missouri & N. A.*

Rd. Co. v. *Duncan,* 104 Ark. 409, and *Memphis, Dallas & Gulf Rd. Co.* v. *Yandell,* 123 Ark. 515, and cases cited.

It follows that the judgment must be affirmed.

STANLEY *v.* SMITH.

Opinion delivered October 7, 1918.

1. DAMAGES—WHEN NOT EXCESSIVE.—A verdict for $450 for damages to personal property *held* not excessive.
2. LANDLORD AND TENANT—WRONGFUL EJECTION—INSTRUCTION.—In an action by a tenant against his landlords for damages to personal property caused by his wrongful ejection from the leased premises, an instruction that "if plaintiff's wife took immediate charge of said property after its removal defendants would not be liable for the value of any of the articles which may have subsequently been lost or injured" was properly refused where the evidence tended to prove that the property was injured by exposure to the weather, and that plaintiff was unable to secure shelter for the property.
3. TRIAL—SPECIAL FINDINGS.—It was within the discretion of the court to require the jury to make special findings.

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

L. C. Going, for appellants.

1. The verdict is against the evidence. The damages, if any, arose from plaintiff's own neglect. The total damages proven only aggregate $35, and the verdict is excessive.

2. The court erred in refusing to direct a verdict and in refusing to require the jury to answer the interrogatory.

J. C. Brookfield, for appellee.

1. The evidence supports the verdict. 46 Ark. 524; 66 *Id.* 175; 44 *Id.* 486.

2. The verdict is not excessive. 15 Ark. 452; 24 *Id.* 55.

3. There is no error in the instructions. Special findings are authorized by law. The judgment is right.

WOOD J. This action was brought by the appellee against the appellants. Appellee alleged that appellants entered his home which he occupied under a lease from the appellants; that appellants drove his wife from his home, took possession of his household and kitchen furniture and threw the same into the public road in the mud while a rain was falling, by which appellee was damaged as follows:

1 piano	$250.00
2 brass bed-steads	22.75
1 wooden bed-stead	5.00
1 princess dresser	125.00
1 oak dresser	5.00
1 wash stand	2.50
1 sewing machine	17.50
1 ice box	5.00
1 davenport	12.50
2 feather beds	22.50
2 felt mattresses	12.50
1 straw mattress	1.25
1 ice cream freezer	1.25
1 heating stove	6.25
1 cook stove	9.00
500 pounds of meat	125.00
1 bowl and pitcher	2.50
1 slop jar	1.25
Picture frames	3.00
1 set of cooking utensils	6.25
Stove pipe	1.00
Rocking chair	2.50
Plain chair	1.25
1 hand saw	2.00
1 kitchen safe	2.50
1 lot of tools	7.50
1 lot of harness	15.00
2 tons of cotton-seed	300.00

Appellee alleged damage also to his wife and son resulting from exposure in the rain in the sum of $250. He alleged that the acts complained of were maliciously

and wantonly done and prayed for punitive damages in the sum of $1,000. The appellants answered and denied all material allegations of the complaint. The testimony of the appellee tended to sustain the allegation of his complaint as to the illegal and wrongful ejection of his family from the home of appellee and the removing therefrom by the appellants of the items of household and kitchen furniture specified therein, and the placing of the same on the river bank.

The appellants virtually concede here that the ejection was unlawful. At least, they make no contention that same was lawful. The jury returned a verdict in favor of the appellee in the sum of $450. Judgment was entered in his favor for that sum, from which is this appeal.

The appellants contend here, first; that the verdict is contrary to the evidence; second, that the court erred in refusing to give instruction No. 9 requested by the appellants, and third; that the court erred in refusing to require the jury to answer the following interrogatory: "If you find for plaintiff, what articles of property do you find were lost, destroyed or damaged, and the value of, or damage to each article?"

1. It could serve no useful purpose to set out and discuss in detail the evidence on the issues of fact. The appellee testified that "they (appellants) threw my stuff on the river bank and when I got back where it was, it was pouring down rain." His testimony and the testimony of his wife tended to show that a piano, which had cost $275 four months before, was damaged by the rain so that it was "not much 'count, keys all down, not much sound." He alleged the damage on this item of $250. A couple of bed-room sets, one costing $57 which was new, and the other $65, "went down the river." The sewing machine that cost about $19 "that was all right at the time" also went down the river. Appellee lost what was estimated at "about 500 pounds of home killed hog meat" worth about 15 or 16 cents a pound. Appellee had six sets of harness: "got tramped all down in the mud; got

tore up; saved one set, worth about $3.50 to $4 a set." Appellee lost, "about 30 odd hundred pounds of cotton-seed worth about $45 a ton."

Appellee testified to various other items that were lost or damaged and stated what they were worth. One witness testified that he passed up the river and saw appellee's piano and household furniture on the bank and that it had then been raining two or three days. Another witness testified that he saw the furniture on the bank of the river the second day after it had been put there and that it was in a bad shape; that the cotton-seed were wet; that hogs and cattle had been tramping over it and that it was impossible for anybody to get a house at that time; that witness tried to get appellees a house and failed; that appellees got an order from the chancellor restraining the appellants from interfering with appellees' possession and they moved back into the house.

Appellants made no specific objection to the testimony that was offered by the appellee. The testimony of appellee tending to show what he had paid for the articles mentioned in his complaint, the length of time he had used same, their cost, their present worth and damaged condition, was relevant on the issue as to the measure of appellee's damages. See *Perkins* v. *Ewan,* 66 Ark. 175.

2. Appellants' prayer 9 was as follows: "If plaintiff's wife took immediate charge of said property after its removal, defendants would not be liable for the value of any of the articles which may have subsequently been lost or injured." The appellee testified that he left his wife in charge of the household goods the day they were moved by the defendant, and that she was in charge of same when he got back. The appellee was not at home at the time the goods were moved out of the house.

John Stanley testified that he "told the negroes to put the furniture under a pecan tree next to Rogers' house," when the wife of plaintiff said: "Don't put it down there, put it down in front of Mr. Lindley's house because Walter will be up after a while, and we will take care of it this afternoon." Witness "sent some lumber

up there to floor those vacant tents and she said she did not want it; that Walter would take care of the furniture."

The prayer for instruction 9 was not a correct declaration of law for the reason that there was testimony tending to prove that efforts had been made to obtain a house for the appellee, and that none could be found. There was testimony from which the jury might have found that appellee's property was damaged by reason of its removal from the house by appellants, notwithstanding the appellee's wife took immediate charge of the same. The instruction was therefore misleading. Besides, the subject-matter of this prayer for instruction was sufficiently covered by instructions 2 and 3 as follows:

"2. You are instructed, gentlemen, that the act of the defendant in moving from the house, testified about the property mentioned, was a wrongful act, and that the plaintiff is entitled to recover from the defendant the value of any of the property that was lost or destroyed or damaged and injured on account of the wrongful act in moving from the house, except in so far as the act of the plaintiff in failing to care for the property was concerned, and about which I will now instruct you.

"3. It was the duty of the plaintiff, after his property was removed from the house, and, as soon as he was apprised of its position and condition, to use due diligence and reasonable effort, with the means and opportunity available to him, or reasonably procurable, to protect said property against loss and damage, and to the extent of any loss and damage due to the failure of the plaintiff to exercise such care and diligence, the defendant would not be liable, under the rules as announced to you."

3. It was within the discretion of the court to require or not the jury to make special findings as requested by appellants, and the court did not abuse its discretion in refusing to require such special findings. *L. R. & Ft. S. Ry. Co.* v. *Pankhurst,* 36 Ark. 371. There is no error in the record and the judgment is affirmed.

WHORTON v. HAWKINS.

Opinion delivered October 7, 1918.

1. JUDGMENT—CONCLUSIVENESS.—Where a court had jurisdiction to render a decree, the fact that the decree was erroneous would not excuse disobedience on the part of those bound by its terms until it was reversed.
2. CONTEMPT—MODE OF REVIEW.—Review of a final judgment in a proceeding for contempt of court is by certiorari; and not by writ of error or appeal.

Appeal from Madison Chancery Court; *Ben F. McMahan,* Chancellor; affirmed.

STATEMENT OF FACTS.

On the 8th day of February, 1918, a citation issued out of the chancery court of Madison County upon appellant, J. P. Whorton, commanding him to appear in that court on February 12, 1918, and show cause why he had not paid to the commissioner of that court the sum of $425.96, which sum the court at its August term, 1917, had ordered its commissioner to pay to appellee, Rebecca A. Hawkins, out of the moneys held by appellant for the commissioner as in pursuance of the above decree in the case of *Rebecca A. Hawkins* v. *W. E. Danner et al.* The citation was duly served, and the appellant filed his response in which he set up, (1) that he should not be required to pay the sum mentioned in the citation for the reason that no judgment had been rendered against him in the cause mentioned in the citation and no order of the court had been made requiring him to do so, and that there was no finding of the court that appellant had in his hands the sum mentioned; (2) that he had no money in his hands or possession belonging to the estate of R. B. Newman, deceased, or arising from the sale of real estate belonging to said estate; (3) that he held a mortgage against the lands of R. B. Newman which constituted his homestead, and had brought a suit for foreclosure against the children and heirs of R. B.Newman, one of whom, Earl Newman, was a minor 11 years of age; that after the foreclosure there was a balance in his hands belonging to the

estate of R. B. Newman of $2,069; that respondent had purchased the interest of all the heirs in the homestead except the minor, Earl Newman; that in the foreclosure suit the court decreed that respondent was entitled to two-thirds of the surplus, and Earl Newman, the minor, was entitled to one-third; that at the August term, 1914, of the chancery court one W. E. Danner, guardian of Earl Newman, the minor, filed his petition praying the court for an order authorizing Alfred Hawn, the clerk of the court, to pay over to W. E. Danner as guardian of Earl Newman, as his part of the surplus from the sale of the homestead, the sum of $700; that the court entered a decree ordering such sum to be paid to the guardian, and the respondent, Whorton, was by the decree released from further payment, and the commissioner was authorized and did turn over to the respondent the balance of the surplus in his hands and took respondent's receipt therefor.

Respondent alleged that the surplus remaining from the sale of the homestead, therefore, was no longer a fund in the hands of the court, but was the absolute property of respondent. He further alleged that in the event the court should hold that the surplus from the sale of the mortgage was subject to the payment of the debts of the estate of R. B. Newman, the amount of $700 of such surplus which had been paid to the guardian of Earl Newman was also subject to the payment of the debts of R. B. Newman and should bear its proportion in the payment of same, and that respondent could not be required to pay the amount until he arrived at his majority and that he was then 18 years of age. He further alleged that appellee, Rebecca A. Hawkins, never had made any payment of any kind against the estate of R. B. Newman. He therefore prayed that the citation be discharged.

The commissioner's report showed substantially the facts as set up in the response to the citation, that he had been directed by the chancery court of Madison County to pay over the sum of $700 to the guardian of Earl Newman, which he had done and taken his receipt therefor, and

that he had taken a receipt of J. P. Whorton for the balance of the surplus as a settlement in full of the judgment held by J. P. Whorton against the other heirs of R. B. Newman's estate. He reported that, in making the settlement with Whorton, the respondent, he had acted upon the advice and agreement of the court and counsel for all the parties in the original case of Whorton v. Ben and Earl Newman.

The original decree in the case of Rebecca A. Hawkins v. W. E. Danner, guardian of Earl Newman and Joseph Whorton, rendered at the August term, 1917, was introduced and contains the following recitals: "On this day, this cause coming on to be heard upon the complaint of the plaintiff and the answer of the defendant, Joseph Whorton, from which the court finds; that the defendants, Earl Newman and Joseph Whorton, have each been served with personal service for the time and in the manner required by law. The court further finds that Joseph Whorton, who is the owner of the R. B. Newman homestead, has in his hands and possession the sum of $1,369.04 or rather that said sum is in the hands of the commissioner of this court due the said Joseph Whorton, and that the same is the proceeds of the homestead of Earl Newman, the sum arising from the sale of the foreclosure of a mortgage upon said homestead, which mortgage was held by the said Joseph Whorton. The court further finds that Rebecca A. Hawkins is the owner of a judgment against the estate of R. B. Newman, deceased, which judgment was rendered by the probate court of Madison County, Arkansas, in the total sum of $328.56 with interest thereon from the day of ....., 1906, amounting to the total sum of $732.70, which said amount is a lien against the surplus of the proceeds of the said mortgage sale, which surplus is $1,369.04. The court further finds that the defendant, Joseph Whorton, is the owner of probated claims against the estate of R. B. Newman, deceased, in the total sum of $1,617.81, which amount is also a lien against the surplus from the proceeds of the said homestead sale. The court further finds that the

said Rebecca A. Hawkins and Joseph Whorton are entitled to share in said surplus to the amount of their respective claims against said homestead, and that the said Rebecca A. Hawkins is entitled to recover the sum of $425.96.

It is therefore by the court considered, ordered, adjudged and decreed that the said sum of $425.96 be and the same is declared a lien on the said sum of $1,369.04 in the hands of the commissioner of this court together with the costs of this suit, and the commissioner of this court is ordered to pay said amount of $425.96 to the said Rebecca A. Hawkins."

The court refused to allow further proof to be introduced on the issue made by the citation and response thereto "on the ground that all the matters alleged in the response were fully adjudicated between Rebecca A. Hawkins and the said J. P. Whorton in this action at the August term, 1917, of this court and that the decree of the court entered thereon and that the full rights of said Rebecca Hawkins and the said J. P. Whorton to the $1,369.04 involved herein, were fully adjudicated in said decree. That said Whorton prayed and was granted an appeal to the Supreme Court of Arkansas, and the said Rebecca A. Hawkins prayed and was granted a cross-appeal, and the court finds that no appeal has been perfected by either party. And the court further finds that said Whorton is by said decree bound for the payment of $425.96 adjudged to Rebecca A. Hawkins and cost accruing in said matter." The court therefore entered a decree dismissing the appellant's response for want of equity and ordered the appellant to pay Alfred Hawn, the commissioner, within 30 days the sum of $425.96, from which decree is this appeal.

H. G. Combs, for appellant; *J. B. Harris* and *J. S. Combs,* of counsel.

1. Appellant was not permitted to introduce any proof in support of his response. If appellee had any remedy it was by proceeding to modify the judgment. The court committed judicial error when it found that the

surplus was in the hands or possession of Alfred Hawn. 15 Standard Enc. of Proc. 123-4 and notes. It was error to cite appellant to show cause and order him to pay over. There was no judgment against him nor finding that he had said sum in his hands, and he had not.

W. N. Ivie, for appellee; *W. H. Spencer,* of counsel.

1. The order is not a final judgment. 3 C. J. 512; 44 Ark. 141; 3 C. J. 517, 518. There is no appeal from such an order.

2. Courts have inherent power to enforce their judgments and orders. 99 Ark. 163. Appeal is not the proper remedy, but certiorari. 78 Ark. 262; 14 *Id.* 538.

3. But this case is controlled by 80 Ark. 579. The court had jurisdiction and the parties are bound by the order. 80 Ark. 579; 86 *Id.* 140. There is no merit in this appeal.

WOOD, J., (after stating the facts). The decree of August 14, 1917, in which the appellee and the appellant were parties was *res adjudicata* on the matters set up by the appellant in his response to the citation. In that case the decree of the court was tantamount to a judgment in favor of the appellee against appellant for the sum of $425.96, which sum appellant was ordered to pay over to the commissioner appointed to carry out the original decree of foreclosure. If the decree in that case was erroneous, the appellant could and should have had the same corrected on appeal or in some other manner which involved a direct attack on that decree. The citation herein was but a process to enforce that decree which had not been annulled in any manner provided by law.

In *Meeks v. State,* 80 Ark. 579, we held: "Where a court had jurisdiction to render a decree, the fact that the decree was erroneous would not excuse disobedience on the part of those bound by its terms until it was reversed." The citation herein is in the nature of a direct proceeding against the appellant for contempt for disobedience of the orders of the chancery court, and ap-

pellant's remedy against a final judgment or order based upon such process was not by writ of error or appeal, but by certiorari. *Cossart* v. *State,* 14 Ark. 528; *Ex parte Butt,* 78 Ark. 262. But the record is before us and treating it as on certiorari, it does not appear that the court erred in its decree, and the same is therefore affirmed.

HUMPHREYS, J., not participating.

BUSH v. BUSH.

Opinion delivered October 7, 1918.

1. DIVORCE—CONDONATION.—Condonation is the voluntary forgiveness and remission of a cause for divorce upon the condition that the offender will reform and will not be guilty of another cause for divorce; such condonation, in order to constitute a waiver of the cause for divorce, must amount to a reconciliation and a reunion of the parties, and may be by express agreement of the parties to forgive the past and continue to live together or be implied from the conduct of the injured party.
2. DIVORCE—CONDONATION.—Where plaintiff, after a separation, visited his wife at her parent's home, and agreed upon terms of reconciliation with her, and took her back to his home, a distance of three miles, and, after waiting ten or fifteen minutes, announced to her that they could not get along together and against her protest carried her back to her parents, his acts amounted to a condonation of any existing causes for divorce.

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

W. A. Cunningham and *W. E. Beloate,* for appellant.

1. The facts do not constitute adultery on the part of appellant. 110 N. Y. 658; 71 *Id.* 137; 9 A. & E. Enc. "Adultery."

2. The mere indiscretions of the wife were condoned by appellee. 23 Ark. 621; 87 *Id.* 179; 14 Cyc. 637.

3. The charge of cruelty is a recriminatory defense to adultery. 128 Ark. 110; 6 A. & E. Am. Cases 169 and note p. 172.

W. P. Smith, for appellee.

1. Adultery was fairly proved. 110 N. Y. 658, and cases cited by appellant.

2. There was no condonement. 23 Ark. 615; 53 *Id.* 484.

McCULLOCH, C. J. This is an action instituted by a husband against his wife to obtain a decree for divorce on the alleged ground of adultery. The parties intermarried in December, 1914, and lived together until on or about July 2, 1917, a girl baby having been born unto them in the meantime, who was about a year and a half old at the time of the separation. The acts of adultery are alleged to have been had with one Swan during the month of May, 1917. The answer of the defendant contained a denial of the charge of adultery, but the court found the issue of fact in favor of the plaintiff and granted the divorce.

The plaintiff is a farmer residing in Lawrence County, out in the country a few miles from Alicia, and defendant's parents reside in the same neighborhood. The proof shows beyond dispute that the parties did not live happily together after a few weeks subsequent to their intermarriage. The proof shows, too, that the plaintiff was at fault in that his conduct toward his wife was overbearing, and intolerant, and at times brutal. He admits in his testimony that he determined a few weeks after the marriage that he and his wife could not live happily together and that he would have carried her back to her parents if he could have "put her back home in as good shape as he found her." The proof shows that plaintiff struck his wife on several occasions, once with a bed slat, and his own explanation shows that it was on very trivial grounds that he struck his wife. It seems that during the month of May, 1917, a rumor became current in the neighborhood that the defendant and Swan were corresponding with each other by letter, and that there were perhaps improper relations between the two. The first information communicated to plaintiff concerning the matter was made by defendant's father, and the plaintiff at once be-

gan an investigation which he says convinced him of the infidelity of his wife, and on July 2, he took her back to the home of her parents and left her there. The extent of the communications between defendant and Swan is fully developed in the testimony, and the defendant from the very start made frank admissions concerning them. The evidence shows that defendant wrote to Swan twice, once by postal card and the other time by letter, and in each instance she gave the communication to other parties to mail or deliver. The letter was unsealed and the contents of neither of the communications have been proved, except that one of the witnesses testified that, while he could not remember all of the contents of the letter, it began by addressing Swan as "Dear boy" or "Dear old boy." It appears from the testimony that defendant and Swan had been sweethearts before her intermarriage with plaintiff. The proof also shows that Swan wrote a letter to defendant in which he stated that rumors were current in the neighborhood concerning their conduct, and that it would be best for them to discontinue further communications. The communications between the defendant and Swan seem to have been conducted without any attempt whatever at secrecy. The letters were unsealed, and were intrusted for delivery to acquaintances who had full opportunity to read them, and who did read them.

The testimony also proved two meetings between defendant and Swan in plaintiff's absence. On one occasion defendant attended a singing school at a church house in the neighborhood one night, and left the place with Swan before the singing ended. The facts concerning their meeting come from defendant herself, and she states that she started home in company with Swan, but after walking together for a certain distance she heard some one coming, and realizing the awkwardness of the situation she ran away from Swan and went home alone. Defendant admits that in the letter to Swan she expressed her willingness for him to come to her home to see her while her husband was absent attending a lodge meeting. She

states that Swan came to the gate on the occasion mentioned and that she went out there to meet him. Her husband was absent, but others who lived in the house were there at the time. Defendant denied that there was any criminal intimacy between her and Swan, and there is no proof of such intimacy further than the correspondence and meetings above recited.

The chancellor concluded that acts of adultery were inferable from the proved relationship and communications between the parties. Since we have concluded to dispose of this cause on another issue, which will be presently discussed, it is perhaps unnecessary to determine whether the chancellor was justified in drawing the inference that acts of adultery had been committed between defendant and Swan, but when all the circumstances are considered together the inference is necessarily a very weak one, and it is doubtful, to say the least of it, whether it ought to be indulged so as to convict the defendant of so grave a charge of infidelity to her husband. The defendant from the very start admitted to her husband that she had been guilty of acts of indiscretion, and the openness with which the communications between those parties was conducted evinces a consciousness on her part of slight acts of indiscretion, rather than more serious acts of culpable immorality.

But, without passing on the question of the sufficiency of the evidence to warrant the finding of the chancellor, we pass to the further question in the case whether or not the alleged offense of adultery was condoned by the plaintiff so as to preclude him from pleading the original act as grounds for divorcee. The proof shows that after plaintiff carried his wife back to her parents on July 2, he visited her several times at that place, but there is a sharp conflict in the testimony as to the character and circumstances of those visits. Defendant testified that plaintiff remained there with her two nights and occupied the same bed with her and the baby. The testimony of others living in the house was to the effect that plaintiff occupied the same room with defendant on those two nights. Plain-

tiff denied this, however, and introduced testimony tending to show that he did not stay at the house of defendant's parents on those nights, or on any other night after he carried her back to the home of her parents. It is unnecessary to determine where the preponderance of testimony on that question lies, for we propose to base our conclusion on other admitted facts concerning the conduct of plaintiff toward his wife.

