ERRATA.

On page 301, 16th line from top, for "all" read *ill.*

On page 354, 10th line from top, for "one per cent." read *one cent per mile.*

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VOL. 140

CASES DETERMINED

IN THE

Supreme Court of Arkansas

FROM

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JAMES V. JOHNSON
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1920

JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

EDGAR A. McCULLOCH, - - - - - - - Chief Justice
CARROLL D. WOOD, - - - - - - - Associate Justice
JESSE C. HART, - - - - - - - - - Associate Justice
FRANK G. SMITH, - - - - - - - - Associate Justice
THOMAS H. HUMPHREYS, - - - - Associate Justice
JOHN D. ARBUCKLE, - - - - - - Attorney General
WILLIAM P. SADLER, - - - - - - - - - - - Clerk
JAMES V. JOHNSON, - - - - - - - - - - - Reporter

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

RIDER *v.* STATE.

Opinion delivered September 29, 1919.

1. HOMICIDE — SELF-DEFENSE—BELIEF OF IMMEDIATE DANGER—INSTRUCTION. In a prosecution for homicide, where the jury found that the killing was not in necessary self-defense and was not done in a sudden heat of passion caused by provocation apparently sufficient to make the passion irresistible, it was not error for the trial court to have refused to instruct the jury that the degree of homicide should be reduced if they found that the accused honestly believed at the time he fired the shot that he was in immediate danger of great bodily harm.
2. TRIAL — IMPROPER ARGUMENT — PREJUDICE.—In a prosecution for homicide counsel for the State, in his closing argument, said: "If you should render a verdict of manslaughter in this case" counsel for the defense, naming them, "would go out over this town and say that they had won the greatest victory they had ever won." Objection was made to these remarks. *Held*, while these remarks were improper, they were not prejudicial.
3. TRIAL—CONTINUANCE—ABSENT WITNESSES.—It is not improper to refuse a continuance on the ground of absent witnesses, when other witnesses present testified to the same facts.
4. TRIAL—CONTINUANCE—ABSENT WITNESS—DILIGENCE.—It is proper to refuse a continuance on the grounds of an absent witness where appellant's motion failed to show diligence on his part, and also failed to show where the absent witness was at that time or that his attendance could be procured at the next term.

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

McCaleb & McCaleb and *Samuel M. Casey,* for appellant.

1. Defendant's motion for a continuance should have been granted. The proper showing was made and the court abused its discretion in refusing a continuance. 99 Ark. 394; 94 *Id.* 545; 71 *Id.* 180; 60 *Id.* 564; 21 *Id.* 460.

2. The court erred in refusing to give instruction No. 1-A, asked by defendant. It correctly states the law and is not covered by any other given. 74 Ark. 453; 102 *Id.* 109; 120 *Id.* 30-34; 91 *Id.* 570-575.

3. The argument of the prosecuting attorney in his closing speech was prejudicial. 61 Ark. 130; 58 *Id.* 353; 95 *Id.* 233; 99 *Id.* 558; 75 *Id.* 577. The court by refusing to interfere approved the prejudicial statements. 99 Ark. 563.

4. The issue as to manslaughter should have been submitted to the jury as requested by defendant as there was evidence to sustain the theory of manslaughter. 74 Ark. 453; 91 *Id.* 570, and cases *supra.* See also 100 Ark. 124.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. The motion for continuance was properly overruled. It was within the sound discretion of the court and no abuse of discretion is shown. 40 Ark. 144; 26 *Id.* 323; 79 *Id.* 594; 82 *Id.* 203; 100 *Id.* 132; 103 *Id.* 354; 109 *Id.* 450; 110 *Id.* 402. Due diligence was not shown. 94 Ark. 169; 71 *Id.* 62. It was not shown that the witnesses were residents of this State. They may have been nonresidents. 110 Ark. 402; 90 *Id.* 384; 103 *Id.* 509.

2. There was no error in refusing instruction No. 1-A, as it was amply covered by the charge of the court to the jury generally and in No. 8 given.

3. There was no reversible error in the argument of the prosecuting attorney. No clear abuse of discretion by the court is shown. 23 Ark. 32; 193 S. W. Rep. 89; 74 Ark. 256. It was a mere expression of opinion. 112 Ark. 452; 115 *Id.* 101.

McCULLOCH, C. J. Appellant, Oliver Rider, was convicted of murder in the second degree in the killing of Lon Hatler, which occurred on March 3, 1919, in the county of Independence.

The killing occurred out in a field on a farm occupied by appellant under a lease. Appellant had subrented that part of the farm to a tenant named Pharr, and appellant was working with Pharr in the field at the time of the killing. Hatler had cultivated another field during the previous year under rental contract with appellant, and the quarrel which led up to the killing grew out of differences between the men as to whether or not Hatler had the right to cultivate the field another year. Appellant admitted that he killed Hatler, but contended that he did so in self-defense or under circumstances which reasonably induced in his mind a belief that Hatler was about to make an assault on him with a deadly weapon.

The court gave appropriate instructions on the law of self-defense and there is no complaint concerning the rulings of the court in that respect. The court also gave a correct instruction, which was not objected to, on the law of voluntary manslaughter where the killing had been done in a sudden heat of passion, but error of the court is assigned in refusing to give the following instruction requested by counsel for appellant:

"If you believe from the evidence that defendant and deceased, Hatler, became involved in a sudden difficulty in which the deceased cursed defendant and struck him and made a demonstration as if to draw a deadly weapon upon defendant, and if, under these circumstances, defendant shot, not in the heat of passion, but because he, in good faith, believed that he was in immediate danger of an assault with a deadly weapon, or that he would receive great bodily harm from deceased, then, even though you may further believe that defendant acted too hastily and without due care, you should convict him of manslaughter and not of murder."

It is conceded that this instruction is a correct statement of the law, but it is contended on the part of the State that, under the proof adduced and in view of the findings of the jury on the plea of self-defense and on the issue as to the killing being done in a sudden heat of passion, there was nothing in the evidence to base this instruction on. Pharr was the only eye-witness to the killing except appellant and Hatler, and his testimony makes out a clear case of murder. There was nothing in his testimony to justify a finding that the killing was done in self-defense or under an honest belief on the part of appellant that he was in danger of serious bodily harm. The only theory upon which the jury could have based a verdict on the testimony of Pharr for a lower degree of homicide than murder was that the killing was done in a sudden heat of passion, aroused by the conduct of Hatler in using insulting language to appellant and in striking him. There is little, if any, conflict between the testimony of Pharr and that of appellant himself on this phase of the case. They both testified that Hatler participated in the quarrel and used insulting language to appellant and struck him a blow on the temple. The witnesses differ to some extent as to what subsequently occurred. Appellant testified that he and Hatler were standing in the field at or near a plow that appellant was using and that they quarreled concerning the occupancy that year of the field which Hatler had cultivated the previous year. He stated that Hatler continued to abuse him and used vilely insulting language and finally walked up to him (appellant) where he was standing at the end of the plow and struck him a severe blow on the temple and then stepped back and threw his hand toward his pocket. He said that he then drew his pistol and that Hatler then sprang forward and grabbed the pistol with both hands and that he (appellant) began firing and continued firing until Hatler fell mortally wounded and immediately expired. Pharr testified that, after Hatler fell, he arose to his knees and that appellant walked up to him and pushed aside his cap and fired the last shot through

Hatler's forehead. The body was removed to a hiding place in the bed of a dry slough and subsequently thrown into the river. There is a conflict in the testimony of appellant and Pharr as to whether or not the latter assisted in concealing the body.

Now, it is to be remembered that the jury, upon correct instructions on the law of self-defense, found against appellant on that issue, and also found, upon correct instructions, that the killing was not done in a sudden heat of passion, aroused by sufficient provocation, and, that being true, there is nothing in the testimony of appellant himself to justify a submission of the issue that he fired the shot too hastily and without due care but under an honest belief that he was in danger of great bodily harm. While he states that the deceased, after striking him, stepped back and threw his hand to his pocket, he says at the time he began firing the deceased was making no attempt to draw a weapon, but was endeavoring to seize the weapon which he (appellant) was attempting to use, and did immediately use. If, in other words, the killing was, as the jury found, not in necessary self-defense and not done in a sudden heat of passion caused by provocation apparently sufficient to make the passion irresistible, then there was no room for the jury to find from the testimony adduced that appellant honestly believed at the time he fired the shot that he was in immediate danger of great bodily injury. There was no error, therefore, in the ruling of the court in refusing to give the instruction quoted above.

It is next contended that alleged improper conduct on the part of the prosecuting attorney in the closing argument before the jury calls for a reversal of the judgment. The conduct of the prosecuting attorney to which this assignment relates is in making the following statement to the jury in his closing argument: "If you should render a verdict of manslaughter in this case, Judge McCaleb and Sam Casey would go out over this town and say that they had won the greatest victory they had ever won." Objection was made, which the court

failed to sustain. This remark had, of course, no relevancy to the issues in the case, and it was improper for the prosecuting attorney to make use of it, but we can not see how it could possibly have resulted in any prejudice to appellant's cause. Such controversies between counsel in the trial of a case are unfortunate, and, to say the least of it, out of place, but unless we can see that prejudice might have resulted it would be an abuse of power to set aside a verdict because an improper or uncalled-for remark was made by counsel.

There is only one other assignment of error, and that relates to the ruling of the court in refusing to grant a continuance to give time for appellant to procure the attendance of three absent witnesses. Two of the witnesses would have been introduced, according to the recitals of the motion, for the purpose of impeaching the character of the witness Pharr, but no prejudice resulted from refusing to postpone on that account for the reason that appellant introduced numerous other witnesses who testified that they were acquainted with the reputation of Pharr, and that, according to that reputation, he was unworthy of belief. The testimony of the other witness was sought to prove a contradictory statement by Pharr, but the motion failed to show sufficient diligence on the part of appellant, and also failed to show where the absent witness was at that time or that his attendance could be procured at the next term. True, it is stated in the motion that appellant believed that if granted a continuance until the next term he could procure the attendance of the witness, but he failed to state any facts which tend to support that allegation. The court did not, therefore, abuse its discretion in refusing to grant a continuance.

Judgment affirmed.

SNOW v. STATE.

Opinion delivered September 29, 1919.

1. CRIMINAL LAW — VALIDITY OF INDICTMENT — ENDORSEMENT OF NAMES OF WITNESSES ON INDICTMENT—MOTION TO QUASH.—An indictment should not be quashed on account of the failure to endorse thereon the names of witnesses, but on application of the accused the court should require the prosecuting attorney to endorse the names of the witnesses on the indictment or furnish a list of the witnesses to the accused.
2. TRIAL—CONTINUANCE—ABSENT WITNESS.—A cause will not be continued on account of the absence of a witness, where the witnesses' testimony would be merely cumulative of the testimony of other witnesses present, or where the appellant fails to show diligence in procuring the witnesses' attendance.
3. RAPE—SUFFICIENCY OF THE EVIDENCE.—In a prosecution for rape six boys, including defendant, were present when the act was consummated. The prosecutrix testified that the act was without her consent; the boys testified that she consented. *Held,* it can not be maintained that the verdict of guilty of assault with attempt to rape was entirely without substantial evidence to support it.
4. RAPE—DEGREE OF CRIME.—Where the finding of the jury was that defendant had sexual intercourse with the accused forcibly and against her will, the defendant should have been found guilty of the crime of rape, but the defendant can not complain that the jury found him guilty of an assault with intent to commit rape.
5. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—WITNESS PRESENT AT TRIAL.—The granting of a new trial on the ground that testimony favorable to defendant was not given by a witness present at the trial is within the sound discretion of the trial court.

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

Jesse Reynolds and *G. O. Patterson,* for appellant.

1. The motion to quash the indictment should have been sustained because the names of the witnesses were not endorsed upon it. 33 Ark. 174; Kirby's Digest, § 2225.

2. It was error to refuse defendant's motion for a continuance. Due diligence was shown.

3. The prosecutrix is contradicted in so many ways that the verdict should not stand and the verdict was not the verdict of the jury but a quotient verdict and in any event the punishment should be reduced to the minimum. 34 Ark. 232; 66 *Id.* 264; 91 *Id.* 502.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. It was not error to overrule the motion to quash the indictment. 33 Ark. 174.

2. The motion for continuance was properly overruled. No injustice is shown nor abuse of discretion by the court. 40 Ark. 144; 26 *Id.* 323; 79 *Id.* 594; 82 *Id.* 203; 100 *Id.* 132; 103 *Id.* 354; 119 *Id.* 450; 110 *Id.* 402; Kirby's Digest, § 7613. The burden was on defendant to show due diligence. 94 Ark. 169; 71 *Id.* 62. The witnesses also were non-residents. 110 Ark. 402; 90 *Id.* 384; 103 *Id.* 509.

3. The motion for new trial for newly discovered evidence was properly overruled. 2 Ark. 133; 74 *Id.* 377; 76 *Id.* 88.

4. The evidence was sufficient to sustain the verdict and there is no evidence to show a quotient verdict. 66 Ark. 232; 91 *Id.* 502; Kirby's & Castle's Digest, § 2595. See also 130 Ark. 457.

McCULLOCH, C. J. An indictment was returned by the grand jury of Johnson County accusing the defendant Hobart Snow of the crime of rape, committed on the person of Pearl Martin, a young woman about the age of seventeen years. On the trial of the case defendant was convicted of assault with intent to rape and the punishment was fixed at confinement in the penitentiary for a term of fifteen years.

The first ground urged for reversal is that the court erred in refusing to quash the indictment because the names of all the witnesses who appeared before the grand jury were not endorsed on the indictment. The record does not show that defendant asked for a ruling of the court on the motion to quash. Moreover, this court de-

cided in *Johnson* v. *State,* 33 Ark. 174, that an indictment should not be quashed on account of the failure to endorse thereon the names of witnesses, but that on application of the accused the court should require the prosecuting attorney to endorse the names of the witnesses on the indictment or furnish a list of the witnesses to the accused. No such application was made to the court in this case.

The next ground for reversal urged is that the court should have granted defendant's motion for continuance on account of absent witnesses. It is stated in the motion that the two witnesses would testify that they were present when the act of sexual intercourse took place between defendant and Pearl Martin and that she consented to the intercourse. This testimony would have been cumulative of that of other witnesses who were present at the trial. Besides, the motion for continuance failed to show diligence in an effort to procure the attendance of the absent witnesses. The testimony shows that there were six boys present, defendant being one of them, and that three of them had intercourse with the girl. She testified, in substance, that the intercourse with her was had forcibly and against her will, but the boys testified that she consented. There is a conflict in the testimony, but the verdict of the jury determined that issue against the defendant. It can not be successfully maintained that the verdict is entirely without substantial evidence to support it. If the sexual intercourse between defendant and the girl was, as the jury found, forcibly and against her will, the verdict should have been one finding defendant guilty of the crime of rape, for it seems to be undisputed that the act of sexual intercourse between the parties was fully consummated. But the fact that the jury have acquitted defendant of the higher offense, which the evidence warranted, is not a matter of which he can complain since the verdict of the jury was an act of leniency.

Again, it is urged that the judgment should be reversed because the jury fixed the verdict by the quotient method. This charge is not sustained by evidence, except by the affidavit of a juror, which is inadmissible to impeach the verdict. *Speer* v. *State,* 130 Ark. 457.

The motion for new trial sets forth newly-discovered evidence favorable to defendant, which a witness introduced by him failed to disclose when he was examined. The motion fails to show diligence. The witness was introduced by defendant and gave testimony favorable to his defense, but questions were not propounded to elicit the testimony said to have been disclosed after the trial. The granting of a new trial on such grounds is generally a matter within the sound discretion of the trial court, and no abuse of discretion is shown in this instance.

Affirmed.

LEWIS v. ROAD IMPROVEMENT DISTRICT NO 1 OF POLK COUNTY.

Opinion delivered September 29, 1919.

1. COURTS—ORDER OF ADJOURNMENT—PRESUMPTION.—The record of the county court entered on March 3rd, did not show the order of adjournment on that day; but the opening order of the record on March 5th, recited that the court met that day pursuant to adjournment; *held* it will be presumed that on March 3rd, there was an adjournment over to March 5th.
2. ROADS AND ROAD DISTRICTS—VALIDITY OF ORGANIZATION.—A road district *held* properly organized under act of 1915, page 1400.

Appeal from Polk Circuit Court; *J. S. Steel,* Judge; affirmed.

Pole McPhetrige, for appellant.

1. The petition did not contain a majority in number of land owners, acreage or land values as prescribed by law. Kirby's Digest, §§ 6899-6903-4; 99 Ark. 508; Acts 1915; Act 338, § 2.

2. The record shows that court was legally in session when the judgment was entered. *Light* v. *Self,* 138 Ark. 221.

Norwood & Alley, for appellee.

1. There is no bill of exceptions in the record. 117 Ark. 377; 86 *Id.* 456.

2. The brief of appellants does not contain a sufficient abstract. 90 Ark. 393; 92 *Id.* 141; 89 *Id.* 349.

3. The motion for new trial was not filed in time.

4. The petition contains a majority of land owners and the petition should have been granted. The finding of the court is conclusive. 90 Ark. 512; 91 *Id.* 108; 92 *Id.* 41; 96 *Id.* 606; 104 *Id.* 154. Act 338, Acts 1915, § 2, was fully complied with.

McCULLOCH, C. J. Appellants are owners of real property within the boundaries of a road improvement district in Polk County created by a judgment of the county court of that county, entered on March 5, 1919, pursuant to the terms of the act of March 30, 1915, authorizing the creation of such districts. Acts 1915, page 1400. Appellants appeared in the county court within thirty days after the rendition of the judgment creating the district and prosecuted an appeal to the circuit court from that judgment. The trial of the cause in the circuit court resulted in a judgment of that court creating the district, as was done by the order of the county court appealed from.

The only issue in the trial below was concerning the number of signatures of property owners to the petition for the improvement. Section 2 of the statute cited above provides that the county court shall make an order establishing a district when it appears to the court "that the petition is signed by either a majority in land value, acreage, or in number of land owners within the proposed district, and if the county court deems it to the best interest of the county and the land owners in said district" and that "such majority in acreage, number of land owners, or majority in land value to be determined by the assessment for the purpose of general taxation in force in said county at that time."

(1) Appellants have undertaken to raise here for the first time the question whether or not the record shows that the county court was in session when the judgment was rendered creating the district. The record sent up to

the circuit court contains the opening order of the court on the day fixed by law, being the first Monday in January, 1919, and various adjournment orders from time to time over to March 3, but the order of adjournment on March 3 does not appear in the record. In other words, the record of the county court entered on March 3 does not show the order of adjournment on that day. The opening order of the record on March 5 recites, however, that the court met that day pursuant to adjournment. This question was not raised in the trial below, and in view of the silence of the record concerning the adjournment on March 3, and the recitals of the opening order of the court on March 5, we must indulge the presumption that there was an adjournment over to the latter date.

(2) Coming then to the only question raised in the trial below and properly presented here for decision, we are only called upon to decide whether or not there was substantial evidence to sustain the finding of the court. On the application of all the parties to the controversy, the court appointed three commissioners to ascertain the facts concerning the number of property owners in the district and the number of valid signatures to the petition. Those commissioners made a report of their findings to the court, and also testified orally. Appellants also testified concerning the number of property owners and the number of valid signatures on the petition. Appellants also introduced the record of real estate assessment books of the county, but the same has not been abstracted. They have, however, abstracted the testimony of all the witnesses bearing on the issue involved.

We are, as before stated, only concerned with the question of legal sufficiency of the evidence, and upon due consideration we have reached the conclusion that there is sufficient evidence to sustain the finding of the court. In doing so we look only to the abstracted evidence, which was that of the witnesses introduced on each side without objection, tending to establish the number of owners of real property in the district and the number of valid signatures to the petition. The judgment of

the court was manifestly based upon a finding that the petition contained a majority of the owners of property, not in acreage or in value, but a majority in numbers, and we think there is enough testimony to support that finding.

We do not deem it necessary to decide whether or not the county tax assessment records are conclusive as to the ownership and number of land owners, for we think that in either view of the matter there is enough evidence to sustain the finding of the court. The testimony adduced by appellee tends to show that there are 1,841 owners of real property in the district, but that the names of 132 of them do not appear on the assessment books, which, according to that testimony, leaves 1,709 names of property owners on the assessment books. The same testimony also tends to show that there are on the petition the signatures of 881 property owners whose names appear on the county assessment books, and also the signatures of 132 other property owners in the district whose names do not appear on the assessment books. Taking, therefore, the assessment books as the sole guide, there are 1,709 names of which 881 appear on the petition, which constitutes a majority of 53. On the other hand, if we construe the statute not to make the assessment books the sole test, it appears from the testimony most favorable to appellee that there are 1,841 owners of property in the district and that 1,013 of them signed the petition. In either event, there is legally sufficient evidence to sustain the verdict, and the judgment is, therefore, affirmed.

HINES v. STATE.

Opinion delivered September 29, 1919.

1. HOMICIDE—ADMITTED KILLING—PROOF OF JUSTIFICATION.—Where the killing is both proved and admitted, it devolves upon the accused to prove circumstances in justification or excuse; but it is sufficient for him to show facts which would raise in the minds of the jury a reasonable doubt as to his guilt.

2. SAME—FELONIOUS INTENT.—The evidence *held to* warrant an instruction that if accused, "armed with a deadly weapon, sought the deceased with a felonious intent to kill him or sought or brought on, or voluntarily entered into, the difficulty with deceased, with the felonious intent to take his life, then defendant can not invoke the law of self-defense, no matter how imminent the peril in which he found himself placed."
3. HOMICIDE—EFFECT OF ACCUSED ARMING HIMSELF.—Instructions that although accused armed himself with a pistol, and went to deceased's store, in the course of his duty, not to engage in a difficulty, but to peaceably settle a misunderstanding, and that he armed himself for protection only, the fact that he did arm himself will not cut off his right of self-defense, *held* correct.
4. APPEAL AND ERROR—MULTIPLICATION OF INSTRUCTIONS.—Appellant can not object to the refusal to grant his prayer for an instruction, where the court in another instruction given completely covers the issue.
5. CRIMINAL LAW—READING STATUTE TO THE JURY.—In a criminal prosecution it is not error to read to the jury sections of the digest relating to the issue.
6. TRIAL—REMARKS OF COUNSEL—REMOVAL OF PREJUDICE.—In a criminal trial, defendant's counsel stated in his opening statement, that defendant had nothing to conceal. During the trial said counsel objected to certain testimony offered by the State, and was sustained. In argument the State's attorney referred to the incident as an attempt by defendant to conceal something. Defendant's counsel objected to this argument, and was overruled. Later the State's attorney made the same assertion, counsel again objected and was this time sustained. The court said: "Mr. P., that argument is wrong and the jury will not consider it and you had better not follow it any further." The attorney then said that his only object in making the argument was to answer counsel's statement that accused had nothing to conceal. Defendant's counsel then requested the court to withdraw these remarks from the jury and to reprimand and punish counsel. The court overruled the motion and told Attorney P. to proceed with his argument within the ruling of the court.

   Held, the action of the court, after defendant's second objection related back to all the remarks made by the State's attorney at any stage of his argument and was tantamount to a reconsideration of the court of its first ruling in the matter, and was equivalent to a favorable ruling to the defendant in both instances.

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

W. F. Denman and *J. M. Carter,* for appellant.

The court erred in giving instructions asked by the State and in refusing those asked by defendant. There was prejudicial error in the remarks of the State's attorney and the action of the court thereon. 61 Ark. 174; 63 *Id.* 176; 72 *Id.* 139-140; 58 *Id.* 478; 61 *Id.* 130; 95 *Id.* 237.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. Instructions Nos. 6 and 9 given for the State were properly given. 120 Ark. 193; 76 *Id.* 515. Nos. 10 and 11 were proper. There was no error in refusing No. 8 for defendant, nor No. 7. These were covered by others given correctly.

2. There was no reversible error in the argument of the prosecuting attorney. The admonition of the court was sufficient. 23 Ark. 32; 193 S. W. Rep. 89. See also 93 Ark. 66; 74 *Id.* 555; 123 *Id.* 619.

3. All the instructions of the court are not set out in the bill of exceptions. 46 Ark. 207; 78 *Id.* 374; 28 *Id.* 549; 104 *Id.* 315.

4. There were no exceptions saved to the argument or remarks of counsel. 84 Ark. 95; 86 *Id.* 360.

5. There is no record here upon which this court can reverse; the record is not properly authenticated. 5 Ark. 474; 6 *Id.* 252; 9 *Id.* 474; 11 *Id.* 639; 1 *Id.* 20; 73 *Id.* 608.

STATEMENT OF FACTS.

Jeff D. Hines was indicted for murder in the first degree charged to have been committed by killing Peter W. Mackley. He was tried before a jury and convicted of murder in the second degree, his punishment being fixed at a term of fifteen years in the State penitentiary.

The facts are as follows: On the part of the State it was shown that Peter W. Mackley was shot and killed by Jeff D. Hines at the former's floral shop in Texarkana, Arkansas, about 5:30 o'clock P. M. on the 8th day of March, 1919. The defendant, Jeff D. Hines, worked for

the express company in the city of Texarkana, Arkansas, and delivered packages for it. The deceased, Peter W. Mackley, conducted a floral shop in that city in which he was assisted by his wife. On the afternoon before the killing the defendant brought some flowers which had been received by express to the store of Mackley for the purpose of delivering them. Mrs. Mackley opened the flowers and at first refused to receive them because they were wilted. The flowers had been sent from Neosho, Mo., and she claimed that they should have arrived on the morning train and have been delivered then. After some discussion about the matter with the defendant, the claim agent of the express company was called in and Mrs. Mackley received the flowers upon his promise to pay the damages.

According to the testimony of some of the witnesses, Mrs. Mackley told the claim agent, in the presence of Hines, that she did not believe there was a drop of gentleman's blood in Hines' body. Mrs. Mackley admitted using this language concerning Hines, but stated that she used it after Hines had left the store.

Miss Jennie Van Treese, a friend of Mr. and Mrs. Mackley, was present in the store at the time Mackley was killed and witnessed the killing. According to her testimony, Hines came in and laid his express book down on the show case on a counter in the front part of the store. Mr. Mackley started to sign a receipt for the express agent, but before he had completed his signature, Hines threw a pistol in Mackley's face and ordered the latter to throw up his hands. Mackley threw up both of his hands and Hines held the gun right in Mackley's face with both hands on it. Mrs. Mackley saw Hines draw the pistol on Mackley and immediately got up and went towards her husband. She got a pistol out of a desk and started towards her husband with it hanging down by her side. This was the last the witness noticed of Mrs. Mackley until after the killing. Hines stepped back two steps and shot several times. Two shots took effect in Mackley's body and resulted in his death. Two other

shots took effect in the body of Mrs. Mackley. The witness was so scared that she does not recollect the number of shots that were fired. The witness stepped into a back room while the shooting was going on and remained there until it was over.

It was shown by the State that one of the shots entered Peter W. Mackley's left breast between the first and second ribs and ranged downward. The other shot entered his back about two inches below the belt line in the center of the back and the bullet lodged in his hip. One of the shots took effect in the chest of Mrs. Mackley and was a pretty serious wound. Another took effect in her hip and was of no importance.

According to the testimony of Mrs. Mackley, she first saw Hines enter the front part of the store and called her husband's attention to the fact. They both knew that Hines had come to collect charges on the flowers delivered the day before, because their claim for damages had been settled by the express company. Mr. Mackley got up and went to the front part of the store to attend to the matter and Mrs. Mackley paid no further attention to it right at the time. In a few moments her attention was attracted by loud talking and she heard the word "apologize." She looked up and saw Hines with a pistol presented right in the face of her husband. Her husband had both of his hands in the air. Mrs. Mackley jumped up and ran to a desk and took a pistol out of it and started towards her husband to protect him. Before she reached her husband Hines began firing at him and her husband staggered back towards her. She caught him before he fell and he never said another word. She helped carry him to the back part of the store where he died. She did not attempt to use her pistol. She did not remember whether she dropped it, or what she did with it. The defendant shot her in the breast and one of the shots also took effect in her hip, but the latter shot did not bother her much.

Jeff D. Hines, the defendant, was a witness for himself. According to his testimony he had not been in Tex-

arkana long and his work was to deliver perishable goods for the express company. He knew Mr. and Mrs. Mackley in this way, and Mr. Mackley had always treated him nicely. On the day before the killing he carried a package of flowers into their store which had been sent from Neosho, Missouri, and Mrs. Mackley thought he had spoken abruptly to her about the flowers and spoke harshly to him about the matter. Their controversy resulted in the claim agent being sent for and he settled with the Mackleys for the flowers. Mrs. Mackley stated in Hines' presence that he did not have a drop of gentleman's blood in his body. The defendant left the store without resenting this or saying anything further to her about it. According to his testimony, Mrs. Mackley also called him a liar, but she denied doing this. Before commencing to deliver goods on the next day, the defendant borrowed a pistol to carry up to the store in case Mr. or Mrs. Mackley would try to do him any violence. He thought from the way they talked and acted the day before that they were going to try to do something to him and for that reason he carried a pistol up there for the purpose of protecting himself. He went into the store to collect for the flowers delivered the day before. He laid his book on the end of the counter just like he always did, and Mr. Mackley came up to the front of the store to sign it. The defendant said, "Mack, don't you think you ought to apologize to me for the way I was treated yesterday?" He said, "What?" and Hines repeated it, "Don't you think you ought to apologize to me for the way I was treated yesterday?" and Mackley said, "Hell, no, you damn son-of-a-bitch." When he said that Hines said, "Yes, you will," and threw his gun on him. Mackley then said, "I have got no gun, I'll apologize." Hines said, "All right, Mack," and asked Mackley what did he want to talk to him that way for, and said, "I don't see why you shouldn't want to apologize." Hines then walked up to him. Mrs. Mackley got up from where she was sitting and pulled a gun out of a desk and started forward. Hines then stepped back two or three feet and

said, "Lady, put up that gun, the trouble is all over with;" she said, "No, it ain't, either, I'm in on this." When she got up to get her pistol, Hines had his pistol on Mr. Mackley. Hines told her several times to stop. When he first told her to stop he had his gun in his bosom but had it where he could whip it into place any time he wanted to. When Mrs. Mackley got to Mr. Mackley, his hands were up. It seemed like they both stopped for about a second and that Mr. Mackley did not want to take the gun from her. Hines had his gun on Mr. Mackley at that moment. Mrs. Mackley saw her husband was not going to take the gun and the defendant thought she started to shoot. He shot at her and shot to kill. Mackley then grabbed for the gun and Hines fired at him. He did not know that he hit him the first shot and fired again.

Other witnesses were introduced both on the part of the State and of the defendant whose testimony tended to corroborate the testimony of the witnesses above recited. The case is here on appeal.

HART, J., (after stating the facts). (1) It is insisted by counsel for the defendant that the court erred in giving instruction No. 9, which is as follows: "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense only amounted to manslaughter, or that the accused was justified or excused in committing the homicide."

There was no error in giving this instruction. The instruction as given is a copy of section 1765 of Kirby's Digest. The killing of Mackley by the defendant was both proved and admitted, and the statute is applicable and makes it devolve on the defendant to prove circumstances in justification or excuse. In other instructions the court plainly instructed the jury that the burden was on the State to prove the defendant's guilt beyond a reasonable doubt. The jury were fully and fairly instructed on the question of reasonable doubt in other instructions given by the court, and in this way the rights of the

defendant were entirely safeguarded. *Tignor* v. *State,* 76 Ark. 489; *Johnson* v. *State,* 120 Ark. 193, and *Turner* v. *State,* 128 Ark. 565. So it will be seen that the jury understood from the instructions of the court that, although the burden of proving acts of mitigation or justification devolved on the accused, it was sufficient for him to show facts which would raise in the minds of the jury a reasonable doubt as to his guilt.

(2) It is next insisted that the court erred in giving instruction No. 11, which is as follows: "If you believe from the evidence in this case that the defendant, armed with a deadly weapon, sought the deceased with a felonious intent to kill him, or sought or brought on, or voluntarily entered into the difficulty with deceased with the felonious intent to take his life, then the defendant can not invoke the law of self-defense, no matter how imminent the peril in which he found himself placed."

It is claimed by counsel for the defendant that there is no testimony upon which to predicate this instruction. The evidence shows that the defendant and the wife of the deceased had a controversy over the delivery of some flowers on the day before the killing. According to the defendant's own testimony, he anticipated further trouble with the parties about the flowers and for that reason armed himself with a pistol. When he first went into the store and before the deceased had time to write his name upon the express book, the defendant demanded of him an apology for the way he had treated him the day before. From these facts and others appearing in the statement of facts there was abundant evidence upon which to predicate the instruction.

3. It is next insisted that the court erred in refusing to give instruction No. 1, asked by the defendant. The instruction is as follows: "The fact that defendant procured a pistol and went to deceased's place of business armed is a circumstance that the jury may consider in determining what was his purpose and intention in going there; but, after considering all the testimony in the case, if you believe he went there not for the purpose of en-

gaging in a difficulty with deceased, but in the discharge of the duties of his employment, and that he armed himself for protection only while in the performance of such duties, then the fact that he had armed himself would not cut off his right of self-defense."

The court did give instruction No. 2, which is as follows: "The fact that defendant procured a pistol and went to deceased's place of business is a circumstance that the jury may consider in determining what was his purpose and intention in going there; but, after considering all the testimony in the case, if you believe he went there, not for the purpose of engaging in a difficulty with deceased, but in the discharge of the duties of his employment, or to settle peaceably with him a misunderstanding or ill feelings between them, or between him and deceased's wife, and that he armed himself for protection only while trying to carry out such purpose, then the fact that he had armed himself would not cut off his right of self-defense."

According to the defendant's own testimony, it was necessary for him to go to the deceased's place of business in the course of his employment. He anticipated further trouble with the deceased or his wife and armed himself that he might protect himself from violence at their hands. The defendant, also, said that as soon as he went into the store on the day of the killing he demanded an apology from the deceased for what had been said to him the day before. So it will be seen that both of these theories of the defendant were presented to the jury by the instructions given by the court.

4. It is next insisted that the court erred in refusing to give instruction No. 8, which is as follows: "The law presumes the defendant innocent of this charge, and this presumption shields and protects him, and in reasonably doubtful cases is in itself sufficient to turn the scale in his favor and acquit him."

The court gave instruction No. 9, which is as follows: "The law presumes the defendant in this case innocent of the charge against him, and that presumption of inno-

cence shields and protects him from a conviction in this case until such time as you may find from the evidence beyond a reasonable doubt the defendant is guilty of the charge against him."

Thus it will be seen that the matters embraced in instruction No. 8 as asked by the defendant were completely presented in instruction No. 9, which was given by the court.

The defendant also contended that the court refused to give certain instructions asked by him on the question of reasonable doubt. We do not deem it necessary to set out these instructions because the court gave other instructions on that subject which were complete in themselves and fully and fairly submitted that question to the jury.

5. The court also read to the jury certain sections of the digest relating to homicide. There was no error in this. *Mitchell* v. *State,* 73 Ark. 291. One ground of objection to the reading of these sections of the statute was that they did not contain any charge on the subject of appearance of danger to the defendant. This phase of the case was fully and fairly submitted to the jury in other instructions given by the court, and the instructions when read as a whole are harmonious. Therefore the court did not err in this regard.

6. Finally it is insisted that the court erred in not granting a new trial because of certain remarks made by one of the attorneys for the State in his closing argument to the jury. In his opening statement to the jury the defendant's counsel told the jury that the defendant had nothing to cover up or conceal from the jury. Later on he objected to certain testimony being given to the jury at the instance of the State, and the court sustained his objection and excluded the testimony. One of the State's attorneys, in his closing argument, referred to this fact as an attempt by the defendant to conceal the facts from the jury. The defendant's counsel objected to the argument, but the court overruled his objection. Counsel for the State then proceeded again with the same line of ar-

gument, and the defendant again objected to the argument. Thereupon the court said to the counsel for the State making the argument: "Mr. Parks, that argument is wrong, and the jury will not consider it and you had better not follow it any further." The attorney then said that his only object in making that argument was in answer to Judge Carter's statement to the jury that the defense had nothing to conceal or hide in the case. Counsel for the defendant then requested the court to withdraw these remarks from the consideration of the jury and to reprimand and punish counsel. The court overruled his motion and told Attorney Parks to proceed with his argument within the ruling of the court above made and set out.

Counsel for the defendant assigned this action of the court as error, and rely upon the case of *Holder* v. *State,* 58 Ark. 473, and other cases of like character. In the Holder case the prosecuting attorney persistently defended his action and in defiance of the court repeated his objectionable argument. Here the facts are essentially different. Upon the first complaint the court overruled the objections of the defendant's attorney. Upon the second complaint he sustained his objections and specifically directed the jury not to consider the remarks and told the attorney for the State that his remarks were wrong and that he had better not repeat them. This had the effect to relate back to all the remarks made by the prosecuting attorney at any stage of his argument and was tantamount to a reconsideration of the court of its first ruling in the matter and was equivalent to a favorable ruling to the defendant in both instances.

It is true the State's attorney then stated that his only object in making the argument was in answer to the defendant's attorney's opening statement that he had nothing to conceal; but it does not appear to us that this remark was made in defiance of the orders of the court but was rather an apology for his transgression of the rules of argument. It seems that the court so understood it and declined to reprimand him further, but told

him to proceed with his argument within the ruling of the court above set out.

We think the action of the court removed any prejudice that might have resulted from improper remarks made by the counsel for the State, and that the jury disregarded the improper remarks of counsel as directed by the court and considered the case solely upon the testimony and the law. It may be fairly assumed from the record that the jury heeded the admonition of the court and did not consider the improper remarks made by the State's attorney. *Sims* v. *State,* 131 Ark. 185.

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

WYLIE *v.* STATE.

HAMILTON *v.* STATE.

Opinion delivered September 29, 1919.

1. LARCENY—MONEY DEPOSITED WITH ANOTHER—COLOR OF A BET.—Where persons conspire to cheat a man under color of a bet and he simply deposits his money as a stake with one of them, not meaning thereby to part with the ownership thereof, they, by taking the money, commit larceny, and not the less so, though afterwards they, by fraud, made it appear to win.

2. EVIDENCE—LARCENY CASE—INFORMATION LEADING TO ARREST.—One P. claimed to have been robbed of a purse containing money, she having loaned possession of the purse for a moment to her cousin, one H., the defendants being accused of stealing the purse from H. *Held,* testimony of the town marshal, as to how he came to be called, and how he received information leading to the arrest of the accused, was admissible.

3. LARCENY—INSTRUCTION—WAGERED MONEY.—In a prosecution for larceny under the facts set out in the preceding syllabus the trial court charged the jury:

"You are instructed that if you find from the evidence that H. wagered the money alleged to have been stolen, with W. (accused) as stake holder, and at the time he deposited the same as a wager he meant to part with the ownership therein, then you are instructed this would not constitute larceny, and you will find the defendants not guilty."

Defendant objected to the phrase, "part with the ownership." *Held,* the instruction was correct, that the phrase meant to "part both with the title and possession of the money."

Held, also, it was defendant's duty, in objecting to the instruction to submit to the court a written instruction, defining the objectionable words.

4. LARCENY—MONEY WAGERED.—One who takes money which has been wagered, under the honest belief that he is the owner of the same is not guilty of larceny.

Appeal from Monroe Circuit Court, *George W. Clark,* Judge; affirmed.

S. S. Jeffries and *Lee & Moore,* for appellants.

1. The court erred in the admission of the evidence of Jesse Hankins in answer to questions by the State's attorney, as it was hearsay testimony purely, and it was error to refuse to permit Tom Jennings to answer on redirect examination the question as to what was said about taking down the money, etc., as it was a matter vital to the whole case. Authorities are not necessary to be cited, as a defendant has a right to present his side of the case under well recognized rules of procedure and evidence.

2. It was error to give instruction No. 2 for the State. The court should have defined the phrase "part with the ownership" and added the words "in the event he lost" to the instruction. The instruction as given is vague and indefinite. 49 Ark. 147; 75 *Id.* 427; 88 S. W. Rep., cited in note 20, L. R. A. (N. S.) 1164; 72 Ark. 516; 81 Southern Rep. 836, cited in note 20, L. R. A. (N. S.) 1164; 109 Ark. 346.

The instructions are conflicting, as the theory of the defense was that to cheat on a trick or game of cards is not larceny, as shown by the cases cited *supra.* Instructions No. 1 and No. 3 and No. 6 asked by defendant embodied this rule but the court refused all these except No. 3.

3. The evidence was insufficient to convict Arnold Wylie of any crime at all and he was entitled to instruction No. 7. Cases *supra.*

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. There was no error in the examination of Jesse Hankins, as complaint and outcry made by one who has been robbed shortly after the robbery is admissible as evidence. Wigmore on Evidence, par. 1762 and 1142.

2. No error in refusing to allow attorney for defendants to ask Tom Jennings what he said about taking down the money.

3. There was no error in giving instruction No. 2. 72 Ark. 516; 75 *Id.* 427; 114 *Id.* 398.

4. The instructions are not conflicting, as the court followed closely the law. 72 Ark. 516; 75 *Id.* 427; 114 *Id.* 398.

5. The evidence shows defendant Wylie equally guilty and there is no error in refusing instruction No. 7. Cases *supra.*

HART, J. Arnold Wylie and Theo Hamilton were convicted of larceny from Smomie Purdemon of about $75 in money which was accomplished by means of a trick with cards with Will Hoy, her cousin. From the judgment of conviction they have duly prosecuted an appeal to this court.

Arnold Wylie and Theo Hamilton were confederates in the fraud. According to the testimony for the State, Smomie Purdemon, accompanied by Will Hoy, her kinsman, went into the depot in the town of Clarendon, about 4 o'clock on the morning of the third day of February, 1919, for the purpose of taking a train. Smomie Purdemon had a purse containing $70 in greenbacks and four or five dollars in silver. Arnold Wylie and Theo Hamilton were already in the depot standing by the stove warming themselves. When Hoy walked up to the stove, the defendant, Hamilton, began a conversation with him by asking him if he knew anything about the death of old lady Caroline, a negro fortune teller, who had just died in the neighborhood. In the course of the conversation Hamilton explained to Hoy that he also could tell fortunes. He said in order to do it, it was necessary for him to have a pack of cards and asked Hoy if he had one. Hoy did

not have any, but the defendant Wylie produced the cards. After Hamilton had received the cards, he said it would be necessary for him to have change for $10 before he could perform the trick. Hoy did not have the change and walked back to where Smomie Purdemon was and borrowed her pocketbook in order to get the change. When he returned with the pocketbook containing the amount of money above stated, Hamilton told him to wait a minute and he would show him a trick. Hamilton told Hoy to hold out his hands and cut the cards into three parts. Hoy had the purse with the money in it in one hand and Hamilton told him to turn the money over to him while he cut the cards. Just as soon as Hamilton got the money he ran off with it. Smomie Purdemon demanded her money but Hamilton pulled his pistol and then ran off with the money. Hoy made a complaint to the city marshal who, after a search arrested Hamilton and Wylie in a rooming house in the town of Clarendon. Both of them were in bed when they were found, but they had their clothes on.

According to the testimony of the defendants, Hoy and Hamilton entered into a wager and Hoy lost the money that way. Hamilton had shown Hoy the deck of cards with the queen of diamonds under the bottom of the pack and then offered to bet Hoy that the queen of diamonds was not there. Hoy accepted the bet and when cards were turned the queen of spades appeared where Hoy expected to see the queen of diamonds, and Hoy thereby lost the bet.

The theory of the State was that Wylie and Hamilton were confederates and conspired together to obtain the money by means of a sham bet or trick with cards.

On the part of the defendants it was contended that they made a real bet with Hoy and that he lost the money in that way.

(1) In *Hindman* v. *State,* 72 Ark. 516, the court held that where persons conspire to cheat a man under color of a bet and he simply deposits his money as a stake with one of them, not meaning thereby to part with the ownership

therein, they, by taking the money, commit larceny and not the less so, though afterwards they are by fraud made to appear to win.

The principle was stated more comprehensively in *Welsh* v. *People,* 17 Ill. 339, where the court said: "The rule is plainly this: If the owner of goods alleged to have been stolen parts with both the possession and the title to the goods to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to fraud. It is obtaining goods under false pretenses. If, however, the owner parts with the possession voluntarily, but does not part with the title, expecting and intending that the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back and make the taking and conversion a larceny."

This principle of law was expressly reaffirmed in two later decisions of this court. *Johnson* v. *State,* 75 Ark. 427, and *Coon* v. *State,* 109 Ark. 346. In the application of this principle of law the evidence for the State, if believed by the jury, was sufficient to convict the defendants.

(2) The next assignment of error is that the court erred in admitting certain evidence given by the town marshal for the State. On this assignment of error we quote from the record the following:

"Q. Tell who called you to the depot.

"A. I went to the depot and seen this Will Hoy, and he said he had been robbed.

"Q. Did you get information from Will Hoy that Smomie Purdemon had been robbed?

"A. I made a search for these boys, Arnold Wylie and Theo Hamilton, and asked them if they would know the two men if they seen them again; and I found them at Will Williams' house."

It is contended by counsel for the defendants that this testimony was hearsay and was for that reason inadmissible. Oftentimes it is impracticable to go directly into the main issue, and it is necessary to know the cir-

cumstances leading up to it. These circumstances, while not in themselves relevant, are treated as the introduction to the main matter or by way of inducement to it. Hence the preliminary question above quoted was entirely proper. Jones, Commentaries on Evidence, Vol. 1, sec. 137 a.

(3) It is next claimed that the court erred in giving instruction No. 2 on behalf of the State, which is as follows: "You are instructed that if you find from the evidence in this case that Will Hoy wagered the money alleged to have been stolen, with Arnold Wylie as stakeholder, and at the time he deposited the same as a wager he meant to part with the ownership therein, then you are instructed this would not constitute larceny, and you will find the defendants not guilty."

The defendants objected to this instruction and asked that the phrase "part with the ownership" be defined. There was no error in this regard. It is evident that the court meant by the use of the words to part both with the title and possession of the money. Besides if the counsel for the defendants thought otherwise, they might have submitted to the court a written instruction so defining these words and asked that it be given to the jury. Not having done this, they can not complain of the action of the court in refusing to give the definition on its own account. *Paxtom* v. *State*, 114 Ark. 398.

(4) The next assignment of error is that the court gave conflicting instructions to the jury. At the request of the defendant the court gave instruction No. 3, which is as follows: "It is not every taking and carrying away that is larceny; it becomes larceny when the taking and carrying away is with the fraudulent intent that is a purpose to steal, and if you find from the evidence that the defendants, or either of them, had engaged in a bet or wager with the prosecuting witness, Hoy, and that said money of the prosecuting witness Hoy, was bet upon said trick or chance and won by the defendants, or either of them, and the money was taken by the defendants under an honest belief that they had won same in said game of

chance, and that said money was their property, and they had a right to remove it, this would not constitute a crime of larceny, as in order to constitute a crime of larceny there must be a taking and carrying away of the property of another with the fraudulent intent to steal same and dispossess the true owner of the possession thereof."

At the request of the State the court gave instruction No. 5, which is as follows: "If it is contended on the part of the State that the defendant is guilty of larceny, before you can convict the defendant of the crime of larceny the State must prove beyond a reasonable doubt, first, that the money taken, if any was taken, was the property of Smomie Purdemon, the prosecuting witness, with the felonious intent to steal the same and deprive Smomie Purdemon of the possession thereof. The intent to steal at the time of the taking is an essential element of the crime of larceny."

A comparison of the language of these two instructions shows plainly that the circuit court properly distinguished between a real bet and one that was merely colorable or simulated for the purpose of getting wrongful possession of the money of the prosecuting witness, and the instructions are not conflicting. On the other hand they clearly submit to the jury the respective contentions of the State and of the defendants.

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

DICKASON v. McNEIL.

Opinion delivered September 29, 1919.

SALE OF LAND—WARRANTY DEED—FAILURE TO HAVE ABSTRACT EXAMINED—VENDOR'S LIEN.—D. entered into a contract to purchase certain lands from M., the latter to give a good title. D. paid part cash, was to assume a mortgage on the land, and for the balance of the purchase price agreed to convey certain other property to M. and in default of such conveyance M. was to have a vendor's lien for the said amount on the said property deeded from M. to D. M. executed his deed to D., who entered into

possession, but neglected to have the abstract furnished him by M. submitted to an attorney. Thereafter D., claiming a defect in title and a shortage in acreage, sought to rescind the trade, but remained in possession. M. sued D., seeking to foreclose the vendor's lien, D. having failed to deed the other property to M. *Held,* the contract was, under the facts, binding on D.; that M. could enforce his vendor's lien, and that D.'s remedy for any defects of title or shortage in acreage was upon the warranty in the deed from M. to him.

Appeal from St. Francis Chancery Court; *R. J. Williams,* Special Chancellor; affirmed.

Mann, Bussey & Mann, for appellant.

1. Both parties were represented by agents and defendant was drawn into a situation different from that intended by her and was entangled in the web woven by real estate agents.

The sale to Mrs. Dickason was never complete. She never received a good title to the property described in the deed. The title to the 169 acres was not a marketable title, the description being insufficient. 129 Ark. 334. There was also a failure of the grantors to deliver the land as described in the deed. The proof is clear that the agent from whom Mrs. Dickason purchased misrepresented the location of the lines of the property.

2. The refusal of the defendant to make the deed to the Memphis lots was based on a failure of title to the Arkansas lands and she should have been allowed a reasonable time to convey a good title before a lien was declared for $2,000 liquidated damages.

3. Interest should be allowed defendant on the amount paid Moore from the date of payment.

Hughes & Hughes, for appellee.

By accepting the deed from Moore appellant agreed to its terms, one of which was that if within the time there limited a deed conveying a merchantable title to the lots be not given she should then pay the sum of $2,000, an agreed sum. Having so agreed, she can not keep the land and refuse to pay. She was allowed for the deficiency of 18.1 acres at $25 per acre. Interest was

properly allowed from date of payment. On the cross appeal, it was error to allow $45 on account of the survey, and the decree should be modified so as to allow appellees $1,547.50 and 6 per cent. interest from April 16, 1917, to date of decree, and from that date until paid.

STATEMENT OF FACTS.

A. J. McNeil, T. F. Lundergan, and T. F. Lundergan as trustee brought this suit in equity against Mary E. Dickason and E. A. Rolfe to foreclose a vendor's lien reserved in a deed from W. J. Moore to Mary E. Dickason, dated January 16, 1917, conveying certain lands in St. Francis County, Arkansas, and which lien was subsequently transferred and assigned by W. J. Moore to the plaintiffs. The evidence, stated in brief, tends to establish the following facts:

J. S. Dickason is the husband of Mary E. Dickason and acted as agent for his wife throughout the transaction. Percifull and Vinsohn were agents for W. J. Moore and acted for him throughout the transaction. The lands which are the subject-matter of the suit are situated in St. Francis County, Arkansas, but all the parties resided in Memphis, Tennessee. After some negotiation between J. S. Dickason for his wife, and Percifull and Vinsohn for W. J. Moore, a written contract was entered into on the 12th day of January, 1917, whereby W. J. Moore agreed to sell to J. S. Dickason four hundred and three (403) acres of land in St. Francis County, Arkansas, being the lands involved in this suit. While the contract was made in the name of Dickason, he was acting as agent for his wife and took the contract in his own name for convenience sake. To complete the sale, on the 16th day of January, 1917, W. J. Moore executed a warranty deed to said lands to Mary E. Dickason. Under the contract the purchase money was to be $25 per acre, or the aggregate sum of $10,075. Dickason gave Percifull and Vinsohn a check for his wife for $2,475. There was a mortgage on the land for $5,100, the payment of which was assumed by Mary E. Dickason. A part of the consideration named in the deed was the following: "It

is agreed and understood by the vendee and vendor herein that the conveyance of certain real estate hereafter to be conveyed is a part of the consideration for the above described land, which real estate to be conveyed is lots thirty-six (36), thirty-seven (37), thirty-eight (38) and thirty-nine (39) of block "I" of the Mt. Arlington Subdivision located in the city of Memphis, Shelby County, Tennessee, which said lots the said Mary E. Dickason agrees to convey or cause to be conveyed unto the said W. J. Moore, or to his order, by warranty deed conveying a good merchantable title, such conveyance to be made within ninety days from this date, and should the said Mary E. Dickason fail or be unable to make such conveyance, she hereby agrees to pay to the said W. J. Moore the sum of two thousand ($2,000) dollars; and to secure the conveyance of said lots or the payment of the said $2,000 a vendor's lien is hereby retained on the said Arkansas land, but when the said Mary E. Dickason conveys the said lots or pays the said $2,000, the said Moore agrees to make a proper release of this lien."

The Memphis lots were estimated to be worth $1,500 in cash, but were placed in the deed at the value of $2,500. The contract provided that Moore was to furnish abstracts of title to the land and convey to Dickason a good title thereto. The title to the property was not examined before the deed from Moore to Mrs. Dickason was executed. The deed was delivered to Dickason and he took possession of the lands in St. Francis County for his wife. He received a warranty deed to the lands. Percifull told Dickason that he would have a survey made of the lands and showed Dickason where the line was. Soon after the deed was delivered to Dickason he took possession of the lands and commenced to build some houses. He was told that the line did not commence where Percifull had shown him it did, but that it was back some 200 yards to the east. Dickason then went back to Memphis and told Percifull that the line was not where he said it was and that he would not take the lands. Percifull again went on the lands with Dickason and showed him the same

place he had shown him before the deed was executed. Dickason told Percifull that the line was back further 200 yards; that he did not want the lands but wanted his money back. Finally Percifull made a resale of the lands to a Mr. Mahan and wanted Dickason to give him a warranty deed. Dickason refused to do this but said that his wife would give a quitclaim deed to Mahan and that Moore would give him a warranty deed. Mrs. Dickason did not convey to Moore the lots in Memphis as she had agreed to do. Some time after the time had elapsed within which she was to convey these lots to Moore, a flaw was discovered in the title to the St. Francis County lands, and Mahan refused to complete his contract of purchase of them on that account. Dickason continued in possession of the lands for his wife, but she never did execute any deed to the Memphis lots; nor did she ever offer to deed the lands back to Moore. By assignment the vendor's lien of Moore came to the plaintiffs in this action.

H. Gannaway, an attorney, examined the title for F. W. Mahan when he obtained his contract to purchase the St. Francis County lands. He examined the abstracts of title and found some defects in the title which he pointed out to the parties and specifically described in his testimony herein. Mahan then declined to carry out his contract of purchase. Gannaway also discovered the defects in the title to the Memphis lots and specifically pointed out such defects in his testimony.

Other testimony will be stated or referred to in the opinion.

The chancellor found that there was a vendor's lien reserved in the deed from W. J. Moore to Mary E. Dickason dated January 16, 1917.

The court further found that the consideration for the conveyance was at the rate of $25 per acre or the aggregate sum of $10,075; that the sum of $2,475 was paid in cash by Mary E. Dickason at the time the deed was executed; that by the terms of said deed Mary E. Dickason assumed as part of the consideration a prior encum-

brance on the land of $5,100 and the accrued interest; that the remainder of the consideration was the conveyance of the Memphis lots by Mary E. Dickason to W. J. Moore which was in the language set out in our statement of facts.

The court further found that Mary E. Dickason did not, within the time provided for in the deed, tender a deed of the Memphis lots to Moore, and that she did not have a good and merchantable title to said lots to convey; and that the vendor's lien of W. J. Moore was duly transferred and assigned to the plaintiffs.

The court further found that there was a deficiency in the acreage in the land in the deed from W. J. Moore to Mary E. Dickason to the amount of 18.1 acres and that the agreed price was at the rate of $25 per acre.

The court further found that Mary E. Dickason was entitled to a further abatement of the purchase price in the sum of $45, the expense of having the land surveyed.

The court was of the opinion that a decree should be in favor of the plaintiffs for the sum of $1,502.50 with 6% interest thereon from April 16, 1917, amounting in the aggregate at the date of the decree to the sum of $1,551.33. A decree was entered in accordance with the opinion and the finding of the court.

The case is here on appeal.

HART, J., (after stating the facts). It is contended by counsel for the defendant, Mary E. Dickason, that the decree should be reversed because under the contract of purchase Mrs. Dickason was to have a deed that conveyed a good title to the St. Francis County lands and that this she never got. The deed conveyed from Moore to Mrs. Dickason 403 acres of land in St. Francis County, Arkansas, and counsel for the defendant now claims that because the deed to 169 acres of the land had a defect in the description there was no completed sale of the lands. The preliminary contract of sale between Moore and Dickason provided that Dickason should receive a warranty deed conveying a good title to the Arkansas lands. A warranty deed was duly executed and delivered to Dick-

ason for his wife. Dickason had the right to have the title to the lands examined before completing the sale. He also had the opportunity to do this, for abstracts of title were furnished him in compliance with the contract. He accepted Moore's deed without asking legal advice about the title and entered into possession of the lands and has been in possession of them ever since. Even after he says that he discovered that there was a defect in the description of the lands as contained in the deed, he did not offer to have the lands reconveyed to Moore by his wife; nor did he relinquish possession of the lands or offer to do so in favor of Moore. It is true he acquiesced in the sale of the lands to Mahan, but this was done on the ground that there was a deficiency in the quantity of lands. It was while the sale to Mahan was in progress of negotiation that the defect in the title was discovered. Mahan refused to complete the sale on account of this alleged defect. Even after this Mrs. Dickason continued in possession of the lands and never offered to relinquish possession of them or reconvey them to Moore. Under these circumstances her only remedy would be to recover on the covenants of warranty contained in the deed from Moore to her. The deed from Moore to Mrs. Dickason provided that she was to convey or cause to be conveyed to Moore within ninety days from the date of the deed four certain lots in Memphis by warranty deed conveying a good and merchantable title; and that, in the event she should fail or be unable to do so, she would in lieu thereof pay to the grantor the sum of $2,000. A vendor's lien was expressly retained in the deed to secure the conveyance of the said lots or the payment of said sum of money as the case might be.

The record shows that Mrs. Dickason did not have a good title to the Memphis lots, and that she did not convey or cause to be conveyed these lots to Moore. The ninety days had expired long before she discovered any defect in the title to the Arkansas lands. No excuse is shown why Mrs. Dickason did not carry out or attempt to carry out this provision of the deed. When all the

circumstances are considered, as above stated, we are of the opinion that the decision of the chancellor was correct.

The chancellor, without objection, allowed Mrs. Dickason an abatement of the purchase money to the extent of the deficiency in the amount of land and of the amount of money expended in making a survey of the land according to the agreement of Moore's agents.

The plaintiffs have presented a cross-appeal on the question of interest. Without going into details on this branch of the case, it is sufficient to say that we have examined the record and find the decision of the chancellor to be correct.

The decree will therefore be in all respects affirmed.

HICKS v. STATE.

Opinion delivered September 29, 1919.

1. FALSE PRETENSE—SALE OF COLORED WATER FOR WHISKEY.—A conviction for obtaining money under false pretenses will be sustained, where defendant sold to the prosecuting witness for $21 four quart bottles which he said contained whiskey, but which in fact contained colored water.
2. CRIMINAL LAW—THEORY OF PROSECUTION—PREVENTION OF CRIME AND PROTECTION OF PUBLIC.—Criminal prosecutions are not for the protection and benefit of the particular person injured; they are to prevent crime and to protect the public.
3. FALSE PRETENSES—GIST OF THE ACTION.—The gist of the offense of obtaining money or other property of value by false pretense is fraud or deception perpetrated upon another to his injury.

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

Edwin Hiner and *John B. Hiner*, for appellant.

1. The court erred in excluding the testimony of L. F. Fairchild as to what Goldsworthy, an absent witness, testified in examining trial. Kirby's Digest, § 2148; 76 Ark. 515; 33 *Id.* 539; 60 *Id.* 400; 95 *Id.* 172.

2. The court erred in refusing the instructions asked by defendant. No public offense was charged or

proven. The prosecuting witness parted with his money in an effort to get appellant to violate the law by selling liquor, or parted with his money in bad faith. The Legislature has declared liquor to have no value. Having no value, a person can not be convicted for larceny of it or obtaining money for it under false pretense.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. There was no abuse of discretion by the court in excluding Fitpatrick's testimony as to what Goldsworthy testified to in the examining trial, as no proper foundation was laid nor due diligence shown. 33 Ark. 549; 58 *Id.* 353.

2. A purchaser of whiskey is not an accessory. 129 Ark. 106. A crime was charged and proved. 11 R. C. L., § 37. See also 72 Ark. 516; 75 *Id.* 427; 109 *Id.* 346; 61 *Id.* 157-180.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Fort Smith District of Sebastian County for obtaining $21 in money from Lem Drake under the false pretense that he had delivered him four quart bottles filled with whiskey, when, in truth, the bottles contained colored water. From the judgment of conviction, an appeal has been duly prosecuted to this court.

The evidence on the part of the State showed that on Saturday night, April 12, 1919, Lem Drake was in Sid Collier's store in Fort Smith; that appellant offered to sell and Lem Drake agreed to buy four quarts of whiskey from him for $21; that appellant, pursuant to the agreement, placed four quart bottles, in paper sacks in Drake's buggy, representing that they contained good whiskey—Bond, Lillard and Crow—for which Drake paid him $21; that the bottles contained colored water instead of whiskey.

Appellant attacked the indictment and judgment of conviction in the court below on the ground that no public offense was charged or proved. A reversal and dismissal is now contended for upon the same ground. It

is insisted that because the prosecuting witness parted with his money in an effort to get appellant to violate the law by selling liquor, or, in other words, parted with his money in bad faith, that the law will not heed his complaint. The inherent error in this contention is the assumption that criminal prosecutions are for the protection and benefit of the particular person injured. Such is not the case. The true purpose is to prevent crime and protect the public; hence prosecutions for crime proceed in the name of the State, and not in the name of the individual injured. In the case of *Lawson* v. *State,* 120 Ark. 337, the rule is laid down that "It is no answer to say that the accused should not be bound because the prosecuting witness was also guilty of an offense in the same transaction." The rule is sound and well sustained by authority. *Perkins* v. *State,* 67 Ind. 270, 23 Am. Rep. 89; *Commonwealth* v. *Henry,* 22 Pa. 253; *Commonwealth* v. *O'Brian* (Mass.), 52 N. E. 72; *Horton* v. *State* (Ohio), 39 L. R. A. (N. S.) 423; case note to 17 L. R. A. (N. S.) 276; R. C. L., vol. 11, section 37 (False pretense).

Again, it is insisted that, because liquor is contraband and without monetary value, a false representation concerning it can not be made the basis of a prosecution for obtaining something of value through a false representation. The error of this contention lies in the assumption that the essence of the offense is the value of the thing misrepresented. Not so. The gist of the offense for obtaining money or other property of value by false pretense is fraud or deception perpetrated upon another to his injury.

No error appearing, the judgment is affirmed.

CHRONISTER *v.* STATE.

Opinion delivered September 29, 1919.

1. CRIMINAL LAW—INDICTMENT—CHARGING TWO OFFENSES—LIQUOR LAWS.—Not more than one offense may be charged in a single indictment, except in certain instances, and a violation of the liquor laws is not one of them.

2. SAME—SAME—STATE MUST ELECT.—Where two separate offenses are charged conjunctively in the same indictment, the State may be required to elect upon which it will stand.

3. LIQUOR—MANUFACTURE—SALE.—Under the liquor statutes, the manufacture of wine is a separate and distinct thing from the sale thereof. The proof of making wine will not establish a sale thereof, and *vice versa.*

4. SAME—SAME—SAME—INDICTMENT CHARGING BOTH.—An indictment under act of February 6, 1915, is invalid which charges both the manufacture and the sale of liquor.

Appeal from Johnson Circuit Court; *A. B. Priddy,* Judge; reversed.

Jesse Reynolds and *G. O. Patterson,* for appellant.