It is admitted that plaintiff visited his wife at the home of her parents on July 5, and that there in the presence of defendant's mother the parties agreed upon terms of reconciliation, and that they were to resume their relations as husband and wife, and that she was to return to his home. After entering into this agreement, plaintiff went out to the field where defendant's father was at work and told the latter about the reconciliation, and received the congratulations and good wishes of his father-in-law. Plaintiff went back to the house, and he and his wife started back on their journey to his home, a distance of about three miles, with the understanding that their reconciliation was complete. When they got to plaintiff's home, it was about dark, and after remaining there a very short time, perhaps ten or fifteen minutes, plaintiff announced to defendant that he had concluded that they could not get along together and directed that she get together some of her clothes and that he would take her back to her parents. She objected to going back, but he insisted, and against her protest he carried her back to her parents. Plaintiff's brother was living with him at the time, and they had cultivated a crop together, and the evidence tends to show that plaintiff's change of mind was brought about on account of his brother's threat that he would not live there if defendant was taken back into the home. Plaintiff denied that that was the cause of his change of mind, but he gives such an unsatisfactory explanation of his conduct at that moment that the conclusion is irresistible that his brother's attitude was the cause of his change of mind. We think the evidence shows that while he had fully made up his mind to take his wife back to his home and to become completely reconciled and

forgive her alleged past offense, he deliberately made a choice between her and his brother, and decided to give her up rather than suffer his brother to leave.

The question now presented is whether or not he made that choice too late, and is barred by his acts of reconciliation with his wife. The definition of condonation in its legal application to marital relations is stated by one of the text writers on that subject as follows: "Condonation is the voluntary forgiveness and remission of a cause for divorce upon the condition that the offender will reform and will not be guilty of another cause for divorce. The condonation, in order to constitute a waiver of the cause for divorce, must amount to a reconciliation and a reunion of the parties. The reconciliation may be by express agreement of the parties to forgive the past and continue to live together. But ordinarily the condonation is implied from the conduct of the injured party. One who relies upon a cause for divorce must not be guilty of inconsistent conduct. If such party has acted as if no real injury was inflicted, or has pursued a course of conduct evincing an intention to forgive the past and not apply for a divorce, he is estopped to declare a contrary intention." 1 Nelson on Divorce and Separation, Sec. 450. The same author in another section (452) further states the law on the subject as follows: "The conduct which amounts to condonation must be something more than mere verbal forgiveness. It must amount to a reconciliation of the parties to such an extent as to evince an intention to forgive the offense and an acceptance of the forgiveness by the offender. The offer of the injured party to return and resume cohabitation is not such a waiver of the past as will amount to condonation. At most, such offer amounts to a waiver only on condition that a reconciliation is brought about. Such offer is not inconsistent with an intention to apply for a divorce in case the offer is declined."

The conduct of the appellant according to his own admission contains all the elements necessary to constitute legal condonation of the alleged offense. It was vol-

untary and complete. It is true that he changed his mind and undertook to rescind his acts of forgiveness and reconciliation before the resumed relations with his wife had proceeded to the extent of actual cohabitation or sexual intercourse, but it is not essential that the relations should have proceeded to that extent in order to become complete and binding. There are two modes or forms of condonation; one express and the other implied, and, while there are some authorities that go to the extent of holding that an implied condonation is not completed with any act short of actual cohabitation, we find none of the authorities that hold that an express condonation need go to that extent.

There is no statute in this State on that subject, and we must, therefore, resort to the application of common law principles for the purpose of determining what does and what does not constitute an act of condonation which is binding.

We have already seen from the statements of the text writers on the subject that mere words alone are not sufficient to constitute even an express condonation unless acted upon by the parties by resuming to some extent the marital relations. In the language of the Lord Chancellor in the case of *Keats* v. *Keats,* 32 Law Times Rep. (O. S.) 321, condonation means "a blotting out of the offense imputed, so as to restore the offending party to the same position which he or she occupied before the offense was committed." The case just cited contains an interesting discussion on the subject of what is necessary to constitute a complete condonation, and the following is stated to be the law on that subject:

"It is true that forgiveness is an act of the mind, but it can only be manifested by words or by outward acts. The acts which prove forgiveness may be so strong and unequivocal, as by taking home an offending wife and cohabiting with her, that they may conclusively establish condonation. But words, however strong, can at the highest only be regarded as imperfect forgiveness, and, unless followed up by something which amounts to a recon-

ciliation and of a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete. It has been argued that nothing less than renewed sexual intercourse will be sufficient to establish condonation. It is obvious, without adducing instances to illustrate my meaning, that that in some cases may be a test wholly inapplicable."

The few cases which apparently hold to the rule that actual intercourse is essential to a completion of the condonation are cases where the husband or wife remained in the house with the offending party after discovering the acts of infidelity, and in none of the cases did it occur, so far as we can discover, that the parties had separated and afterwards resumed to any extent their relations as husband and wife. In the present case it is seen that there was a complete separation, and later a complete verbal reconciliation in the presence of other parties, and this was acted upon by a return of the wife to the home of her husband pursuant to the agreement that there was to be complete forgiveness and a resumption of the marital relation. They walked a distance of three miles to get back to their home, and it was only after they had gotten there that the plaintiff changed his mind and decided to recall his act of reconciliation. We think it was too late for him to do so, for he had deliberately entered into the agreement with his wife and permitted her to act upon that agreement by leaving the home of her parents and journeying back with him to their former home.

This conclusion is distinctly in line with our decision in the case of *Shirey* v. *Shirey,* 87 Ark. 175, where we held that the dismissal of a divorce suit pursuant to an agreement to resume the marital relation constituted a complete condonation of the alleged offense.

The decree of the chancery court is, therefore, reversed, and the cause is remanded with directions to dismiss the complaint for want of equity.

GIBSON v. STATE.

Opinion delivered September 23, 1918.

1. HOMICIDE—SUFFICIENCY OF INDICTMENT.—An indictment for murder is sufficient which alleges that defendant killed decedent by shooting him with a dangerous weapon, towit, a pistol, then and there held in the hands of him, the said Tom Gibson, with the felonious intent, etc., although the indictment fails to allege that the pistol was loaded or what it was loaded with.

2. JURY—DISQUALIFICATION.—Veniremen in a murder case who had read a newspaper account of the killing written by one who testified at the trial were not incompetent as jurors, although they had formed opinions about the case, where they stated that they could and would disregard such opinions if accepted as jurors, and where it appears that they did not regard the newspaper article as a narrative of one who had personal knowledge of the facts there recited, and they had no special intimacy or friendship with the writer of the article.

3. CRIMINAL LAW—EXCLUSION OF EVIDENCE—HARMLESS ERROR.—The exclusion of evidence, in a homicide case, that defendant and decedent on the morning of the killing had gone together to get some whiskey and that their conversation disclosed no friction or ill will between the men was not prejudicial when other testimony admitted showed that later in the day the men were still drinking together in friendly fashion and that no quarrel arose between them until after they had commenced a game of poker, which was broken up by the killing.

4. HOMICIDE—SELF-DEFENSE—INSTRUCTION.—Where there is evidence that would support a finding of self-defense, the court should give a proper requested instruction upon that feature of the case, notwithstanding the defendant's testimony that he did not do the killing.

5. HOMICIDE—SELF-DEFENSE—INSTRUCTION.—Where, in a prosecution for homicide, defendant denied that he killed the decedent, and the only testimony which tended to prove that the killing was in self-defense tended to establish that the defendant was the aggressor at the outset, an instruction on self-defense which ignored defendant's duty, if he was the aggressor, to make an honest attempt in good faith to withdraw from the combat was properly refused.

Appeal from Greene Circuit Court, Second Division; *W. J. Driver,* Judge; affirmed.

W. W. Bandy and *Huddleston, Fuhr & Futrell,* for appellant.

1. The indictment is defective as it does not allege that the pistol was loaded with gunpowder and balls. 2 Bishop New Cr. Proc. § 514 (2); Bishop Div. and Forms (2 Ed.) 520 and notes.

2. Incompetent jurors were accepted. 79 Ark. 127.

3. The court erred in excluding testimony of B. R. Hopkins. 3 Wigmore on Ev. § 1730.

4. The court erred in refusing instruction No. 1 on the theory of self-defense. 86 Ark. 30; 73 *Id.* 126; 19 A. & E. Cases 118; 70 Kan. 241; 10 Enc. Pl. & Pr. 173; 40 N. E. 525; 46 S. W. 491; 107 *Id.* 739; 1 Bishop Cr. Proc. (3 Ed.) § 980, etc.

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

1. The indictment is sufficient. Kirby's Digest, § § 2229, 2242-3.

2. There was no error in accepting jurors. The challenged jurors were competent. 114 Ark. 472; 109 *Id.* 450; 103 *Id.* 21; 66 *Id.* 53.

3. There was no error in excluding testimony of B. R. Hopkins.

4. Defendant's requested instruction on self-defense was properly refused. Appellant denied the killing outright. He provoked the difficulty and made no attempt to withdraw or avoid the necessity of the killing. 16 Ark. 568; 69 *Id.* 558; 104 *Id.* 397; 95 *Id.* 428; 77 *Id.* 141; 93 *Id.* 409; 99 *Id.* 576; 77 *Id.* 97.

SMITH, J. On Christmas day, 1917, about seven o'clock P. M., John Wise, the constable of Clarke Township, in Greene County, was shot and instantly killed in the Main Hotel in the City of Paragould, Arkansas. No one was present at the killing except John Wise, Croft Morris and E. T. Gibson, who was the owner of the hotel. Gibson was indicted at the May, 1918, term of the Greene Circuit Court for murder in the first degree, and at his trial was convicted of murder in the second degree and his punishment fixed at twenty-one years in the peniten-

tiary, and he has prosecuted this appeal to reverse that judgment.

A demurrer was filed to the indictment on the ground that the "indictment does not allege with what the pistol was loaded, nor does it allege in fact that the pistol was loaded."

The allegation of the indictment was that Gibson had killed Wise by "shooting him, the said John Wise, with a dangerous weapon, to wit, a pistol, then and there had and held in the hands of him, the said Tom Gibson, with the felonious intent," etc.

The motion for a new trial assigned as error the action of the court in holding four members of the special venire competent to serve as jurors, thereby compelling appellant to exhaust his peremptory challenges. The ground of this objection is the same as to each of these jurors. They had each read the newspaper account of the killing written by one Griffin Smith, with whom the veniremen were acquainted, and who testified as a witness at the trial, and it is insisted that under the showing made, Smith's story as it appeared in the paper was not mere rumor, but had the weight and verity of a personal conversation with the witness. These veniremen admitted that they had formed opinions about the case, although they stated that they could and would disregard them if accepted as jurors and would return a verdict based alone upon the evidence heard at the trial.

Error was assigned in the refusal of the court to permit B. R. Hopkins to detail a conversation between Wise and Gibson on the morning of the killing, the purpose of the excluded testimony being to show the friendly feeling then existing between the men. The action of the court in refusing to give a requested instruction on the law of self-defense is also assigned as error.

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

The indictment was not drawn with the usual technical accuracy. But it is not defective. Our statute provides: "The words used in an indictment must be con-

strued according to their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning." Kirby's Digest, sec. 2242. And when the language of this indictment is so construed, no room for doubt is left that the pistol then and there had and held in the hands of him, the said Tom Gibson, was loaded as pistols are ordinarily loaded.

Shortly after the killing occurred, Smith, in company with certain officers, went to the jail, where Gibson and Croft Morris had been carried, and there undertook to interview both of those men in regard to the killing, for the purpose of writing an account of it to be published in his newspaper.

Wise, Gibson and Morris had spent a considerable portion of Christmas day together, during which time they had regaled themselves by drinking whiskey and playing poker. Morris accused Gibson of firing the fatal shot, and has since persisted in that statement. According to the story written by Smith and published in the paper, Gibson denied firing the shot and stated that Morris had done so, but later, during the same interview, Gibson contradicted that statement, and finally stated that he would not talk further about the case. Smith did not write the article on the night of his interview but on the following day, and it was then written in narrative form from memory.

It is earnestly insisted that the statements made by the veniremen on their examination touching their qualification as jurors from which the facts above recited were elicited brings this case within the rule announced by this court in the case of *Sullins* v. *State,* 79 Ark. 127, on the subject of competency of jurors. In that case the juror testified that he had not talked with any of the witnesses in the case, but had formed his opinion from reading a report of the homicide in a newspaper written by his brother-in-law, who was also a witness for the State. The juror stated that he had confidence in his brother-in-law and relied on his statement in the

paper and had formed his opinion from this statement. In holding this juror incompetent, Judge RIDDICK, speaking for the court, said:

"Ordinarily, opinions formed from newspaper reports do not disqualify, but when the author of the report is known to the juror as a witness in the case, and is a person in whom he has confidence, then an opinion formed from reading his statement disqualifies, just as an opinion formed from talking with such witness would disqualify. In other words, if an opinion formed from talking with one known to be a witness disqualifies, then an opinion formed from reading a written report of the facts of the homicide made by one known to be a witness and in whom the juror has confidence must also disqualify, because in each case the juror knows that the statement on which he bases his opinion is not a mere rumor but a statement of the facts by a witness."

In the instant case, however, no attempt was made to show any special intimacy or friendship between Smith and any of the veniremen, and while the veniremen had formed opinions based upon the newspaper story, they stated that they regarded the article which they had read just as they would any other newspaper article which might or might not be true, and their testimony, taken as a whole, warranted the finding which the trial judge evidently made that the jurors did not regard the newspaper article as a narrative of one who had personal knowledge of the facts there recited. Indeed, it is not now contended that such is the case, for Smith was not present at the killing and knew nothing about it except what he had been told. It is true he had heard Gibson himself discuss the killing and make statements in regard to the circumstances of its commission, and he subsequently detailed these statements at the trial before the jury, but this evidence was of value chiefly as tending to refute the defendant's explanation of the killing.

We recognize the fact that the record presents an exceedingly close question as to the competency of these jurors. But our statute wisely provides that it shall not

be ground of challenge that a juror has formed or expressed an opinion from rumor merely (Sec. 2366, Kirby's Digest). And it does not appear that the trial judge was not warranted in treating the newspaper article read by the veniremen as a mere rumor. Of course, it is possible for a juror to be so influenced by a newspaper report, which, at last, is nothing more than a rumor, as to be unable to disregard an impression thus created. Such person should, of course, be discharged, and the accused not be required to use a peremptory challenge to be rid of him. But that question is not presented here, as the jurors all stated unequivocally that they could render a verdict uninfluenced by the article which they had read.

The purport of the testimony of the witness Hopkins which was excluded was that Gibson and Wise, on the morning of the killing, had gone together to get some whiskey, and that their conversation, heard by Hopkins, disclosed no friction or ill will between the men. The exclusion of this testimony was not prejudicial, because the testimony on the part of the State shows that later in the day these men were still drinking together in friendly fashion and that no quarrel arose between them until after they had commenced the game of poker, which was only broken up by the killing. The exclusion of this testimony, even if erroneous, was not prejudicial.

The court refused to give, at appellant's request, the following instruction: "While the defendant does not admit the killing, but on the contrary denies it, still if you find from the evidence that beyond a reasonable doubt, that he did in fact kill the deceased, John Wise, and if you find from the evidence that defendant, Tom Gibson, killed John Wise, and at the time he shot and killed Wise he believed honestly and in good faith from the facts and circumstances as they appeared to defendant at the time that deceased, Wise, was in the act of making a deadly assault upon him, under such facts and circumstances as make it reasonable for defendant to believe that he was about to lose his life, or receive

great bodily injury at the hands of the said Wise, and fired the fatal shot to protect himself, he would be guilty of no crime, and it matters not that it may appear to you, or might then have appeared to some other person, that defendant was in fact in no danger at said time; but, if he honestly believed that he was, it will be sufficient, but the mere fact that defendant believed that his life was in danger is not in itself sufficient. In addition to that, it must appear that at the time it was done the facts and circumstances connected with the difficulty made it reasonable for defendant to have entertained the belief, acting in good faith and without fault on his part."

It is conceded by the Attorney General that the instruction is correct as an abstract statement of the law, but it is insisted that no error was committed in refusing to give it under the facts contained in this record. The defendant did not admit the killing, but, upon the contrary, denied it. And it appears that the trial court took the view that under those circumsances there could be no question of self-defense. There appear to be cases which so hold, but in nearly, or quite, all of them there was an entire lack of evidence that the killing was justifiable. The proper rule appears to be that, where there is evidence that would support a finding of self-defense, the instructions should cover that feature of the case, notwithstanding the defendant's testimony that he did not do the killing. *Reed* v. *State,* 40 N. E. (Ind.) 525; *Morris* v. *Commonwealth,* 46 S. W. 491; *Gatliff* v. *Commonwealth,* 107 S. W. 739.

This court recognized the principle governing in such cases in the case of *Cooper* v. *State,* 86 Ark. 30, where the court said that the jury was not bound to accept all the testimony of any witness, or all of the theory of the State or of the defendant, but may find the truth to lie partly on one side and partly on the other, and that when such is the case, it is right and proper for the court to submit an instruction covering any phase of the evidence which may be fairly deduced partly from one side and partly from the other.

The testimony here which is said to furnish support for the instruction on the question of self-defense is that of the witness Morris. This witness testified that a disagreement arose between Wise and Gibson over the action of Gibson in taking chips out of a jack-pot to pay for whiskey which the parties were drinking. Wise questioned Gibson's right to do so, and Gibson became angered and called Wise a "damn crook" and a number of other very vile names, and that Gibson got up from the table at which they had been playing cards and drew his pistol as he did so, and that as Gibson drew his gun Wise "dropped his hand down like that (indicating his hip pocket)."

Giving this testimony of Morris its highest probative value, it would appear that Wise made a demonstration as if he was about to draw his own weapon, and the testimony shows that he was armed. But it also appears that Wise only did this after he had been vilely abused by Gibson who had his pistol in his hand, and before taking the pistol in his hands he had it in his lap.

The instruction set out was, therefore, incorrect, because it did not take into account the duty of Gibson to abandon the difficulty which he had himself brought on. We have many cases to the effect that one can not bring on a difficulty, and then kill the person whom he has thus assailed and plead self-defense in justification, without having first made an honest attempt, in good faith, to withdraw from the combat. *Atkins* v. *State,* 16 Ark. 568; *Blair* v. *State,* 69 Ark. 558; *Velvin* v. *State,* 77 Ark. 97; *Wheatley* v. *State,* 93 Ark. 409; *Ferguson* v. *State,* 95 Ark. 428; *Taylor* v. *State,* 99 Ark. 576; *Manasco* v. *State,* 104 Ark. 397. Having abused Wise and made a threatening demonstration against him, Gibson had no right to fire the fatal shot without having first made the effort required by the law to withdraw from the combat; and, as the requested instruction wholly ignored this duty on the part of Gibson, no error was committed in refusing it. If appellant wished the law of this subject stated to the jury, he should have asked a correct instruc-

tion, but no other instruction on this subject was requested.

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

LANE v. COOK.

Opinion delivered October 7, 1918.

1. DRAINS—IMPROVEMENT DISTRICT—NOTICE.—Where the circuit court created a drainage district which described one of the tracts included as the south half of the northwest quarter of a certain section, but the notice published pursuant to the statute incorrectly described the territory included by substituting the south half of the northeast quarter of said section, the intended tract being correctly described in the subsequent proceedings, the notice is jurisdictional, and the variance between the order and the notice is a fatal defect in the formation of the district.
2. SAME—IMPROVEMENT DISTRICT—DEFECT IN NOTICE—WAIVER.—Where there is a variance between an order of court creating a drainage district and the published notice thereof, in that a certain tract of land is substituted in the notice for one contained in the order, all of the property owners in the proposed district may consent to waive the irregularity, under Acts 1913, p. 738, § 8, but a waiver by the owners of the two tracts above mentioned is insufficient.

Appeal from Craighead Chancery Court, Western District; *Archer Wheatley,* Chancellor; reversed .

Gordon Frierson, for appellant.

A correct description in the notice is jurisdictional. Error in the publication of the notice is fatal to the district. 104 Ark. 298; 115 *Id.* 163; 113 *Id.* 566; 120 *Id.* 230.

Lamb & Frierson and *Huddleston & Futrell,* for appellees.

The cases cited are not in point here. Defendants entered their appearance and waived the error under § 8, Acts 1913, Act 177; 119 Ark. 20; 76 *Id.* 423; 25 Cyc. 203.

McCULLOCH, C. J. The circuit court of Greene County made an order, upon the petition of property owners, creating a drainage district embracing certain

lands in Greene and Craighead Counties. The boundaries of the district as created by said order of the court were correctly described in the petition, and also in the preliminary survey made by the engineer appointed by the court. Those boundaries included the south half of the northwest quarter of section 27, township 16 north, range 3 east, in Greene County, but the notice published pursuant to the requirements of the statute incorrectly defined the boundaries in that it omitted the tract above mentioned and included in lieu thereof the south half of the northeast quarter of said section 27. The notice was in all other respects in proper form, and the court made the order creating the district on the day specified in the notice. The proceedings were conducted under the Act of the General Assembly of 1909, page 829, as amended by the act of 1913, p. 738. Assessors were appointed to assess the benefits, and the court subsequently made an order confirming the assessments. Thereafter the owner of the south half of the northwest quarter of said section 27, which had been included in the district but omitted from the notice, and the owner of the south half of the northeast quarter of section 27, which was not embraced in the district as created but was described in the notice, joined in a stipulation which was filed in the circuit court, and which, after reciting the ownership of said lands, reads as follows:

"We hereby agree that said lands be incorporated in the First Slough Drainage District, and that said lands be assessed as the same are assessed now on the assessment roll of said district, and as confirmed by the circuit court, and we hereby waive all notice as to the establishment of the district and all notice as to the publication of the assessment roll required by law."

Appellant is the owner of other lands embraced in the district, and he instituted the present action in the chancery court to restrain further proceedings for the collection of assessments on the ground that the order of the court creating the district was void.

In the case of *Paschal* v. *Swepston,* 120 Ark. 230, we decided, construing the same statute under which this district was created, that the publication of the notice was jurisdictional, and that where the notice failed to correctly describe the area to be incorporated in the district it was fatal to the validity of the proceedings. The present case is controlled by that decision, for the reason that the omission from the notice of the south half of the northwest quarter of section 27 lessened the area described in the original petition and in the engineer's plat and the inclusion of the south half of the northeast quarter of section 27 was unauthorized because that tract had not been put into the area described in the original petition.

In dealing with a similar state of facts under a somewhat similar statute in the case of *Norton* v. *Bacon,* 113 Ark. 566, we said: "To exclude the territory from the plat would be to form a district of less territory than that included in the boundaries set forth therein; and, on the other hand, if we should include that territory in the district, it would be done without notice having been given to the owner as required by the statute. So we think that there is a fatal variance between the description of the lands embraced in the notice and those included in the plat, and that this invalidates the formation of the district."

But appellees, who are the commissioners of the district, insist that the void order attempting to create the district was validated by the subsequently filed stipulation of the owners of the two tracts of land mentioned above, and that such is the effect of sec. 8 of the act of 1913, *supra,* which reads as follows:

"The property owners in a drainage district may consent to waive the right to resort to courts and may absolutely ratify and confirm what has been done by the board of commissioners, and all other officials with reference to the district; and may thereafter be forever barred from testing or contesting in any way the validity of the proceedings up to that time, the assessments made

or the tax levied for the payment of principal and interest of bonds or for any other purpose."

The statute just quoted contains no specification or direction as to how the property owners may manifest their waiver or consent, and as that is not involved in the present controversy we pretermit any discussion on that subject, but we are clearly of the opinion that it requires the consent of all of the property owners in the district to give efficacy to such stipulation. The notice is jurisdictional, as we have already shown, and an order of the court based upon insufficient notice is void. It is not conceivable that the Legislature meant to provide that a part of the property owners interested could validate the proceedings by a waiver of the defects. The language is clear that the "property owners in the drainage district may consent," etc., and this necessarily means all of them, for the prior proceedings are wholly void, and can not be revived except upon the consent of all of the interested property owners.

Our conclusion, therefore, is that the proceedings gained no validity from the stipulation filed by two of the property owners, and that the chancellor erred in upholding the validity of the district. The decree is reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

SMITH v. GLOVER.

Opinion delivered October 7, 1918.

1. SET-OFF AND COUNTERCLAIM—SUBJECT OF COUNTERCLAIM.—Under Acts of 1917, p. 1441, amending Kirby's Dig., § 6099, a cause of action arising either upon contract or tort may be counterclaimed in any action for the recovery of money, but not in an action merely for the recovery of specific property.
2. SAME—COUNTERCLAIM—ACTION FOR RECOVERY OF MONEY.—In an action of unlawful detainer which seeks to recover damages for detention of the property sued for, the defendant may plead a counterclaim for damages for breach of the contract of lease.

3. LANDLORD AND TENANT—FORFEITURE OF LEASE.—Under a lease of land for a term of six years which stipulated that the lessees must put the leased land "in cultivation continuously during the life of this lease," but contained no express provision for a forfeiture, and the evidence shows a partial performance by the lessees, a forfeiture for failure to cultivate all of the land during the second year will not be enforced, such forfeitures not being favored even in actions at law.

4. APPEAL AND ERROR—HARMLESS ERROR—ERRONEOUS INSTRUCTION.—The giving of an erroneous instruction was not prejudicial to plaintiffs where they failed to establish a right of recovery.

Appeal from Clark Circuit Court; *C. C. Hamby,* Special Judge; affirmed.

John H. Crawford and *Dwight H. Crawford,* for appellant.

1. Plaintiff's instruction No. 1 should have been given. 80 Kan. 746. It was error to give the instruction on the court's own motion.

2. The demurrer to the cross-complaint should have been sustained. Counterclaims are not assertable in unlawful detainer. Acts 1917, p. 1441; Kirby's Digest, § 6099, 6101. The old rate is not changed by the new act. Kirby's Digest, § § 3644-5; 23 Ark. 76; 44 *Id.* 500; 40 *Id.* 38; 36 *Id.* 316, 319, 324. The damages are too remote. There can be no recoupment for alleged independent torts. 96 Ark. 78, 84; 36 *Id.* 316; 196 Mass. 431; 13 L. R. A. (N. S.) 378.

3. The verdict is contrary to the law and evidence and is excessive. The landlord was not liable on the counterclaim. 72 Ark. 405; 95 *Id.* 131; 114 *Id.* 532.

McMillan & McMillan, for appellees.

1. A partial breach of the contract by appellees would not give appellant the right to repudiate the contract, declare appellee's rights forfeited and re-enter the land. 17 Ark. 228; 24 Cyc. 1349; 100 Ark. 565.

2. Forfeitures are not favored in equity. Before forfeiture is declared the law requires every important requisite shown, even where forfeiture is provided for in express terms. 2 Taylor Land. & Ten., 489; 59 Ark. 405; 51 Mich. 482; 44 Minn. 312; 97 Ind. 247. See also

11 Metc. (Mass.), 117; 96 U. S. 242; 29 Conn. 341; 6 Iredell (N. C.) 65.

3. The contract must be construed favorably to appellee. 59 Ark. 405, 408; 24 Cyc. 915.

4. There is no error in the instructions. No specific objections were made. 119 Ark. 179; 111 *Id.* 196; 105 *Id.* 579.

5. The counterclaim was properly allowed. Acts 1917, 1441 amending Kirby's Digest, § 6099. "Any cause of action" may be set up in the counterclaim. 2 Words & Phrases, 1015.

6. The damages are not too remote. Appellant turned his hogs in the field and they damaged the crop. Kirby's Digest, § 1915; 24 Mont. 316; 152 U. S. 81. As to the measure of damages see 95 Ark. 297; 120 *Id.* 264; 85 *Id.* 111; 113 *Id.* 598.

McCULLOCH, C. J. The plaintiffs own lands in Clark County, and leased thirty acres thereof to defendants for a term of six years under a written contract which stipulated that defendants must "put this land in cultivation continuously during the life of this lease." After the expiration of the second year of the lease, plaintiffs instituted this action of unlawful detainer to recover possession on the ground that the defendants had failed to put all the land in cultivation and to cultivate it continuously. In the complaint a breach of the contract is alleged, and this is denied in the answer. Defendants also presented a counterclaim against plaintiffs for the recovery of damages alleged to have been caused by plaintiffs in turning stock into the field and in stopping up a road which provided access to the leased lands. The prayer of the counterclaim was for recovery of damages in the sum of $150. There was a trial before a jury, which resulted in a verdict in favor of defendants for recovery of damages in the sum of $25, and judgment was rendered accordingly, from which the plaintiffs have appealed.

Plaintiffs demurred to the counterclaim of defendants on the ground that such a plea is not available in an ac-

tion of this kind. The court overruled the demurrer, and that ruling is assigned as error. The action of the court in sustaining the counterclaim is defended on the ground that the recent statute enacted by the General Assembly of 1917, amending Kirby's Digest, sec. 6099 (Acts of 1917, p. 1441), broadens the statute on that subject so as to allow a counterclaim upon a cause of action of any character and in any kind of an action. The statute originally read as follows:

"The counterclaim mentioned in this chapter must be a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transactions set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action."

The amendatory act reads as follows:

"The counterclaim mentioned in this chapter may be any cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them."

It is manifest that the framers of the new statute meant to broaden the definition of a counterclaim so as to eliminate the restriction that it must arise "out of the contract or transactions set forth in the complaint" and to allow such plea in any action for the recovery of money whether the claim arose either out of contract or tort, or whether it arose out of the contract or transaction set forth in the complaint. We construed the new statute in the recent case of *Coats* v. *Milner*, 134 Ark. 311, which was an action to recover for debt due on contract and a counterclaim was presented for unliquidated damages, and we held that the plea was available under those circumstances. We said in that case that, since the passage of the new statute, "the law is that a cause of action arising either upon contract or tort may form the subject-matter of a counterclaim in any action for the recovery of money, and this may be done in any case where liability could be asserted in an original action brought against the plaintiff." Other language used in the opinion in discussing the effect of the statute must, of course, be

considered in the light of the facts of that particular case, and when so considered is not in conflict with the conclusion we reach in the present case.

We do not, however, share the views of learned counsel for defendants in the contention that the statute allows a counterclaim in an action other than one for the recovery of money. In the very nature of the subject the term "counterclaim" means a cross demand which may be asserted in liquidation or reduction of the claim made by the plaintiff, and this is necessarily limited to actions for the recovery of money, for there could be no such thing as a cross demand asserted against a cause of action for the recovery of specific property. A counterclaim is defined to be "a claim presented by a defendant in opposition to or deductions from the claim of plaintiff." 34 Cyc. 629.

Code provisions existing in most of the States with reference to counterclaims combine the elements of the pleas of set-off and of recoupment; either of which apply to claims in liquidation or reduction of plaintiff's claim. 1 Sutherland on Code Pleading, sec. 627. See also Baylies' Code Pleading, p. 414, where the rule is stated in the construction of code provisions of this character that a counterclaim "must tend in some way to diminish or defeat the plaintiff's recovery." That being essentially the nature of a counterclaim, there can not, in a suit for recovery of specific property, be such a thing as a cross demand which tends "to diminish or defeat the plaintiff's recovery." It is not conceivable that the framers of the new statute meant to provide another form of cross action and denominate it a counterclaim, when that term would be so entirely foreign to the use for which it was intended.

We are of the opinion, therefore, that a counterclaim is allowable under the statute only in actions for the recovery of money. This, however, is such an action, for there is a prayer in the complaint for the recovery of damages for the detention of the property sued for, and there is no reason why the statute would not apply to that kind of an action. It meets every requirement of the

statute, for it is an action to recover money, and the demand set forth in the counterclaim is one which, if established, would liquidate or reduce the claim set forth by the plaintiff. We conclude that the court was correct in overruling the demurrer.

It is next insisted that the court erred in one of its instructions telling the jury that if the defendant Glover "has performed his part of the contract, and that he has cleared and cultivated as much of the land as he reasonably could have cleared and cultivated during the first year, then he has not broken the contract." Plaintiff requested an instruction telling the jury that under the contract defendants were bound to cultivate all of the leased land "continuously each and every year during the term of the lease," but we observe in passing that the contract does not state specifically when the land shall be put in cultivation, and without undertaking to construe the contract in that respect, we deem it sufficient to say that the undisputed evidence shows a partial performance, and there is no express provision for a forfeiture. Therefore, there can not in any view of the case be any recovery by plaintiffs in the present action. Forfeitures in lease contracts are not favored, even in actions at law, and a court of equity will not lend its powers in aid of enforcement of forfeitures. *Little Rock Granite Co.* v. *Shall,* 59 Ark. 408; *Williams* v. *Shaver,* 100 Ark. 565.

Even if the court was in error in its instruction, no prejudice resulted, because plaintiffs had not established their right of recovery.

It is further contended that the evidence is not sufficient to sustain the verdict of the jury in favor of defendants for the recovery of damages, but we think there is evidence of a substantial nature sufficient to sustain the recovery. The counterclaim, it is true, presented an independent right of action for wrongs committed by the plaintiff against the rights of the defendant, but the statute, as we have already seen, allows that, and there is enough evidence to show that defendant was damaged by

such wrongful acts to the extent of the amount of the verdict allowed by the jury. Glover, one of the defendants, testified that plaintiffs turned 17 hogs into the field and that the hogs rooted up the ground and prevented him from cultivating a portion of it. He also testified to other acts of misconduct on the part of plaintiffs which caused him additional inconvenience and labor.

We find no prejudicial error in the proceedings, and the judgment is affirmed.

N. M. URI & COMPANY v. MCCROSKEY.

Opinion delivered October 7, 1918.

1. EQUITABLE GARNISHMENT—PRIORITY OF LIEN.—While a judgment creditor, under Kirby's Digest, § 3308, may establish a lien upon the property of an apparently insolvent debtor in the hands of a third party by instituting equitable proceedings to subject the property to the payment of his claim, which lien shall exist from the service of the summons, neither that section nor the subsequent sections can give the judgment creditor a prior lien on said property over an existing lien or equity in favor of a third person not made a party to the suit.
2. SET-OFF AND COUNTERCLAIM—PRIORITY OF RIGHT.—One who purchased a stock of goods without complying with the bulk sales law and is compelled to pay the outstanding indebtedness of his vendor's business, has an equitable right, when sued upon the purchase notes, to counterclaim or set-off his damages resulting from the enforced payment of the vendor's debts against the vendor or his assignee not a *bona fide* purchaser of such notes, and such right is prior to the lien of a judgment creditor of the vendor obtained by instituting equitable proceedings under Kirby's Digest, § 3308.

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

Benjamin F. Washer and *William Kirten*, for appellant.

1. Appellant complied strictly with the statute and followed the remedy laid down by the law. K. & C. Dig., § § 6322, 3625, 3985.

2. Appellant had the paramount lien and should have the preference as a judgment creditor. K. & C. Dig.,

§ 3985. McCroskey had no valid cause of action. A judgment will not be vacated on motion or complaint until it is adjudged that there is a valid defense. 129 Ark. 136; 84 *Id.* 527; 94 *Id.* 348. It was error to set aside the decree of July 3, 1917. We had a right to prior lien as against the judgment of McCrosky and himself as a creditor of Bowden. 103 Ark. 105; 90 *Id.* 240; 12 Cyc. 64, F. & note. See also 6 Ark. 391; 18 *Id.* 249; 40 *Id.* 531.

Hammock & Crenshaw, for appellee.

1. Appellee was not a party to the suit and not affected by the decree rendered for appellant. He had no notice. 19 Ark. 574; 23 Cyc. 683.

2. The decree rendered at appellant's instance should have been in accordance with the statute and have created a lien only on the assets of Bowden in possession of the bank at the date of the decree.

3. Appellant relies on strict compliance with K. & C. Dig., § 6322. Appellee was one of the persons owing defendant in execution. Appellee should have been made a party. Kirby's Dig., § 6238.

4. Appellant was not entitled to preference. Kirby's Dig., § 6238; 80 Ark. 183.

5. The decree rendered on appellee's interplea is justified; he was a creditor and had the right to attack collaterally the decree rendered at appellant's instance, as he was not a party to the action nor in privity. 23 Cyc. 1068-9.

6. The Bulk Sales Law does not affect appellee's rights. He properly came into court to assert his rights and no specific form need be followed. 26 Ark. 228.

7. The cases cited by appellant are not in point. Appellee is not a general creditor of Bowden but he has the right of set-off and has an equitable defense to Bowden's chose in action and that defense existed long prior to appellant's rights in garnishment. The decree of February 23, 1918, is just and equitable to all parties and the finding of the chancellor is in accord with the principles of equity.

HUMPHREYS, J. A. T. Bowden sold a confectionary and billiard hall to appellee, C. H. McCroskey. The Bulk Sales Law was not complied with in making the sale, and Bowden's creditors required appellee to pay the outstanding mercantile indebtedness of said businesses. Appellee brought suit against Bowden to recover the amount he was required to pay on this account and recovered judgment in the common pleas court of Chicot County on the 23rd day of July, 1917, against A. T. Bowden for $656.47. In making the purchases aforesaid, appellee had executed notes to A. T. Bowden in payment of a part of the purchase price for the businesses. These notes, with other securities belonging to Bowden and his wife, were transferred by them before maturity to the Exchange Bank & Trust Company to secure certain indebtednesses that they owed the bank.

Appellant was a general creditor of A. T. Bowden prior to September 1, 1915, and on that date recovered a judgment in the common pleas court of Chicot County against appellant and issued an execution thereon which was returned *nulla bona.*

The Exchange Bank & Trust Company instituted suit in the Chicot Chancery Court to foreclose its mortgages and subject its collaterals to liquidate the indebtedness due it by the Bowdens. Appellant intervened in this suit, setting up its judgment of date September 1, 1915, seeking a discovery of any money, choses in action, equitable or legal interest and all other property to which the Bowdens were entitled in the hands of said bank. The proceeding followed by appellant is founded on section 3308 of Kirby's Digest. On July 23, 1917, the court rendered a judgment in favor of the bank, subjecting the mortgaged property and collaterals to the payment of the bank's indebtedness, but declared a lien on the equity of Bowden in all of said property in favor of appellant in so far as it was necessary to pay Bowden's indebtedness to appellant on the judgment obtained by appellant against Bowden. Appellee was not a party to this suit, and no appeal was prosecuted therefrom. After the ren-

dition of that judgment and before the equity in the securities belonging to Bowden had been subjected to the payment of appellant's judgment, appellee filed an interplea by consent of all the parties in the original suit, seeking to offset his judgment obtained in the common pleas court against the purchase money notes for the confectionary and pool businesses which Bowden had assigned to the bank as collateral security; and asking that the judgment of date July 3, 1917, be modified so as to allow his judgment as an equitable offset against the notes in question. Appellant later filed a motion to strike the intervention of appellee. The court heard the case and allowed appellee's judgment in the sum of $656.47 as an equitable credit on the purchase money notes. The effect of this modification of the original decree was to render appellee's judgment a paramount claim to that of appellant's judgment on Bowden's equity in the purchase money notes. To this appellant objected, and has prosecuted an appeal to this court.

It is insisted by appellant that it acquired a lien on Bowden's equity in the purchase money notes paramount to appellee's claim of offset thereto by having followed strictly the proceedings under section 3308 of Kirby's Digest and in prosecuting its claim to final judgment rendered on the 3rd day of July, 1917. It is true, under section 3308 of Kirby's Digest, that a judgment creditor may establish a lien upon the property of an apparently insolvent judgment debtor in the hands of a third party by instituting equitable proceedings to subject the property to the payment of his claim, which lien shall exist from the service of the summons. There is nothing, however, in this or subsequent sections that gives a judgment creditor a paramount or prior lien on said property to an existing lien or equity in favor of a third person, so the effect of proceeding under this and subsequent sections can not impair an existing equity or lien. Especially is this true when the owner of such an existing equity was not made a party to the suit and has not had an opportunity to protect his equity. A proceeding under this

section can not have the effect of placing the judgment creditor in the situation of an innocent purchaser. The bank, of course, was an innocent purchaser of the purchase money notes for the confectionary and pool businesses which it acquired from Bowden before maturity and for value. This proceeding did not have the effect of subrogating appellant to the rights of the bank. It only acquired by the proceeding such equity in the notes as Bowden had. In Bowden's hands, appellee McCroskey had the equitable right, if sued upon the notes, to counterclaim or offset his damages resulting from the enforced payment of Bowden's indebtedness for goods purchased in the pool and confectionary businesses. Or, putting the converse proposition, appellee had a right to sue Bowden on his warranty that the goods sold were free from indebtedness and liquidate the notes to the extent of the amount recovered. The impounding of the notes by appellant amounted to a taking of them and an establishment of a lien on them subject to any original rights or equities existing in any third party concerning them. If appellant and appellee had been on a parity, appellant's contention would necessarily prevail, because it would then have acquired the first lien by proceeding under section 3308 of Kirby's Digest. In that event, it would have been a race between general creditors, and the diligent would have been rewarded, but they were not on a parity. Appellee had an original or inherent equity to offset his damages against the particular notes in question before they were seized by appellant. This being the case, the holder of an original or inherent equity in the property has the prior and paramount lien.

It is said, however, that appellee was forced to pay Bowden's indebtedness through his own fault by omitting to comply with the Bulk Sales Law. Bowden could not be heard to make such a defense, and appellant's right acquired by a seizure of the paper can rise to no higher plane than Bowden's rights.

No error appearing in the decree, it is affirmed.

BEACH v. EUREKA TRACTION COMPANY.

Opinion delivered May 20, 1918.

1. APPEAL AND ERROR—DIRECTED VERDICT—PRESUMPTION.—In determining on appeal the correctness of the trial court's action in directing a verdict for either party, the rule is to take that view of the evidence most favorable to the party against whom the verdict is directed.
2. CARRIERS—STREET CAR PASSENGERS—SAFE PLACE TO ALIGHT.—Under the rule requiring street car companies to exercise toward passengers the highest degree of skill and care which may reasonably be expected of prudent persons engaged in that business, they are required to furnish a passenger a safe place to alight.
3. CARRIERS—STREET CAR PASSENGERS—QUESTIONS FOR JURY.—In an action by a woman passenger against a street car company for injuries in alighting from an open car, from which passengers under the company's rules were allowed to alight from either side, where the testimony tended to prove that the car stopped at a place where the ground on one side was slanting, uneven and washed out and ranging from 25 to 33 inches below the running board of the car, and that in attempting to alight from that side she sustained a fractured ankle, *held* that whether she was guilty of contributory negligence in attempting to alight from that side of the car was for the jury.

Appeal from Carroll Circuit Court; *Jos. S. Maples*, Judge; reversed.

Sam R. Chew, for appellant.

1. It was error to direct a verdict. There was at least some evidence to establish an issue and the cause should have been submitted to a jury. 63 Ark. 94; 77 *Id.* 556; 70 *Id.* 74; 89 *Id.* 368; 90 *Id.* 210; 91 *Id.* 337; 93 *Id.* 191; 95 *Id.* 560; 96 *Id.* 394; 103 *Id.* 401; 71 *Id.* 445.

2. There was evidence of negligence. Appellee was a common carrier of passengers and it was its duty to exercise the highest degree of care for the passenger's safety, and provide a safe place to alight. 89 Ark. 222; 75 *Id.* 211

C. A. Fuller, for appellee.

1. The court properly directed a verdict. There was no negligence on the part of appellee's servants. The right side of the car was the safer to alight on but she chose the left side. 36 Ark. 377; 49 *Id.* 357.

2. She was guilty of contributory negligence. 96 *Id.* 394. Carriers are not insurers of the safety of their passengers. 75 *Id.* 211. There was no case for a jury. 57 Ark. 461.

HUMPHREYS, J. Appellant instituted suit against appellee in the circuit court for the Western District of Carroll County, to recover damages for an injury received through the alleged negligence of appellee while alighting from its street car in Eureka Springs. The allegation of negligence in the complaint insisted upon for recovery is the charge that appellee failed to furnish her a safe place to alight in this, that upon reaching her destination, appellee stopped its car at a point on the line of its railway where the ground was uneven and washed out until the step was too high for her left foot to reach the ground, so that in attempting to get off she fell and fractured her ankle.

Appellee made a specific denial of the allegation of negligence relied upon by appellant for recovery, and all other allegations of negligence complained of in the complaint, and, by way of additional defense, pleaded contributory negligence on the part of appellant for the alleged reason that she was familiar with the ground where the car stopped, and in the exercise of ordinary care, should have observed and avoided the dangers incident to alighting.

The cause was tried upon the pleadings and evidence, and at the conclusion thereof a directed verdict was returned by the jury in favor of appellee.

An appeal has been properly prosecuted to this court.

The only question to be determined on appeal is whether the trial court erred in directing a verdict. In testing the correctness of a directed verdict, this court has adopted the following rule:

"In determining on appeal the correctness of the trial court's action in directing a verdict for either party, the rule is to take that view of the evidence most favorable to the party against whom the verdict is directed.

And where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury." *Jones* v. *Lewis,* 89 Ark. 368.

It is also well settled that the strongest probative force must be given the evidence of the losing party in construing on appeal the correctness of an instructed verdict. *Williams* v. *St. L. & S. F. Rd. Co.,* 103 Ark. 401.

The undisputed evidence in the case disclosed that appellant took passage on appellee's street car, on the 17th day of March, 1916, at 3 o'clock p. m., from Harding's Spring to Dunkinson's house; that the car was stopped by the motorman in front of Dunkinson's house for her to get out; that the car was an open summer car with a running foot-board on each side about ten inches below the floor, for passengers to step on and off the car; that hand-holds were attached to uprights on each side of the car between the seats; that the seats ran clear across the car; that passengers were permitted to get on and off on either side of the car; that the foot, or running board extended out over the ends of the ties; that the ground where the cars stopped sloped down from the track and down from the sidewalk; that the sidewalk on the left hand side was four or five feet from the track; that the surface water had cut a small gulley five inches deep about one foot from the end of the ties; that the ground on the right side was level and about eighteen inches below the running board; that on the left side the ground was sloping and ranging from 25 to 33 inches below the running board; that appellant got off the car on the left side and, in doing so, fell and sustained a compound fracture of her ankle.