1. The demurrer to the indictment should have been sustained. It charges two offenses and the State should at least have been required to elect upon which charge the State would proceed. Kirby's Digest, § 2230; 135 Ark. 243; 36 Ark. 55; 37 *Id.* 224; 50 *Id.* 305; 92 *Id.* 413; 118 *Id.* 35.

2. It was error to permit Arch Wilkins to testify as to John G. Chronister slipping in before the grand jury and indicting his brother and allowing N. A. Holman to testify as to what defendant said and the evidence fails to justify a verdict either for making or selling wine.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

Confesses error, citing Kirby's Digest, § § 2230-1; 48 Ark. 94; 33 Ark. 176; 36 *Id.* 55; 38 *Id.* 555; 45 *Id.* 62; 59 *Id.* 326; 68 *Id.* 251; 97 *Id.* 5; 135 *Id.* 243.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Johnson Circuit Court for manufacturing and selling wine. The indictment charged, in substance, that, on the first day of September, 1917, appellant did unlawfully, wilfully, and feloniously manufacture, sell and give away ardent, vinous, malt, spirituous and fermented liquors and alcoholic spirits and a certain compound and preparation thereof commonly called ton-

ics, bitters and medicated liquors, against the peace and dignity of the State of Arkansas.

Among other proceedings, appellant filed a motion to require the State to elect on which charge it would try him. The court overruled the motion, to which ruling proper exceptions were saved by appellant. Evidence was adduced tending to show both the manufacture and sale of wine by appellant. The cause was sent to the jury upon the theory that appellant might be convicted either for the manufacture or sale of wine. The verdict was in the following form: "We, the jury, find the defendant guilty as charged and assess his punishment at one year in the penitentiary."

From the judgment of conviction, an appeal has been prosecuted, under proper proceedings, to this court.

Under the indictment and proceedings in the case, it is impossible to ascertain whether appellant was convicted for manufacturing or selling wine. Appellant was indicted under the act of February 6, 1915, which reads as follows: "It shall be unlawful for any person, firm or corporation, to manufacture, sell or give away, or be interested, directly or indirectly, in the manufacture, sale or giving away of any alcoholic, vinous, malt, spirituous or fermented liquors, or any compound or preparation thereof, commonly called tonics, bitters, or medicated liquors within the State of Arkansas." Acts 1915, p. 98. The manufacture of wine is a separate and distinct thing from the sale thereof. The proof of making wine will not establish a sale thereof, and *vice versa.* It is therefore apparent that the statute just quoted makes the manufacture and sale of wine separate and distinct offenses. It is forbidden by statute in this State to charge more than one offense in any indictment, except in certain instances. The exceptions do not include violations of the liquor laws. Sections 2230 and 2231, Kirby's Digest. Where two separate offenses are charged conjunctively in the same indictment, the State may be required to elect upon which charge it will stand. *Gramlich* v. *State,* 135 Ark. 243. Appellant filed such a mo-

tion in apt time, which was overruled, and the Attorney General has frankly confessed error.

For the error indicated, the judgment is reversed and the cause remanded with directions that appellant's motion to require the State to elect be sustained and that appellant be given a hearing upon the charge elected by the State.

COLCLASURE v. STATE.

Opinion delivered October 6, 1919.

NIGHT RIDING—THREATENING MESSAGE—EVIDENCE—INCOMPETENCY.—Defendant was convicted under act of 1909, page 315, known as the statute against night riding. As the representative of an organization using a certain building, defendant went to one O., giving him three days' notice to vacate the building. *Held,* testimony by O. is incompetent, that before defendant came to him he found a message tacked on his door, telling him to get out or that he would be burned out. *Held,* evidence of the notice was inadmissible, there being no evidence connecting defendant with it in any way.

Appeal from Johnson Circuit Court; *A. B. Priddy,* Judge; reversed.

Paul McKennon, for appellant.

1. The continuance should have been granted for the testimony of Jess Accord.

2. The testimony fails to show a design on part of defendant or any member of the union to resort to violence.

3. Testimony as to a former written notice was not competent, as defendant was not shown to have been connected with the posting of this notice on the door.

4. It was error to exclude the evidence of Ward Dunlap and in admitting the remarks of the State's attorney before the jury.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. The motion for continuance was properly overruled, as no abuse of discretion by the court is shown. 40 Ark. 144; 26 *Id.* 323; 79 *Id.* 594; 109 *Id.* 450; 110 *Id.* 402; 94 *Id.* 169.

2. The absent witness was a resident of Oklahoma; this is shown on the face of the motion. 110 Ark. 402; 90 *Id.* 384; 103 *Id.* 509.

3. There was no error in permitting evidence and argument as to the assault made on prosecuting witness nor in permitting witness to testify that Jamestown had been union or nonunion, nor in admitting testimony that a threatening message had been placed on the door and that prosecuting witness had employed a person to guard his premises. The State could not impeach its own witness. Kirby & Castle's Digest, § 3440.

4. Appellant was not denied the right to cross-examine the witness, Grey.

McCULLOCH, C. J. Appellant was indicted by the grand jury of Johnson County for violation of law constituting a felony under the act of March 6, 1909, known as the statute against night-riding. Acts 1909, p. 315. Sections 1 and 3, bearing on this particular case, read as follows:

"If two or more persons shall unite, confederate or band themselves together for the purpose of doing an unlawful act in the night time, or for the purpose of doing any unlawful act while wearing any mask, white caps or robes, or being otherwise disguised, or for the purpose of going forth armed or disguised for the purpose of intimidating or alarming any person, or to do any felonious act, or if any person shall knowingly meet or act clandestinely with any such band or order, be such organization known as night-riders, black hand, white caps, or by any other name, they shall each be guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a term not to exceed five years.

* * * * * * * * * *

"If any person shall by means of any writing, drawing or printed matter, or by any sign or token, such as

the delivery of matches or bundles of switches or other things, seek to intimidate, threaten or alarm any person, or shall knowingly be connected either in the preparation or delivery of any such message or token, by saying or intimidating, even in the wording of any such message, or by any signature, or by the nature of the thing left or delivered; or who shall deliver or repeat any verbal message purporting to come from any such organized band or any member or members thereof, which in its substance or nature is intended to intimidate or threaten any person, shall be deemed guilty of a felony and upon conviction shall be confined in the penitentiary for a term of not less than one or more than seven years."

The indictment charges an offense under the last paragraph of section 3 and alleges that at the time and place named in the indictment appellant delivered to one Oberle a verbal message purporting to have come from a certain band united together for the purpose of committing in the night time trespass and arson, which message was in substance as follows: "If you don't get out of here by next Saturday night, we will burn you out." On the trial of the case appellant was convicted, and he prosecuted an appeal to this court.

It appears from the testimony that appellant was a coal miner at Jamestown, in Johnson County, and was a member of the local miners' union, which said organization was the owner of a building in Jamestown at the time of this occurrence and which had been for some time occupied as a storehouse by Frank Oberle, who is a naturalized citizen of German birth. There was ill feeling against Oberle on the part of the inhabitants of that community on account of alleged statements of the latter indicating disloyalty to the government, and the proof also tends to show that for a year or two past the members of the union had been desirous of canceling the lease with Oberle for the occupancy of the building.

The verbal message in question is said to have been delivered during the forenoon of a certain Thursday, and purported to have come from a meeting of the miners'

union. The meeting had been held, according to the testimony, the night before. The testimony of Oberle and another witness was that the message was a threatening one, in substance the same as that set forth in the indictment.

Appellant testified that at the meeting on Wednesday night the local union decided to demand possession of the building from Oberle; that the union delegated to him (appellant) the duty of making the demand, and that he merely went to Oberle's place of business the next day and made the demand. He testified that all that he said to Oberle was that he had been sent down there to give notice for the building to be vacated in three days, and that he delivered no threatening message. There was a sharp conflict in the testimony, not only as to the exact language of the message, but also as to the substance thereof. Oberle was permitted to testify, over appellant's objection, that, on Tuesday morning preceding the occurrence above set forth, he found a written notice on his door in the following words: "Hello! you better get out by next Saturday night or we are coming to burn you out; but do not wait until the last hour. Good-bye."

There was no testimony tending to show a design on the part of appellant or any of the members of the miners' union prior to the meeting of the union on Wednesday night to resort to violence in bringing about Oberle's removal from the building unless the written notice posted on the door is held to be competent evidence for that purpose. Nor was there any evidence tending to show that appellant or any members of the union had anything to do with the posting of that notice. It was purely a matter of conjecture as to the identity of the person or persons who posted the notice, and there was nothing to warrant the inference that appellant or the other members of the union did it. Such being the case, we are of the opinion that testimony as to the contents of that notice was incompetent. It was certainly prejudicial because if the jury took it into consideration at all they accepted it as corroborative of Oberle's testimony as to the character of

message which appellant delivered on Thursday morning. Of course, if there had been evidence tending to connect appellant, or those with whom he was associated in the enterprise, with the posting of this notice, it would have been competent for the purpose mentioned above, but in the absence of such testimony it made it possible for the jury to draw an inference which was not justified by the proof in the case. We have no means of determining to what extent the verdict of the jury was influenced, and the only way in which the error can be corrected is to grant a new trial.

There are other errors assigned, but they relate to matters which will not necessarily arise in the next trial, and they need not, therefore, be discussed in this opinion.

Reversed and remanded for a new trial.

HARRIS v. STATE.

Opinion delivered October 6, 1919.

1. CRIMINAL LAW—MISJOINDER OF OFFENSES—REMEDY—DEMURRER.—By demurrer is the proper method of raising the question of misjoinder of offenses in one indictment.
2. CRIMINAL LAW — INDICTMENT — ONE OFFENSE COMMITTED TWO WAYS.—An indictment may charge the commission of a single offense but by different ways.
3. SAME—SAME—IMPROPER CAPTION.—An improper caption to an indictment will not invalidate it, when it sets out facts constituting an offense under the law.
4. LIQUOR—SALE OF—PRINCIPAL AND ACCESSORY.—The first count of an indictment charged the sale of liquor made by appellant himself; the second count charged the offense to have been committed by a sale made by one E., appellant being present aiding and abetting. *Held,* under either count appellant was guilty as principal, and that the two counts charge merely two methods of commission of the same offense.
5. APPEAL AND ERROR — CRIMINAL LAW — INDICTMENT WITH TWO COUNTS—ACQUITTAL ON ONE, CONVICTION ON OTHER—PRACTICE ON REVERSAL.—An indictment charged the commission of a crime by two methods. Appellant was acquitted on the first count, but convicted on the second. Where the judgment of conviction is reversed, there may be a second trial under the second count of the indictment.

6. LIQUOR—SALE OF—PURCHASER.—One who assists the purchaser in buying intoxicating liquors, and confines his participation in the transaction exclusively to the buying, and not to the selling, is not guilty of any offense.

Appeal from Johnson Circuit Court; *A. B. Priddy,* Judge; reversed.

W. N. Ivie, for appellant.

1. The demurrer to the second count of indictment should have been sustained. Each count is a separate and distinct charge—a separate indictment. Clark, Crim. Proc., 288; 3 Ark. 84. Under sections 1560-3, Kirby's Digest, the indictment does not state facts sufficient to make defendant guilty of being an accessory before the fact. 43 Ark. 99, 149; 56 Id. 515.

2. The court erred in overruling motion in arrest of judgment. 16 C. J. 134, § 126; 100 Ark. 195; 29 *Id.* 68; 96 *Id.* 58; 108 *Id.* 447; 42 *Id.* 94; 16 C. J., p. 1107, § 2595; 170 U. S. 262; *Ib.* 402; 104 Ark. 245.

3. The continuance should have been granted; defendant was entitled to have compulsory process for his witnesses. 50 Ark. 161; 99 *Id.* 394.

4. The court erred in admitting testimony and in its instructions to the jury. 16 C. J., p. 971, § 2369, and p. 272, § 2370.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. The demurrer was properly overruled, as it charged only the same offense committed by different means and different modes. One can be indicted as a principal and also as accessory to a crime in the same indictment. 42 Ark. 105; 50 *Id.* 305; 59 *Id.* 422; Kirby's Digest, § § 1560-1-3; 96 Ark. 58; 108 *Id.* 447. The name of a crime is controlled by the specific acts charged and an erroneous name does not vitiate the indictment. 130 Ark. 457; 34 *Id.* 275; 71 *Id.* 80; 77 *Id.* 480; 102 *Id.* 651. The second count does not charge defendant with two offenses as being both principal and accessory, but if so that can not

be raised by demurrer, but only by motion to require the State to elect. 133 Ark. 243.

2. The motion in arrest and for continuance was properly overruled and there was no error in admitting testimony nor in the instructions. Instruction No. 2 was covered by Nos. 1 and 3, given for defendant.

McCULLOCH, C. J. An indictment against appellant with two counts was returned by the grand jury of Johnson County, which, omitting the caption, reads as follows:

"The said John Henry Harris, in the county and State aforesaid, on the 15th day of March, 1919, did wilfully, unlawfully, and feloniously sell and give away, and was wilfully, unlawfully and feloniously interested in the sale and giving away of ardent, vinous, malt, spirituous and fermented liquors and alcoholic spirits, and a certain compound and preparation commonly called tonics, bitters and medicated liquors, to one J. W. Carter, against the peace and dignity of the State.

COUNT 2.

"And the grand jury aforesaid, in the name and by the authority aforesaid, further accuses the said John Henry Harris of the crime of accessory to the sale of liquor, committed as follows, to-wit: The said John Henry Harris, in the county and State, and at the time aforesaid, did wilfully, unlawfully and feloniously did assist, abet, advise and encourage, and was wilfully, unlawfully and feloniously present, aiding, abetting and assisting, and ready and consenting to aid and abet in the commission of a felony, to-wit: The sale of liquor, which said felony was committed as follows: One Walter Evans, in the county and State aforesaid, on the 15th day of March, 1919, did wilfully, unlawfully and feloniously sell and give away, and was wilfully, unlawfully and feloniously interested in the sale and giving away of ardent, vinous, malt, spirituous and fermented liquors and alcoholic spirits, and a certain compound and preparation thereof, commonly called tonics, bitters and medicated liquors to one J. W. Carter, at which unlawful and felo-

nious sale of liquor by the said Walter Evans to the said J. W. Carter aforesaid the said John Henry Harris did wilfully, unlawfully and feloniously aid, assist, abet, advise, encourage, and was unlawfully and feloniously present, aiding and abetting and ready and consenting to aid and abet as aforesaid, against the peace and dignity of the State of Arkansas."

There was a trial on both counts, which resulted in a verdict of conviction on the second count. Before the commencement of the trial appellant demurred to the indictment on the grounds that the same did not state facts sufficient to constitute a public offense, and that there was an improper joinder of separate offenses. There was also a demurrer specifically directed to the second count of the indictment on the same grounds set forth above. The court overruled each of the demurrers, and exceptions were duly saved.

(1) It is insisted on behalf of the State that the defect of misjoinder cannot be reached by demurrer and can be reached only by motion to require the State to elect, and the case of *Gramlich* v. *State,* 135 Ark. 243, is cited in support of that contention. Such indeed was the ruling of the court in that case, but upon further consideration it seems clear that the ruling was not in accordance with our statute and the former decisions of the court on the subject, and it is now disapproved. The statute (Kirby's Digest, section 2286) expressly provides that a demurrer is the proper plea where more than one offense is charged in the indictment, and we have followed that statute in several instances by holding that demurrer is the proper method of raising the question of misjoinder of offenses in one indictment. *Ince* v. *State,* 77 Ark. 426; *Mears* v. *State,* 84 Ark. 136.

(2) The indictment, giving it the interpretation contended for by counsel for appellant, merely charges two offenses committed in different methods, which could be joined in the same indictment. *Lay* v. *State,* 42 Ark. 105; *Corley* v. *State,* 50 Ark. 305; *Gill* v. *State,* 59 Ark. 422.

(3-4) The further contention that there is an attempt in the second count to charge two offenses—that of being principal and of being accessory—is equally untenable, for, if an offense is properly charged as having been committed, it is with respect to one of the modes and not two. The facts alleged in that count that appellant was present, aiding and abetting a sale made by Walter Evans constitute, under the statute (Kirby's Digest, section 1563), a charge of the commission of an offense as principal, but the caption erroneously characterizes the method of committing the offense as accessory before the fact. This improper characterization does not invalidate the indictment as one charging the offense which the facts set forth in the indictment constitutes under the law. *Speer* v. *State,* 130 Ark. 457. We decided in *Larimore* v. *State,* 84 Ark. 606, that in an indictment for accessory before the fact to the commission of a felony an express affirmation of the absence of the accused at the time of the commission of the principal offense was not essential to the validity of the indictment. The statute (Kirby's Digest, section 1563) provides that persons who were present, aiding and abetting the commission of a felony are deemed principal offenders and must be indicted as such, and the affirmative allegation in this indictment that appellant was present makes him a principal. The first count charges the commission of the offense by a sale made by appellant himself, and the second count charges the offense to have been committed by a sale made by Walter Evans, appellant being present aiding and abetting. Under either count, he was guilty as principal and the two counts merely charge two methods of commission of the same offense. Our conclusion, therefore, is that the demurrers were properly overruled.

(5) The verdict operated as an acquittal of appellant of the offense charged in the first count of the indictment, but this does not bar another trial under the second count of the indictment if it be found that there are other errors in the proceedings which call for a reversal of the judgment. The first count was sufficient to charge the

commission of the offense in either of the modes mentioned, and an acquittal would have barred any further prosecution if there had been no other count in the indictment; but, since the jury has found appellant guilty of the commission of the crime committed by the method charged in the second count of the indictment, the acquittal under the first count does not operate as a bar to a further prosecution of the offense as alleged to have been committed under the second count.

(6) Appellant requested the court to give an instruction in the following words:

"You are instructed that one who assists the purchaser in buying intoxicating liquors, and confines his participation in the transaction exclusively to the buying, and not to the selling, is not guilty of any offense. And if you find that the defendant acted solely as the agent or messenger of the purchaser, and did not in any manner assist the seller, if you find there was a sale, and that he had no pecuniary or other interest in the sale, he would not be guilty under the law. In other words, if defendant's interest, if any, was solely in the purchase, and his efforts, if any, where directed solely to the buying or aiding in the purchase, if you find there was a purchase, then you will find him not guilty."

The court refused to give the instruction as requested, but modified it and gave it with the words "on the first count of the indictment" added at the end. Proper exceptions were saved, and it is now urged that this was error which calls for reversal. We are of the opinion that appellant was entitled to the instruction as requested and that the court erred in refusing the request and in modifying the instruction limiting its operation to the first count of the indictment. It is conceded by the Attorney General that the instruction as requested correctly states the law on that subject in accordance with the decisions of this court. *Bobo* v. *State,* 105 Ark. 462; *Wilson* v. *State,* 130 Ark. 204; *Ellis* v. *State,* 133 Ark. 540. That being true, appellant was entitled to have his theory of the case submitted in the consideration of the

charge involved in the second count. In fact, the instruction was not applicable to the commission of the crime in the method set forth in the first count, that is to say under the charge of a direct sale made by appellant himself, but in the second count he was charged with being present, aiding and abetting Evans in the sale, and this instruction was peculiarly applicable to the charge of the offense in that form. Appellant testified that his only participation with the transaction was in connection with one Patrick who purchased liquor from Evans. His contention was that he merely joined Patrick in the purchase of liquor or assisted Patrick in the purchase. The court gave an instruction defining what would constitute such an interest in the sale as would make appellant a guilty participant therein, but that instruction makes no reference to his participation merely as the agent or associate of the purchaser and does not cover the theory of the case set forth in the refused instruction which appellant requested.

There are other assignments of error which, in view of another trial of the case, are unnecessary to discuss.

For the error indicated in refusing to give instruction No. 1, the judgment is reversed and the case remanded for a new trial.

DOWELL v. BOYD.

Opinion delivered October 6, 1919.

1. PLEADING AND PRACTICE—OBSCURE PLEADING, HOW TREATED.—An obscure pleading will be treated in the light in which the parties themselves treat it.
2. INFANTS — PARTIES PLAINTIFF — SUBSTITUTION OF NAMES OF GUARDIANS.—In an action in which certain infants were named parties plaintiff, it is proper for the court to permit the names of their guardians to be substituted.
3. INFANTS—PLEADING AND PRACTICE—REAL PARTIES IN INTEREST—CHANGE OF NAMES.—In an action involving the interests of certain infants, the infants themselves, and not their representatives, are the real parties to the litigation, and any change in the names of the representatives of an infant defendant is not a sub-

stitution of a new party, but only the substitution of a new representative for one who is already the real party.

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

G. B. Colvin, for appellant.

When the case was dismissed as to all the original parties plaintiff, it was at an end, and the court had no right or power to permit entirely new parties plaintiff to be brought in where the case had been dismissed as to all the original parties. 94 Ark. 277; 126 S. W. 835.

J. H. Bowen, for appellee.

No defect of parties is shown in the motion to dismiss. The suit was properly brought in the names of the Lipscomb heirs, who were the owners and landlords, and there was no error in permitting the three original plaintiffs to be made parties in their fiduciary capacities as guardians of the minors. The pleadings were properly amended "in furtherance of justice." 55 S. W. 483.

McCULLOCH, C. J. This action was instituted by appellees against appellant before a justice of the peace in Perry County to recover for rent on lands and to enforce the lien on a bale of cotton grown on the land. An order of attachment was issued at the commencement of the action, which was levied on the bale of cotton. The affidavit for attachment was the only written plea filed by appellees at the institution of the action. The affidavit was made by appellee, M. L. Boyd, who described himself therein as "agent for the Lipscomb heirs," and his name so appears in the caption naming the parties to the action, but the names of the six Lipscomb heirs, to-wit: Hattie McCabe, Maud Boyd, Etta Alexander, Rebecca Lipscomb, Evander Lipscomb and Ivey Lipscomb, also appear in the caption as parties plaintiff. Appellant filed a motion before the justice of the peace to dismiss the cause on the ground that there were no proper parties plaintiff, but the motion did not set forth in what

respect the parties were improper. That motion was overruled, and the trial of the cause resulted in a verdict and judgment against appellant, who prosecuted an appeal to the circuit court where the motion to dismiss was renewed and overruled. During the progress of the trial M. L. Boyd testified, in response to questions propounded by counsel for appellant, that three of the Lipscomb heirs, viz., Rebecca Lipscomb, Evander Lipscomb and Ivey Lipscomb, were infants with duly appointed guardians, and thereupon appellant moved to dismiss the cause as to the infant parties because they were not represented in the action by their guardians. The court sustained the motion, but permitted the guardians of the infants to appear in the action to represent their several wards. This was done over the objection of appellant, and the ruling of the court in permitting the guardians to be substituted constitutes the only assignment of error.

Counsel for appellant invoke the rule announced by this court that a trial court may, in its discretion, allow additional parties plaintiff or defendant to be added, but can not permit an entire change of parties so as to substitute the name of a plaintiff who has a cause of action in the place of another who has no cause of action. *Schiele* v. *Dillard,* 94 Ark. 277. That rule, however, is not applicable to the present case. The original plea in the case is to some extent obscure as to who was intended as the real plaintiffs—whether M. L. Boyd sued alone as agent of the other parties named, or whether the other parties were joined with him as plaintiffs. The parties themselves, including defendant, seem to have treated the original plea as having joined all the Lipscomb heirs as parties plaintiff, and in view of the obscurity it is our duty to treat the pleading in the light that the parties themselves treated it. This is shown by the fact, as before recited, that appellant moved the court during the progress of the trial to dismiss the action as to the three infant plaintiffs. When it was made to appear to the court that the infant plaintiffs were not represented in the manner prescribed by the statute, it was proper for the

court to allow the names of the guardians to be substituted. *St. L., I. M. & S. Ry. Co.* v. *Haist,* 71 Ark. 258. The effect of joining M. L. Boyd as party plaintiff as "agent of the Lipscomb heirs" and his active participation in the institution and prosecution of the suit was an appearance by him as the representative of the infant plaintiffs. The infants themselves, and not their representatives, are the real parties to the litigation, and any change in the names of the representatives of an infant defendant is not a substitution of a new party, but only the substitution of a new representative for one who is already the real party. *Morgan* v. *Potter,* 157 U. S. 198.

Before the conclusion of the trial there was evidence tending to show that the land on which the crop was grown was the homestead of the Lipscomb ancestor, and that the homestead rights inured to the three infants during minority. On motion of appellant, the court decided that the adult heirs were not entitled to join in the recovery of the rent and dismissed the action as to them. It is not important to inquire whether or not that ruling was correct for it was a ruling in favor of appellant himself. The dismissal, however, of the action as to the three adults did not affect the right of recovery of the amount of rent by the other parties.

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

MADDEN *v.* WHEELER.

Opinion delivered October 6, 1919.

SALE OF LAND—FAILURE TO PAY—RENT—FORFEITURE.—Land was sold to appellant on installments, the contract providing that, in case of default, the sale should be forfeited, and payments made be treated as rent. Default was made. *Held,* a forfeiture occurred which was not waived, and the relationship of landlord and tenant automatically established.

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

Stevens & Stevens, for appellant.

1. The decree below is erroneous because (1) there is no evidence that J. W. Wheeler declared a forfeiture on the failure to pay the first note due and he died before the second note fell due, and (2) because at no time after the contract could Wheeler or his estate convey the title to Madden in compliance with the contract, and until the vendor could so comply there could be no forfeiture on the part of the vendee. 10 L. R. A. 465-468; 62 S. W. 94.

2. A vendor of land can not enforce the contract against his vendee who is in default unless he himself is in condition to perform. 3 L. R. A. (N. S.) 106; 36 *Id.* 315. And plaintiffs can not complain for the delay in payment, for there was no one to pay until May 18, 1914, when Fannie Wheeler was appointed administratrix. The failure to pay has been waived. Bowen on Law of Waiver, § 56; 1 Pom. Eq. Jur., § 452; 59 Ark. 409; 87 *Id.* 393; 77 *Id.* 168.

Under the facts of this case appellant is clearly entitled to a conveyance. 113 Ark. 433; *Hanson* v. *Brown,* 139 Ark. 60; 88 Ark. 604.

3. The evidence is uncontradicted. The sheriff levied upon the crop of appellant, ungathered in the field, and told him not to gather it; that at the time of the levy, there was according to the sheriff's opinion and appellant's, 75 bushels of corn and 800 pounds of seed cotton and about 35 bushels of peas, and the loss amounted to $156 from damage, and appellant may prove what the crop was worth when levied on and what it was worth when the attachment was released. 54 Ark. 463.

4. We are thus entitled to credit for this on the amount due the estate. 55 Ark. 622.

Walker Smith, for appellees.

1. There was no waiver of forfeiture prior to Wheeler's death. Mere failure to return the contract,

or mere silence on his part, is not sufficient to show a waiver. 48 Ark. 413; 87 *Id.* 593.

2. There has been no waiver since the death of Wheeler. Wheeler died intestate, leaving no debts. The land descended to his heirs, some of whom are minors, and they, not appellant, have paid the taxes since 1910. Appellant has not paid or attempted to pay any of the five notes. Fannie Wheeler was appointed administratrix in 1914, and appellant was advised that he could present his petition to the proper court, and, on payment of amount due, the court would order a deed made. Appellant made no effort to pay until about the time the last note was due and the only reason given by him was inability to pay. The chancellor made his finding on conflicting evidence and his findings will stand. 87 Ark. 593. Kirby & Castle's Digest, section 213, provides a method which appellant could have pursued had he desired to pay his notes and secure a deed. The administratrix had no authority to waive the forfeiture. 27 Ark. 235; 115 *Id.* 572. See also 18 Cyc. 317.

3. Appellant can not deny appellee's title, either as purchaser or tenant. He took possession of the land and recognized Wheeler's title and now can not deny it. 27 Ark. 61; *Ib.* 160; 188 S. W. 561.

4. The rents amount to more than any claim of appellant for damages or loss claimed.

McCULLOCH, C. J. Appellees, who were plaintiffs below, are respectively the widow and heirs of J. W. Wheeler, who died in the month of May, 1911, and was the owner of the tract of land in controversy. About a year before the death of J. W. Wheeler he entered into a written contract with appellant for the sale of the land in controversy to the latter for a small cash consideration and the balance of the price to be paid in five annual installments evidenced by promissory notes. The contract contained the following clause:

"But in case the said second party shall fail to make the payments aforesaid, or any of them, punctually and

upon the strict terms and at the time above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly and literally, without any failure or default, time being the essence of this contract, then this contract shall, from the date of such failure, be null and void, and all rights and interests hereby created, or then existing, in favor of the said second party, heirs or assigns, or derived under this contract, shall utterly cease and determine, and the premises hereby contracted, shall revest in the said first party, its successors or assigns (without any declaration of forfeiture or act of re-entry, or without any other act by said first party to be performed and without any right in said second party of reclamation or compensation for moneys paid or improvements made), as absolutely, fully and perfectly as if this contract had never been made. And it is hereby further covenanted and agreed by and between the parties hereto, that immediately upon the failure to pay any of the notes described all previous payments shall be forfeited to the party of the first part, and the relation of landlord and tenant shall arise between the parties hereto, for one year, from January 1, immediately preceding the date of default, and the said party of the second part shall pay rent at the rate of $..... for occupying the premises from the said January 1, to the time of default, such rent to be due and collectible immediately upon such default."

The first of the annual installment notes became due before J. W. Wheeler died, but it does not appear that any effort was made on his part to declare a forfeiture or to disturb appellant's occupancy of the land. Appellant subsequently made a small payment on the purchase price to the administrator of the estate of J. W. Wheeler.

This action was instituted by appellees to recover possession of the land. Appellant filed an answer and cross-complaint admitting the execution of the contract and alleging that he had been ready at all times to pay the purchase price. The prayer of the cross-complaint was that the cause be transferred to equity and an ac-

counting taken as to the balance due on the purchase price and that specific performance of the contract be decreed. The cause was transferred at appellant's request and proceeded to final decree on oral testimony.

There is a sharp conflict in the testimony on the issue as to whether or not appellant offered to perform the contract. It is conceded by counsel for appellant that there were grounds for forfeiture on account of failure to pay the notes, but it is contended that there was a waiver of the forfeiture by agreement to accept the amount of the purchase price, and that the forfeiture was inoperative because appellant stood ready at all times to pay the price upon the execution of the deed. We have carefully considered the evidence and have reached the conclusion that the finding of the chancellor on this issue is not against the preponderance of the evidence.

It is also contended that there was no forfeiture for the reason that appellants were not in an attitude to comply with the contract of J. W. Wheeler in that the latter did not have a perfect title at the time of his death. The evidence discloses the fact that there was an incumbrance on the land, which the widow of J. W. Wheeler subsequently discharged, and the widow was appointed administratrix of the estate for the purpose of making a conveyance to appellant when ordered so to do by the probate court. It is shown by the evidence that appellant was notified of the fact that the administratrix was appointed so that the execution of the deed could be ordered upon the payment of the purchase price, but that appellant failed to avail himself of the opportunity to pay the price and procure a deed in accordance with the terms of the contract.

We are of the opinion that, under the terms of the contract between J. W. Wheeler and appellant, the latter automatically became a tenant upon his failure to pay the installments of the purchase price, that appellant failed to pay or offer to pay the purchase price as the installments fell due, and that there was no waiver of the forfeiture.

It is further contended that the court erred in refusing to allow appellant damages on account of a wrongful attachment of his property, but the court seems to have taken that into consideration in fixing the amount of the decree for rent. At any rate, it does not satisfactorily appear from the abstract of the case that the amount of damages was not taken into consideration and allowed by the court.

Decree affirmed.

GREER v. LEVEE DISTRICT No. 3, CONWAY COUNTY.

Opinion delivered October 6, 1919.

1. IMPROVEMENT DISTRICTS—FUNDS BORROWED BY THE DISTRICT—ENDORSEMENT OF NOTE BY DIRECTORS—NEW NOTE BY DISTRICT.—Funds were needed by a levee district, and a loan was negotiated at a bank, and notes were signed by the directors of the district and other individuals, with the understanding, that the notes were to become the notes of the district, and to be paid out of its funds. Later notes were executed by the district, and the original notes surrendered to the makers. *Held,* under the evidence, that this did not release the original makers from their liability to the bank.
2. PRINCIPAL AND AGENT—INDIVIDUAL ACTS OF AGENT—PRESIDENT OF BANK—ACTS DONE IN INDIVIDUAL CAPACITY.—Under the facts set out above, one of the makers of the notes was the president of the creditor bank; *held,* in an action by the bank against the makers of the notes to collect the same, that the knowledge of the president of the bank, and his testimony as to the purpose of himself and his co-makers in borrowing money from the bank, is not chargeable to the bank, for in a transaction in which his interests conflict with those of the bank it will be held that he was not acting for or representing the bank, and his conduct can create no estoppel against the bank to enforce the payment of the notes.
3. LEVEES AND LEVEE DISTRICTS—BORROWING MONEY.—Levee District No. 3 of Conway County, *held,* to have complied with the terms of Act 83, Acts 1905, and have properly performed all requirements, rendering a loan from plaintiff bank a valid charge upon the district.
4. LEVEES AND LEVEE DISTRICTS—APPLICATION OF MONEY BORROWED.—When a levee district has complied with the terms of the stat-

ute in borrowing money from plaintiff's bank, in an action to recover said money by the bank, the application of the funds by the district is immaterial; the bank not being called on to see that the funds were properly expended.

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

Edward Gordon, for appellants.

1. C. C. Burrow is not liable on either of the notes, as no presentment was ever made or demand for payment made before due date. Kirby & Castle's Digest, § § 7011-12-14.

2. Burrow signed the notes with the understanding that he was not to be liable. W. S. Wood also signed them, and he did not so sign. The notes were never transferred to an innocent holder or purchaser for value without notice. 48 Ark. 426; 103 Fed. 427; 120 N. W. 414.

The county court has no authority to abolish districts. Kirby & Castle's Digest, § § 5753-4-5; 102 Ark. 401; 103 *Id.* 298. A special act is not repealed by a later general act. 72 Ark. 125; 93 *Id.* 621. See also 93 *Id.* 495; 79 *Id.* 234-5; 22 Neb. 618. Levee District No. 3 and J. H. Dowdle, C. H. Summerhill, C. C. Burrow, L. A. Carter, W. L. Wood, Bob Sesson, Jim Sesson, Josie Green, G. O. Vail, D. M. Hays and W. E. Harwell can not be assessed to pay off the $6,000 created by J. J. Scroggin for the purpose of repairing and rebuilding the levee in District No. 5, as none of them own lands in No. 5 and all their lands are in District No. 3, which is a separate district.

W. P. Strait, for appellees.

1. The county court had the power and properly exercised it in making the orders dissolving District No. 5 and in extending the boundary lines of Levee District No. 3. The territory embraced was subject to overflow from the lands adjoining, and without the levee the lands would be practically worthless. Art. 7, § 28, Const. 1874; 79 Ark. 158; 111 *Id.* 150; 104 *Id.* 425. See also 21

Ark. 40; 48 *Id.* 385; 59 *Id.* 536; 81 *Id.* 567; 83 *Id.* 54; *Ib.* 344; 97 *Id.* 322; 99 *Id.* 100.

2. The question of allowing improvement districts to go beyond their specified boundaries for carrying on improvements contemplated is well settled. 119 Ark. 166; 107 *Id.* 442.

3. As to the question of liability for the debts, see Kirby's Digest, § § 4942, 4943; Acts 1905, Act No. 83, p. 205, conferring the necessary special powers on District No. 3 to construct and repair its levees and borrow money by executing notes, etc. In the proceedings involved the directors and land owners complied with the general laws and every provision of the Special Act No. 83, Acts 1905, p. 205. A meeting of land owners was held and a proper resolution adopted which bound the district to pay the debts contracted and thus fixed the liability of the district and land owners. This liability is personal under the resolution adopted. 107 Ark. 239; 65 *Id.* 543; 45 *Id.* 313; 48 *Id.* 267; 49 *Id.* 412; 56 *Id.* 92; 63 *Id.* 373. In all respects the decree below is correct as to the liability of the individuals and the district and in fixing the lien on the property in the district according to the assessed benefits for this indebtedness due the First National Bank. The only error, if any, was in wrongfully excluding as part of District No. 3 the territory added which once constituted District No. 5, which can be corrected here by so modifying the decree below as to add this territory to District No. 3 and in all other respects the decree should be affirmed. Cases cited *supra.*

STATEMENT OF FACTS.

Many years prior to the year 1916 Levee Districts Nos. 3 and 5 of Conway County were duly established under the general laws, chapter 100, Kirby's Digest. These districts were adjoining and the maintenance of the levee systems in each was essential to give protection from overflow to the lands in both. No. 3 was a much larger district. No. 5 was a very small district, and the annual tax for levee purposes in this district was not

sufficient to keep its levees in repair. Levees in both districts had been broken by extraordinary overflows.

For the purpose of better maintaining levee systems in both districts the officers and land owners of same conceived the idea of abolishing the smaller district (No. 5) and of extending the boundary of District No. 3 so as to include all of the territory formerly embraced in No. 5 and some additional lands. They petitioned the county court for orders to effectuate such purpose and these orders were granted. No change was made, after these proceedings, in the directors of District No. 3 or in the assessors of that district. C. C. Burrow was chairman of the Board of Directors of the Levee District No. 3 and J. J. Scroggins and H. S. B. Oliver were the other members.

After the above orders of the county court had been made, an engineer was employed to make a survey and estimate of the cost to rebuild and repair the levees, and he reported to the directors of the Levee District No. 3. The directors called a meeting of the land owners, and they authorized the directors to have the work done. It was ascertained that it would require about $6,000 to do the work. First the sum of $4,000 was borrowed from the First National Bank of Morrilton, as evidenced by a note of $2,000 dated May 27, 1916, and a note of $2,000 dated August 22, 1916. These notes were signed individually by Burrow, Oliver and Scroggins and also by James, Dowdle and Stallings, it being the understanding between the makers that the notes would afterwards become the notes of the levee district and would be paid from the proceeds of the levy of taxes on lands in the district.

The levee district, as such, afterwards incurred an indebtedness in the sum of $2,000.

J. J. Scroggins, president of the First National Bank of Morrilton and also one of the directors, testified that these matters had been submitted to the land owners, and upon the strength of their authority the directors borrowed the money, and it was used in repairing and recon-

structing the levees; that after everything was completed the people who were on the notes wanted the levee district to make a new note, and thereupon the levee district's note was executed and placed in the bank in lieu of those executed by the individuals but that the debt that the individuals owed on their note had not been paid.

Clifton Moose, cashier of the First National Bank, testified that the original notes signed by the individuals were turned over to them and two notes in the sum of $3,000 each were taken in lieu thereof; that at the time he surrendered these individual notes to these gentlemen who had borrowed the money, he understood the notes taken in lieu thereof were good notes and could be enforced against the district, that the parties who signed the notes for the district so stated; it was understood that the levee district's notes would bind the original makers the same as the first notes did. The witness said: "When we surrendered them it was not intended to release the individuals who signed the first notes, and this was so understood by the parties at the time." His testimony further shows that the individual notes were surrendered to the makers "with the understanding that they were still liable under the new notes as endorsers and makers;" that the sum of $1,655.03 had been paid on the indebtedness of the levee district.

This lawsuit grew out of an effort on the part of certain land owners in Levee District No. 3 to restrain the collector of Conway County from collecting taxes that had been levied on their lands for levee purposes and of an effort on the part of the First National Bank to obtain judgment against both the individuals who signed the original notes and also against Levee District No. 3. Several suits were filed in the chancery court, but the pleadings in all raised substantially the same issues and by consent of the parties they were consolidated and tried as one.

The land owners, seeking to enjoin the collection of the levee taxes, contend that the county court had no jurisdiction to make the orders abolishing District No. 5

and extending the boundaries of District No. 3; that no legal assessment of benefits was made by the assessors who were authorized to make it; that the money for which these taxes were levied was expended in building and repairing the levee in Levee District No. 5 for which the lands in District No. 3 were not liable; that for the above reasons the taxes assessed against, levied on their property, and attempted to be collected, were illegal and void. The issue also was raised as to the liability of those who signed the notes as individuals.

The trial court found that the county court was without jurisdiction to enter the orders dissolving Levee District No. 5 and also without power to enter the order to extend the boundaries of Levee District No. 3 so as to include the territory embraced in that order. The court further found that C. C. Burrow and others who signed the notes to the bank as individuals were liable therefor and also found that the indebtedness was incurred by the signers of those notes for the use and benefit of Levee District No. 3, which was used by the latter district in repairing a levee outside its original boundaries and was used by it to repair the levees which were within the limits of District No. 5; that the Levee District No. 3 was liable to the bank on the note executed by it through its directors.

The court thereupon entered a joint and several judgment in favor of the bank against C. C. Burrow and all of the other signers of the original notes and also against Levee District No. 3, and also entered a separate judgment against Levee District No. 3 for the balance due on the note executed by the district through its directors to the bank.

From the decree of the court an appeal was prayed and granted to various parties designated, and among them C. C. Burrow. But none of them, according to the statement of counsel who filed the brief in this court in his behalf, has appealed except C. C. Burrow.

WOOD, J., (after stating the facts). The decree of the chancery court is correct, and should be affirmed.

(1) The undisputed evidence shows that C. C. Burrow was one of the makers of the original notes to the bank in the sum of $4,000. True, the evidence also shows that it was understood among the makers of those notes at the time the same were executed that the money was being borrowed for the use and benefit of the levee district, that is for the purpose of building and repairing levees particularly in what constituted Levee District No. 5 before the county court entered the order abolishing such district, and they, the makers, contemplated among themselves that when Levee District No. 3 executed its note to cover the amount they should be released from individual liability. But the preponderance of the evidence does not warrant the conclusion that it was so understood by the officers of the bank but rather to the contrary.

J. J. Scroggins, who was president of the First National Bank and also a maker of the notes, testified that after the work was finished the levee district's notes were executed by its directors and were formerly placed in the bank in lieu of those that had been executed by the individuals, but he further says that the debt owed by the individuals on their notes had never been paid.

Moose, the cashier of the bank, who as such had in charge the making of the loan, states that the original notes of $2,000 each were the individual notes of the makers, that "the levee district was not in it." He states that the original notes were turned over to J. R. Stallings and Dowdle, two of the makers, with the understanding that the new notes made by the levee district were to take the place of those signed by the individuals. But later on he was asked this question, "If these new notes now are no good then do you still look to the individuals who gave the first notes and actually borrowed the money for the payment of this indebtedness?" and he answered, "Yes, sir; they agreed to that." He explained what he meant as follows: "I mean that Mr. Dowdle, James and Stallings told us at the time they would be just as liable under the new notes. We wanted it understood

that the levee district's notes would bind them just the same as the first notes did," and he further states that when he "surrendered them that it was not intended to release the individuals who signed the first notes. This was so understood by the parties at the time."

(2) The knowledge of J. J. Scroggins, president of the bank, and his testimony as to the purpose of himself and co-makers in borrowing the money from the bank is not chargeable to the bank, for in that transaction where his interests conflicted with that of the bank it must be held that he was not acting for or representing the bank and his conduct could create no estoppel against the bank to enforce the payment of the notes. See *Bank of Hartford* v. *McDonald,* 107 Ark. 239; *City Electric R. R. Co.* v. *First National Bank,* 65 Ark. 543.

(3) Under act 83 of the Acts of 1905 the Board of Directors of Levee District No. 3 are specially "authorized to borrow money, to issue bonds, notes, and other evidences of indebtedness" under certain restrictions which are set out in the second section of act 83 of the Acts of 1905, page 205. The proof shows that all of these restrictions were fully complied with by the directors before the notes in this case were executed. Such compliance on the part of the directors of Levee District No. 3 with the provisions of this act constituted the notes executed by them "a charge and lien upon all of the lands of the district in proportion to the benefits *et cetera,*" which the owners and holders of the evidences of the indebtedness, or the board of directors, could enforce in a court of chancery for the use and benefit of such holders.

(4). As between the bank and the levee district, the act of the board of directors in borrowing the money from the bank was authorized by the statute, *supra,* and rendered the district liable for its payment. The bank was not called upon to see that the funds were properly expended. This act of the board of directors was not *ultra vires.* It must be borne in mind that this is not a suit by land owners of Levee District No. 3 against the directors of such district for misuse or misappropriation

of funds, therefore the issue as to whether the funds borrowed by the directors from the bank were properly and legally expended, does not arise in this case.

We are not called upon as we view the issue to determine on this appeal whether or not the county court had jurisdiction to abolish Levee District No. 5 and to extend the boundaries of Levee District No. 3.

The decree is affirmed.

Kansas City Southern Railway Company v. McCrossen.

Opinion delivered October 6, 1919.

1. Railroads—killing mule on right-of-way—uncontradicted evidence.—In an action for damages for killing plaintiff's mule, when defendant railway's engineer and fireman testified that they struck a mule, but observed him too late on account of a curve in the track, and plaintiff's witnesses testified that at that point the track is straight for some distance, the railway company was not entitled to a directed verdict on the ground that its testimony was uncontradicted.
2. Same—same—failure to keep proper lookout.—Under the facts set out above, the jury was warranted in finding that a proper lookout was not maintained, and an instruction fixing liability if a proper lookout was not kept was properly given.
3. Same—same—prima facie case of negligence.—When the evidence showed that plaintiff's mule was killed by a train, a *prima facie* case of negligence is made out, and the duty then shifts to the defendant railway company, to go forward with evidence exonerating it from the charge of negligence.
4. Same—same—presumption that animals will get off track.—The engineer of a train has no right to proceed upon the assumption that any animal on the track will get off before it is struck by the train.

Appeal from Little River Circuit Court; *James S. Steel*, Judge; affirmed.

June R. Morrell and *James B. McDonough*, for appellant.

1. The court should have directed a verdict for the defendant, as the testimony shows that the engineer in charge of the train could not have prevented the killing

or that the train ran down the animal. The engineer did not see the mule, but he was sounding the whistle and making every effort to avoid striking the mare and colt and did not know the mule was on the other side and could not see him. He came suddenly before the engine, and the engineer could not see him and he was struck before the fireman could notify the engineer, therefore there was no liability, and a verdict should have been instructed. 66 Ark. 439; 67 *Id.* 514; 89 *Id.* 120; 78 *Id.* 234; 53 *Id.* 96; 69 *Id.* 659. There was no failure to keep a proper lookout. Under the proof the engineer was not required to slow up the train. 37 Ark. 593; 119 *Id.* 316; 119 Ala. 611; 29 So. 594; 39 S. W. 320; *Ib.* 31; 21 So. 249; 28 *Id.* 806.

2. The court erred in giving and refusing instructions. 9 Ark. 312; 37 *Id.* 593; 105 *Id.* 278; 119 *Id.* 278; 119 *Id.* 530; 77 *Id.* 234; 110 *Id.* 188.

3. Before the burden of proof is shifted to the railway company it must be shown that the animal was killed by the train and the instruction that the fact the mule was found killed on the right-of-way shifted the burden and a *prima facie* case was made was error. 60 Ark. 187; 56 *Id.* 549; 42 *Id.* 122.

4. It was error to give No. 2, requested by defendant. The animal was not on the track, but merely on the right-of-way. Cases *supra;* 37 Ark. 593; 99 *Id.* 226; 24 So. 373; 21 *Id.* 249.

5. It was error to refuse No. 3, asked by defendant. *Supra.*

A. P. Steel and *Langley & Johnson,* for appellee.

1. It was a question for the jury whether the mule was struck on a straight track or a curve or whether the proper lookout was kept by the fireman or engineer. This court will not interfere with a verdict unless there is a total want of evidence to sustain it. 51 Ark. 467; 56 *Id.* 314; 70 *Id.* 385. Here the evidence sustains the verdict.

2. It was the imperative duty of defendant to show a proper lookout was kept. 74 Ark. 606. This must

be done by credible witnesses and must not be contradicted upon any material point by circumstances or direct evidence. 88 Ark. 12; 83 *Id.* 217. See especially *K. C. So. Ry. Co.* v. *Whitley,* 139 Ark. 255.

HART, J. Appellant prosecutes this appeal to reverse a judgment of the circuit court against it in favor of appellee for the alleged negligent killing of a mule by one of its trains. Briefly stated, the evidence for appellee tended to prove the following facts:

Some time during the first part of August, 1918, a mule belonging to appellee was found twenty-five or thirty steps from the railroad track of appellant about one and a half miles north of Wilton in Little River County, Arkansas. The mule was struck about the hips and upon the back and was considerably scarred all over. He was found about 250 yards beyond a public crossing and about twenty-five or thirty steps from the point where something appeared to have been knocked off of the railroad track. An examination showed that some animal's knees had struck the dirt, and there were prints in the earth where its head had scoured the ground on the side of the railroad track. A few days later the mule died as a result of his injuries. From the point where it was found that something had been knocked off of the track and from where the mule was found, you could see a mile or more up the track; that is to say, the track was straight for that distance.

The witnesses for appellant admitted that one of its trains struck the mule of appellee and knocked it off of the track. According to the testimony of the engineer and fireman who were operating the train that struck the mule, they were both keeping a lookout and did not see the mule in time to avoid striking it. The accident happened on a curve and for that reason the engineer was unable to see the mule as it went upon the track. The fireman stated that as soon as he saw the mule come on the track, he called the engineer's attention to it; but it was too late to stop the train in order to avoid striking the mule; that the train was two or three hundred feet

from the mule and a mare and colt when the animals were first discovered; that the mule started suddenly to run across the track and saw it could not make it, and then ran down the track; that it barely got started down the track when the pilot beam of the engine struck it.

(1) From the above statement of facts, it is readily apparent that the testimony of appellant's witnesses is not uncontradicted and does not therefore overcome the *prima facie* case of negligence made out by showing that the mule was struck and killed by the moving train. Both the engineer and fireman testified that the mule was killed beyond the public crossing and that there was a curve there which prevented the engineer from seeing the mule in time to have avoided striking him.

According to the evidence adduced by appellee the mule was struck 250 yards beyond the crossing and the track was perfectly straight there. Thus the jury were warranted in finding that the engineer could have seen the mule if he had been keeping the lookout required by the statute. *K. C. So. Ry. Co.* v. *Whitley*, 139 Ark. 255. Therefore the court properly held that the appellant was not entitled to a directed verdict.

(2) The next assignment of error is that the judgment must be reversed because the court gave the following instruction:

"The court instructs the jury that if you find from the evidence in this case that the defendant's servants could have seen the mule killed in this action by discharging their duty in keeping a lookout and in the exercise of ordinary care prevented the killing you will find for the plaintiff."

The error complained of is that under the evidence in the case there is no proof that the engineer or fireman failed to keep a lookout, or that by keeping a lookout the mule could have been seen by them. In other words, counsel insist that there is no proof to show that the mule was killed because of any failure to keep a lookout. As we have just seen, the evidence for appellee tended to show that the track was perfectly straight for

some distance at the point where the mule was struck. It also shows that the mule had turned and was running on the track at the time he was struck. Hence the jury was warranted in finding that a proper lookout was not kept by the engineer and fireman and there was no error in giving this instruction.

It is next insisted that the court erred in giving the following instruction:

"The court instructs you that if you believe from the evidence in this case that plaintiff's mule was found killed or injured on the right-of-way of defendant's road, that this makes out a *prima facie* case of negligence against the defendant and the burden then shifts to the defendant to show that said mule was not killed by its negligence in the operation of its train."

(3) It is insisted that this instruction is erroneous because it tells the jury that a *prima facie* case was made out by the finding of appellee's mule injured on the right-of-way of appellant's road. It is true, as insisted by counsel for appellant, the court should have told the jury that in order to make a *prima facie* case of negligence against appellant it devolves upon appellee to show that the mule was killed by the train. There is no error in giving this instruction, however, because the undisputed evidence showed that the mule was killed by the operation of the train. Both the engineer and fireman admitted that the running train struck the mule and injured him.

(4) It is next insisted that the court erred in refusing to give instruction No. 2 asked by appellant. It is as follows:

"The court instructs the jury that the engineer operating the locomotive pulling a train has the right to operate the train upon the assumption that any animal on the track will get off before being struck by the train. In this case, if the animal was upon the track, or if it was near enough to the track to be struck by the engine, nevertheless the engineer had the right to assume that the animal would move out of the way before the train ar-

rived at the point where the animal was. If the animal started across the track in front of the engine suddenly, and if the animal remained still until the engine was only a short distance away and then started suddenly to cross the track in front of the engine, and if, after the engineer realized that the animal would cross in front of the engine, he was unable to slow the engine down or to stop it, so as to avoid the killing, in that event you will find for the defendants."

This instruction was not the law, and the court properly refused to give it to the jury. Its error consists in telling the jury that the engineer operating the train had a right to proceed upon the assumption that any animal on the track would get off before it was struck. This would be to attribute to an animal human intelligence and impute to it the same knowledge of danger and means of avoiding it, as to a human being.*

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

UNITED STATES AUTO COMPANY v. ARKADELPHIA MILLING COMPANY.

Opinion delivered October 6, 1919.

1. DAMAGES—BREACH OF CONTRACT—EXPECTED PROFITS TO BE EARNED AS COMMISSIONS.—Where the direct purpose of a contract is for one of the parties to earn commissions or profits, and the other party breaks the contract, the former party is entitled to recover profits actually lost as his damages for the breach of the contract.
2. CONTRACTS—SALE OF AUTOMOBILES—BREACH—DAMAGES.—The A. Company entered into a contract with the B. Company, automobile dealers, to sell cars for the B. Company within a certain territory. A. Company employed one G. to act as agent for it in selling the cars. B. Company then, without right, canceled the contract, and employed G. to sell cars for it in the designated territory. A. Company then sued B. Company for the value of the commissions earned on the sale of the cars in the said territory. *Held*, a verdict awarding damages to A. Company would be sustained.

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*(NOTE)—See *Kansas City Sou. Ry. Co.* v. *Simmons*, p. 80.—(Reporter.)

3. CONTRACTS—BREACH—DAMAGES—PROFITS.—For breach of contract, profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or when from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.

4. APPEAL AND ERROR—FAILURE TO SET FORTH INSTRUCTIONS IN FULL.—On appeal the instructions should always be set forth in full, and a failure to do so invokes the presumption that correct instructions were given curing those complained of, if they are curable.

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

James A. Comer, for appellant.

1. The second contract superseded the first entered into October 30, 1916. The contract was duly signed and it is not contended to be a forgery. The court erred in its instructions as to damages for loss of profits by breach of contract. 65 Mo. 534; 53 L. R. A. 33; 52 *Id.* 33; 78 Ala. 243; 78 Ark. 336; L. R. A. 1916 B, p. 836.

2. The court erred in refusing a new trial because the newly discovered evidence was material.

Rogers, Barber & Henry, for appellee.

1. There never was but one contract entered into, as the second contract was never executed and was never ratified or recognized. It was signed only by H. Flanagin, and the words Arkadelphia Milling Company were written above Flanagin's signature and it was a nullity or spoliation. The second contract was not binding, but the question was fairly submitted to a jury by instruction No. 4, asked by appellant.

2. There is no error in the instructions given or refused. Profits are a proper element of damages. 69 Ark. 219; 80 *Id.* 228. See also 105 Ark. 421; 113 *Id.* 556; 101 N. Y. Supp. 205; 139 U. S. 199. All the questions involved are settled by the verdict and it should stand.

STATEMENT OF FACTS.

Appellee sued appellant to recover damages in the sum of $1,929.18, which is alleged to be due as commissions on the sale of automobiles.

Appellant denied the allegations of the complaint and by way of counterclaim averred that appellee was indebted to it in the sum of $597.75 for an automobile purchased on the 11th day of May, 1917. The facts are as follows:

On October 30, 1916, appellant and appellee entered into a written agreement whereby the former allotted to the latter the exclusive sale of Maxwell automobiles in Clark County, with the exception of that strip lying south of Antoine River, including the town of Delight and also that part of Dallas County lying west of Princeton. The contract also contained a clause as follows:

"This contract will stand until further agreement by both parties."

There, also, appears in the record a contract of the date of April 18, 1917, with the following signatures thereto:

"United States Auto Co.
"By Thos. Joyce, Dealer.

"Arkadelphia Milling Co.
"By H. Flanagin, Special Dealer."

This alleged contract goes very much more into details than the first contract. It contains a clause that the agreement shall continue in force until June 30, 1917, but that it may be canceled by either party at any time upon written notice. This alleged second contract is the foundation of this lawsuit.

It is claimed by appellant that the signatures thereto are the genuine signatures of the parties. On the other hand it is claimed by appellee that the contract was signed by H. Flanagin, and that he had no authority to sign it for appellee and that appellee did not sign the contract, but that the words, "Arkadelphia Milling Company by" were added to the contract after it had been signed by H. Flanagin for himself.

Under the contract dated October 30, 1916, appellee bought cars at two different times, which were shipped to its place of business at Arkadelphia and were sold by it in due course of business. On the 18th day of April, 1917, appellee ordered a carload of five cars from appellant. When the car arrived there were only four autos instead of five. There was room for five automobiles if properly loaded and if there had been five automobiles in the car the freight would have been $31.70 each, but with only four in the car, the freight was $39.60 each.

According to the testimony adduced by appellee, Flanagin did not have any authority to sign the contract dated April 18, 1917, for it, and its name was not signed thereto by any one who had authority to do so. The evidence of its manager shows that the agents of appellant tried to get him to sign the contract, but that he refused to do so. The manager of appellee corporation did not know that appellant claimed that it had signed the contract dated the 18th day of April, 1917, until appellee received the letter dated May 15, 1917, notifying appellee that its contract dated about April 18, 1917, had been canceled.

Evidence was also adduced by appellee tending to show that it had made a contract with T. B. Griffin to sell cars for it in the territory allotted to it by appellant under the contract of October 30, 1916. After the alleged contract of April 18, 1917, had been canceled, appellant made a contract with Griffin to act as its agent in the sale of cars in the territory which had been allotted to appellee October 30, 1916.

During the months of May, June and July, 1917, T. B. Griffin sold sixteen Maxwell automobiles in the territory which had been allotted to appellee under the contract of October 30, 1916, and if the cars had been sold by it, it would have received as commissions $1,196 therefor. During these same months, C. E. Elms, another agent of appellant, sold its cars in the territory which had been allotted to appellee under the contract of October 30, 1916, and appellee's commissions on these cars are

estimated at $571.50. It is also shown by appellee that it paid as an advance on the car of automobiles $100, which has not been refunded to it.

H. Flanagin was a witness for appellee, and stated that he signed the contract of April 18, 1917, for himself and not for appellee. He stated positively that the words "Arkadelphia Milling Company by", were not written on the contract at the time he signed it.

On the part of appellant it was shown that the words "Arkadelphia Milling Company by" were written on the contract by H. Flanagin, who was an agent for appellee. Other evidence was adduced by appellant tending to show that the contract of April 18, 1917, was ratified by appellee. Witnesses for appellant also testified that the cars which were sold by Elms were not sold in the territory which had been allotted to appellee under the first contract. It is also shown by appellant that appellee was indebted to it in the sum of $597.75 for one Maxwell automobile purchased on the 11th day of May, 1917.

Other facts will be stated or referred to in the opinion.

The jury returned into court the following verdict: "We, the jury, after allowing defendant's counterclaim, find for the plaintiff in the sum of $257.28 above the counterclaim."

HART, J., (after stating the facts). It is insisted by counsel for appellant that the court erred in giving instruction No. 10, which is as follows:

"If you find for the plaintiff, the measure of damages will be the profits, shown to a reasonable certainty, which the plaintiff would have gained by virtue of carrying out the terms of their contract with the defendant, and by profits is meant the amount of the commissions on sales of cars, less the cost to plaintiff of effecting the sales."

(1) The subject of profits as damages is well recognized in the law and when the direct purpose of the contract is to enable one of the parties to earn commissions

or profits, he is entitled to recover profits actually lost as his damages for the breach of the contract by the other party. Uncertainty as to the amount of damages does not prevent recovery, but uncertainty as to whether any benefit or gain would have been derived at all does bar a claim for damages. *Hurley* v. *Oliver,* 91 Ark. 427; *Alf Bennett Lumber Co.* v. *Walnut Lake Cypress Co.,* 105 Ark. 421; *Wilkes* v. *Stacy,* 113 Ark. 556, and *Streudle* v. *Leroy,* 122 Ark. 189. See also *McGinnis* v. *Studebaker Corporation of America* (Ore.), Ann. Cas. 1917 B and note.

(2-3) A comprehensive statement of the rule and one much quoted is that of Justice Lamar in *Howard* v. *Stillwell, etc., Mfg. Co.,* 139 U. S. 199-206, 11 U. S. Sup. Ct. 501-503. "Profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into."

In the case at bar the evidence for appellee tended to show that appellant had shipped it some cars under the first contract, which had been sold by appellee. Appellee had appointed T. B. Griffin as its agent in the sale of the cars. When appellant canceled the contract with appellee it made a contract with Griffin to sell cars for it in the same territory as that allotted to appellee under the first contract. Griffin sold sixteen cars in that territory and the commissions which would have accrued to appellee, had the sale been made by it, would have amounted to $1,196. Under the provisions of the first contract it was to stand until further agreement by both parties.

According to the testimony of appellee it never signed the second contract and never ratified it after-

wards. Therefore, according to the evidence adduced in favor of appellee, the first contract was still in force and the court did not err in giving the instruction.

(4) Counsel for appellant also assigns as error the action of the court in giving other instructions to the jury. We can not consider these assignments of error for the reason that counsel has not set out in full the instructions given by the court.

This court has uniformly held that the instructions should always be set forth in full and that a failure to do it invokes the presumption that correct instructions were given curing those complained of, if they are curable. The object of the rule is to facilitate the work of the court. If each judge was required to explore the transcript to see if the instructions as set out are in the exact language in which they were given by the court, an unnecessary amount of time would be consumed, and a great delay in deciding the case and in preparing the opinion would result. *Jacks* v. *Reeves,* 78 Ark. 428; *Harrelson* v. *Eureka Springs Electric Co.,* 121 Ark. 269, and *Morris* v. *Raymond,* 132 Ark. 449.

The salutary effect of this rule is apparent in the present case. Counsel for appellant has not undertaken to set out all the instructions. He has only undertaken to set out the instructions of which he now complains. There does not appear to be any inherent defects in them, and under the rule stated above the presumption is that, if erroneous in any respect, the errors were cured by the other instructions given by the court. Counsel for appellant has not set out in full the instructions of which he now makes complaint, but has only set out what he considers the substance of them. In some instances counsel for appellee claim that the instructions as given by the court are not susceptible of the meaning given to them by counsel for appellant in his brief. Hence the judges would have to explore the transcript in order to determine whether the language of the instructions was susceptible of the meaning claimed by appellant before they could proceed to a determination of whether or not

the instructions complained of were correct. If the instructions had been copied in full, each judge in reading the brief could go at once to a consideration of the question of whether or not the instructions were correct, instead of waiting to explore the transcript to see if the language of the instructions warranted the meaning attributed to them by counsel for appellant.

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

Kansas City Southern Railway Company v. Simmons.

Opinion delivered October 6, 1919.

1. Railroads—killing cow—evidence.—In an action for the killing of plaintiff's cow, the evidence held sufficient to sustain a verdict against the railway company.
2. Railroads — killing of a cow — instruction — presumption—harmless error.—While an instruction is improper which charges that if plaintiff's cow was found dead on defendant's railway company's right-of-way, *a prima facie* case of negligence is made out, because it must also appear that the dead animal was struck by a train, the error is harmless in a case where it was not questioned that the cow was killed by one of defendant's trains.
3. Same—same—duty to keep lookout.—A defendant railway company is liable for the killing of a cow by one of its trains, if the defendant's servants could have seen the cow by discharging their duty in keeping a lookout, and in the exercise of ordinary care could have prevented the killing.
4. Same—same—behavior of animals—presumption.—There is no presumption which may be indulged by a locomotive engineer that any animal upon the track will get off before being struck by the train.

Appeal from Little River Circuit Court; *James S. Steel,* Judge; affirmed.