With reference to leaving the car, Mrs. Beach testified, in substance, as follows: When the car stopped for her to get off, two women were sitting on the same seat to her right and that, on that account, she got off on the left side; that in getting off, she stepped on the running-board, took hold of a hand-hold and stepped down with her left foot until she thought it was far enough to

touch the ground, when she discovered that she must step about five inches further to reach the ground; that she judged she could step that much further and stepped down; that her clothing caught on the car; that although she tried, she could not pull herself back and could not hold longer with the hand-hold; that her clothing, which was holding her, tore and her left foot went on down in the ditch hole and she fell down and broke her ankle; that the hole was under the running-board and she could not, and did not, see it when she was standing on the running-board; that the ground in and around the hole was soft; that she may have said it was her fault (meaning she ought not to have ridden in the car); that she perhaps remarked she ought to have gotten out on the other side; that she had gone up there two or three times before on the car, but the car did not stop in exactly the same place on other occasions. Mrs. Beach denied that she told any one then or later that she was at fault and appellee's employees were not to blame.

Mrs. Beach was corroborated in many particulars by other witnesses, but in other respects, her evidence was in sharp conflict with a majority of the witnesses. For example, according to the other witnesses, she stepped off the car promptly when it stopped; she made no effort to pull herself back on the running-board; practically all other witnesses testified that there was no hole in the ground except the water course which was about five inches below the surface; and none of the witnesses observed that her clothes caught on the car or that they were torn. The motorman testified that she said it was her own fault and not his. The president of the company said she afterwards told him she was injured by her own fault and not through the fault of appellee's employees.

The evidence is voluminous, but the substance thereof, in so far as it relates to the issue for our determination, is about as set forth above.

This court has adopted the rule that: "A common carrier of passengers by street car is required to exercise the highest degree of skill and care which may rea-

sonably be expected of intelligent and prudent persons employed in that business, in view of the instrumentalities employed and the dangers naturally to be apprehended." *Little Rock Traction & Electric Co.* v. *Kimbro*, 75 Ark. 211; *Oliver* v. *Ft. Smith Light & Traction Co.*, 89 Ark. 222. Under this rule it was the duty of appellee to furnish appellant a safe place to alight. We think the evidence tends strongly to show that the ground on the left side of the car was an unsafe place for ladies to get out. The proof indicated that it was slanting, uneven and washed out until the distance from the running-board to the ground made it dangerous to alight. No effort was made by the motorman to prevent passengers from getting out from that side at that point. Under the rules of the company, passengers were permitted to get on or off on either side. Passengers had a right to presume that it was safe to get off and on either side, having had no notice to the contrary. Again, it can not be said as a matter of law, under the undisputed facts, that the danger was so apparent that a casual observer would necessarily detect the danger before alighting, or that the plaintiff was so familiar with the condition of the ground that it was contributory negligence on her part to alight at that particular place.

It can be said that appellant's evidence tended to prove the issue of negligence set forth in her complaint. We think there is ample evidence in the record, when viewed in its most favorable light, to have warranted a verdict in her favor, if returned by the jury under proper instructions.

For this reason, it was error to instruct the verdict against her.

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

DANIEL v. DOYLE.

Opinion delivered June 10, 1918.

1. CARRIERS—STATION DEFINED.—A railroad "station" is a place at which both freight and passengers are received for transportation or are delivered after transportation, and includes a flag station.
2. HIGHWAYS—ESTABLISHMENT—CONSTRUCTION OF ORDER.—Where the county court ordered a road to be opened to the north side of a railroad track and thence to a nearby flag station of the railroad, the fact that passengers were received at a platform on the south side of the track and only freight on the north side was immaterial, and it was error to enjoin the road overseer from opening up the road on the north side of the track.

Appeal from Boone Chancery Court, *Ben F. McMahan,* Chancellor; reversed.

Shouse & Rowland and *Guy L. Trimble,* for appellant.

1. Equity cases are tried anew in this court and plaintiff has failed in his proof that defendant was laying out a road contrary to the order of the county court. 96 Ark. 434.

2. The order is not void for uncertainty. 102 Ark. 558.The presumption is that the order is valid. Technical accuracy is not necessary in the description of a road. 37 Cyc. 75, 121.

3. "Station" is a place where passengers or freight are received and discharged. 29 Atl. 157; 66 Ark. 544; 7 Words & Phrases, "Station." The order is sufficiently definite and certain.

J. M. Shinn, for appellee; *Oscar W. Hudgins,* of counsel.

1. The findings of a chancellor will not be disturbed on appeal unless against the clear preponderance of the evidence. 105 Ark. 460; 112 *Id.* 333.

2. The order is indefinite and uncertain. The station is on the south side of the railroad and appellant was seeking to open a road not in accordance with the order of the county court. There was no station building at Capps and no station there. 29 Atl. 157; 66 Ark. 544. The appellant was not following the order of the court.

Whitney v. *Mixon,* 132 Ark. 24. The overseer was a mere trespasser. The lands were enclosed and in cultivation. The testimony shows damages and none were allowed.

STATEMENT OF FACTS.

J. H. Doyle brought this suit in equity against D. E. Daniel to restrain the latter as road overseer from opening up a road on the lands of the former. The defense of Daniel was that he was opening up a road in compliance with the orders of the county court. In 1911, the county court appointed viewers to view and survey a proposed county road and so much of the description of the road as is applicable to the issue raised by the appeal in this case is as follows:

"Thence north about 300 yards to the north side of the right of way of the M. & N. A. R. R., thence in a westerly direction to the station of the M. & N. A. R. R."

The court approved the report made by the viewers and ordered that the road as described in the report be declared to be a public highway and the road overseer of the district through which said road passed was ordered to open it up to a width of 30 feet. The road as established was an extension of the Hill Top and Capps road. Just west of where the proposed road crossed the railroad there was a flag station called Capps. There was no depot or other building there. On the north side of the railroad was a platform where freight was unloaded. On the south side of the railroad at that point passengers were received upon and discharged from the trains and express packages were also loaded and unloaded there. After the order the platform on the north side of the railroad was torn away and a side track was constructed, on which freight cars were stored while they were being loaded or unloaded. A cinder platform was constructed on the south side of the road for the use of passengers and to load and unload express packages. The railroad fenced its right of way at this point and by agreement with the plaintiff discontinued the road on the north side

of the railroad and established one on the south side of the railroad leading to the flag station. A gate was erected for the use of those going to and from the station. Wagons would cross over at the station on the north side for the purpose of unloading freight from freight cars stored there. In the spring of 1917, the county court ordered the road overseer of the district to open up the road on the north side of the railroad in accordance with the order made in 1911, so that when the fruit season opened people could reach the cars on the siding on the north side of the railroad. The road overseer commenced the work in compliance with the order of the county judge and the plaintiff forbade him from going on to his land and executing said order. He secured a temporary injunction restraining the road overseer from opening up a road on the north side of the railroad either on the right of way of the railroad company or upon the land of the plaintiff adjacent thereto on the north. On final hearing it was decreed that the injunction should be dissolved so far as the right of way of the railroad company was concerned, but the injunction was made perpetual as to the lands of the plaintiff lying adjacent to and north of the right of way of the railroad. The case is here on appeal.

HART, J., (after stating the facts). The record shows that the railroad runs east and west at the place where the public road crosses the railroad and that the station is west of the crossing. The order of the county court establishing the road concludes the description of the road as follows:

"Thence north about 300 yards to the north side of the right of way of the M. & N. A. Railroad; thence in a westerly direction to the station of the M. & N. A. Railroad." The record shows that the first clause carried the public road across the railroad. It also shows that the flag station of Capps is a short distance west of the crossing. At the time the county court made the order approving the report of the viewers and establishing the public road passen-

gers were received upon and discharged from the trains on the south side of the railroad at Capps. Hence it is insisted that the order of the county court established the road on the south side of the railroad from the crossing to the station. It is true that the court in *St. Louis & San Francisco Ry. Co.* v. *Neal*, 66 Ark. 543, said that a railroad station is a place where passengers are received upon and discharged from railroad trains; but the court was speaking with reference to our statute requiring local freight trains to carry passengers from and to all its stations. In its broad sense and in its common signification, a station is a place at which both freight and passengers are received for transportation or are delivered after transportation and includes a flag station. Inasmuch as the first clause of that part of the order quoted carried the public road across the railroad to the north side of the right of way, we think the last clause of the description meant to locate the road on the land north of and adjacent to the right of way of the railroad from the crossing to the station, and that the word station means the place where freight is loaded upon and unloaded from the cars. This point was as much a part of the station as the point on the south side where passengers were received and discharged. Otherwise we must hold that the court intended the road to recross the railroad in order to construct the public road on the south side thereof; for as we have already seen the first clause takes the public road across the railroad to the north side of the right of way. Therefore, we think that the last clause means in a westerly direction from the north side of the right of way at the crossing to the place on the north side of the railroad where freight was received and delivered.

It follows that the court erred in granting the injunction. Therefore, the decree will be reversed and the cause remanded with directions to the chancery court to dismiss the complaint of the plaintiff for want of equity.

PUCKETT v. GLENDENNING.

Opinion delivered June 10, 1918.

1. GUARDIAN AND WARD—SALE OF WARD'S LANDS—DISCHARGE OF GUARDIAN.—An order of the probate court, touching a guardianship, recited that the guardian's accounts and report were correct, and "same is fully approved and confirmed and ordered recorded * * * and the said guardian with sureties are hereby discharged and released from any further liability thereon." On the same day the court made an order directing the guardian to sell certain lands for the maintenance and education of the minors. *Held,* the order of sale was not made after the discharge of the guardian.
2. HOMESTEAD—SALE BY GUARDIAN—VALIDITY.—A probate sale by a guardian of a minor's homestead inherited from his deceased father is void where the order of sale does not show that there were no debts existing against the minor's deceased father.
3. APPEAL AND ERROR—FINDING OF CHANCELLOR.—Shortly before his death, deceased moved from one farm to another, continuing to own both at the time of his death. *Held,* where it is difficult to determine where the preponderance of the testimony lies, the finding of the chancellor as to which farm constituted deceased's homestead would not be disturbed on appeal.

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

STATEMENT OF FACTS.

Alice P. Puckett brought this suit in equity against Mrs. Margaret Glendenning to set aside a deed to certain lands made pursuant to a guardian's sale in the probate court and to have her title to said lands quieted against the defendant. She alleges that the sale made by her guardian under orders of the probate court, was void; (1) Because at the time of said sale her guardian had been discharged and the probate court had no jurisdiction over her property and, (2) Because at the time of said sale said lands constituted her homestead. Frank Polk, the father of the plaintiff, owned two tracts of land including the tract in controversy in Ouachita County, Arkansas. He had a wife and five children. He first lived on a tract of land known as the Old Polk Place and this was his homestead. All of his children were born on this place. He had a good substantial dwelling house

and a good barn and outhouses. In the fall of 1899, he moved on the land in controversy which was in the bottoms and which for convenience will be hereinafter known as the bottom place. He had about one hundred head of cattle and moved on the bottom place because he had a better pasture there. He sold off some of his horses and mules but moved all of his other property, including a saddle horse and a team of mules to the bottom place. He lived there with his family until sometime in March, 1900, when he died. He left surviving him his widow and five children. His widow continued to live on the bottom place with her children for about one year and then moved to town. Letters of guardianship were issued to the widow upon the person and property of the plaintiff and the other children, who were minors. On the 3rd day of the October term, 1906, of the probate court, which was on Saturday, October 20, 1906, Mrs. Mittie Polk, as guardian of the plaintiff and the other minor children, filed what she called her third annual and final settlement as such guardian. On the same day the probate court made an order directing her as guardian to sell the lands in controversy for the maintenance and education of said minors. The lands were duly sold in compliance with the order of the court to L. T. Dale for the sum of $1,377, the same being more than three-fourths of their appraised value. The sale was duly approved and confirmed by the probate court and a guardian's deed in regular form was executed to the purchaser. Mrs. Margaret Glendenning purchased the lands from L. T. Dale, the purchaser at the guardian's sale.

Evidence was introduced by the plaintiff tending to show that she was a minor at the time of the guardian's sale and that the lands so sold were the homestead of her mother and herself. On the other hand evidence was adduced by the defendant tending to show that the lands in controversy were not the homestead of the plaintiff and her mother. This testimony will be more particularly set out in the discussion on this branch of the case

in the opinion. The order of the probate court confirming the settlement of the guardian and the order made on the same day directing the sale of the lands in controversy by the guardian will also be more particularly referred to in the opinion.

The chancellor was of the opinion that there was no equity in the plaintiff's complaint and it was dismissed for want of equity. The case is here on appeal.

H. E. Meek and *A. N. Meek,* for appellant.

1. The sale was void because the guardian had been discharged. 97 Ark. 189; 92 *Id.* 230.

2. The land was the homestead of the minors. 123 Ark. 389. There is no showing of record that there were no debts against the estate.

Gaughan & Sifford, for appellee.

1. There is no order showing the discharge of the guardian. The order merely discharged the guardian and his sureties from liability.

2. The testimony shows that the land was not a homestead. 55 Ark. 55; 56 *Id.* 589; 65 *Id.* 373; 103 *Id.* 574; 19 S. W. 20.

HART, J., (after stating the facts). It is first contended by counsel for the plaintiff that the guardian's sale of the lands in controversy is void because the probate court had approved the final settlement of the guardian and discharged her and the sureties on her bond as such guardian before an order directing the sale of the lands was made. We do not agree with counsel in this contention. On the third day of its October term, 1906, the probate court approved and confirmed what was called the third annual and final settlement of Mrs. Mittie Polk, as guardian of the plaintiff and her other minor children. The order concludes as follows: "The court further finds that said guardian has properly charged herself, with all amounts coming into her hands belonging to her said wards. And that the credits claimed by her are supported by good and valid vouchers, and said settlement being found in all things correct, same is

fully approved and confirmed and ordered recorded in the proper record of settlements of administrators, guardians, etc., and the said guardian with sureties are hereby discharged and released from any further liability thereon."

(1) On the same day the court made an order directing the guardian to sell the lands in controversy for the maintenance and education of the minors. The lands were duly appraised by appraisers thereafter appointed by the probate court and the appraisement was approved by the said court. On November 14, 1906, the guardian filed her report of sale of said lands and the same was approved and confirmed by the probate court and a deed was ordered to be executed by the guardian to the purchaser. On Novembr 24, 1907, a petition was filed by the next friend of said minors to have the letters of guardianship of Mrs. Mittie Polk revoked. On the 20th of January, 1908, Mrs. Mittie Polk filed a response in the probate court to this petition which also purports to be a settlement with her wards for the proceeds of the sale of the real estate in controversy. The record does not show that the petition or the response were ever acted upon by the probate court. When the whole record is considered we are of the opinion that the court did not discharge the guardian before the order for the sale of the lands was made. We think that the only effect of that part of the order which we have quoted above was to approve and confirm the settlement made by the guardian and to discharge and release her and her sureties from any further liability as to the matters embraced in her said settlement. This is shown by the concluding part of such order as follows: "And the said guardian with sureties are hereby discharged and released from any further liability thereon." The word "thereon" evidently refers to the settlement and not to the discharge from the guardianship. The fact that the order confirming the guardian's sale and the order directing the guardian to sell the minor's interest in the lands were made on the same day indicates that the court did not

intend to discharge the guardian from the guardianship, but only to discharge and release her and her sureties as to the matters embraced in her settlement. We are strengthened in this view from the fact that the same judge immediately made an order directing her to sell the lands and afterwards appointed appraisers, approved her report of sale and ordered her to execute a deed to the purchaser at the guardian's sale.

In *Ex parte Baldwin,* 118 Ark. 416, it was held that when two orders are made on the same day with reference to the same matter, the subsequent order tends to explain and control the former.

(3) It is also contended that the lands sold constituted the homestead of the minors and that the sale is void because the order of sale does not show that there were no debts existing against their deceased father. See *Ex parte Tipton,* 123 Ark. 389. In that case we held that the record of the probate court in the matter of selling the minor's homestead upon the application of the guardian should show the fact that there were no debts, and that when the record is silent on that point the order of sale is void. The record in the instant case does not contain any showing that there were no debts against the estate. This brings us to the question of whether or not the land ordered sold was the homestead of the minors. The evidence shows that Frank Polk owned two tracts of land in Ouachita County. Prior to the time he moved on the land in controversy, he lived on another tract of land known as the old Polk Place. He had resided there for many years and all of his five children had been born there. He had a comfortable and substantial dwelling house and a good barn and outhouses. He purchased a herd of one hundred head of cattle and in the fall of 1899 moved on the land in controversy where there was a better pasture for his cattle and resided there until his death in March, 1900.

The deposition of the plaintiff was taken on the 6th day of April, 1917. According to her testimony, she was twenty-three years of age and resided at Little Rock,

Arkansas. She had not seen the lands involved in this suit and had never received any of the proceeds from their sale. She had not heard directly from her mother for six or seven years. She stated that at the time of her father's death he was living on the land involved in this suit and that it was his homestead. On cross-examination she stated that she was not able to give the numbers of the particular forty acres of land on which her father resided at the time of his death but that the land in question was the homestead and that they never had any other home; that all of the children were born there and that her grandfather and grandmother were buried there.

Edwin Morgan testified that in the fall or winter of the year 1899, Frank Polk moved on the land in controversy; that Polk told him that the bottom land was better than the land on which he had been living; that Polk did not say anything about how long he was going to live on the bottom place.

Brad Polk testified that Frank Polk was his uncle, and that he was intimately associated with him prior to his death; that in the fall of 1899, his uncle had one hundred head of cattle and moved on the land in controversy because there was better pasture land there; that his uncle did not talk like he would ever move back to the Old Polk Place, but stated that he might go to Texas; that if he did not go to Texas, he thought he would build a house on the bottom place; that he, (witness,) considered the bottom place the only home Polk had when he moved there; that Frank Polk was going to send his cattle to Texas and turn them over to his brother-in-law; that he might move to Texas the next fall if things turned out right; that the bottom place had a good barn and good lots and pastures. On cross-examination he stated that the house on the bottom place was a small one and that a family of negroes had lived in it before his uncle moved there; that Polk cleaned out the house and papered it before he moved in but did not make any other repairs on it;

On behalf of the defendant, J. G. Brummett testified that he had known Frank Polk many years and had been his partner until a few years before his death; that there were 280 acres of land in the old Polk Place and that Frank Polk had been born and raised there; that Frank Polk told him about his plans; that he was buying up cattle to go to Texas; that he rented out the old Polk Place and moved to the bottom place because there were better pastures there for his cattle; that he intended to move to Texas the next spring or fall; that he only intended to live on the bottom place temporarily while buying up cattle preparatory to going to Texas; that the house he lived in on the bottom place was only a shack and that he made no repairs on it except to make it warm; that Polk got sick and died in the spring before he moved to Texas.

William Green corroborated in all respects the testimony of J. G. Brummett. He stated that Frank Polk told him that he was going to Texas in the fall and was going to take his family with him; that he had already been to Texas and had shipped a load of cattle there before his death.

The old Polk Place was the homestead of Frank Polk. He had the right to change his homestead and acquire a new one. The question is did he acquire a new homestead in the bottom place? In determining this question we must consider the intent of Polk as shown by his declarations when he moved to the bottom place as well as the other facts and circumstances in the case. It is manifest that the testimony of the plaintiff sheds no light whatever on the subject. She was twenty-three years of age when she testified in April, 1917. Hence she was only about six years old when her father died and less than that age when he moved from the old Polk Place to the bottom place. It is true she testified that this was his homestead but she also stated that all his children had been born there and that her grandfather and grandmother were buried there. This shows that she was thinking about the old Polk Place and had con-

fused the two places in her mind. This is not to be wondered at when we consider her tender age at the time. This leaves for our consideration only the declarations of Polk when he moved to the bottom place indicating his intention of occupying the place. One witness for the plaintiff testified that Frank Polk told him that he intended to make the bottom place his home. He was a grown man at the time and in some respects is corroborated by a young man who was only about thirteen years of age when Frank Polk moved to the bottom place.

On the other hand two other witnesses, both of whom were grown and one of whom had been for many years the partner of Frank Polk testified that he told them of his plans. They said that he only intended to live on the bottom place temporarily while he was gathering up some cattle preparatory to moving to Texas; that he had already shipped one car load of cattle to Texas and had gone there with them in the spring of 1900 before he died. They stated that he had only moved from his home place to the bottom place while he was gathering up his cattle preparatory to moving to Texas.

(3) The chancellor found that he had not acquired a homestead in the bottom place and the testimony on the subject is conflicting and the question being mainly one of intention as manifested by the declarations of Polk, together with the attendant circumstances, it is somewhat difficult to determine where the preponderance lies. We are unable, however, to say that the conclusion of the chancellor is against the preponderance of the evidence and therefore it is our duty to follow his findings. *Long* v. *Hoffman,* 103 Ark. 574; *Stewart* v. *Pritchard,* 101 Ark. 101. The decree will be affirmed.

CHIPMAN v. PERDUE.

Opinion delivered October 7, 1918.

1. EXECUTORS AND ADMINISTRATORS—AUTHENTICATION OF CLAIM—SIGNATURE.—A claim against an administrator as such is sufficiently authenticated where the claimant, after directing his son to sign his name to the claim, appeared before an officer and acknowledged and approved the signature.
2. DEPOSITION—MOTION TO SUPPRESS.—Where a motion to suppress a deposition went to the whole of the deposition, though part of it was competent, it was proper to overrule the motion.
3. EXECUTORS AND ADMINISTRATORS—DISPUTED CLAIMS—JURY TRIAL.—Upon the trial of a disputed claim against an administrator, either party may, under Kirby's Digest, § 128, require a jury.
4. APPEAL AND ERROR—HARMLESS ERROR—FAILURE TO ALLOW JURY TRIAL.—Where the undisputed evidence established the validity of a claim against an administrator, he was not prejudiced by the court's refusal to allow him a jury trial.

Appeal from Union Circuit Court; *C. W. Smith*, Judge; affirmed.

Aylmer Flennekin, for appellant.

1. The claim was not properly authenticated. Kirby's Digest, § 114; 66 Ark. 327; 48 *Id.* 304; Kirby's Digest, § 7799; 70 Ark. 449.

2. It was error to refuse a jury trial. 109 Ark. 534; 4 *Id.* 158; 56 *Id.* 391; 75 *Id.* 443. It was not waived. K. & C. Dig., § § 7609, 7651.

3. The court erred in not suppressing the deposition of Alex Perdue. Kirby's Dig., § 3093. He was not a competent witness.

Caldwell & Triplett, for appellee.

1. The judgment is not contrary to the evidence. The evidence fails to show payment.

2. If a trial by jury had been granted appellee would have been entitled to a directed verdict.

3. The claim was duly authenticated. The signature was directed. 25 Ark. 16; 35 *Id.* 198; 36 Cyc. 451; 4 Words & Phr. (2 series), 585-6. An affidavit to a claim against an estate need not be signed at all. 23 Ark. 16, 347.

4. A jury trial was not necessary. 9 Ark. 259; 26 *Id.* 281, 291; 32 *Id.* 553; 40 *Id.* 290; 48 *Id.* 426; 50 *Id.* 266; 72 *Id.* 161; 99 *Id.* 1, 16; 24 Cyc. 102, 104-6-7, 131; 124 Ark. 569; 40 *Id.* 290, 296-7. A party appealing from a judgment of the county court has no right to a jury in the circuit court. 24 Cyc. 148; 123 Ark. 458; 32 *Id.* 553; 40 *Id.* 290, 296.