June R. Morrell and *James B. McDonough,* for appellant.

1. The court erred in not directing a verdict for defendant. The uncontradicted evidence of the engineer and fireman when reasonable, as here, as a matter

of law overcomes the presumption of negligence and authorizes a verdict for defendant. 78 Ark. 234; 66 *Id.* 439; 67 *Id.* 514; 89 *Id.* 120; 53 *Id.* 96; 69 *Id.* 659. The evidence here is fully set out and is conclusive that there was no negligence on part of appellant or trainmen. Mere guesses are not sufficient; the evidence must be substantial as here. 122 Ark. 445. The engineer was not required to slow up, 37 Ark. 593, nor to stop. 119 *Id.* 316. The cow was standing in a place of safety. 119 Ala. 611; 29 So. 594. She was not on the track and no movement indicated that she would go on the track. 39 S. W. 320; *Ib.* 31. See also 21 So. 249; 28 *Id.* 806.

2. The court erred in giving the instruction as to *prima facie* case of negligence and the shifting of the burden of proof. It was misleading and prejudicial. 60 Ark. 187; 56 *Id.* 549; 42 *Id.* 122.

3. The court erred in giving instructions on issues not involved. 9 Ark. 312; 37 *Id.* 593. An instruction not based upon the evidence is prejudicial error. 105 Ark. 378; 119 *Id.* 530; 77 *Id.* 234; 110 *Id.* 188. For errors in instructions, see 37 Ark. 593. The animal was on the right-of-way. 99 *Id.* 226; 24 So. 373; 21 *Id.* 249.

4. It was error to refuse No. 3 for defendant. Cases *supra.*

A. P. Steel and *Langley & Johnson,* for appellee.

There is no error in the instructions given or refused. The law of this case is well settled by 89 Ark. 129; 68 *Id.* 32, and *Railway Co.* v. *Whitley,* 139 Ark. 255, this court just decided. Justice has been done and the judgment should be affirmed.

SMITH, J. Appellant railway company seeks a reversal of the judgment in this case upon the ground, first, that it is unsupported by the testimony, and upon the second ground that error was committed in giving and refusing to give instructions to the jury.

As to the first assignment of error it may be said that the testimony on the part of appellee (who brought this suit to recover damages against the railway com-

pany for killing his cow) was substantially as follows: Appellee found his cow lying dead near the railroad tracks and in relating what he observed there testified as follows: "I got back down the road and could see where the cow, or something, had been there in the rocks, had run for fifty or sixty yards, something like that, back up the other side of there, north of there. It seemed, when the cow started to run she was right about the center of the track, but just before I got to where the cow was at she got over near the west rail. There was not a mark on her body. It seemed like she had been hit in her hind quarters and her rectum had been punched out, kind of turning wrong side out."

It is pointed out by counsel for appellant that the witness could not and did not identify the tracks as having been made by his cow. Nevertheless we think this was an inference which might fairly have been drawn by the jury from the testimony set out above.

The engineer and fireman testified that when they first saw the cow it was about a quarter of a mile distant and that it was standing on the right-of-way with other cattle and gave no indication that it was about to go upon the track until the train was about one hundred and fifty feet away, when the cow suddenly started across the track. The cow did not get across the track but got close enough for the pilot beam of the engine to hit its head and kill it; and that the collision was unavoidable.

(1) It must be admitted that the testimony of the engineer and fireman exonerates the railroad company from blame or liability, and its counsel invokes the doctrine of those cases in which it has been held that where the testimony of the engineer and fireman in charge of a locomotive is consistent, reasonable and uncontradicted, and shows that the killing of an animal was unavoidable, the judgment in favor of the plaintiff will be reversed. But the testimony of the operatives of the locomotive was not so consistent, reasonable and uncontradicted that only by acting arbitrarily could the jury have disregarded it. There is an irreconcilable conflict between the

testimony of appellee and the inferences reasonably deducible therefrom and that given by the engineer and fireman; and the testimony of appellee if accepted by the jury was legally sufficient to support the verdict.

(2) Among other instructions to which an exception was saved is the following: "The court instructs you that if you believe from the evidence in this case that plaintiff's cow was found killed or injured on the right-of-way of defendant's road, that this makes a *prima facie* case of negligence against the defendant, and the burden then shifts on the defendant to show that said cow was not killed by its negligence in the operation of its train."

It is pointed out that the instruction is erroneous in that it makes the finding of a dead or injured animal on the right-of-way of defendant's road a *prima facie* case of negligence, whereas a presumption of negligence arises only when it is shown that the animal was struck by a train. The instruction is open to the objection stated; but that error is harmless as it is not questioned that the animal was killed by one of appellant's trains.

(3) Another instruction to which exceptions were saved reads as follows: "The court instructs the jury that if you find from the evidence in this case that the defendant's servants could have seen the cow killed in this action, by discharging their duty in keeping a lookout, and in the exercise of ordinary care prevented the killing, you will find for the plaintiff."

It is said this instruction is prejudicial because the engineer admits having seen the animal. But it will be remembered that in making this admission he so stated the facts as to make a case of non-liability, and, as we have shown, was contradicted in doing so, and the jury may, therefore, have disregarded his testimony. The instruction is a correct declaration of the law and under the circumstances it was not prejudicial to tell the jury what the duty of appellant was in having a lookout kept and the consequence of a failure to keep it.

An instruction requested by appellant and refused by the court announced the law to be that the engineer

had the right to operate the train upon the assumption that any animal on the track would get off before being struck by the train and to act upon that assumption. This instruction imputes reason and discretion as well as caution to a cow, and is, of course, erroneous on that account.*

An instruction numbered 3, requested by appellant, was refused; but the propositions of law there announced appear to have been substantially covered by another instruction requested by appellant numbered 4, which was given.

Finding no prejudicial error, the judgment is affirmed.

MAYO v. MAXWELL.

Opinion delivered October 6, 1919.

1. COVENANT OF WARRANTY—BREACH—OUTSTANDING ENCUMBRANCE—DISCHARGE BY COVENANTEE.—Where the covenantee buys in an outstanding encumbrance to protect his estate, he is entitled to recover the sum expended in so doing from the covenantor, provided such sum does not exceed the amount paid to the warrantor for the property, with legal interest on such sum from the date of the extinguishment of such encumbrance.
2. SAME—SAME — SAME — LIABILITY OF COVENANTOR — RECOVERY BY COVENANTEE—ATTORNEY'S FEES.—In a cause covered by the above statement of law, where the covenantor raised no issue as to the validity of the claim against the premises deeded to the covenantee, and the covenantee recovered from him the amount necessary to discharge the indebtedness, the covenantee can not recover attorney's fees from the covenantor.

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

Lamb & Frierson, for appellants.

1. The old common law rule of warranty, that in order to satisfy an encumbrance the covenantor convey to the covenantee either the lands contracted for with a good title or lands of equal value has been changed and the measure of damages now prevailing is the purchase

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*(NOTE)—See *Kansas City Sou. Ry. Co. v. McCrossen,* p. 68.—(Reporter).

money paid with interest or the value of the land at the time of the conveyance as estimated by the purchase price. 15 C. J., p. 1318, § 223; 7 R. C. L. 1167; 1 Ark. 313; 59 *Id.* 195; 54 *Id.* 195.

2. Where the breach of warranty is on account of an outstanding encumbrance, the measure of damages is the amount required to get rid of the encumbrance, not exceeding the amount paid the covenantor. 52 Ark. 322; 59 *Id.* 629. Where the breach results substantially in failure of the title, the measure of damages is the consideration money, interest and costs. 15 C. J. 1328; 59 Ark. 195; 7 R. C. L. 1200; 15 C. J. 1336; 54 Ark. 195.

2. When the purchase price has been paid to the covenantee with interest the covenant is discharged and satisfied. Cases *supra.* Moore & Maxwell were only entitled to satisfaction of their damages on account of the breach of warranty. The enhanced value of the land can not be taken into consideration. Cases *supra.*

3. Counsel fees are not recoverable. 15 C. J. 1333-4.

4. When we treat the deed of trust to Ball & Co. as constituting a total failure of title to forty acres, we have given it the strongest possible construction in Moore & Maxwell's favor. The full purchase money with interest was the full measure of their damages, and this was tendered them by Ball & Company, and Mayo & Robinson conceded they were entitled to the amount of tender, and therefore the breach of covenant was entirely satisfied and discharged and Moore & Maxwell have no right to demand in addition thereto enough money to pay off the Ball & Company deed of trust. The cross-complaint of Moore & Maxwell should be dismissed for want of equity. The result of the enhancement in value should not in equity be laid upon the shoulders of Mayo & Robinson, the warrantors. They should not be penalized for the enhancement in value of this tract of land which has arisen from causes affecting the country at large and possibly in part from improvements added by Moore & Maxwell. If, instead of an encumbrance, the claim of Ball & Company had been an outstanding deed, and on

account of the enhancement in value Moore & Maxwell had desired to retain the land, they would have been compelled to pay whatever amount it cost exceeding the purchase price and interest. The same rule should be applied to an encumbrance which is treated as a failure of title. Cases *supra.*

W. R. Satterfield, for appellees.

1. The sole questions here are whether or not appellants are liable on the warranty clause in their deed to appellees for the money paid by appellees to Ball & Company, and, if so, are appellants liable for attorneys' fees? Ball & Company are entitled to redeem. This is conceded. 85 S. W. 32; 74 Ark. 138; 84 *Id.* 541, 106 S. W. 682. The general rule is stated in 36 L. R. A. (N. S.) 427, note. Also 54 Ark. 273, 15 S. W. 886; see 27 C. J. 1797, citing 37 Ark. 632.

It is therefore clear that the forty acres were subject to an encumbrance of Ball & Company for $1,596.75 at the time appellants conveyed to appellees, and that appellees are protected by the warranty clause from harm from Ball & Company, and plaintiff is entitled to recover the amount he fairly and reasonably paid to remove the encumbrance not exceeding the amount paid by the covenantor. 15 C. J. 1327; 52 Ark. 322; 12 S. W. 702; 6 L. R. A. 107.

2. The general rule for the measure of damages in case of failure of title to a portion of the land conveyed is that the vendee can only recover such part of the original purchase price as bears the same ratio to the whole consideration that the value of the land to which the title has failed bears to the *value* of the whole premises, such relative values to be ascertained as of the time of the conveyance instead of at the time of the trial. 15 C. J. 1321; 106 Ark. 256; 153 S. W. 101.

3. Attorneys' fees should be allowed. 106 Ark. 256; 153 S. W. 101.

4. The decree should be affirmed for the amount paid by appellees to protect their title and reasonable attorneys fees should be allowed on their cross-appeal. *Supra.*

SMITH, J. Mayo & Robinson, hereinafter referred to as appellants, owned a six hundred acre tract of land in Crittenden County, Arkansas, which they sold to Moore & Maxwell, hereinafter referred to as appellees, for the sum of twenty-five thousand dollars, and conveyed the same by warranty deed. The deed contained general covenants of warranty, both of seisin and against encumbrances. Prior to this sale appellants had sold forty acres of the tract to one Neal and by way of security therefor reserved in the deed to Neal a vendor's lien. Neal entered upon the land and began to clear and cultivate it and in doing so became indebted to W. M. Ball & Company in the sum of $1,590, to secure the payment of which Neal gave Ball & Company a mortgage on the land. Neal defaulted in the payment of the purchase money and appellants brought suit to enforce their vendor's lien, and became the purchasers, at the sale by the commissioner appointed to enforce the decree of foreclosure, for the sum of $1,950. This sale was approved and they obtained the commissioner's deed prior to their sale to appellees.

Ball & Company were not made parties to this foreclosure proceeding, and after its conclusion they tendered to appellants and appellees the sum for which the land had been sold at the foreclosure sale, but the tender was refused. Thereupon this suit to redeem was brought by Ball & Company, against both appellants and appellees, and appellees called upon appellants to defend the title under the covenants of warranty. Appellants filed an answer in which the right of redemption was confessed and prayed that the sum of $1,950, which was tendered into court, be accepted and paid over to appellees in satisfaction of appellant's liability under the covenants of warranty. Appellees denied the right of redemption and filed a cross-bill against appellants in which they alleged that if the right of redemption was decreed in favor of Ball & Company, their title would have failed to that extent, and they prayed that they be allowed to pay Ball & Company the sum due under the mortgage

and thereby discharge that encumbrance, and that they have judgment against appellants for the sum necessary to discharge that lien, together with the expense of defending the title, including a reasonable attorney's fee.

The court found that the value of the land at the time of the decree was $5,000 and that the purchase price paid by appellees to appellants was $41.66 per acre or $1,666.40 and that appellants were liable to appellees in the sum of $1,596.75 under their covenants of warranty; but that appellees were not entitled to recover attorney's fees. The mortgage executed by Neal to Ball & Company was satisfied and canceled upon the exhibition of a receipt from Ball & Company for $1,596.75, the balance then due to Ball & Company, and a decree for that amount was rendered against appellants, and this appeal has been duly prosecuted by appellants from that finding and judgment; and appellees have perfected a cross-appeal from the refusal of the court to allow them their attorney's fees.

It was shown that when appellees purchased the property there was only one house on the land and only twenty-five or thirty acres in cultivation. That appellees built three houses and cleared the remainder of the land, and these improvements, together with the general enhancement in values, raised the value of the land to $5,000.

Appellants state their own contention as follows: "Moore & Maxwell paid Mayo & Robinson approximately $1,666 for the land. W. M. Ball & Company tendered to Moore & Maxwell $1,950, nearly $300 more than the purchase price and interest. Mayo & Robinson conceded this entire sum to Moore & Maxwell and only asked that it be treated as a satisfaction of the warranty of title. In so doing they gave to the existence of the encumbrance its strongest value as a breach of their warranty, *i. e.*, they treated it as a complete and total failure of title."

Appellees show, however, that if they had accepted the tender made by Ball & Company in satisfaction of appellant's liability under their covenants of warranty

they would have received $1,950 in money and would have surrendered a tract of land worth $5,000, and they say they had the right to treat the mortgage to Ball & Company as an encumbrance against the land and to discharge the same by paying the debt it secured, as the sum so paid did not exceed the purchase money paid the covenantors (appellants) for the land.

(1) In the case of *Collier* v. *Cowger,* 52 Ark. 322, this court said: "Where the covenantee buys in the outstanding encumbrance to protect his estate, he is entitled to recover the sum expended in so doing, provided such sum does not exceed the amount paid to the warrantor for the property, with the legal interest on such sum from the date of the extinguishment of such encumbrance. *Boyd* v. *Whitfield,* 19 Ark. 447; Rawle, Cov. Tit., § § 143-6."

Other cases which state this right to recover and announce the measure of the recovery are: *Brawley* v. *Copelin,* 106 Ark. 256; *Scroggin* v. *Hudgins,* 78 Ark. 531; *Dillahunty* v. *Railway,* 59 Ark. 629; *Alexander* v. *Bridgford,* 59 Ark. 195; *Barnett v. Hughey,* 54 Ark. 195.

Appellants have much to say about this litigation having arisen out of the fact that the land has enhanced in value, and they contend that their liability should not be enhanced on that account. And so it should not. But neither should it be diminished on that account. Had there been no enhancement, appellees would have repaid the purchase money and interest or, preferably, would have discharged the mortgage, as the debt secured by it was less than the purchase money. Can it be equity that appellees, after giving to the land its enhanced value, shall be made to lose the legal right on that account of having appellants remove the encumbrance with their own funds? Shall appellants be relieved of a well-established and admitted legal liability because appellees have enhanced the value of the land to such an extent that it would have been profitable to Ball & Company to redeem from the foreclosure sale and obtain a five thousand dollar farm for the $1,950 tendered?

The real question in the case is, to whose benefit does the enhanced value inure? Can appellants say to appellees that they are discharged from a liability which would otherwise exist because appellees have so far enhanced the value of the land that Ball & Company could with profit redeem the land? Is it not fairer to say to appellants that they are liable under their covenant for so much of the purchase money received by them as is necessary to extinguish the Ball & Company mortgage and that they shall not be permitted to discharge this liability by appropriating to themselves or by taking from appellees the enhanced value resulting from appellees' improvements? For such, in effect, is the result of their contention.

Of course, these questions might have been avoided had Ball & Company been made parties to the foreclosure proceeding. But appellants are responsible for this failure. They conveyed the title to Neal and reacquired it by the foreclosure proceeding—but when they did so it was subject to the encumbrance of Ball & Company's mortgage, and their attitude is that of any other grantor who conveys land against which there is at the time an outstanding encumbrance. It would be neither equity nor good conscience to permit such a grantor to discharge a legal and fixed liability arising out of the payment of a mortgage encumbrance, against which he had covenanted, by compelling his grantee, who had given to the land conveyed an enhancement greater than the purchase price, to lose the land thus enhanced or suffer the penalty of absolving his grantor from liability under the covenant of warranty.

We conclude, therefore, that the court properly treated this mortgage as an encumbrance which could be —and which was—removed by a payment less than the purchase price of the land and decreed that appellants should discharge that liability with their own funds.

(2) The majority of the court are of the opinion, however, that the court properly disallowed appellees' claim for attorneys' fees for the reason that there was no issue

about the mortgage of Ball & Company, constituting an encumbrance. (The writer is of the opinion, however, that the claim for attorneys' fees should have been allowed). All the parties conceded that fact and the right of Ball & Company to redeem from the foreclosure sale was not the subject-matter of the litigation and no question was litigated or decided as against Ball & Company, and the decree of the court below disallowing the attorneys' fee is also affirmed.

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

Opinion delivered October 6, 1919.

1. APPEAL—EFFECT OF, WITH SUPERSEDEAS.—An appeal and supersedeas do not have the effect of vacating the judgment, but only to stay proceedings thereunder.
2. SHERIFF'S SALE—GENERAL EXECUTION—BOND EXECUTED FOR PURCHASE MONEY.—The chancery court is without authority to approve a sheriff's sale made under general execution, directed and issued on a bond given for the purchase money of property sold under order of the chancery court. A sale under an execution on a bond, had under Kirby's Digest, § § 3260-3262, is strictly a statutory proceeding, and no authority is given in the statute authorizing a court to confirm a sale of real estate made thereunder, nor order the sheriff to make the sale and make a deed to the purchaser, or to issue a writ of possession.
3. LANDLORD AND TENANT—TRANSFER OF LEGAL TITLE—RESPONSIBILITY OF TENANT.—Where a landlord's title has passed to another by process of law, the tenant's responsibility is then to the true owner. A tenant may attorn to the purchaser of his landlord's interest at an execution sale, or at a forclosure sale.
4. INJUNCTION — RELIEF AGAINST TRESPASSER.—Although one is in the rightful possession of certain premises, under purchase at an execution sale, he cannot invoke injunctive relief to protect his possession against trespasses remediable at law.
5. BILL OF REVIEW—FORECLOSURE SALE.—The validity of an execution sale is not a proper subject for a bill of review, where the sale was made after the final adjudication in the original foreclosure proceedings.

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

R. G. Davies and *O. H. Sumpter,* for appellants.

1. The original judgment of the Garland Chancery Court was a money judgment, and appeal was taken to this court and supersedeas bond filed, which superseded the judgment, and judgment was rendered against appellant and sureties in the Supreme Court and should have been enforced from this court and not the lower court. 44 Ark. 178.

2. The chancery court erred in issuing an execution upon the bond of William Sumpter, Nannie E. and O. H. Sumpter without taking any judgment against them.

3. The court erred in requiring appellants to elect either to sue Tombler or proceed on their complaint to set aside the sales.

4. The court erred in sustaining appellee's demurrer to the bill of review and Tombler's motion to strike the petition of appellants as against him and in overruling appellants' demurrers and motions to strike appellees' complaints and amendments thereto and in dismissing the answer and cross-complaints of appellants, also in ratifying and confirming the sales under execution and in appointing a commissioner and directing him to execute a deed to the lands purchased under execution and also in ordering a writ of assistance to place appellee in possession. Appellees were estopped by their acts and pleadings from appealing to the chancery court to put them in possession, because they were already in possession and had induced a tenant of Mrs. William Sumpter to attorn to them. The whole proceedings are erroneous and should be set aside and an execution issued upon the supersedeas bond filed in this court, which alone had jurisdiction to enforce its judgment. 44 Ark. 178.

C. T. Cotham and *C. C. Sparks,* for appellees.

1. 44 Ark. 178 does not support nor sustain the claims of appellants. The mandate of this court was filed with the clerk of the chancery court December 14, 1916, and was a compliance with Kirby & Castle's Digest, section 1346. Taking an appeal with supersedeas bond does not vacate the judgment but only stays or supersedes it and does not preclude a party from pursuing another remedy, viz., application to the trial court for a distribution of a fund in court. 86 Ark. 452. Appellee had the right, not to its remedy on the supersedeas bond, but to make application to the trial court which regained jurisdiction on filing the mandate of this court and have the property the *rem* sold pursuant to the terms of the original decree.

2. The chancery court did not err in issuing execution upon the bond. Kirby & Castle's Digest, § § 3574-5-6; 189 S. W. 854.

3. There was no error in sustaining appellees' demurrer to the petition to review nor in sustaining Tombler's motion to strike, and the facts as alleged did not give the court jurisdiction to grant the relief prayed.

4. The chancery court did not err in dismissing the answer and cross-complaint of appellants. No error is pointed out, and the chancellor's opinion shows ample authority for his action. The demurrer was properly sustained, as the answer did not state matters of fact sufficient to constitute a defense, counter-claim or set-off.

5. The court did not err in confirming the sale under execution nor in appointing a commissioner and directing deed. 48 Ark. 312-321.

6. Appellees did not gain possession of the Sumpter House property by any collusion with the tenants of the Sumpters, but the Georges after due investigation as to who held the paramount title attorned to the bank as their landlord after it has properly received its deed from the sheriff. 17 Ark. 547; 31 *Id.* 470; 24 Cyc. 956; 65 Ark. 135.

7. The chancery court should have approved all the execution sales and directed a deed to be made to all the property sold. Kirby & Castle's Digest, § § 3525-3526; 16 R. C. L., § 9, "Judicial Sales."

8. The chancery court should have granted a writ of assistance placing appellees in possession of all the property embraced in their deed. Pom. Eq. Jur., par. 177, p. 213.

On the whole case the decree should be affirmed in so far as it granted appellees the relief prayed and on cross-appeal should be sustained and the chancery court directed to grant the relief prayed in the cross-appeal.

STATEMENT OF FACTS.

The appellee, Hot Springs Savings, Trust & Guaranty Company, being the owner and holder of a note and mortgage for $14,000, given to it by appellant, Mrs. Nannie E. Sumpter, proceeded in the chancery court of Garland County to foreclose said mortgage. It obtained judgment and decree of foreclosure and order of sale against all property described in the deed of trust, including lot 1, in block 112, in the city of Hot Springs, known as the Sumpter House property. Mrs. Nannie E. Sumpter pleaded usury as a defense in that action. From the judgment and decree of foreclosure an appeal was prosecuted by Mrs. Nannie E. Sumpter, which was affirmed and a judgment entered in the Supreme Court against her and her bondsmen, William Sumpter, Orlando H. Sumpter and D. F. Radford, for the amount of the indebtedness, interest and costs. A mandate was secured, and, upon the filing thereof in the chancery court of Garland County, the commissioner was directed to sell the property described in the decree, in accordance with the terms specified in the order. Mrs. Nannie E. Sumpter requested that lot 1, block 112, known as the Sumpter House property, be sold first, which was done, at which sale William Sumpter bid $17,100, being the amount of the judgment and costs to that date. He executed his bond with Orlando H. Sumpter and Mrs. Nannie E. Sumpter as sureties thereon for the payment of said sum,

and the sale was confirmed by the court. The bond was not paid at maturity, and the court directed the clerk to issue an execution on the bond. The sheriff levied upon all the property described in the original decree of foreclosure, and on the 3rd day of September, 1917, sold same in separate parcels, at which sale, appellee, Hot Springs Savings, Trust and Guaranty Company, purchased each tract for a specified amount. The total amount of the bids for the several tracts was insufficient to pay the amount due on the bond. On the 10th day of August, 1918, Mrs. Nannie E. Sumpter, William Sumpter and Orlando H. Sumpter filed a bill of review, containing a motion to set aside the sale of said property under execution, to which a demurrer was filed. Upon hearing, Mrs. Nannie E. Sumpter, William Sumpter and Orlando H. Sumpter, refusing to elect between the causes of action set up in the bill of review, said bill was dismissed upon the ground that it contained a misjoinder of causes of action and parties. From the decree dismissing the bill of review, an appeal was prosecuted to, and is now pending in, this court.

An alias execution was obtained and levied upon other property belonging to the bondsmen of William Sumpter to satisfy the balance not paid by the sales under the first execution. The Hot Springs Savings, Trust & Guaranty Company also became the purchaser of the property sold under the alias execution. On the 19th day of December, 1918, after the expiration of one year from the date of the execution sales, the sheriff executed a deed to the Hot Springs Savings, Trust & Guaranty Company for all the property it had purchased at said execution sales. Mrs. Nannie E. Sumpter had remained in the possession of lot 1, block 112, known as the Sumpter House property, under tenant, until early in December, 1918. Her tenant, Mr. Mark, was renting the property under monthly contract. He sold the furniture in the hotel and the balance of his monthly term to J. F. George. Upon hearing that the Hot Springs Savings, Trust & Guaranty Company had obtained a deed to the property from the

sheriff, J. F. George attorned to it, by paying one month's rent in advance, on the 26th day of December, 1918, for the use of the Sumpter House property. Thereupon, Orlando H. Sumpter, representing himself, Mrs. Nannie E. Sumpter and Ida M. Sumpter, widow of William Sumpter, who had died early in December, 1918, nailed up some of the doors in the Sumpter House and threatened to put J. F. George and his guests out. Thereupon, appellees, the Hot Springs Savings, Trust & Guaranty Company and J. F. George, instituted a suit in the Garland Chancery Court against the appellants, seeking an injunction to prevent appellants from interfering with their possession. Subsequently the appellees filed two amended complaints, to each of which complaints appellants filed demurrers, motions to strike, and, specifically reserving the points raised in the demurrers and motions to strike, filed an answer and cross-complaint to each of said complaints. The pleadings on the part of the appellees, as finally amended, were in the alternative; First, that they were in possession and their possession was being disturbed by appellants; second, if not in possession, they were entitled to have a confirmation of the execution sale made by the sheriff and a deed issued to the Hot Springs Savings, Trust & Guaranty Company by a commissioner of the chancery court and a writ of assistance to place them in possession of all the property they had purchased at both execution sales. Appellants' defenses were, in substance, that they were themselves in possession of the hotel property by tenant, that the chancery court had no jurisdiction to confirm the sales of the sheriff under execution, or to order a commissioner to make a new deed to the Hot Springs Savings, Trust & Guaranty Company, or to issue a writ for possession.

The chancery court dissolved the temporary injunction it had issued in favor of appellees and dismissed the bill for permanent injunction; also struck out the answer and cross-bill of appellants upon the ground that they set up the same matter that was contained in the bill of review; also, treated the sale of the sheriff, under

the first execution sale, as a sale under order of court, confirmed it, and directed a commissioner, specially appointed for that purpose, to make a deed for all of the lands sold under the first execution, to the Hot Springs Savings, Trust & Guaranty Company; also issued a writ in favor of appellees, Hot Springs Savings, Trust & Guaranty Company and J. F. George, for the possession of the Sumpter House property, and declined to approve the sale of the sheriff under the second execution and to direct deed and issue writ of possession in favor of the Hot Springs Savings, Trust & Guaranty Company for the property sold and purchased by it under said execution. The case is before us for trial *de novo* on appeal and cross-appeal.

HUMPHREYS, J., (after stating the facts). (1) It is first insisted by appellants that, because a judgment was rendered in the Supreme Court on appeal, in the original foreclosure proceeding, against Mrs. Nannie E. Sumpter and her bondsmen on the supersedeas bond, the Hot Springs Savings, Trust & Guaranty Company had no right to take a mandate and attempt to enforce the collection of its original judgment and decree of foreclosure in the chancery court. Such is not the effect of an appeal with supersedeas. This court said in the case of *Miller* v. *Nuckolls,* 76 Ark. 485, that "An appeal and supersedeas do not have the effect of vacating the judgment, but only stay proceedings thereunder."

(2) It is next insisted that the chancery court had no jurisdiction to approve a sheriff's sale made under general execution, directed and issued on the bond executed for the purchase money of the Sumpter property by William Sumpter, as principal, and Mrs. Nannie E. Sumpter and Orlando H. Sumpter, as sureties, upon their failure to pay it. The execution referred to under which the sale was made was a general execution issued on said bond, which had been executed in the manner provided in sections 3260 and 3261 of Kirby's Digest. It is provided by section 3262 of Kirby's Digest that "All such bonds

shall have the force and effect of a judgment, * * *'' This execution could have been raised as well without as with an order of the court. The order of the court directing it does not give it any additional force and effect. The sale under an execution on such a bond is strictly a statutory proceeding. No authority is given in the statute authorizing a court to confirm a sale of real estate made thereunder, nor to order the sheriff to make the sale and make a deed to the purchaser, or to issue a writ of possession for the property sold under it. It is a proceeding wholly independent of an order of sale made by a chancery court in the enforcement of a decree of foreclosure. In that character of sale, it is the duty of the court to fix the time, place and terms of sale, and the court making such an order is authorized to confirm the sale and order a deed and issue a writ for the possession of the specific property sold thereunder. The chancery court therefore erred in confirming the sheriff's sale made under the first writ of execution, in appointing a commissioner to make a deed, and in issuing a writ of possession for the Sumpter House property in favor of appellees, Hot Springs Savings, Trust & Guaranty Company and J. F. George.

It is contended, however, by appellees, that, because J. F. George, Mrs. Nannie E. Sumpter's tenant, attorned to the Hot Springs Savings, Trust & Guaranty Company, it was in possession of the property and had a right to injunctive relief to protect its possession against trespassers, and that, under the rule that when the chancery court takes jurisdiction for one purpose it will give complete relief, it was entitled to have the sheriff's sale confirmed, a court deed and a writ for possession.

(3) If the execution sale was regular, the effect of the sheriff's deed was to divest whatever title William Sumpter and his sureties, Orlando H. Sumpter and Mrs. Nannie E. Sumpter, had in the real estate sold under both executions, and to vest it in the Hot Springs Savings, Trust & Guaranty Company. Where the landlord's title has passed to another by process of law, the tenant's responsibility is then to the true owner. *Earle* v. *Hale,* 31

Ark. 470. The rule is laid down in 24 Cyc., at page 956, that "A tenant may attorn to the purchaser of his landlord's interest at an execution sale, or at a foreclosure sale."

(4) Presuming, then, on the regularity of the execution sale and that appellees were, and are, in the rightful possession of the Sumpter House property, it does not follow that injunctive relief may be invoked to protect their possession against trespasses remediable at law. The trespasses and threats of ouster alleged in the complaint were not of such continuous and irreparable nature as would call for injunctive relief. Appellees, being in possession of the Sumpter House property, had a right to sue the Sumpters at law for any damages occasioned by their trespasses, it not being alleged that they were insolvent. This is the substance of their complaint as to said property.

(5) As to the other property purchased, for which they held a sheriff's deed, the complaint can only be treated as a suit in ejectment if appellants are resisting possession thereof. The answer of appellants indicates that they are resisting the right to recover possession of the latter property, and also the action for damages on account of trespasses as to the Hotel Sumpter property, because the execution sale was not made according to law. It is said that such a defense can not be interposed, because the validity of the execution sale was involved in the bill for review. It was not a proper subject for a bill in review, because the sale was made after the final adjudication in the original foreclosure proceeding. It was proper subject-matter for defense in the suit of appellees for damages on account of trespasses to the Sumpter House property, and in a suit for the possession of the other property sold at the first execution sale. The court erred in striking out that portion of appellant's answer.

For the errors indicated, the decree is reversed with instructions to transfer the suit to the circuit court.

JOHNSON v. TAYLOR.

Opinion delivered October 6, 1919.

1. HOMESTEAD — DOMICILE OF MINORS — CONFLICT OF LAWS.—The last domicile of the deceased father of an infant constitutes the legal domicile of the infant and the domicile of the infant can not be changed or removed by his own act until he reaches his majority.
2. HOMESTEAD—SALE OF RIGHTS OF MINOR CHILDREN.—The sale of the homestead to pay the debts of the deceased father is invalid when he left minor children surviving him.
3. LIMITATIONS — JUDICIAL SALES. — The statute of limitations, as announced in Kirby's Digest, § 5060, does not begin to run against judicial sales, until five years from the date of confirmation.
4. LACHES—DEFINITION.—The delay which will bar an action is delay working to another's disadvantage, which may come from the loss of evidence, change of title, intervention of equities and other causes.
5. ESTOPPEL IN PAIS—DEFINITION.—Estoppel *in pais is* worked by conduct intended and calculated to induce, and in fact inducing, another person to alter his condition so that it would be a fraud in him to allow the person to take an inconsistent attitude to his detriment.
6. HOMESTEAD — SALE OF — DAMAGES.—When homestead land was erroneously sold, their heirs, in recovering the land, may also recover a reasonable rental for the land, and the value of timber removed.
7. COLOR OF TITLE — IMPROVEMENT TO LANDS — BETTERMENT ACT.—Under the betterment act, an occupant of land cannot claim for improvements made unless he has color of title. A certificate of purchase is not color of title.

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

Stevens & Stevens, for appellant.

1. The sale of the land by the administrator of R. O. Taylor was a valid sale and vested the title in the vendees on its confirmation. The widow had conveyed her homestead rights. The minor children were with their mother in another State and the lands were subject to the payment of debts of the deceased R. O. Taylor, and the sale was valid. Kirby's Digest, § 3898; art. 9, § 3, Const. 1874; 21 Cyc. 458. Under the facts of this

case the lands were not a homestead. 26 Am. St. 319; 29 So. 777; 21 Cyc. 467. The proof shows that Frank and Haston Taylor, on the death of their father, were not a part of the family and had not been for fully fifteen or twenty years. 24 Ark. 158; Kirby's Digest, § § 3882-3, 3898; 71 Ark. 206.

2. The sale was void and appellees are barred. 53 Ark. 410; 79 *Id.* 411; 54 *Id.* 642; 76 *Id.* 150.

3. Appellees are barred by *laches* and are estopped. 55 Ark. 94; 33 *Id.* 468-9; Bigelow on Estoppel (6 ed.) 608.

Gross negligence will estop. 97 Ark. 43; 89 *Id.* 349.

Appellees are barred by limitation. 54 Ark. 87; 87 *Id.* 237; 55 *Id.* 85; 60 *Id.* 50.

4. The place had no rental value but for Johnson's improvements and appellees are barred from recovering rents. 33 Ark. 495; 46 *Id.* 109; 42 *Id.* 423; 55 *Id.* 369.

The lower court erred in decreeing title in appellees and in the money judgment against appellant, and the decree should be reversed and dismissed as to the children of R. O. Taylor and the two oldest children of Mrs. Jane Thomas, deceased.

McKay & Smith, for appellees.

1. The appeal should be dismissed, as it is shown that appellant has settled with all except two of the original heirs and a portion of the grandchildren who are heirs of Mrs. Jane Thomas, deceased. The decree, not abstracted by appellant, shows that appellant is now the owner of seven-tenths interest in the lands, leaving a three-tenths interest that has not yet been settled. Appellant's act in settling this judgment with the principal part of the appellees is inconsistent with his right to appeal. If this judgment is reversed, it must be as to all the appellees. He has acquiesced in the judgment and can not appeal. 3 C. J., pp. 665, 675-6-7; 113 Ark. 25; 132 *Id.* 69; 106 *Id.* 292; 83 *Id.* 306; 53 *Id.* 514.

2. The absence of the minor children at the time of their father's death does not deprive them of their homestead rights. Art. 9, § 6, Const. 1874; 29 Ark. 280-293.

The last domicile of the deceased father is the minor children's domicile and can not be changed until majority. 116 Ark. 361; 16 *Id.* 377; 72 *Id.* 299. The minors could not abandon their homestead right if the widow could. 125 Ark. 291; 115 *Id.* 359; 113 *Id.* 135; 123 *Id.* 389; 126 *Id.* 1.

3. Appellees are not barred by limitation. 53 Ark. 400. The seven years' statute applies, and not the five years', as to judicial sales. 115 Ark. 359. The statute only runs from the confirmation of the sale, not from its date. 126 Ark. 86; 108 *Id.* 370; 69 *Id.* 539; 61 *Id.* 80; 82 *Id.* 55; 32 *Id.* 181; 76 *Id.* 146; 69 *Id.* 540. The sale here and the confirmation are absolutely void, because they were not made in compliance with our statutes. Kirby & Castle's Digest, § § 4194-196; 106 Ark. 563.

4. Appellant is not entitled to recover for improvements, as he made them after the sale but before the confirmation thereof, and he had no color of title even, nor did he believe himself the owner. 47 Ark. 62; *Ib.* 528; 48 *Id.* 183; 93 *Id.* 93; 102 *Id.* 181. All he had was a certificate of purchase; no title nor color thereof. 67 Ark. 184; 72 *Id.* 601; 26 *Id.* 48; 76 *Id.* 152; 126 *Id.* 86; 105 *Id.* 261; 69 *Id.* 539. He was not entitled to possession until he received his deed duly confirmed and entitled to no rents nor improvements. 108 Ark. 370; 47 *Id.* 528; 67 *Id.* 184; 92 *Id.* 173.

5. Appellees are not estopped or barred by *laches.* 131 Ark. 77; 70 *Id.* 371; 67 *Id.* 320; 103 *Id.* 251.

HUMPHREYS, J. This suit was commenced on September 13, 1916, as an ejectment suit by appellees against appellant in the Columbia Circuit Court to recover certain lands alleged to have comprised the homestead of their father, R. O. Taylor, at the time of his death, and for damages on account of rents and timber cut during the detention thereof by appellant. The complaint alleged ownership in appellees of the land by inheritance from their father, and that appellant was in the unlawful possession thereof.

Appellant answered, admitting that appellees were the only heirs of R. O. Taylor, deceased, but that their title was extinguished under a probate sale of said lands for the payment of valid claims against the estate of said R. O. Taylor, deceased; that he and his brother purchased the lands at said probate sale and received certificates of purchase for the respective parts purchased by each; that his brother assigned his certificate of purchase to the appellant; that the sale was confirmed on the 22d day of November, 1913, at which time, he received a deed to said land; that he went into possession of the land under the certificates of purchase aforesaid and made valuable improvements thereon, setting them out in detail, both as to kind and value; that he paid the taxes thereon in the sum of $81.16; that he paid the administrator, on account of the purchase, $415.99, which was used in liquidating the indebtedness of said estate; that said lands were subject to sale for the indebtedness of the estate, even though the homestead of the deceased at the time of his death, for the alleged reason that the widow had conveyed her homestead right, and that all children entitled to enjoy the homestead were of full age at the time said real estate was ordered sold. As further defenses, appellant pleaded limitations, estoppel and laches.

On motion of appellant contained in the answer, the cause was transferred to the chancery court of Columbia County. Appellees filed a reply, denying all the material allegations relating to new matter in the answer, with the additional request that the deed received under and by virtue of the probate sale be canceled as a cloud on their title.

The cause was heard upon the pleadings and exhibits thereto, depositions of witnesses and an agreed statement of facts marked "1" and "2," from which the court found that appellees were owners of said land by virtue of inheritance from R. O. Taylor, deceased, but that H. T. Taylor, an appellee, had conveyed his interest therein to appellant; that the other appellees owned an undi-

vided nine-tenths in said real estate; that they were entitled to a rental of $1,578.53, covering the period from the institution of the suit until the date of the decree and for three years prior to the institution of said suit, and $167.48 for timber cut and removed from said land by appellant. As an off-set to these two amounts, the court found that appellant was entitled to $81.16 paid for taxes, and $928.90 for improvements, leaving a balance of $635.96 due appellees on account of detention of the lands by appellant; that appellant was entitled to be subrogated to the right of the creditors of the estate of R. O. Taylor, deceased, to the amount of $415 and interest, but that the amount appellant received as rents on the place from the time he took possession until September, 1913, was a full and complete off-set against said last named amount. A decree was rendered in accordance with the findings, from which an appeal has been duly prosecuted to this court. During the pendency of this appeal, appellant has settled with and purchased the interest of Mrs. Jean Taylor, Mrs. Mary Lee Taylor, Mrs. Ida Denman, Mrs. Carrie Sweet, Haston Taylor and Frank Taylor. Based upon appellant's purchase and settlement of said interests during the pendency of this appeal, the other appellees filed a motion to dismiss the appeal. This court dismissed the appeal as to the interest of the appellees purchased by appellant, but overruled the motion as to the appellees whose interests were not purchased.

The following facts are definitely established by the record: R. O. Taylor, the father of appellees, together with his wife, Nancy Taylor, occupied the lands in controversy as their homestead when he died. Years before he married Nancy Taylor, he had been divorced from the mother of Haston and Frank Taylor, who took them in infancy to another State, where they remained until after R. O. Taylor's death. They were both minors at the time of their father's death. Haston became of age December 28, 1910, and Frank in May, 1913. They had never actually lived with their father on the land in question. The older children continued to reside near, and were

living near him when he died. Mrs. Nancy Taylor abandoned her homestead right on January 4, 1910, by conveying same to H. T. Taylor.

H. T. Taylor conveyed his interest to appellant on the 9th day of December, 1913. W. M. Johnson, father of appellant, was appointed administrator of the estate of R. O. Taylor, deceased, on January 7, 1910. He obtained an order, on May 11, 1910, from the probate court to sell the property in question for the purpose of paying the indebtedness of the estate. Pursuant to the order, the land was sold on the 10th day of June, 1910, one parcel being purchased by Henry Johnson and the other by appellant. The land sold for $415, which amounted, including interest, at the date of the judgment to $584.97. Henry Johnson afterwards assigned his certificate of purchase, for the parcel bought by him, to appellant. Appellant went into possession under his certificates of purchase and made valuable improvements thereon prior to May, 1913, and paid $81.16 taxes thereon from that time until the judgment was rendered herein. The sale under which he purchased was reported on November 22, 1913, at which time he received a deed.

The facts responsive to the issues of estoppel, laches, the value of the improvements made and the rental value of the land, both before and after the improvements were made, were in conflict. It would occupy much space to set out the disputed facts in detail, so we will content ourselves with giving our conclusions thereon in determining the questions to which they relate.

It is insisted by appellant that, because Haston and Frank Taylor had never resided with their father upon this particular land and were not with him at the time of his death, they were thereby deprived of their homestead rights in the land in question. Section 6, article 9, of the Constitution of 1874, which is repeated as section 3882 of Kirby's Digest, provides that "* * * if the owner leaves children, one or more, said child or children shall share with said widow, and be entitled to half the rents

and profits till each of them arrives at twenty-one years of age; each child's rights to cease at twenty-one years of age, and the shares to go to the younger children, and then all to go to the widow; and, provided, said widow or children may reside on the homestead or not. * * *" In construing this section of the Constitution, as applied to a widow who did not reside with her husband at the time of his death, this court said, in the case of *Duffy* v. *Harris*, 65 Ark. 251: "In this State it is held that the domicile of the widow follows that of the husband, and we understand this to be the rule, and that the fact that she abandons her husband, and lives apart from him in another State, will not form an exception, nor cause her to forfeit her right to the homestead. She is not a non-resident, while her husband is a resident. Her legal status, as to this, is governed by that of her husband."

(1-2) In the case just quoted from, the wife had abandoned her husband and was residing and leading an immoral life in Missouri. Surely, if a widow under such circumstances does not forfeit her homestead right, it can not reasonably be contended that a minor will forfeit such right by continued absence during minority. This court is firmly committed to the doctrine that "the last domicile of the deceased father of an infant constitutes the legal domicile of the infant and the domicile of the infant can not be changed or removed by his own act until he reaches his majority." *Grimmett* v. *Witherington*, 16 Ark. 377; *Young* v. *Hiner*, 72 Ark. 299; *Landreth* v. *Henson*, 116 Ark. 361. Haston and Frank Taylor, being minors when their father died, were in contemplation of law, members of his family and entitled to their homestead rights in the land in controversy. This being true, the sale of the homestead of R. O. Taylor, deceased, by the administrator, made on the 10th day of June, 1910, was void.

(3) It is next insisted that appellees were barred from instituting this suit by section 5060 of Kirby's Digest, which is in part as follows: "All actions against

the purchaser, his heirs or assigns, for the recovery of lands sold at judicial sales shall be brought within five years after the date of such sale and not thereafter. * * *"

Appellants insist that the date of sale referred to in the statute has reference to the date it was made, and appellants that it has reference to the date it was confirmed. This court said in the case of *Cowling* v. *Nelson,* 76 Ark. 146, that:

"The five-year statute does not apply to judicial sales unless they are confirmed, because there is no sale until that act."

And in *Morrow* v. *James,* 69 Ark. 539, said: "Before the statute of limitations of five years could apply, there must have been confirmation of the sale made under the order of the probate court. Without confirmation there was no sale."

It seems clear that, if there could be no sale until confirmation, the statute could not begin to run until the sale was confirmed, but this court was more specific in *Gavin* v. *Ashworth,* 77 Ark. 242, in which it was said that: "The limitation of five years, applicable to judicial sales of lands, commences to run as soon as the sale is confirmed."

And it was still more specific in the case of *Gaither* v. *Gage,* 82 Ark. 51, where it was said, in speaking of the five-year statute of limitations under judicial sales, that: "The statute runs from the date of the completed sale, regardless of the time when possession is taken."

Appellant cites and relies upon the construction placed upon the statute in *Mitchell* v. *Etter,* 22 Ark. 178. The ruling in that case had application to a tax sale and not to a judicial sale. It is apparent that this action was not barred by the five-year statute of limitations for the reason that the suit was brought within five years from the confirmation of the sale by the probate court.

(4-5) Again, it is insisted by appellant that appellees were barred by laches and estopped by their conduct from bringing this suit. In the case of *Tatum* v. *Arkansas Lumber Co.,* 103 Ark. 251, this court announced the doctrine that the character of delay which would bar an ac-

tion was "delay working to another's disadvantage, which may come from the loss of evidence, change of title, intervention of equities and other causes." And in the case of *Thompson* v. *Wilhite,* 131 Ark. 77, defined estoppel in pais as follows: "Estoppel in pais is conduct intended and calculated to induce and in fact inducing another person to alter his condition so that it would be a fraud on him to allow the person to take an inconsistent attitude to his detriment."

Upon conflicting evidence, the chancellor found that appellees were not guilty of laches or in any way, by their action, estopped from instituting this suit. Under the rules announced in the cases above cited, applicable to laches and estoppel in pais, it can not be said that the finding of the chancellor, to the effect that the appellees were neither estopped nor guilty of laches, was contrary to the weight of the evidence.

(6-7) Lastly, it is insisted by appellant that the court erred in ascertaining and decreeing $635.96 to appellees by way of damages for the detention of their property. The chancellor found that the rents and profits, for three years prior to the filing of the suit and up until the time of the rendition of the judgment, was $1,578.53, based upon an acreage in cultivation of seventy-four acres at a rental rate of $4 per acre. After a careful reading of the evidence, we think this finding fully sustained by the weight thereof. He also found that appellant had removed timber of the value of $167.48, which finding was likewise sustained by the weight of the evidence. As against the rents and profits, the chancellor allowed appellant an off-set of about $928 for improvements which had been made by him while he occupied the place under a certificate of purchase. Under the Betterment Act, an occupant can not claim for improvements made unless he has color of title. A certificate of purchase is not a color of title. Appellant did not get a color of title in this case until he received his deed on November 22, 1913. This error by the chancellor was favorable to appellant, because the value of the improvements allowed as an off-set amounted

to more than the taxes and money paid for the property to the administrator and expended by him in paying the indebtedness of said estate.

No prejudicial error appearing in the record, the decree is in all things affirmed as to the several interests of the appellees, now before the court, in the land in controversy and in the judgment rendered for damages for the detention thereof.

GRAY, TRUSTEE, *v.* MCGUIRE.

Opinion delivered October 6, 1919.

1. WILLS—CREATION OF ESTATE TAIL.—A will provided: "I devise and bequeath to my sister * * * all the remainder of the property of which I die seized and possessed, * * * the real estate to be held and enjoyed by her during the term of her natural life and at her death to go to and vest in the heirs of her body, share and share alike, in fee simple forever." *Held,* the effect of the language used was to vest in the devisee named a life estate, with remainder in fee simple to the children of said devisee.
2. RULE IN SHELLEY'S CASE—APPLICATION.—The rule in Shelley's case is only applicable when the language of the will or conveyance creates a limitation to the heirs of the devisee or grantee in general; if the limitation is to the bodily heirs or the heirs of the body of the grantee, then the rule in Shelley's case has no application.

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

S. M. Bone, for appellants.

Mrs. Mattie E. McGuire, under the rule in Shelley's case, acquired the fee simple title under the fourth clause of the will of Mrs. Laura Ewing. The language is plain and unambiguous, and evidence of the testator's intention not admissible nor competent to sustain a different meaning. 40 Cyc. 1433; Jones on Ev., p. 599, § 475; 40 Cyc. 1436. Mrs. McGuire took the fee simple estate. 58 Ark. 303; 129 *Id.* 155.

Samuel M. Casey, for appellee.

1. Only a life estate passed to Mrs. McGuire under the will Under the terms of Mrs. Ewing's will, the rule in Shelley's case does not take effect nor apply. 105 Md. 332; 66 Atl. 264; 104 Ark. 445; 40 Cyc. 1438.

2. The case should be affirmed under the rulings in 44 Ark. 458; 67 *Id.* 517; 94 *Id.* 615; 98 *Id.* 570; 128 *Id.* 149; 115 *Id.* 400; 116 *Id.* 233; 29 L. R. A. (N. S.) 947 and note.

HUMPHREYS, J. This suit was brought by appellee in the Jackson Chancery Court against appellants, to construe the will of Mrs. Laura C. Ewing, in which request the trustee in succession, in the last will of Mrs. Mattie E. McGuire, joined in his answer after service of summons had upon him. Proper service was obtained upon the minors, after which Claude Erwin was appointed guardian *ad litem* for them. As such guardian *ad litem,* he filed answer specifically denying each and every material allegation in the bill. The cause was heard upon the pleadings, the duly probated will of Mrs. Laura C. Ewing, the duly probated will of Mrs. Mattie E. McGuire, a deed from Mrs. Elizabeth Ewing Gray to all of her interest in the real estate in controversy to appellee, and the depositions of witnesses, from which the court found that, under the fourth clause of the last will and testament of Mrs. Laura C. Ewing, her sister, Mrs. Mattie E. McGuire, had only a life estate in the real estate devised to her, with remainder in fee simple to the heirs of her body, appellee and his sister, Mrs. Elizabeth Ewing Gray; that Mrs. Elizabeth Ewing Gray conveyed all her interest in the property to appellee and that the entire title rested in him and did not pass to the trustee in succession for the use and benefit of the minor defendants under the will of their grandmother, Mrs. Mattie E. McGuire. A decree was rendered in accordance with the findings of the chancellor, from which an appeal has been prosecuted to this court.

The minor defendants are the children of Mrs. Elizabeth Ewing Gray. Mrs. Elizabeth Ewing Gray and ap-

pellee, E. R. McGuire, are brother and sister, and the sole bodily heirs of Mrs. Mattie E. McGuire, who was an only sister and nearest relative of Mrs. Laura C. Ewing. In the will of Mrs. Mattie E. McGuire there was a clause devising all her real estate, not otherwise specifically devised, to Lyman F. Reeder, in trust for the minor defendants. Lyman F. Reeder resigned, and W. D. Gray was appointed trustee in succession under said will.

The contention of appellants is that Mrs. Mattie E. McGuire, under the rule in Shelley's case, acquired a fee simple title to the real estate in question, under the fourth clause of the will of Mrs. Laura C. Ewing. If that is true, the title passed to the trustee under the will of Mrs. Mattie E. McGuire. If Mrs. McGuire had only a life estate to said property, under the fourth clause of Mrs. Ewing's will, then the fee simple title passed to the appellee and his sister, and, having obtained a conveyance thereto from his sister, the entire title rests in him. The fourth clause of Mrs. Ewing's will is as follows:

"I devise and bequeath to my sister, Mattie E. McGuire, all the remainder of the property of which I die seized and possessed, the personal property to be held by her absolutely and the real estate to be held and enjoyed by her during the term of her natural life and at her death to go to and vest in the heirs of her body, share and share alike, in fee simple forever." The language clearly creates an estate in tail in appellee, the effect of which, under Kirby's Digest, section 735, was to vest in Mrs. McGuire a life estate, with remainder in fee simple to appellee and his sister, Mrs. Elizabeth Ewing Gray. It was held, in the case of *Watson* v. *Wolff-Goldman Realty Co.,* 95 Ark. 18, that "a conveyance to A and 'her bodily' heirs meant the same as to her and the heirs of her body;" and that "a conveyance unto A and unto her bodily heirs created a contingent remainder in the bodily heirs." The instant case does not fall, as contended by appellants, within the rule announced in *Hardage* v. *Stroope,* 58 Ark. 303, and *Henson* v. *Breeze,* 129 Ark. 155, in which cases the limitation was to the heirs generally,

but falls within the rule announced in *Horsley* v. *Hilburn,* 44 Ark. 458, and followed in *Wilmans* v. *Robinson,* 67 Ark. 517; *McDill* v. *Meyer,* 94 Ark. 615; *Watson* v. *Wolff-Goldman Realty Co.,* 95 Ark. 18; *Dempsey* v. *Davis,* 98 Ark. 570; *Gist* v. *Pettus,* 115 Ark. 400; *Rogers* v. *Ogburn,* 116 Ark. 233; and *Georgia State Savings Assn.* v. *Dearing,* 128 Ark. 149, in which class of cases the limitation was to the bodily heirs of the grantee. The rule in Shelley's case is only applicable when the language of the will or conveyance creates a limitation to the heirs of the devisee or grantee in general. If the limitation is to the bodily heirs or the heirs of the body of the grantee, then the rule in Shelley's case has no application.

The construction placed upon the fourth clause of Mrs. Ewing's will by the chancellor being correct, the decree is affirmed.

DYER TRADING COMPANY *v.* JAMES.

Opinion delivered October 13, 1919.

STIPULATIONS—MONEY IMPROPERLY TAKEN BY PARTY TO AN AGREEMENT.—The ownership of a certain fund was in dispute. By agreement of the parties it was put in a bank for safe keeping pending the outcome of the case. Appellant, one of the claimants to the fund, violated the agreement, and procured the funds upon order of a justice. *Held,* appellee, another claimant, and one of the parties to the suit, had an action against appellant for a restitution of the fund.

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

Starbird & Starbird, for appellant.

The complaint stated no cause of action nor did the agreed state of facts prove one. The money did not belong to James and Moss or either of them. The title to the property was in P. Moss and the possession was that of the law. Obtaining it by order of court or otherwise was no violation of appellee's rights or possession and no cause of action could arise. 38 Ark. 528; 4 Cyc.

653. Appellee's only remedy was to obtain an order of restitution and enforce it by contempt proceedings or obtain a judgment of restitution. 101 Ark. 416; 57 *Id.* 500; 117 *Id.* 492; 119 *Id.* 413.

E. D. Chastain and *J. E. London,* for appellees.

1. The cases cited by appellant do not apply. Money wrongfully paid may be recovered by the owner. 101 Ark. 350. Where one has in his possession money belonging to another, the law implies an agreement to pay it over on demand. 110 Ark. 578. Contempt proceedings would have been futile, as the answer would be that the specific fund had long been spent and no part of it still in possession of appellant. 129 Ark. 416, syl. 5.

2. The verdict will not be disturbed when supported by substantial evidence. 129 *Id.* 369. The finding is conclusive on appeal. 101 *Id.* 154. The proof shows that the moneys belonged to appellees, and that their attachments took precedence over that of appellant, and the court so found, which is conclusive. *Supra.*

McCULLOCH, C. J. Appellees, T. J. James and Mrs. J. W. Moss, instituted separate actions before a justice of the peace in Crawford County against appellant, Dyer Trading Company, a domestic corporation, to recover certain sums of money, and on recovery in that court separate appeals to the circuit court were prosecuted by appellant. In the circuit court the causes were consolidated and tried before the court, and judgment was rendered in favor of appellees.

The record discloses the following state of facts, as found by the trial court: James instituted an action before a justice of the peace in Crawford County against one Moss for the recovery of the amount of a debt due by contract, and sued out an order of attachment which was levied by the constable of the township on two bales of cotton, on which Mrs. Moss, one of the appellees in the present action, claimed a lien as landlord. Two days later appellant also sued Morse before a justice of the peace to recover for debt, and sued out an order of at-

tachment, which was placed in the hands of the same officer and levied on the two bales of cotton already in his custody under the attachment issued at the instance of James. Mrs. Morse intervened, claiming her lien, in appellant's action against Morse, but the justice of the peace decided the case against her and she appealed to the circuit court. Mrs. Moss also intervened in James' action against Morse, and the justice of the peace decided the case against James, and he prosecuted an appeal to the circuit court, where both actions were consolidated, and on the trial of the consolidated cases the circuit court decided in favor of James and Mrs. Moss, and rendered judgment declaring that Mrs. Moss had a superior lien on the attached property for the amount of her claim of $40; that James had a second lien on the same property for the sum of $84.94; and that appellant had a third lien on the property for its claim of $160, and ordered the constable to pay said claims out of the proceeds of the attached property in the order of priority. While those cases were pending before the justice of the peace, the parties entered into an agreement that the attached property should be sold and the money deposited by the constable in a local bank to remain there until the cases were finally disposed of.

It is alleged in the present action that appellant violated that agreement by obtaining from the justice of the peace after rendition of the judgment there, and before appeals were perfected in the circuit court, an order on the constable for the proceeds of the sale of the attached property and obtaining the money from the bank. The constable refused to pay over the money to appellees in compliance with the order of the circuit court in the original actions, and the court refused to render judgment against him for failure to do so. The grounds of the court's ruling in refusing to do that are not stated in the record in the present case, but the action of the court was presumably based on the theory that the constable was not liable because the funds had been paid over to appellant on the order of the justice of the peace and was

no longer in the officer's custody and control, having been placed in the bank pursuant to agreement of the parties.

The contention of counsel for appellant on the present appeal is that no cause of action is now stated against appellant for the reason that appellees were not the owners of the specific funds, but merely had a lien on the proceeds of the attached cotton as adjudged by the circuit court, and that the exclusive remedy of appellees for the recovery of the money was by obtaining an order of the court for the restitution of the funds received as aforesaid by appellant. Appellant was a party to the original actions, and, conceding that the court might have made an order of restitution enforceable, if necessary, by contempt proceedings, that was not the exclusive remedy available to appellees. *Dodson* v. *Butler,* 101 Ark. 416. The funds were originally in the custody of the court, but, according to the testimony, the same were by agreement of the parties taken out of the custody of the court and placed in a bank for safe keeping, and appellant violated that agreement by taking the money out of the bank. On the failure of appellees to procure the money from the constable there arose against appellant a right of action for the restitution of the funds so taken.

Judgment affirmed.

HARRISON v. ABINGTON.

Opinion delivered October 13, 1919.

1. STATUTES—CONSTRUCTION—ERROR WILL BE TREATED AS CLERICAL, WHEN.—If, in the construction of a statute, from the language thereof taken as a whole the court can discover the legislative intent, the court will disregard an error appearing therein, and will treat the same as a mere clerical error.
2. IMPROVEMENT DISTRICTS — DESCRIPTION OF ROAD — POINT OF BEGINNING—ERROR.—A statute, creating a road district in White County, described the same as beginning at "Pope Mill Bridge over Cypress Creek on the line between White and Lonoke counties," and in section 26 it appeared that there was only one bridge across Cypress Creek in that township, which was in section 28. *Held,* under all the facts the recital that the bridge was in sec-

tion 26 was a mere clerical mistake, and that the statute was not invalid for a mere misdecription.

3. ROADS AND ROAD DISTRICTS—ROUTE—VALIDITY OF STATUTE.—The statute creating a road district is not invalid because it did not specifically describe the route to be followed, but provided, with certain instructions, that the route be selected by the commissioners, the boundary of the district being dependent upon the selection of the route.

4. ROADS AND ROAD DISTRICTS—LANDS TO BE BENEFITED—CONFLICT IN SECTIONS OF THE STATUTE.—A statute organizing a road district, after designating the northern terminus of the road as at the boundary between A. and C. townships, section 1 of the act provided that no lands in C. township should be included in the district; in section 6 it provided that if the commissioners find that "lands not within the boundary of the district as hereinbefore laid out shall be benefited by the improvement," that they shall assess the benefits on such lands; *held,* the two sections of the statute were not in conflict, and under no circumstances were lands in C. township to be included in the district.

5. IMPROVEMENT DISTRICTS — SAME LAND IN SEVERAL DISTRICTS.—The same land may be included in several improvement districts.

6. SAME—EXCESSIVE BURDEN.—The inclusion of the same land in two improvement districts does not of itself constitute the imposition of an unlawful burden, and it cannot be said that a confiscatory burden is so placed until the amount of the assessment is known.

7. IMPROVEMENT DISTRICTS — PLACE FOR HEARING COMPLAINTS OF PROPERTY OWNERS.—A statute creating a road improvement district is not invalid because it authorizes the commissioners to fix a place other than the county seat for the purpose of hearing the complaints of property owners.

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

Eugene Cypert, for appellants.

The special act is invalid for want of proper notice in accordance with section 24, article 5, Constitution of 1874, and because indefinite with respect to the commencement of the road and uncertainty as to boundaries of the district and the lands included. The act is indivisible, and its conflicting clauses render it void. 34 Ark. 224. It is arbitrary and discriminatory. 130 Ark. 70; 83 *Id.* 54; 113 *Id.* 566; 120 *Id.* 230; 122 *Id.* 491; 105 *Id.*

380; 74 N. Y. 183; 30 Am. Rep. 289; 128 N. Y. 190; 2 Ballard on Real Estate, 352; 1 Black on Judgments, 221-226.

Pace, Campbell & Davis, for appellees.

1. The act is valid. Proper notice was given. 87 Ark. 8.

2. There is no uncertainty as to the lands nor their description, and the Legislature had the power to delegate to the commissioners the powers to determine the boundaries of the district. 125 U. S. 355.

3. The jurisdiction of the county court is not invaded. *Sallee* v. *Dalton,* 138 Ark. 549; 213 S. W. 762; *Ib.* 767.

4. Mere clerical errors in a bill of description do not render the act invalid. 113 N. E. 831; 44 W. Va. 315; 98 Kan. 46; 170 Pac. 399; 165 *Id.* 835; 172 S. W. 677; 136 Ark. 524.

5. The act is not void for ambiguity, nor indefiniteness or uncertainty. The intention of the Legislature is clear and the description of the road and boundaries sufficiently definite and certain. Cases *supra;* 213 S. W. 767.

6. Lands in one district may also be included in another and larger district. 123 Ark. 13; 103 *Id.* 452; 213 S. W. 773; *VanDyke* v. *Mack,* 139 Ark. 524.

7. Due notice was given and published. The Legislature is the sole judge of the mode of notice. Hamilton Law of Special Assessments, § 141; 1 Page & Jones on Taxation, etc., § 121; 74 N. Y. 183.

McCULLOCH, C. J. This case involves an attack on the validity of a special statute enacted by the General Assembly of 1919 at the regular session creating a road improvement district to be known as the "Beebe, Antioch and Lonoke Road Improvement District" in White County, Arkansas. Acts of 1919, page 2437. Appellants are the owners of real property in the district and seek to restrain the proceedings under that statute. The chancery court sustained a demurrer to the complaint and entered a decree dismissing it for want of equity.