5. Alex Perdue was a competent witness. Kirby's Digest, § 3093; 16 Ark. 271; 18 *Id.* 123; 48 *Id.* 177; 107 *Id.* 494. His testimony did not pertain to transactions between himself and deceased. Part of his testimony was at least competent and it was error to suppress it entirely.

HUMPHREYS, J. On the 28th day of October, 1915, Alex Perdue presented to appellant, administrator of the estate of J. J. W. Smith, deceased, a note of date February 20, 1904, for allowance, showing a balance due thereon of $1,446.21, after deducting all credits which were entered on the back of the note. Attached to the note was an affidavit of authentication. Appellant disallowed the claim, whereupon appellee presented the claim to the probate court of Union County, Arkansas, upon due notice to the administrator. The probate court allowed the claim, from which an appeal was prosecuted to the circuit court of Union County.

Appellant's defenses against the claim in the circuit court were: first, that the affidavit of authentication was not signed by Alex Perdue himself, but that his name was signed by his son who failed to witness it in writing; second, that the note was paid by J. J. W. Smith in his lifetime.

The circuit court tried the cause without a jury upon the issues joined and evidence adduced and rendered a judgment against the administrator in the sum of $1,446.21. From the judgment an appeal has been prosecuted to this court.

It is insisted that the court erred in admitting the note in evidence as authenticated. The evidence dis-

closed that Alex Perdue could write but that, instead of signing his own name, he directed his son to sign it to the affidavit of authentication for him. His son did as directed, but did not attest the signature as a witness. Appellant cites section 7799 of Kirby's Digest in support of his contention that appellee's signature should have been attested by the signature of his son in order to render it effective. This section has no application whatever to a person who does not attempt to sign his name by mark. The statute referred to does not render an unattested signature by mark void. A signature by mark unattested would be valid if proved. The effect of attesting a signature by mark in the manner provided by statute is to render it a *prima facie* signature. If not attested in the manner provided by the statute, a signature by mark may be otherwise established. *Ex parte Miller,* 49 Ark. 18; *Davis* v. *Semmes,* 51 Ark. 48; *Fakes* v. *Wilder,* 70 Ark. 449; *Ward* v. *Stark,* 91 Ark. 268; *Dawkins* v. *Petteys,* 121 Ark. 498. A directed signature is as effective as if written by the party directing it. *Clark* v. *Latham,* 25 Ark. 16; *Weaver* v. *Carnall,* 35 Ark. 198. Especially would that be true where the party himself appeared before an officer and acknowledged the signature and approved the authorized or directed signature, as was done in this case.

Again, it is insisted by appellant that the court erred in not suppressing the deposition of appellee on the ground that he testified to transactions between himself and the deceased. It is true that a party to a suit between himself and the administrator of an estate can not testify to transactions between himself and the deceased. Kirby's Digest, section 3093. But it is likewise true that a party to a suit against an administrator may testify to matters not concerning transactions between himself and the deceased relative to the issues involved. Practically all of Alex Perdue's evidence pertained to matters not touching transactions between himself and J. J. W. Smith. He gave testimony as to the ownership of the note, the manner of authenticating same, etc. The

motion to suppress the deposition went to the whole deposition, competent as well as incompetent parts thereof. It was therefore proper to overrule the motion. *Hempstead* v. *Johnson,* 18 Ark. 123.

Appellant insists that the court erred in denying him a jury trial. Appellant is correct in this contention. The statute is plain. Sections 127 and 128 of Kirby's Digest are as follows:

Sec. 127. "The court shall hear and determine all demands presented for allowance under this act, in a summary manner, without the forms of pleading, and in taking testimony shall be governed by the rules of law in such cases made and provided."

Sec. 128. "If neither party require a jury, the court shall decide the validity of the claim, and allow or disallow it; but, if either party require a jury, the court shall direct a jury to be forthwith summoned."

It does not necessarily follow that, because the court committed error in this regard, the judgment must be reversed. In order to work a reversal, the error must have been prejudicial. Appellant admitted that his intestate executed the note and, by way of defense, pleaded payment. The burden was upon appellant to establish payment. The only evidence tending to prove payment were the credits on the back of the note and the evidence offered by appellee showing the correctness of them. All these credits were allowed. Giving the evidence offered by appellant in support of payment its greatest probative force, it amounts to nothing higher than surmise. Only one witness testified on the issue of payment in behalf of appellant. This witness was R. Q. Thompson, an uncle of deceased. The substance of his testimony, as abstracted by appellant, is as follows:

"J. J. W. Smith was my nephew. I raised him. We were in business together. From my relation with Smith I believe the note has been paid. Smith talked to me freely about his business."

The undisputed evidence established the claim, and it was therefore the duty of the court to have directed

a verdict even if it had been tried by a jury. No prejudice could, or did, result to appellant on account of the denial of a jury trial.

No error appearing, the judgment is affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* COMPTON.

Opinion delivered October 7, 1918.

1. MASTER AND SERVANT—ASSUMED RISK—PATENT DANGER.—Where a defect is so patent and the danger so obvious that a servant of reasonable intelligence, exercising ordinary care for his own safety in the use of appliances furnished him, must have had knowledge of and appreciated the dangers incident to such work, he assumes the risk.
2. SAME—ASSUMED RISK—BOARDING MOVING MOTOR CAR.—Where an employee of a railroad company was injured by making a misstep in attempting to board a motor car, he will be held to have assumed the risk, since no person of ordinary prudence could have failed to appreciate the danger.

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

Daniel Upthegrove, J. R. Turney and *Gaughan & Sifford,* for appellant.

The court erred in its instructions. No negligence was proven and plaintiff clearly assumed the risk. 90 Ark. 407; 108 *Id.* 483; 58 *Id.* 125; 89 *Id.* 50; 106 *Id.* 436; 76 *Id.* 441.

Mehaffey, Keeney & Dalby and *J. M. Carter,* for appellee.

Appellee was guilty of no negligence but appellant was. Appellee did not assume the risk. 182 S. W. 83; 129 *Id.* 88; 203 *Id.* 840; 232 U. S. 94; 182 S. W. 81.

SMITH, J. The appellee instituted this action against appellant for damages for personal injuries, and a judgment was rendered in his favor from which is this appeal. The facts are substantially as follows:

The appellee was a section hand in the employ of appellant. He was 57 years of age. On the 3rd day of

July, 1917, he was engaged in the work of repairing appellant's road bed. There were no others in the section gang at that time except another man and the section boss. The section gang were required to carry along a motor car which was operated by power generated by the explosion of gasoline. The motor car was rolled out and lifted on the railway track. Appellee and the other man started the car. The foreman told the appellee and his fellow servant to get on the other side of the car and start it. Appellee was on one side, and his fellow helper on the other. Appellee put his right side to the car, shoved it slowly and when the engine began to exhaust, he sprang on. In starting the car he went in a trot. They had made three or four stops, each time starting the car in the above manner. Appellee described the manner in which he received his injuries as follows: "I started to speed it up. There was a road crossing there. I crossed the cattle gap and was walking on the end of the ties pushing along, all the time running along with it. As quick as we left the cattle gap, I went to make a spring and noticed the exhaust was sufficient to run, and I did not catch it with my foot. I made the spring with my right foot and threw up my right foot to the edge of the car and it slipped off. I had to gather in close to the car on account of a plank coming down from the cattle gap and I did not get quite high enough. I was expecting my weight to come on it and it slipped off. My foot came down on the rail and the wheel ran across it."

Appellee was employed on the morning of the 2nd of July and was on the car operated by the section gang on that day. The car, on that day, was started a half dozen times. It was started the same way every time. There was nothing to keep appellee from looking at the men and from seeing how it was done. On the next day appellee helped to start the car. Appellee's foreman did not explain to him how to start the car except that he showed appellee where to set his foot. He did not explain to appellee that there was any danger in doing that. Appellee, when he applied for the job, told his foreman

that he was inexperienced. There were no running boards or steps on the sides of the car where a man could step on after the car was started. There was no self-starter on the motor. It was about 18 inches or 2 feet between the front wheels and hind wheels of the car. The car is just a plank table that goes out from the wheels for the men to ride on and to put a box of tools on.

The section foreman testified in regard to the injury and the appliance with which appellee was working as follows: "The car is about three feet high, has four wheels with a small four horsepower engine on the center of the car which runs with a belt drive. The body of the car is almost square. The platform of the car does not extend out from the end of the ties. It extends about six inches from the rail. There was a seat about 16 inches above the car made of boards set upon legs. These planks were 10 inches wide and were for seats. The edge of this plank does not come out as far as the edge of the platform of the car. In stepping on the car you held to the car and stepped on the edge of the car. There is no difficulty in stepping on the car except it is a little high. When the car started that started the engine. These motor cars have been used on the Cotton Belt something like six or seven years. The body of the car is like the old section car that was operated by hand, except it uses a gasoline engine instead of levers. It is like the old car except the frame and handle is off; about the same height and width. The company furnished the car and I furnished the motor. I have seen similar cars on the other railroads that were operated in the same way. At the time Mr. Compton got hurt we had only two men that day; one man on each side. Compton was on the right hand side and he, being a new man, I told him to get on the car first, and I would start the engine, and I would start the car without him pushing it. He started to pushing, himself, and when he did start to step on the car, the car had started to move a little bit, and in stepping on it, being a little high, he put his foot on the car and started to put his left foot on the car and missed the car and his back foot got caught

but he took it off the rail." This witness further testified "that the car that injured appellee was a little too high for a man to step on it safely. There was no self-starter to the motor. It had to be moved along at a speed of about 3 or 4 miles an hour to start the motor, and a man would have to go in a little trot to explode it. Two men can start it. When the appellee was injured, the car was going at a speed of about three miles an hour. The car was a little higher than the smallest hand-car. It was not higher than one class of hand-cars. About half the hand-cars are made in the small size and about half in the large size. This car was the large size."

The other servant was a step-son of the appellee and he testified substantially corroborating the testimony of the appellee as to the manner of the injury, and he further stated "the section foreman told my father that morning how to get on and off the car. At the time he got hurt he did not tell him. That morning he showed him how to get on the car. He showed him at the section house, and he showed him just like I stated."

It was shown that there were five section hands working on the day before the injury to appellee.

The appellee alleged that the appellant was negligent in not having sufficient men in the gang to properly handle the car, and in not warning the appellee of the danger in starting and getting on the car, and in furnishing the appellee a car that was not equipped with a self-starter, and that had no steps or platform upon which the appellee could step safely from the ends of the ties to the top of the car. The appellant denied specifically the allegations of the complaint, and pleaded that the appellee assumed the risk, and that he was also guilty of contributory negligence. The majority having reached the conclusion that the cause must be reversed for another reason, it is unnecessary to determine whether the testimony was sufficient to sustain the verdict on the issues of negligence and contributory negligence; and it may be conceded for the purpose of this decision that the instructions on these issues were correct. Nevertheless, the appellee cannot

recover for the reason that he assumed the risk. The undisputed evidence shows that such danger as existed was an open and obvious one which a man of ordinary prudence must have understood and fully appreciated when he entered upon the performance of his duties. Appellee was 57 years of age. He had seen the car started in the same manner a half dozen times on the first day, and on the day that he was injured, appellee had speeded up the car four times or more before he was hurt. The section foreman had shown appellee where to set his foot. The whole operation of starting the car in the manner shown by the proof was so simple and obvious that appellee must be held to have had knowledge of whatever danger there was and to have appreciated such danger. Where the defect is so patent and the danger so obvious that a servant of reasonable intelligence, exercising ordinary care for his own safety in the use of the appliances furnished him, must have had knowledge of and appreciated the danger incident to his work, then he assumes the risk. Such was the case here and in such case the law charges the servant with knowledge of the defect and appreciation of the danger. *Fullerton* v. *Henry Wrape Co.*, 105 Ark. 437, and cases there cited; *Mo. & North Ark. Ry. Co.* v. *Murphy,* 106 Ark. 438; *Pekin Stave Co.* v. *Ramey,* 108 Ark. 490 and cases cited. These and other cases are collated in 3 Crawford's Digest, p. 3441, Sec. 99, *et seq.;* 2 Sec. 100.

Even though appellee's foreman was present directing the work, he had shown appellee how to do it, and it could only be done in one way. The height of the car was obvious, and the difficulty of reaching it and the danger from a misstep on the ties while attempting to board the car in motion was also obvious, and no man of ordinary intelligence and prudence could have failed to have known and appreciated such danger as existed. There was nothing peculiar in the circumstances to justify the appellee in relying upon the superior knowledge of his foreman as to the defects and dangers. In this respect the case in hand is distinguished on the facts from the cases of *Griffin*

v. *St. L. I. M. & S. Ry. Co.*, 121 Ark. 433; *Dickinson* v. *Mooneyham,* 203 S. W. 840, and *A. L. Clark Lbr. Co.* v. *Northcutt,* 95 Ark. 291 and other cases cited in appellant's brief.

For the error in not instructing the jury to return a verdict in favor of the appellant as requested by appellant's prayer No. 1, the judgment is reversed and the cause is dismissed.

WOOD, J., dissenting.

Appellee testified: "I discovered that I couldn't handle myself as good with my left side as I could with my right to the car. When we started I went around the car to change sides. Obie West asked me to change sides with him but the boss said, 'No, Mr. Compton, go back to that side. You don't understand handling that brake beam.' I never said a word; that was his orders. I started to speed it up. There was a road crossing there. I crossed the cattle gap and was walking on the end of the ties pushing along, all the time running along with it. As quick as we left the cattle gap, I went to make a spring, etc."

The testimony of this witness shows that he could not get on the car as well with his left side to it as he could with his right side, hence he was intending to change to the other side of the car when his foreman directed him not to do so. His testimony shows that the foreman was present directing the work. While the foreman had shown appellee how to board the car when it was in motion, he had not told appellee that the car was too high to be safe and expressly warned appellee of the danger because of such fact in attempting to get upon same while the car was in motion.

Under the circumstances thus disclosed by the evidence it was a question for the jury to say whether or not the appellee assumed the risk. This case cannot be distinguished in principle from the cases of *Dickinson* v. *Mooneyham,* — Ark. —, 203 S. W. 840; *A. L. Clark Lum-*

ber Co. v. *Northcutt,* 95 Ark. 291; *St. L. I. M. & S. Ry. Co.* v. *Griffin,* 121 Ark. 433; *Ry. Co.* v. *Cosio,* 182 S. W. 83.

Under the doctrine of the above cases it was a question for the jury as to whether or not the appellee knew and appreciated the danger incident to boarding the car in the manner indicated. Therefore the court did not err in refusing to declare as a matter of law that the appellee assumed the risk. It occurs to us that the present case can not be distinguished from the doctrine of the above cases without too great refinement of reasoning. See also *Gila Valley, Globe & Northern Ry. Co. et al* v. *Hall,* 232 U. S. 94. In the latter case it is said: "Moreover, in order to charge the employee with the assumption of risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew that it endangered his safety, or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it." Such being the law, it was for the jury to say under the circumstances in the instant case as to whether or not the appellee had the right to rely upon the superior knowledge of his foreman and whether or not appellee in so doing, as a person of ordinary care, would be bound to know and appreciate the danger incident to his work.

Mr. Justice HUMPHREYS concurs.

CLARK v. STATE.

Opinion delivered October 14, 1918.

1. RAPE—PROSECUTION FOR CARNAL ABUSE—INSTRUCTION.—In a prosecution of one for carnal abuse of a female under the age of sixteen years, the court refused to give the following instruction to the jury, towit: "In passing upon the question of the age of the prosecuting witness, Sarah Embrey, you may take into consideration the size, development and mature appearance of the said Sarah along with the other facts in proof as to her age, and in doing this if you have a reasonable doubt as to her being under the age of sixteen years at the time she says the defendant carnally knew her, then you

should acquit the defendant. *Held,* no error, as the instruction singled out a particular portion of the evidence, and invaded the jury's province in directing them to consider the mature appearance of the prosecuting witness.

2. SAME—CARNAL ABUSE—INSTRUCTION.—In a prosecution for carnal abuse, the court instructed the jury as follows: "The fact, if you should find it to be a fact, that Sarah Embrey was willing to the intercourse, or the fact, if you should find it to be a fact, that Sarah Embrey had intercourse with other men, would not be a defense for the defendant in this case." *Held,* not objectionable for assuming that there was intercourse where another instruction told the jury to acquit defendant if they had a reasonable doubt whether he had had sexual intercourse with the prosecutrix while she was under sixteen years of age.

3. CRIMINAL LAW—EVIDENCE—REPUTATION.—Where a witness in a criminal case has testified to the good reputation of the defendant, he may be asked on cross-examination whether he had had defendant arrested for removing mortgaged property.

4. SAME—HARMLESS ERROR.—Where a witness has testified to the good reputation of the accused, it was not prejudicial error to permit the prosecution to ask the witness on cross-examination whether he had ever had accused arrested for removing mortgaged property where the witness answered that he had no recollection of having done so.

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

Sam R. Chew, for appellant.

1. The proof as to the age of Sarah Embrey is far from satisfactory. The court erred in refusing to give instruction "A" and in giving No. 2. The appearance and development of the witness should have been submitted to the jury. The question of fact as to sexual intercourse should have been left to the jury.

2. Cravens' testimony was improper and prejudicial. 37 Ark. 261; 120 *Id.* 492. Testimony as to another crime was not admissible. 67 Ark. 112.

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

1. Instruction "A" was properly refused. It singles out a particular portion of the evidence and directs the jury to consider it. 105 Ark. 457; 130 *Id.* 365; 75 *Id.* 76;

57 *Id.* 512. It charges the jury as to matters of fact and assumes them as true and draws inferences from the evidence. 49 Ark. 147; 59 *Id.* 417; 36 *Id.* 117; 16 *Id.* 568.

2. There was no error in giving No. 2. It is not open to criticism when considered in connection with others given. The jury were not misled. 70 Ark. 337.

3. The evidence of Cravens was competent on cross-examination as to defendant's good reputation. 83 Ark. 119; 12 L. R. A. 140; 10 R. C. L., p. 953, § 124; 82 Ark. 555.

SMITH, J. Appellant seeks by this appeal to reverse the judgment of the court below sentencing him to the penitentiary for the offense of carnal abuse alleged to have been committed on Sarah Embrey, a female under the age of sixteen years. As grounds of reversal, the following errors are assigned: (First) Refusal to give instruction A. (Second) The giving of instruction numbered II. (Third) The erroneous admission of certain testimony of witness J. J. Cravens. Instructions A reads as follows:

"In passing upon the question of the age of the prosecuting witness, Sarah Embrey, you may take into consideration the size, development, and mature appearance of the said Sarah, along with the other facts in proof as to her age, and in doing this, if you have a reasonable doubt as to her being under the age of sixteen years at the time she says the defendant carnally knew her, then you should acquit the defendant."

No error was committed in refusing this instruction, as it singles out a particular portion of the evidence which it directs the jury to consider. It was, moreover, a charge on the weight of the testimony, as it directed the jury to consider the mature appearance of the said Sarah, whereas, one of the issues of fact was the age of the prosecutrix, and it was the province of the jury, and not that of the court, to say whether the witness puresented a mature or an immature appearance. *Fowler* v. *State,* 130 Ark. 371.

Instruction No. II reads as follows:

"The fact, if you should find it to be a fact, that Sarah Embrey was willing to the intercourse, or the fact, if you should find it to be a fact, that Sarah Embrey had intercourse with other men, would not be a defense for the defendant in this case."

The objection made to this instruction is that it assumes that there was intercourse, a fact denied by appellant. We think the instruction is not open to this objection, especially when the instructions are read as a whole, for the instruction immediately preceding the instruction II expressly told the jury to acquit appellant if they had a reasonable doubt whether he had had sexual intercourse with the prosecutrix while she was under sixteen years of age.

Cravens was called by appellant to prove his general reputation, and testified that it was good. In the cross-examination of the witness, the following colloquy took place:

"Q. Jess, when did you have him arrested for selling mortgaged property?

"A. I don't remember ever having him arrested, I have done business with him ever since I have been in the county.

"Q. Don't you know that he and Dock H——— sold Mr. McGehee two bales of cotton on which you had a mortgage?

"A. I don't remember about the circumstance, the records will show it, but I am pretty sure if he tried to get away with some cotton I had a mortgage on I had him arrested.

"Q. You won't say you ever had Clark arrested or not?

A. No, sir."

It is objected that the effect of this testimony was to prove appellant guilty of a crime not charged in the indictment, and to permit his conviction of one crime by proof of his guilt of another. We think the objection made is not tenable. Appellant had voluntarily put his repu-

tation in issue, and the witness had testified that it was good, and it was not, therefore, improper to interrogate the witness as to the basis of this opinion. The rule in such cases is announced as follows in 10 R. C. L., p. 953, section 124: "Accordingly, evidence of defendant's good character by general reputation can not be rebutted by evidence of particular acts of misconduct or crime, and that by rumors and reports in the country. But a witness as to character may, on cross-examination, be interrogated as to what he had heard in the community touching the character of the party inquired about. This is to afford a test of the value of his evidence in chief, to show that his conclusion as to the reputation in issue, and which rests upon the estimation of the community, is not supported by the expressions of that estimation, and thus to weaken its force."

Moreover, this witness did not testify that he had had appellant arrested for removing mortgaged property. Upon the contrary, he stated that he had no recollection of having done so. But, even if the witness had stated that he or some one else might have had appellant arrested for this or for some other charge, it would have been competent for the witness to testify that appellant's reputation was good, notwithstanding that fact, if this were true. One might be arrested for a crime, and still have a good general reputation. But these are proper questions for the jury, and it was not improper for the court to permit an examination of the witness which tended to disclose the facts upon which he based his opinion.

Finding no prejudicial error, the judgment is affirmed.

WOLF v. STATE.

Opinion delivered October 14, 1918.

1. GAMING—BETTING ON HORSE RACE—PUNISHMENT.—Under Acts 1907, p. 134, providing that it shall be a misdemeanor to bet on a horse race, and providing severe punishments for second or subsequent offenses by the same person, one may be punished as for a second offense though the conviction for the first offense did not occur within one year before the return of the indictment for the second offense.

2. GAMING—BETTING ON HORSE RACE—EVIDENCE.—On an indictment for betting on a horse race, evidence that defendant wired to a point without the State a bet for a certain person on a horse race to be run outside the State, and agreed to pay such person if the horse he bet on should win the race, *held* to sustain a conviction.

3. GAMING—BETTING ON HORSE RACE—INSTRUCTION.—On a prosecution for betting on a horse race, the court instructed the jury in effect that the evidence must show that a wager was placed with defendant and that he accepted it; that if the witness telephoned defendant to bet on a certain horse in a race, and a horse race was had, the parties treated that as a binding obligation, it would be a wager, *held* not erroneous.

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

A. J. Murphy, for appellant.

1. The demurrer should have been sustained. The offense is a misdemeanor and the conviction for the first offense did not occur within one year before the return of the indictment for the second offense. Kirby's Digest, § 2106.

2. As to the particularity with which a conviction for the first offense must be alleged in an indictment for the third offense, see 14 R. C. L., p. 190, § 35; 22 Cyc, 356, § 2; 22 Ark. 323; Ann. Cases, 1914, C. 562, note; 9 Ann. Cases, 767, note; 24 L. R. A. (N. S.) 421 and note.

3. The evidence does not support the conviction and there is error in the instructions. 104 Ark. 162. The evidence fails to show that a horse race was run within or without the State.

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

1. The demurrer was properly overruled. Acts 1917, § 1 and 2, Act No. 55; — U. S. —— The second offense need not be within a year and the statute does not so provide.

2. The evidence is sufficient. It was proper to permit the State to prove a violation of the statute within the statutory period. 127 Ark. 289; 129 *Id.* 106; *Mobley* v. *State,* Ms. Op.

3. There is no error in the instructions.

HART, J. John Wolf prosecutes this appeal to reverse a judgment of the circuit court convicting him of the crime of horse racing, charged to have been committed contrary to Act 55 of the Acts of 1907. See Acts of 1907, p. 134. The act is as follows:

"Section 1. That hereafter it shall be unlawful to bet in this State, directly or indirectly, by selling or buying pools or otherwise, any money or other valuable thing, on any horse race of any kind whether had or run in this State or out of this State.

"Section 2. That any person who shall violate section one of this act shall be deemed guilty of a misdemeanor and for the first offense, on conviction shall be fined in any sum not less than ten dollars nor more than twenty-five dollars; and for the second offense, on conviction shall be fined in any sum not less than twenty-five nor more than one hundred dollars, and for all offenses after the second, on conviction shall be fined in any sum not more than five hundred dollars and imprisoned in the county jail for a term of not less than thirty days nor more than six months, and every bet, wager, sale of pools or purchase of pools shall be deemed a separate offense."

It is first insisted that the judgment must be reversed because the offense is a misdemeanor, and the conviction for the first offense did not occur within one year before the return of the indictment for the second

offense as is required by our statute in indictments for misdemeanors. We do not think this contention is sound. In the first place, it may be said that statutes which provide for increased penalties when committed by prior offenders are uniformly upheld. *State* v. *Burgett*, 22 Ark. 323; Notes to 24 L. R. A. (N. S.) 432; 9 A. & E. Ann. Cas. 768, and Ann. Cas. 1914 C, at 565.

In some States the statute provides that in case of a subsequent conviction of the same person during the year, the punishment shall be increased. Under such statutes, of course, both the prior and subsequent offense must occur within the year. It will be observed that our statute contains no such limitation. It only provides an additional punishment for one who is convicted of a crime after having been previously convicted of the same kind of crime. The prior offense only affects the punishment for the subsequent offense, and for that reason it is not necessary to charge and prove that the prior offense was committed within the statutory period for returning an indictment for the subsequent offense.

It is also contended by counsel for the appellant that the evidence is not sufficient to warrant the verdict. We do not agree with counsel in his argument on this ground. Three witnesses for the State were examined and cross-examined at length. It would unduly extend this opinion to set out their testimony at length, and we have concluded to only give a brief summary of it.

The offense charged is a misdemeanor, and according to the testimony of R. G. Morris he went to the appellant's place of business in Hot Springs, Garland County, Arkansas, or telephoned to him there several times within 12 months before the return of the indictment in this case, and had the appellant to wire some bets away for him on horses. The witness would bet whatever he chose to bet at the time, and there was a winning or losing of money as a result of these wagers. There was no money passed between them, but it was agreed and understood that the loser would pay the winner.

It is fairly inferable from the extended cross-examination of this witness that the transactions had by him with the appellant were wagers on races that took place without the State.

The language of the statute includes betting by selling pools or otherwise for money or other valuable thing on any horse race of any kind whether run in this State or out of the State. It will be observed that the language of the statute is very broad and comprehensive. It does not require that money should be bet. The agreement between the parties that the loser should pay to the winner the amount due him as a result of their wagers, brings the transaction within the prohibition of the statute.

We have carefully read the record, and it is fairly inferable from it that appellant wired to a point without the State a bet for the witness on a horse race to be run outside the State and agreed to pay the witness if the horse he bet on should win in the race. This warranted the jury in finding appellant guilty.

It is also insisted that the court erred in giving the following instruction:

"The evidence that the witness may have telephoned the defendant to bet money on a horse race and that he supposed that defendant telephoned the bet away would not be sufficient to authorize you to convict the defendant, but before you can convict him the evidence must show that a wager was placed with him and that he accepted it. As I have stated in the instructions, you must find that he bet money or something of value. But on that point, to amplify it a little bit more and apply it to the evidence, if you believe from the evidence, beyond a reasonable doubt, that the witness telephoned or told him that he wanted to bet or to place such money on a certain horse in a race, and that a horse race was had in which that horse ran, and the parties treated that as a binding obligation after the result of that race, either as having won or lost, one or the other, and treated it between themselves as a binding obligation, then the court

would instruct you that that would be something of value, and it would be a wager the same as if the cash money had been placed."

It is contended that the vice of this instruction consists in making the guilt of appellant depend upon whether or not the parties after the result of the race treated their agreement which has been hereinbefore recited as a binding obligation. We do not agree with counsel in this contention. Of course, after a race had been run, the parties could not then agree that they had made a wager and thus bring one of them under the ban of the statute. But we do not think the instruction fairly susceptible to this construction. It leaves to the jury the truth or falsity of a series of acts between the parties and makes the guilt or innocence of the appellant depend upon the finding of the jury as to all these acts. In short, the guilt of appellant is made to depend upon the finding of the jury as to a series of acts connected together and not upon any of them singly.

We have carefully examined the record and find no reversible error in it. Therefore, the judgment is affirmed.

JONES v. PHILLIPPE.

Opinion delivered October 14, 1918.

1. USURY—BURDEN OF PROOF.—The burden of proof is on the party who pleads usury to show clearly that the transaction is usurious.
2. SAME—KNOWLEDGE OF BORROWER.—To constitute usury, there need not be, under our statute, a mutual agreement to give and receive unlawful interest; it is sufficient if it be actually received, taken, secured, or agreed to be taken and reserved, and it may be reserved by the lender without the knowledge of the borrower.
3. SAME—BONUS PAID TO BROKER.—Where a loan of money was made at the highest rate of interest, and the lender, contemporaneously with the contract and as part consideration of it, received part of a bonus paid by the borrower to a broker for procuring the loan, the loan is usurious.

Appeal from Madison Chancery Court; *B. F. McMahan,* Chancellor; affirmed.

Harvey Combs and *W. N. Ivie,* for appellant.

1. The plea of usury is not sufficient. It fails to allege a corrupt intent or agreement. 4 Ark. 44; *Ib.* 410. A corrupt agreement and the intention to take or reserve more than the legal rate of interest are essential and must be averred. 26 *Id.* 356. The burden is on the party who pleads usury. 74 Ark. 241; 83 *Id.* 31; 105 *Id.* 653. The written contract is legal on its face and a parol contract to take usury must be shown by clear and convincing evidence. 83 Ark. 31; 105 Id. 653.

2. The evidence does not show usury. 62 Ark. 99. Usury must be proven; it is never implied. 91 *Id.* 458; 87 *Id.* 534. There must be an agreement to receive and to give a greater rate than 10 per cent. 54 Ark. 566; 83 *Id.* 31.

3. A sum paid by the borrower to his own agent to procure the loan is not usury. 51 Ark. 534; 4 L. R. A. 462; 14 Am. St. 73.

E. B. Wall, for appellee.

1. The contract is clearly usurious. Kirby's Digest, § § 5389, 5394. Here the interest and the bonus or commission paid the agent of the lender with his knowledge, and divided with the lender makes a clear case of usury. Ignorance or mistake is no protection. 2 Cowen, 678; 4 Scam. 29; 1 Porter, 96; 62 Ark. 379; 41 Ark. 331; 62 *Id.* 379; 51 *Id.* 534; 51 *Id.* 546; 123 *Id.* 612; 126 *Id.* 155; 68 *Id.* 164.

2. The death of Mrs. Phillippe was duly suggested and proven. There was no request for revivor but the case went to trial without objection. Kirby's Digest, § § 6298, 6317; 69 Ark. 215; 31 *Id.* 319; 93 *Id.* 307; 16 *Id.* 168; 39 *Id.* 235; 51 *Id.* 82; 69 *Id.* 215; 81 *Id.* 462.

See also 31 Ark. 319; 56 *Id.* 324; 81 *Id.* 462; 93 *Id.* 307; 127 *Id.* 159, 498; 105 *Id.* 222; 128 *Id.* 155; 103 *Id.* 601.

3. As to the usury the decree of the chancellor is correct. 54 Ark. 50; 41 *Id.* 331; 51 *Id.* 534.

WOOD, J. This action was brought by appellant against appellees to recover a balance alleged to be due

on a promissory note and to foreclose a mortgage on certain real estate executed to secure the note. The note, on its face, was for the sum of $300 with interest at the rate of 10 per cent. per annum. The defense was a plea of usury.

Appellee, M. J. Phillippe, testified concerning the execution of the note as follows: "Through Mr. Nunnelley I borrowed the money from Alfred Hawn to pay off the indebtedness against the land. I borrowed $300 from Mr. Hawn which I understood covered the amount due against the land together with interest and also cost of suit. We executed to Mr. Hawn our note for $300 and a mortgage on the land to secure the same. I gave Mr. Nunnelley, as I said in my examination in chief, the sum of $15 to secure this loan for me. I was in the State of Oklahoma at the time and I live in Oklahoma now. The $15 was paid to Mr. Nunnelley for securing me the loan and the note given to Mr. Hawn for the $300 drew 10 per cent. only. My wife died on the 18th of July, 1917. The deed to this land was made to me and my wife jointly, and I now own the land and no one else has any interest in it. I own now all the interest that my wife owned prior to her death."

Alfred Hawn testified: "The note in suit was made to me. The first suit was started and I furnished Mr. Phillippe the money to pay for the original debt. I just loaned Mr. Phillippe $300. My recollection is that Mr. Nunnelley came to me and told me that Mr. Phillippe was giving him $15 to procure this loan of $300 and I don't remember how much of the $15 he gave me but it is my best impression that I and Sam Nunnelley divided the $15. After I loaned the $300 I sold and transferred the note and mortgage to Mrs. Sarah E. Jones. I know that I got some of the $15 but don't know how much I got for letting Mr. Phillippe have the $300.

The court found that: "The defendant's plea of usury should be sustained; that, in the contract for the loan of said money, the said Alfred Hawn in addition to the 10 per cent. interest specified in

said note, took and received a further additional sum of money for the forbearance of said loan, and that said note became and is void. The court further finds that the defendant and cross-complainant, Lela Phillippe, departed this life July 18, 1917, and that her death was suggested and admitted in open court, and said cause proceeded to a hearing without objection from either party." The court entered a decree dismissing appellant's complaint for want of equity, from which is this appeal.

(1) "The burden of proof is on the party who pleads usury to show clearly that the transaction is usurious." *Holt* v. *Kirby,* 57 Ark. 251, 256; *Citizens Bank* v. *Murphy,* 83 Ark. 31, 36; *Smith* v. *Mack,* 105 Ark. 653.

In *Scruggs* v. *Scottish Mortgage Co.,* 54 Ark. 566, 569, we said: "To constitute usury, there must be an agreement to pay for the use of money more than 10 per cent. interest." And in *Citizens' Bank* v. *Murphy, supra,* we said: "To constitute usury, there must be an agreement on the part of the lender to receive, and on the part of the borrower to give, for the use of the money, a greater rate of interest than 10 per cent."

In *Garvin* v. *Linton,* 62 Ark. 370, 379, Judge Battle, speaking for the court, said: "There need not be, under our statute, a mutual agreement to give and receive unlawful interest to constitute usury. If it be actually reserved, taken, or secured, or agreed to be taken or reserved, the contract is void for usury. As it may be reserved, taken, or secured by contract without the knowledge of both parties, a concurrence of the intent of both of them is not an essential element of usury under the statute. There must be an intent to take unlawful interest to constitute usury."

When the language in these cases is taken in connection with the facts under review therein, there is no conflict in the decisions, and the law as announced in *Garvin* v. *Linton, supra,* must be taken as the settled law in this State. The reason for the rule there announced is force-

fully stated by Mr. Justice Mitchell in *Lukens* v. *Hazlett,* 37 Minn. 441, quoted by Judge BATTLE in *Garvin* v. *Linton, supra,* as follows: "There are some loose statements in the text books, and perhaps some judicial authority, to the effect that, to render a contract usurious both parties must be cognizant of the fact constituting usury, and must have a common purpose to evade the law. But it seems to us that it would be contrary both to the language and policy of the usury law to hold any such doctrine, as thus broadly stated. These laws are enacted to protect the weak and necessitous from oppression. The borrower is not *particeps criminis* with the lender, whatever his knowledge or intention may be. The lender alone is the violator of the law, and against him alone are its penalties enacted. It would indeed be strange if the only party who could violate the law had intentionally done so, and could escape its penalty because, by some device or deception, he had so deceived the borrower as to conceal from him the fact that he was taking usury."

Now, it matters not whether Nunnelley be regarded as the agent of the borrower, or as the agent of the lender, or as the agent of both, in conducting the negotiations and in consummating the contract between the appellees and Hawn, because the undisputed evidence clearly justifies the conclusion that Hawn intentionally received, in addition to the 10 per cent. specified in the note, a bonus from Nunnelley for making the loan. The evidence shows that this payment of the bonus was contemporaneous with the contract evidenced by the note, and was part of the consideration for it. It could hardly be contended that if the makers of the note at the time of its execution had paid to Hawn the sum of $7.50 as a bonus for making the loan in addition to the 10 per cent. specified in the note, that such transaction would not be usurious. Yet in legal effect this is precisely what was done, because Nunnelley told Hawn that he was receiving from the appellees the sum of $15 which he was dividing with him for the purpose of obtaining the loan. The evidence clearly sustains the finding of the trial court "that in the contract for the

loan of said money the said Alfred Hawn, in addition to the 10 per cent. interest specified in said note, took and received a further and additional sum of money for the forbearance of said loan." Such is the only reasonable deduction to be drawn from the testimony.

It is undoubtedly true that a borrower may pay a fee or bonus to his agent who procures a loan for him, and where this is done before or after the contract for the loan is executed, it is no concern of the borrower what disposition his agent may make of the bonus thus received. The agent of the borrower may do as he pleases with his own money, and if on his own account, and not as the agent of the borrower, before or after a loan has been consummated by him, he pays to the lender a certain sum in consideration of making the loan, the sum paid under such circumstances could not be considered, between the borrower and the lender, as for the use of the money. Such is the effect of our holding in *Sumpter* v. *Hot Springs Savings, Trust and Guaranty Co.*, 126 Ark. 155, where we said: "If the person making the loan acted as the agent of the borrower alone, whether he received or did not receive a bonus is immaterial on the plea of usury; what the borrower pays to his own agent for procuring a loan is no part of the sum paid for the loan or forbearance of money." But here as we have shown, the transaction was but tantamount to the lender receiving direct from the borrower a bonus in excess of 10 per cent. per annum for the forbearance of his money.

(2) The decree recites that "the defendant and cross-complainant, Lela Phillippe, departed this life July 18, 1917, and that her death was suggested and admitted in open court and said cause proceeded to a hearing without objection from either party." Appellee, M. J. Phillippe, testified as follows: "The deed to this land was made to me and my wife jointly, and I now own the land and no one else has any interest in it, or in other words, I mean to say that I own now all of the interest that my wife owned prior to her death." It does not appear that there was any request in the court below to have the cause

revived in the name of the heirs of Lela Phillippe. The recitals of the decree show that the cause proceeded, after her death was suggested, to a hearing without objection from either party and was evidently disposed of upon the theory that M. J. Phillippe was the sole owner of the land and the only party in interest as defendant and cross-complainant. His testimony tended to prove that such was the case and there is no testimony in the record to the contrary. It must be presumed therefore, in favor of the decree of the trial court that it found that an order of revivor was unnecessary. The decree is therefore affirmed.

Mr. Justice HUMPHREYS not participating.

McCULLOCH, C. J., (dissenting). The facts are undisputed and the case made out in the record is one where borrowers, by contract with their own agent, agreed to pay the latter a commission of $15 as compensation for procuring a loan of $300 from some third party or parties; the agent applied to the lender and agreed to divide the commission, which the lender accepted in addition to charging the borrower the highest legal rate of interest. The contract between the borrowers and their agent for payment of the commission was an independent one to which the lender was not a party; and the subsequent contract between the lender and the borrowers' agent to divide the commissions was also an independent one to which the borrowers were not parties. In other words, the payment to the lender of a portion of the commission was a mere gratuity on the part of the borrowers' agent. He paid his own money which he earned under his valid contract with the borrowers, and it was, therefore, not the borrowers' money which the lender received in addition to the interest.

There is not the slightest evidence in the record of collusion between the borrowers' agent and the lender to exact from the borrowers, by secret device or scheme, a sum in addition to the legal rate of interest, nor is there

any evidence that the agent who procured the loan was the agent of the lender. Does this state of facts constitute usury? The question is plainly answered in the negative by Mr. Webb in his work on Usury (Sec. 97) in the statement that "where a loan is negotiated through a broker, who, by arrangement with the borrower, received commissions for effecting the loan, the fact that the broker allowed the lenders to share in such commissions, in order to induce them to take the loan, will not brand the transaction as usurious, when it is shown that such action on the broker's part was a mere gratuity, and not part of a scheme to avoid the laws against usury." The following cases are cited, and they fully support the text: *Eslava* v. *Crampton,* 61 Ala. 507; *Dickey* v. *Brown,* 56 Iowa, 426; *Collamer* v. *Goodrich,* 30 Vt. 628.

The same author makes this further statement: "In this class of cases, as in all others, usury may be concealed in an apparently legal transaction. If by any secret arrangement between the borrower's agent and the lender, the latter is to receive any portion of the commissions paid by the borrower to his agent, the transaction is tainted with usury."

This means, of course, that where there is a secret arrangement between the borrower's agent and the lender that a commission is to be exacted from the borrower and a portion of it paid over to the lender, this constituted a mere cloak for usury and renders the contract usurious.

The authorities cited in the opinion of the majority are instances where the lender has received from the borrower a sum in excess of the legal rate of interest as a bonus or commission, but none of the cases cited involve a state of facts where a commission was paid by some person other than the borrower himself. It is unimportant that the borrower's agent paid it out of his own commission, for in that case it was the agent's money and not the borrower's which was paid in excess of the legal rate of interest. I understand the usury laws to mean that a contract between the borrower and lender for payment of interest in excess of the legal rate is usurious and void,

and that a contract whereby the lender is to take or receive from the borrower by any device or cloak whatever a sum of money in excess of the legal rate of interest is likewise void.

The transaction now under consideration does not fall within the ban of the law, for the reason that there was neither a contract between the borrower and the lender for the payment of excessive interest, nor did the lender take or receive from the borrower any sum of money in excess of the legal rate of interest.

HALL v. HARRIS.

Opinion delivered October 14, 1918.

1. SPECIFIC PERFORMANCE—PAROL CONTRACT—SUFFICIENCY OF EVIDENCE.—Equity will not decree specific performance of a parol contract for the conveyance of land unless the terms of the contract are clearly and conclusively proved.
2. SPECIFIC PERFORMANCE—SUFFICIENCY OF EVIDENCE.—Evidence *held* insufficient to entitle plaintiff to specific performance of a parol contract for conveyance of land.

Appeal from Van Buren Chancery Court; *B. F. McMahan,* Chancellor; affirmed.

The appellants *pro sese.*

1. Appellee purchased from Henley, subject to and with notice of appellant's claim. Open, notorious, unequivocal and exclusive possession under claim of ownership for the statutory period, gives title. 47 Ark. 533; 54 *Id.* 273. The legal title can not overrule the equities of the occupants. 13 L. R. A. (N. S.) 54. A subsequent purchaser gets no better title than his grantor had. *Ib.* Appellee was chargeable with all the information a diligent inquiry would have disclosed. 33 Ark. 465; 41 *Id.* 173.

2. When a donee enters into possession and makes valuable improvements on the faith of a gift it constitutes a consideration for specific performance. 82 Ark. 33. This cause falls clearly within the rule in 82 Ark. 33.

Garner Fraser, for appellee.

1. The decree is supported by the clear preponderance of the testimony. 81 Ark. 68; 1 Crawford's Dig., p. 309, citing 57 cases.

2. Appellee has the paper title. Appellant's improvements were not sufficient to take the parol gift out of the statute. Appellants have shown no equities.

WOOD, J. Riley Williams owned a tract of land in Van Buren County. He had three daughters, Betty Williams, Nice Nenley, and Lou Hall. They were all of age. Williams was 76 years of age in 1915 and in feeble health. He concluded to divide his farm among his children. He called in three of his neighbors and requested them to lay off the land into three tracts. His desire was to have them made as near equal in value as possible. They were designated as the upper, middle and lower tracts. He first concluded to give the upper tract to Mrs. Henley, the middle to Betty Williams, and the lower to Lou Hall. This was in the fall of 1915, but at that time he executed no deeds. In the spring of 1916 he changed his mind and executed and delivered a deed to his daughter, Lou Hall, to the upper tract, and to Betty Williams the middle, and to Nice Henley the lower.

On December 20, 1916, Nice Henley deeded the lower tract to W. D. Harris. On the 17th of February, 1917, Riley Williams executed to his daughter, Nice Henley, a second deed to the lower tract, which deed recited that it was made to correct an error in the description in his first deed to her, and on the same day Nice Henley executed another deed to appellee, Harris, reciting that it was made for the purpose of correcting the error in the description in her deed to Harris of December 20, 1916. Harris paid $425 in cash and gave his notes for $425 as the consideration for the deed.

Robert Hall, who married Lou Williams in February, 1916, took possession of the lower tract. Harris, claiming to be the owner of this tract under his deed from Nice Henley, demanded of Hall the possession of the land

which Hall refused to surrender. Whereupon Harris instituted an action for possession of the land and for damages against Bob and Lou Hall. The appellees answered, alleging that Riley Williams had given to them the tract in controversy in consideration of an indebtedness due from Williams to them in the sum of $250, and that he had placed them in possession of the land promising to execute a deed to them for same; that they had made valuable improvements in the sum of $35 and had paid all the taxes on the land. They made their answer a cross bill, and prayed that the deeds from Nice Henley to Harris be cancelled as a cloud on their title, and that the cause might be transferred to equity to give them such relief. The cause was, accordingly, transferred to the chancery court. At the hearing the court found that Harris had title to the land, and was entitled to the immediate possession and to the rents for same for the year 1917, in the sum of $126. From the decree dismissing appellants' complaint for want of equity and quieting the title in appellee, and awarding appellee damages in the sum of $126, is this appeal.