Two of the grounds for attack on the validity of the statute are that notice of introduction of the bill for this statute was not given in accordance with section 24, article 5, of the Constitution, and that the statute is violative of the provision of the Constitution (section 24, article 5), that "where a general law can be made applicable, no special law shall be enacted." Those questions have been decided by this court against the contention of appellants so many times that the law on that subject must be treated as settled.

It is next contended that the act is indefinite and void with respect to the point of commencement of the road to be improved. The language of the complaint on this subject reads as follows:

"They further charge that said act is indefinite, uncertain and conflicting, because it provides that said road to be improved by said board of commissioners, shall begin at 'Pope Mill Bridge' over Cypress Creek, on the line between White and Lonoke counties, in section 26, township 5 north, range 8 west, when in fact the only bridge across Cypress Creek in said township and range is in section 28, two miles from place mentioned in said act; that Cypress Creek runs through section 26 in said township and that Pope Mill Bridge in section 28 is a well known bridge on a public road."

That part of the statute which describes the road and prescribes the boundaries of the district reads as follows:

"A road running from Pope Mill Bridge over Cypress Creek on the Lonoke County line in section twenty-six (26), township five (5) north, range eight (8) west, and running northwesterly through the town of Beebe, on streets to be selected by the commissioners and to and through the town of Antioch, on the route which the commissioners may choose, to the north line of Antioch township; and said district shall embrace all quarter sections of land, any part of which is within three and one-half miles of the road as laid out by the commissioners, except that it shall include no lands in Coffey Township."

(1-2) The objection to the validity of the statute in this respect is clearly stated in the charge that there was a legislative mistake in describing the commencement of the road at the bridge mentioned and reciting it to be located in section 26, whereas the only bridge so named answering to that description is situated in section 28, two miles distant, and that this inaccuracy renders the statute void. There is, according to the language of the complaint, which we must accept as true for the purpose of testing the correctness of the court's ruling on the demurrer, an error in describing "Pope Mill Bridge over Cypress Creek on the line between White and Lonoke counties" as being in section 26, but it does not follow that this legislative mistake renders the description void, for if we can, from the language of the statute taken as a whole, discover the legislative intent, it is our duty to disregard the error, treating it as a mere clerical one. We learn from the language of the complaint that Pope Mill Bridge over Cypress Creek is a very well known bridge on a public road; that it is in section 28, and that it is the only bridge across Cypress Creek in that township. We take judicial cognizance of the fact that Cypress Creek runs through both of those sections, and that it is the boundary line between Lonoke and White Counties. It is clear, therefore, from the language of the statute, and considering it in the light of the facts recited in the complaint, that the Legislature meant for the road to begin at this bridge and that the description of the particular section was a clerical mistake. We should, therefore, disregard that mistake and accept the other language which accurately indicates the legislative will. In this view of the matter we think we are fully sustained by the decisions of this court in the following cases: *Heinemann* v. *Sweatt,* 130 Ark. 70; *Dorsey Land & Lumber Co.* v. *Board of Directors of Garland Levee District,* 136 Ark. 524.

(3) It is insisted in the same connection that the act is void for uncertainty because it fails to designate the particular bounds of the district and leaves it to the com-

missioners to determine the boundaries by selecting the route of a portion of the road, and that this is an improper delegation of authority to the commissioners. It will be noticed that the statute does, in fact, authorize the commissioners to select the route of a portion of the road, the point of commencement and a general outline of the route being given in the statute, and that the district shall embrace "all quarter sections of land any part of which is within three and one-half miles of the road as laid out by the commissioners." In other words, it provides for the improvement of a road which commences at Pope Mill Bridge and runs to and through the town of Beebe and thence to the town of Antioch, and thence to the north line of Antioch Township.. The town or village of Antioch is in Antioch Township, which is north of Beebe, and Coffey Township is the adjoining township on the north of Antioch Township. The boundary line between Antioch Township and Coffey Township is made the northern terminus of the road, and the commissioners are given the authority to select the route from the town of Antioch to that terminus, but the statute in express words excludes from the boundaries of the district lands lying in Coffey Township. In the recent case of *Van Dyke* v. *Mack,* 139 Ark. 524, 214 S. W. 23, we had under consideration a special statute creating a road improvement district which contained substantially the same provision with respect to laying out the route of the road to be improved, and including all lands within a certain distance of that route when selected by the commissioners. We upheld the statute. The decisions of this court in *Nall* v. *Kelley,* 120 Ark. 277, and *Conway* v. *Miller County Highway & Bridge District,* 125 Ark. 325, also sustains this view. In those cases we drew a distinction between statutes which fixed the assessment regardless of the selection of the route, whilst authorizing the commissioners to make a selection, and those statutes which authorize such selection by the commissioners, but provide for the actual assessment of benefits derived from a road along the route so selected. We think there is no valid objection

to the exercise of legislative power in that way. It does not constitute a delegation of legislative authority.

The contention that the statute deprived the county court of its jurisdiction has been adversely decided by this court in the recent case of *Sallee* v. *Dalton,* 138 Ark. 549, 213 S. W. 762, the statute being identical with respect to the selection of a new route where there is no established public road. The statute in this case, as in the case just cited, provides for an order of the county court laying off a road along the route selected.

The next ground of attack is that there is an irreconcilable conflict between sections 1 and 6 of this statute which renders it void in that section 1 expressly excludes the lands in Coffey Township whilst section 6 contains a provision that the commissioners shall, if they find that "lands not within the boundaries of the district as hereinbefore laid out shall be benefited by the improvement," assess the benefits on such lands and make return thereof. The contention is that section 1 excludes lands in Coffey Township, but that section 6, with equal certainty, authorizes the assessment of benefits thereon, and that this makes an irreconcilable conflict which vitiates the whole statute. We do not think that there is any irreconcilable conflict between those sections, when they are read and considered together. The proper interpretation of section 1, according to the views of a majority of the judges, is that the lands in Coffey Township are absolutely excluded from the operation of the statute—that the boundaries between the two townships mentioned in that section marks the line between the lands to be affected and those not to be affected. The terminus of the road is to be at that line, and no lands beyond it are affected by the statute at all. Now, when the language of section 6 is considered in connection with this, it is clear that the Legislature meant to authorize the assessment of benefits outside of the boundaries of the district which may be found to receive benefits from the improvement, not taking into consideration those lands which have already been in plain words excluded.

The language of section 1 constitutes a legislative determination that the lands in Coffey Township will not be benefited, and it can not be presumed that the Legislature meant to authorize an assessment on those lands or to authorize the board of improvement to inquire whether or not those lands will in fact be benefited. The doctrine announced by this court in *Van Dyke* v. *Mack, supra,* is decisive of this question. The only difference between the cases being that in the case cited the lands excluded from the operation of the statute were situated in another county, although within the five-mile limit prescribed by the statute. We held that the manifest purpose of the Legislature was to include only lands in the county named and that lands in another county, even though within the prescribed limit of five miles, were not intended to be included. We think that by the same rule of interpretation it should be held that the Legislature has in the present statute determined that lands in Coffey Township are not to be considered for any purpose in carrying out the provisions of the statute. The decision in the case just cited, as well as the case of *Cumnock* v. *Alexander,* 139 Ark. 153, 213 S. W. 767, are decisive of the question that it is not an abuse of legislative power to exclude from the assessment of benefits lands lying in Lonoke County beyond the southern terminus of the road to be improved and the lands in Coffey Township beyond the northern terminus of the road.

(6) Another ground of attack is that lands of appellant within this district are also included in another road improvement district previously organized under another statute, and that those lands will be again assessed for this district, and "the increased burden placed on said lands would be far in excess of the amount that said lands should bear or that the law contemplates and to that extent is confiscatory." We have decided in several cases that the same land may be included in several improvement districts. *Lee Wilson & Co.* v. *Compton Bond & Mortgage Company,* 103 Ark. 452; *Keystone Drainage District* v. *Drainage District No.* 16, 121 Ark. 13; *Reitz-*

ammer v. *Desha Road Improvement District No.* 2, 139 Ark. 168, 213 S. W. 773; *Van Dyke* v. *Mack, supra.*

The language of the complaint is defective in stating merely a conclusion, rather than stating facts which would justify the charge that the organization of this district will necessarily prove confiscatory of the lands of these parties. *Moore* v. *Board of Directors of Long Prairie Levee District,* 98 Ark. 113. In the case just cited the court dealt with an attack upon a statute creating an improvement district and fixing the amount of the assessment, which constituted a legislative determination of the extent and value of the benefits to accrue from the construction of the improvement, and in that respect the case was different from the one now under consideration; but the principle is applicable for the reason that in the present case it is not alleged that any assessments at all have been made pursuant to the present statute, and the allegations of the complaint constitutes a conclusion, without facts stated to support it, that the inclusion of the lands in another road improvement district would necessarily prove to be burdensome and confiscatory.

The language of this charge carries it own weakness on the very face of it because the mere inclusion of lands in two districts does not of itself, as we have held, constitute the imposition of an unlawful burden, and until the amount of the assessments are known it can not be said that there is any confiscatory burden placed on it by this statute, which provides for an actual assessment of benefits by a board of assessors and an equalization of those assessments upon a hearing given to all property owners after due notice. This provision for notice of the filing of the assessment list in the county clerk's office, and fixing the time and place for a hearing of the complaints made by property owners, answers all of the objections made by counsel for appellants with respect to the feature of the act authorizing the commissioners to fix the boundaries of the district by a selection of the route and levying as-

sessments on lands outside of those boundaries when it will be found that the same would be benefited by the improvement.

(7) We see no grounds for the attack on the statute because it authorizes the commissioners to fix a place other than the county site for the purpose of hearing the complaints of property owners. In fact, the statute itself fixes the town of Beebe as the place for hearing complaints, and no reason is stated in the brief why it is beyond the power of the Legislature to select the place or to authorize the board of commissioners to select the place. Nor is there any foundation for the charge that the statute, in creating the district and vesting the powers hereinbefore enumerated in the board of commissioners, has undertaken to create a tribunal with judicial powers. Such an improvement district is a governmental agency, and the functions of the commissioners are administrative, and not judicial.

Our conclusion is that all of the attacks made on this statute in the present action are unfounded, and the decree of the chancery court sustaining the demurrer and dismissing the complaint is therefore affirmed.

WOOD and HART, JJ., dissent.

LEWELLING v. MANUFACTURING WOOD WORKERS UNDERWRITERS.

Opinion delivered October 13, 1919.

1. INSURANCE—EXCHANGE OF CONTRACTS.—Under the act of 1915, p. 610, individuals, partnerships and corporations of this State, are authorized to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships and corporations of other States.
2. INSURANCE — INSURANCE ASSOCIATION—DESIGNATION OF NAME—SERVICE.—Act 152, Acts 1915, authorizing certain insurance associations to do business in the State, designated a name under which such association should do business and provided the person upon whom service should be had in all suits involving the validity of policies of insurance and contracts of the association.

3. INSURANCE ASSOCIATIONS — ACTION AGAINST — NAME.—Although Act 152, Acts 1915, does not, in express terms, provide that suit shall be brought against the insurance association under its associate name, but such is the effect of the statute when all of its parts are read in the light of each other.
4. INSURANCE—CONTROL BY STATE.—The State, in the exercise of its police power, may fully and completely regulate the business of insurance; and it may prescribe the conditions under which persons or corporations outside the State may exchange insurance with persons or corporations within the State.

Appeal from Howard Circuit Court; *James S. Steel,* Judge; reversed.

James S. McConnell, Mann & Mann and *Hughes & Hughes,* for appellants.

1. The court erred in quashing the service and dismissing the complaint. The concern was properly sued in its own name, Manufacturing Wood Workers Underwriters. Acts 1915, p. 610. It was a voluntary association without incorporation, but upon methods and forms used by incorporated bodies for the prosecution of a common enterprise. 5 C. J. 1333; 96 Miss. 720; 24 L. R. A. 298.

2. An unincorporated association can not, in the absence of statute, be sued in the company name, but statutory authority may be implied and it need not be expressed. 30 Cyc. 102; 235 Fed. 1; 191 App. Cases 426; 30 Cyc. 102.

3. The act itself, 1915, p. 610, makes the concern suable as a legal entity. The act requires and permits the subscribers to select a name, and when so selected may contract and be bound by that name. Here they are bound by the name selected.

4. The attorney in fact was a proper party defendant and was so named in the amended complaint and properly served with process. 105 Ark. 307; 43 L. R. A. (N. S.) 527; 94 Ark. 277. The intention of the act and of the documents in evidence is that the underwriters may be sued as an association, but if not the attorney in fact was a proper defendant, and it was error to dismiss the cause.

Mann, Bussey & Mann, also for appellants.

Kinsworthy, Henderson & Kinsworthy and *Zane, Morse & McKinney, amici curiae.*

1. The question here is one arising out of reciprocal or inter-insurance. 96 Mass. 725, 778.

The act of 1915, p. 610, was not passed to create corporations or associations, but it is recognized that a class of contracts theretofore known and existing is brought under State regulation and is intended to authorize Arkansas corporations to make such contracts, but not to enable a corporation to become a member of an insurance association but to enable corporations to exchange inter-insurance contracts with other persons, firms and corporations and to provide regulations by and revenue to the State. This is plain from its title. Service must be had upon the subscribers as individuals, and they are liable. The service was properly quashed, and suit dismissed. 57 Vt. 358; 11 S. W. 12; 53 S. W. 267; 76 *Id.* 931; 34 Ark. 144; 56 *Id.* 166; 94 *Id.* 277; 105 *Id.* 300-306. See also 50 S. E. 978; 73 Ga. 474; 33 So. Rep. 343; 30 Cyc. 98, 99, 100.

An unincorporated association can not be sued by name. 76 S. W. 931; 64 Iowa 220; 73 Ga. 474; 33 So. Rep. 343; 50 S. E. 887; 2 L. R. A. (N. S.) 788; 192 Mass. 572; 116 Am. St. Rep. 272-289. The suit was a nullity. *Supra.*

2. As the suit was a nullity, the complaint could not be amended. 31 Cyc. 487; 34 Ark. 144; 56 *Id.* 166; 105 *Id.* 300-306; 94 *Id.* 277. See also 73 Ga. 474; 33 So. 343; 11 S. W. 12; 76 *Id.* 931.

3. The subscribers were not even an unincorporated association under the act of 1915, which can be sued as such. Cases *supra.* The subscribers are only liable as individuals, if at all. 30 Cyc. 98 to 100; 76 S. W. 931; 60 S. E. 724; 147 N. C. 103; 7 Ga. App. 305; 52 Am. Rep. 436; 53 S. W. 267.

The rule is well settled in this State that no action lies against an unincorporated association in the absence

of express legislative authority. 94 Ark. 277; 34 *Id.* 144. See also 2 L. R. A. (N. S.) 788; 75 N. E. 887; 116 Am. St. Rep. 272; 30 Cyc. 102; 31 Cyc. 487.

4. The action brought was forbidden by the policy. 56 L. R. A. 193; 62 N. J. Law 16; 39 N. Y. Supp. 585; 233 Ill. 487-497.

5. As to the liability of subscribers, see 91 Fed. 677; 48 N. Y. Supp. 239; 218 N. Y. 29; 1 Q. B. 135; 29 Mich. 254; 80 N. W. 726; 19 N. H. 560; 158 U. S. 356.

The original complaint was a nullity and unamendable, and the judgment should be affirmed.

STATEMENT OF FACTS.

On December 14, 1918, P. J. Lewelling and Vernon Price-Williams, a partnership, brought suit in the circuit court to recover on a fire insurance policy issued by the Manufacturing Wood Workers Underwriters alleged to be organized under a statute and empowered to issue policies of fire insurance to the members thereof. On April 23, 1918, said association issued a policy of insurance to Allen Lumber & Box Company, insuring it against loss or damage by fire in respect to certain sawmill property in Howard County, Arkansas, belonging to said company in the sum of $35,000. The plaintiffs bought the property, and the Allen Lumber & Box Company assigned the policy to them with the consent of the association. Subsequently the property insured was almost entirely destroyed by fire, the loss amounting to $24,900. Notice and proof of loss were made according to the terms of the policy, and although more than ninety days elapsed the said association failed to pay the amount of the loss to the plaintiffs. Hence this lawsuit.

A summons was issued against the Manufacturing Wood Workers Underwriters, which was served on the Insurance Commissioner of the State of Arkansas on the 21st day of December, 1918.

A. J. Neimeyer Lumber Company, a domestic corporation doing a lumber business at Little Rock, Arkansas, appeared in the suit solely for the purpose of moving to dismiss it for want of a party defendant. The

court sustained the motion and dismissed the complaint of the plaintiffs. The plaintiffs have appealed.

HART, J., (after stating the facts). (1) The Legislature of 1915 passed an act authorizing individuals, partnerships and corporations of this State to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships, and corporations of other States. Acts of 1915, page 610.

The only issue raised by the appeal is whether or not, in a suit to recover on a fire insurance policy, the subscriber may sue the association in its associated name. A voluntary association, being only a collection of individuals, could not, at common law, sue or be sued by its associated name, and, in the absence of an enabling act, suits against such associations should be brought against individual members. 4 Cyc. 312-313, and 5 C. J. 1369.

It is the contention of counsel for the plaintiffs that the statute under which the association was permitted to make insurance contracts in this case provides, in effect, that the association should be sued in its society or company name. The act in question is act 152 of the General Assembly of 1915, entitled An act authorizing and regulating certain classes of indemnity contracts empowering corporations to make such contracts and fixing certain fees and the penalty for violation thereof.

Section 1 authorizes the exchange of inter-insurance contracts of individuals, partnerships, and corporations.

Section 2 provides that such contracts may be executed by duly authorized and designated attorneys, and that the office where such contracts are issued shall be located as designated in the power of attorney.

Section 3 provides that the subscribers so contracting among themselves shall file with the Insurance Commissioner certain declarations, through their attorney, which shall be verified under his oath.

Section 4 is as follows: "Concurrently with the filing of the declaration provided for by the terms of section 3 hereof, the attorney shall file with the Insurance Commissioner an instrument in writing executed by him

for said subscribers, conditioned that, upon the issuance of certificate of authority provided for in section 10 hereof, service of process may be had upon the Insurance Commissioner in all suits in this State arising out of such policies, contracts, or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorney. Three copies of such process shall be served, and the Insurance Commissioner shall file one copy, forward one copy to said attorney, and return one copy with his admission of service."

Section 5 provides that the attorney shall file with the Insurance Commissioner a statement showing the maximum amount of indemnity upon any single risk and information as to the commercial rating of the subscribers.

Section 6 provides for a reserve sum for the payment of losses.

(2-3) It will be noted that section 4 of the act provides for service of process upon the Insurance Commissioner in all suits in this State arising out of policies issued by the association. The object of the present suit was to establish the liability of the association upon the policy sued on which was issued by the association. It is true the act does not, in express terms, provide that suit shall be brought against the association under its associated name, but such is, we think, the effect of the statute when all its parts are read in the light of each other. It would be a vain and idle thing to provide that service of process should be had upon the Insurance Commissioner in all suits in this State arising out of such policies and contracts, and that such service should be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through the attorney in fact if the plaintiffs had to resort to the common law method of procedure as to the parties to the suit. In other words, it would be useless to provide that suits should be brought against each subscriber in his individual name and that service might be had upon the Insurance Commissioner.

Section 2 provides for the execution of the contracts by the attorney who acts for the subscribers and that the office where such contracts are issued shall be located as designated in the power of attorney. The power of attorney recites that Lee Blakemore, Incorporated, is attorney in fact for subscribers at Manufacturing Wood Workers Underwriters of the city of Chicago. The record also shows that the Manufacturing Wood Workers Underwriters is located at 1518 McCormick building, city of Chicago, State of Illinois. The insurance purports to be issued by the Manufacturing Wood Workers Underwriters. It is true Lee Blakemore testified that Lee Blakemore, Incorporated, is attorney in fact for subscribers at Manufacturing Wood Workers Underwriters and that the Manufacturing Wood Workers Underwriters is the name or title of the office at which such subscribers proposed to exchange indemnity contracts, but when the whole record is considered we think that the Manufacturing Wood Workers Underwriters was the name under which the voluntary unincorporated association acted. In other words, the power of attorney not only designated the building, street number, and city in which the office of the association was situated, but it also designated the name under which such association made its contracts. Therefore, we are of the opinion that, when all the provisions of the statute are considered, it meant to designate a name under which the association should do business and to provide the person upon whom service should be had in all suits involving the validity of policies of insurance and contracts of the association.

Counsel who have filed a brief as *amici curiae* claim that this construction of the statute is shown to be wrong by a provision of the policy. The clause is as follows:

"In the event of litigation herein, to avoid a multiplicity of suits, no suits or other proceedings at law or in equity shall in any event be begun or maintained for the recovery of any claim upon, or by virtue of, this policy against more than one of the underwriters hereon at any time, nor in any court other than the highest court of

original jurisdiction; and that final decision in such suit, or other proceedings, shall be taken to be decisive of the similar claim, so far as the same may subsist, against each of the other underwriters hereon, absolutely fixing his liability in the premises, each of the underwriters hereon, in consideration of this entire stipulation, so far as he individually is or may be concerned, expressly agrees to accept and abide by the result of such final decision in the same manner and to the same effect as if he had been sole defendant in a similar suit or proceeding as to the similar claim against him, so far as the same may subsist, save and except, however, as to the matter of costs and disbursements."

In the first place, it may be said that the subscribers could not abrogate the statute by any provisions inserted in their policy. So at most this could be said to be only an additional remedy afforded the subscribers. We think, however, the object of this clause was to provide the method for a subscriber suing on a policy to enforce the proportionate liability against his fellow-subscribers in the event that the reserve fund on deposit was not sufficient to pay the loss. In such a case the policy holder might sue an individual subscriber for his proportionate part of such sum as would be necessary to pay the loss, the liability of each subscriber being individual and not joint. The Legislature has provided the method by which voluntary unincorporated associations may do business and the kinds of business they may do. It has provided for a reserve fund which the association may collect from its subscribers and for an attorney-in-fact who shall conduct the business of the association. The Legislature has complete control over the remedies which it gives the subscribers of such associations. It provides in express terms for the service of process in all suits arising out of policies upon the Insurance Commissioner, and by necessary inference we think provides for a name under which the association may do business and under which it may bring or defend suits which are brought against it. It

adopted such a name, and the policy sued on was issued under that name.

It follows that the court erred in quashing the service of summons and in dismissing the complaint. For that error the judgment must be reversed, and the cause will be remanded for further proceedings according to law.

HART, J., (on rehearing). It is earnestly insisted by counsel in their brief on the motion for a rehearing that the opinion is in conflict with the case of *Schiele* v. *Dillard,* 94 Ark. 277, and other cases of like character which hold that, while the court may in its discretion allow additional parties plaintiff or defendant to be added, it can not make an entire change of parties, as that would be tantamount to a new suit between different parties. When the suit was first commenced, it was alleged in the complaint that the defendant was a corporation. It turned out that such was not the fact, but that it was a voluntary unincorporated association. The plaintiff asked permission to amend, and it is now insisted that the effect of such an amendment to the complaint would be to overrule the decisions referred to above. We do not think so. The plaintiff in his original complaint made a misnomer of the defendant. The only effect of the amendment would be to correct that mistake, and process should then be issued and directed to the defendant in its correct name. Of course, this process would then be served upon the defendant and form a new point for the commencement of the suit against it. Therefore, in our original opinion, we proceeded at once to what we considered the real issue in the case, and that was whether or not the statute in express terms, or by necessary implication, prescribes that in suits of this sort the association may sue or be sued in its associated name. While the statute does not prescribe in express terms that suits shall be prosecuted for and against the association in its associated name, it does do so by necessary implication.

Section two provides the name of the office at which indemnity contracts shall be issued, and that the name

shall not be similar to any other name previously adopted by similar organizations. It provides for the officer who shall execute such contracts in behalf of the association. It further provides that there shall also be filed with the insurance commissioner a copy of the form of policy by which such insurance is about to be effected or exchanged.

Section four provides that the attorney for the association shall file with the insurance commissioner an instrument in writing executed by him for the subscribers, conditioned that upon the issuance of a certificate of authority to do business in the State service of process may be had upon the insurance commissioner in all suits in this State arising out of such policies.

It would be a vain and useless thing to make all these provisions in the statute unless the Legislature intended that the corporation should sue or be sued in its associated name. If it had been intended that the association should be governed by the common law rule regulating voluntary unincorporated associations, there would have been no necessity for the provision of a name and place where the association would issue its contracts nor for that provision providing for service upon the insurance commissioner in all suits in this State arising out of policies issued by the association. The certificate of insurance sued on was issued in the name of the Manufacturing Wood Workers Underwriters. The association has complied with the statute and has held itself out and conducted its business with subscribers in this State under that name. This shows that the association in practice put the same construction upon the statute that we have. It is now insisted that such a construction of the statute renders it unconstitutional, and that it is an infringement upon the freedom to contract which the 14th Amendment of the Constitution of the United States guarantees They rely upon the case of *Allgeyer* v. *Louisiana,* 165 U. S. 578.

In the case of *New York Life Ins. Co.* v. *Dodge,* 246 U. S. 357, the court said: "In *Allgeyer* v. *Louisiana, supra,* we held a Louisiana statute invalid which under-

took to restrict the right of a citizen while within that State to place insurance upon property located there by contract made and to be performed beyond its borders. We said: 'The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it,' and ruled that under the 14th Amendment the right to contract outside for insurance on property within a State is one which can not be taken away by State legislation. So to contract is a part of the liberty guaranteed to every citizen. The doctrine of this case has been often reaffirmed, and must be accepted as established.''

(4) We do not think the principles there announced have any application whatever to the facts of the case at bar. That the State in the exercise of its police power may fully and completely regulate the business of insurance has been repeatedly settled both by decisions of this court and of the Supreme Court of the United States. The principle was recognized by the Supreme Court of the United States in the case last cited. The statute in question does not attempt to forbid or penalize the making of contracts of insurance outside of the State to be performed outside of the State upon property within the State. It only prescribes the conditions under which persons or corporations outside of the State may exchange insurance with persons or corporations within the State, and this was a valid exercise of police power by the Legislature and does not in any wise interfere with their freedom to contract. It only regulates their method of doing business in the State.

It follows that the original opinion will prevail, and the motion for a rehearing will be denied.

PEKIN COOPERAGE COMPANY v. DUTY.

Opinion delivered October 13, 1919.

1. FOREIGN CORPORATIONS—REGULATION, LIMITATION, AND LIABILITY.—Under § 11, art. 12, of the Constitution of 1874, the regulations, limitations and liabilities imposed upon domestic corporations constitute the measure of the liabilities of foreign corporations.
2. SAME—LOCAL OR COUNTY RESIDENCE.—The statutes of this State allowing foreign corporations to do business in this State, and permitting them, after complying with the statute, to sue and to be sued in the courts of this State, does not confer a local or county residence upon them.
3. SAME—SERVICE UPON.—An action may be brought in Independence County against a foreign corporation for damages for personal injuries occurring at defendant's plant in Pike County, and service is valid which is had upon the agent of defendant company at its place of business in Pike County.
4. SAME—SERVICE UPON—VALIDITY OF ACT.—Section 834 of Kirby's Digest, providing for service of summons upon foreign corporations, *held* valid.
5. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCE—COMPLAINT—PROMISE TO REPAIR.—A servant does not assume the risk of danger from a defect in machinery, when he has complained of it and relies upon the express promise of the master to repair the defect, unless the danger from continuing at work is so imminent or obvious, that no prudent person would do so.
6. SAME — SAME—SAME.—Plaintiff, working in a stave mill, was operating a jointer machine and observed a defect therein; he notified the manager who told him to continue until noon, when repairs would be made; later he saw the employee whose duty it was to make repairs and told him of the defect; his reply was for plaintiff to continue work until noon when he would make repairs. Before noon plaintiff was injured. *Held*, although plaintiff knew the danger, that it was for the jury, under the circumstances, to say whether or not plaintiff had a right to rely upon the superior knowledge and judgment of the foreman, and continue to work for the short time which would elapse until the noon hour.

   Held, also, under the evidence, that the manner of plaintiff's injury was not conjectural; that plaintiff discovered the defect by seeing a piece of wood on the floor which had come through a slit in the sheathing about the jointer machine, and *held*, the jury was warranted in finding that plaintiff's eye was injured by being struck by a small particle of wood, which escaped through the slit or opening.

7. SAME — SAME — SAME.—Under the facts as stated above, the duty rests upon the plaintiff to prove by a preponderance of the testimony that he requested that repairs be made, that they were promised and that he continued at work because of the promise.

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

T. D. Wynne and *John B. & J. J. McCaleb,* for appellant.

1. The court erred in overruling defendant's motion to dismiss. The act of March 18, 1889, is violative of our State Constitution and the 14th Amendment. Art. 12, § 11, Const. 1874. Kirby's Digest, section 834, violates article 12, section 11, and is a discrimination against foreign corporations, and the Independence Circuit Court had no jurisdiction.

2. The act of 1889 violates the 14th Amendment U. S. Constitution. 125 U. S. 181. A foreign corporation is a citizen within the meaning of the clause. 204 U. S. 103; 216 *Id.* 400, 418; *Ib.* 419.

3. A verdict should have been directed for defendant, as plaintiff under the law and evidence assumed the risk. 4 Labatt on Master & Servant, § 1342; 95 Wis. 6; 70 N. H. 390; 7 S. W. 420; 81 Ark. 343; 116 *Id.* 56.

4. The court erred in its instructions to the jury, Nos. 1, 2 and 3 given. Cases *supra.*

Pace & Davis, for appellee.

1. The court did not err in refusing to dismiss the suit. Due service was had on defendant in Pike County as prescribed by law. Kirby's Digest, § 834; Act March 18, 1889; art. 12, § 11, Const.; 114 Ark. 161; 76 *Id.* 4; 64 Fed. 165, 177; 143 U. S. 168; 75 *Id.* 168; 153 *Id.* 776.

2. There was no error in refusing the peremptory instruction for a verdict, as plaintiff did not assume the risk. He had complained of the defect and the company had promised to remedy it. 97 Ark. 553; 84 *Id.* 74; 88 *Id.* 28.

3. There was no error in the instructions given or refused. Cases *supra.*

HART, J. W. M. Duty was injured on the 29th day of May, 1918, at the mill plant of the Pekin Cooperage Company at Glenwood, Pike County, Arkansas, while he was operating a stave jointer machine. This machine is used to cut down and smooth the edges of the staves so that when they are placed in a barrel they will fit so compactly as to hold liquids. Duty claims that the accident occurred because the wood rim which incased the wheel of the machine was so defective that it permitted splinters or parts of the staves which were being cut down to fly out of the machine and strike him in the eye and destroy his eyesight. He sued the company for damages and recovered judgment. The case is here on appeal.

The suit was brought and the case was tried in the circuit court of Independence County, Arkansas. Service was had upon the agent of the company at its place of business in Pike County, Arkansas, by virtue of section 834 of Kirby's Digest, which is as follows:

"Service of summons and other process upon the agent designated under the provisions of section 834 at any place in this State shall be sufficient service to give jurisdiction over such corporation to any of the courts of this State, whether the service was had upon said agent within the county where the suit is brought, or is pending, or not. Act March 18, 1899."

The defendant filed a motion to quash the service of summons and to dismiss the complaint on the ground that the section just referred to under which service of process was had was in violation of section 11, article 12, of the Constitution of the State of Arkansas, which is as follows:

"Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this State except

while it maintains therein one or more known places of business and an authorized agent or agents in the same, upon whom process may be served; and as to contracts made or business done in this State they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, nor shall they have power to condemn or appropriate private property."

(1-2) Under this clause of the Constitution the regulations, limitations and liabilities imposed upon domestic corporations constitute the measure of the liabilities upon foreign corporations. To illustrate, as held in the *American Smelting & Refining Co.* v. *Colorado*, 204 U. S. 103, the State could not impose higher taxes upon foreign corporations than upon domestic corporations. Every State, however, has complete control over the remedies which it provides its suitors. Foreign corporations have their legal existence and are located within the boundaries of the State under whose laws they are organized. Under our statutes a foreign corporation can not do business here without subjecting itself to the jurisdiction of our courts and our statute has provided a method of procedure in such cases. Our statute has not, however, given a local or county residence to a foreign corporation. This court has expressly held that the statute allowing foreign corporations to do business in this State and permitting them after complying with the statute to sue and to be sued in the courts of this State does not confer a local or county residence upon them. *American Hardwood Lbr. Co.* v. *Ellis & Co.*, 115 Ark. 524.

(3) In that case appellant was a Missouri corporation, and had complied with the laws of the State in regard to transacting business here. The corporation maintained an office in Saline County, Arkansas, which it designated as its principal place of business, and it designated an agent there upon whom service of summons and other process might be had. Appellees were engaged in business in Calhoun County, in this State, and instituted an action against appellant in the circuit court of that county to recover an amount alleged to be due them by

appellant for certain carloads of lumber. Summons was issued and directed to the sheriff of Saline County and served upon the designated agent of appellant there. The court held that the action, being a transitory one, could be maintained in the courts of any county in the State, and that the service was valid. That case controls here, and the court properly denied the motion of defendble for the jury to ascertain from the proof whether or ant to dismiss the complaint.

(4) It is also contended that the act in question is in violation of the Fourteenth Amendment to the Constitution of the United States. What we have said above applies with equal force to this objection. The statute does not take away or impair any right of the defendant. As above stated, it only fixed the forum in which it might sue or be sued.

The principal contention of the defendant is, that the court erred in not directing a verdict in its favor. It is contended (*first*) that the plaintiff assumed the risk resulting in his injury and (*second*) that it was impossible for the jury to ascertain from the proof whether or not the injury complained of was caused on account of the defect in the casing of the jointer machine, or whether it resulted from particles of wood flying from the machine in the ordinary course of its operation.

According to the evidence adduced by the plaintiff, he had been in the employment of the defendant for many years and knew and appreciated fully the danger from operating a jointer machine. A jointer machine is five or six feet in diameter and in appearance somewhat like the face of a large clock. The one in question had eight knives projecting from the face of the machine which revolved with great rapidity when the machine was in use. The staves were piled to the left of the machine, and the operator stood on the left hand side of it. The staves were placed by the operator in a clamp in front of the machine and by pressing the pedal they were thrown against the face of the machine where they were shaved or jointed by the revolving knives. The rapidly revolv-

ing knives created a current of air which blew most of the shavings and splinters through a slot and then up a chute. There was a casing around the machine to keep the splinters or shavings from flying in the face of the operator.

About 10 o'clock on the morning of the injury, the plaintiff discovered a little piece of splinter lying on the floor and upon picking it up, saw it had come out of the machine by reason of a broken place in the casing about six or eight inches long. He went to the manager and asked him to have the machine repaired before he operated it any longer. The manager asked him to continue at work until noon, and said that he would have the machine repaired at that time. The plaintiff started to work again, and in a little while the brother of the manager, whose duty it was to actually make the repairs, came along and the plaintiff asked him to repair the machine. He was again told that it was nearly noon and for him to go ahead and work at the machine until that time when it would be repaired. The plaintiff continued at work, and in a few minutes something struck him in the eye and pained him severely. He did not see the particle which struck him, but it began to pain him severely at once. The injury finally resulted in the loss of his eye. Previous to this time the plaintiff had lost his other eye, so that the result of this accident rendered him wholly blind.

On the part of the defendant, it was shown that no promise to repair was made and that the plaintiff knew and fully appreciated the danger of continuing at work with the defective machine. It also appeared from its testimony that it was a matter of conjecture as to whether the particle which struck the plaintiff in the eye resulted from the defective condition of the casing, or from the ordinary operation of the machine and was therefore a risk which he assumed.

(5) It is well settled that the servant does not assume the risk of danger from a defect when he has complained of it and is relying upon the express promise of the master to repair the defect, unless the danger from continuing at work is so imminent or obvious that no prudent

person would do so. *Western Coal & Mining Co.* v. *Burns,* 84 Ark. 74; *Marcum* v. *Three States Lumber Co.,* 88 Ark. 28; and *Headrick* v. *H. D. Williams Cooperage Co.,* 97 Ark. 553.

(6) In the case at bar the plaintiff fully realized the danger of continuing at work with the defective machine. He says he saw a small particle of wood lying on the floor, and knew at once that there must be a defect in the machine. He examined it and found that a piece about eight inches long had been broken off of the casing and that the particle of wood had escaped through the opening. He went at once to the manager and notified him of the defect and asked him to have the machine repaired. The manager told him to continue at work until noon, and that he would then have the machine repaired. He went on back to work, and in a few minutes the employee whose duty it was to repair the machine came along. He showed him the defect and asked him to repair it. He was told again to continue to work at the machine until noon, and that it would then be repaired. It was only a short time until the noon hour, and while it was true that the plaintiff knew and realized the dangers from working with the defective machine, yet we think, under the circumstances, it was a question for the jury to say whether or not he had a right to rely upon the superior knowledge and judgment of the foreman and continue to work for the short time which would elapse until the noon hour.

Neither do we think it a matter of conjecture as to the manner in which the plaintiff was hurt. The plaintiff first discovered the defect in the machine by seeing a small particle of wood on the floor under the machine. This caused him to examine the machine, and he found the defect in the casing.

From the attendant circumstances, the jury was warranted in finding that a small particle of wood escaped through this opening and struck the plaintiff in the eye, resulting in the destruction of his eyesight.

It is true there would be some dust flying about when there was no defect in the machine. But, according to the testimony of the plaintiff, there would be no particles of wood flying from the face of the machine which would likely destroy the eyesight when the casing was in perfect condition.

Therefore, we are of the opinion that when the testimony of the plaintiff is given its strongest probative force the jury was warranted in finding that a particle of wood escaped through the opening in the defective casing and struck the plaintiff in the eye, thereby destroying his eyesight.

(7) The next error assigned is that the court gave instruction No. 1, which is as follows:

"While the servant assumes all the ordinary risks incident to his employment, yet a duty rests upon the company to commit no act of negligence whereby he may suffer injury and to exercise ordinary care to protect him from danger, and in this case if you find from a preponderance of the evidence that the plaintiff, W. M. Duty, was in the employ of the defendant, Pekin Cooperage Company, operating a stave jointer wheel, and that a piece of the wooden rimming that incased the wheel came off, making the wheel defective and increased the danger of its operation, and that plaintiff notified defendant, or one of its agents whose duty it was to keep defendant's machinery in repair, of the condition of the jointer wheel and requested that the same be repaired, and that the said agent of the defendant told him to operate the wheel in its defective condition until noon, at which time he would have it repaired, and further find that the plaintiff relied upon said promise, if any, and continued to operate said wheel and was injured on account of the defective condition of the wheel, as aforesaid, and that the danger arising from its continued operation in its defective condition was not so obvious, imminent and glaring that an ordinarily prudent person would not have continued in the work, and that the defendant thereby failed to exercise ordinary care to protect plain-

tiff from danger and that its failure to repair the machine was the proximate cause of the injury, and that the plaintiff at the time was exercising ordinary care for his own safety, you will be authorized to find for the plaintiff and assess his damages at such a sum as will, from the evidence, fully compensate him for his injuries."

It is claimed that this instruction assumes as a matter of fact that a promise to repair was made and that the inducing cause of plaintiff continuing at work was the assumed promise.

It is true the burden was on the plaintiff to show not only a promise to repair, but to show that he continued at his work for the reason that the promise to repair was made. The plaintiff so testified, and the instruction in question tells the jury that before the plaintiff is entitled to recover he must show by a preponderance of the evidence that he requested the machinery to be repaired and that the agent of the defendant told him to operate the wheel in its defective condition until noon and that he would then have it repaired and that it must further find that the plaintiff relied upon such promise, if any, and continued to operate the machine in reliance thereon and was injured on account of the defect in the machine.

It is also urged by counsel for the defendant that the instruction is erroneous because it ignores the defense of assumed risk and that the injury might have been caused by reason of the fact that the foreign particles came from some other part of the machinery than the defective rim.

We do not think the instruction is open to that objection. It is apparent from reading it that the question of assumed risk was submitted to the jury and the jury was also required to find that the injury resulted from the defective casing before the plaintiff was entitled to recover. Other instructions were given by the court clearly submitting to the jury the question of assumed risk and explaining that doctrine to the jury. The instruction plainly told the jury that it must find by a pre-

ponderance of the evidence that the plaintiff was injured on account of the defective condition of the wheel.

Other instructions were given by the court which plainly told the jury that the plaintiff was not entitled to recover unless the injury resulted from the defective condition of the rim.

The jury was also instructed that, if it believed from the evidence that the injury complained of did happen or might have happened from other causes than the opening in the rim of the casing, the plaintiff was not entitled to recover.

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

BOSHEARS v. ANDERSON, ADMINISTRATOR.

Opinion delivered October 13, 1919.

1. ADMINISTRATORS—APPLICATION OF MONEY BELONGING TO A THIRD PARTY—NATURE OF LIABILITY.—An administrator who has applied to the use of the estate money or the proceeds of personal property belonging to a third person is liable in his representative capacity, and the injured party may elect whether he will hold the administrator liable personally or in his representative capacity.
2. ADMINISTRATORS—SALE OF PROPERTY BELONGING TO ANOTHER.—B. left three cows with A. for keeping while he was away. Before B.'s return A. died; an administrator was appointed, who procured an order of court for the sale of the cows, the administrator thinking that they had belonged to deceased. The cows were sold and brought a certain sum. B. returned and sued the adminstrator in his representative capacity for the amount the cows brought on sale. *Held*, the money received at the administrator's sale represents the property, and must be paid over to B.

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

E. H. Tharp, for appellant.

The court erred in sustaining the demurrer. The probate court had no exclusive jurisdiction of claims against the estate of deceased persons. 7 Ark. 84; 134

Id. 411; 210 S. W. 145. Our circuit courts also have jurisdiction of such claims. 7 Ark. 78; 14 *Id.* 237; 30 *Id.* 756; 90 *Id.* 340; 49 *Id.* 51; 51 *Id.* 361; 210 S. W. 145.

W. A. Cunningham, for appellee.

The demurrer was properly sustained. If the complaint is true, there was a cause of action against J. W. Anderson personally, but none against the estate of James Anderson, as he committed no wrong, and there is no allegation that he converted the proceeds of the sale as administrator. 33 Ark. 144.

STATEMENT OF FACTS.

The appellant filed his complaint in the Lawrence Circuit Court on September 16, 1918, alleging in substance that on or about the 2d day of January, 1917, he lived at Portia, Arkansas, and desired to move to Lepanto, Arkansas; that he had more live stock than he was permitted to ship in the car with his household effects, and that he made arrangements with James Anderson in his lifetime to take care of the stock for him until he could come back and get them; that before he came back for the cattle James Anderson died; that J. W. Anderson had been properly appointed and duly qualified as administrator of the estate of James Anderson, deceased; that as such administrator he had taken possession of the three head of cattle belonging to appellant, inventoried and sold same as the property of James Anderson; that the three head of cattle were reasonably worth the sum of $250; that appellant made demand on said J. W. Anderson as such administrator for the sum of $200, and duly presented his claim properly verified, which was disallowed by the said administrator; that the appellant owed James Anderson the sum of $50 balance on a promissory note, and that said sum should be credited on his claim for $250 against the estate of James Anderson, deceased. Judgment is prayed for against the estate.

The court sustained a demurrer to the complaint, and, appellant declining to plead further, judgment was

rendered in favor of appellee, and the complaint was dismissed. The case is here on appeal.

HART, J., (after stating the facts). (1) It is contended by counsel for appellee that the judgment should be sustained under the authority of *McCustian* v. *Ramey, Admr.,* 33 Ark. 141, where it was held that an executor or administrator receiving money by mistake as assets of his decedent's estate will not be excused from his liability to refund the same on the ground that the money has been applied by him in the course of administration. This case only goes to the extent of holding the administrator liable personally in cases like the one under consideration and does not consider the question of whether or not he might also be liable in his representative capacity. The authorities on this question are divided. 18 Cyc. 883 and 884, and 11 A. & E. Enc. Law (2 ed.), p. 943. But we believe the weight of authority and the more equitable rule is that, if the administrator has applied to the use of the estate, money or the proceeds of personal property belonging to third persons, he is liable in his representative capacity, and that the person injured may elect whether he will hold the administrator liable personally or in his representative capacity.

In the discussion of this question in the case of *De Valengin's Administrators* v. *Duffy,* 14 Pet. Repts. (U. S.), 282, Chief Justice Taney, speaking for the court, in part said:

"The second question is one of more nicety, and the cases are not entirely reconcilable to each other. There are, doubtless, decisions which countenance the doctrine that no action will lie against an executor or administrator, in his representative character, except upon some claim or demand which existed against the testator or intestate in his lifetime; and that if the claim or demand wholly accrued in the lifetime of the executor or administrator, he is liable therefor, only in his personal character. But upon a full consideration of the nature, and of the various decisions on the subject, we are of the opinion that whatever property or money is lawfully re-

covered or received by the executor or administrator, after the death of his testator or intestate in virtue of his representative character, he holds as assets of the estate; and he is liable therefor in such representative character to the party who has a good title thereto. In our judgment, this, upon principle, must be the true doctrine."

We have not copied the reasoning of the court in that case in full, but we think it sound. We think the principal in such a case may sue the administrator in his personal character, or in his representative character at his election. This avoids circuity of action. *Gentry's Administrator* v. *McKehen,* 5 Dana (Ky.), 34; *Clapp* v. *Walters,* 2 Tex. 130; *Brewer* v. *Strong's Executors,* 44 Am. Dec. (Ala.), 514; *Simpson* v. *Snyder,* 54 Iowa, 557; *Gaffney's Estate,* 146 Pa. St. 49; *Clayton* v. *Boyce,* 62 Miss. 390, and *Donaldson* v. *Rust,* 3 Martin's Reports, (La.), 135.

(2) According to the allegations of the complaint, the administrator took possession of the property involved in this suit, believing it to belong to his decedent, and in good faith procured an order of the probate court for its sale and the distribution of the proceeds in due course of administration. Under these circumstances the prices received at the administrator's sale represent the property, and, under the principles of law decided in the cases above cited, ought to be paid over to appellant, less the amount which he admits he owed the estate.

Therefore the judgment must be reversed with directions to the circuit court to overrule the demurrer, and for further proceedings according to law.

CENTRAL COAL & COKE COMPANY *v.* BURNS, ADMINISTRATOR.

Opinion delivered October 13, 1919.

1. MASTER AND SERVANT—DEATH OF SERVANT COAL MINER—UNINSULATED LIVE WIRE.—The operator of a coal mine permitted uninsulated and exposed electric wires, one dead but the other carrying 225 to 250 volts of electricity, to be strung along a pas-

sageway used by the miners in their work. Deceased, a miner, came in contact with the live wire, and was killed. *Held,* the jury was warranted in finding that the defendant was guilty of negligence in the construction and maintenance of the wire.

2. SAME — SAME — SAME — CONTRIBUTORY NEGLIGENCE.—Under the facts detailed in the above syllabus, *held,* the trial court was correct in refusing to declare deceased guilty of contributory negligence as a matter of law.

3. SAME — SAME — SAME — INSTRUCTION.—When the court had already instructed the jury that there was no negligence in the maintenance of the dead wire, and that the same carried no current, another instruction is not prejudicial which uses the term *wires* in the plural, and charges negligence in not insulating and protecting the *wires.*

4. ASSUMED RISK—BURDEN OF PROOF.—Assumption of risk is an affirmative defense, and the burden is upon the defendant to establish it unless it is shown by the plaintiff's own testimony.

5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—TWO INSTRUCTIONS.—Defendant, in a personal injury suit, is not entitled to two instructions upon the issue of contributory negligence, and when one correct instruction has been given, defendant will not be heard to complain that a second and similar instruction was refused.

6. MASTER AND SERVANT—DEATH OF SERVANT—AMOUNT OF DAMAGES—Deceased, a coal miner, was electrocuted by coming in contact with a live wire in the mine. He lived fifteen minutes and suffered great pain. *Held,* the verdict for $5,000 was not excessive.

7. PERSONAL INJURY ACTIONS—DEATH—UNEXPLAINED INJURY—PRESUMPTION.—In personal injury actions when the manner in which deceased sustained the fatal injury is unknown, there is always a presumption against the deceased having intentionally inflicted injury upon himself.

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

James B. McDonough, for appellant.

1. The court erred in not directing a verdict for defendants. The proof wholly fails to sustain the allegations of plaintiff as to negligence. Plaintiff was not in the ordinary discharge of his duties nor in the place where his duties were, but was where he ought not to have been, and the injury was the result of his own

contributory negligence. The obligations of a master do not follow a servant into a place of danger where he is not expected to go. 3 Labatt on M. & S., § 1253; 4 *Id.*, § 1558 B; 65 Ark. 126. There is no presumption of negligence in a case of this kind. 115 Ark. 351.

The burden is on the servant to show liability. 112 Ark. 446; 115 *Id.* 529; 192 S. W. 190.

In cases where the act of the servant himself is the cause of his injury, the master's negligence is immaterial. 130 Ark. 583. Under the proof there could be no recovery. 86 Ark. 289; 91 *Id.* 260.

There is no fact in the record to apprise the master of the servant's danger. 101 Ark. 117; 35 *Id.* 602; 108 *Id.* 183; 113 *Id.* 60; 206 S. W. 634.

2. The court erred in giving instruction No. 6 for plaintiff. 135 Ark. 330.

It is harmful error to give conflicting instructions as here. 134 Ark. 575; 128 *Id.* 336; 83 *Id.* 202.

3. It was error to give Nos. 7 and 8.

4. It was error to give No. 13 on the burden of proof on the assumption of risk. 4 Labatt on Master & Servant, § 1608.

5. The court erred in refusing requests by defendant. 44 Ark. 258; 100 *Id.* 1; 90 *Id.* 135; 103 *Id.* 361; 79 *Id.* 179.

Ira D. Oglesby, for appellee.

1. The peremptory instruction for defendant was properly refused. The wires were negligently installed and maintained and plaintiff was guilty of no contributory negligence.

The evidence made a case to go to the jury, and it was properly submitted to one. 152 C. C. A. 244; 245 Fed. 935; 253 *Id.* 362; 199 *Id.* 712-719; 118 C. C. A. 150; 17 Wall. 657. See also 112 Ark. 307; 130 *Id.* 583.

2. There is no error in the instructions. 31 Ark. 103; 68 *Id.* 284; 35 *Id.* 100; 24 *Id.* 124; 80 *Id.* 86; 48 *Id.* 460; 126 *Id.* 563.

The verdict is not excessive. 103 Ark. 361; *Ry. Co.* v. *Craft,* 115 Ark. 483.

HART, J. This is an appeal by a coal company from a judgment against it for damages for the negligent killing of a coal miner while at work in its mines.

The principal issue raised by the appeal is that the court erred in not directing a verdict in favor of the defendant coal company.

Key Burns was employed as a coal digger in mine No. 4 of the Central Coal & Coke Company of Hartford, Sebastian County, Arkansas, and was engaged in digging coal in room 46 on the morning he received the injuries which resulted in his death. The mine was the usual kind of a mine operated upon the room and pillar plan. A curtain was stretched across the entry for the purpose of ventilation. There was a track which led from the main track into the room where Key Burns worked. On the morning of the accident, Key Burns had filled a car with coal. In accordance with the custom he had called on the driver to take out the loaded car and place him an empty car in his room. The usual custom was that before the driver would go into the room to haul out the loaded car he would push the empty car away from the room entry a sufficient distance so that it would not interfere with the moving of the loaded car. It was the custom of the miner to assist the driver. They would push the loaded car out and the empty car in afterwards, when they could do so. If they could not do this, the driver would hitch the mule to the cars and pull them out and in with it.

Hugh Waters was the driver, and on the morning in question hitched his mule to the loaded car and pulled it out of the room. Waters and Burns had pushed the empty car beyond the curtain and beyond the switch point, leaving the empty car on the main line. This was done so that the loaded car could be pulled out without striking or interfering with the empty car. Waters then hitched the mule to the loaded car and pulled it through the curtain, stopping out on the main line after it had been placed out a sufficient distance beyond the curtain.

After stopping the loaded car east of the curtain, Waters unhitched the mule from the loaded car and drove it along in front of the empty car. At that time the west end of the empty car was at the curtain. Waters then hitched the mule to the empty car at the switch and started to pull the empty car into the room where Key Burns worked. At the time that Hugh Waters was unhitching the mule from the loaded car and driving the mule through the curtain, Key Burns was standing at the corner by the side of the car at the switch. Immediately after starting to pull the empty car into the room and about the time the empty car had gone through the curtain, Waters heard Burns halloo or cry out. Waters turned the mule loose and immediately went back to where Key Burns was. He found Key Burns with his back and body pushed back on two electric wires which were strung along there. The feet and head of Burns pointed south and both wires touched his body. Waters first grabbed the leg of Burns to pull him off. He was shocked by electricity and turned Burns loose. He then grabbed Burns by the pant leg and pulled him off of the wires. Burns moved on his all-fours and tried to talk and vomit but could not do so. Burns was white as a sheet and could not say a word. Waters kept talking to him, trying to get him to speak, for about ten or fifteen minutes. Waters then placed Burns on a car and had taken him down the distance of about twenty-eight rooms when he died. The rooms were about thirty feet apart. Burns was groaning all the time. Burns was standing right at the corner of the switch the last time that Waters saw him before the injury. In a few seconds thereafter Waters heard Burns halloo and jumped off the front end of the car and ran around to where Burns was lying. There was both a dead wire and a live wire strung along there. The dead wire was next to the track and was about ten or twelve inches from it. It was just nailed up to the props.

The props are posts set in the ground and extending up to the roof of the mine for the purpose of

supporting it. The live wire was back of the dead wire and was about seven or eight inches from the dead wire. The two wires were parallel with each other and were about the same height from the ground. They were both nailed to the props and had no insulation. There was no plank or boxing to keep any one from coming into contact with the wire.

Another witness stated that the dead wire was about fifteen inches from the track, and that it was about three and a half feet from the ground; that the live wire was about ten inches further away from the track than the dead wire and that the wires were not insulated. The wires were strung along for the purpose of furnishing current to run the machines in the rooms. The dead and the live wires are really the positive and negative wires. The positive wires are the live wires and carry the current to the motor. The negative wire carries the current back to the ground or to the generator. The dead wire is the ground wire. It is connected permanently with the ground and is the same as the ground. If one with his body touches the live wire and the dead wire at the same time he will get a shock by electricity. Connecting the two wires makes the circuit. One will not receive any shock if he only touches the dead wire. The live wire in question carried from 225 to 250 volts of electricity.

(1) In testing the sufficiency of the evidence to support the verdict, the testimony must be considered in the light most favorable to the plaintiff. Therefore it is unnecessary to abstract the evidence adduced by the defendant. It is sufficient to say that the evidence of the defendant tended to show that there was no negligence on its part and that Key Burns was guilty of contributory negligence. While it was necessary for the electric wires to be strung along there for the purpose of furnishing electricity to run the machines in the various rooms where they were placed, the testimony for the plaintiff tends to show that they might have been insulated or that a plank might have been nailed in front of them so

that the servants having occasion to work near them would not come in contact with the live wire. Hence the jury was warranted in finding that the defendant was guilty of negligence in the construction and maintenance of the wires.

(2) It is earnestly insisted, however, that Key Burns was guilty of contributory negligence as a matter of law and that the court erred in refusing so to instruct the jury. This we consider the most serious question in the case, but under all the circumstances adduced in evidence we believe that the court was right in submitting that question to the jury.

According to the evidence adduced by the plaintiff, it was the duty of Key Burns to assist the driver in getting the loaded car out of his work room and in placing the empty one in it. The dead wire was only ten or twelve inches from the track and the wires were eight or ten inches apart. This places the live wire from eighteen to twenty-two inches from the track. The post to which the wires were attached was in a narrow space between the gob and the track, the live wire being next to the gob.

The jury might have inferred that Key Burns stepped back next to the dead wire for the purpose of getting out of the way of the moving car and that he stumbled or his foot slipped in some way so that he fell back against the live wire and in this way received the injuries which resulted in his death. There is nothing in the record tending to indicate that he intended to commit suicide or that he purposely placed himself in contact with the live wire. It is fairly inferable that he stumbled or slipped and fell against it and in this way was injured. This view is strengthened when we consider the state of the record. The witnesses had a map of the scene of the accident before them when they testified and evidently pointed to positions on the map in describing the position of the actors at the time of the accident. This testimony was plain to the jury and showed exactly the proximity of Burns to the wires. These positions

were not marked on the map so that we can follow the testimony as plainly as the jury. *San Jacinto Rice Co.* v. *Ulrick* (Tex. Civ. App.), 214 S. W. 777.

The next assignment of error is that plaintiff's instruction No. 6 submitted issues of negligence upon which there was no proof. This contention is without merit. The complaint charged as negligence: (1) Failure to insulate the wire; (2) not protecting the wire with a plank or in some other suitable manner; (3) placing them uninsulated and unprotected too close to where the employees worked; (4) permitting the dead wire to become charged with electricity. There was testimony to sustain all these allegations except that defendant permitted the dead wire to become charged. The court by a specific instruction told the jury that there was no evidence upon which to submit this issue and that it should not consider it. The instruction complained of was in general terms, and, this issue having been withdrawn from the jury by a specific instruction, such an instruction would be considered as explaining the general instruction, and not as being contradictory to it. We do not deem it necessary to set out the instruction, and are of the opinion that the jury could not have in any wise been misled by it when read in the light of the other instruction given by the court.

(3) It is next insisted that the court erred in giving instruction No. 8, which is as follows: "If you believe from the evidence that the defendant, Central Coal & Coke Company, negligently constructed and maintained electric wires in its mine and negligently failed to safeguard said wires, and that said wires carried a dangerous current of electricity and that deceased in the performance of his duty was likely to come in contact with said wires, and you further believe from the evidence that said defendant, by the exercise of ordinary care and caution, could have rendered said wires reasonably safe by insulation or by protecting said wires, if they could not be insulated, so that its employees would not, in the discharge of their duty come in contact with same, and that

it in the manner alleged in the complaint failed to do so, then such failure was negligence.''

It is claimed that the instruction is erroneous because the court submitted to the jury the negligent construction and maintenance of both the live and the dead wires. We do not think that this constitutes reversible error. As we have already seen, the court specifically told the jury there was no issue of negligence on the construction and maintenance of the dead wire for it to determine. When that is considered in connection with instruction No. 8 complained of, we do not think that the jury were confused or misled by the court giving instruction No. 8. The instruction refers only to wires that carried a dangerous current of electricity, and the jury bearing in mind that the court had withdrawn from its consideration the allegation of the complaint with regard to the negligent construction of the dead wire, and had specifically stated to it that there was not sufficient evidence to sustain that allegation of negligence, could not have been misled by the court giving the instruction.

(4) It is also alleged that the court erred in instructing the jury that the burden of proof was upon the defendant to establish its defense of assumption of risk. Assumption of risk was an affirmative defense, and the burden of proof was upon the defendant to establish it unless it was shown by the plaintiff's own testimony. Such has been the uniform holding of this court with respect to the defense of contributory negligence, which is also an affirmative defense. *Little Rock & Fort Smith Ry.* v. *Atkins,* 46 Ark. 423; *L. R. M. R. T. Ry. Co.* v. *Leverett, Admr.,* 48 Ark. 333; *St. L., I. M. & S. R. Co.* v. *Sparks,* 81 Ark. 187; *St. L., I. M. & S. R. Co.* v. *Gilbreath,* 87 Ark. 572; *St. L., I. M. & S. R. Co.* v. *Hutchinson,* 101 Ark. 424, and *St. L., I. M. & S. R. Co.* v. *Rodgers,* 118 Ark. 263.

(5) The next assignment of error is the court erred in refusing to give defendant's instruction No. 8 on the contributory negligence of the deceased. We do not deem it necessary to set out the instruction. The court did give at the request of the defendant instruction No. 6,

which is as follows: "The court instructs the jury that the master is not an insurer of the safety of the employee. The master has the right to install electric wires for use in the mines, and he has a right to install them along entry ways. If the deceased, Key Burns, failed to use due care, while passing through the mine, and if his death is due solely and alone to his negligence in touching a live wire, and if it was not due to any negligence of the defendant, then the plaintiff can not recover."

The defendant was not entitled to two instructions on the question of contributory negligence. The one given by the court plainly submitted that question to the jury.

(6) Finally it is insisted that the verdict is excessive. We can not agree with counsel for the defendant in his contention. It is fairly inferable from the testimony that Key Burns lived fifteen minutes after he was injured and that he endured conscious pain and suffering during that time. One of the witnesses stated that after he pulled Burns away from the wires he moved along on his all-fours and tried to talk and vomit, but could not do either; that he attempted to give Burns water and Burns would spit it back; that this continued for ten or fifteen minutes and that they then started out of the mine with Burns; that he lived until they had traversed a distance of about 800 feet. From this testimony the jury might have inferred that he was conscious and suffered great pain.

The court upheld a verdict for $5,000 in a case where the decedent lived for fifteen minutes and suffered great pain. *St. L., I. M. & S. R. Co.* v. *Craft,* 115 Ark. 483.

We find no reversible errors in the record, and the judgment will be affirmed.

HART, J., (on rehearing). Counsel for appellant has filed a voluminous brief entirely devoted to the argument that there is no proof of a substantial character which would warrant the submission of the case to the

jury. He claims that the verdict of the jury under the facts as disclosed by the record must have resulted from conjecture merely. We do not agree with the contention of counsel for appellant. The witnesses were examined and cross-examined at great length and it is impractical to set out their testimony in full. Within the proper limits of an opinion we can only undertake to set out the substance of the testimony.

As we pointed out in our original opinion, the witnesses testified that the live and the dead wires were strung along on posts without insulation and that they were parallel to each other and about ten inches apart. They were about three and a half feet above the floor of the mine and the gob or earth wall was right behind them. The impression of the clothes of Burns was left upon the earth of the gob. His body showed a burn on his neck and also one about ten inches below on his back. No one saw him hurt and he was found under the wires almost immediately after he cried out.

Counsel for appellant claim that the position in which he was found shows conclusively that he did not fall or stumble. He contends that the physical facts show that if he had done so, he would not have been under the wires. As we have just seen, there was the print of his clothes on the gob behind the live wire indicating that he might have fallen over the wires and his body at first rested on the gob, then by a violent struggle to escape from the wire he might have fallen from the gob down under the wires and have attempted to crawl out from under them . This is indicated by the fact that when he was rescued from the wires he commenced to crawl off on his all-fours. At least the jury might have legitimately inferred a state of facts such as we have just described.

(7) As we pointed out in our original opinion, there is always a presumption against suicide. There was nothing in the record whatever tending to show that the injury to the deceased was otherwise than accidental. An affirmative circumstance tending to show that his death was not the result of design was the fact that he

commenced crawling off on his all-fours as soon as he was pulled from under the wires.

It follows that the motion for rehearing will be denied.

ST. PAUL FIRE & MARINE INSURANCE COMPANY v. HARRISON.

Opinion delivered October 13, 1919.

FERRIES — PUBLIC FERRY. — Appellee owned a boat which he used for the transportation of himself and his teams across a river. He did not hold himself out as operating a public ferry, and while he and his ferryman often transported others across the river he never made any charge therefor. *Held,* the appellant did not operate a public ferry.

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

Crawford & Hooker, for appellant.

The evidence clearly proves that C. C. Harrison was at the time of the injury complained of a public ferryman within the purview of the law and as such liable as a common carrier for the loss. 26 Ark. 3. Custom also had made it a public ferry and our statute made it a public ferry, as it was over a navigable stream. Kirby's Digest, § 3556. The court, by its instruction and modification, nullified our statute by its modification. See Kirby's Digest, § 3556; Acts 1913, Act No. 50, and 26 Ark. 3; 31 Ark. 219-221; 50 *Id.* 404. In view of the error in the law and the case being now fully developed, judgment should be entered here for the appellant.

Nixon, Levine & Nixon, for appellee.

The only question is, was it a public ferry under the evidence? This was submitted to a jury under proper instructions and their verdict is conclusive. The authorities cited by appellant settle the law and the verdict settles the facts and the judgment should be affirmed. 31 Ark. 219; 42 Ga. 528.

SMITH, J. The issue in this case appears from an instruction numbered 1, requested by appellant, reading as follows:

"1. This is an action in which it is alleged that one J. S. Graham was the owner of an automobile, that it was insured under a policy of insurance of the plaintiff, St. Paul Fire & Marine Insurance Company, for the sum of one thousand dollars; that the defendant C. C. Harrison was the owner of a public ferry in Jefferson County, Arkansas, known as Greenback Ferry; that on the date mentioned in the complaint the owner of said automobile, J. S. Graham, secured passage for his automobile on the ferry boat of the defendant C. C. Harrison; that while crossing the river the said boat was capsized and the said automobile lost and destroyed. That thereupon the plaintiff was compelled to and did pay to the said J. S. Graham the amount of its policy, towit, one thousand dollars, taking his receipt therefor and an assignment of the policy of insurance, and this suit is brought by the plaintiff under the said articles of subrogation. You are instructed that the owner of a public ferry is a common carrier and as such an insurer of the property committed to its care against all loss or damage not occasioned by the act of God or the public enemy. If you believe that the defendant, C. C. Harrison, was the owner of the ferry in question, and that said automobile was placed on said ferry boat, in the custody of the defendant, his agent or employees, and said automobile lost or destroyed, and that plaintiff paid the amount of its policy to the said Graham, as in said complaint alleged, then your verdict will be for plaintiff in such sum as the proof shows it has been damaged, which in this case will be the amount paid out under the policy of insurance, with interest thereon from the date of its payment at the legal rate."

The court gave this instruction after modifying it by adding after the phrase, "If you believe that the defendant C. C. Harrison was the owner of the ferry in question," the words, "and same was operated as a pub-

lic ferry," exceptions being duly saved to this modification. It is insisted that under the undisputed testimony the modification was erroneous and prejudicial.

It is unquestionably true that there was sufficient testimony to have supported a finding that the ferry was a public ferry, as a number of citizens stated that they had frequently crossed at this ferry and always paid the negro ferryman who operated it the sum of fifty cents. But we do not think the undisputed testimony establishes the fact that the ferry was a public one. Appellee testified that his family resided in Pine Bluff, where his daughter went to school, and that he was in Pine Bluff frequently and that it was necessary for him to cross the river to go there and that there was no public ferry and that for his own convenience as well as that of his neighbors he put in a small private ferry. That he did not install the ferry for profit; that he had never fixed any ferriage charges nor made any charge for ferriage. That the ferry was operated by a colored man ordinarily, although he himself occasionally propelled the ferry boat across the river with a gasoline launch, while the colored man operated the ferry by hand with the aid of a cable stretched across the river. That this colored man was not authorized or permitted to make any charge for ferriage, although he was permitted to accept gratuities or tips, and it was shown that these tips ran from ten to seventy-five cents and averaged about fifty cents, and that most people in crossing gave the colored man half a dollar.

It was shown that appellee himself in operating the ferry had been tendered ferriage, which was always refused. He did admit, however, that he had ferried some doctors from Pine Bluff who were visiting patients in that neighborhood, who gave him drinks of whiskey; but this was a mere amenity of the occasion.

Appellee had never applied for ferry license and no attempt had been made on the part of the officers of the county to collect the license fee required by law for all public ferries.

Section 3555 of Kirby's Digest provides that, "All ferries upon or over any public navigable stream shall be deemed public ferries."

The appellant says this statute makes appellee a public ferryman, and, therefore, liable as a common carrier. The statute of which the section quoted is a part gives ferrymen there referred to the exclusive right of franchise to operate a ferry within a certain distance of his ferry; but, in construing the nature and extent of this right in the case of *Hunter* v. *Moore,* 44 Ark. 184, this court said that this franchise did not take away from a citizen within the prescribed limits any rights which before that he had of common right and that one might keep his own ferry upon a navigable stream with which to do his own ferrying, this upon the theory that such a citizen was not operating a public ferry.

We held, however, in the case of *Ramsey* v. *Nevills,* 133 Ark. 93, that when a number of persons organize themselves into a company and with common funds bought a boat and paid monthly dues to a ferryman to operate it the franchise of a neighboring ferry was being infringed, as the case of this company of individuals could not be assimilated to that of an individual doing his own ferrying. But there is no question here as to whether appellee's operation of his ferry would have constituted a violation of another's franchise to operate a ferry. A liability is sought to be imposed on him as a common carrier, which liability exists in the event only that he was operating a public ferry.

In Black's Law Dictionary a ferry is defined as "A liberty to have a boat upon a river for the transportation of men, horses and carriages with their contents, for a reasonable toll. The term is also used to designate the place where such liberty is exercised." The same author draws the following distinction between a public and a private ferry: "A public ferry is one to which all the public have the right to resort, for which a regular fare is established, and the ferryman is a common carrier, bound to take over all who apply, and bound to keep

his ferry in operation and good repair. *Hudspeth* v. *Hall,* 111 Ga. 510, 36 S. E. 770; *Broadnax* v. *Baker,* 94 N. C. 681, 55 Am. Rep. 633. A private ferry is one mainly for the use of the owner, and though he may take pay for ferriage, he does not follow it as a business. His ferry is not open to the public at its demand, and he may or may not keep it in operation. *Hudspeth* v. *Hall, supra.*"

Applying the test there stated, we think the testimony set out above warranted the jury in finding that appellee did not operate a public ferry, and the decree of the court below is, therefore, affirmed.

SWEET v. McEWEN.

Opinion delivered October 13, 1919.

1. APPEAL AND ERROR—TESTIMONY ADDUCED, RECORD OF—SUFFICIENCY OF BILL OF EXCEPTIONS.—A bill of exceptions recited:

   "The plaintiff, to sustain the issues on her part, adduced evidence tending to prove" (then follows a statement of the facts shown by plaintiff's testimony).

   "The defendants, to sustain the issues in their behalf, adduced evidence tending to prove" (then follows a statement of the facts shown by defendant's testimony).

   "The plaintiff, in rebuttal, adduced evidence tending to prove" (then follows a statement of the facts shown by this testimony).

   "Thereupon, the court, at the request of the plaintiff, gave to the jury the following written instructions," etc.

   The certificate of the judge was attached to the effect that he was "the regular judge presiding during all said proceedings;" that the bill of exceptions was by him "examined and found to be a correct record thereof, is approved as such and is ordered to be filed."

   Held, these recitals show inferentially and by necessary implication that the bill of exceptions contains all the testimony, and is sufficient, on that ground.

2. APPEAL AND ERROR—FAILURE TO SET OUT ALL TESTIMONY IN ABSTRACT.—When appellant failed to set out all the testimony in his abstract, it will be presumed that instructions given by the court were justified by the testimony given, but this presumption will not prevent a reversal, if the instructions are fundamentally wrong and no state of facts can be assumed which would justify giving them.

3. CONTRACTS—BREACH OF CONTRACT OF EMPLOYMENT—FAILURE TO SEEK OTHER EMPLOYMENT—DAMAGES.—Where an employee is wrongfully discharged by his employer, his right to recover damages therefor is not defeated by his failure to seek other employment; such failure goes only in reduction of damages.

4. APPEAL AND ERROR—ERRONEOUS INSTRUCTION—DISCHARGE OF EMPLOYEE—OTHER EMPLOYMENT—CORRECT INSTRUCTION.—In an action by an employee against her employer for damages growing out of the latter's discharge of her in violation of their contract, an instruction that plaintiff can not recover if she did not use due diligence to secure other employment, whether her discharge was justified or not, is erroneous and prejudicial, and the error is not cured by the giving of a correct instruction in that issue.

5. APPEAL AND ERROR—BREACH OF CONTRACT OF EMPLOYMENT—SPECIFIC OBJECTION TO IMPROPER INSTRUCTION—MODIFICATION—GENERAL OBJECTION.—Plaintiff sued her employer for damages resulting from his wrongful discharge of her from the employment. Defendant requested an instruction that the burden was on the plaintiff to prove the contract sued on and that defendant discharged plaintiff without reasonable cause. Plaintiff objected specifically to this on the ground that the instruction improperly placed the burden of proof. Defendant then modified the request, and the court gave the instruction as modified to the effect that "the burden is upon the plaintiff to prove by a preponderance of the evidence the contract sued on and the breach thereof by the defendant." To this instruction plaintiff objected generally. *Held*, the specific objection was made to the original instruction, and when the request for instruction was modified and plaintiff again objected, it will be assumed that she had not changed the ground of her objection.

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

Coleman & Gantt, for appellant.

1. Instruction No. 2 given for defendant is fundamentally erroneous.

In no case can the defense of other employment operate to defeat entirely plaintiff's cause of action; plaintiff is at least entitled to nominal damages. 18 R. C. L. 528; 6 L. R. A. (N. S.) 99, note; 44 Pa. St. 99; 84 Am. Dec. 419; 58 Ark. 617-623; 9 *Id.* 194; 49 Ill. App. 304.

2. Instruction No. 6 asked by defendants states the correct rule, but because of the fundamental error in No.

2, the two instructions are in conflict. Mrs. Sweet was not required to seek employment anywhere except in Pine Bluff. 18 R. C. L. 529; 1 Labatt on Master & Servant, § 394; 26 Cyc. 1014.

2. There was error also in the 4th and 5th instructions for defendants. To justify a dismissal the disloyalty or unfaithfulness must have resulted in loss to defendant's business where plaintiff was employed 131 N. W. 521; 34 L. R. A. (N. S.) 1217 and note.

3. No. 7 for defendant is indefinite and No. 8 both erroneous and prejudicial. The breach of a contract is breaking or violating it. Cent. Dict. *verbum;* Bouvier Dict., "Breach." The only way plaintiff could discharge the burden put on her of showing a breach of contract of employment was by showing she was wrongfully dismissed, as a rightful dismissal would have been no violation of the contract. 26 Cyc. 1006; 18 R. C. L. 516; 177 S. W. 718; 37 S. E. 64; 48 *Id.* 646.

The burden was on defendant to show that plaintiff was rightfully discharged after her employment. 72 S. E. 795; 52 *Id.* 207; 75 S. E. 604; 1 Elliott on Ev., § 132; 94 S. W. 577; 114 *Id.* 577; 150 *Id.* 984; 115 N. W. 48; 152 *Id.* 535; 27 N. E. 406; 58 Ark. 617; 6 L. R. A. (N. S.) 81.

4. It was error to submit to a jury matters about which there was no controversy. 183 S. W. 720; 183 *Id.* 553.

Powell & Alexander, for appellee.

1. The appellant has not brought into his bill of exceptions all the evidence, nor in her abstract set out all the evidence. 59 Ark. 251; Rule 13, this court; 74 Ark. 551; 81 *Id.* 327; 101 *Id.* 555; 76 *Id.* 118.

2. There was no error in the instructions complained of. 87 Ark. 396; 93 *Id.* 589; 115 *Id.* 538; 131 *Id.* 487.

SMITH, J. This is a suit for damages for breach of a contract of employment. It is undisputed that appellee McEwen, who is a merchant engaged in the millinery business in Pine Bluff, had employed Mrs. Sweet, the appellant, who is a milliner, for a period of one year

at a salary of $130 per month; and that he discharged her from the employment before the expiration of that time. The testimony is not abstracted further than the statement, by way of a summary of it, that appellant presented testimony amply sustaining her claim that she had performed the duties called for by her employment capably, efficiently and faithfully, and, after being discharged, made every reasonable effort to get other employment but without success; and that, on the other hand, appellee offered testimony which justified appellant's discharge.

Following this statement of the testimony, the instructions given and refused are set out and a reversal of the judgment is asked on account of instructions numbered 2 and 8, given at the request of appellee, over appellant's objection.

As the errors complained of are such as could be brought into the record only by a bill of exceptions, affirmance of the judgment below is asked upon the ground that the testimony is not fully abstracted and that the bill of exceptions does not show that there was no testimony other than that therein set out.

(1) The bill of exceptions recites:

"The plaintiff, to sustain the issues on her part, adduced evidence tending to prove (then follows a statement of the facts shown by plaintiff's testimony).

"The defendants, to sustain the issue in their behalf, adduced evidence tending to prove (then follows a statement of the facts shown by defendant's testimony).

"The plaintiff, in rebuttal, adduced evidence tending to prove (then follows a statement of the facts shown by this testimony).

"Thereupon, the court, at the request of the plaintiff, gave to the jury the following written instructions," etc.

The certificate of the circuit judge is to the effect that he was "the regular judge presiding during all said proceedings." That the bill of exceptions was by him "examined and found to be a correct record thereof, is approved as such and is ordered to be filed."

We think these recitals show inferentially and by necessary implication that the bill of exceptions contains all the testimony; and that is sufficient. *Simmons* v. *Lusk et al.*, 128 Ark. 336; *Warden* v. *Middleton*, 110 Ark. 215; *Abbott* v. *Kennedy*, 133 Ark. 105.

(2) No question is raised about the competency or sufficiency of the testimony to support the verdict, and as appellant's abstract does not purport to set out this testimony we will presume that if the instructions could be justified by any testimony whatever that such testimony was introduced. But that presumption will not prevent a reversal if the instructions are fundamentally wrong, and no state of facts can be assumed which would justify giving them.

We think both instructions 2 and 8 are erroneous and prejudicial.

(3-4) Instruction No. 2 reads as follows: "You are instructed that it is the duty of the plaintiff to use due diligence to find other similar employment after her discharge, whether you find that same was justified or not, and if you find from the evidence that she did not use diligence to find other similar employment the plaintiff can not recover."

The right of a wrongfully discharged employee to recover damages is not defeated by the failure to seek other employment; but such failure goes only to the reduction of the damages. The law of that subject was announced in the case of *Van Winkle* v. *Satterfield*, 58 Ark. 617, where it was said: "The burden of proof is on the employer to show that the servant might have obtained similar employment; for the failure of the servant to obtain other employment does not affect the right of action, but only goes in reduction of damages, and, if nothing else is shown, 'the servant is entitled to recover the contract price upon proving the employer's violation of the contract, and his own willingness to perform.' The fact that the servant might have obtained new employment does not constitute a defense. It is one of the facts to be considered in estimating the servant's loss."

It is pointed out by appellee that a correct instruction on this branch of the case was given. But that fact does not cure the error of giving an erroneous instruction in conflict therewith.

(5) Appellee requested the court to give the following instruction. "8. You are instructed that the burden is upon the plaintiff to prove by a preponderance of the evidence the contract sued on herein and that the defendant discharged the plaintiff without reasonable cause."

Appellant objected to this instruction because it put on her the burden of showing that she had been wrongfully discharged; when the burden should be on appellee to show that she had been rightfully discharged. The appellee thereupon modified the instruction and requested it in the following form:

"8. You are instructed that the burden is upon the plaintiff to prove by a preponderance of the evidence the contract sued on and breach thereof by the defendant."

The court gave the instruction as modified over the objection of the appellant.

Appellee concedes that the instruction as originally asked was erroneous because his answer admitted the contract of hire and the dismissal, and the controlling question in the case was whether the dismissal was justifiable or not, and the burden of proof on that issue rested on appellee. But appellee says that the instruction meant only that the burden was on appellant to prove the contract of hire and the breach thereof by her discharge, whether rightful or wrongful, and that if appellant thought it meant more than that a specific objection should have been made. But the specific objection was made to the original instruction that it put on appellant the burden of showing that she had been wrongfully discharged, and when she objected to it in its modified form there was no reason to assume that she had changed the ground of her objection.

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

HORN v. BAKER.

Opinion delivered October 13, 1919.

APPEALS FROM COUNTY TO CIRCUIT COURT—ORGANIZATION OF ROAD DISTRICT.—Act 48 as amended by Act 103 of the Acts of 1919, undertook to create a road district in Baxter County, and named the county court of that county as the arbiter, giving it the power to approve or disapprove the plans as formulated by the commissioners, and provided for no appeal to the circuit court. *Held,* the circuit court has jurisdiction to review on appeal the action of the county court, relative to the organization of the road district.

Prohibition to Baxter Circuit Court; *J. B. Baker,* Judge; prohibition denied.

Allyn Smith, for petitioners.

1. Act No. 48 as amended by Act 103, Acts 1919, named the county court as being the arbiter and gave it power to approve or disapprove the plans of the commissioners and provided for no appeal to the circuit court. The approval or disapproval by the county court was in no sense litigation nor was it an adversary proceeding. It was purely a matter of local concern of administration and legislation. The action of the county court was final and the circuit court had no jurisdiction. The circuit court's judgment has not been carried into effect and its execution can be prevented by prohibition. 25 Ark. 567.

2. The matter of the approval of the plans as provided by Act 48 as amended did not call for the exercise of a judicial function and was not a judicial act and the act provided for no appeal and the county court's judgment was final and conclusive. 35 Ark. 74; 31 Kan. 125; 211 U. S. 210; 214 S. W. 380. The action of the circuit court was an usurpation of jurisdiction and its judgment void and prohibition will lie. *Supra.*

Rose, Hemingway, Cantrell & Loughborough and *Williams & Seawel,* for respondent.

1. Even if the circuit court was without jurisdiction, the Baxter Circuit Court has finally adjourned and

its judgment was final unless the court may exercise further control over same, such as injunctions, etc. 101 Ark. 106; 100 *Id.* 496; 89 *Id.* 160; 115 *Id.* 317. It follows that the order of the circuit court on the appeal became final. The office of prohibition is preventive, not corrective, and now there is nothing to prohibit. 32 Cyc. 603; 71 S. W. 1008-9; 111 N. E. 851.

2. The writ of prohibition is never granted unless the inferior tribunal has clearly exceeded its authority and the party has no other protection against the wrong done by such usurpation. 33 Ark. 191; 66 *Id.* 211; 73 *Id.* 66; 96 *Id.* 332, 339.

3. But if the writ does lie, the circuit court did have and obtain jurisdiction of the subject-matter and parties, and hence the writ should be denied. Art 4, § § 1 and 2, Constitution 1874, and art. 7, § 1 *Ib.;* 72 Ark. 180; 33 *Id.* 508; 43 *Id.* 62-67; 43 *Id.* 42; 51 *Id.* 159; 79 *Id.* 505.

4. An appeal lies to the circuit court from the county court. 135 Ark. 85; 33 *Id.* 508, 515; 109 *Id.* 11; Kirby's Digest, § 1487; 120 Ark. 277. This is merely an attempt to substitute this proceeding for an appeal or certiorari and neither is allowable here. 125 Ark. 155. The petition should be dismissed.

SMITH, J. This is an application for a writ of prohibition to restrain the circuit court of Baxter County from exercising an alleged unlawful and excessive jurisdiction in relation to the approval of the plans formulated by Road Improvement District No. 1 of Baxter County and filed with the county court for approval. The county court refused to approve the same and an appeal was taken to the circuit court. When the cause came on for hearing in the circuit court, the relators herein filed their motion to dismiss the appeal because the circuit court had no jurisdiction, on the ground that the matter was purely administrative or legislative in its character, and in no sense the exercise of a judicial function, and that no provision was made in the act for an

appeal from the refusal of the county court to approve the same, and that the circuit court had no jurisdiction on appeal. The court held that it did have jurisdiction and overruled the motion and proceeded to a final hearing of the appeal on its merits, and reversed the judgment of the county court and entered an order approving the plans of the commissioners.

Several questions of pleading have been raised which we need not now consider or decide as the parties during the oral argument agreed that the petition filed herein might be treated as an application for a writ of *certiorari* to bring before the court for review the alleged void order of the circuit court made upon the appeal from the county court.

The petitioners state their position as follows:

"The Legislature, in the act providing for the creation and improvement of Road Improvement District No. 1, Act 48, as amended by Act 103 of the Laws of 1919, named the county court as being the arbiter and gave it the power to approve or disapprove the plans as formulated by the commissioners, and it provided for no appeal to the circuit court. The approval or disapproval by the county court was in no sense litigation. The proceeding was in no sense adversary. It was purely a matter of 'local concern,' of administration and legislation. Its action was final."

There is nothing in the act referred to, however, which indicates that the county court was to act in this instance in any manner other than as it ordinarily acts in the disposition of the administrative matters over which it is given jurisdiction by the Constitution. The act provided that the commissioners should prepare the plans for the improvement and should submit these plans to the county court for its action. Was the action of the county court final? We think not. It must be true that, if the action of the county court in refusing to approve the plans of the commissioners is final, its action in approving the plans—had that action been taken—would also have been final. That view would result in saying

that the county court is a forum whose orders and judgments made in the exercise of its exclusive original jurisdiction under section 28 of article 7 of the Constitution are final and beyond review. This is the section conferring jurisdiction upon the county court in matters of "internal improvement and local concerns of the respective counties." Counsel for petitioners say that such is the effect of that section and quote from the case of *Russell* v. *Jacoway,* 33 Ark. 191, the following language in support of that view:

"The removal of the county seat is manifestly a local concern of the county, over which the county court has exclusive original jurisdiction; and its authority to determine for itself, whether the conditions exist upon which the removal is required, is unquestionable. *Blackburn ex parte, supra.*"

We think counsel have misinterpreted that opinion. It was not there decided that the circuit court would not review on appeal the action of the county court taken in the decision of an administrative matter. The court simply decided that original jurisdiction over the matter in controversy rested in the county court, and that the circuit court could not interfere before the county court had exercised its jurisdiction in reference thereto.

The question raised is not a new one. The case of *Dodson* v. *Mayor, etc.,* 33 Ark. 508, was a proceeding to annex certain territory to the city of Fort Smith. The county court heard the petition, rejected it and denied its prayer, whereupon the city appealed to the circuit court. The matter was then heard *de novo* after a refusal to dismiss for want of jurisdiction. The circuit court on appeal held that the prayer of the petition should be granted and the territory was ordered annexed. Upon the appeal of the remonstrants prosecuted to this court it was contended that the finding and judgment of the county court was final and conclusive; but, in disposing of that contention, it was there said:

"By the Constitution of 1874 (schedule, section 23), the county courts were made successors and mere con-

tinuations of the former boards of supervisors of the counties, and were given exclusive original jurisdiction in all matters necessary to the internal improvement and local concerns of their respective counties (article 7, section 28). All laws then in force, not in conflict with the new Constitution, were continued until amended or repealed (schedule, section 1). By the laws then in force (Gantt's Digest, sections 706 and 1191) appeals lay in all cases, by persons aggrieved, to the circuit court from the final judgments or orders of the boards of supervisors. This applies now to the county courts, and it is plain that the circuit court properly entertained jurisdiction of this appeal, and it was further the duty of the circuit court to retain jurisdiction of the subject-matter for final judgment, in the same manner and to the same extent as though original jurisdiction had been conferred on said circuit court by law. (Gantt's Digest, sec. 1195.)"

The case of *Gunter* v. *Fayetteville,* 56 Ark. 188, was also a proceeding to annex territory to a city, and, in construing the statute under which that proceeding was had, the court said:

"The statute probably did not contemplate the allowance of an appeal in this class of cases, for the legislation is borrowed from States where the acts prescribed to be performed by the county court in our act are administrative purely, and where no appeal is allowed. But the right to appeal has been found elsewhere, and is established by the decisions of this court. *Dodson* v. *Ft. Smith,* 33 Ark. 508; *Foreman* v. *Marianna,* 43 *Ib.* 324; *Vestal v. Little Rock,* 54 Ark. *sup.*"

The case of *Shemwell* v. *Finley,* 95 Ark. 342, originated in the county court, the issue there being which of two proposed ferries would better accommodate and conserve the interest and convenience of the public. The establishment of ferries is one of the matters over which the county court is given exclusive original jurisdiction by section 28 of article 7 of the Constitution. The cause was appealed to and heard in the circuit court, and

an appeal was duly prosecuted to this court, where the issue determined was not whether the circuit court had the right to try the case *de novo* but whether it had in fact done so, the reversal of the judgment of the circuit court being asked upon the ground that the circuit court had not tried the case *de novo*. This court held that the cause had been tried *de novo* and affirmed the judgment of the circuit court.

By section 33 of article 7 of the Constitution it is provided that:

"Appeals from all judgments of county courts or common pleas when established may be taken to the circuit court under such restrictions and regulations as may be prescribed by law."

Under the authority of this section appeals have been uniformly granted as a matter of constitutional right from all judgments of the county court, and no distinction has been made between administrative matters and judicial causes. See cases cited in respondent's brief.

The contention that no appeal could be taken, because that right was not provided for by the act, is answered by the opinion of this court in the case of *Huddleston* v. *Coffman,* 90 Ark. 219. That case involved the allowance of an attorney's fee in a proceeding to establish a drainage district. The statute under which the drainage district had been organized provided for an appeal from the county court to the circuit court on certain issues and also specified the time and manner of taking the appeal; but no provision was made for an appeal from an order of the county court allowing attorney's fees, and the contention was made that the right of appeal therefore did not exist. The court said, however, that section 14 of article 7 of the Constitution conferred the right of appeal, and, as the statute under review had not conferred that right, the appeal could be taken under the general statute governing appeals from county courts.

We are not, of course, attempting to affirm the judgment of the circuit court in reversing the order of the

county court and approving the plans of the commissioners. That is a question which can come before us only on appeal. It is sufficient to dispose of the issues raised in the present case to hold that the circuit court had the jurisdiction to review on appeal the action of the county court; and as the county court had that jurisdiction, the prayer of petitioners will be denied.

MIDLAND VALLEY RAILROAD COMPANY v. JOHNSON.

Opinion delivered October 13, 1919.

1. ATTORNEY'S FEES—LIEN ATTACHES WHEN.—The lien for attorney's fees, upon the subject-matter of the litigation, as the proceeds in case of a compromise and settlement, attaches when the suit is brought, and is not affected by a settlement and compromise and a dismissal of the suit.
2. SAME—VALIDITY OF CONTRACT.—The lien for attorney's fees can only exist upon a valid, express or implied, contract between the attorney and client.
3. INFANTS—DISAFFIRMANCE OF CONTRACTS—NECESSITIES.—Contracts for the necessities of life, made by infants during minority, can not be disaffirmed by them after reaching their majority.
4. ATTORNEY'S FEES—CONTRACT WITH INFANT CLIENT—RIGHT OF DISAFFIRMANCE.—A contract for attorney's fees made between an attorney and an infant, when the latter is sufficiently intelligent to understand the nature and extent of the contract, is binding upon the infant, and it can not disaffirm the same after majority.
5. ATTORNEY'S FEES—MINOR—DISAFFIRMANCE—SETTLEMENT AND DISMISSAL.—Since a minor, after reaching his majority can not disaffirm his contract made with an attorney, the fact of settlement of the cause of action and dismissal thereof will not operate as a cancellation of the contract with the attorney for fees, and lien.
6. SAME—INFANT—LIEN—FEES AND EXPENSES.—An attorney has a lien under act 293, Acts 1909, upon the property of a railway company for fees and expenses, where the contract between the attorney and client provided that the attorney should receive fifty per cent. of the amount recovered and one-half of the attorney's expenses.

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

Thos. B. Pryor, for appellant.

1. Appellee, though a minor when the contract with intervener was made, had the right to disaffirm after coming of age and dismiss the suit, and she did so. Under the law no contract could be entered into with a minor which would be binding after she became of age, and if intervener had a contract it was subject to repudiation and disaffirmance after reaching majority. Here she disaffirmed, and the contract was rescinded, and the basis for a fee and lien was destroyed. 44 Ark. 296; Acts 1909, p. 892.

2. The trial court ignored the rights of the attorney first employed by Elliott. Elliott was first employed and continued to represent her until the settlement was had. Rev. Laws of Oklahoma, § 249. The injury occurred in Oklahoma, and the contract was made there and appellant was advised of his employment and under Oklahoma laws he had a lien for his fees, etc., and both appellant and intervener were advised of Elliott's claim and lien.

2. Only one lien can be allowed, and Elliott's was superior under the law. Rev. Laws of Okla., § 247.

3. The evidence does not disclose where the *contract* was made with the intervener, and no notice was served of intervener's claim or lien, if any. There was evidence of the value of the services of the intervener. The law of Oklahoma governs, and he had no lien that could be enforced in this State, either for fees or expenses. 96 Ark. 112.

Allyn Smith, for intervener, Johnson.

1. An infant could not and did not disaffirm her contract of employment with intervener. The right to disaffirm is a personal privilege to the infant, and defendant railway company can not avail itself of this defense. 51 Ark. 294; 59 *Id.* 1; 31 *Id.* 364; 102 U. S. 148-161; 6 Wis. 645; 8 Kan. 122; 59 Ark. 1; 90 *Id.* 351; 119 S. W. 75; 6 Ark. 109.

2. The next friend of an infant may employ an attorney for an infant and fix his compensation and such attorney may intervene and claim his lien. 149 S. W. 894-6; 142 S. W. 207.

3. An attorney so employed is entitled to recover on a *quantum meruit*. 96 S. W. 512. See also 110 U. S. 42; 27 Wash. 250; 102 N. Y. 560; 77 Ark. 35.

An infant is bound for necessaries, 18 Ark. 53; 15 *Id.* 137; 23 Kan. 343, and the minor can not repudiate or disaffirm.

4. Appellant and Elliott settled plaintiff's part only, and intervener was clearly entitled to his fees, expenses, etc., and the infant could not disaffirm her contract, and the judgment should be affirmed with penalty.

HUMPHREYS, J. This suit was instituted on the 16th day of June, 1916, in the circuit court in the Greenwood District of Sebastian County, by Lizzie Murphy, as next friend for Nevada Murphy, against appellant, Midland Valley Railroad Company, to recover damages received by Nevada Murphy while alighting from a train of appellant at Tulsa, Oklahoma.

Upon the filing of the complaint, a summons was issued and duly served upon appellant. On the 5th day of July following, appellant filed a demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action; and on the 7th day of July, thereafter, filed an answer denying each and every allegation in the complaint. On January 8, 1917, appellant filed stipulations of agreement between appellant, on the one side, and Nevada Murphy and her lawyer, D. G. Elliott, residing in Oklahoma, on the other, for settlement and dismissal of the suit for damages. In a few days thereafter, towit, January 12, 1917, the attorney of record, Jo Johnson, for Nevada Murphy in the damage suit, filed a petition by way of intervention, alleging a compromise and settlement without his consent or knowledge, and asking for judgment against, and lien on, the property of appellant railroad company for his fees,

as per his contract with plaintiff in said damage suit, under which contract it was alleged said attorney was entitled to one-half of the proceeds of recovery and one-half of said attorney's expenses, amounting, *in toto,* to $110. By agreement of appellant and intervener, the issue on the intervention was transferred for trial to the Fort Smith District of Sebastian County. On December 7, 1918, a response was filed by appellant to the petition to fix attorney's fees, in which it was denied that the settlement mentioned in the stipulations for the dismissal of the case was made without the knowledge or consent of said intervener, or that said intervening attorney had any right to a lien on the proceeds of the settlement for a fee and expenses under and by virtue of any agreement or contract with Nevada Murphy.

The cause was heard by the court upon the pleadings and evidence adduced, from which the court found that the intervener was entitled to recover from appellant $122.70, including interest, and to a lien on appellant's railroad for said sum. A judgment was rendered in accordance with the finding of the court, from which an appeal has been properly prosecuted to this court.

The facts are, in substance, as follows: On the 22d day of May, 1916, Nevada Murphy's ankle was injured while alighting from the train of appellant at Tulsa, Oklahoma. She was seventeen years of age at the time. A few days thereafter, D. G. Elliott, an attorney residing at Tulsa, Oklahoma, wrote to the general attorney of appellant that he had been employed in the case of Nevada Murphy, who had been injured while stepping off of the train at Tulsa. Thereafter, the intervener was employed by W. T. Murphy, father of Nevada Murphy, by and with the consent of her mother, Mrs. Lizzie Murphy, and herself, to institute a suit for damages against appellant in the Greenwood District, Sebastian County, for the injury received by Nevada Murphy at Tulsa, while alighting from appellant's train. The suit was filed on June 16, to which appellant filed demurrer on July 5, and answer on July 7, following. The claim was settled by appel-

lant with Nevada Murphy and her attorney not of record, without the consent of her attorney of record, and with knowledge that the suit was pending and that the intervener was the attorney of record.

The claim agent, Frank J. Wieman, testified that, four or five days after the injury, after investigating the claim, he attempted to make settlement with Nevada Murphy and D. G. Elliott for $100, and, although Mr. Elliott advised her to settle for $100, she contended for $200; that, after the suit had been brought at Greenwood, he agreed to pay Mr. Elliott on settlement $200, but that the settlement itself was made through the general attorney, O. E. Swan; that, at that time, he asked Mr. Elliott about the suit for damages pending at Greenwood and that he talked with Nevada Murphy about it, who informed him that no one except Mr. Elliott was authorized to represent her; that when he went to Fort Smith he telephoned to intervener that he was negotiating a settlement of the claim through D. G. Elliott of Tulsa, Oklahoma.

O. E. Swan, general attorney for appellant railroad company, testified that on January 4, 1917, he made settlement with Nevada Murphy for the injury she received on May 22, 1916, while alighting from appellant's train at Tulsa, for the sum of $200, took a receipt from her for the money and obtained the stipulation for the dismissal of the suit pending in the Greenwood District of Sebastian County, wherein said Nevada Murphy by her next friend, Lizzie Murphy, was plaintiff, and appellant was defendant; that, at the time of settlement, Nevada Murphy made an affidavit to the effect that she was then eighteen years of age, and that D. G. Elliott of Tulsa, Oklahoma, was at the time employed to represent her in her claim against appellant for said injury, and that he had been employed since the second or third day after she received the injury.

Lizzie Murphy, mother of Nevada Murphy, testified that, acting for her daughter, she employed intervener

to institute the suit for damages against appellant, in the Greenwood District of Sebastian County.

Nevada Murphy testified that intervener was employed to represent her by her mother, Lizzie Murphy, with her consent, and that said intervener was still her attorney.

Intervener, Jo Johnson, testified that the first he heard of the case was by letter from W. T. Murphy, written to him from Cotter, Arkansas, and that the correspondence continued until he was authorized to file the suit; that the contract was in writing, and that he was to receive for his fee fifty per cent. of the amount recovered and one-half of his expenses; that one-half his expenses amount to about $10; that he never consented to a settlement and dismissal of the suit, and knew nothing of it until a few days before he filed a claim for attorney's fees.

Appellant does not seriously contend that Nevada Murphy did not make a contract in the State of Arkansas with the intervener to institute a suit against appellant in the Greenwood District of Sebastian County, to recover damages on account of the injury she received to her ankle at Tulsa, while stepping from appellant's train. If such contention were insisted upon, the evidence is sufficient to sustain the finding of the court that such a contract was made in this State. Learned counsel content themselves with the statement that, "The only question involved in this suit is the right of the plaintiff, after becoming of full age, to disaffirm her contract, if she had one with the intervener, and to repudiate the contract made by her mother with the intervener to institute suit on behalf of the plaintiff (referring to Nevada Murphy)."

The contention of appellant, as we understand it, is that intervener can not claim a judgment and lien, by virtue of the attorney's lien statute in this State, under the contract made with Nevada Murphy, for the reason that she was a minor when she made the contract, and that her act in settling the damage suit and signing the

stipulation for dismissal thereof constituted a disaffirmance of the contract, after reaching her majority. Unless the act of settling the case and signing the stipulation for the dismissal thereof constituted a disaffirmance of her contract with her attorney, the intervener herein, the intervener was entitled, under act 293, Acts of 1909, to a judgment against, and a lien on, appellant's railroad property and bed, for the contractual fee. *St. L., I. M. & S. R. Co.* v. *Kirtley & Gulley,* 120 Ark. 389; *St. L., I. M. & S. R. Co.* v. *Hays & Ward,* 128 Ark. 471.

(1-3) This court said, in the case of *St. L., I. M. & S. R. Co.* v. *Blaylock,* 117 Ark. 504, that "a client may dismiss his cause of action or may settle with the opposite party without consulting his attorney, but where there are any proceeds resulting from the litigation, either through settlement or compromise, * * * the attorney has a lien on such proceeds of which he can not be deprived by the parties to the lawsuit by any settlement they may make." The lien upon the subject-matter of the litigation, or the proceeds in case of a compromise and settlement, attaches when the suit is brought and is not affected by a settlement and compromise and a dismissal of the suit. Of course, under the terms of the statute, the lien can only exist upon a valid express or implied contract between the attorney and client. If the contract in question became nugatory through a disaffirmance thereof by Nevada Murphy after reaching her majority, it might well be contended that there was no contract upon which to base a judgment and lien for attorney's fees in favor of the intervener. In this State it is well settled that contracts for the necessaries of life, made by infants during minority, can not be disaffirmed by them after reaching their majority.

(4) At the time the contract in question was made Nevada Murphy was seventeen years of age. It is true she had not reached her majority, but she had attained to the age where she was sufficiently intelligent to understand the nature and effect of a contract. We

think a contract made for attorney's fees between an attorney and an infant, who is sufficiently intelligent to understand the nature and extent of the contract, is as binding as one for the necessaries of life. The property rights of a minor, as a rule, can not be protected without the aid and assistance of an attorney. The right to be protected involves litigation in the courts. In recognition of this principle, it was said in the case of *Vance* v. *Calhoun,* 77 Ark. 35, that (quoting syllabus): "Where an infant employed an attorney to bring a suit in his behalf, and afterwards sold him the judgment therein, the infant may subsequently disaffirm such sale and recover the amount collected on the judgment, less the amount owing to the attorney for his services."

As this contract was approved by the minor after she attained to the age of intelligence, it is unnecessary for us to decide whether a contract made by the next friend of a minor with an attorney for an attorney's fee would bind the minor.

(5) It follows from the doctrine thus announced that it was not within the power of Nevada Murphy to disaffirm her contract of employment with the intervener herein. Not being a contract subject to disaffirmance by her after reaching her majority, her settlement and stipulation for dismissal of the suit could not affect the right of intervener to his judgment under his contract against appellant and lien on its railroad property, under the construction placed upon the attorney's lien statute in this State in the case of *St. L., I. M. & S. R. Co.* v. *Blaylock, supra.*

(6) It is also insisted that the court erred in allowing $10 expense money and including it in the lien. It is true the statute only allows a lien for attorney's fees based upon valid contracts of employment, express or implied, but if the expenses contracted for are a part of the fee, they come within the purview of the statute. A contract for fifty per cent of the amount recovered and one-half of an attorney's expenses, as in the instant case,

must be regarded as a contract including expenses as a part of the fee.

No error appearing, the judgment is affirmed.

NORTHWEST ARKANSAS LUMBER COMPANY v. HOUSTON.

Opinion delivered October 13, 1919.

1. CONTRACT—SALE OF SILO—WRITTEN AGREEMENT—EVIDENCE OF SALE BY SAMPLE.—A contract for the sale of a silo was in writing, and specified the kind and character of silo to be delivered. It contained a clause that the contract embodied all, and was the only agreement between the parties. *Held,* oral proof to the effect that the silo should be constructed out of material of a sample exhibited at the time of the sale is contradictory of the writing and inadmissible.
2. SAME—SAME—SAME—SILAGE CUTTER.—Under the same contract and facts as set out above, evidence that at the time of the sale the seller agreed to furnish a silage cutter for the use of all the purchasers of silos in the neighborhood is inadmissible.

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

Calvin Sellers, for appellant.

1. The court erred in permitting the testimony concerning the sample to go to the jury, and in refusing to exclude. There is nothing in the orders indicating that the silos were sold by sample or that any representations were made by the agent about any samples whatever.

Defendant could not add to or vary the terms of the contract, as it recites that it was the only contract or agreement entered into. 36 S. E. 291; 56 N. E. 619; 14 Minn. 273; 60 Minn. 219; 61 N. W. 1132; 18 Wendel (N. Y.), 425; 77 N. Y. 614; 78 Va. 254.

There were no false representations, and, if so, defendant did not rely upon them, and the burden was on the defendant to show this.

Under the pleadings and proof the judgment should be reversed and judgment entered here.

Edward Gordon, for appellees.

1. Parol evidence was admissible to show that the agent of appellant assured appellee that Libby had sold and guaranteed that their ensilage could be cut for 30 cents a ton. 76 Ark. 140; 48 Ark. 138; 100 *Id.* 363.

2. The testimony shows that appellant furnished its agent, Medlock, samples to sell by and can not now object to proof that he sold by the samples. 72 Pac. 537.

3. There is no error in the instructions nor any ruling of the court as to samples. 68 S. W. 594; 107 N. W. 428; 4 Ky. Law Rep. 716; 39 S. W. 855; 67 N. E. 617; Tiedeman on Sales, § 188. Whether the sale was by sample or not was for the jury. 18 Wend. 425; Long on Sales (Rand. Ed.), § 540; 4 Comp. 144; *Ib.* 22; 87 N. Y. Supp. 168.

4. There is ample evidence to sustain the verdict, and it is conclusive, as there is no error in the instructions. *Supra.*

HUMPHREYS, J. Appellant instituted three separate suits in a magistrate's court against the respective appellees for amounts due on the purchase price of silos, the amounts being represented by three notes. The Houston note was for $62.50; the Massengill note for $60, and the Bailey note for $75. The suits were based upon the following written order:

"Notice. * * * The Northwest Arkansas Lumber Company shall not be held responsible for delays in delivery caused by strikes, fires, storms or transportation companies.

"Northwest Arkansas Lumber Company.

"Date, Dec. 6, 1916.

"Please ship to me on or before April 15, 1916, or at your earliest convenience, to town of Morrilton, County of Conway, State of Arkansas, the following described silo at prices f. o. b. Fayetteville, Arkansas, this order being subject to approval of the Northwest Arkansas Lumber Company of Fayetteville, Ark.:

Outside Diameter	Height	Kind of Wood	Price
10 ft.	20	Yellow Pine	$125.00

"Subject to countermand up to 3/15/16.

"On receipt of the above I will pay to the Northwest Arkansas Lumber Co., or its order, $125 dollars, payable at Morrilton, Bank of Morrilton, as follows, towit: One-half November 1, 1916; one-half November 1, 1917, at rate of 8 per cent after November 1, 1916.

"It is understood that the silo above ordered is guaranteed according to current catalogue, and all staves are to be two inches thick before being machined, all staves to be tongued and grooved. All silos furnished with continuous door frame and doors, rafters, hoops and anchors. All claims for shortage, damaged or defective parts must be made by purchaser within ten days from time of receiving silo. In the event shortage exists or parts are to be replaced, purchaser shall render all friendly and necessary assistance free of charge and shall return broken or defective parts to railroad station and shall consign them to the Northwest Arkansas Lumber Company, and furnish said bill of lading as evidence of his claim. The Northwest Arkansas Lumber Company agrees to pay all freight charges in making exchange or replacing shortage. All settlements to be made at time of delivery of silo, either in cash or by bankable notes bearing current rate of interest. It is expressly agreed that the silo above ordered shall be and remain the exclusive property of said Northwest Arkansas Lumber Company, and that the title thereto shall not vest in the purchaser until the purchase price thereof or any note or security given therefor shall have been paid in full in cash, and the acceptance of notes or other security shall not act as a waiver of this condition. This order embodies all and is the only agreement between the parties hereto.

"Sign here J. H. Houston,
"P. O. Hattieville, R. F. D. 1.

"Witness: K. Kebby, Agent.

"J. K. Medlock, written on left hand margin."

Each appellee filed a demurrer, answer and cross-complaint in the suit brought against him.

The defense set up in the answer was that the agent who took the order represented that the company would place a silage cutter and engine with a Mr. Libby in the neighborhood, who would cut the silage for use in the silos at thirty cents per ton, and that they relied upon said representation so made by the agent as an inducement to signing the contract, which representations were false, fraudulent and untrue; that, in addition to the failure of appellant to furnish a cutter and engine, the silos shipped were of an inferior grade to the kind it sold appellees, that, on account of the misrepresentations as to furnishing a cutter and engine, and because the silos were of an inferior grade to the kind sold them, they refused to accept them when offered for delivery. Judgments were rendered in favor of appellees in the magistrate's court, and appeals were prosecuted to the circuit court. In the circuit court, it was agreed that the cases might be consolidated and tried as one action, and judgment rendered in each of the cases as though tried separately. It was also agreed that, should judgment be rendered in the Supreme Court against appellee, J. H. Houston, judgment might also be rendered against W. M. Massengill and W. J. Bailey in the amounts found due at the date of judgment, upon the notes executed by them, respectively. The consolidated cases were submitted to a jury as one action in the circuit court, under the style of Northwest Arkansas Lumber Company v. J. H. Houston, Jr., upon the pleadings and depositions of the several witnesses with exhibits thereto attached, and the instructions of the court, upon which the following verdict was returned: "We, the jury, find for the defendant. I. M. Ruff, Foreman."

A judgment was rendered for appellees in accordance with the verdict, from which an appeal has been duly prosecuted to this court.

In the course of the trial, appellees offered to introduce testimony in support of their allegation that appel-

lant's agent had represented that it would place a cutter and engine, for the purpose of cutting silage at thirty cents a ton, in the neighborhood, as an inducement to their signing the order, and that the representation was false, fraudulent and untrue. The court excluded this evidence, and the appellees saved their exceptions to the ruling of the court in excluding it.

Over the objection and exception of appellant, appellees were permitted to introduce testimony relating to the exhibition of samples and the representation on the part of the agent of appellant that the silos would be constructed of yellow pine, free from knots, like the samples, and that the silos offered for delivery had knots in them, and, in this respect, were inferior to the samples exhibited by the agent of appellant.

The cause was sent to the jury upon the theory that, if the order or contract did not specify the grade of lumber to be shipped, and samples were exhibited by the agent of appellant and represented by him to be the grade out of which the silos would be constructed, and the silos did not equal the samples in grade, appellant could not recover.

It is insisted by appellant that the court erred in admitting the evidence with reference to a sale by sample over its objection and exception. The contract was before the court and contained the following clause: "This order embodies all and is the only agreement between the parties hereto."

It contained the following description of the silo: "Outside diameter, 10 feet; height, 20 feet; kind of wood, yellow pine."

It also contained the following provision: "It is understood that the silo above ordered is guaranteed according to current catalogue, and all staves are to be two inches thick before being machined, all staves are to be tongued and grooved. All silos furnished with continuous door frame and doors, rafters, hoops and anchors."

(1) There was nothing whatever in the written contract referring to a sale by sample, or that the grade of

the lumber used in constructing the silos should compare with the lumber used in a sample. Where a contract specified the kind and character of silo to be delivered, such as this contract does, and contained a clause that the order or contract embodied all and is the only agreement between the parties, oral proof to the effect that the silo should be constructed out of material of the quality of a sample exhibited at the time of the sale, would be contradictory of the terms of the written contract. The following authorities are in point and support the rule thus announced: *Imperial Portrait Co.* v. *Bryan,* 36 S. E. (Ga.), 291; *Weston* v. *Barmicoat,* 56 N. E. (Mass.), 619; *Walter A. Wood Harvester Co.* v. *Ramberg,* 61 N. W. (Minn.), 1132.

(2) Under this view of the law, as applied to the written order or contract in evidence, the case must be reversed. We are of the opinion that the court properly excluded the evidence tending to establish the representation made by the agent of appellant in reference to the silage cutter and engine being placed in the neighborhood for cutting silage at thirty cents a ton. The allegation and proof offered amounted to no more than a representation concerning an additional promise or agreement, not included within the contract as an inducement to obtaining the signatures of appellees. It was not a false and fraudulent misrepresentation of an existing fact made as an inducement to obtaining appellees' signatures to the order.

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

STATHAM *v.* BROOKE.

Opinion delivered October 13, 1919.

1. ADMINISTRATION—ORDER OF DISTRIBUTION—ORDER TO PAY OVER—FAILURE TO COMPLY—LIABILITY OF BONDSMEN.—Failure to comply

with an order of distribution or an order to pay over, by an executor or administrator, constitutes a breach of the executor's or administrator's bond, and fixes liability on the bondsmen.

2. SAME—SAME—SAME.—An administrator in succession must proceed in the probate court against the former executor or administrator for a settlement or accounting and an order to pay over the sum found due to him, before he can sue the bondsmen of the former executor or administrator.

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

J. F. Wills, for appellant.

1. The demurrer should have been sustained because (1) the court had no jurisdiction and (2) the complaint failed to state a cause of action against appellants. The administration was still pending in the probate court. Art. 7, sec. 34, Const.; 18 Cyc. 1289; 96 Ark. 222-229; 33 *Id.* 727; 48 *Id.* 544; 51 *Id.* 75, 79, 80; 90 Ark. 444-451; 96 *Id.* 251-264; 98 *Id.* 63.

2. The complaint did not state a cause of action, as it fails to allege that there had been an order of distribution or order to pay, by the probate court, and a disobedience of the order. 5 Ark. 468-473; 9 *Id.* 226; 11 *Id.* 12-14; 35 *Id.* 46; 40 *Id.* 433-442; 47 *Id.* 222; 85 *Id.* 246, 249-51; 96 *Id.* 222.

3. By the agreement between J. R. Gwyn, the executor, and the other heirs, the bondsmen were released from liability and the suit was premature. 18 Cyc. 1261.

4. The court should have found for appellants on the facts.

George W. Dodd, for appellee.

1. The court had jurisdiction, and there was no motion to transfer to the law court. 79 Ark. 502; 74 *Id.* 122. The appellants asked affirmative relief in their answer. 105 Ark. 558.

2. The probate court had adjusted the accounts of the defaulting executor, found the amount due and an or-

der to pay. See also Kirby's Digest, § § 47, 48; 63 Ark. 145. There was a breach of the bond when the former executor failed to pay over the $1,000 found due by the probate court. There was no fraud, and appellants are bound by the order.

3. The bondsmen were not relieved by the agreement as to the amount of J. R. Gwyn's indebtedness. There is no showing that the agreement altered or increased the liability of the sureties. There is no proof of fraud, and the judgment of the probate court can not be impeached collaterally, for no fraud is proved. The judgment should be affirmed.

HUMPHREYS, J. This suit was instituted by appellee against appellants in the Sebastian Chancery Court, Greenwood District, to recover $1,000 and interest on a bond given by appellants as surety for J. R. Gwyn, executor of the last will of W. P. Gwyn, deceased. It was alleged in substance that the will was probated and J. R. Gwyn qualified as trustee thereunder; that in the course of administration he wasted the assets; that exceptions were filed to his settlement in the probate court by the heirs and other legatees of the testator; that, upon trial of that issue, J. R. Gwyn was found to be indebted to the estate in the sum of $1,126.40, $126.40 of which was paid with the fund on hand, and a judgment rendered against him for the balance; that he was insolvent and failed to pay the judgment; that J. R. Gwyn executed a mortgage on 120 acres of land and a deed to his undivided interest as a legatee in the estate of W. P. Gwyn to appellants to indemnify them against loss on said bond; that Mattie C. Gwyn, widow of W. P. Gwyn, deceased, renounced the will and elected to take a dower interest in said estate, under the statutes; that dower was assigned to her; that the lands were not susceptible of division in kind; that J. R. Gwyn was discharged as executor, and appellee was appointed as administrator in succession with the will annexed, and qualified as such and was ordered by the court to wind up the estate; that

he demanded the amount of the judgment from appellant bondsmen each and all of whom refused to pay same. The prayer of the petition was for judgment on the bond, subrogation to the rights of appellants on their indemnities, decree of foreclosure of the mortgage, and partition and order of sale of the lands belonging to the estate.

A demurrer was filed to the petition on the ground, among others, that the petition did not state facts sufficient to constitute a cause of action. The demurrer being overruled and exceptions saved, the appellants reserved all their rights under the demurrer and filed an answer, denying every material allegation in the petition, and prayed for a dismissal of the bill for want of equity. Other allegations were made in the answer, upon which relief was asked if the court assumed jurisdiction, but it is unnecessary to set them out under our view of the law applicable to the case.

The cause was heard upon the pleadings, the will of W. P. Gwyn, deceased, the mortgage and deed executed by J. R. Gwyn to appellants to indemnify them against loss, all the proceedings had and done in the course of the administration of said estate, and the depositions of witnesses, from which the court found and adjudged in accordance with the prayer of the petition, from which decree an appeal has been duly prosecuted to this court.

(1) It is insisted by appellants that the petition failed to state a cause of action, either in law or in equity, and, on that account, the court erred in not sustaining the demurrer and dismissing the bill. The alleged defect in the petition is that no allegation was made therein to the effect that an order was made by the probate court on J. R. Gwyn, executor, to pay the amount ascertained to be due, and for which judgment was rendered, to any one, and a failure on his part to comply with the order. The rule is well established in this State that an order of distribution or an order to pay over, and a failure to comply with the order by an executor or administrator, is what constitutes a breach of the administrator's or executor's bond and fixes liability on the bondsmen. *Outlaw*

v. *Yell, Governor,* 5 Ark. 468; *Porter* v. *State, use of Brown,* 9 Ark. 226; *Gordon* v. *State, use Wallace,* 11 Ark. 12; *Norton* v. *State,* 25 Ark. 46; *Hall* v. *Brewer,* 40 Ark. 433; *George* v. *Elms,* 46 Ark. 260; *State, use McCreary,* v. *Roth,* 47 Ark. 222; *Euper* v. *State,* 85 Ark. 223; *Ferguson* v. *Carr,* 85 Ark. 246; *Planters' Mutual Insurance Assn.* v. *Harris,* 96 Ark. 296.

It is strenously contended by learned counsel for appellee that the rule announced in the foregoing cases is not applicable to the case at bar, for the reason that this is a suit by an administrator in succession who is entitled to the entire assets of the estate, and that the cases cited relate to suits by distributees, legatees or creditors who could only recover such amounts as had been ascertained and ordered paid to them and that, therefore, an order by the probate court to pay them a specific sum necessarily constituted the only basis for their action. No exception in favor of administrators in succession was made in announcing the rule. The rule was laid down and has been adhered to as a general rule without exception. It is grounded on the theory that the breach of the bond consists in the disobedience of the order of the probate court to pay over by an executor or administrator.

We think the case of *Wilson* v. *Hinton,* 63 Ark. 145, cited by appellee, fails to sustain the distinction contended for. That was a suit by an administrator in succession against the administrator and personal representative of a deceased administrator for an accounting and an order in the probate court to pay over under sections 47 and 48 of Kirby's Digest, to serve as a basis for a suit against the estate of the deceased administrator and his bondsmen. Upon appeal to the circuit court in a trial *de novo,* the amount due from the deceased administrator was ascertained and his personal representative ordered to pay same. That order was confirmed by this court, indicating an approval of the rule as applied to administrators in succession.

(2) Our conclusion is that under the statutes of this State an administrator in succession must proceed in the probate court against the former executor or administrator for a settlement or accounting and an order to pay over the sum found due to him before he can sue the bondsmen of the former executor or administrator.

No breach of the bond having been sufficiently alleged or proved, it follows that no cause of action, either at law or in equity, was alleged or established; so the decree is reversed and the bill dismissed.

WALKER v. ILLINOIS BANKERS' LIFE ASSOCIATION.

Opinion delivered October 20, 1919.

1. LIFE INSURANCE—APPLICATION—MISSTATEMENT OF AGE—ACT OF AGENT.—The insured in a policy of life insurance will not be bound by, nor held responsible for, a misstatement of his age in his application, where the applicant signed the application in blank, and an agent of the company later filled in the incorrect age.
2. SAME—SAME—SAME—KNOWLEDGE OF AGENT.—The knowledge of an agent of a life insurance company in the preparation of applications for insurance constitutes knowledge in the part of the company itself, which is responsible for the conduct of its own agent within the limit or apparent limit of his authority.
3. SAME—STIPULATION IN CONTRACT AS TO LIABILITY—MISREPRESENTATIONS BY AGENT.—The fact that the application for a policy of life insurance contained an express stipulation to the effect that the company should not be bound by the misrepresentations of its own agent is unavailing to defeat liability, when it does not appear that the applicant himself participated in the fraud.
4. SAME—SAME—SAME.—Where the agent of a life insurance company undertakes to fill out the application for insurance, and, after the applicant has signed the same in blank, the agent takes the same away and fills it out, the applicant is not bound to read it over in order to detect a misstatement.

Appeal from Yell Chancery Court, Dardanelle District; *Jordan Sellers,* Chancellor; reversed and judgment here.

G. O. Patterson and *J. E. Chambers,* for appellants.

1. The proof clearly establishes that Barger knew nothing as to the company's limitation as to his age; that he made true answers to all questions asked him by the agent of the company, who took his application and wrote his answers; that said agent knew of the limitation as to age and knowingly misstated his age in the application, and said agent never at any time advised the insured as to the misstatement as to his age, and insured never learned of the same; that the insured made true answers to the medical examiner of the company and was never apprised of the misstatements contained in the reports, and that he never had actual knowledge of the misstatements in the application or report of the examiner and never read either, nor the policy, and had no knowledge of the warranties or conditions relative to knowledge of the agent or examiner. The agent who wrote and forwarded the application was acting within the scope of his authority in filling out the blank application upon a form furnished him by the company.

Upon these proved facts the decree should have been for the defendant. 52 Ark. 11; 68 N. Y. 434; 24 *Id.* 302; 63 Ark. 187; 81 *Id.* 205; 81 *Id.* 508; 71 *Id.* 209.

2. Knowledge of the agent was the knowledge of the company. *Supra.* 65 Ark. 54, 581; 71 *Id.* 295; 81 *Id.* 508; 102 *Id.* 146-151; 104 *Id.* 508; 111 *Id.* 435; 126 *Id.* 360; 129 *Id.* 450; 134 *Id.* 245.

3. The findings of the chancellor are conclusive that the agent had knowledge of any misstatement in the application and the company is estopped from resisting payment on the grounds of misstatements. 24 N. Y. 302; 129 Ark. 450, and cases *supra.*

4. An innocent misstatement as to the age will not avoid a policy unless wilfully made. 134 Ark. 245. The provision as to misstatement as to age was well known to the agent at the time he wrote the application and when the policy was delivered. To permit the company to avoid liability would permit it to take advantage of its

own wrong. On the law and the proof the decree should be reversed. Cases *supra.*

Hays & Ward and *J. T. Bullock,* for appellee.

Barger was charged with notice of the clauses in the policy as to misstatement of his age. It was his duty to examine the policy; he had ample opportunity to read it and his failure to do so prevents him from pleading estoppel. The decree of the chancellor is right. He did not forfeit the policy but upheld it and based his decree upon clause 12 and that appellee was entitled to recover the difference between the amount actually paid and the amount for which the company was liable under the terms of the policy. 44 Misc. Rep. 478; 90 N. Y. Supp. 56; 117 U. S. 519; 2 Bacon on Life & Acc. Ins., § 216; 1 *Id.,* § 205. See also 170 N. Y. 13; 88 Am. St. 625; 13 Wall. (U. S.) 222, Lawy. Ed., 617; 107 N. Y. 292; 65 Ark. 295; 92 *Id.* 276; 212 S. W. 310-315. The cases cited by appellant as to forfeiture do not apply to the facts here, and the decree is right.

McCULLOCH, C. J. Appellee is a foreign life insurance company, and on March 2, 1916, issued and delivered a policy in the sum of $2,000 on the life of John C. Barger of Yell County. The policy contained the following stipulation:

"In the event of misstatement of age the amount payable on this policy shall be such as the premiums would have purchased at the correct age, except where the true age was beyond the age limit at which insurance would have been granted by the association; in which the liability of the association shall not exceed the sum actually paid the association with 4 per cent. interest thereon."

The age of fifty-five was fixed as the limit on which policies would be issued by the company.

The application signed by the appellant contained the following clause:

"I have verified each of the foregoing answers and adopt them as my own whether written by me or not,

and declare and warrant that they are full, complete and literally true answers to the questions against which they are written; and I agree that the exact literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers. I also agree that proof of the fact that either the agent taking this application, or the examiner, has knowledge of facts contrary to any of the answers or declarations thereon shall not make valid insurance issued on the faith of such answers or declarations."

Barger died a few months after the issuance of the policy. He assigned the policy to appellant Walker as creditor, and after his death Walker became administrator of his estate. Proof of death was duly made, and the amount of the policy was in due time paid over to appellant.

This is an action instituted by appellee in the chancery court of Yell County against Walker to recover the sum so paid under the policy on the ground that Barger misrepresented his age in the application for insurance, stating his correct age to be fifty-four years, when in fact his age was sixty-four years; that Barger made false representations concerning the state of his health at the time he procured the insurance, and that appellant Walker in his proof of loss also made false representations as to those matters and procured the payment of the policy on the faith of such false representations. It is not clear whether recovery is sought from Walker in his representative capacity as administrator of the estate of Barger, or individually as assignee of the policy, but, in view of the conclusion we have reached with respect to the merits of the controversy, it is unnecessary to take further notice of that fact.

The chancery court, on the trial of the cause, made a finding that the proof failed to show whether or not Barger had actual knowledge of the misstatement of age contained in the application, but held that he was chargeable with knowledge of the contents of the application by reason of having signed it, and that under the terms of

that portion of the policy set forth above there was no liability under the policy except for the amount of premiums paid with interest thereon, and the court rendered a decree in favor of appellee for recovery of the difference between the amount actually paid and the amount which the company was liable for under the terms of the policy.

(1) The record supports the finding of the chancellor that there was no testimony that Barger had knowledge of the misstatement of his age, but we are of the opinion that the chancellor erred in his conclusion of law that Barger was, under the circumstances of this case, chargeable with notice of the misstatement, or that that portion of the policy referred to above was conclusive of the rights of the parties. We are of the opinion that the clause in question has no application to the facts of this case for the reason that the proof does not show that Barger, the assured, misstated his age, but on the contrary the proof shows conclusively that the misstatement was made by appellee's agent without the knowledge of Barger, and that Barger was induced by the agent to accept the policy under the belief that it was a valid contract for the amount of insurance specified. The policy was secured by Barger through appellee's local agent in Yell County. The agent in question was clothed with authority to solicit, receive and forward applications for insurance and to deliver policies when issued by the company. He secured the application from Barger and wrote out the application himself in which he inserted the statement of Barger's age at fifty-four years. This was not done in the presence of Barger, but after the agent had carried the application to his home, or to his office, where it was filled out after Barger had signed it.

The agent testified that he asked Barger the date of his birth, but that when he filled out the blank he was not absolutely certain whether Barger had stated the date of his birth to be in the year 1851 or the year 1861, and that he wrote the date 1861 in the application, which made it show Barger's age to be fifty-four years. He testified that he forwarded the application in that form, and that

when the policy was sent to him by the company for delivery to Barger he made the delivery and at the same time asked Barger how old he was and Barger stated his age to be sixty-four. He testified further that he did not inform Barger of the mistake that had been made in the statement of the application concerning the age of the applicant, but delivered the policy to Barger, who immediately turned it over to him to be put away in the iron safe of appellant Walker. The proof shows that Barger did not read the policy, and the conclusion is justified that he was induced to accept it and put it away without reading it by the conduct of the agent in impliedly representing to him that the policy had been issued in accordance with the application as correctly stating his age.

(2) Under those circumstances the misrepresentation of the age of the applicant is not attributable to the applicant himself, and for that reason the clause limiting the amount of recovery under the policy is not applicable. Any other view of the matter would permit appellee to take advantage of the wrong of its own agent, who by his misstatement imposed on Barger and led him to believe that the policy was a valid contract for the amount of insurance named. It is scarcely necessary to cite authorities in support of the statement that the knowledge of such an agent of a life insurance company in the preparation of applications for insurance constitutes knowledge on the part of the company itself, which is responsible for the conduct of its own agent within the limit or apparent limit of his authority. *Franklin Life Ins. Co.* v. *Galligan,* 71 Ark. 295; *People's Fire Ins. Assn. of Arkansas* v. *Goyne,* 79 Ark. 315; *Mutual Reserve Fund Life Assn.* v. *Cotter,* 81 Ark. 205.