The appellee testified that he purchased the land from Nice Henley, and introduced his deeds. He received his last deed in February, 1917, and demanded possession of the land from Hall which Hall refused to surrender.

Riley Williams testified that he had owned a farm in Van Buren county for 25 or 30 years. He gave his daughter, Nice Henley, the particular tract described in her deed because he wanted her to have it and deeded to the other children the parts he wanted them to have. At the time the children received their deeds they thanked him and said they were satisfied. R. W. Hall told the witness in the spring of 1916 that he had already started his crop, but that if witness would let him cultivate the lower end, he would turn the land back after the crops were gathered in just as good shape as when he got it. That was the agreement under which Hall cultivated the lower end of the field in 1916. Witness did not owe Hall or his wife anything and never did owe either of them. For 25 years

witness had furnished them land to cultivate, about 17 acres, and they did not pay any rent for it. He paid a little scrip on witness' taxes, but in all it amounted to practically nothing. Witness suspected from Hall's actions and talk that he had in mind to try to get the whole farm, and witness wanted to fix it while he was living so each of his daughters would get an equal part. Witness stated that, on one occasion when he came to Little Rock to have an operation performed, Hall accompanied him. Witness was to pay all expenses. Witness paid Hall $25 in cash and later paid the balance of the expense of the trip to Hall in corn and hay. Witness did not owe Hall for any services, nor for any money loaned or advanced by Hall to witness. Hall commenced farming the lower end in the spring of 1916. He went into possession under a verbal agreement. At the time of the rental agreement Hall knew that witness had deeded the land to his three daughters, and knew what part each was to get. The mistake in witness' deed of April 4, 1916, to his daughter, Nice Henley, was an error of the notary.

The testimony of Nice Henley tended to corroborate the testimony of her father as to his intention in the division of the farm among his three daughters. She stated that he intended that his daughters should each get one-third of his land, divided according to its value, and he deeded the land in controversy to her, and to the others their respective tracts, to carry out his intention. The testimony of the three men who were selected by Williams to divide his land tended to show that Williams requested them to divide his land into three parts as near equal as possible according to value.

Appellant, Lou Hall, testified that her father gave her the lower tract, the land in controversy; her sister, Betty, the middle part, and Nice the upper part; that he put her in possession of her part and told her that he would give her a deed to it in time, and for her husband to have it assessed in her name. He said he was going to divide it equally; that he was due Bob and was going to pay him until he was satisfied; that the indebtedness was

Bob's paying off a note to one Mr. Roberts for him and for his paying his way to Little Rock. He promised to make witness a deed to the lower end, but instead made it for the upper end. On cross-examination she stated that when she received the deed, her father told her it was for the upper end. She asked him why he had changed his mind, and he replied that the Nice boys were not satisfied. He told witness he hoped she would be satisfied. Witness replied that she "just as well be for all the good it would do;" that she could not help what he did and she was glad to get any part. Her husband cleared the land known as the upper end; he never paid any rent; just kept the taxes paid on it. For 27 years he got the use of the upper end for the improvements he made on it.

Appellant, R. W. Hall, testified that he and his wife were in possession of the land in controversy, and had been since February, 1916. Riley Williams and his three daughters had a family meeting, and at that meeting he turned this tract over to witness' wife. The next day he said he was owing witness some, and, if it was satisfactory, witness could take that part (the lower tract) and strike off even. Witness told Williams of the $100 he had paid to one Roberts for Williams and also of $50 or $55 borrowed money. Witness told Williams that he would rather have the lower end by $200 than either of the other tracts, and witness and Williams agreed to strike off even. Witness then cancelled Williams' indebtedness as a consideration for his giving witness' wife the lower tract and took possession of the lower by reason of such division. Witness testified that he had some evidences of Williams' indebtedness to him and introduced what purported to be a receipt as follows:

"Scotland, February 21, 1888. Received of Robert Hall, $100 due him by Riley Williams. (Signed) C. C. Roberts."

Witness also introduced receipts showing payments of the expenses of Williams and witness on their trip to Little Rock. Witness denied receiving any cash from Williams on the trip. On cross-examination he stated

that he had been working the upper tract about 28 years, but never did pay any rent. He was to have a lease from Williams as long as he and Williams lived, for clearing and fencing it. The lease was oral, and witness paid $2.50 a year on the taxes. Witness improved the lower tract after he went into possession, by removing all the timber blown down on it by the cyclone, and by clearing a strip around the slough, and rebuilding the fence. The total value of the improvements amounted to $25 or $30. There were 21 acres in cultivation on the lower tract of the fair rental value of $6 per acre.

A decided preponderance of the evidence tended to prove that the rental for the year 1917 exceeded the sum awarded by the court in its decree in favor of the appellee. We have set forth in substance the testimony relied upon by the parties tending to sustain their respective contentions, and we are convinced that the preponderance of the evidence shows that the appellee had title to the property as alleged in his complaint, and that his damages by reason of the appellant's detention of the same amounted to at least the sum adjudged to appellee in the decree of the trial court.

The issues as to whether the appellee made an oral gift of the land in controversy to appellant, Lou Hall, and whether or not appellants, in pursuance of such, took possession and made substantial and valuable improvements thereon, are purely issues of fact. The law applicable to such cases where specific performance is prayed is declared by this court in *Young* v. *Crawford,* 82 Ark. 33, where we held: "Equity will not decree specific performance of a parol contract for the conveyance of land, unless the terms of the contract are clearly and conclusively proved."

The burden was upon the appellants upon their cross-complaint, and their proof is not sufficient to entitle them to the relief prayed. The decree is in all things correct and is, therefore, affirmed.

HALLIBURTON v. BRINKLEY.

Opinion delivered June 10, 1918.

1. ADVERSE POSSESSION—DURATION OF POSSESSION.—Title by adverse possession for seven years is not established by defendant by proof that actual possession was acquired since January 1, 1912, where suit against him was filed September 4, 1916.
2. SAME—COLOR OF TITLE—TAX DEED.—A tax deed void for insufficient description is not such color of title as will set in motion the two-year statute of limitation provided by Kirby's Dig., § 5061.
3. TAXATION—TAX DEED—DESCRIPTION.—A description in a tax deed is sufficient if the description itself furnishes a key through which the land may be definitely located by proof *aliunde*, but not to cure or perfect description which in itself is void, and offers no key or suggestion through which the land may be located. Thus, a tax deed describing the land as N. of R. R. frl. S. W. ¼, sec. 26, T. 6 N., R. 7 E. is void on its face.

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

H. R. Boyd and *W. R. Satterfield*, for appellant.

1. The court erred in refusing to transfer the cause to the chancery court. 46 Ark. 272; 76 *Id.* 426; 95 *Id.* 121; 80 *Id.* 343. A flagrant case of *laches* is alleged and shown. 81 Ark. 352; *Id.* 432; 88 *Id.* 333; 90 *Id.* 430; 95 *Id.* 18; 93 *Id.* 298; 99 *Id.* 455; 99 *Id.* 480.

2. Appellants and their predecessors in title had the actual, open, adverse and notorious possession of the land for more than the statutory period under a tax title. Halliburton, under the contract with Hammett, had the equitable title to the land. Rooks and appellants cleared the land and made improvements. One who holds land under an equitable title cannot be ejected. 85 Ark. 25. An equitable defense may be made to a suit at law. 26 Ark. 54; 27 *Id.* 632; 71 *Id.* 484. Appellees are barred by Kirby's Digest, § 5061.

3. N. of R. R. means North of Railroad and is definite, certain and well known. On the first appeal (129 Ark. 334) the case was on demurrer. The case now is here upon the answer and agreed statement of facts. It was shown that the railroad ran through the land. The

description identifies the land as north of the railroad. 16 Cyc. 861. As to judicial knowledge see 68 Ark. 289; 93 *Id.* 604; *Ib.* 269; 110 *Id.* 595; 90 *Id.* 599. The description is sufficiently definite to identify the land and the tax deed was not void. See authorities cited on former appeal.

B. J. Semmes, for appellees.

1. This is an ejectment suit. Laches is no defense to a suit at law. 67 Ark. 320; 70 *Id.* 371; 108 *Id.* 248; *Ib.* 515. The court properly refused to transfer to equity. If transferred, being still a suit at law, laches was no defense. But after the ruling a trial was had on the merits. Appellants waived any error. 31 Cyc. 752; *Ib.* 746; 30 Ark. 684.

2. The tax deed was void and was not color of title. No title was acquired by the statute of limitations. Kirby's Digest § 5061; 55 Ark. 218; 76 *Id.* 460; 17 S. W. 878; 88 *Id.* 1005. There was a fatal hiatus in the chain of title. 2 C. J. 171. Appellants had no color of title. 89 Ark. 450. A bond for title does not constitute color of title. 67 Ark. 184; 53 S. W. 1060. Kirby's Digest, § 5061, does not apply. 72 Ark. 601; 84 S. W. 224. Short periods of limitation are construed strictly. 86 Ark. 300, 110 S. W. 1047. Statutes of limitation should not be applied to cases not clearly within their provisions. 25 Cyc. 990. See also as to short periods of limitation, and strict construction, 87 Ark. 409; 114 *Id.* 47; 88 *Id.* 277. Possession must be accompanied by a deed. 73 Ark. 221; *Ib.* 344; 83 S. W. 946; 84 *Id.* 703. There was no deed to the State, nor have appellants any deed from the levee board or Hammett. 89 Ark. 450; 116 S. W. 899. The levee sale was void. 196 S. W. 118. The seven year statute is the only statute applicable and that does not apply here because appellants' possession was only four years. The two year statute does not apply. 76 Ark. 601.

3. It was decided on the former appeal that the levee tax sale was void. 196 S. W. 118. That decision is the law of this case. 4 C. J. 1093, 1099; 85 Ark. 158;

55 *Id.* 609; 14 *Id.* 304; 10 *Id.* 186. The matter is now *res adjudicata.* 91 U. S. 526.

HUMPHREYS, J. This case was before us on former appeal and is reported under the style of *Brinkley* v. *Halliburton,* in 129 Ark. at page 334. For the substance of the complaint, reference is made to that opinion. The trial court had sustained a demurrer to the complaint and dismissed it, but this court reversed that judgment and remanded the cause with directions to overrule the demurrer. On remand of the case the demurrer was overruled and the defendants, appellants on this appeal, filed an answer to the effect that the letters "RR" appearing in the description in the tax deed, upon which they relied, referred to the Chicago, Rock Island & Pacific Railroad which passes over the land, and that by the aid of such evidence the description in the tax deed is rendered definite and certain; and pleaded the further defenses of laches and two and seven years' statutes of limitation, and thereupon, moved to transfer the cause to the chancery court. The motion to transfer the cause to the chancery court was overruled and an exception to the ruling was saved by appellants. A reply was filed to the affirmative allegations in the answer. The cause was then submitted to the court upon stipulations of counsel without a jury, which stipulations are as follows:

"For the purpose of expedition and avoidance of expense, it is hereby agreed by B. J. Semmes, attorney for plaintiffs, and H. R. Boyd, attorney for defendants, that the following facts are true, and may be used in the trial of the above cause, and may be made a part of the record therein:

I.

"That the title to the southwest quarter of section 26, T. 6 North, Range 7 East, of Crittenden County, Arkansas, passed to the State of Arkansas under the Swamp Land Grant of 1850; that the State of Arkansas granted said land to R. C. Brinkley, and issued a patent to him on March 9, 1859, which patent is recorded in Book J, page

170; and that on said date said R. C. Brinkley was the owner of said land, and never conveyed same to anyone.

II.

"It is agreed that R. C. Brinkley above mentioned died intestate on the 28th day of November, 1878, leaving surviving him his widow, Elizabeth M. Brinkley, who died intestate on the 15th day of October, 1892, and his children, as follows:

1. Lucile B. Brinkley, who died intestate on the 2d day of December, 1893, leaving as her sole heirs at law her brothers and sister hereafter named:

2. W. J. Brinkley, who is now 45 years old;

3. R. C. Brinkley who is now 47 years old;

4. J. M. Brinkley, who is now 62 years old, and who on the 16th day of May, 1895, conveyed his interest in said land to his wife, Clara F. Brinkley. That J. M. Brinkley and Clara F. Brinkley, the plaintiff herein, are husband and wife, and were married on the 3d day of November, 1876.

5. Elizabeth B. Currier, who is now a married woman, 57 years of age, and that the said Elizabeth B. Currier was married on the 3d day of June, 1885, and has been under the disability of coverture since that date.

III.

"It is further agreed that the defendants and one W. M. Rooks, under whom defendants claim, have been in actual possession of part of said land, claiming to own the 150 acres which lies north of the Rock Island Railroad since January, 1912, and have continuously since that time paid taxes thereon; that the taxes and improvements paid and made by defendants equal in value the amount of the reasonable rental value of said land and that the rents offset the taxes and improvements, and that the judgment of the court, if in favor of plaintiffs in this case shall be only for possession and costs.

"It is agreed that the taxes for the year 1866 on said land were not paid and that the description under which they were assessed and land sold, was as follows, to-wit:

SW. ¼, Sec. 26, T. 6 N., R. 7 E., 160 A.; and that the collector of Crittenden County sold same to the State of Arkansas under said description on July 8, 1867. That said sale was irregular and that no suit in ejectment could be maintained thereunder, the clerk having failed to affix his certificate to the delinquent list.

"It is agreed that the taxes for the years 1882, 1883 and 1884, on said land were not paid and that the description under which the taxes were assessed and land sold was as follows: Und. Frl. pt. SW.¼, Sec. 26, T. 6 N., R. 7 E., 138 acres; and that the collector of Crittenden County sold same to the State of Arkansas under said description on April 13, 1886.

"It is agreed that on the 29th day of March, 1909, the Board of Directors St. Francis Levee District executed quit claim deed conveying all interest it had in SW. ¼, Sec. 26, T. 6 N., R. 7 E., 160 acres, to J. H. Hammett.

"It is agreed that on the 30th day of January, 1911, J. H. Hammett entered into a contract of sale or bond for title with W. Halliburton in which he agreed to sell said Halliburton all that part of the SW. ¼ lying north of the Rock Island Railroad in Sec. 26, T. 6 N., R. 7 E., a copy of which is attached hereto and made a part hereof.

"It is agreed that Hammett did not pay levee taxes for year 1909; that same went delinquent, and that the Board of Directors St. Francis Levee District brought a suit to foreclose said levee taxes in the chancery court of Crittenden County, at the January term, 1910, under Act No. 262 of Acts of 1909, the complaint warning order, complaint decree and deed, and all proceedings in said cause describing the land as being N. of RR. Frl. SW. ¼, Sec. 26, T. 6 N., R. 7 E., 125 acres; that at said sale W. M. Rooks became the purchaser and deed was executed by Louis Barton, commissioner, to W. M. Rooks in which the last mentioned description was used on the 13th day of November, 1911; that on the 1st day of January, 1912, said Rooks went into actual possession of part of the land lying north of Rock Island Railroad, and cleared and put into cultivation a part of same; that before and up to the

1st of January, 1912, all of the SW. ¼, Sec. 26-6-7 was wild and unoccupied, and in the actual possession of no one, and that 150 acres of said land lie north of the said C. R. I. & P. Railroad.

"It is agreed that the Memphis & Little Rock Railroad was located in said SW. ¼, Sec. 26 in the year 1860 and has remained thereon to this date, and is now known as the Chicago, Rock Island & Pacific R. R.; the said railroad runs through the SW. ¼ in an easterly and westerly direction leaving south of the railroad 10 acres and 150 acres north of the said railroad in said SW. ¼.

"That on the 27th day of January, 1913, W. M. Rooks executed quit claim deed to defendants conveying all interest he had in all that part of the SW. ¼, Sec. 26-6-N, R-7-E, 135 acres, lying north of Rock Island Railroad, to defendants; that defendants and Rooks, under whom they claim, have been in the actual possession of all the cleared land on that part of the SW. ¼, Sec. 26-6-7 lying north of the Rock Island Railroad, claiming title to all of same both wild and cleared, since January 1, 1912.

"It is agreed that the rental value during this time equals the amount of taxes and improvements made on said land, and that no money judgment shall be rendered.

"This suit was filed September 4, 1916.

"It is agreed that the SW.¼, Sec. 26, T. 6 N., R. 7 E., is a regular quarter section containing 160 acres.

"These facts above enumerated constitute all the facts in the lawsuit and it is agreed that judgment shall be rendered thereon.

B. J. SEMMES,
Attorney for Plaintiff.
H. R. BOYD,
Attorney for Defendant."

It will be observed from the agreed statement of facts that appellants have been in actual possession of all the cleared land on that part of the SW. ¼, Sec. 26, T. 6 N., R. 7 E., on the north side of the Chicago, Rock Island & Pacific Railroad since January 1, 1912, paying taxes thereon and claiming title thereto; and that this suit was

filed September 4, 1916. Their actual possession of said premises existed for only 4 years, 9 months and 4 days prior to the institution of this suit; hence, their defense that they acquired title by seven years' adverse possession is not tenable.

The other defenses must depend upon whether the description in their tax deed is such a description as may be rendered definite and certain by evidence *aliunde*. Appellants can not invoke the statute of limitations of two years provided by section 5061 of Kirby's Digest in favor of tax purchasers, unless the description in the tax deed is sufficient to identify the land involved in litigation. A tax deed void for insufficient description is not such a color of title as will set the statute in motion. *Woodall* v. *Edwards*, 83 Ark. 334. Nor can appellants avail themselves of a plea of laches on the part of appellees as a defense to the cause of action unless they themselves have some interest in the land.

We proceed, at once, then, to a consideration of whether the description in the tax deed is that character of description which may be aided by extrinsic evidence to identify or locate the land. The description in the tax deed is as follows: N. of RR. Frl. SW. ¼, Sec. 26, T. 6 N., R. 7 E., 125 acres. This court has held that a description of land in a tax deed is sufficient if the description itself furnishes a key through which the land may be definitely located by proof *aliunde*. *Kelly* v. *Salinger*, 53 Ark. 114; *Lonergan* v. *Baber*, 59 Ark. 15; *Buckner* v. *Sugg*, 79 Ark. 442. Of course, the converse of this proposition is true. That is to say, extrinsic evidence is not admissible to cure or perfect a description which in itself is void and offers no key or suggestion by which the land may be located. The sufficiency of the description in the tax deed in the instant case was fully considered when the case was before us on former appeal. This court said at that time:

"In special statutory proceedings to enforce tax charges against lands, the abbreviations employed must have been in such general use and knowledge in reference

to government surveys that the meaning thereof will be intelligible, not only to experts but also to persons with ordinary knowledge of such matters."

And referring to the use of the letters "RR" in the description further said: "The abbreviation 'RR' is not an abbreviation commonly used to designate government subdivisions. Government surveys were not made with reference to railroads. The abbreviation 'RR' does not necessarily convey the meaning of railroad to one of only ordinary experience in land titles. As suggested by appellants ,(referring to appellants on that appeal) the letters could have reference to Ridge Road or River Road. It might refer to any natural or artificial monument where such letters were used in spelling the monument in mind."

And the court further said: "Testing the description before us by the rule laid down by this court, we have concluded that the description is fatally defective." *Brinkley* v. *Halliburton,* 129 Ark. 334.

We decided in that case that this particular description was void on its face, which was in effect saying, that the description contained no key or suggestion by which the land could be definitely located by evidence *aliunde.* This ruling became, and is, the law of this case.

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

RIBELIN *v.* WILKS.

Opinion delivered October 14, 1918.

ATTACHMENT—JURISDICTION OF JUSTICE OF THE PEACE.—Under § 4555, Kirby's Digest, providing that actions by attachment "may be brought before any justice of the peace in the county," *held,* that a judgment for the amount of the debt in an attachment suit based on service of process in the county outside of the township of the justice of the peace is valid, though no property was found upon which to levy the writ of attachment.

Appeal from Yell Circuit Court, Danville District; *A. B. Priddy,* Judge; reversed.

Wilson & Chambers and *Evans & Evans,* for appellant.

The justice had jurisdiction and the summons was duly served upon appellee. The judgment was not void as the justice of the peace acquired jurisdiction of appellee's person by service. Process served anywhere in the county was valid and the judgment was valid and improperly set aside. 102 Ark. 255; Freeman on Judgm. § 126; 2 Dillon C. C. 351; 55 Ark. 209; Kirby's Digest, § 4555; 78 Minn. 87. *Ford* v. *Adams,* 54 Ark. 137, is not in point.

W. B. Rutherford, for appellee.

The service of summons on appellee was void. 54 Ark. 137; 43 *Id.* 230; 24 *Id.* 615.

HUMPHREYS, J. Appellant obtained judgment against appellee on the 5th day of January, 1910, for $104.15 on a note in an attachment proceeding instituted before J. M. Hopkins, a justice of the peace of Revilee Township in Logan County, Arkansas. On the 28th day of April, 1917, appellant instituted this suit against appellee in the Yell Circuit Court, Danville District, upon the aforesaid judgment, seeking to reach, by garnishment, funds in the hands of S. B. Nance, C. N. Gilliam and C. D. Owen, which they owed appellee.

On the 11th day of August, 1917, appellee answered, denying the validity of the judgment sued upon, assigning as a reason for its invalidity that no legal service was had on him in the case in the justice court in Logan County prior to the rendition of the judgment.

The court heard the cause upon the pleadings and evidence adduced, from which it found that the judgment sued on was void for the reason that summons in that case was served upon appellee in Logan County outside of Revilee Township. In accordance with the finding, it was adjudged that appellant take nothing by his suit. From this judgment an appeal has been duly prosecuted to this court.

The facts are that an attachment suit was instituted, presumably in good faith, in Revilee Township by appel-

lant against appellee, which suit met all the requirements of an attachment proceeding and was regular in so far as the record discloses. The officer appointed to serve the writ of attachment and summons made return to the effect that he served the summons upon appellee but that no property was found upon which to levy the writ of attachment. The return failed to show where the summons was served on appellee. The evidence disclosed that it was served in Blue Mountain Township in Logan County.

The only question to be determined upon appeal is whether or not it is essential to seize property under the writ of attachment in order to obtain personal service upon the defendant in a different township from the township in which the suit was instituted. It is provided by section 4555 of Kirby's Digest that actions for provisional remedies including attachments may be brought before any justice of the peace in the county. This, of course, means actions for amounts within the jurisdiction of a justice of the peace. We think in proceedings for provisional remedies, including attachments, that the jurisdiction of a justice of the peace is co-extensive with the county, and not limited to the township in which he was elected. Under the statute, ordinary proceedings must be brought before a justice of the peace of the township in which the defendant resides or is found. Not so in actions for provisional remedies including attachments. There is nothing in the statute from which an inference can be drawn that upon failure to find property belonging to the defendant in the township or county where the suit is brought that the summons in the proceedings can not be served upon the defendant unless he resides or is found in the township in which the suit is instituted. The contrary is clearly evidenced by the plain language of the statute. It is insisted by appellee that this case is ruled by the case of *Ford* v. *Adams,* 54 Ark. 137. The cases are not parallel. The insufficiency of the service of the summons in that case was based upon a statute (section 6052, Kirby's Digest) which provided that service might be had on the owners or officers of steamboats in any county in

the State if the suit was commenced in the county where the steamboat or vessel was found, if from any cause the summons or process could not be served in the county where the suit was commenced.