(3) The fact that the application contained an express stipulation to the effect that the company should not be bound by the misrepresentation of its own agent is unavailing to defeat liability when it does not appear that the applicant himself participated in the fraud. *Insurance Co.* v. *Goyne, supra.*

(4) It is earnestly insisted that Barger should have read the policy and made such inquiry as would have brought the mistake to light, and that, having failed to do so, the loss should fall on those claiming under the policy, and not on the company. This is not true, however, in the present case for the reason that the conduct of the agent was the cause of Barger's failure to make inquiry and read the policy. He had the right to assume, under the circumstances, that his age had been correctly recorded in the application as stated by him to the agent.

The testimony in the case is not sufficient to warrant a finding that Barger falsely misrepresented the condition of his health in his application for the policy.

The heirs of Barger intervened in the action and filed a plea contesting the assignment of the policy to appellant Walker, and they, too, have appealed from the decree of the court dismissing the intervention. However, the interveners have failed to abstract any testimony in support of their attack on the validity of the assignment, and no reason is stated in the brief why the court should have sustained their intervention.

The decree dismissing the intervention of the heirs is affirmed, but the decree in favor of appellee against appellant Walker is reversed and judgment will be entered here dismissing the complaint for want of equity. It is so ordered.

RUDDELL v. RICHARDSON.

Opinion delivered October 20, 1919.

1. FRAUD—JUDGMENT.—The conduct which will vitiate a judgment of a court must be fraud in the procurement of the judgment, and not merely in the original cause of action upon which it is based.

2. JUDGMENT—FALSE TESTIMONY—WITHHELD TESTIMONY—EFFECT OF.—The giving of false testimony, or withholding testimony which might have been produced, is not sufficient to warrant a court in setting a judgment aside.

3. JUDGMENT—FRAUD—WHEN SET ASIDE.—In order to justify the cancellation of a judgment for fraud, there must have been some trick or artifice on the part of the successful litigant which deceived the court or the adverse party in the presentation of the matter, and which resulted in the judgment. It is not sufficient merely to show that the successful party presented testimony which turned out to be false, or withheld testimony which might have been pertinent to the issue and affected the result.

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

The appellant, *pro se.*

1. The failure of the court to sustain the demurrer, and further to declare from the evidence that no fraud was practiced on it by plaintiff, were errors for which the judgment should be reversed and the petition to vacate dismissed. Kirby's Digest, § 4433; 39 Ark. 107-110; 93 *Id.* 462.

2. The judgment of the court where it was free of fraud is conclusive of the merits of the cause. 90 Ark. 261-263; 68 *Id.* 492; 73 *Id.* 415; 75 *Id.* 415; 90 *Id.* 166; 93 *Id.* 462; 107 *Id.* 136. See also 81 Am. Dec. 654; 20 R. C. L. 292; 38 Am. Dec. 100.

This was merely an attempt to set aside a judgment at the next term and try it again on a different theory. 91 Ark. 362. There was no evidence of fraud in the procurement of the judgment. 1 Enc. of Ev. 452; 93 Ark. 462, 471. The demurrer should have been sustained to the motion to set aside the judgment because it did not show any cause why all the defenses alleged in the motion were not used at the former trial and does not show any fraud practiced on the court. 93 Ark. 462; 20 R. C. L. 292. No excuse is shown for not pleading all her defenses in the original action. Cases *supra.*

Casey & Thompson, for appellee.

1. A judgment obtained by fraud should be vacated even at the next term of court. Kirby's Digest, § 4431; 13 Pac. 593; 36 Kan. 374; 67 N. E. 39; 202 Ill. 257. The court properly set aside the former judgment; (1) there

was fraud and concealment practiced on the court; (2) this fraud was unknown to attorneys of appellee at the time, and (3) appellee had a good defense if the matters concealed by appellant had been known and the judgment was properly set aside. Cases *supra.* 96 Ark. 184; 100 *Id.* 510; 90 *Id.* 504; 15 *Id.* 553.

2. The findings of a court are as conclusive as the verdict of a jury. 54 Ark. 229; 55 *Id.* 331.

McCULLOCH, C. J. Ruddell recovered judgment against Mrs. Richardson in the circuit court of Independence County in January, 1919, for the sum of $718 in an action for breach of a contract of guaranty on the sale of a printing plant of the Batesville Record. The contract in suit recited that the Intertype machine, which constituted a part of the printing plant, was encumbered with a lien in the sum of about $1,900 (which sum Ruddell assumed to pay) and there was a guaranty on the part of Mrs. Richardson that the indebtedness against the machine did not exceed that amount, and that she would hold Ruddell harmless from any claims in excess of that amount.

Mrs. Richardson appeared in the action by her attorneys, and filed an answer denying the allegations of the complaint, and among other things alleging that she did not have any means of information at the time of the sale of the printing plant concerning the amount of indebtedness against it, but on the contrary Ruddell was entirely familiar with the amount of the debts against the plant. There was a trial of the issues, which resulted in the aforesaid judgment in favor of Ruddell. Mrs. Richardson, acting through the same attorneys who represented her in the former trial, instituted the present proceedings in the same court at the next term thereof to set aside the judgment on account of fraud alleged to have been committed by Ruddell in procuring the judgment. In the complaint the statements of the original answer of Mrs. Richardson were substantially reiterated, and in addition it was alleged that at the time she exe-

cuted the contract in suit she was "just recovering from a very serious operation" and that "at said time was absolutely irresponsible and incapable of transacting business or understanding the nature of said contract and plaintiff well knew same was true." There was a demurrer to the complaint, which the court overruled, and on a trial before the court an order was made vacating the former judgment, from which an appeal has been prosecuted to this court. Since the appeal was perfected, Mrs. Richardson died, and the cause has been revived in the name of the executor under her last will and testament.

It appears from the testimony that the printing plant was owned by a corporation, in which V. G. Richardson, the deceased husband of Mrs. Richardson, was the principal stockholder. In fact, V. G. Richardson owned all of the stock in the corporation except two shares, one of which was held by his wife, the appellee, and the other by Ruddell. After the death of V. G. Richardson, Roy Hudson was appointed administrator of the estate and made the sale of the printing plant to Ruddell. The guaranty contract between Mrs. Richardson and Ruddell was executed contemporaneously with the sale made by Hudson as administrator, and, as before stated, the contract contained a guaranty as to the amount of the encumbrance against the Intertype machine. The contract also recited the fact that V. G. Richardson was the owner of the shares of stock in the corporation, and that Mrs. Richardson owned one share and was the sole beneficiary under the last will and testament of V. G. Richardson. The contract also contained an assignment by Mrs. Richardson to Ruddell of the shares of stock in the corporation formerly held by her husband and the one share held by herself.

(1) We do not find any evidence in the record sufficient to justify the court in setting aside the former judgment on account of fraud on the part of appellant Ruddell in its procurement. The testimony in the trial below was addressed solely to the physical and mental condition of

Mrs. Richardson at the time she executed the contract of guaranty, and to the fact that the sum of money in consideration of the sale of the printing plant was paid by Ruddell to Hudson, the administrator, and not to Mrs. Richardson. These were matters which were necessarily issues in the former trial, and, in the absence of fraud in the procurement of the judgment, were concluded by that adjudication. We have often held that the conduct which will vitiate a judgment of court must be fraud "in the procurement of the judgment, and not merely in the original cause of action upon which it was based." *Scott* v. *Penn,* 68 Ark. 492; *Womack* v. *Womack,* 73 Ark. 281; *James* v. *Gibson,* 73 Ark. 440; *Boynton* v. *Ashabranner,* 75 Ark. 415; *Davis* v. *Rhea,* 90 Ark. 261.

In *Boynton* v. *Ashabranner, supra,* we said: "The court may have reached its conclusion upon false or incompetent testimony as to payment of taxes, yet that would not constitute grounds for reopening the question and trying it anew. In other words, it must be shown that some fraud or imposition was practiced by the petitioner or his attorney upon the court in procuring the decree, before it can be set aside."

(2-3) It is thus seen that the giving of false testimony in the case, or withholding testimony which might have been produced, is not sufficient to warrant a court in setting aside the former judgment. There must, in order to justify the cancellation, have been some trick or artifice on the part of the successful litigant which deceived the court or the adverse party in the presentation of the matter, and resulted in the judgment. It is not sufficient merely to show that the successful party presented testimony which turned out to be false, or withheld testimony which might have been pertinent to the issue and affected the result.

The judgment of the circuit court vacating the former judgment is therefore reversed, and the cause is remanded with directions to dismiss the complaint.

ABER v. MAXWELL.

Opinion delivered October 20, 1919.

1. BANKS AND BANKING—INSOLVENCY—DOUBLE LIABILITY—CALL BY BANK COMMISSIONER.—In an action to enforce the double liability of the stockholders of an insolvent bank, the action of the bank commissioner in levying assessments is conclusive as to the necessity for the call and the amount thereof.
2. SAME—SAME—SAME—REMEDY OF STOCKHOLDER.—The remedy of the stockholders for an unnecessary or excessive call, is in the chancery court, which supervises the proceedings of the State Bank Commissioner and allows claims and makes final distribution of the assets.

Appeal from Hempstead Circuit Court; *G. R. Haynie*, Judge; affirmed.

D. B. Sain, T. D. Crawford and *L. F. Monroe*, for appellant.

1. There was error in refusing to require the complaint to be made more specific. Acts 1913, p. 494. The Bank Commissioner was trustee for the stockholders as well as the bank's directors. The stockholders are entitled, as matter of law, to an accounting from the commissioner. Certainly where he makes an assessment of 100 per cent., they are entitled to know why he does so. There is no presumption that the commissioner could do no wrong. If he makes improper allowances of claims or misuses the bank's funds so as to sacrifice the bank's funds and the stockholders' liabilities, they are entitled to know it. The complaint was demurrable.

2. There was error in sustaining the demurrer to the answer and amended answer; the cause should have been transferred to equity. If the president, Foster, allowed the cashier to recklessly pay overdrafts, and was liable to the stockholders, Foster should have been made a party in equity and affirmative relief granted against the only creditor and the note to Foster canceled. Acts 1913, § 33, p. 482; 60 Cal. 126; 120 Ky. 776; 36 Mich. 263; 7 C. J. 566; 1 Michie on Banks, etc., p. 286; Zane on Banks, etc., 379; Tiffany on Banks, etc., p. 298; 86 Fed. 505.

2. A stockholder may sue in equity the officers and directors for gross negligence resulting loss of corporate assets, where the directors are still in control or the receiver refuses to sue. 3 Michie on Banks, etc., p. 1915; 110 Ark. 39; 4 Cowler 682; 15 Am. Dec. 412. The cause should have been transferred to equity and Foster made a party.

Graves & McFadden, for appellee.

1. Motion to make complaint more definite and certain was properly overruled. Acts 1913, p. 494, etc., § § 54-5-6; 130 Ark. 128; 8 Wallace 498.

2. It was not necessary that the other assets of the bank be exhausted before proceeding against the stockholders. 92 U. S. 156; 130 Ark. 128; 94 U. S. 673; 94 *Id.* 680.

3. There was no error in sustaining the demurrer. The action of the Bank Commissioner is conclusive against defendant. 130 Ark. 128; 8 Wall. 498.

4. No error in refusing to transfer to equity. The remedy was at law. 8 Wall. 498; 94 U. S. 673.

McCULLOCH, C. J. The Hempstead County Bank, a domestic corporation doing business at Hope, Arkansas, became insolvent, and on December 17, 1917, the State Bank Commissioner, in the exercise of his authority conferred by statute (Acts 1913, page 462), took charge of the property and affairs of the bank and proceeded to administer the same, and on March 11, 1918, the commissioner issued and published a call on the stockholders for the assessment of double liability imposed by that statute. Appellant was a stockholder, and failing to respond to the call by payment of his assessment, the Bank Commissioner instituted this action against him to recover the amount of the assessment. Appellant appeared by counsel and first filed a motion to require that the complaint be made more definite and certain by setting forth a list of the assets and liabilities of the defunct bank, and, the motion being overruled, an answer

was filed, which contained the following paragraphs relied on here as stating a defense to the action:

"And, further answering, the defendant denies that there was any necessity existing for the said John M. Davis, Bank Commissioner, as aforesaid, to take charge of the affairs of said bank; denies that said bank was insolvent and alleges the truth to be that on account of the carelessness and incompetency of the plaintiff, John M. Davis, Bank Commissioner, or his assistants, the true condition of the affairs of said bank was not discovered at the time the said Bank Commissioner took charge of the affairs of said bank; that the deficit existing in the accounts of the said banking corporation at the time the same was taken in charge by said Banking Commissioner was caused by numerous overdrafts drawn by the Dixie Broom Company of Hope, Arkansas; that said overdrafts had been carried on the books of said banking corporation for a long time prior to June 30, 1916, and had been overlooked by the Bank Examiner in making his investigation; that the overdrafts of the said Dixie Broom Company continued from day to day after June 30, 1916, and that on December 17, 1917, the overdrafts of the Dixie Broom Company had reached the sum of $125,068.37; that all of said overdrafts were being carried on the books of said bank and had been for a long period of time.

"That under the laws of the State of Arkansas the officers of said bank became liable to the stockholders for the amount of the overdrafts so drawn by the Dixie Broom Company; that W. Y. Foster, president of said bank, without the knowledge or consent of the stockholders of said bank, permitted the Dixie Broom Company to draw money out of said bank on overdrafts, and thereby himself became liable to the stockholders of said bank for the amount of the overdrafts of the Dixie Broom Company; became liable to pay same and did pay same, and that when said W. Y. Foster had paid the amount found to be necessary to adjust the affairs of said bank he paid what he was liable under the law to pay, and the

amount so paid in adjusted the affairs of said bank and the necessity no longer existed to make an assessment of 100 per cent or any other amount against the stockholders of said bank.

* * * * *

"Defendant further answering alleges that all the debts of said bank have been paid by the said W. Y. Foster, as he should have done; that the same amounted to less than the amount of the overdraft allowed by the said W. Y. Foster to the Dixie Broom Company, and that they are not liable for any assessment of the value of their stock.

"And further answering the defendant alleges that the claim for which plaintiff is attempting to enforce the penalty of a double liability for stock in said bank, is a claim founded on a note executed by the said W. Y. Foster, president of the Hempstead County Bank, to himself or by said bank after said bank had become insolvent and was in the hands of the plaintiff as Bank Commissioner; that said note was given, or said debt created in due course of business of said bank, and is not such a debt, contract or engagement of said bank as would warrant or justify the plaintiff in making said assessment for its payment."

The prayer of the answer was that the cause be transferred to equity and that the note alleged to have been executed by Foster be canceled. An amendment to the answer was filed, which contained charges of negligence and other misconduct of the directors of the bank in the management of its affairs, and a prayer that Foster and the other directors be made parties, and the prayer for transfer to equity was renewed. The court sustained a demurrer to the answer, and, on the failure of appellant to plead further, final judgment was rendered.

(1) In the case of *Davis, State Bank Commissioner,* v. *Moore,* 130 Ark. 128, we construed the statute creating the State Bank Department and conferring authority upon the State Bank Commissioner with respect to winding up of insolvent banks, and we decided that in a suit

to enforce the double liability of stockholders, the action of the commissioner in levying assessments was conclusive as to the necessity for the call and the amount thereof, and that the question could not be raised in that suit. We based our conclusion on the fact that the terms of the statute were borrowed from the National Banking Act, which had been thus construed by the Supreme Court of the United States. The first decision of that court was in the case of *Kennedy* v. *Gibson*, 8 Wall. 498, and the decision there rendered has been steadily adhered to. *Casey* v. *Galli*, 94 U. S. 673; *United States* v. *Knox*, 102 U. S. 422; *Bushnell* v. *Leland*, 164 U. S. 684; *Studebaker* v. *Perry*, 184 U. S. 258; *Hale* v. *Allison*, 188 U. S. 56; *Christopher* v. *Norvell*, 201 U. S. 216.

It was contended before the Supreme Court of the United States that the question of the necessity for the call was a matter of judicial cognizance which Congress could not withdraw from the courts and place exclusively within the authority of the Comptroller of the Currency, but the court refused to accept that theory, and held that the comptroller had the power to make the call, and that the necessity for it was conclusive in an action to enforce it. In our own case cited above, we expressly pretermitted a decision of the question whether or not, in an action to enforce the double liability of a stockholder, a charge of fraud and collusion on the part of the Bank Commissioner would constitute a defense. It is unnecessary to decide that question in the present case, for the reason that the answer does not contain any such allegation, either expressly or inferentially. The substance of the answer is that all of the valid debts of the defunct banking corporation have been paid, and that the only asserted claim is a note held by W. Y. Foster, the president of the bank, which he executed for the bank to himself for money advanced in refund of moneys overdrawn by the Dixie Broom Company, and that Foster's claim was not a valid one for the reason that he had wrongfully permitted the overdrafts, and was, therefore, liable to the bank for the amount thereof.

This is no more nor less than the statement in detail of the fact that there was no necessity for the commissioner's call on the stockholders for compliance with the double liability. The answer does not, as before stated, constitute an allegation of collusion between the Bank Commissioner and Foster for the wrongful imposition of this liability on the stockholders for the purpose of paying the money over to Foster in satisfaction of an unjust claim against the bank. It is true the answer alleges that there were no valid unsatisfied claims on the bank at all, but this, too, relates merely to the question of the necessity for the commissioner's call, and it falls squarely within the decision of this court and the decisions of the Supreme Court of the United States on this subject. If, as we have heretofore held, the call of the Bank Commissioner is conclusive of its necessity and propriety in an action to enforce the call, then that necessity can not be inquired into on an allegation that the debts of the bank have in fact been paid, for it is the very thing which the commissioner himself must inquire into and decide before he issues a call.

(2) The remedy of the stockholders for an unnecessary or an excessive call is in the chancery court, which supervises the proceedings of the State Bank Commissioner and allows claims and makes final distribution of the assets.

The decision of the circuit court was correct, and the judgment is, therefore, affirmed.

HUMPHREYS, J., dissents.

HART, J., (dissenting). In the case of *Davis, State Bank Commissioner* v. *Moore,* 130 Ark. 128, the court held that the duty devolved upon the Bank Commissioner in making the assessment of liability of individual stockholders, and that his finding as to the amounts necessary to be assessed was conclusive in an action to enforce that liability. In that case the court recognized that the statute was borrowed from the act of Congress regulating national banks. In construing the act of Congress the

Supreme Court of the United States has said that the general purpose of the statute was to confer upon the creditors of the bank a right to resort to the individual liability of the shareholders to the extent, if necessary, of the whole amount of their stock therein.

Under the acts of Congress and the decisions of the Supreme Court of the United States cited in the majority opinion, the comptroller of the currency is constituted a *quasi* judicial tribunal to determine at what time and what amounts, not exceeding the full liability of the stockholders, it is necessary to collect for them to pay the debts of the bank. It is said that his decision, like the decision of the land department and of other *quasi* judicial tribunals, is open to avoidance by the court only in a direct attack upon it upon the grounds of error of law, fraud, or mistake.

The effect of the holding in the majority opinion is that the decision of the Bank Commissioner can not be reviewed for errors of law committed by him in making the assessment. Here is where I think the opinion is wrong and is contrary to the decisions of the Supreme Court of the United States on the question. In *United States* v. *Knox,* 102 U. S. 422, the court said:

"Although assessments made by the comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it can not be doubted that a court of equity, if its aid were invoked, would promptly restrain his injunction."

Here clearly the Supreme Court of the United States recognizes that the decisions of the comptroller are open to avoidance by a court in a direct attack upon them in an error of law, fraud, or mistake. Such, too, I think, is the effect of the reasoning of the other cases cited in the majority opinion. Such construction has been placed

upon them by Judge Sanborn in *Deweese* v. *Smith,* 106 Fed. Rep. 438, and by Michie on Banks and Banking, vol. 3, sec. 248 (2 C. B.), p. 839, and The National Bank Act annotated by Bolles (4 Ed.), sec. 57, p. 169. This makes it necessary to consider whether or not the Bank Commissioner committed an error of law in ordering the assessment.

A demurrer was sustained by the lower court to the answer of the defendants. Therefore this question must be tested by the allegations of the answer, for the demurrer admits the allegations to be true. According to the allegation of the answer, Foster was the president of the bank and one of the directors thereof. It is also alleged that the directors of the bank negligently failed and neglected to give attention to or to take any control in the management of the bank and its affairs, but allowed the cashier to recklessly pay overdrafts and dissipate the assets of the bank in making bad loans and that the course pursued by the cashier in this respect was known to the directors; that the cashier permitted the Dixie Broom Corporation to make overdrafts for the period of a year and a half, which finally amounted to the sum of $125,-068.37; that the president of the bank knew the conditions with respect to the overdrafts from time to time as they accumulated and failed to have them corrected; that, after the commissioner took possession of the bank, the president, realizing that he was liable to the amount of these on account of his negligent management of the affairs of the bank, paid all the creditors of the bank, and that the amount so paid by him was less than the amount of the overdrafts; that, after he had paid the debts of the bank and after the Bank Commissioner had taken charge of its assets as an insolvent bank, the Bank Commissioner allowed him to take a note from the bank in the sum of the amounts he had paid to the creditors, and that the assessment ordered by the Bank Commissioner was for the purpose of making the stockholders pay this note. The allegations of the answer bring the case within the

principles of law decided in *Bailey* v. *O'Neal,* 92 Ark. 327. In that case the court held: "Where the directors of a bank knowingly permitted the cashier to pursue for a number of years a reckless course of dealing, the probable consequence of which would be the insolvency of the bank, they will be held liable to the creditors of the bank." Again, in the case of *Bank of Des Arc* v. *Moody,* 110 Ark. 39, the court held:

"Where the cashier of a bank made a number of bad loans, and the directors were guilty of negligence in not managing the affairs of the bank and controlling the action of the cashier, the directors will be held liable, not only to the creditors who are unable to enforce their rights against the bank, but to the stockholders thereof, whose stock was rendered worthless on account of the losses sustained by the bank."

Under the principles of law decided in these cases and under the allegations of the answer, the president of the bank was guilty of negligence in managing the affairs of the bank and was liable for the overdrafts. Hence he could not take the note of the bank payable to himself for the amount of the overdrafts paid by him, and the Bank Commissioner committed an error of law in holding that he could give the bank his note for that amount and in ordering an assessment upon the stockholders to pay it.

The defendant moved to transfer the case to equity and to make the president of the bank a party thereto. This should have been done. It would have avoided circuity of action; and if the allegations of the answer are true, there was no liability upon the part of the stockholders and the lawsuit would have been ended. It is perfectly manifest that if the president of the bank was liable to the creditors of the bank under the statute by reason of his negligently permitting the large overdraft of the Dixie Broom Company, he could not pay the creditors and then recover back from the stockholders the amount so paid.

FULK v. ROBINSON.

Opinion delivered October 20, 1919.

1. MARRIED WOMEN—TRANSFER OF INCHOATE RIGHT OF DOWER AND HOMESTEAD.—Prior to the passage of Act 324, p. 241, Acts of 1919, a married woman could not convey her inchoate right of dower and homestead to a stranger by executing a deed to him in which her husband did not join.
2. SAME—SAME.—The deed of a married woman to a third party, relinquishing dower and homestead only, in which the husband did not join, is invalid under Kirby's Digest, section 741.
3. SAME—SAME.—Under Act No. 324, Acts of 1919, a married woman may relinquish dower and homestead in her husband's lands, in a deed in which her husband does not join, only where she executes the instrument to her husband's grantee or to one claiming title under him.
4. CONVEYANCES—CONFORMITY TO STATUTE.—Where a statute prescribes a method of conveyance, that method must be followed to make the conveyance valid.

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

Mehaffy, Donham & Mehaffy, for appellants.

Under section 741, Kirby's Digest, a married woman may relinquish her dower by joining her husband in a deed and acknowledgment, etc. Under this section she could only release her dower by joining her husband in a deed to a third person, but this was amended by act 324, Acts 1919, 241, so as to allow wives to release dower by a separate instrument to her husband's grantee or anyone claiming title under him, etc., and the court erred in sustaining appellee's demurrer to appellant's answer. Under our new law the wives have properly relinquished dower to their husband's grantee. As this is a new act no authorities are available now.

Will G. Akers, for appellee.

Act 234 has no retroactive effect and was passed after the deed was made. The dower did not pass. 13 Ark. 422; 31 *Id.* 678-681; 67 *Id.* 15-23. Under these decisions the deed tendered was not sufficient to vest the right of dower of Elizabeth and Willie Fulk.

WOOD, J. In this case the appellants, Florence M. Fulk, Gus Fulk and Guy Fulk each owned an undivided one-third interest in certain lots in the city of Little Rock, Pulaski County, Arkansas. Wives of the appellants Gus and Guy Fulk deeded to appellant Florence M. Fulk all their rights of dower and homestead in and to these lots. Thereafter the appellants sold the lots to the appellee for a consideration of $900, evidenced by $250 cash and notes for the balance. The appellants tendered to the appellee their warranty deed signed and acknowledged by each of them. The appellee refused to accept the deed on the ground that it did not contain relinquishment of dower and homestead of the wives of Guy and Gus Fulk and was not signed by their wives.

This suit was instituted by the appellee against the appellants setting up the contract and praying a rescission thereof and that appellants be enjoined from negotiating the notes and be required to deliver same into the registry of the court for cancellation and have judgment against the appellants in the sum of $250.

The appellants answered admitting the truth of the allegations contained in the complaint and setting up in defense the facts as above set forth.

The appellee demurred to the answer, and upon these pleadings the court rendered a decree sustaining the demurrer and giving the appellee judgment for the amount sued for and canceling the unpaid notes. From which judgment is this appeal.

The question presented by this appeal is whether or not a wife can convey her inchoate right of dower and homestead to a stranger by executing a deed in which her husband does not join. The conveyance by the wives of their dower and homestead to Florence M. Fulk was on February 3, 1919. The contract of purchase between appellee and appellants was on February 24, 1919.

Section 741 of Kirby's Digest provides that "a married woman may relinquish her dower in any of the real estate of her husband by joining with him in a deed of conveyance thereof and by acknowledging the same in a

manner hereinafter prescribed." Under this section the deeds of the wives of Guy and Gus Fulk to the appellant Florence Fulk would have been invalid as a conveyance of their right of dower because their husbands did not join in the execution of those deeds.

But appellants contend that these deeds were valid and operated as a conveyance of the dower interest of the wives under Act 324 of the Acts of 1919, page 241, which reads as follows: "A married woman may relinquish her dower in any of the real estate of her husband by joining with him in the deed of conveyance thereof, or by a separate instrument executed to her husband's grantee or any one claiming title under him, and acknowledging the same in the manner hereinafter prescribed."

The conveyance of the wives of Guy and Gus Fulk to Florence M. Fulk were prior to the passage of the act 324 of the Acts of 1919, March 21, 1919. That act has no retroactive effect and does not purport to be in any manner a curative statute. Therefore, it does not operate to validate the conveyance of the wives of Gus and Guy Fulk. Moreover, if it could be so construed, these conveyances could not be brought within the terms of that act because they were not made direct to their husbands' grantee or any one claiming title under him.

Where a statutory method of conveyance is prescribed, that method must be followed to make the conveyance valid. Under the statute there has been no conveyance of the inchoate right of dower of the wives of Gus and Guy Fulk to the appellee.

The appellants concede that the contract of purchase called for a warranty deed from the appellants conveying to the appellee a perfect title.

The decree is, therefore, correct and is affirmed.

WORTHINGTON v. OSBORNE.

Opinion delivered October 20, 1919.

1. APPEALS—WAIVER OF RIGHT TO APPEAL.—A stipulation waiving the right of appeal is valid and binding, and where properly pleaded will constitute a bar to an appeal taken in violation of the terms thereof.
2. APPEALS—AGREEMENT NOT TO PROSECUTE—CONSIDERATION.—In an action pending before a justice, the defendant sought a continuance. At the suggestion of the justice the parties were granted the continuance upon executing a stipulation that they agreed to submit the controversy to the justice, abide his judgment, and would not appeal. *Held*, the agreement was valid and binding.

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

J. D. DeBois and *Avery M. Blount*, for appellant.

The court erred in dismissing the appeal, as the transcript and all the papers showed that the appeal was duly taken in time on the statutory affidavit made within the 30 days. Art. 7, sec. 14, Const. 1874; Kirby's Digest, § ....., p. 70. The Legislature can not enlarge or abridge the Constitution. 48 Ark. 82. And a justice of the peace can not abridge the constitutional right of appeal by contract or demand. Kirby's Digest, § § 4672-4665; 95 Ark. 552; 25 Ark. 487; 46 *Id.* 420.

A share cropper has no right to possession of the crop until his part is set out to him. 43 Ark. 284. Appellant was in the lawful possession of the crop and had the right to retain it. Replevin was not the remedy to enforce a division. 39 Ark. 442. The cause should be dismissed at cost of appellee, being improperly brought.

John E. Miller and *C. E. Yingling*, for appellee.

The court correctly dismissed the appeal, as the parties voluntarily bound themselves to abide by the judgment and that appeal should be taken. 173 Fed. 577; 19 Ann. Cases, 1054, 1056. A stipulation waiving an appeal is binding. 19 Ann. Cases, 1056; 20 Ark. 150; 2 R. C. L., p. 59, § 39; 28 Ark. 519; 42 Am. St. 200 and note, p. 208; 2 R. C. L., pp. 386-7, § 32.

WOOD, J. This is an action instituted by the appellee against the appellant, before a justice of the peace of Cadron Township, in White County, to recover the possession of certain cotton.

A change of venue was had, first to Justice of Peace J. E. Shelby and later, on motion, was transferred to J. B. West, the justice of peace of Gravel Hill Township. By consent of parties the cause was set for hearing December 12, 1918. Osborne and his attorney were present that day ready for trial. The Worthington's attorney was not present. It was a rainy day. Worthington moved to continue until another day, giving as his reason that his attorney was not present to represent him in the case. Whereupon, according to the testimony of Worthington, the justice of the peace announced that he would grant the continuance if he (Worthington) would agree not to appeal the case and abide the decision of the court. After some hesitation, Worthington agreed and entered into the following agreement:

"We, John W. Osborn, on my part, plaintiff, and G. S. Worthington, defendant, hereby contract and agree and bind ourselves in open court to continue this case to the 18th day of December, 1918, and to submit this cause to the court. Plaintiff to be represented by H. A. Midyett and defendant to be represented by Avery Blount. And we bind ourselves to perform the judgment of the court and not to pray an appeal or cause any further delays in any way, in consideration of all our differences between us.

"This December 12, 1918.

"In case of sickness of either or both attorneys, they are to be substituted.

"John W. Osborn.

"George S. Worthington.

"Subscribed and sworn to before me this December 12, 1918.

"James B. West, J. P."

After the above agreement was entered into by the parties the cause was continued and set for December

18, 1918. On that day the parties were present in person and by their respective attorneys.

The case was by consent tried before the court, the evidence was adduced and the court rendered judgment in favor of Osborn, from which judgment Worthington duly appealed to the circuit court. In the circuit court Osborn moved to dismiss the appeal. The court heard testimony on the motion which developed substantially the above facts.

The testimony of Worthington showed that the suggestion came from the justice of peace to the effect that he would continue the cause only on condition that he, Worthington, would agree to abide by the decision.

The testimony of the constable, who was present at the time the agreement was entered into, was to the effect that the parties agreed to settle the case on its merits; that Worthington did not have a representative there and the court thought it would throw extra cost on some one else if continued to another day, and because of the further fact that it would then be appealed to the circuit court, was unwilling to grant the continuance. Thereupon the parties entered into the agreement. Witness did not know of any undue influence exercised by Osborn or any one in his behalf.

The court entered judgment dismissing the appeal from the justice court and from the judgment of the circuit court is this appeal.

The testimony is not sufficient to warrant a finding that the appellant Worthington was under any duress or that any fraud was practiced upon him either by the justice of peace or the appellee when he signed the agreement with the appellee to abide the decision of the justice. This agreement, therefore, was a voluntary waiver of his right to appeal.

The testimony discloses that the purpose of this agreement was to avoid the costs incident to the further delays and further prosecution of the suit before the justice and to the appellate courts. The agreement was thus founded upon mutual promises of the parties which was of equal benefit to each of them.

In a case note to *U. S. Consolidated Seeded Raisin Co.* v. *Chaddock & Co.*, 19 Ann. Cas., p. 1056, it is stated: "The rule obtaining in a majority of jurisdictions is that a stipulation waiving the right of appeal is valid and binding and when properly pleaded will constitute a bar to an appeal taken in violation of the terms thereof.

Among the numerous cases cited to sustain the rule stated in the above case is that of *Lyon* v. *Sanders*, 3 Green (Iowa), 332, which is similar to the case at bar. There the court said: "Because a party has a right to appeal it does not therefore follow that he must appeal or that he can not waive his right." See also 2 R. C. L., p. 59, sec. 39, and cases cited.

The judgment is correct, and is, therefore, affirmed.

SMITH *v.* WALLIS-McKINNEY COAL COMPANY.

Opinion delivered October 20, 1919.

1. APPEAL AND ERROR—TRIAL—TIME WHEN MOTION FOR NEW TRIAL WAS FILED.—The evidence held to show that appellant's motion for a new trial was not filed before the expiration of the term.
2. APPEAL AND ERROR—MINUTES ON JUDGE'S DOCKET—EVIDENCE.—The minutes entered by the judge on the docket of his court are competent evidence, but not conclusive of the facts which they recite; so, where the judge's docket showed that a motion for a new trial had been filed in time and overruled, it may be shown by other evidence that the docket entry does not speak the truth, and that the motion was in fact filed after the expiration of the term.
3. APPEAL AND ERROR—TRIAL—FILING MOTION FOR NEW TRIAL—EXPIRATION OF TERM—CONDUCT OF TRIAL JUDGE.—Where a verdict is returned against appellant, and the trial judge makes an entry in his docket that appellant has filed a motion for new trial, and the same was overruled, and gives the appellant to understand that he may file said motion later, after the adjournment of the term, and appellant relies upon such understanding, the court later is without authority to expunge the record entry showing that the motion for new trial was filed before adjournment of the term.

4. NEW TRIAL—MOTION MAY BE PRESENTED, WHEN.—Under Kirby's Digest, section 6216, as amended by Act 291, Acts of 1909, page 890, appellant may present motion for new trial to trial judge at any time within thirty days after verdict or decision, upon reasonable notice to the other party or his attorney of record. It is then the duty of the judge to pass upon said motion, and if he overrules the same to endorse upon said motion his ruling thereon, and to endorse an order granting an appeal to the Supreme Court, and granting appellant a reasonable time in which to file bill of exceptions.

5. APPEAL AND ERROR—MOTION FOR NEW TRIAL—MINUTES OF TRIAL JUDGE.—Under the facts as set out in syllabus three, *supra*, the court may correct his docket to speak the truth, where, at the time he made the entry he believed that appellant would file its motion for new trial before the expiration of the term, and where appellant did not do so.

6. APPEAL AND ERROR—ERRORS IN RECORD—RIGHT OF COURT TO CORRECT—DOCKET ENTRY.—A court of record may correct mistakes in its records which did not arise from judicial action of the court, but from the mistakes of the recording officer; and it may do this either on suggestion or motion of those interested, or upon its own certain knowledge and mere motion.

7. APPEAL AND ERROR—ABSENCE OF MOTION FOR NEW TRIAL.—When there is no motion for new trial this court can only correct such errors as appear in the record proper or judgment roll.

8. MASTER AND SERVANT—INJURY TO SERVANT—COMPLAINT.—In an action for damages for personal injuries the complaint alleged defendant had carelessly and negligently failed to furnish deceased an entry to his place of work, with a safe roof, and that "by reason of defendant's negligence in looking after the safety and sufficiency of said entry way and roof, in ways unknown to plaintiff." *Held,* it was not error, upon motion of defendant, to strike the last clause above from the complaint.

Appeal from Franklin Circuit Court, Ozark District; *James Cochran,* Judge; affirmed.

Allyn Smith and *Jo. Johnson,* for appellant.

1. The court erred in striking from the amended complaint the clause alleging negligence. This error appears on the face of the record, and the error was prejudicial. 184 S. W. 456; 123 Ark. 119; 165 Ky. 632; 177 S. W. 445.

In an action for personal injury caused by the negligence of defendant, plaintiff may aver the negligence

complained of in general terms and may then show any specific acts of negligence which the evidence conduces to support, but if he specifically avers the acts constituting the negligence, he can not prove nor rely on acts constituting negligence not alleged in the pleadings. 205 S. W. 931, 933-4.

The error in striking out this clause entered into and vitiated the whole theory and the trial of plaintiff and forced appellant to submit the case to a jury. The particular mode of the injury and particular negligence need not be stated in the complaint. 51 Kan. 294; 77 Mo. 232, 234. This is the general rule in all Code States. 10 Minn. 418; 62 Ala. 494; 57 Ind. 297; 80 Ky. 82; 49 Mich. 380; Kirby & Castle's Digest, § 7533; Bliss on Code Plead. § 211-a; 80 Ky. 84; 42 Iowa 376; 34 Mo. 235; Bliss Code Pl., § 310-a. See also 45 Mo. 322.

2. The motion for a new trial was filed in due time, overruled and duly excepted to. The minutes of the judge show this, as does the record. 8 Kan. 228-35; 30 *Id.* 753. Appellee is estopped from disputing the truth of the record made here. The office of a *nunc pro tunc* order is to make the record speak the truth as to what was actually done.

3. The court erred in its instructions. 39 U. S. Sup. Ct. Rep. 407. Those asked by defendant and refused were contradictory and properly refused. 101 Ark. 117-120; 141 S. W. 763; 208 S. W. 765-6.

Evans & Evans, for appellee; *J. D. Benson,* of counsel.

1. It appears from the record, as well as from the testimony, that there was no motion for a new trial in the case, and there is nothing for the court to consider. 83 Ark. 356.

The power of a court of record to correct its own record to make it speak the truth is settled, and that was done here. 78 Ark. 228. Parol evidence was admissible. 78 Ark. 364; 78 *Id.* 227-8; 75 Ark. 12; 40 *Id.* 324; 103 Ark. 4; 82 *Id.* 188; 86 *Id.* 90.

The uncontradicted testimony shows that the judgment correcting the record is correct. The judgment of the circuit court amending the record should be affirmed. When this is done, there is nothing for this court to consider on appeal.

2. Counsel for appellant practically concedes that there is no motion for a new trial in the main case and there was no error in sustaining appellee's motion to make more definite and certain the complaint. The action of the court with reference to the motion to require appellant to make his complaint more definite and certain does not appear upon the face of the record and there was no motion for new trial and the error complained of cannot be considered. 93 Ark. 84; 61 *Id.* 33; 39 *Id.* 258; 34 *Id.* 684; 95 *Id.* 85, 382; 127 *Id.* 26. See also 132 *Id.* 9; Simpkins, Federal Suit at Law, p. 104; 92 C. C. A. 253, 527; 167 Fed. 75; 168 *Id.* 842.

3. There was no demurrer to the complaint nor the amended complaint, but the court sustained appellee's motion to make more definite and certain.

The rule of pleading in negligence cases is plain and well settled. This is not a case where the rule of "*res ipsa loquitur*" applies. The mere statement of the transaction does not raise an inference of negligence. The cause of action must be stated in ordinary and concise language of the cause of action. The general rule of pleading in actions of negligence is stated in 29 Cyc. 565. Reasonable certainty as to essential facts is required, facts showing a legal duty and neglect thereof by defendant resulting in injury. *Ib.*, p. 567. On motion to make more definite and certain, the acts or omissions characterized by negligence must be set up in traversable form and in such manner that defendant may be apprised of what it is called on to defend against. 29 Cyc. 564-5, etc.

The allegation in the amended complaint stricken out was not the allegation of any act or omission. It was indefinite and delusive and properly stricken out. 99 Ark. 302; *Ib.* 314; 102 *Id.* 187; 20 R. C. L. 173-175.

Defendant here availed itself of its legal remedy, and the court, as was its duty, struck out the paragraph, since plaintiff would not or could not make his complaint more definite and certain. 6 Thompson on Neg. Ch. 199, 482, § 7447. The act or omission must be stated by the pleader. In cases where there is a presumption of negligence from the happening of the act or omission to charge its act or omission is to charge something which warrants a recovery. *Supra.*

4. The instructions are not made part of the bill of exceptions. 45 Ark. 485; 74 *Id.* 88; 73 *Id.* 49; 53 *Id.* 215.

5. There was no evidence showing any negligence of appellee. He assumed the risk of injury from all sources except the negligence of the employer. It is not alleged, nor is there any evidence, that the company had any knowledge of any dangerous condition of the rock, or that it was negligently ignorant of such dangerous condition, nor that an inspection would have disclosed that the rock was about to fall or was defective or dangerous. No negligence was proved. The doctrine *res ipsa loquitur* does not apply. 74 Ark. 22. The burden was on appellant to show negligence. 79 *Id.* 437; 74 *Id.* 81; 208 S. W. 765; 95 Ark. 477.

WOOD, J. This action was brought in the Franklin Circuit Court by the appellant against the appellee to recover damages which the appellant alleged resulted to the widow and next of kin and to the estate of E. A. Page, deceased, by the negligence of the appellee.

There was a jury trial, a verdict rendered and judgment entered in favor of the appellee as of September 27, 1918, and this appeal.

The record concerning the filing of a motion for a new trial contains the following recital:

"On this September 27, 1918, the plaintiff being present by his attorney, Jo Johnson, and the defendant being present by its attorneys, J. H. Evans and J. D. Benson, and plaintiff files motion for new trial in the action, and the court, being well and sufficiently advised, doth over-

rule said motion for a new trial, and the plaintiff duly excepts and prays an appeal to the Supreme Court, which is granted and ninety days given to file bill of exceptions."

At a succeeding term of the court, towit, on the 7th of February, 1919, the appellee, defendant below, filed a motion to strike from files of the court the motion for new trial, alleging that same had not been filed at the September term nor after that term had expired in the manner prescribed by law. The appellee further moved the court to correct the record entry made at the September term of the court which recited that a motion for a new trial was filed, that it was overruled, and that the plaintiff below, appellant here, saved his exceptions to the overruling of said motion.

The alleged ground of the motion to strike and to correct the record *nunc pro tunc* was "that no motion for new trial was filed, considered or overruled by the court in term time and no exceptions thereto were saved by the appellant."

The appellant was duly notified of the motion to strike and to correct the record *nunc pro tunc.*

On the hearing of this motion the appellee introduced the clerk, who testified to the recitals of the record as above set forth and stated that the record was entered the last day of the September term of court and that the motion for new trial was not filed on that day but some time after that; that the motion for new trial was sent to him through the mail and was marked filed as of the last day of the September term, 1918; it was a month and perhaps longer after that term of the court before witness received and filed the motion. Mr. Johnson, attorney for the appellant, prepared the precedent for the record recital above set forth and called witness' attention to the fact that the court record showed the filing of the motion for new trial.

J. H. Evans, one of the attorneys for appellee, testified that Mr. Johnson, who was the attorney for the appellant, did not file the motion for a new trial during

the September, 1918, term of the court; that he prepared a precedent for the entry showing that such motion was filed, overruled and exceptions saved, but none of that happened at the term of court; that he said he would prepare a motion later and would send witness a copy of it and witness never knew that he claimed to have filed a motion until he received a bill of exceptions; that the record entry showing that a motion for new trial was filed on September 27, 1918, was untrue. Witness knew that Mr. Johnson did not file any motion and that the court did not pass on it. Witness was asked by Mr. Johnson, the attorney for the appellant, the following question:

"Q. Don't you recall that while you and Mr. Benson were still sitting over there at the time the court from the bench asked me if I desired to make any further entries at that time and it was at that time that the court asked, in substance, if I wanted to take an entry for a new trial at that time and that the entry was made?"

Witness answered: "Might have occurred, but I have no recollection of it, Mr. Johnson."

Witness J. D. Benson testified that he was one of the attorneys for the appellee; that the case was concluded on the afternoon of the last day of court; that if there was any motion for new trial filed at that time witness did know it.

Jo Johnson, attorney for the appellant, testified in part as follows: "The minutes of the judge's docket read as follows: '9-27 plaintiff files motion for new trial, motion overruled and plaintiff excepts and prays an appeal to the Supreme Court, prayer granted and ninety days given to file bill of exceptions.'

"The minutes of the judge's docket state the truth as to the entries on the docket, and these entries were made in open court before the judge had left the bench and while I was in open court, and also both of the counsel for the defendant were still there in open court, and at the time I think they understood it and knew it. I never had any thought to the contrary until I have heard statements from the counsel for the defendants. The entry

by His Honor on the bench, the regular judge as presiding now, Judge Jas. Cochran, called my attention to it, or probably I would have missed mentioning it right away because the court was about ready to adjourn when the jury returned the verdict. That was the last important entry. I then said in reply to the court: 'Yes, I would like to have an entry of the filing of a motion for a new trial.' 'I will not have anything to argue before the court.' I asked Judge Evans about including the entry of plaintiff's motion for new trial in the precedent for the judgment. He objected. There was a precedent prepared. It was left with the clerk. That precedent was entered. On the motion for new trial in entry judgment in favor of the defendant, I had no intention to say to Judge Evans that I would furnish him a copy of the motion. I never knew until today that Judge Evans expected a copy of that motion for new trial. As to the statement of the clerk that I said I would prepare that motion for a new trial before I left town, I did not understand that I made that sort of a statement. I knew I was not going to write it. I think the Judge knew that I was going to leave. The judge knew that I had not written the motion for a new trial. As to when the motion for a new trial was actually written, under protest and objection, I state I think I wrote it right away after I got to my office. I do not know the date it reached the hands of the clerk. I don't know whether I sent it direct to the clerk. I did not actually file this motion until some time after that. I prepared the motion for new trial after the court adjourned. I wrote on the motion for a new trial the endorsements: 'Filed September 27, 1918, Clerk,' leaving the place blank. I did that because the court said or asked or else I had said between the time Your Honor made that entry on the docket showing the truth of the transaction in the court and signed the motion for a new trial, it would be all right to file as of the date on which Your Honor made the docket entries.''

The above constitutes the substance of all the testimony that is material on the motion to strike and to correct the record by *nunc pro tunc* entry.

The court found that the minutes were entered on the docket by the court as set forth above; that "no motion for new trial was filed by the plaintiff during the sitting of the court nor until some time after the court adjourned, and therefore the court finds that the record does not speak the truth when it says that said motion for new trial was filed, overruled and exceptions saved."

The court thereupon entered an order amending the record so as to show that the motion for new trial was not filed until after the court had adjourned. The appellee duly excepted to this ruling.

(1) The finding of the court that the motion for new trial was not filed until after the court adjourned was sustained by substantial evidence. Indeed, counsel for the appellant concede that the motion was not filed during that term, and Johnson testified that he prepared and filed the motion some time after the court had adjourned.

(2) While the minutes of the judge's docket shows that the appellant filed his motion for new trial on September 27, 1918, and the clerk of the court entered up his record in accordance with these minutes showing that the motion was filed and overruled September 27, 1918, yet the facts, as developed by the undisputed testimony of the clerk and of the attorney for the appellant who prepared and presented the motion, show that the record entry made by the clerk was not in accordance with the facts and that the minutes entered on the judge's docket did not correctly state the facts. The minutes entered by the judge on the docket of his court were competent evidence but not conclusive of the fact which they recite. On the application, therefore, of the appellee duly made to correct the record *nunc pro tunc* so as to make the same speak the truth, the court after hearing the evidence doubtless concluded that these minutes did not correctly reflect the facts, but that the truth was as shown by the testimony of the clerk who made the record entry and by the testimony of the attorney for the appellant, that the motion was in fact not filed until some time after September 27, 1918, and after the court had adjourned for the term.

(3) If the testimony proved conclusively that the circuit judge, when his court was about to adjourn, stated to counsel for appellant that he would let the record show that his motion for new trial was filed as of that day and overruled, noting appellant's exceptions to the court's ruling, when in fact the judge knew that no motion for a new trial would be filed that day, and if the proof showed that the attorney for the appellant was induced by this suggestion of the judge to delay filing his motion for new trial until after the court had adjourned, and if the testimony proved that the attorney for the appellant was assured by the judge from the bench that his motion for new trial, although presented and filed after the court adjourned, would be treated as filed during, and as of the last day of the term, then, if the court afterwards struck from its files a motion for new trial that had been presented by the counsel for the appellant, acting upon the court's suggestion, and expunged a record entry showing that a motion had been filed as of the last day of the term, such act by the court would be a fraud upon appellant's rights which could not avail appellee. If such were the facts, appellant would be entitled to a reversal of the judgment and a new trial on account of an error prejudicial to appellant by act of the court under the ancient maxim, "An act of the court shall prejudice no one." Broom's Legal Maxims, 99.

(4) But, after a careful consideration of the testimony of counsel for the appellant, we do not find that his testimony warrants the conclusion that his failure to file the motion for new trial during the term was caused by the act of the judge in entering upon his docket the recitals above set forth. There is nothing in the recitals themselves nor in the testimony of counsel for the appellant which excludes the idea that the judge at the time he made the entry believed that counsel for the appellant had filed or would file the motion for new trial as of the day shown by the entry, September 27, 1918. In the absence of positive evidence showing that the judge knew at the time he made the entry that the motion for new trial was not filed

and would not be filed on that day, we must assume, in justice to the judge of the court, that he had no such knowledge, but on the contrary that his minutes reflected what he believed to be the fact, towit, that the motion for new trial would be filed on that day before the court finally adjourned for the term. Unless the court did so believe, there was no necessity for making any record entry at that time showing that the motion for new trial was filed and overruled. For, under our statute, section 6216 of Kirby's Digest, as amended by act 291 of the act of May 31, 1909, page 890, the appellant could have presented his motion for new trial to the judge at any time within thirty days after the verdict or decision, upon reasonable notice to the opposing party or his attorney of record. In which case it would have been the duty of the judge to pass upon said motion, and if he overruled the same to endorse upon such motion his ruling thereon, and if he overruled the same to also endorse thereon an order granting an appeal to the Supreme Court, and granting the appellant a reasonable time in which to file his bill of exceptions.

(5) Counsel for appellant contend that if the judge entered these minutes on his docket knowing at the time that a motion for new trial was not and would not be filed on the 27th of September, 1918, as therein stated, and that the record was entered by the clerk from these minutes (he also having personal knowledge of the fact), then such record could not be impeached by oral testimony showing that it did not speak the truth. If the facts were as counsel contend, they would be correct for the reason that the minutes of the judge so entered with knowledge of the facts and the record made in accordance therewith would be an act of the court in fraud of and prejudicial to the appellant's rights, of which appellee could not avail himself as we have already seen under the maxim stated. The court under such a state of facts would not be allowed to stultify itself to the prejudice of the litigant. But if, on the contrary, the judge at the time he entered these minutes on the docket

did so under the belief that the motion for a new trial would be filed before the court adjourned on September 27, 1918, as recited in the minutes, and if the court afterwards ascertained that the minutes were entered under an honest mistake of fact, and that the record made therefrom did not speak the truth, then it would be its duty and within its power to correct the same in accordance with the facts as they actually existed.

The law on this subject is well settled by our own and the authorities generally. In *King & Houston* v. *State Bank,* 9 Ark. 185, we said: "The authority of the court, in such cases, does not arise from the statute of Amendments and Jeofails, etc., but from the high equity powers of the court, which enable it to amend in whatever may be necessary to make the record speak the truth, whenever the ends of justice require such amendment."

(6) In *Louis* v. *Ross,* 37 Me. 230, it is held, quoting syllabus, that a "court of record may correct mistakes in its records which did not arise from the judicial action of the court, but from the mistakes of its recording officer; and this it may do either on suggestion or motion of those interested, or upon its own certain knowledge and mere motion."

Other cases to the same effect in our own and other courts are: *Sweeney* v. *State,* 35 Ark. 588; *Bobo* v. *State,* 40 Ark. 324; *Ward* v. *Magness,* 75 Ark. 12; *Goddard* v. *State,* 78 Ark. 228; *Liddell* v. *Bodenheimer,* 78 Ark. 364; *Roberts & Schaeffer Co.* v. *Jones,* 82 Ark. 188; *Schofield* v. *Rankin,* 86 Ark. 90; *Lower* v. *Hart,* 93 Ark. 548-558; *Hydrick* v. *State,* 103 Ark. 4; *Wright, Petitioner,* 134 U. S. 136-141; *Waters* v. *Engle,* 53 Md. 179; *Greff* v. *Fickey,* 30 Md. 78; *Cribb* v. *State,* 45 S. E. (Ga.), 396; *Balch* v. *Shaw,* 7 Cush. 282-5; *Christensen* v. *Hodges,* 84 Pac. 530; *Strickland* v. *Strickland,* 95 N. C. 471.

Counsel for appellant concede that no motion for new trial was filed in vacation in compliance with the terms of the statute, *supra.*

(7) The record, therefore, shows that no motion for new trial has been filed in this cause. "Where there is no motion for a new trial, we can only correct such errors as appear in the record proper or judgment roll." *Hayes* v. *Hargus,* 127 Ark. 22-26; *Haglin* v. *Atkinson-Williams Hardware Co.,* 93 Ark. 85; *Independence County* v. *Tomlinson,* 93 Ark. 382.

(8) The amended complaint alleges: "Said roof so caved and said Page was so injured because defendant, through its servants aforesaid and others, unknown to plaintiff, carelessly and negligently failed to furnish for the use of said Page an entry way with a safe roof; failed to make it safe and to inspect it and to remove said rock and to prop it sufficiently and by reason of defendant's negligence in looking after the safety and sufficiency of said entry way and roof in ways unknown to plaintiff."

The appellee moved to make the amended complaint more definite and certain by striking out the words in the above, towit: "By reason of defendant's negligence in looking after the safety and sufficiency of said entry way and roof, in ways unknown to plaintiff." The record showing the court's ruling recites: "The court sustains said motion and strikes said words from the paragraph of the complaint, the plaintiff duly excepts to this judgment of the court."

Conceding, without deciding, that the ruling of the court is properly challenged by the record before us, nevertheless there was no error prejudicial to appellant in striking out the allegation set forth above.

The amended complaint alleged that Page was injured by the caving in of the roof to the entry way of the room where Page was working so that a large rock fell on Page.

It further alleged that the injury was caused by the negligence of appellant in failing to furnish Page with a safe roof, to inspect it, to remove said rock and to prop it sufficiently.

After these general and specific allegations of negligence, it is manifest that no prejudice could have resulted to appellant in striking out the clause set forth. It was in substance but a mere repetition of the allegations that had gone before. Under the allegation that the defendant "had carelessly and negligently failed to furnish for the use of said Page an entry way with a safe roof," the appellant could have adduced all the evidence that it was possible to adduce under the clause which the court struck out.

There are no errors prejudicial to appellant appearing upon the face of the record proper or judgment roll, and the judgment must therefore be affirmed.

TENENBAUM v. GERARD B. LAMBERT COMPANY.

Opinion delivered October 20, 1919.

1. EVIDENCE—PAROL EVIDENCE—WRITTEN CONTRACT—PROOF OF FRAUD.—The rule prohibiting the admission of oral evidence to vary a written contract does not preclude the admission of such evidence to establish fraud in the making of such contract.
2. CONTRACTS—FRAUD—REFORMATION—SALE OF SCRAP IRON—ESTIMATED QUANTITY.—G. wrote T. a letter offering to sell him certain scrap iron. G. was operating a plantation, and wished to sell only the accumulation of scrap iron it had on hand. T.'s agent visited G. and estimated the scrap iron on hand to be fifty tons, and so advised G. The parties then entered into a written contract, whereby G. was to sell to T. fifty tons of scrap iron at a certain sum per ton. G. then shipped all the scrap iron at which T.'s agent had looked, to T., but it amounted to only thirteen and a half tons. T. refused to pay G. for the thirteen and a half tons, and sued G. for damages for breach of the contract. *Held,* the amount of the scrap iron having been erroneously estimated by T.'s agent, that G. was entitled to compensation for the iron shipped, but that T. could not recover from G. any damages for failure to ship more than thirteen and a half tons.
3. CONTRACTS—WRITING—PAROL EVIDENCE—PROOF OF FRAUD.—Where G. entered into a written contract with T., upon erroneous information furnished by T.'s agent, in an action by T. to recover damages for breach of the contract, G. may introduce parol testimony to explain the transaction and to escape liability.

Appeal from Phillips Chancery Court; *Edward D. Robertson,* Chancellor; affirmed.

Ben F. Reinberger, for appellant.

1. No fraud was proved, and there was no mutual mistake. The contract was in writing and oral testimony was not admissible to show that the parties intended to make a different contract. 78 Ark. 574; 80 *Id.* 505; 94 *Id.* 130; 13 *Id.* 573; 67 *Id.* 62; 78 *Id.* 574; 83 *Id.* 105; 86 *Id.* 162; 94 *Id.* 130; 95 *Id.* 131; 104 *Id.* 483.

2. The testimony fails to show that a mutual mistake was made. 102 Ark. 326. To reform a contract the proof must be full, clear and decisive; a mere preponderance is not enough. 91 Ark. 162; 111 *Id.* 205; 120 *Id.* 326; Bishop on Cont., § 708; 71 Ark. 617; 46 *Id.* 167. The mistake must be common to both parties, for nothing can be mutual except by consent. 75 Ark. 75; 81 *Id.* 420; 83 *Id.* 131; Enc. Pl. & Pr. 781; 12 Ga. 281; 69 Miss. 891; 89 Pac. 490; 71 Ark. 617; 104 *Id.* 484.

3. Defendant made the contract with full knowledge of all the facts. It had the iron in possession and knew its weight and value. After the value increased it can not disaffirm their written and binding obligation to plaintiff's loss and to their material gain. We purchased fifty tons and if defendant disposed of same or fails to deliver, we are entitled to recover for our loss sustained in purchasing like material to fill our contracts. 83 Ark. 309.

4. In chancery cases on appeal the case is tried *de novo* here. Where the evidence is conflicting but which must be clear, full and convincing, this court should reverse. 84 Ark. 349. No mistake was shown to reform the contract and defendant having failed to make a case, the decree should be reversed.

Moore & Vineyard for appellee.

1. Equity has jurisdiction to reform a written contract as here for mutual mistake or for mistake by one and fraud by the other party. 104 Ark. 483; 4 Pom. Eq. Jur., § 1376; 104 Ark. 483; 35 Cyc. 61; 98 Ark. 23.

2. Appellant has wholly fallen down on the question of proving damages, if he had made a valid contract for the purchase from appellee.

Upon a breach by vendee in a contract for a sale of goods, the measure of damages is the difference between the contract price fixed by the contract and the market value of the goods at the time and place of delivery, provided the contract price exceeds such market value. 92 Ark. 111; 121 *Id.* 50. There is no conflict in the evidence and the proof is full, clear and decisive in favor of the contention of appellee and the decree should be affirmed.

STATEMENT OF FACTS.

A. Tenenbaum brought this suit in the circuit court against Gerhard B. Lambert Company to recover $540 damages which he alleges he has sustained by reason of a breach of a contract with the defendant to sell it approximately 50 tons of scrap iron.

The defendant answered, denying the allegations of the complaint, and by way of cross-complaint asked judgment against plaintiff for the price of 13½ tons of scrap iron which it shipped to the plaintiff and for which it has not been paid. The defendant prayed for a reformation of the contract of sale and asked that the case be transferred to the chancery court. Without objection, the case was transferred to equity and tried there.

The chancellor found for the defendant in the amount of its counterclaim. It was therefore decreed by the court that the complaint of the plaintiff be dismissed for want of equity and that the defendant have and recover of the plaintiff the sum of $149.37.

The case is here on appeal.

HART, J., (after stating the facts). The only issue raised by the appeal is as to the correctness of the finding of the chancellor.

According to the evidence adduced by the plaintiff, he has been engaged in the business of buying and selling scrap iron and hides at Little Rock, Arkansas, since the

year 1890. His son traveled for him over the State of Arkansas, buying scrap iron for him. He went to Elaine, Phillips County, Arkansas, and entered into a contract with the Gerhard B. Lambert Company, a corporation engaged in business there, for the purpose of buying scrap iron from it, and the contract is evidenced by a letter signed by the Gerhard B. Lambert Company and written to A. Tenenbaum, Little Rock, Arkansas, and dated May 5, 1917, Elaine, Arkansas. The letter is as follows:

"Dear Sir: We beg to confirm sale made to you through your representative, M. M. Tenenbaum, for approximately fifty gross tons of scrap iron, free of boilers, grates and stove plates, at $13.50, gross tons f. o. b. cars, Elaine approximately 50 tons of scrap iron and that the bill of lading attached, delivery to be made within two weeks. We beg to acknowledge receipt of your draft for $50 to apply on this shipment.

"Yours truly,"

The defendant shipped to the plaintiff one car of scrap iron within two weeks and notified the plaintiff that this was all the scrap iron that it had. The plaintiff received the car load of scrap iron, but refused to pay for it, claiming that the contract called for approximately 50 tons of scrap iron and that the defendant had only shipped to the plaintiff 13½ tons. The plaintiff claimed that he had contracts out for the sale of the scrap iron, and that in order to fill them he had to buy scrap iron at an advanced price from other parties and that he was damaged in the sum of $540 by the defendant not complying with its contract. It is also shown by the plaintiff that the defendant estimated that it had on hand at Elaine approximately 50 tons of scap iron and that the plaintiff bought that amount from it.

On the other hand, it was shown by the defendant that it was engaged in business at Elaine, Arkansas, and that on the 5th day of May, 1917, a son of the plaintiff called upon it to purchase the scrap iron which it had accumulated at its place of business. An agent of the

defendant showed Tenenbaum the iron which it had accumulated at Elaine and Tenenbaum estimated the amount to be between 40 and 50 tons. The plaintiff's agent was also told that the defendant had some more scrap iron at Lambrook on its plantation, eight miles away. The defendant was engaged in operating a cotton plantation of about 3,000 acres and also operated a store and gin on the premises. The defendant knew nothing as to the amount of scrap iron on hand and relied entirely upon the estimate made by Tenenbaum. The latter knew that the defendant was not engaged in the business of buying and selling scrap iron and that it only intended to sell the plaintiff the amount of scrap iron which it had on hand at Elaine and Lambrook. The contract in question was written by an agent of the defendant, but was dictated by the agent of plaintiff.

The above facts were testified to both by the bookkeeper and manager of the defendant.

(1) It is first insisted by counsel for the plaintiff that this testimony on the part of the defendant was inadmissible on the ground that it violated the well known rule that parol evidence is inadmissible to modify or vary a written contract. The facts bring this case within an exception to the rule. The rule prohibiting the admission of oral evidence to vary a written contract does not preclude the admission of such evidence to establish fraud in making the contract. This is so because fraud in a contract could never be proved if the parties were bound by its terms as written. *Brown* v. *LeMay,* 101 Ark. 95, and *Carwell* v. *Dennis,* 101 Ark. 603.

(2-3) In the case at bar two witnesses for the defendant testified in positive terms that it was engaged in running a plantation of 3,000 acres and in operating a store, mill, and gin situated thereon; that it only intended to sell the scrap iron which it had accumulated in the course of its business; that it was not engaged in the business of buying and selling scrap iron and that the plaintiff knew these facts and knew that the defendant relied upon his agent in estimating the quantity of scrap iron on hand.

The iron was to be delivered within two weeks. The defendant did deliver all the scrap iron it had on hand to the plaintiff within this time.

The chancellor correctly held that the action of the plaintiff in estimating the quantity of scrap iron in the contract at approximately 50 tons, when in fact there were only about 13½ tons, was a fraudulent misrepresentation which induced the defendant to sign the contract, as dictated by the plaintiff's agent. This view is strengthened by the fact that the defendant wrote the plaintiff a letter offering to sell him the scrap iron which it had on hand and the agent of the plaintiff went down there to buy it in response to this letter.

It follows that the decree will be affirmed.

PATTERSON v. STATE.

Opinion delivered October 20, 1919.