For the error indicated the judgment is reversed and the cause remanded with directions to enter judgment for appellant and for further action on the garnishment proceedings.

McCLAIN v. McFARLANE.

Opinion delivered October 14, 1918.

1. ATTORNEY AND CLIENT—CONTRACT—VALIDITY.—A contract between an attorney and client with reference to a law suit which stipulated that the attorney was to have entire control of the settlement and suit, if one was brought, and that in making settlement, either before or after suit was brought, the attorney was not to act until he had submitted said offer of settlement to the client and obtained his consent, was not invalid as prohibiting the client from settling his suit without the consent of the attorney.
2. APPEAL AND ERROR—HARMLESS ERROR.—Where the undisputed evidence established that plaintiff was entitled to recover more than the jury awarded him, defendant cannot on appeal complain of error in the trial of the cause.

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

G. C. Hardin, for appellant.

1. The contract is void as against public policy. 66 Ark. 190; 98 *Id.* 523; 78 *Id.* 92; 38 *Id.* 149; 88 *Id.* 556.

2. The admission of the testimony of R. W. McFarlane was reversible error. 114 Ark. 542; 104 *Id.* 1. See also 103 *Id.* 356; 112 *Id.* 452; 125 *Id.* 314; 61 *Id.* 130; 63 *Id.* 174; 81 *Id.* 87; 100 *Id.* 437; 89 *Id.* 58; 180 S. W. 474.

3. The testimony of McFarlane, Ben Cravens and Holland as experts was improperly admitted. Hypothetical questions were erroneous. 130 Ark. 542; 100 *Id.* 518; 103 *Id.* 196; 114 *Id.* 542; 113 *Id.* 503.

4. Counsel's argument was improper and prejudicial. 74 Ark. 256; 114 *Id.* 542; 61 *Id.* 130; 81 *Id.* 231; 80 *Id.* 23; *Ib.* 158; 81 *Id.* 25; 87 *Id.* 461; 89 *Id.* 515; 87 *Id.* 515.

5. Plaintiff's instruction No. 2 was error; also No. 3. It was error to refuse defendant's Nos. 4, 5 and 7 and the verdict is excessive and not supported by the law or evidence. The case was tried on the wrong theory.

R. W. McFarlane, for appellee.

1. The contract is not void. 66 Ark. 199; 104 *Id.* 474; 114 *Id.* 542; 104 *Id.* 1; 123 *Id.* 210; 42 *Id.* 197; 47 *Id.* 301; 98 *Id.* 530; 111 *Id.* 520; 117 *Id.* 504; 120 *Id.* 390.

2. No improper testimony was admitted and counsel's remarks were not prejudicial. 74 Ark. 259; 66 *Id.* 199. The judgment should have been for $625 instead of $325.

HUMPHREYS, J. Appellee instituted suit against appellant in the Sebastian Circuit Court, Greenwood District, to recover an attorney's fee of $625, based upon a written contract between himself and appellant, binding him to endeavor to recover by settlement or suit damages growing out of an injury resulting in death to appellant's wife by the train of the Midland Valley Railroad Company through the negligent operation of same by its employees. The contract provided that appellee should receive for his legal services 25 per cent. of the amount recovered, if settlement was effected without suit. It was alleged that appellee performed all the duties required of him under the contract and that appellant received $2,500 in settlement for the injury and failed and refused to pay appellee's fee.

The court ruled that the contract was void as against public policy and treated the action as one to recover for services upon *quantum meruit.*

Appellant defended upon the ground that no legal service was rendered, and if rendered, did not merit such reward. The cause was submitted to a jury upon the pleadings, evidence adduced and instructions of the court. A verdict was returned in favor of appellee for $325. A judgment was rendered against appellant for the amount, from which an appeal has been prosecuted to this court.

The undisputed facts disclosed that appellant's wife was injured by a Midland Valley Railroad train in Greenwood, on the morning of January 30, 1917, from which place she was removed to a hospital in Ft. Smith where she died as a result of the injury. After death and burial, appellee was employed by appellant to recover by settlement or suit, damages for the injury. The following written contract was entered into between them:

"It is agreed by and between J. N. McClain, party of the first part, and R. W. McFarlane, party of the second part, that the party of the first part employs the party of the second part to make settlement with the Midland Valley Railroad:

"That whereas the wife of the party of the first part was injured and killed by the train of the Midland Valley Railroad under circumstances that we believe was caused by the negligence and carelessness of the employees of the Midland Valley Railroad, therefore, the party of the second part shall endeavor to make settlement for said injury, failing in that that he is to bring suit and prosecute said suit to judgment. That in making settlement either before or after suit brought the party of the second part is to not act until he has submitted said offer of settlement to the party of the first part and obtained his consent. That the party of the second part is to have entire control of the settlement and suit if one is brought. That when said settlement is made, if without suit, the amount received is to be divided between the parties hereto, 25 per cent. being paid to the party of the second part and balance to the party of the first part; if suit is brought then of the amount received 50 per cent. is to go to the party of the second part and balance to the party of the first part.

"It is further agreed that if after suit is brought the children of the party of the first part desire to employ additional counsel they shall have the right to do so to aid in the prosecution of said suit."

"J. N. McClain.
"R. W. McFarlane."

Appellee interviewed three eye-witnesses to the injury and advised appellant of his rights. Appellant entered into negotiations with the Midland Valley Railroad Company, and, as the settlement progressed, advised with appellee as to the amount he should receive in settlement. Appellant finally settled with the railroad company for $2,500.

Appellant insists (1) that the contract between himself and his attorney was contrary to public policy and therefore void; and (2) that many reversible errors, not necessary to set out under our view of the case, were committed in the conduct of appellee's cause of action under the rule of *quantum meruit.*

It is admitted by appellant that if the contract was valid, appellee had a right to recover under its terms. The fact is appellant received $2,500 in settlement of the damages. Under the terms of the contract, appellant and appellee were to divide the proceeds of the settlement, if made before the institution of a suit, in the proportion of 75 per cent. to appellant and 25 per cent. to appellee. In other words, under the undisputed facts in the case, appellee was entitled to recover $625, or one-fourth of the amount paid appellant in settlement of the damages, if the contract was not void. The invalidity of the contract is suggested and contended for under the rule laid down in *Davis* v. *Webber,* 66 Ark. 196, because the contract contains the following clause: "That the party of the second part is to have entire control of the settlement and suit, if one is brought." In construing this particular clause of the contract, it must be read in connection with the preceding clause which is as follows: "That in making settlement, either before or after suit is brought, the party of the second part is not to act, until he has submitted said offer of settlement to the party of the first part and obtained his consent." There is not necessarily any conflict between these two clauses when read together, it being apparent that the words "entire control," as used in the latter clause, were used in the sense of managing the settlement and suit and not in the sense

of preventing appellant from directing or commanding a settlement. The first clause clearly limits the power of appellee to act in making the settlement except by consent of appellant either before or after suit. In the case of *Davis* v. *Webber*, the contract prevented the client from settling his claim without the assent of the lawyer. The contract in the instant case provides exactly to the contrary. It provides that the lawyer can not act without the consent of the client. So there is a very marked difference between the contracts. The rule laid down in the case of *Davis* v. *Webber* is as follows, (quoting syllabus 2):

"A stipulation in a contract for an attorney's fee for prosecuting a suit that the client shall not settle the suit without the attorney's consent is void as against public policy; and if such stipulation is not severable from the rest of the contract, but is an inducement for entering on it, the entire contract is void."

Of course, this rule was not applicable to a contract which permitted the client to settle his suit without consent of the attorney. There must be an abridgment of the client's right to settle his claim before a contract for services between him and his attorney can be declared void as contrary to public policy. We find no abridgment in the language of the contract, and none in the subsequent conduct of the parties under the contract. Acting under the contract, appellant himself made the settlement after advising with appellee, his attorney.

Under this view of the contract, we deem it unnecessary to proceed to a discussion of the many assignments of error insisted upon by appellant in the conduct of the case under the *quantum meruit* rule. Appellee only recovered $325, which is much less than he was entitled to under the undisputed facts in the case. It follows that appellant was in no way prejudiced by error in the conduct of the suit, if committed. The appellee did not cross-appeal and, therefore, we pretermit any discussion of appellant's other assignments of error.

The judgment is affirmed.

J. I. CASE THRESHING MACHINE COMPANY *v.* SOUTHWESTERN VENEER COMPANY.

Opinion delivered October 14, 1918.

1. SALES—FAILURE TO READ CONTRACT—MISTAKE.—The rule that a party who signs a written instrument witnessing a contract must read it before he signs it or he cannot be heard to say that it does not evidence the contract is subject to the qualification that where a mistake is induced by the conduct of one of the parties, and the one who signs does so upon the belief that it contains certain omitted matter, this affords a good defense to a suit on the contract.
2. SALES—MEETING OF MINDS.—Where a contract of sale of machinery was supposed to be signed in duplicate, but the copy sent to the seller by its agent for approval was materially different from that delivered to the purchaser, and it appeared that the agent and the purchaser intended to execute the form of contract delivered to the purchaser, there was no meeting of minds, and no liability resulted.
3. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—Where there was a conflict in the testimony, the chancellor's finding on an issue of fact will be sustained if not against the preponderance of the testimony.

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

J. A. Comer, for appellant.

1. No warranty was made by appellant. Mere puffing or commendation is not a warranty. 44 Ark. 216; 45 *Id.* 284.

2. Appellee had ample opportunity to read the written contract, and he is bound. 119 Ark. 553; 84 *Id.* 349.

3. All Robnolt's statements were made prior to the execution of the written contract and all testimony as to conversations should have been excluded, as all prior statements and representations were merged in the contract. 108 Ark. 503. It is plain, unambiguous and complete. 83 *Id.* 283.

4. A warranty resting in parol can not be engrafted upon a written instrument of sale of a chattel. 83 Ark. 240; 19 L. R. A. (N. S.) 1195.

5. There was no fraud. The burden to prove it was on appellee; also the burden to prove a breach of warranty. 99 Ark. 400.

6. No offer was made to return the machine, nor refund demanded. Rescission was not asked. The proof did not entitle appellee to a rescission. 4 Ark. 467; 5 *Id.* 395; 38 *Id.* 335; 94 *Id.* 200. There was no implied warranty as to quality or defects. 89 Ark. 108. The only warranty was as to title. There were no defects in the machine.

Roy D. Campbell, for appellee.

1. The contract was procured through fraud and misrepresentation.

2. The law implies that the machine was suitable for the purpose for which it was sold and that warranty failing appellee is not liable. Where a manufacturer offers his goods for sale and the vendee has no opportunity of inspection, the vendee necessarily relies upon the seller's knowledge and the law implies a warranty that the article is merchantable and reasonably fit for the purpose for which it was intended. 100 Ark. 21; 93 *Id.* 454; 79 *Id.* 470; 48 *Id.* 330; 72 *Id.* 343; 77 *Id.* 546; 81 *Id.* 549; 83 *Id.* 15; 90 *Id.* 78.

The converse of this proposition is also true. 80 Ark. 109.

3. The admissions and undisputed facts here entitle appellee to relief. 99 Ark. 490; 84 *Id.* 353; 123 *Id.* 492; 82 *Id.* 20-24; 112 *Id.* 498; 47 *Id.* 164.

4. While the contract expresses the final agreement of the parties, and parol testimony is not admissible to vary, qualify, contradict, add to or subtract from its terms, the rule does not apply where there is fraud. 87 Ark. 614; 100 *Id.* 28; 95 *Id.* 150; 101 *Id.* 95; 73 *Id.* 542; 99 *Id.* 438.

5. Taking charge of and operating the property does not waive a breach of warranty express or implied. 104 *Id.* 581; 53 *Id.* 155.

6. No offer to return was necessary as it would have been useless and vain. 90 Ark. 583; 95 *Id.* 488.

McCULLOCH, C. J. This is an action instituted by appellant against appellee in the chancery court of Woodruff County to recover the sum of $1,250, with interest, being the aggregate amount of five promissory notes executed by appellee to appellant for the balance on the purchase price of a traction engine, and to enforce a lien on the property.

Appellant was engaged in manufacturing and selling new machinery of the kind sold to appellee, but this particular sale covered a second-hand machine. Appellee was engaged in the business of manufacturing lumber in Woodruff County, and part of its business was to transport logs from the woods to the manufacturing plant and the machine in question was purchased by appellee to use for that purpose.

The sale was negotiated between Mr. Robnolt, one of appellant's salesmen, and Mr. Bush, the manager of appellee's business, and negotiations took place at appellee's place of business. Appellant furnished its salesmen with two printed forms or order blanks, one printed on pink paper for use in taking orders for second-hand machinery, and the other printed on blue paper for use in taking orders for new machinery. It was customary for salesmen to leave a carbon copy of an order with the purchaser, but on this particular occasion it appears that the agent only had one copy of the form used for second-hand machinery, and instead of making a carbon copy, he wrote the terms of the sale upon the other form of blank and made the following indorsement on that form, and signed it:

"This copy should be written on a second-hand order blank, but it is understood this blank takes its place."

This copy was left with Mr. Bush, appellee's manager, and the original order written on the second-hand machinery order blank was signed by appellee and sent in to appellant by Mr. Robnolt. The terms of the con-

tract of sale were that appellee was to pay $400 cash on delivery of the machine and execute five equal notes for the balance of $1,250. The order blank which was sent in to the company contained no warranty concerning the article sold, but, on the contrary, contained the following clause:

"As a condition hereof it is fully understood and agreed that said machinery is purchased as second-hand and the company makes no warranties or guaranties of any kind either expressly or by implication except as to the ownership thereof at time and place of delivery. No representation made by any person as an inducement to give and execute this order shall bind the company."

The copy left with appellee contained a clause warranting the material, durability and capacity of the machine and contained a further provision that the machine should be tested within ten days and if found not up to warranty, appellant should have the right to replace it with other machinery or to refund the portion of the price paid and take the machinery back. The machine was shipped to appellee by appellant, and on its receipt appellee made the cash payment of $400, and executed the notes pursuant to the contract.

The preponderance of the testimony is to the effect that appellant's agent, in negotiating the sale with appellee, made representations to the latter that the second-hand machine which was the subject of the sale would do the work of a new machine, and that it would pull a load of three times its weight. After the machine was received by appellee it was tested and found that it would not do satisfactory work as represented. Appellee notified appellant of the result of the test, and thereupon a controversy arose as to what the contract was between the parties, and this litigation ensued.

Appellee in its answer and cross-complaint set up the fact that the machine was purchased under the belief that the copy of the contract left with its manager represented the terms of the sale, that appellant's agent had misrepresented the capacity of the machine, and that the

machine would not do the work either according to the representations of the salesman or the language of the written warranty, and the prayer of the cross-complaint was for the recovery of the sum of $400 paid. The finding of the chancellor was in appellee's favor.

The testimony is voluminous and embraces the depositions of Robnolt, appellant's salesman, and Bush, appellee's manager. Bush did not, in his testimony, claim that Robnolt, in express words misrepresented the contents of the written contract which he (Bush) signed and which was sent in to the company, but his testimony shows that he was led to believe by Robnolt's representations and conduct that the copy signed by him and sent in to appellant company expressed the same terms with reference to the warranty of quality and capacity as that contained in the copy of the contract which was left with Bush. Robnolt's indorsement on the printed form left with Bush is ambiguous. It states that the copy "should be written on a second-hand order blank," but it goes on further to state that "it is understood this blank takes its place." The first part of the indorsement would indicate that another form had been used stating different terms, but the concluding language is that the form of contract upon which the indorsement was made took the place of the other, and was to evidence the contract between the parties. The ambiguity is sufficient to let in proof which is, according to the preponderance, in favor of Bush's contention that he was misled by the conduct and representations of Robnolt, and that in good faith he accepted the copy of the contract from Robnolt believing it to contain the same terms as the one to be sent to the company.

The established rule is, of course, that the party who signs an instrument of writing which is intended to evidence his contract with another party must read it before he signs, otherwise he can not be heard to say afterwards that it does not constitute the contract. But this rule is subject to the qualification that where a mistake is induced by the conduct of one of the parties, and the

one who signs does so upon the belief that it contains certain omitted matter, this affords a good defense to a suit on the contract. *Steiwart* v. *Fleming*, 96 Ark. 371.

The facts proved make out a case of failure of the minds of the parties to meet, for it appears from the testimony that appellee's manager intended to make one kind of a contract, whilst an entirely different one was sent to appellant for its approval, and that this state of facts was induced by the conduct of appellant's agent. Since the minds of the parties did not meet upon the same contract, no liability resulted. *Barton-Parker Mfg. Co.* v. *Taylor,* 78 Ark. 586.

There is a conflict in the testimony as to what took place between Robnolt and Bush, but the finding of the chancellor on that issue of fact is not against the preponderance of the testimony. The decree is, therefore, affirmed.

BURTON v. STATE.

Opinion delivered October 14, 1918.

1. INTOXICATING LIQUORS—TRANSPORTATION INTO STATE.—One who delivers a trunk filled with whiskey to a carrier in another State to be shipped as baggage to this State is not guilty of "shipping" or "transporting" liquor into this State, within act of January 24, 1917.
2. SAME—TRANSPORTATION INTO STATE.—One who delivers a trunk filled with whiskey to a carrier in another State to be shipped to a point within this State, is not liable under act of January 24, 1917, to prosecution in this State under act of January 24, 1917, for aiding the carrier in an unlawful shipment into the State, the act having no extraterritorial effect.
3. SAME—ACCEPTING SHIPMENT FROM CARRIER.—Where defendant delivered a shipment of whiskey to a carrier in another State to be transported to a point within this State, the shipment was seized by the sheriff at destination, and was subsequently claimed by defendant, he was not liable, under section 2 of the act of January 24, 1917, making it unlawful "to accept for corporations, companies or any persons mentioned in section one of this act any delivery of the liquor mentioned in section one or any of them, when transported into or delivered in this State."

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

Brundidge & Neelly, for appellant.

1. The demurrer to the affidavit should have been sustained. It does not allege that the defendant was a common carrier, or that he secured one to bring the liquor into the State, nor does it allege that it was not for his personal use, nor that it was delivered in this State. 60 Ark. L. Rep. 363; 130 Ark. 159.

2. The court erred in its instructions. Cases *supra.*

3. The testimony is insufficient to prove the allegations in the affidavit. 114 Ark. 391; 124 *Id.* 20.

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

1. There was no error in overruling the demurrer. The information stated a public offense and put defendant on notice. 94 Ark. 207; 86 *Id.* 436; 126 *Id.* 501; 45 *Id.* 536.

2. The evidence is ample. Appellant was a party aiding, assisting and abetting a common carrier in violating the law. 10 Ark. 378; 18 *Id.* 198; 49 *Id.* 60; 47 *Id.* 188; 45 *Id.* 361.

3. There is no error in the instructions. 60 Ark. L. Rep. 1, 361.

McCULLOCH, C. J. Appellant was convicted in the circuit court of White County of violating the Act of January 24, 1917, prohibiting the shipment of intoxicating liquors into the State. Acts 1917, p. 41.

There was a conflict in the testimony in the trial below, but the testimony was sufficient to warrant a finding that appellant, who resided at Bald Knob, Arkansas, went to Poplar Bluff, Missouri, and there filled a trunk with whiskey in bottles, and on his return trip to Arkansas purchased a ticket from the Missouri Pacific Railway Company from Poplar Bluff, to Kensett, Arkansas, and caused the carrier to check the trunk thus filled with whiskey through to Kensett on that ticket. Appellant did not receive the trunk from the carrier at Kensett, nor apply for its delivery to him, but the sheriff of White

County ascertained that the trunk was in the hands of the carrier at Kensett and seized it. The sheriff put the trunk filled with whiskey into an automobile and started to Searcy, the county site, and on the trip over to Searcy appellant either claimed the whiskey or proposed a division of it, which proposition was declined by the officer. Appellant subsequently claimed the trunk after the whiskey had been taken out of it by the officer.

The question presented to us is whether these facts make an offense under the first section of the statute referred to above. We have heretofore decided in *Rivard* v. *State,* 133 Ark. 1, and *Winfrey* v. *State,* 133 Ark. 357, that the first section of the statute in question was directed solely against the transportation into the State of intoxicating liquor for another person, firm or corporation. It is directed against the carrier of such liquor who carries it for or delivers it to another. Conceding, without deciding, that the act of the carrier in checking a trunk for a passenger as personal baggage constitutes a shipment of liquor within the meaning of the statute, the carrier only is liable, and not the consignor. The words "to ship" and "to transport" are synonymous as used in the statute, and apply to the carrier and not to the consignor.

The Attorney General contends in support of the judgment of conviction that the delivery of the liquor to the carrier in Missouri amounted to aiding in the unlawful shipment into the State, and that since the offense is a misdemeanor and all participants in such offenses are treated as principal offenders, appellant was properly convicted upon the testimony showing that he delivered the liquor to the carrier. The answer to that contention is that the statute can have no extra-territorial effect, and the only act done by appellant in connection with the shipment was to deliver the whiskey to the carrier, and that occurred in the State of Missouri. The transportation into this State was not a joint enterprise of the carrier and the consignor, but was the sole act of the carrier, and was done through its own agencies and in-

strumentalities. The consignor parted with the possession of the property when he delivered it to the carrier and gave it into the entire possession and control of the carrier. The transportation of the liquor into the State was the thing which constituted the offense, and the consignor had no part in the performance of that act in merely delivering the article to the carrier in another State. If the transportation of the trunk of whiskey be treated merely as the carriage of baggage by the traveler himself, and not as a shipment or transportation by the carrier, the latter would not be guilty of any unlawful act, nor would the traveler be guilty under the statute unless he brought the whiskey into the State for some other person. So, in no event can appellant be guilty under the evidence adduced.

The second section of the statute referred to makes it unlawful "to accept from corporations, companies, or any persons mentioned in section 1 of this act any delivery of the liquors mentioned in section 1, or any of them, when transported into or delivered in this State," but there is no contention or effort to prove that appellant received the liquor from the carrier or made application to the carrier for its delivery to him.

The testimony, when viewed in its light most favorable to the State's contention, wholly fails to make out a case against appellant of violating the statute in question, and since the facts have been fully developed, no useful purpose would be served in remanding the cause for a new trial. The judgment is, therefore, reversed and the cause dismissed.

WOOD and HUMPHREYS, JJ., dissent.

APPENDIX

I.

OPINIONS NOT REPORTED.

Raybourn *v.* Kirk, opinion delivered June 24, 1918; appeal from Crawford Chancery Court; W. A. Falconer, Chancellor; affirmed, *per* Smith, J.

Brunson *v.* Cromwell; appeal from Crawford Circuit Court; Jas. Cochran, Judge; affirmed June 17, 1918, *per* McCulloch, C. J.

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