1. CRIMINAL LAW — INDICTMENT — RETURN INTO COURT. — An indictment *held* to be properly returned into court, when the record expressly shows that the grand jury came into court in a body and returned an indictment numbered 11, the indictment in question bearing that number.

2. LIQUOR—PROOF OF MANUFACTURE—CONFESSION.—Defendant was accused of the manufacture of intoxicating liquor. She confessed the crime on two occasions. Under the other testimony the jury was warranted in finding that some one had made "choc" beer at defendant's house, and that the same was intoxicating. *Held,* the evidence was sufficient to sustain a conviction.

3. LIQUOR—MANUFACTURE—PROOF OF PURCHASE.—It was proper for two witnesses to testify that they bought "choc" beer from a man who came out of defendant's house, a short time before she was arrested, and that the same was intoxicating.

4. SAME—SAME—INSTRUCTION.—When defendant was accused of the illegal manufacture of liquor, the jury may, in considering her guilt, take account of the fact that defendant had in her possession malt, grain, or other materials out of which alcoholic liquors may be manufactured.

5. LIQUOR—ILLEGAL MANUFACTURE—"MANUFACTURE" DEFINED.—In a prosecution for the illegal manufacture of liquors the following instruction held correct:

"By 'to manufacture' alcoholic liquors means to convert the raw materials out of which alcoholic liquors can be made into alcohol."

Held, where the testimony showed that alcoholic liquors could be made out of the mash found in defendant's house, that if she actually made a preparation containing alcohol out of it she was guilty under the statute. (Section 2, Act 30, Acts 1915, page 98.)

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

Sam R. Chew, for appellant.

1. The indictment was not found and returned into court by the grand jury. Gould's Digest, chap. 52, § 87; 33 Ark. 180; 93 *Id.* 290.

2. The evidence does not sustain the verdict. There is no proof that defendant manufactured or brewed liquors of any kind. Outside of appellant's admission that she made the *stuff* found in her residence, there was no evidence of the *corpus delicti.*

3. The court erred in admitting the testimony of Ruth Harris Thompson and Wallace that Wallace and Thompson had bought a bottle or package of liquor called choc beer. Appellant was not present when the sale was made. The testimony was not competent and was prejudicial.

4. The court erred also in examining the witnesses. That was the business of the State's attorney.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. The endorsement on the indictment shows that it was returned into court in the presence of the grand jury and was marked filed by the clerk. 37 Ark. 238; 93 *Id.* 290.

2. The *corpus delicti* was proved sufficiently and that it was alcohol liquor. 111 Ark. 457. All the circumstances as well as defendant's confession shows that de-

fendant made this *choc beer* contrary to the laws of Arkansas in Crawford County, Arkansas.

3. There was no error in admitting the testimony of the sale of liquor by Harvey Davis and that it was intoxicating.

4. The indictment does not charge two offenses; only one was charged in the two counts. The case in 135 Ark. 243 was disapproved of in *Harris* v. *State, ante* p. 46.

5. Appellant's instruction No. 1 was properly modified by the court and on the whole case the judgment is right and should be affirmed.

HART, J. Geraldine Patterson prosecutes this appeal to reverse a judgment of conviction against her for manufacturing intoxicating liquors or a compound or preparation thereof commonly called "choc" beer, contrary to the statute.

(1) The first assignment of error is that the record does not show that the indictment was returned into court by the grand jury, and for that reason the conviction can not be sustained.

The indictment has endorsed on the back the following: "No. 11, State of Arkansas v. Geraldine Patterson. A true bill. S. W. Haley, foreman, indictment for manufacturing liquor. Witnesses, Ruth Hart, Dick Wallace, Jim Thompson, D. W. Moore, L. D. Buel, Rich Henry, Otto V. Martin. Filed July 11, 1919, by Wallace Oliver, Clerk." The words, "Filed July 11th, 1919, Wallace Oliver, Clerk," were stamped on the back of the indictment in purple ink with a rubber stamp. The record also contains the following:

"July 11, 1919. In the matter of the grand jury. The grand jury comes into court in a body and files in open court indictments Nos. 6 to 12, inclusive, and, having no further business, retire to consider their further duties."

The record in the present case is different from that in *Shinn* v. *State,* 93 Ark. 290, relied upon by counsel for the defendant. There the only showing made by the rec-

ord was the words, "Filed in open court this 8th day of September, 1909," and the court held that this was not sufficient to show the return into court by the grand jury. Here the record expressly shows that the grand jury came into court in a body and returned an indictment numbered 11. The indictment in question bears that number, and this is a sufficient showing that the grand jury returned the indictment into court. *Fitzpatrick* v. *State,* 37 Ark. 238. It follows that this assignment of error is not well taken.

(2) The next assignment of error is that the evidence is not sufficient to support the verdict. In making this contention, counsel rely upon the rule laid down in *Greenwood* v. *State,* 107 Ark. 568, and many other cases, to the effect that under our statute, to warrant a conviction upon a confession not made in open court, there must be independent evidence to show that the offense was actually committed by some one.

In the present case the defendant confessed to the deputy sheriff who arrested her, that she had manufactured a preparation called "choc" beer which was found in a keg in her house at Van Buren, Arkansas. She also admitted to another witness that she had manufactured the "choc" beer, and said that she had made it for her own use. There was other proof which, if believed by the jury, showed that the beer was manufactured in the house of the defendant in Van Buren, Arkansas. The liquid was found in a keg, and a chemist, who made an examination of it, testified that the keg smelled like it contained fermented liquor. Some grain mashed up in a sack was also found in her house, which was shown to the chemist. He said that this grain seemed to have passed through a state of fermentation, or at least it had been cooked and would, when placed with yeast in water, ferment and produce alcohol. Other witnesses testified that choc beer was intoxicating.

The defendant lived in a small house in the city of Van Buren. The grain which was found in her house had mold in it, and all that was necessary to cause fer-

mentation was to add water and yeast. This testimony was sufficient to warrant the jury in finding that some one made choc beer at the defendant's house and that it was an intoxicating liquor. The defendant admitted that she had made it, and the testimony was amply sufficient to warrant the jury in finding her guilty.

(3) Two witnesses were permitted to testify that they had bought some choc beer from a negro man who came out of the defendant's house with it. This was a short time before the defendant was arrested and while the keg of choc beer was in her house. These witnesses testified that the choc beer which was brought out of there was intoxicating. The testimony was competent as tending to show that choc beer was intoxicating, and it might also be considered by the jury as a circumstance tending to show that choc beer was made by some one in the house of the defendant.

(4) The next assignment of error is that the court erred in modifying instruction No. 1, asked for by the defendant. The instruction as asked by the defendant, is as follows:

"The fact, if it is a fact, that the defendant had in her possession malt or other material, out of which alcoholic spirits, or liquors, could be manufactured, is not enough, standing by itself, to authorize you to convict the defendant; but the proof must go further and show beyond a reasonable doubt that the defendant did, in fact, manufacture or make a liquor commonly called choc beer, and, if this is not proved beyond a reasonable doubt, your verdict should be one of not guilty."

The court modified the instruction by adding the following words: "But the fact, if you find it to be a fact, that the defendant had in her possession malt, grain, or other material, out of which alcoholic liquors could be manufactured, is a circumstance you may consider to determine her guilt or innocence of this charge."

There was no error in modifying the instruction. The instruction as asked by the defendant might have tended to confuse and mislead the jury. The defendant

lived in a small house in the city of Van Buren. She had a keg which contained fermented liquor and she also had in her possession a sack of molded grain or mash that had either passed through a state of fermentation, or had been cooked, and in either event was in a condition suitable for use in making intoxicating liquors. Hence the court did not err in modifying the instruction.

The defendant has also assigned as error that the court gave to the jury the following instruction:

"By 'to manufacture' alcoholic liquors means to convert the raw material out of which alcoholic liquors can be made into alcohol." There was no error in giving this instruction.

The testimony showed that alcoholic liquors could be made out of the mash found in the defendant's house, and if she actually made a preparation containing alcohol out of it, she was guilty under the statute. Section 2 of Act 30, Acts of 1915, p. 98.

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

ROAD DISTRICT NO. 6 OF LAWRENCE COUNTY v. HALL.

Opinion delivered October 20, 1919.

1. CONSTITUTIONAL LIMITATIONS—TAKING PRIVATE PROPERTY FOR PUBLIC USE—IMPROVEMENT DISTRICT—ROAD.—In the absence of any special constitutional provision prescribing how compensation shall be ascertained, there is no limitation on the Legislature, except the provision that no man shall be deprived of his property except by due process of law; the Legislature may provide such a mode as it sees fit for ascertaining the compensation, provided only that the tribunal is an impartial one, and that the parties interested have an opportunity to be heard.
2. SAME—SAME—JURISDICTION OF COUNTY COURT.—Art. 7, § 28, of the Constitution refers to the laying out and vacating of public roads, and the division of the county into convenient road districts.
3. SAME—SAME—CONDEMNATION—ROAD DISTRICT—JURISDICTION OF CIRCUIT COURT.—Under act 338, page 1400, Acts 1915, the circuit court has jurisdiction in condemnation proceedings.

4. ROADS AND ROAD DISTRICTS—TAKING OF PRIVATE LAND—COMPENSATION.—Under act 338 of 1915, compensation is provided to a landowner for lands taken or damaged in the construction of the improvement. Section 12 of the act provides that compensation may be either paid out of the funds of the district or by reduction of benefits in proportion to the amount of damages sustained. Where the lands were not taken or damaged at the time assessments were made, compensation must be paid to landowners out of the funds of the district.

5. PLEADING AND PRACTICE—TRIAL—AMENDMENT TO PLEADINGS.—In an action to condemn lands, by a road district, where five separate actions were combined in one proceeding, it is proper for the court to refuse to permit plaintiff to amend its complaints on motion after the defendants had concluded their testimony, in the absence of a showing of diligence by the plaintiff.

6. ROADS AND ROAD DISTRICTS — CONDEMNATION — COMPENSATION — ELECTION OF REMEDY.—A road district was organized under act No. 338 of 1919, and after the assessment of benefits was made the commissioners changed the route, and brought actions against the owners whose lands were taken, to condemn the lands. The commissioners thereafter attempted to dismiss these actions, but, upon objection of the land owners, the circuit court declined to permit the dismissal. *Held,* under section 12, act 338 of 1915, and section 37, Act 422 of 1911, the circuit court properly refused to permit the dismissal.

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

Ponder & Gibson, for appellant.

1. The circuit court had no jurisdiction to try the issues, as the county court had exclusive jurisdiction under our Constitution to ascertain the compensation due the land owners. Act 338, Acts 1915, page 1400; 134 Ark. 121; art. 7, § 28.

2. Road districts are not liable for damages in the manner as held by the court below. 110 Ark. 416; 58 Miss. 197; 94 Ark. 380; 121 Col. 96; 53 Pac. 401; 36 N. W. 267; 14 Cyc. 1057; 118 Ark. 1.

3. There was no assessment of damages at the time the assessment of benefits was made, and, defendants not having appealed, the judgment confirming the assessment

is binding, and it is now too late to attack the assessment collaterally. 212 S. W. 334.

4. The acts complained of were all the acts of Newman B. Gregory, an independent contractor, for which he alone was liable, and not the commissioners nor the district. 53 Ark. 503; 54 *Id.* 424; 118 *Id.* 561.

5. The damages should have been confined to such damages as existed at the time of the trial and not those *in futuro* or speculative. 54 Ark. 140. Plaintiffs should have been permitted to amend their complaint as to Donie Hall and Mrs. Lee Coffman, setting up that they owned a life estate and not the fee, nor was the district liable for damages except those specifically growing out of the widening of the right-of-way and those accorded at the time of trial the value of the land taken only. *Supra.*

Smith & Gibson and *Sloan & Sloan,* for appellees.

1. The road district was liable for all damages caused by the improvement. 110 Ark. 416-420; 118 *Id.* 1-3; Kirby & Castle's Digest, § 1917; Act March 30, 1915, page 1400, § 12; K. & C. Digest, § 9158.

2. The right to recover damages is not *res adjudicata.* 212 S. W. 334.

3. The Alexander and Turner acts do not have identical provisions. K. & C. Digest, § 5844; *Ib.,* § § 9117-18; 33 Ark. 575.

4. This suit in the circuit court to condemn was instituted in pursuance of the statute upon demand made for trial by jury. At the time the assessment of benefits was made the widening of the road had not been done nor contemplated, and the defense of *res adjudicata* was not pleaded nor proved. 134 Ark. 121; 203 S. W. 260.

5. The court did not err in refusing to permit appellant to amend its petition as to Donie Hall and Mrs. Lee Coffman. 70 Ark. 423, 426; 12 Enc. of Ev. 604; 106 Ark. 14.

6. Refusal to permit a witness to answer certain questions will not be prejudicial if it does not appear

what his answer would have been. 87 Ark. 52; 92 *Id.* 509; 96 *Id.* 190; 97 *Id.* 564; 88 *Id.* 562; 108 *Id.* 500; 123 *Id.* 548. Appellant merely offered to amend but did not ask leave to amend. 32 Ark. 244.

7. The acts complained of were not those of an independent contractor. The hirer is responsible to the district here. 14 R. C. L., p. 86, § 23.

8. The circuit court had jurisdiction to try the issues as to amount of damages. K. & C. Dig., § § 9127-9158. The statute is constitutional. 93 Ark. 612; 27 *Id.* 292; 25 *Id.* 246; 102 *Id.* 166; 77 *Id.* 250; 66 *Id.* 466; 114 *Id.* 156; 100 *Id.* 175; 86 *Id.* 231; *Ib.* 412; 122 Ark. 291.

Under the act the county court made the order changing the road. 134 Ark. 121. There was no error as to damages from change of road. 98 Ark. 206; 71 *Id.* 152; Lewis on Em. Dom. (3 Ed.), § 348; 98 Ark. 206.

9. The entry was made under the orders of both the circuit and county courts.

10. Damages were properly allowed for lands only actually taken. 44 Ark. 258, 262.

STATEMENT OF FACTS.

Road Improvement District No. 6 of Lawrence County, Arkansas, was duly organized under Act 338 of the Acts of 1915, for the purpose of improving certain public roads located in the Eastern District of Lawrence County, and W. J. Robinson, John K. Gibson, and J. E. McCall, were appointed commissioners for the construction of said improvement. They were duly qualified and commenced the construction of the improvement. They instituted proceedings in the circuit court against Mrs. Donie Hall, a landowner in the proposed district, to condemn certain lands belonging to her and situated in the district, for use in making the proposed improvement. A preliminary deposit was made by them. Similar proceedings were filed against other landowners in the district, viz.: Clay Sloan, Frank Stewart, Mary C. and S. W. Stewart, and Mrs. Lee Coffman. Preliminary deposits were also filed in each of these cases.

Before the circuit court convened, the commissioners of the district caused each of the proceedings to be dismissed and the deposits of money to be restored to them. At the next term of the circuit court, Mrs. Donie Hall, and the other landowners named above made a motion to have the proceedings reinstated in the circuit court and that the preliminary deposits be again made. The motion was granted and the proceedings were reinstated. The cases were consolidated for the purpose of trial and tried before a jury. The jury returned the following verdict: "We, the jury, assess damages to the defendants as follows: Clay Sloan, $140; Frank Stewart, $500; Mary C. and S. W. Stewart, $500; Mrs. Dona Hall, $100; Mrs. Lee Coffman, $100. G. R. Statler, Foreman."

Judgment was rendered upon the verdict and the commissioners have duly appealed to this court.

HART, J., (after stating the facts). It is first contended that the circuit court had no jurisdiction and that the county court, under our Constitution, had exclusive jurisdiction to ascertain the compensation due the landowners. The district was organized under an act providing for the creation and establishment of road improvement districts for the purpose of building, constructing, and maintaining the highways of the State of Arkansas. Acts of 1915, p. 1400.

Section 16 provides for alteration or change in the plans or specifications, or the route of the road to be constructed at any time before the improvements are made, and also provides the manner in which such changes shall be made.

Section 36 provides that it shall be the duty of the board and the county court in changing the route of any road to enter upon and lay out said roads over any lands in the improvement district in accordance with the provisions of act 422 of the Acts of 1911, amending section 7328 of Kirby's Digest.

Section 37 reads as follows: "If any owner of real property in said district demands the assessment of dam-

ages to his property by reason of the improvement by a jury, the Board of Commissioners shall institute an action in the circuit court for the condemnation of said lands, which action shall be in accordance with the proceedings for the condemnation of the rights-of-way for railways, telegraph and telephone companies with the right of paying into the court a sum to be fixed by the court, and then proceeding with work before the assessment of said damages by a jury. Where there is more than one claimant for damages, such actions shall be consolidated if practicable, and one jury shall assess the damages accruing to all."

(1) The land involved in this suit was taken pursuant to the provisions of this act. The commissioners found that it was necessary to widen the road at certain points and at others to borrow earth from lands adjacent to the road for the purpose of constructing the improvement. They instituted condemnation proceedings in the circuit court under section 37 for the purpose of condemning the land necessary to be taken. It may be stated at the outset that, in the absence of any special constitutional provision prescribing how compensation shall be ascertained, there is no limitation on the Legislature, except the provision that no man shall be deprived of his property except by due process of law. The Legislature may provide such a mode as it sees fit for ascertaining the compensation, provided only that the tribunal is an impartial one and that the parties interested have an opportunity to be heard. Lewis, Eminent Domain (3 Ed.), par. 511 (313), and 10 R. C. L., p. 223, sec. 190. In the exercise of this power sometimes the Legislature provides a summary method of condemning property as being more expeditious and to the best interest of all parties concerned, and at others it provides for the compensation to be made by a court exercising general jurisdiction and according to the course of the common law, as being better for the landowner and as, also, in the interest of the public for whose benefit the land is taken or damaged.

(2) But counsel for the appellants contend that exclusive jurisdiction is conferred upon the county court to ascertain the compensation due the landowners in the case of the construction of roads. They rely upon section 28 of article 7 of the Constitution of 1874, which provides, in substance, that the county courts shall have exclusive original jurisdiction in all matters relating to roads, bridges, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. Such has not been the construction placed upon that clause of the Constitution by the decisions of this court. It has been uniformly construed to refer to the laying out and vacating of public roads and the division of the county into convenient road districts. All of our decisions bearing on the subject show that that clause of the Constitution has never been construed as conferring upon the county courts exclusive jurisdiction in condemnation proceedings relating to public roads, bridges, or for the internal improvement of the respective counties. To illustrate: Levees and drainage districts within a county have uniformly been held to be types of internal improvements.

In the case of *Board of Directors of St. Francis Levee District* v. *Redditt,* 79 Ark. 154, the court upheld a statute which authorized a board of directors of a levee district to condemn lands for the purpose of constructing the levee and to appear in the county court and cause a jury of twelve land owners to assess the damages to the land owners. Provision was made under the statute for notice to the land owners.

In *Board of Directors St. Francis Levee District* v. *Powell,* 89 Ark. 570, the land owner was permitted to recover in a suit brought by himself in the circuit court for lands taken outside of the right-of-way granted by the plaintiff and used by the levee district in the construction of the levee.

In *Drainage District No.* 11 v. *Stacey,* 127 Ark. 549, the land of the plaintiff was taken by a drainage district and used in constructing the drainage ditch and the plain-

tiff was allowed to recover in a suit brought by himself for that purpose in the circuit court.

In *Board of Directors of St. Francis Levee District* v. *Barton,* 92 Ark. 406, an action in the circuit court was instituted by a land owner against the board of directors of the levee district to recover damages for permanent injuries to his land by the construction of the levee. The right to maintain the action was recognized, but relief was denied because the action was barred.

(3) In the case of *Fort Smith & Van Buren Dist.* v. *Scott,* 103 Ark. 405, there was a proceeding to condemn land for a site for a free bridge authorized to be constructed by a special act of the Legislature of 1909, Acts of 1909, page 325. By the terms of the act lands necessary for the improvement were authorized to be condemned in the same manner as lands for railroad purposes and right-of-ways are condemned by railroad companies. The statute in the present case also authorizes that the condemnation of lands shall be in accordance with proceedings for the condemnation for the right-of-way of a railroad company. In that case, as in the case at bar, there was a proceeding by the board of directors to condemn land to be used in constructing the bridge. The proceeding was instituted in the circuit court as was done in the present case pursuant to the terms of the act. The validity of the statute was upheld, and although there was no discussion of the precise issue, the opinion proceeds upon the theory that the control of the Legislature over the mode of condemnation is not restricted under our Constitution. It will be noted that the section of the Constitution referred to mentions bridges in express terms as well as roads. It follows that the circuit court did not err in holding that it had jurisdiction in the condemnation proceedings under the statute.

(4) It is next insisted that the road district was not liable for the damages sustained by the land owners. Counsel rely upon the case of *Wood* v. *Drainage Dist. No.* 2, 110 Ark. 416, and *Timothy J. Foohey Dredging Co.* v. *Mabin,* 118 Ark., p. 1. We do not think these cases sus-

tain the contention of counsel for appellants. In those cases it was held that the drainage districts were not liable for damages which resulted to the land owner from faulty or improper construction of the improvement by independent contractors. They recognized, however, that under section 22, article 2 of our Constitution which provides that private property shall not be taken, appropriated, or damaged for public use without just compensation therefor, drainage and other improvement districts could be made liable for land taken or damaged in the proper construction of the improvement. Section 12 of the act under consideration provides that damages accruing to any owner of real property may be paid out of the funds of the district, or by a reduction in the assessment of benefits in proportion to the amount of the damages sustained by reason of right-of-way taken or other damages sustained. Under this section of the statute compensation is provided to the land owner for lands taken or damaged in the construction of the improvement. It is true that the section provides that the damages may be either paid out of the funds of the district or by reduction of benefits in proportion to the amount of damages sustained. In the present case the land in question had not been taken or damaged at the time the assessors made the assessment of benefits. Consequently, the damage to the land could not have been taken into consideration by the assessors in assessing the benefits, and it necessarily follows that the compensation must be paid to the land owners out of the funds of the district. The case of *Dickerson* v. *Tri-County Drainage Dist.*, 138 Ark. 471, has no application under the facts of the case at bar. The statute considered in that case was essentially different from the one in the present case. There the statute provided in express terms that the commissioners should assess all damages that would accrue to any land owner by reason of the proposed improvement, including all the injuries to land taken or damaged, and where they made no return of such assessment of damages as to any tract of land, it should be

deemed a finding by them that no damage was sustained. Here, as above stated, the statute provides that the damages may be paid out of the funds of the district, or by a reduction in the assessment of benefits. Moreover, in that case the land was taken before there was any assessment of benefits made. In the case at bar the land was taken after the assessment of benefits had been made and pursuant to a section of the statute which gave the commissioners and the county court the right to change or alter the width of the road. The road was widened and the land in question was taken for that purpose. It was used in the construction of the road and the road district was liable for the damages sustained by the land owner by reason of such taking, and under the statute the damages should be paid out of the funds of the district.

(5) It is next insisted that the court erred in refusing to allow the plaintiffs to amend their complaint so as to allege that Mrs. Donie Hall and Mrs. Lee Coffman only owned a life estate in the lands mentioned in the complaint and in not allowing them to prove this fact to the jury. The plaintiffs filed five separate condemnation proceedings against the land owners, and these cases were consolidated for the purpose of trial. The amendment to the complaint was not offered until after all the witnesses for the defendants had testified. No reason is shown by the plaintiffs why they did not allege in the first instance that Mrs. Donie Hall and Mrs. Lee Coffman were only life tenants, if such were the fact. The taking of the testimony in the case had been nearly concluded at the time they offered to amend their complaint, and no reason is given why they did not make the offer sooner. There is nothing to indicate that they were prevented by the defendants from acquiring this knowledge earlier. The record does not even disclose that they had, at the time they offered the amendment, just come into possession of knowledge that these parties were only life tenants. Under these circumstances we do not think the court abused its discretion in refusing to allow them to make the amendment.

Finally it is insisted that the evidence is not sufficient to warrant the verdict. We do not deem it necessary to set out the evidence in this branch of the case. We deem it sufficient to say that we have read and considered it and are of the opinion that it was amply sufficient to support the verdict of the jury; and, indeed, from the evidence adduced by the defendants, the jury would have been warranted in finding damages for the defendants in larger sums.

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

HART, J., (on rehearing). In their motion for rehearing, counsel for appellant earnestly insist that under the statute the county and not the district is liable for the damages suffered by the landowner for the land taken for the purpose of widening the highway in question. They rely on section 36 of act 338 of the Acts of 1915. See Acts of 1915, page 1400. The section in question provides that it shall be the duty of the board in changing the route of any road to lay it out in accordance with the provisions of act 422 of the Acts of 1911 and they claim that under this section the county would be liable for damages to land taken in changing the road. In making this contention counsel have not taken into consideration section 12 of the act in question. This section in express terms provides that the damages shall be paid out of the funds of the district, or by a reduction in the assessments of benefits.

(6) Again it is insisted by counsel that the court erred in not holding that the method of procedure should be in accordance with the provisions of act 422 of the Acts of 1911 as provided in section 36 of the act under consideration. In making this contention counsel have not considered section 37. The two sections must be read and construed together. Section 37 provides that if any owner of real property in the district demands the assessment of damages to his property by reason of the improvement by a jury, the board shall institute an ac-

tion in the circuit court for the condemnation of said land which shall be in accordance with the proceedings for the condemnation of the right-of-way of a railroad. The commissioners commenced this case in the circuit court under section 37. They attempted to dismiss their action, but the landowner objected. This was tantamount to an election to have the commissioners proceed under section 37, and the court properly refused to allow the commissioners to dismiss their action in the circuit court, and proceed under section 36.

The motion for a rehearing will be denied.

NEWTON v. MATHIS.

Opinion delivered October 20, 1919.

1. APPEAL AND ERROR—INSTRUCTIONS NOT IN BILL OF EXCEPTIONS.—Where the bill of exceptions does not set out the instructions, it will be conclusively presumed that the law was correctly declared.
2. LEASE—ABANDONMENT.—A mere quarrel between a landlord and tenant about the location of a fence will not justify a breach of the contract of lease by the lessee.
3. CONTRACT—BREACH—JURISDICTION OF JUSTICE.—A justice has jurisdiction in an action for a breach of contract of lease though the amount sued for exceeds $100.
4. STATUTE OF FRAUDS—VERBAL CONTRACT OF LEASE—PART PERFORMANCE.—The substantial part performance of a verbal lease contract, by the construction of a barn and the clearing of land, takes the lease out of the operation of the statute of frauds.

Appeal from Johnson Circuit Court; *A. B. Priddy*, Judge; reversed.

Jesse Reynolds, for appellant.

1. This is a suit for conversion or damages of personal property in the sum of $300, and the justice had no jurisdiction. Kirby's Digest, § 4552.

2. The lease was verbal and not to be performed within a year, and hence within the statute of frauds. Kirby's Digest, § 3654; 48 Ark. 485; 46 *Id.* 80; 65 *Id.*

604; *Carnahan* v. *Terrall,* 137 Ark. 407. In determining whether a contract comes within the statute, courts are to be governed by the language and intention of the parties as to the time of performance. 54 Ark. 199; 93 *Id.* 3. Appellee occupied the land and worked it for two years without paying any rent and the rents and profits far exceeded the value of the improvements he placed on the land, and a court of equity would not grant specific performance of the contract. 82 Ark. 33; 116 *Id.* 461; 125 *Id.* 393.

SMITH, J. Appellee recovered damages on account of an alleged breach of a contract of lease. He testified that he leased from appellant a forty-acre tract of land, of which only a small portion was in cultivation, and that by his contract he had the privilege of clearing as much land in any year as he pleased, and that he was to have free of rent any land so cleared for a period of three years from the date of the clearing. He cleared eight acres the first year and six the next and built a barn which appellant had agreed to build. A controversy arose over the location of a fence which appellee desired to build around a pond of water. Appellant insisted that the pond was not on his land, but on land belonging to his father, and refused appellee permission to build the fence he desired to build, whereupon appellee left the farm.

(1-2) The bill of exceptions does not set out the instructions, and it will, therefore, be conclusively presumed that the law was correctly declared. The testimony is set out, however, and shows no reason why appellee should have abandoned his lease and left the premises except that he had a quarrel with appellant about the location of the fence, and that was not a sufficient reason to justify his abandonment of the contract and treating it as breached by appellant.

As the cause will have to be remanded for a new trial, for the reason that no breach of the contract by appellant was shown, we dispose of the questions of law discussed

in appellant's brief, there being no brief filed in appellee's behalf.

(3) It is first insisted that the action is for damage to personal property, and as the sum claimed and the judgment recovered exceeds $100 the justice had no jurisdiction. This contention can not be sustained; the suit is not one for damage to personal property but for an alleged breach of contract.

(4) The second point is that the lease contract was a verbal one and that as it was not to be performed within a year from its date it was within the statute of frauds. It is true the contract was a verbal one, but there had been a very substantial part performance of it by the construction of the barn and by clearing land, this testimony having been accepted by the jury, as is evidenced by the verdict, and this part performance took the contract for the lease out of the statute of frauds. *Storthz* v. *Watts,* 125 Ark. 393.

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

BOST *v.* STATE.

Opinion delivered October 20, 1919.

1. LARCENY—COTTON—SUFFICIENCY OF THE TESTIMONY.—The evidence held sufficient to sustain a conviction of larceny of a load of cotton.
2. CRIMINAL LAW — CIRCUMSTANTIAL PROOF.—An instruction was properly refused which charged the jury that when the State relied wholly on circumstantial evidence, the chain of circumstances, as a matter of law, must not only be inconsistent with defendant's innocence, but must be so convincing of his guilt as to exclude every other hypothesis, and must establish in the jury's mind an abiding conviction of moral certainty of the truth of the charge.

Appeal from Craighead Circuit Court, Lake City District; *R. E. L. Johnson,* Judge; affirmed.

G. W. Barham, for appellant.

The court erred in refusing defendant's instruction No. 1. 117 Ark. 296. But whether this instruction should have been given or not, the evidence does not sustain the verdict.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

Confesses error in that the evidence does not sustain the conviction, as there is absolutely no proof that the cotton defendant sold was the same cotton stolen the night before.

SMITH, J. Appellant was convicted of the offense of grand larceny alleged to have been committed by stealing twelve hundred pounds of seed cotton, and has prosecuted this appeal.

(1) The Attorney General has confessed error because in his opinion the testimony is not legally sufficient to support the verdict. In the State's brief it is said: "There is absolutely no proof that the cotton which defendant sold was the same cotton that was stolen the night before, and the evidence which shows that the person who stole the cotton drove a team of mules, refutes the idea that defendant stole it, for the reason that the next morning he was driving a team of large horses, and there is further evidence that his father did not own a team of mules at that time."

The testimony shows that the cotton was stolen at night, and that it was hauled from a point near the pen from which it was taken in a wagon drawn by two mules. Appellant lived in the neighborhood and admitted hauling a load of cotton into Monette very early in the morning after the cotton had been stolen and selling it there but he claimed that the cotton hauled by him had been given to him by his father. He was suspected and arrested, but escaped immediately from the officers and was a fugitive from justice for several years. Appellant proved that the team driven by him was two large horses, and he introduced testimony to the effect that his father

had no other team and did not in fact have a team of mules at that time. The theory of the State was that a team of mules had hauled the cotton from the pen and that a team of horses had hauled the cotton to Monette where it was sold.

Appellant's mother testified that appellant did not own a team of any kind, and that appellant's father, with whom appellant lived, owned only a team of horses.

This testimony unquestionably tended to show that appellant did not steal the cotton, as he did not have the teams, if that testimony were true, to make the change which he must have made if he was in fact guilty. But it can not be said that this testimony is undisputed. In fact, a witness named Rip Helms testified in rebuttal that appellant's father did own a team of mules at the time. Upon the cross-examination of this witness he was asked:

"Q. If his (appellant's father's) wife said that he didn't have any mules at the time this cotton was stolen, then she has lied about it or she is mistaken and didn't know?

"A. She is undoubtedly mistaken.

"Q. Then you say that you ought to know about his affairs and the teams he owned better than his wife did?

"A. Well, he hauled the cotton with them.

"Q. How do you know they were his?

"A. Well, he tried to sell them to me.

"Q. When?

"A. The fall he bought them and in the summer."

It must be confessed that the testimony considered as a whole is unsatisfactory, but, when given its highest probative value, together with the inferences reasonably deducible therefrom, we can not say that it is not sufficient to support the finding of guilt, and the confession of error is therefore not sustained.

(2) Reversal of the judgment is asked because of the refusal of the court to give the following instruction:

"Instruction No. 1. You are instructed that when the State relies wholly upon circumstantial evidence, as in this case, to justify a conviction of a person charged with a crime, then such chain of circumstances, as a matter of law, must not only be inconsistent with the defendant's innocence, but must be so convincing of his guilt as to exclude every other hypothesis, and must establish in the minds of the jury an abiding conviction of a moral certainty, of the truth of the charge, and unless this is done in this case, then it is your duty to acquit the defendant."

It is said that authority for this instruction is found in the case of *Davis & Thomas* v. *State,* 117 Ark. 296, and that as no instruction was given on the manner of weighing circumstantial evidence the judgment must be reversed. In answer to this contention, it may be said that we did not in the case of *Davis & Thomas* v. *State, supra,* approve the instruction set out as a correct declaration of the law to be given in every case. We merely said there that no error was committed in refusing to give an instruction which elaborated the duty of a jury in weighing circumstantial evidence because that feature of the case was covered by the instruction set out above, which was given.

Indeed, in the case of *Jones* v. *State,* 61 Ark. 88, it was held not to be error to refuse an instruction that before a defendant could be convicted upon circumstantial evidence the jury must find that the circumstances proved established the guilt of the defendant to the exclusion of every other reasonable hypothesis except that of guilt, if the jury were properly instructed as to the burden of proof resting upon the State and as to reasonable doubt. See, also, *Green* v. *State,* 38 Ark. 304; *Thompson* v. *State,* 130 Ark. 217.

Moreover, the instruction requested is materially different from the one given in the case of *Davis & Thomas* v. *State, supra.* There it was said the circumstantial evidence "must be so convincing of their guilt as to exclude every other *reasonable* hypothesis. * * *"

The instruction here omits the word "reasonable," and as requested would therefore have required that the testimony exclude every other hypothesis—which would mean to a mathematical certainty; and the law imposes no such requirement.

The court did instruct the jury that appellant could not be convicted if there was a reasonable doubt about his guilt; and if it was thought that the law of that subject was not sufficiently amplified a correct instruction should have been asked, and as this was not done, appellant is in no position to complain that the one given was not as full and complete as it should have been. *Lackey* v. *State,* 67 Ark. 416.

Finding no prejudicial error, the judgment is affirmed.

WOODARD *v.* STATE.

Opinion delivered October 20, 1919.

1. SEDUCTION—CONDITIONAL PROMISE.—In a prosecution for seduction the prosecuting witness testified that defendant "said if anything happened he would marry me." *Held,* the court improperly refused the following instruction: "If you find from the evidence that the defendant had intercourse with the prosecuting witness, and that she was induced to consent to such intercourse by reason of a promise on the part of the defendant that he would marry her 'if anything happened' as a result of such intercourse, you will find defendant not guilty."
2. SAME—SAME—UNCONDITIONAL PROMISE.—If the prayer for instruction set out above had been given, it would be proper for the court to declare the converse of it, viz., that if there was an absolute and unconditional promise of marriage, though appellant also said that he would marry her immediately if she became pregnant, or that if anything got the matter they would marry right away, such conditional promises, or similar ones relating to the time or manner in which the original promise should be discharged, did not render the original promise of marriage a qualified or a conditional one.

Appeal from Johnson Circuit Court; *A. B. Priddy,* Judge; reversed.

W. E. Atkinson and *G. O. Patterson,* for appellant.

1. The prosecuting witness was not sufficiently corroborated as to the promise of marriage. Kirby & Castle's Digest, § 2216; 130 Ark. 149; 27 *Id.* 16; 35 Cyc. 1364; 101 Ark. 45; 93 Va. 815; 365 S. W. 366; 15 A. & E. Enc. Pl. & Pr. 246; 9 Ala. 641; 89 Iowa 573; 102 Pa. St. 48; 104 Mo. 644; 46 Tex. Cr. 290; 65 S. W. 475; 63 *Id.* 317; 48 *Id.* 192; 31 *Id.* 366.

2. Mrs. Basham's testimony was incompetent and no corroboration. 101 Ark. 45; 54 Iowa 743; 55 *Id.* 258; 50 *Id.* 317; 86 Ark. 30; 126 *Id.* 98; 77 *Id.* 23; 84 *Id.* 67; 111 Iowa 69; 132 *Id.* 196; 78 Iowa 123; 110 N. Y. 188.

3. There was no proof that Bessie Miller was a single woman. The burden was on the State to prove this and it failed. 35 Cyc. 1345.

4. The promise must be unconditional. A promise conditioned upon pregnancy is not sufficient. 15 Col. App. 220; 114 Pac. 585; 38 S. E. 341; 66 *Id.* 619; 132 S. W. 225; 110 N. W. 380; 15 Ann. Cases, 222; 144 N. Y. 361; 39 N. E. 343; 78 Hun. 509; 29 N. Y. Supp. 542; 30 *Id.* 87; 22 L. R. A. 840; 42 Am. St. 700; 35 Pac. 36; 114 S. W. 841; 119 *Id.* 866; 136 *Id.* 1095; 166 *Id.* 135.

5. It was error to refuse the motion for continuance. 115 Ill. App. 157; 131 Mich. 474.

6. There was error in the instructions given and refused and in permitting the remarks of counsel for the State. 87 Ark. 464.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. The testimony of the prosecutrix was sufficiently corroborated. 40 Ark. 482; 77 *Id.* 468-472; 92 *Id.* 421; 67 *Id.* 416; 73 *Id.* 291.

2. The proof shows she was a single woman. All the circumstances show this. 130 Ark. 149-155.

3. The promise of marriage was unconditional. 113 Ark. 520; 135 *Id.* 221. The instruction asked by defendant was properly refused. 113 Ark. 520; 135 *Id.* 221.

4. The motion for continuance was properly refused, as no diligence was shown to obtain the witness.

SMITH, J. Appellant was convicted under an indictment charging him with the crime of seduction alleged to have been committed by obtaining carnal knowledge of one Bessie Miller by virtue of a false express promise of marriage, and has prosecuted this appeal to review that judgment.

At the time of the commission of the alleged offense he was sixteen years old and Miss Miller was eighteen.

(1) In response to questions somewhat leading in their nature, Miss Miller testified that she yielded to appellant's importunities because she loved him and he had promised to marry her. She stated that they had been engaged for some time but did not marry on account of his youth, but were to marry as soon as his father consented to the marriage. On her cross-examination, however, when asked why she yielded, she said: "Well, he (appellant) said if anything happened he would marry me." Further direct examination of the witness elicited answers which support the contention of the State that the promise was absolute and unconditional; but when the testimony is considered in its entirety it can not be said that no other construction can be given it and the jury might have found that the consent was based upon the promise to marry "if anything happened." Miss Miller testified that the first act of intercourse occurred in March and a baby was born in December following. Appellant denied that he had ever had sexual intercourse with Miss Miller, and also denied that he had ever promised to marry her.

The court gave a general charge correctly declaring the law applicable to the points in issue except that nothing was said about the effect of a conditional promise. Upon that issue appellant asked the following instruction:

"3. If you find from the evidence that the defendant had intercourse with the prosecuting witness and that she was induced to consent to such intercourse by reason of a promise on the part of the defendant that he would marry her if 'anything happened' as a result of such intercourse you will find the defendant not guilty."

In 24 R. C. L., page 765, the law is stated as follows:

"In those jurisdictions where a promise of marriage is by statute essential to criminal seduction the authorities are practically agreed that intercourse procured through a promise to marry the person seduced in case the intercourse results in pregnancy does not amount to criminal seduction."

The footnote to the text quoted cites the annotated case of *State* v. *Caron,* 87 Am. Dec. 401, and *Hamilton* v. *U. S.,* 51 L. R. A. (N. S.), 809, which collect a number of cases on the subject. See, also, *Russell* v. *State,* 15 Ann. Cas. 223.

We have had occasion to consider this question in the following cases: *Taylor* v. *State,* 113 Ark. 520; *Davie* v. *Padgett,* 117 Ark. 544; *Oakes* v. *State,* 135 Ark. 221. The case of *Davie* v. *Padgett, supra,* was not a criminal prosecution for seduction but was an action for damages for breach of promise to marry.

In the case of *Taylor* v. *State,* 113 Ark. 520, the prosecutrix testified that the reason she let the defendant have intercourse with her was that they were going to marry and he said if anything got the matter with her they would marry right away. An instruction was asked in that case somewhat similar to the one set out above, but we held it was not error to refuse it because "it ignored the testimony tending to show that the sexual intercourse was obtained by an absolute promise on the part of appellant to marry the prosecutrix but to be consummated 'right away' in the event of pregnancy." In the opinion, however, we said:

"If a woman consents to the act of sexual intercourse upon a promise of the man to marry her only in the event that pregnancy results from it, then the promise is based upon a condition that might not arise. Where a woman yields to sexual embraces upon such promise she is not sacrificing her virtue alone because of a desire to marry the man to whom she yields, but, in such case, she is indulging her lustful passion and is resting upon the promise of marriage only for protection and assistance when her disgrace shall have been discovered."

Substantially the same question was raised in the case of *Oakes* v. *State, supra,* and we disposed of the question there on the authority of the cases of *Davie* v. *Padgett,* and *Taylor* v. *State, supra,* by saying that the testimony did not present the issue that the intercourse was based on a conditional promise of marriage.

(2) We think, however, that the testimony in the present case does not present the issue whether the promise was an absolute or a conditional one, and that the instruction should have been given. Of course, it would have been proper, had the court given that instruction, to declare the converse of it and to have told the jury that if there was an absolute and unconditional promise of marriage, the fact that appellant also said that he would marry her immediately if she became pregnant (as was said in the case of *Oakes* v. *State, supra*), or that if anything got the matter, they would marry right away (as was said in the case of *Taylor* v. *State, supra*), such conditional promises or similar ones relating to the time or manner in which the original promise should be discharged did not render the original promise of marriage a qualified or a conditional one.

Other assignments of error are discussed, but as they relate chiefly to matters which may not arise upon a trial anew we do not discuss them here.

For the error indicated the judgment will be reversed and the cause remanded.

CHRISTIAN WOMEN'S BOARD OF MISSIONS *v.* CLARK.

Opinion delivered October 20, 1919.

1. MORTGAGES—LIMITATION OF ACTIONS—PROMISE TO PAY.—Appellee held a note secured by a mortgage on land belonging to one C. After the lapse of time sufficient to bar the statute by limitations, C. promised, if given further time, and if appellee would pay the taxes and procure insurance on the property, to discharge the debt, and not to take advantage of the statute. *Held,* under these facts, C. later could not plead limitations.

2. LIMITATION OF ACTIONS—VERBAL PROMISE TO PAY.—Kirby's Digest, section 5079, relates to verbal promises or acknowledgments not supported by a new or additional consideration, and has no application to an original undertaking to pay a debt, otherwise barred by limitations, at a future date, based upon sufficient consideration.

3. LIMITATIONS OF ACTIONS—MORTGAGE—ORIGINAL UNDERTAKING TO PAY—ENDORSEMENT IN THE RECORD.—In order to extend the statutory bar on recorded mortgage liens, as against third parties, the burden and duty are placed (Kirby's Digest, section 5399) upon the mortgagee to enter the payments and dates thereof on the margin of the record where the mortgage is recorded. But no duty is imposed by the statute upon the mortgagee in a recorded mortgage to enter new undertakings by the mortgagor on the record, in order to extend the period of limitation as to third parties. As to such undertakings, third parties occupy the same position as the mortgagor.

Appeal from Carroll Chancery Court, Western District; *Ben F. McMahan,* Chancellor; affirmed.

Festus O. Butt, for appellants.

1. The action is barred by limitation and no notation of payments appear upon the face of the record to extend the time. Kirby's Digest, § 5079. Wanting such notice of extension of time, the grantee took title free from the lien of the mortgage, regardless of secret equities existing between mortgagor and mortgagee. Appellant was a *bona fide* purchaser. The conditions in the deed were all fulfilled, and the deed vested absolute and immediate title.

It must be established by appellee that there were enforceable secret equities between mortgagor and mortgagee and that the conveyance from the mortgagor to the purchaser was so affected by fraud as to be void. If it was a good conveyance, then it was good against the mortgage; if it was not a good conveyance, then the existence of secret equities must be shown by appellee before she could recover. Were there such secret equities existing between Mrs. Christian and Mrs. Clark as amounted to a waiver by Mrs. Christian of the statute of limitations? Nothing in the testimony tends to prove that the limita-

tion date was extended by any new written acknowledgment of the debt or promise to pay it. Such must be in writing to be binding and executed prior to the original limitation date. Kirby's Digest, § 5079; 52 Ark. 288; 66 *Id.* 464; 105 *Id.* 290; 120 S. W. 836; 151 *Id.* 249. The only writing by Mrs. Christian tending to indicate an acknowledgment or promise is dated January 21, 1917, long after the expiration of the limitation period.

In the absence of the marginal credit on the record, the mortgage lien was extinct. 64 Ark. 317; 68 *Id.* 257; 91 *Id.* 394; 121 S. W. 278; 137 *Id.* 808.

2. The grantee under Mrs. Christian had the right to plead the statute against appellee. 153 S. W. 112.

3. There is absolutely no proof of fraud on the part of the grantees and the proof fails to show insanity or unbalanced mentality on the part of Mrs. Christian.

4. The evidence fails to show her mental incapacity. If the person was sane at the time the act charged was accomplished, even evidence of mental condition at other times is inadmissible. 14 R. C. L. 620. The burden of showing mental unsoundness rests upon appellee. 19 Ark. 533. This burden was not met.

5. The testimony does not sustain the decree and the clear preponderance is against it.

C. A. Fuller, W. N. Ivie and *J. W. Nance,* for appellee.

1. Undue influence was exercised over Mrs. Christian, and in view of her weak mental and physical condition our contention is that fraud was perpetrated on her in dealing with her. 3 Johns. Chy. 232; 15 Ark. 581. Undue influence was used over the grantor, and the grantee can not take advantage of it, as it was against conscience. A court of equity will relieve. 26 Ark. 605; 119 *Id.* 466.

2. The conveyance by an insane person is void and the same rule applies where undue influence or fraud is practiced. 115 Ark. 430. Mrs. Christian was incapable of exercising reasonable judgment on account of her dotage

and feebleness of mind and body, and undue influence was used. 119 Ark. 466; 120 *Id.* 788.

3. The findings of the chancellor are not clearly against the preponderance of the evidence, but the evidence sustains them and the decree should be sustained. 119 Ark. 467.

HUMPHREYS, J. This suit was instituted in the Western District of the Carroll Chancery Court by appellee against appellants, to foreclose a mortgage on certain lots in Eureka Springs, executed on the 18th day of October, 1909, by appellant, Persis L. Christian, to A. L. Clark, and to cancel, as fraudulent and void, a deed executed upon the same lots by Persis L. Christian to the Christian Women's Board of Missions, on the 20th day of November, 1917.

The amended bill, in substance, alleged that the appellee was the owner of the note, evidencing the indebtedness secured by the mortgage, by virtue of assignment; that said note, according to its terms, was due on or before one year after date, and, while barred on its face by the statute of limitations, it was not in fact barred, because Persis L. Christian, for a valuable consideration, had agreed by oral contract to pay said indebtedness, and not to plead the statute of limitation; that the deed executed by Persis L. Christian on November 20, 1917, to the Christian Women's Board of Missions was procured by undue influence and overpersuasion at a time when the mind of Persis L. Christian was not sufficiently strong for her to know the effect and consequence of her acts; and that at the time Persis L. Christian executed said deed she was not of sound and disposing mind.

During the pendency of the suit, Persis L. Christian died, and the cause was revived in the name of F. M. Gear, special administrator. The special administrator and the Christian Women's Board of Missions filed answer, denying each and every material allegation in the bill.

The cause was heard upon the pleadings, the note and mortgage, the depositions of witnesses and exhibits

thereto, and certain documentary evidence adduced by agreement of the attorneys, from which the court found the issues in favor of appellee, declared a lien upon the lots in question in favor of appellee for $2,415.75, which included debt, interest and money advanced for taxes and insurance upon the property, decreed a foreclosure and order of sale, and canceled the deed executed by Persis L. Christian to the Christian Women's Board of Missions on the 20th day of November, 1917, in so far as it affected the rights of appellee in the property under her mortgage. From that decree an appeal has been duly prosecuted to this court.

(1) It is first insisted by appellants that the cause of action was barred by the statute of limitations at the time the suit was instituted. The note was dated October 18, 1909, and, under its terms, became due and payable October 18, 1910. No credits appeared upon the note or margin of the mortgage record. The suit was brought on January 30, 1918. Upon the face of the note and mortgage, therefore, the statutory bar attached on October 18, 1915, unless the statute was tolled after the statutory bar attached by a new promise, for a valuable consideration, on the part of Persis L. Christian, to pay the indebtedness or not to plead the statute of limitations. The note and mortgage in question were sent to C. A. Fuller, a practicing attorney in Eureka Springs, Arkansas, by appellee, for collection, in January or February, 1917. Upon receipt of the note and mortgage, Fuller informed Persis L. Christian that he had the note for collection. She stated to him that she was unable to pay it or to pay the taxes and insurance on the property secured by the mortgage, and requested that he get his client, the appellee herein, to advance the money for the taxes and insurance, as she had done in the past, and not to foreclose the mortgage. Fuller called her attention to the fact that the debt was old and might be barred by the statute of limitations if further time were granted. She responded that it was an honest debt, and that if they would give her time she would try to borrow the money

and pay it, and if she happened to die, which she thought she would soon, the mortgage would take the property any way; that she would not try to beat the debt because "it was too old or outlawed." Based on this promise to pay the indebtedness and not to plead the statute of limitations, Fuller obtained the necessary money from appellee to pay the taxes and insure the property. This evidence was sufficient to establish an original undertaking on the part of Persis L. Christian to pay the indebtedness at a future date for an additional consideration. It established an agreement on the part of Persis L. Christian, for a valuable consideration, to pay the indebtedness, and, on the part of appellee, an agreement to forbear.

(2) It is insisted, however, that the original undertaking was not in writing, and, therefore, not binding. Section 5079 of Kirby's Digest is cited in support of the contention. That section, in part, provides that "no verbal promise or acknowledgment shall be deemed sufficient evidence in any action founded on a contract whereby to take any case out of the operation of this act, or to deprive the party of the benefits thereof." This statute has no application to original undertakings to pay at a future date, based upon sufficient consideration. The statute relates to verbal promises or acknowledgments not supported by a new or additional consideration.

But appellants insist that, even though Persis L. Christian is precluded from pleading the statute of limitations against the debt and lien, by reason of an original undertaking, still the mortgage lien became extinct by the failure of appellee to make a note thereof on the margin of the record where the mortgage was recorded. In support of this contention, section 5399 of Kirby's Digest is cited. That section is as follows: "In suits to foreclose or enforce mortgages or deeds of trust, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given. Provided, when any payment is made on

any such existing indebtedness, before the same is barred by the statute of limitation, such payment shall not operate to revive said debt or to extend the operations of the statute of limitation with reference thereto, so far as the same affects the rights of third parties, unless the mortgagee, trustee or beneficiary shall, prior to the expiration of the period of the statute of limitation, endorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded, which endorsement shall be attested and dated by the clerk."

(3) It is apparent that this action requires marginal entries on the record of *payments* only, in order to extend the period of limitations as to third parties. No requirement is made by the section that the mortgagee, or his assignee, shall enter original undertakings on the margin of the record where the mortgage is recorded in order to extend the period of limitations against *bona fide* purchasers of the property. Without such a requirement in the statute, a subsequent innocent purchaser of the property occupies no better position than the mortgagee in relation to recorded mortgages. Prior to the passage of the act in question, it was the duty of subsequent purchasers for value to take notice of recorded mortgages executed by parties in the chain of their title and to inquire whether the lien was in force and effect. The statute exempts third parties from making the inquiry as to whether the debt or lien in recorded mortgages has been extended by payment. In order to extend the statutory bar on recorded mortgage liens, as against third parties, the burden and duty are placed upon the mortgagee to enter the payments and dates thereof on the margin of the record where the mortgage is recorded. But no duty is imposed by the statute upon the mortgagee in a recorded mortgage to enter new undertakings by the mortgagor on the margin of the record in order to extend the period of limitation as to third parties. As to such undertakings, third parties occupy the same position as the mortgagor. While it is immaterial in this case, the board

had actual knowledge of the existence of the mortgage at the time it obtained the deed. As between Persis L. Christian, the mortgagor, and Emma F. Clark, the owner of the note and mortgage, the statutory bar had not attached by reason of a new undertaking binding upon both Persis L. Christian and Emma F. Clark. The Christian Women's Board of Missions, on account of this undertaking, was precluded from successfully pleading the statute of limitation.

Much evidence was taken upon the issue of whether Persis L. Christian was possessed of a sound and disposing mind at the time she executed the deed to the Christian Women's Board of Missions. The evidence is wholly insufficient to establish the procurement of the deed through fraud. Under the view expressed above, it is unnecessary to consider either issue in the trial of the case *de novo*.

The result reached by the chancellor is correct, and the decree is affirmed.

SOUTHERN ANTHRACITE COAL MINING COMPANY *v.* SMITH.

Opinion delivered October 20, 1919.

1. MASTER AND SERVANT—INJURY TO MINER—PROOF OF SMOKE IN MINE.—After a blast, plaintiff, a miner in appellant's employ, entered the mine and was injured by the falling of a large rock. The complaint did not allege that the injury was in any way occasioned by smoke in the mine, but plaintiff introduced evidence showing that condition. *Held,* such evidence was admissible where appellant pleaded assumed risk and contributory negligence.
2. SAME — SAME — SAME — CONTRIBUTORY NEGLIGENCE.—Under the the facts as set out above, plaintiff *held* not guilty of contributory negligence.
3. SAME—SAME—SAME—OBVIOUS DANGER.—Plaintiff, a miner, was injured, when a rock fell upon him from the roof of the mine. *Held,* it was the duty of the employer to inspect for and warn of danger, and that the danger was not so obvious that it could be said that plaintiff assumed the risk as a matter of law.

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

Hays & Ward, for appellant.

1. All evidence and statements of counsel as to a "smoky condition" of the entry were inadmissible and should have been excluded, as there was no allegation in the complaint that such a condition contributed to the injury, nor did counsel for plaintiff ask for an amendment to conform to the proof. 124 Ark. 455; 113 *Id.* 359; 102 *Id.* 581; 85 *Id.* 325; 31 Cyc. 680; Am. Ann. Cases 1912 A, 638 and note.

2. Under the facts of the case the court should have directed a verdict for defendant, as plaintiff was guilty of contributory negligence and assumed the risk. 95 Ark. 560; 112 *Id.* 446; 188 S. W. 549; 81 Ark. 343; 88 *Id.* 243; 122 *Id.* 552; 100 *Id.* 156.

3. The court erred in giving instruction No. 1 for plaintiff because it told the jury that the master failed to furnish the servant a safe place to work and imposed on the master an additional duty to make a reasonable inspection in order to render the working place reasonably safe. 97 Ark. 187; 105 *Id.* 205.

Instruction No. 2 asked by defendant should have been given. 99 Ark. 537.

4. In view of the facts that (1) plaintiff was allowed to introduce improper evidence; (2) that plaintiff in doing his work created a condition causing his injury; (3) that plaintiff failed to heed the warning that the rock was likely to fall and continued to work without making any inspection or examination for his own safety; (4) that in the light of attending circumstances defendant could not have anticipated the condition of plaintiff's working place brought about by the progress of the work; (5) that the court refused to give instructions asked by defendant on assumed risk and contributory negligence; (6) that the case was submitted to the jury upon the proposition that the company "failed to furnish a safe place to work," and (7) that the court refused to withdraw from the jury all evidence and argument of counsel as to the presence of smoke at plaintiff's working place, etc., the judgment should be reversed.

H. H. Ragon, J. T. Bullock, G. O. Patterson and *R. A. Ragsdale,* for appellee.

Appellant's contentions as to contributory negligence and assumed risk, etc., are not well taken. Appellee did not know of the danger, nor was it obvious; the duty of maintaining the entry in safe condition was upon appellant. It was not the servant's duty to inspect, nor make examination for defects. 4 Labatt on M. & S., § 1330; 48 Ark. 333. That was the master's duty. *Ib.;* 4 Labatt, § § 1335, 1338, 1311.

A servant only assumes the ordinary risks incident to his employment. He does not assume the risks of danger arising out of the master's negligence. 95 Ark. 291; 87 *Id.* 217.

There are no errors, and the judgment should be affirmed.

HUMPHREYS, J. Appellee instituted suit against appellant in the Pope Circuit Court to recover damages on account of personal injuries received, through the alleged negligence of appellant, while employed by it as a laborer in its coal mine. The allegation of negligence contained in the complaint was that the agents and officers of appellant failed to prop the roof and take down loose and dangerous slate and rock in the entry where appellee was working, which fell upon and injured him.

Appellant answered, denying the allegation of negligence on its part, and pleading, as further defenses, contributory negligence and assumed risk on the part of appellee, and that the injuries were the result of an accident.

The cause was submitted to a jury upon the pleadings, evidence adduced and instructions of the court, upon which a verdict was returned for appellee in the sum of $2,000. A judgment was rendered in accordance with the verdict, from which an appeal has been properly prosecuted to this court.

The facts are, in substance, as follows: Appellant was operating a coal mine near Russellville, in said

county. Appellee, an experienced coal miner, was an employee, employed to turn a room-neck on the third west entry in the mine. The work assigned to him was marked off by the pit boss and was a room-neck to the fifth room, about thirty feet from the head of the entry. The entry was five and a half feet high, seven feet wide at the bottom and five feet wide at the top. The side of the entry was called the rib, and the top, the roof. The entry ran east and west and the rooms were formed by digging at right angles from the side or rib of the entry. The entry contained a track in the center for the purpose of hauling coal out. The entry was also used as a passageway for the employees going to and from their work, and in which to stand when turning room-necks. It was the duty of the appellant company to keep the top or roof of the entry securely propped, and to take down such loose rock and slate from the top, or roof, as would be likely to fall and injure its employees. In turning the room-neck, it was necessary at first to stand in the entry for the purpose of digging or blasting it. Near the top of the rib or wall where appellee was to turn a room-neck, a large rock, about eight inches thick and from six to eight feet wide, stuck out from the entry wall from eighteen inches to two feet.

The evidence tended to show that the rock extended into and feathered out in the roof and constituted a part of the roof of the entry. This rock was left protruding at the time the entry was driven, and had remained in that position for several weeks. The pit boss had notice of that fact, and testified in the case that "it would have been safer for the men working under it had the company removed it." Other witnesses testified that the way it hung out over the entry rendered it dangerous. The rock was about two and a half feet above the coal that appellee was to remove in turning the room-neck. On the day of the injury he put two shots under the coal near the bottom of the wall. These shots were fired at about 11:30 o'clock while appellee and other employees had gone to dinner.

Upon their return at 12 o'clock, they waited about fifteen minutes for the smoke to partially dissipate before going to work. Alex Gardner entered first, and the coal diggers, including appellee, followed. Upon reaching the room-neck appellee was turning, it was discovered that the shots had torn up the track and had thrown out slate and rock upon it. Gardner directed appellee to clean up and nail down the loosened track so the coal car could pass in and out. Appellee followed Gardner's instructions and began to clear up the track without making any particular examination or inspection of the effect of the shots on the parts of the wall and entry roof in close proximity to them. While engaged in this work, Gardner, who was driving the entry, passed by and called the attention of appellee to the condition of the rock. Gardner said that he told appellee that the rock was swagging and to look out for it. Appellee testified that Gardner passed by and said "lookout for that rock;" that he looked up and could not see any rock in a dangerous position; that while he was cleaning up the track Alex Gardner passed through the entry under the rock several times; that he did not understand by Gardner's remark that there was any immediate danger from a rock; that it was smoky in there and he could not see very well.

All the witnesses testified, over the objection of appellant, that, after the shooting, the entry was darkened by the smoke occasioned by the shooting. While nailing down the rail, the rock fell upon and seriously injured appellee, which injury was permanent in its nature. When the rock fell, it broke off square with the rib or wall and fell almost entirely across the floor of the entry. The evidence showed that it was the duty of the appellant company to inspect and look after the safety of the top or roof of the entry; that, after entering the room-neck and room, it was the duty of the employee to make a careful inspection of the roof to the neck or room, and parts within reasonable distance of where the shots had been fired, before going to work. There

was a conflict in the evidence as to whether it was the duty of an employee, who was just turning a room-neck, to make an examination of the parts above and near the shots after same had been fired, before going to work.

(1) It is first insisted by appellant that the court erred in admitting evidence as to the smoky condition of the entry, occasioned by the blasting or firing of shots. The reason assigned for the inadmissibility of the evidence is that no allegation was made in the complaint that the smoky condition, resulting from firing shots or blasting in the mine, contributed to appellee's injury, or was occasioned through the negligence of appellant. It is true no allegation was made in the complaint charging appellant with negligence by failing to provide sufficient ventilation to drive the smoke out after blasting or firing shots, before the men returned to work, or that the smoky condition contributed to appellee's injury; and also true that no motion was made to amend the complaint to conform to the proof made as to the smoky condition after the blasts or shots. We do not understand, however, that appellee based his claim for damages on the neglect of appellant in allowing a smoky condition to exist or remain in the entry or mine after the shots were fired, nor do we understand that the court submitted the case to the jury on that theory. It will be remembered that appellant interposed defenses of assumed risk and contributory negligence on the part of appellee. Those doctrines imposed the duty upon employees to take notice of obvious or apparent conditions or dangers. We think the evidence of the smoky condition existing after the blasts or shots was competent as tending to show that the danger was hard to detect and not obvious or apparent to the observation of an ordinarily prudent or careful man.

(2) It is next insisted by appellant that the undisputed proof showed it was the duty of appellee to inspect the wall and roof of the entry after the shots were fired, and that he returned to work without making an inspection, thereby contributing to his own injury. The evidence

showed that it was appellant's duty to inspect and make the roof safe, and was in dispute as to whether it was appellant's or appellee's duty to inspect the wall of the entry after shots were fired in turning a room-neck. It is more reasonable to suppose that the rock fell from the roof than the wall, because it fell clear across the entry. The further fact that it broke off square with the wall strongly indicates that it fell from the roof. So the contention of appellant that the undisputed proof established contributory negligence on the part of appellee is not sustained by an analysis of the evidence.

(3) It is also insisted that the undisputed evidence shows that the danger was obvious and apparent, and, for that reason, appellee should have been held to have assumed the risk. Appellee testified that he looked up when Alex Gardner told him to look out for that rock, but could not see anything that looked dangerous; that Gardner passed to and fro under the rock after speaking to him; that he did not gather from Gardner's statement that he was in any immediate danger. The rock that fell and injured appellee was a part of the roof, and, even though protruding from the wall, was not necessarily or obviously dangerous. If firmly embedded, it would not fall, and the duty to ascertain that fact rested upon appellant, and not appellee. The danger was not so apparent or obvious that it can be said as a matter of law that appellee assumed the risk.

Again, it is insisted that the court erred in giving the following instruction to the jury: "The grounds of negligence are that the mining company failed to furnish the defendant a safe place in which to work. You are instructed that it was the duty of defendant to use ordinary care to furnish to the plaintiff a reasonably safe place in which to labor and that this duty involves the further duty on the part of the defendant to make a reasonable inspection to discover dangerous conditions in and about the place plaintiff was laboring in order to render said working place in a reasonably safe condition."

It is said that the instruction told the jury in the first sentence that appellant failed to furnish appellee

a safe place to work. We do not think the sentence referred to is susceptible of the construction placed upon it by learned counsel for appellant. The meaning of the sentence is that appellee had alleged as a basis for recovery that appellant had negligently failed to furnish appellee a safe place in which to work. The second sentence in the instruction and the language in other instructions bearing upon the same point clearly show that the cause was sent to the jury upon the theory that there could be no recovery unless appellant negligently failed to furnish appellee a reasonably safe place in which to labor. Again, it is said that the instruction is erroneous because it imposed upon appellant the additional duty to make a reasonable inspection in order to make said working place reasonably safe. We think the proof in this case made it the duty of appellant to inspect the particular place where appellee was required to work in order to render the place reasonably safe. He was working under the roof of the entry, and all the witnesses testified that it was the duty of appellant to inspect the roof and make it safe. The testimony of Ben Garrison was to the effect that in this mine it was the duty of the rock man to make an inspection every day. The following questions and answers appear in his evidence:

"Q. How many rock men have you in that mine?

"A. Four.

"Q. What do these four rock men do?

"A. Clean up the falls and take down rock that is dangerous, you might call it.

"Q. I will ask you if it is the duty of these four rock men to make an inspection of all working places and entries in the mine every day?

"A. Yes, sir."

Lastly, it is insisted that the court committed reversible error in refusing to give instruction No. 2, requested by appellant. This instruction was based upon the theory that the injury was the result of an accident which could not have ordinarily been anticipated and avoided. We find no evidence in the record supporting

such a theory. The evidence tended to show that the injury resulted from negligence of either appellant or appellee, or both. An instruction on the theory of accident would have been abstract. No error was committed by the court in refusing it.

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

LEE v. BANDIMERE.

Opinion delivered October 20, 1919.

1. GROWING CROPS—UNSEVERED CROPS RAISED BY TRESPASSER.—Unsevered crops raised by a trespasser belong to the owner of the land. A trespasser obtains no title or right to crops raised by him on the lands of another until he has severed same.
2. GROWING CROPS—EJECTMENT SUIT.—The bringing of an ejectment amounts to a claim of title to crops then standing upon the land.
3. GROWING CROPS — OWNERSHIP — REPLEVIN.—A. brought replevin against B. claiming possession of certain growing crops. The replevin suit was dismissed. *Held,* the circuit court had no jurisdiction to entertain a motion to have the proceeds of the crop delivered to B. after adjournment of the term of which the replevin suit was dismissed; B.'s remedy was by independent action against A.

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

Hawthorne & Hawthorne and *D. K. Hawthorne,* for appellant.

Promptly after the dismissal of this cause in the circuit court for the first time, appellants duly prosecuted their appeal to this court and when it was dismissed caused the mandate to be filed in the circuit court and move for a judgment against appellee and his sureties. This was in apt time. Art. 7, § 11, Const.; Kirby's Digest, § § 1319, 6871. Appellant clearly had the right to a judgment against appellee for either the property or its value, which was unlawfully taken from them. Appellee therefore, after the trial in the replevin suit, with all the facts before him, stood on his election to

sue for the rent for the years 1913, 1914 and 1915, and was therefore barred from recovering the rent for 1916. 63 Ark. 259; 64 *Id.* 94. Appellee had no legal right to retain possession of the crops or the money realized from the sale of the crops, not even under the order of delivery in the replevin suit and ought not to be allowed to keep it on a mere technicality. 81 Ark. 274. The court should have rendered judgment against appellee at the time of the dismissal of the cause of action. 68 Ark. 320; 134 *Id.* 404. Appellants, on the dismissal of their first appeal, had the same right upon the prompt filing of the mandate to obtain the same relief from the circuit court as they would have had should such relief have been requested at the time of the dimissal in the first instance.

Basil Baker and *Horace Sloan,* for appellee.

1. It is admitted that, both at the time the replevin suit was started and the ejectment suit commenced, the crops for 1916 on the lands were not severed from the soil. Upon the merits the adjudication in ejectment establishes that appellee was the owner of the crops and entitled to their possession. The Lees were trespassers, and crops grown by such so long as they remain unsevered from the soil are the property of the owner of the land. 8 A. & E. Enc. Law (2 Ed.) 3; 179 Mich. 292; Ann. Cases 1915 D. 356 and note. The recovery in the ejectment suit entitled appellee to the crops. 15 Cyc. 183.

2. Defendant is not entitled to a judgment for a return when the case is not tried on its merits but is disposed of on a plea in abatement. 204 S. W. 307; Kirby's Digest, § 6871. Here there never was a trial on the merits. 11 S. W. 630, 632; 4 L. R. A. 360; 48 Ark. 273, 276. The defendant must show his right to the property to get an order to return the property. 48 Ark. 273; 27 *Id.* 184; 22 *Id.* 76; 6 *Id.* 506; 7 *Id.* 25; 23 R. C. L. 940, § 112.

3. The lower court adjudged that it was without jurisdiction. This judgment, being unreversed, is the law of the case, and the lower court is without jurisdiction for any purpose. 34 Cyc. 1367. When an action is dis-

missed for want of jurisdiction in replevin the court is without power to order a return of the property. 136 Mass. 128; 7 Metc. 590; 56 Neb. 158; 78 N. W. 533; 34 S. C. 154; 13 S. E. 323; 75 Vt. 152; 53 Atl. 1071; 35 Vt. 387; 38 Fed. 491; 56 Neb. 195; 78 N. W. 534; 60 Neb. 442; 85 N. W. 740; 15 C. J. 854, § 176.

4. The motion for return, if otherwise available, should have been made at the time of the dismissal of the action. Afterwards the court had no power, as the case was finally dismissed, to entertain a motion for a return after the lapse of the term. 3 Crawford's Ark. Digest, p. 2980, § 94 (2); 37 Ark. 379-382; 14 Cyc. 391.

5. It is impossible to render judgment for appellants upon their joint motion when their interests are adverse to each other.

6. There was no demand for the return in the answer of appellants in the original replevin suit. 18 A. & E. Enc. Pl. & Pr. 558; 48 Ark. 273-6.

7. There is nothing in the contention that appellee can not split his cause of action. The action was not split, and the Lees were trespassers and the appeal should be dismissed.

HUMPHRIES, J. On the 26th day of December, 1916, appellee brought a replevin suit against appellants, W. D. and Oscar Lee, in the Jonesboro District of Craighead County, to recover the possession of a growing crop on the southwest quarter, and southwest quarter of the southeast quarter, section 24, township 14 north, range 1 east, in said county, alleging ownership in himself, and that the Lees were in the unlawful possession thereof. Appellee filed a bond, procured an order of delivery, and, under said order, received the proceeds of the crop.

The Lees answered admitting possession, but denying the wrongful detention of the crops and appellee's ownership thereof.

J. H. Hamilton filed an intervention, claiming a lien for $113.84 on the crops under a mortgage executed by the Lees to him.

The suit proceeded to trial on September 10, 1917, and resulted in a judgment against the Lees in favor of J. H. Hamilton for $113 and a judgment of dismissal of the replevin suit for want of jurisdiction, without adjudicating the property rights. From that judgment an appeal was prosecuted to the Supreme Court, which appeal was dismissed on the 17th day of June, 1918, upon the ground that the dismissal of the suit by the circuit court was favorable to appellants. It was also ruled on that appeal that the appellants could not insist upon a reversal of the judgment of dismissal on account of the failure of the circuit court to render a judgment for the return of the property, or its value, seized under the writ and delivery to appellee, for the reason that no request for the return of the property, or its value, was made by appellants in the circuit court. Appellants procured a mandate from the Supreme Court and filed same at the September term, 1918, of the circuit court. After the adjournment thereof and prior to the commencement of the succeeding term of the circuit court, appellants filed a motion to have the proceeds of the crops of 1916 delivered to them.

A response was filed to the motion, setting up, in substance, (1) that the judgment of dismissal of the replevin suit, rendered by the circuit court at its September, 1917, term of court, became final upon the adjournment thereof and that the court was without jurisdiction at a subsequent term of court to render an alternative judgment for the property, or its value, seized under the writ of replevin, the proceeds of which were later delivered to appellee; (2) that, on October 4, 1916, appellee had filed an ejectment suit against the Lees for said lands, at a time when the 1916 crops were standing thereon, upon the ground that the Lees were trespassers, which was tried on the 11th day of September, 1917, and resulted in a judgment in favor of appellee. The matter was heard by the court upon the motion, response, proceedings had and done in the replevin and ejectment suits, and an agreement to the effect that at the time of

the institution of both the replevin and ejectment suits the crops of 1916 had not been severed, but were standing upon the ground. The circuit court refused to render an alternative judgment against appellee for the property, or its value, and dismissed the motion. From the judgment dismissing the motion, an appeal has been duly prosecuted to this court.

(1-3) The circuit court took the view that it had no jurisdiction to entertain the motion to have the proceeds of the crops delivered to appellants after adjournment of the term at which the replevin suit was dismissed, and that appellants' remedy was by independent action against appellee and his bondsmen. Appellants contend that they had a right to summarily proceed for the return of the crops, or their value, upon the dismissal of the replevin suit, or at any subsequent term of the circuit court. Be that as it may, the undisputed facts in the case support the result reached by the court. It is agreed that the crops were standing and ungathered on October 4, 1916, when the ejectment suit was instituted. The issues in that possessory action were determined in favor of the appellee upon the ground that these appellants were trespassers. Unsevered crops raised by a trespasser belong to the owner of the land. A trespasser obtains no title or right to crops raised by him on the lands of another until he has severed same. 15 Cyc. 183; 8 Am. & Eng. Enc. of Law (2 Ed.), p. 3.

Appellants insist that the appellee is precluded and barred from claiming the standing crops of 1916 because he only asked, in his ejectment suit, for the rents of 1913, 1914 and 1915. It is said that his request for rents for those years amounted to a waiver of his right to the standing crop of 1916. The institution of the ejectment suit was an assertion of his title to the standing crops for that year, and in no sense a waiver of his claim or right thereto. The effect of the ejectment suit was to claim title to the crops of that year, standing upon the ground, as a part of the realty. His claim of rents in the ejectment suit for prior years was not an election to abandon

any claim or right to the crops of 1916. Had he claimed rents only in the crops of 1916, the omission to claim any rents for that year might have been construed as a waiver thereof. Not so, however, where he claimed the title to the crops upon the theory that they were a part of the real estate.

No error appearing, the judgment is affirmed.

FROMHOLTZ v. TRIMBLE.

Opinion delivered October 27, 1919.

ATTORNEY AND CLIENT—FEE—SETTING ASIDE SALE FOR FRAUD.—Appellant was indebted to appellee for an attorney's fee, and, being insolvent, sold a piece of property which he had acquired, thereby rendering appellee's fee uncollectible. *Held,* under the facts, that the sale was fraudulent and was properly set aside.

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

O. E. Williams and *Moore, Smith, Moore & Trieber,* for appellants.

1. Appellees did not by virtue of defending the McGahey suit obtain any attorneys' lien upon the land conveyed to the bank. At the time of the conveyance by Fromholtz to the bank the land was not encumbered by any lien in favor of appellees. Appellees had no attorneys' lien. 208 S. W. 797; 47 Ark. 86.

2. The evidence does not sustain the findings of the chancellor. The conveyance from Fromholtz to Fletcher was not executed for the purpose of fraudulently hindering or delaying appellees in the collection of whatever claim they may have had against Fromholtz. No fraud is shown; the transfer was not voluntary but for a valuable consideration—a pre-existing debt. 60 Ark. 425; 64 *Id.* 184. A person attacking the conveyance must show participation in the fraud on the part of the grantee. 31 Ark. 163; *Ib.* 554.

Mere inadequacy of price, in the absence of fraud is not sufficient. 118 Ark. 229. The finding of the chan-

cellor that there was fraud was against the clear preponderance of the evidence.

3. The chancellor erred in ignoring the fact that the northwest quarter of section 4, township 1 north, range 8 west, was the homestead of Fromholtz and his wife. A creditor can not complain of a voluntary conveyance of the homestead as it can not be fraudulent as to creditors. 118 Ark. 229; 79 *Id.* 215; 103 *Id.* 145. W. P. Fletcher did not confederate in any fraud with Fromholtz and should not be held to have bought the lands as trustee for appellees and part of the land was a homestead of Fromholtz and wife.

Frauenthal & Johnson and *Trimble & Trimble,* for appellee.

The deed from Fromholtz to Fletcher, Jr., was fraudulent in fact and law so far as the rights of appellees are concerned and appellees' rights should be protected. 12 R. C. L., p. 545, § 69; 47 Ark. 367; 12 R. C. L. 543, § 68. The evidence shows that the deed was executed to hinder and delay appellees in collecting their fee and was fraudulent. Fletcher occupied a relation of trust and confidence towards Mr. Trimble and the deed was at least constructively fraudulent. 3 Pom. Eq. Jur., § 1077; 21 R. C. L., p. 825, § 10; 3 Pom. Eq. Jur., § 958. W. P. Fletcher, Jr., really represented W. P. Fletcher, Sr., and the Bank of Lonoke and occupied a relation of trust to the appellees, and the decision of the chancellor was correct. *Supra.*

McCULLOCH, C. J. This is an action instituted by appellees to cancel a deed alleged to have been executed in fraud of their rights as creditors of the grantors of certain lands in Lonoke County.

Bernard Fromholtz, one of the appellants, was the owner of two tracts of land in Lonoke County, each containing 320 acres, and he and his wife executed a mortgage to L. W. Monroe to secure a debt, which, at the time of the transactions coming under review in this action, amounted to about eleven thousand dollars. The Bank

of Lonoke, a banking corporation doing business at Lonoke, also one of the appellants, held a mortgage on the land to secure a debt of about twenty-five hundred dollars.

Litigation arose between appellant Fromholtz and certain other parties concerning rights in this property, and appellees, who are attorneys at law, represented Fromholtz in defending the suit, which resulted in a decree of the chancery court dismissing the complaint. Appellees charged a fee which is conceded in the present litigation not to be excessive. That is to say, the concession is made in the briefs of counsel in the presentation of the case here, but Fromholtz testified below that the fee was excessive and that he had not agreed to pay a fee in excess of two hundred and fifty dollars. The dismissal of the complaint in the original action against Fromholtz was without prejudice to the rights of the parties to bring another action at law, but it seems that another action was not instituted.

L. W. Monroe died, and the executors of his estate instituted an action to foreclose the mortgage, and the Bank of Lonoke was joined in the suit as a junior lienor. A decree was rendered foreclosing each of the mortgages, giving priority to the executors of the Monroe estate. One of the tracts of land was sold, by agreement of the parties, to Gus Fulk for a consideration of $10,000, which sum was applied on the debt to the executors of the Monroe estate, leaving a balance of about eleven hundred dollars. The conveyance to Fulk was made by Fromholtz and wife. The other tract was sold by a commissioner under the foreclosure decree and was bid in by W. P. Fletcher as trustee for interested parties.

A written contract had been entered into between Fletcher, as a representative of the Bank of Lonoke, and the executors of the Monroe estate, whereby it was agreed that Fletcher should buy in the property and hold it in trust for sale to the best advantage, and that when sold the proceeds should be applied, first, to the extinguishment of the debt to

the executors, and next, to the debt to the Bank of Lonoke. It does not appear, however, from the evidence, that either of the appellees was advised of the existence of that contract. In fact, the testimony is to the contrary. T. C. Trimble, one of the appellees, attended the sale by the commissioner and raised an objection to the sale. There is a conflict in the testimony as to whether or not he stated the grounds of his objection. He testified that he stated no grounds for his objection, but other witnesses testified that he objected on the ground that the wife of Bernard Fromholtz was not a party to the suit and that her dower was not barred. The commissioner proceeded with the sale notwithstanding the protest, and. as before stated, W. P. Fletcher bid in the property as trustee for interested parties. It does not appear that the sale was ever reported to the court or confirmed.

A short time thereafter Fromholtz and wife conveyed the land by absolute deed to W. P. Fletcher, Jr., who was the cashier of the Bank of Lonoke. The consideration named in the deed was $3,500, and it is shown that the Bank of Lonoke paid the balance of $1,100 to the estate of Monroe, and that the consideration of the deed was to cover that sum and the debt due the Bank of Lonoke. In other words, the evidence shows that the conveyance to W. P. Fletcher, Jr., was for the use and benefit of the Bank of Lonoke, the consideration being the amount of the debt to that institution of Fromholtz, including the amount that the bank had paid in satisfaction of the balance due the Monroe estate.

Appellees had no notice of this conveyance until after it was executed and they claimed that it constituted a fraud on their rights. A short time prior to the date of the commissioner's sale, there was a conference between W. P. Fletcher and T. C. Trimble, one of the appellees, at the former's office in Lonoke, Bernard Fromholtz being also present, in which there was a discussion of the status of the Fromholtz property and the indebtedness of Fromholtz to the Monroe estate and the Bank

of Lonoke and to appellees, and there arose a discussion as to the best means of handling the property so that the rights of all those parties could be secured.

There is a conflict in the testimony as to precisely what occurred in that conference. Trimble testified in substance that Fletcher said that the interested parties, including appellees, entered into a joint arrangement to raise enough money out of a sale of the property to pay all the debts, and that he was given assurance by Fletcher that the interest of all the parties named should be taken care of in the disposition of the property and that means should be devised to that end. He testified that he was left under that impression, which was not removed in any way, or notice given to the contrary, until after the conveyance by Fromholtz to W. P. Fletcher, Jr. Fletcher, on the other hand, testified that he merely conferred with Trimble with a view to getting the interested parties together, recognizing at the time the fact that Fromholtz owed appellees a fee and desiring to see it paid, but he denied that he gave any assurance that appellees would be protected in any subsequent transactions. He testified that Trimble failed to give any response to his proposal that they all go in together and handle the property so that they could all collect their respective debts and leave a balance for Fromholtz. He testified that the only response he got from Trimble was that the latter would "look into the matter" and see what could be done, but the witness stated that nothing further was ever said to him by Trimble concerning the matter and that he felt perfectly free to proceed with the arrangement to protect the rights of the Bank of Lonoke, which he was representing.

The chancellor decided that the transaction constituted a fraud on the rights of appellees and canceled the conveyance in so far as it operated against appellees, but declared a lien on the property in favor of the Bank of Lonoke, and in favor of appellees for the fee claimed, subordinate, however, to the prior lien of the Bank of

Lonoke, and ordered the land sold and the proceeds distributed in accordance with the specified priority.

The ground upon which appellees assert the right to have the conveyance set aside is that the representative of the Bank of Lonoke, in the conference prior to the purchase of the property, led one of them to believe that the interests of appellees would be taken care of in subsequent proceedings, and that, in violation of those rights of appellees, an absolute deed was secured from Fromholtz. The chancellor sustained this contention, and we are of the opinion that the testimony does not preponderate against the finding of the chancellor. It is not difficult to discover from the testimony the fact that appellant Fromholtz was antagonistic to the rights of appellees; and that he was willing to adopt means which would prevent them from collecting their fee for services which they had rendered in the other litigation. It is easy to find in the record ground for canceling the conveyances as fraudulent, so far as he is concerned. Fromholtz was insolvent at the time and had no other property or means out of which the fee could be collected.

It is also clear from the testimony that there was an understanding between Fromholtz and Trimble, acting for the other appellees, that the latter were to get their fee out of the proceeds of the land when sold, and that there were no other means of payment, and it is also clear that the representative of the Bank of Lonoke knew that the only means appellees had of collecting their fee was through the proceeds of the sale of this land.

It is not claimed by Trimble that Fletcher made any positive or express promise that he would buy the lands and handle the same for the benefit of appellees so that they could share with the other creditors, and it can be readily seen by the detailed statement of both of the parties as to what was said in the conference, that a difference of opinion could reasonably arise as to what inference should have been drawn from the statements of the respective parties to each other. It is apparent from Fletcher's subsequent conduct that he did not understand

that he was under obligation to protect the interest of appellee without further request to do so from Trimble, and the testimony does not justify the belief that he intended to violate any obligation in having a conveyance made for the benefit of the Bank of Lonoke, or that he intended to defraud the appellees by procuring that conveyance.

But we can not say that the testimony is insufficient to support the finding of the chancellor that Trimble was fairly justified in drawing an inference from what Fletcher said to him that appellees would be protected in any subsequent transaction concerning the property and that he relied on the implied assurance thus given him. That being true, it constituted a fraud in law for the Bank of Lonoke, through its representative, to accept a conveyance which cut off the rights of appellees to enforce their claim against Fromholtz.

However free from actual fraud Fletcher's intentions may have been, if his conduct was such as to give assurance to Trimble that the latter's rights would be protected, the Bank of Lonoke should not in equity be permitted to hold an advantage gained in violation of those rights. The good faith of Fletcher in placing the wrong estimate on his duty to appellees, following the conference with Trimble in relation to this matter, can not serve to enlarge the rights of the Bank of Lonoke so as to give the bank the right to hold to an advantage improperly gained. The evidence warrants the finding that the lands were worth a sum considerably in excess of the amount of the debt to the Bank of Lonoke, and appellees were, therefore, deprived by this conveyance of the right to enforce their debt against the original equities of Fromholtz in the property.

It is earnestly argued that the fact that Trimble attended the commissioner's sale and protested against it affords the best evidence that he was not relying upon any inducement formerly held out to him that his claim against Fromholtz was to be protected. This does not

necessarily follow, for it appears that Trimble was acting for his clients, the Fromholtzes, in objecting to the sale by the commissioner on account of the fact that Mrs. Fromholtz had not been made a party to the suit. Trimble denied that he stated the grounds of his protest, but that such was in fact the ground. He says that he entered the protest in the interest of his client, Fromholtz, and also because he thought the purchase by Fletcher was intended to be for the benefit of appellees in accordance with the prior agreement, and that he deemed it useless to purchase at a sale which did not bar the dower right of Mrs. Fromholtz. This was not inconsistent with his reliance on the assurance which he said had been given him that he would be protected in the arrangement concerning the handling of the property. In other words, if he was induced to rely upon the promise that the interest of himself and his associates would be protected, and did rely on that promise, then the fact that he attended the sale and made the protest for the reasons stated does not constitute a renunciation of the benefit of the promise nor lessen the effect of his reliance on that promise.

Since the effect of the chancellor's decree is to carry out the original intention of the parties as inferable from their statements at the conference held concerning the disposition of the property, it is a correct solution of the controversy, for any other result would operate as a complete denial of the opportunity of appellees to collect their debt. The decree is, therefore, affirmed.

RAILWAY MAIL ASSOCIATION v. JOHNSON.

Opinion delivered October 27, 1919.

1. INSURANCE—BENEFIT AND LIFE POLICY—CLAIM OF FORFEITURE.—A fraternal benefit insurance order can not claim the forfeiture of a policy by reason of the insured's failure to pay certain monthly premiums, where, after the failure, it accepted other premiums paid by him.

2. SAME—SAME—SAME—ESTOPPEL.—Where the insured went to the order's office to inquire if his premium was paid, and was informed by the person in charge that it was, the association is estopped by the conduct of its collecting officer from claiming a forfeiture on the ground of non-payment.
3. INSURANCE—PROOF OF LOSS—DENIAL OF LIABILITY.—Denial of liability by an insurance association, waives proof of loss within the specified time.
4. INSURANCE—LIFE AND BENEFIT POLICY—DISABILITY—NOTICE OF INJURY.—The holder of a policy received injuries, and subsequently died. *Held*, where only a claim for the death was made, notice of the injury was not necessary.
5. INSURANCE—DEATH—PROOF OF HEALTH AND HABITS OF DECEASED. —Deceased held a policy in a fraternal insurance association. He sustained an injury, and later died. In an action by the beneficiary to recover on the policy, the association contended that the death was brought about by deceased having syphilis, which caused apoplexy, which brought about his death, and introduced testimony of physicians who examined deceased's body, to sustain that allegation. *Held*, the court properly permitted plaintiff to introduce witnesses, members of the family, friends and neighbors, who testified, some of them, that they prepared the body after death and that there were no scars on the body or enlargements of the glands, and that the body appeared to be in a healthy condition; that deceased had been a strong, healthy, vigorous man up to the time he was alleged to have received the injury in question.
6. INSURANCE—LIFE AND ACCIDENT POLICY—PROOF OF ACCIDENT—PRESUMPTION AS TO SELF-INFLICTION.—There is a presumption against the self-infliction of an injury, and, in the absence of proof to the contrary, the jury is warranted in finding that the insured, under a life and accident policy, sustained the injury, of which he died by accidental means.

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

Wilson & McGough, for appellant.

1. A peremptory instruction should have been given for defendant because plaintiff failed to prove that appellant was a corporation and because of the failure of assured to pay assessment No. 117. 37 N. E. 353; 73 Fed. 774; 155 *Id.* 92; 102 N. W. Rep. 190.

2. The court erred in not excluding the testimony of witness Tol. Johnson, which was hearsay merely.

3. Plaintiff failed to prove that she filed proof of death and claim with the proper officer within 30 days after death. 195 Ill. App. 421; 58 Pac. 180; 128 Cal. 531; 63 N. E. Rep. 54; 28 Ind. App. 437; 58 Atl. Rep. 1057; 99 Me. 231; 71 N. W. 254; 102 Ia. 267; 181 Ill. App. 133; 58 Pac. 180, 183.

4. The court erred in its rulings as to the admission of testimony and its instructions to the jury. 37 N. E. 353; 76 S. E. Rep. 262, etc.; 73 *Id.* 99; 73 Fed. 774-6; 89 *Id.* 930; *Ib.* 932; 95 Pac. 580; 213 Fed. 599; 106 Ark. 91; 103 N. W. 735.

5. The evidence shows that deceased had diabetes, which co-operated with the injury in causing death. 155 Fed. 92. Death did not result from the injury alone. 94 U. S. 278; 73 Fed. 285.

J. C. Clary and *B. S. Herring,* for appellee.

1. There was no error in the admission of testimony. It showed that insured was a member of the association, had paid his assessments and died from external violent accidental injury; that he was an upright, moral man, free from all vicious, intemperate and immoral habits. The law is stated in 1 Cyc. 292 (G); 1 C. J. 498, § 294; 25 L. R. A. (N. S.) 1256; 202 S. W. 34; 1 Cyc. 289 (G); 1 C. J. 495 (K); 7 Enc. Ev., p. 549 (F).

2. Notice was given as required by law. 85 Fed. 401; 29 C. C. C. A. 223; 40 L. R. A. 653. Formal proof of death was waived. Assessment No. 117 was paid. 121 Ark. 422; 181 S. W. 279; 66 Ark. 588; 82 *Id.* 266.

McCULLOCH, C. J. The plaintiff's husband, Algie M. Johnson, was in the railway mail service for many years prior to his death, which occurred on March 28, 1918, and was a member of the Railway Mail Association, a fraternal insurance society duly incorporated and domiciled at Portsmouth, New Hampshire, with a branch office at Little Rock. The policy issued by the association to its members insured against bodily injury "through external, violent and accidental means not the result of his own vicious or intemperate conduct," and agreed to

pay to the member a certain amount per week for disability caused through the aforesaid means, and to pay to the beneficiary named in the policy the sum of $4,000 in case of the death of the member resulting within 180 days from the aforesaid means.

Plaintiff was the beneficiary under her husband's policy in said association and this is a suit instituted by her to collect the amount of the policy, and it is alleged that the death of Algie M. Johnson resulted from an accident which occurred on November 20, 1917, while on his mail route between McGehee and Warren. The association filed its answer below, defending on the ground that Johnson had forfeited his policy by nonpayment of assessments; that there was no liability on account of failure to give notice of the accident or of the death of Johnson, and that Johnson's injury and death did not result from accidental means, but resulted from a disease caused by his own vicious and immoral habits. There was a trial of the case before a jury and the verdict was in favor of the plaintiff.

(1) The assessments were levied monthly, payable on the 20th of each month, and the defendant introduced its own records from which it appeared that three assessments, payable respectively, February 20, 1917; April 20, 1917, and June 20, 1917, were not paid, and that the last assessment, which was No. 117, payable on February 20, 1918, was not paid. The proof of nonpayment of assessments came from books of defendant association, but it is undisputed that other assessments were regularly paid thereafter, and defendant was, therefore, in no position to claim a forfeiture after having regularly accepted payment of subsequent assessments. Payment of the subsequent assessments were received not merely by the local office, but by the general officers of the association, and under those circumstances the association is estopped to deny that the former assessments were paid, so as to afford grounds of forfeiture.

(2) The books also show that assessment No. 117 was not paid, and the only evidence of pay-

ment is contained in the testimony of Johnson's brother, who accompanied him to the offices of defendant association in Little Rock on a day early in the month of March, 1918, when Johnson applied for an adjustment concerning this assessment, and was informed by the person in charge of the office that the payment of the assessment had been received and a receipt forwarded. Johnson claimed that he had forwarded the money, but, according to the evidence, went to the office for the purpose of paying the assessment, if it had not been received, and he received assurances from the person in charge of the office that the payment had been received and receipt issued. This was a short time before his death and the last assessment made against him. If that testimony is true, the association is estopped by the conduct of its collecting officer from claiming a forfeiture on that ground.

We pretermit a discussion of the question whether or not the assured was required under the constitution and by-laws of the order to pay an assessment levied after the injury occurred. The argument on that point is that the rights of the parties were fixed when the injury occurred, notwithstanding that assessments were levied before death occurred as a result of the injury. We do not decide that question, however.

(3) There was a denial of liability on the part of defendant, which waived the proof of loss within the specified time. The claim of non-liability under the policy on account of failure to give notice of the injury is based on section 8, article 17 of the constitution and by-laws of the society, which reads as follows:

"In the case of death or disability, the beneficiary shall at once notify the assistant treasurer to whom the member pays his assessments or the secretary of the association, in writing. As soon as disability ceases, or in cases where disability is likely to continue for some time and partial payment is desired, the injured member shall file his application * * *."

(4) No claim was made by the assured for weekly benefits on account of disability. In other words, there was no claim for the disability and we do not think that notice was required where no claim on account of disability was made, the claim being based on the death of the assured and not on the disability. If the purpose was to require notice of the injury as a prerequisite to the assertion of a death claim, more appropriate and specific language should have been used. Notice was given of the death after that event occurred, and we think that the language of the by-laws, when fairly interpreted, only require such notice, and does not require a previous notice of the injury.

(5) It is next contended that the court erred in admitting testimony concerning the habits and appearance of the deceased as indicating good health and freedom from disease. One of the defenses was that Johnson was afflicted with syphilis in the tertiary stage, and that the disease caused apoplexy, and that he received his injury, if at all, as a result of a fit of apoplexy, and that the disease was the cause of his death. The testimony of physicians was introduced showing that they examined Johnson after the alleged injury and only a short time before his death and that he had syphilis. The court permitted the plaintiff to introduce witnesses, members of the family, friends and neighbors, who testified, some of them, that they prepared the body after death and that there were no scars on the body or enlargements of the glands, and that the body appeared to be in a healthy condition, and other witnesses testified that Johnson was a strong, healthy, vigorous man up to the time he is alleged to have received the injury in question. This testimony was competent as tending to show that Johnson was not afflicted with disease, at least to the extent that it impaired his health and vigor.

Again, it is contended that there was no evidence that Johnson received an injury through accidental means. The court excluded testimony offered by the plaintiff as to Johnson's own statement concerning the

cause of his injury. Johnson was, as before stated, a railway mail clerk, and the injury which there was evidence tending to show caused his death, was received while on his run between McGehee and Warren on November 20, 1917.

On the afternoon of the previous day Johnson made the run from Warren to McGehee and spent the night at the latter place and started on the return trip early the next morning. There is proof from the testimony of one of Johnson's associates, who was with him on the trip, that he was in good health and spirits the night that he spent at McGehee as above stated, and the next morning when he started on the return trip to Warren. The witness stated that Johnson was apparently in good health, very cheerful and ate a good meal, and that he saw Johnson again on the trip at Monticello and found him apparently feeling well, but when the train reached Warren, Johnson had in the meantime occupied his car alone, he discovered that Johnson had received an injury and had a cut place above his ear from which blood was running. This witness, and another, who was also a mail clerk, and took Johnson's place on the car, testified that when Johnson walked out of the mail car he could hardly walk and was dizzy, and had a cut place above the ear and that blood was running from it. These witnesses started to carry Johnson home and procured a buggy for that purpose. He was carried home and numerous witnesses testified to his injured condition. The testimony abundantly establishes the fact that Johnson received a severe bodily injury on the trip described.

(6) There is a presumption against a self-inflicted injury and in the absence of proof, the jury was warranted in finding that Johnson was injured through accidental means. The proof being sufficient to show that Johnson was in good health at the time he received this injury, there is enough to warrant the conclusion that the injury did not result from disease caused by his own vicious habits. In fact the testimony adduced by plain-

tiff abundantly shows that Johnson was a man of exemplary habits and a man of refinement and good morals.

The court accepted the defendant's interpretation of the policy with respect to the character of accident necessary to constitute liability and gave appropriate instructions on that subject. Some of the instructions were refused, but they were repetitions of those given by the court, and we are of the opinion that there was no error committed by the court in its charge to the jury or in refusing to give instructions. It is unnecessary to discuss the court's charge in detail.

The trial abounded in issues of fact upon which there was sharply conflicting testimony, but those issues have been settled by the verdict of the jury, and we find no error in the record to justify a reversal of the judgment.

Affirmed.

SPIVEY v. PUGH.

Opinion delivered October 27, 1919.

1. WITNESSES—ACTION AGAINST SECRETARY OF CORPORATION—ACTS OF DIRECTORS AND STOCKHOLDERS NOT TRANSACTIONS WITH DECEASED STOCKHOLDER.—The executrix of a deceased stockholder in a corporation sought to hold the secretary thereof liable *de son tort*, in assuming control of the property and managing the affairs of the corporation in the absence of the president. *Held*, evidence of the acts of the directors and stockholders, acting together as a body, was admissible and did not relate to transactions with the deceased stockholder (Kirby's Digest, section 3093), although the said deceased stockholder had attended the said meeting.
2. CORPORATIONS—ASSUMPTION OF CONTROL BY SECRETARY—BURDEN OF PROOF IN ACTION BY STOCKHOLDER.—Under the facts as set out above, the burden is upon the executrix to show that the secretary was guilty of some act of fraud in assuming control of the corporation, and in managing its affairs or the disposition of its assets; or of showing circumstances under which the law would impute to him some wrong or fraudulent conduct.

3. SAME—SAME—SAME.—Under the facts, the evidence *held* insufficient to show defendant, the secretary of the corporation, guilty of any wrong rendering him liable as an individual *de son tort* or as a trustee *ex maleficio.*

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

U. J. Cone, for appellant.

1. The testimony of Spivey's personal attorney, George, as to matters that should be shown by the corporation records was incompetent under Kirby's Digest, § § 3905, 3093.

2. Defendants have not competently shown the measure of good faith required of them as trustees of the corporate assets and they should be held responsible to the widow and administratrix of J. R. Spivey, deceased.

Thos. Compere and *Buzbee, Pugh & Harrison,* for appellees.

1. All the facts are presented to the chancellor do not appear in the transcript, hence the presumption is that the decree below is correct. 45 Ark. 240; 80 *Id.* 74.

2. Despite the law that a corporation can not sell its entire business and all its property except by consent of all the stockholders, if the only stockholder who is complaining was present and did consent to the sale, he is estopped and will not be heard. 91 Ark. 141.

3. Appellant prayed for an accounting and got it. She prayed for judgment for any balance due J. R. Spivey, and upon the testimony the court found that there was nothing due and dismissed her complaint for want of equity and the decree should be affirmed.

G. P. George, of counsel.

WOOD, J. The appellant, as executrix of the estate of her deceased husband, and D. E. Watson, and H. C. Wilcoxon, instituted this action in the chancery court of Ashley County, purporting to sue in their own rights and for the use and benefit of other stockholders, similarly situated, of the Jas. L. Pugh Manuf. Co., a domestic cor-

poration. They alleged that J. R. Spivey and Watson and Wilcoxson were stockholders. All the other stockholders were named defendants.

It was alleged that there was no organized board of directors; that the stockholders who were in charge and in control of the corporate affairs had wrongfully disposed of its assets and wrecked the corporation; that though regularly incorporated and all stock subscriptions paid, no certificates of stock had ever been issued; that there had never been a stockholders' or directors' meeting until just prior to the filing of the complaint herein, and after settlement had been demanded by the plaintiff; that plaintiffs were the minority stockholders and not able to get any settlement; that, soon after the incorporation, Jas. L. Pugh, who was then president and principal stockholder, had, on account of ill health, abandoned the affairs of the corporation and had ever since been absent from the State; that on the departure of said Pugh, his brother, Frank N. Pugh, without authority, wrongfully took charge of the business and took possession and control of all its assets and disposed of the same in such manner as to wreck the corporation; that Frank Pugh wrongfully converted the assets and working capital into money, receiving the sum of $13,264.12; that said Pugh wrongfully used the money thus received to pay the individual debts of Jas. L. Pugh, for which the corporation was not responsible and also other debts that were otherwise secured, and for which it was not necessary to use the assets of the corporation.

The appellants prayed for an accounting and for a judgment against Frank N. Pugh for the value of all the assets of the corporation at the time he took charge and for all deficits occasioned by his wrongful conversion of these assets and for the use and benefit of all the stockholders of the corporation that the business of the corporation be wound up and that the assets be distributed *pro rata* among them, and for all other and further general equitable relief.

The appellees answered, alleging that plaintiffs Watson and Wilcoxson had dismissed their complaint. The appellees, defendants below, further alleged that Jas. L. Pugh and J. R. Spivey, since deceased, were partners in 1913 and 1914, part of the time under the style of Jas. L. Pugh and part of the time as "Pugh Box Company"; that during the partnership the said Pugh and Spivey borrowed from the Ashley County Bank $21,000, for which they were jointly and severally bound; that in the early part of 1914, the Ashley County Bank failed and its assets and liabilities were taken over by A. B. Banks & Co. That Banks & Co., and Pugh and Spivey took inventory of all assets of Pugh and Spivey, which amounted to the sum of $10,500; that A. B. Banks & Co. agreed with Pugh and Spivey to take over these assets and to release said Pugh and Spivey from their indebtedness to Ashley County Bank; that Pugh and Spivey were insolvent except as to the above named property mentioned and they decided to incorporate; that on March 11, 1914, steps were taken towards incorporation.

That Pugh and Spivey negotiated with the Farmers Savings Bank & Trust Company to pay to Banks & Co. the amount which it had advanced to them; that J. R. Spivey was present and assisted in the negotiations; that shortly thereafter Jas. L. Pugh, on account of ill-health, was compelled to abandon the business and leave the State; that at this time Pugh and Spivey and the Jas. L. Pugh Manuf. Co. had $5,352.74 worth of lumber, plant and equipment worth $4,000, and owed various and sundry debts amounting to $10,725; that Spivey was also in bad health and expecting to die at any time. That Jas. L. Pugh was at all times the general manager of the business; that at the time of his departure from the State the mill yard was full of green pine logs and there was quite a stock of green pine lumber on the yard; that Frank N. Pugh, for the accommodation and financial good of the parties interested and without compensation, operated said business to the extent of sawing up the logs

then on hand and properly stacking and caring for the lumber manufactured; that H. T. Benoit bid and offered the sum of $8,852.74 for the lumber, sawmill, box factory and all other assets of the Pugh Manuf. Co., which offer was submitted to a meeting at which J. R. Spivey, F. N. Pugh, F. H. Simpson and G. P. George were present and agreed to accept Benoit's offer.

Appellees further alleged that J. R. Spivey never at any time put any money in the firm of Pugh & Spivey or the Pugh Box Company, nor the Jas. L. Pugh Manufacturing Company; that the latter company was capitalized at $10,000; that Jas. L. Pugh owned the machinery, which he put in at $2,500, and that the machinery put in by J. R. Spivey was old and not worth $2,500; that the balance of the stock was paid in cash by other stockholders for their stock without any idea of realizing any profits therefrom, but contributed the amount of cash for the sole purpose of enabling the Jas. L. Pugh Manuf. Co. to keep going and to continue giving employment to the laboring people of the town; that Jas. L. Pugh and J. R. Spivey were insolvent before the incorporation and on account of the ill health of both, the corporation was wrecked, to the consequent loss of all who were financially interested therein.

The appellant replied, denying all the allegations of the answer and setting up that many of the items charged by Frank N. Pugh were payments of the personal indebtedness of Jas. L. Pugh, for which the corporation was not responsible. She further alleged that Jas. L. Pugh was the owner of a large tract of land from which Frank Pugh had cut and sold timber and converted the proceeds to his own use and that this land and the proceeds from this timber should be subjected to appellant's claim; she alleged that Frank Pugh be held as trustee of all the sums that had come into his hands as the pro ceeds of the property of Jas. L. Pugh.

Appellant prayed for the appointment of a master, who should take testimony and state an account of all the matters set forth in the pleadings and that on the

final hearing she be granted the relief for which she originally prayed.

It will be observed that, although the action was begun by the appellant, as executrix of the estate of her deceased husband and the other stockholders, against the appellee, Frank N. Pugh and other stockholders, alleging that those who were in charge of the Jas. L. Pugh Manuf. Co. had wrongfully disposed of all the assets of the corporation, the complaint further alleged that there had never been a stockholders' or directors' meeting until appellant had demanded a settlement of Frank N. Pugh.

There is an allegation that, shortly after the incorporation, Jas. L. Pugh had, without authority, assumed entire charge and control of the affairs of the corporation, but that because of ill health he had abandoned the business of the corporation and had left the State. There is no allegation that any of the other parties who were made defendants had assumed control and management of the affairs of the corporation, nor are there any allegations of fact sufficient to show a cause of action against any of the parties who were originally named defendants in the bill, except Frank N. Pugh.

It appears, therefore, from the allegations of the complaint and the reply to the answer of Frank N. Pugh *et al.,* the appellees, and the prayers of appellant's pleadings, that the action was one by the appellant against Frank N. Pugh, seeking to hold him liable *de son tort* in taking charge of the assets of the corporation and assuming control over and management of the business affairs of the corporation after Jas. L. Pugh had left the State.

Neither the complaint nor the reply are very definite in their allegations as to the specific acts constituting the wrongs of Frank N. Pugh of which appellant complains. In the original complaint the allegations are to the effect that he "wrongfully and without authority took charge, possession, and full control of all the business *et cetera,* * * * and undertook *de son tort* to

wind up the business affairs of the corporation so that a corporate wreck is all that now remains *et cetera.*" In the reply, the appellant alleges in substance that Jas. L. Pugh owned 280 acres of land which Frank N. Pugh had used for paying the private and personal debts of Jas. L. Pugh in order to hinder and delay the appellant in the collection of her claim, "that said Frank N. Pugh has cut and sold large quantities of timber from said land and wrongfully converted the money received and disposed of same in ways unknown to appellant *et cetera.*"

There was no demurrer to the complaint nor any motion to make the same more specific. The appellees, it seems, were contented merely to deny the allegations of the complaint.

The most that can be said of the pleadings, as we view them, is that they make an issue as to whether or not Frank N. Pugh is liable to the appellant as an individual *de son tort* in taking charge of and managing the business affairs of Jas. L. Pugh Manuf. Co., or whether or not treating him as a trustee of a constructive trust, he could be held *ex maleficio* in the conduct of the business of the corporation which he undertook to manage after the departure of his brother from the State.

Prior to the incorporation of the Jas. L. Pugh Manuf. Co., Jas. L. Pugh and J. R. Spivey had been operating a mill business in the town of Hamburg, called the Jas. L. Pugh Box Manuf. Co. It was not a corporation and just what the business relation was between Pugh and Spivey does not appear from the testimony, but at any rate it seems that they each owned a lot of saw mill machinery and they combined their efforts and their machinery and thus carried on the business.

It appears from the testimony that Jas. L. Pugh was indebted to the Ashley County Bank in the sum of $21,-270.29, and, according to the testimony for the appellant, this was a personal indebtedness of Jas. L. Pugh. But the testimony for the appellees tended to show that this indebtedness to the Ashley County Bank, while standing in the name of Jas. L. Pugh, was really the indebtedness of the Jas. L. Pugh Box Manuf. Co.

It appears that the Ashley County Bank failed, and its assets passed into the hands of A. B. Banks & Co., and J. H. Meeks. Banks & Co. and Meeks discovered that Jas. L. Pugh Box Manufacturing Co. was insolvent, and they agreed that the indebtedness of this company might be settled at fifty cents on the dollar. At this juncture, the Jas. L. Pugh Manufacturing Co. was organized.

One of the witnesses, G. P. George, explains how this organization was effected, as follows: "The business of Pugh and Spivey was at a standstill or practically so, and the laborers were discharged. Pugh and Spivey personally called on the business men of the town and asked these men to come into this company and make some arrangement by which employment could be given the laboring people of the town. A meeting was arranged at my office at which eight or ten business men met to discuss ways and means to start up this business for the good of the town. It was ascertained that the debt due the bank was more than $21,000, and it was decided at this meeting to offer a compromise of fifty cents on the dollar in settlement of the indebtedness due Banks & Co., and if this settlement could be made, they would incorporate under the name of Jas L. Pugh Manufacturing Co. and the business men took stock in the corporation. The corporation was organized and the settlement with Banks & Co. was effected. It was the understanding with everybody that, if any money was gotten out of this, the concern would have to make it with future operations. The price paid Banks & Co. was more than the actual value of all the property taken over. The business of the corporation was to have been run by Jas. L. Pugh and Spivey, who were each to draw a salary of $100 a month. In a short while after the corporation was formed, Jas. L. Pugh, it was discovered, had tuberculosis of the throat. He had to leave the State and had never returned, and J. R. Spivey had heart trouble and was never able to do anything and died within less than a year."

George further testified, "There being nobody to operate the mill with Pugh gone and Spivey sick, the

business was continued by Frank N. Pugh just long enough to saw the green logs on the yard and the timber on the tract of land belonging to the concern. It was decided to get rid of the assets of this corporation. All lumber and whatever else could be sold was sold and applied on the debts of the corporation, and the mill machinery was sold to Mr. Benoit for $4,000. This sale was made and closed at a meeting of the directors of the corporation. Present at that meeting were J. R. Spivey, myself, Frank Pugh and Frank Simpson, and I do not know who else was present. I do not think that Jas. L. Pugh or J. R. Spivey or myself ever got anything out of the stock we owned in the corporation, but some of the stockholders were paid personally by Frank Pugh. Whether Mr. Spivey was liable or not for the debt due the old Ashley County Bank I don't know, but he was interested in the business and received his share of the benefits and credits extended by the Ashley County Bank."

The testimony of Frank N. Pugh corroborates the testimony of George. It is not necessary to set forth his testimony in detail. He states, in part, that he was the secretary and treasurer of the Jas. L. Pugh Manufacturing Co., and when Jas. L. Pugh left, he assumed charge and control of the business and managed it as best he could. He only expected his brother to be gone possibly a week and told him he would look after it until his return. Afterwards it was ascertained that his brother was in a serious condition, and he notified witness that he could not come back and requested witness to do whatever he thought best. Then, says the witness: "I talked the matter over with the stockholders individually, not in a meeting, and we decided it was best to run the mill and saw what stock of logs there was on the yard and then to shut the mill down." Further along, he testified as to the debts of the corporation at the time it suspended business and exhibited a list of them. Witness was asked how these debts were paid and stated that the property belonging to the new corporation was sold and its debts paid out of the proceeds as far as it would go. He stated

that the sale was authorized by the directors of the corporation on June 25, 1914; that J. R. Spivey was vice-president, and was present and participated in the meeting at the time the sale was made; that the money received from the assets of the corporation was used in liquidating its debts.

It is unnecessary to pursue the subject further. The testimony of these witnesses was competent. Such testimony did not relate to transactions with or statements of J. R. Spivey, deceased, with Frank N. Pugh or the other parties defendants to the suit, but the testimony simply revealed what was the act of the directors and stockholders of the Jas. L. Pugh Manufacturing Co., acting as a body or organization and did not concern any individual acts of Spivey. The testimony of these witnesses does not come within the inhibition of section 3093 of Kirby's Digest.

The burden was upon the appellant under the issues as finally presented by the pleadings to show that the appellee was guilty of some positive act of fraud in assuming control and management of the affairs of the corporation after the illness of his brother, or some fraud in the management thereof, or in the disposition of the assets while he was temporarily in charge of the affairs of the corporation, or else to show circumstances under which the law would impute to him some wrongful or fraudulent conduct.

The trial court found that the appellant's complaint should be dismissed for want of equity. While it is manifest that the business affairs of the corporation were not managed in the manner contemplated by law, and that, upon the insolvency of the corporation, its business and assets were not disposed of as the statute in such case contemplates, yet the facts as revealed by the testimony would not justify the conclusion that Frank N. Pugh had done any wrong that would subject him to a liability as an individual *de son tort,* nor as trustee *ex maleficio.* See *Bragg* v. *Hartney,* 92 Ark. 59; 3 Pom. Eq. Jur. 2404, section 1053.

It must be borne in mind that the issue as finally made does not attempt to subject the directors of the corporation, as such, to any liability for the mismanagement of the affairs and the disposition of the assets of this insolvent corporation. If there could be any liability under the circumstances, the directors and stockholders, as such, alone are liable, and not Frank N. Pugh.

The decree is, therefore, correct and it is affirmed.

PIERCE v. FIORETTI.

Opinion delivered October 27, 1919.

1. PRINCIPAL AND AGENT—SALE OF AUTOMOBILE—SCOPE OF AGENT'S AUTHORITY.—Appellee was in the business of selling automobiles and one P. was a special sales agent for appellee, and his authority was limited to taking orders for the sale of automobiles only within a certain territory, and *held,* where P. undertook to make a sale in territory not in the limited district, the sale could become binding only when accepted and approved by appellee.
2. PRINCIPAL AND AGENT—SCOPE OF AUTHORITY—SPECIAL AGENT—DUTY OF THIRD PARTY.—One dealing with an agent not clothed with general authority nor with apparent authority to act, is bound to discover whether the agent had authority to bind his principal; one dealing with such an agent has no right to rely on any presumption that such authority was given the agent nor to trust to any mere assumption of authority by the agent.
3. PRINCIPAL AND AGENT—SALE OF AUTOMOBILE—SCOPE OF AUTHORITY—LIMITATIONS UPON TERRITORY.—Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess.
4. SAME—SAME—SAME—SAME.—M. had the agency for the sale of two makes of automobiles, the "D" and the "E." M.'s agency to sell the "D" car in Sebastian County excluded the city of Fort Smith, but M. did have the agency to sell the "E" car in Fort Smith. M. employed one P. to sell the "D" car in parts of Sebastian County outside Fort Smith. *Held,* an attempted sale of a "D" car in Fort Smith by P. was invalid, being without the au-

thority or approval of M., and that the fact that P. was seen driving both "D" and "E" cars in Fort Smith, did not render the attempted sale within the apparent scope of his authority.

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

Gallaher & Gean, for appellant.

1. Payne was the agent of appellee to sell cars; he was the general agent of Fioretti in selling cars in Fort Smith, and his local representative there. A person dealing with an admitted agent has a right to presume that the agent is a general agent. 103 S. W. 79; 146 *Id.* 130; 132 Ark. 371; 201 S. W. Rep. 508.

2. There was no notice to appellant of any limit on Payne's general agency or authority, and the court erred in admitting testimony about a contract between the Hartford Valley Motor Sales Company and Payne, and in its instructions to the jury. Cases *supra.*

John H. Holland and *Geo. W. Dodd,* for appellee.

1. Payne had authority to sell the car. One dealing with an agent is at once put on inquiry and is bound to discover whether the agent has authority to do the proposed act and has no right to trust to the mere presumption of authority, nor to the mere assumption thereof by the agent. 92 Ark. 315; 94 *Id.* 301; 150 S. W. Rep. 413.

2. Agency can not be proved by the declarations of one assuming act as agent in the absence of the principal. 93 Ark. 600; 90 *Id.* 104; 80 *Id.* 228; 2 Wharton on Ev., § 1183; 85 Ark. 252; 46 *Id.* 222; 33 *Id.* 316. Payne was only authorized to take orders and transmit them to the Motor Sales Company for acceptance or rejection. He had no authority to deliver cars or collect for them or exchange cars or take notes. He had no real authority to do what he did and he was not acting within the scope of his apparent authority. Possession of the car was not sufficient. 31 Cyc. 1647; 100 Ark. 363; 101 *Id.* 69; 2 C. J. 100.

3. The authority of an agent to bind his principal must be shown not by his declarations and acts but by

positive proof of authority. 132 Ark. 155; 126 *Id.* 405; 105 *Id.* 446. The transaction was so far outside the scope of Payne's authority, real or apparent, that the court properly granted a peremptory instruction for plaintiff, and the judgment should be affirmed.

WOOD, J. This is an action instituted by the appellee against the appellant to recover the possession of a five-passenger Dort automobile.

The appellee testified that he was the owner of the Hartford Valley Motor Sales Company, hereafter for convenience called Motor Company; that one Mr. McCallum was the sales manager and had authority to employ salesmen; that he, witness, did not have authority from the manufacturers of the Dort cars to sell the same in Fort Smith; that he had the sub-agency embracing the south part of Sebastian County, but under his contract he could not sell in Fort Smith; that Pierce had in his possession a car belonging to witness; that Pierce told witness that he bought the car from Payne, who said that the car was sold by the Hartford Valley Motor Sales Company, and that he was the agent of and had an interest in said company. Witness was negotiating with a party at Jenny Lind for the sale of the car in controversy; that Payne was to go out and close the deal and deliver the car, but instead of doing this, brought it to Fort Smith and sold it to Pierce.

According to the testimony of the appellee the contract he had with Payne was that when he, Payne, delivered a car he had to have a slip signed which had to be accepted by witness or Mr. McCallum; that Payne was to see Mrs. Dodson at Jenny Lind and close the deal on paper, he was to take so much pay cash and the balance in notes.

Mr. McCallum testified that he was the sales manager of the Motor Company and had authority to employ salesman for that company; that he met Payne at Fort Smith to employ him as a commission salesman; that Payne's authority was limited; that, insofar as any trade

on second-hand cars or accepting any paper in payment of cars, before Payne could do either it would have to be accepted by the sales manager; that this condition is printed on sales slips which the Motor Company used; that there is a place for the purchaser to sign when he buys the car, his address, then a place for the salesman to sign, then a place at the bottom of the slip for the sales manager to sign when he accepts the sale; that these blank slips were furnished the salesmen and read as follows:

"Hartford Valley Motor Sales and Service Co.

"Hartford, Ark....., 191....

"I hereby authorize you to enter my order for a .....automobile, Model.....to be delivered to me on or about.....and for which I agree to pay on signing this order $....., and the balance when notified the car is ready for delivery.

"Price of car f. o. b. Hartford.....

"Extra equipment .....

"Total .....

"Prices to change without notice.

"Purchaser's signature .....

"Purchaser's address .....

"Salesman's signature .....

"Accepted .....

"Manager Retail Department."

No contract made by Payne was binding until accepted by Fioretti or himself. Witness did not accept the order or approve the sale to Pierce. Payne worked for the Motor Company something like two months, during which time he did not sell any cars and take any old cars on them as part payment either for Fioretti or witness. Witness did not hear of the transaction in controversy until after Payne had left the country. Payne made no report to the company of the pretended sale. The Motor Company had no authority to sell Dort cars in Fort Smith. The salesmen employed by witness were furnished with the particular kind of car that he was to sell, to ride around over the country to get orders and

to demonstrate. If he made a sale, the company delivered from the stock on the floor a car like that.

Appellant testified substantially as follows: That he lived in Fort Smith; that Payne made three or four trips to his house in a Dort car and that they were a week or ten days making the trade and that he finally bought the car from Payne on Saturday; that he gave him $200 in cash and a note for $300 due in thirty days; that he knew that Payne was an agent but knew nothing of any limited authority; that Payne had this car in his possession and had been trying to sell it to him for about ten days; that after the sale was closed and the car delivered, money turned over and agent gone, he had a conversation with Mr. Fioretti in which Mr. Fioretti admitted to him that Payne was his agent. Witness stated that Fioretti said that Payne approached him about this very sale before the car was sold to Mr. Pierce and that this conversation occurred in Mr. Dodd's office. Witness said the statement was not made in an effort to compromise. He testified that the car was second-hand when he bought it and had been driven about a thousand miles.

Witness Shucknecht testified: that he met Payne about the middle of May, 1918; that he was selling, so far as witness knew, Elcars in Fort Smith. Witness was the manager of Southern Motor Sales Company and had the Dort agency for Fort Smith. He testified that he had a conversation with Fioretti about his agent Payne selling Dort cars here as well as Elcars. Witness did not know anything about authority Payne had from Fioretti. Witness understood that Payne was selling cars for Fioretti. One of witness' salesmen had been trying to sell Pierce a car and Payne beat him to it. About the same time that the sale to Pierce came up, Payne took a car from witness' company and delivered the same to Mrs. Dodson at Jenny Lind. Witness saw Payne with the Dort car sitting out in front of his place a number of times; one day he got out and looked on the car to see whether or not it was a car Payne had sold for witness,

but it was not one of witness' cars and witness let it go at that.

Fioretti in rebuttal testified that he told Pierce in Dodd's office, when they were endeavoring to compromise, that Payne had no authority to make sales for him of the Dort car; that he, Pierce, should have known there was something crooked about the deal because Payne was willing to take the old car at $450, when no one else offered him more than $250.

The above is all the testimony that is material to the issue involved.

At the conclusion of the testimony the court instructed the jury to return a verdict for the plaintiff for the automobile sued for or its value at the time it was taken.

The defendant below, appellant here, asked the court in several prayers for instructions to submit the issue to the jury as to whether or not Payne was the agent of the appellee and as such had authority to sell the car in controversy. This the court refused.

Proof was taken upon the issue as to the value of the car and the jury returned a verdict in favor of the appellee in the sum of $718.75. From the judgment rendered in appellee's favor is this appeal.

(1) The court correctly instructed the jury to return a verdict in favor of the appellee. The undisputed evidence as we view it shows that Payne was only a special sales agent for the appellee and that his authority was limited to taking orders for the sale of Dort cars in the territory not including Fort Smith, where the alleged sale took place. That these orders, before they were binding on the appellee, had to be accepted by the owner, the appellee, or his general sales manager, and that the sale on orders taken by agent Payne did not become complete until same was so approved.

There were no declarations or acts on the part of the appellee or his sales manager to justify the inference that he had clothed Payne with the general author-

ity to make sales of Dort cars or that they had clothed him with the apparent authority to make sales at any other place or in any other manner than that contained in his contract for the agency.

(2) It is familiar law that one dealing with an agent not clothed with general authority nor with apparent authority to act is bound to discover whether the agent had authority to bind his principal. One dealing with such an agent has no right to rely on any presumption that such authority was given the agent nor to trust to any mere assumption of authority by the agent. See *Latham* v. *First National Bank,* 92 Ark. 315; *Wilson* v. *Shocklee,* 94 Ark. 301.

"The authority of an agent must be shown by positive proof or by circumstances that justify the inference that the principal has assented to the acts of his agent." *Wales-Riggs Plantation* v. *Grooms,* 132 Ark. 155.

(3-4) The undisputed evidence shows that the Motor Company had no authority to sell Dort cars in the territory of Fort Smith, where the alleged sale took place, nor is there any testimony tending to prove that the Motor Company attempted to clothe Payne with such authority.

Appellant contends that the appellee clothed Payne with apparent authority to make the sale in controversy because Payne was representing the appellee in the sale of Elcars in the territory of Fort Smith and because he was seen in possession of a Dort car a number of times in the city of Fort Smith. It by no means follows from this that the appellee had clothed Payne with the apparent authority to make the sale of Dort cars in Fort Smith, and if it could be said that there was any testimony to show that he did have authority to make sales there is certainly nothing in the evidence to justify the inference that appellee had given him authority, real or apparent, to sell the car on credit and take an old car in part payment.

In *American Sales Book Co.* v. *Whitaker,* 100 Ark. 363, we said: "But, according to the great weight of authority, an agent who is only empowered by his principal

to solicit orders for or to make sales of goods, has no implied authority to receive payment thereof, or to modify or cancel such sales. * * * His authority is only to make contracts, to solicit orders for goods, or to make sales thereof." *Lee* v. *Vaughan Seed Store,* 101 Ark. 69; see also 2 C. J. 100.

In 2 C. J. 573, we find the following, which we believe a correct statement of the law as to apparent authority: "Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess."

There is no error in the ruling of the court, and the judgment is, therefore, affirmed.

SOVEREIGN CAMP WOODMEN OF THE WORLD *v.* COMPTON.

Opinion delivered October 27, 1919.

1. LIFE INSURANCE—FRATERNAL ORDER—CONSTITUTION OF, AS PART OF CONTRACT.—Compliance with the essential terms of the constitution and by-laws of a fraternal association is a necessary prerequisite to a valid contract of insurance with it.
2. SAME—SAME—SAME.—The constitution of a fraternal order is a part of the contract insuring its members, and, if not inconsistent with the terms of the certificate, will be binding as part of the contract.
3. SAME — SAME — HAZARDOUS ENTERPRISE — AERONAUTICS—RULE OF THE ORDER.—Deceased, who had held a certificate in appellant fraternal insurance order, was drafted into the Government, assigned to the aviation section of the army, and was killed while flying. In an action by the beneficiary to recover on the certificate, the order pleaded in bar of recovery an amendment to its by-laws, prohibiting from membership those engaged in aviation, unless an additional sum was paid by way of premium. Deceased kept up his dues but did not pay the additional amount. *Held,* the amendment to the constitution of the order applied to

those only engaged in aviation as a private enterprise, and not to persons in the service of the Government in the army or navy.

4. SAME—SAME—SAME.—Under the facts set out in the preceding syllabus, *held,* that a member of the order, in good standing at the time the amendment to the constitution was adopted, did not forfeit his membership by joining the aviation branch of the army, or by failing to pay the additional assessment fixed by the amendment.

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

Lewis Rhoton, Thomas E. Helm and *Gardner K. Oliphint,* for appellant.

1. The assured having engaged in aviation, as an aviator, and failed to notify the clerk of the camp within thirty days of his changed occupation and failed to pay the assessments required by the Constitution and by-laws, plaintiff can not recover as the certificate became void. *Miller* v. *Ill. Bankers Life Assn.,* ms. op., April 28, 1919; 208 S. W. 587; 52 Ark. 201-206; 1 Bacon on Ben. Soc., § 81; 80 Ark. 419; 81 *Id.* 514; 105 *Id.* 140-143; 1 Bacon, Ben. Soc., § 157; 19 R. C. L., p. 1198-9, § 17; Vance on Ins. 193; 122 Ark. 480; 209 S. W. 379; 113 Ark. 400; 241 U. S. 574.

2. It was the duty of the assured to give notice while he was engaged in a prohibited occupation. 167 S. W. 587; 188 *Id.* 941. This case directly in point.

3. The application, rules, by-laws and constitution are part of the contract, and the member must comply with them and give notice as required and pay the additional premium. 19 R. C. L., pp. 1209-10, § 25; 87 S. W. 530.

J. M. Carter, for appellee.

The certificate was not forfeited by assured's enlistment in the army of the United States and is not covered by section 42 or 43 of constitution of the order. The service of an enlistment man under military order of the United States is not a "business" nor "employment" within the meaning of the constitution of the or-

der. Under the evidence appellee has made a clear case of liability by the camp and the judgment should be affirmed.

STATEMENT OF FACTS.

W. G. Compton sued the Sovereign Camp Woodmen of the World to recover as beneficiary on a death certificate for $1,000 upon the life of his son, Jas. H. Compton.

The insurance company denied liability under the terms of the benefit certificate. The case was tried upon an agreed statement of facts substantially as follows:

The insured, Jas. H. Compton, on the 1st day of April, 1917, was between the ages of twenty-one and thirty years and was a citizen of Miller County, Arkansas. He was in good health and a number in good standing of the Sovereign Camp Woodmen of the World. He had a beneficiary certificate in that company for $1,000, in which his father was named as beneficiary. On the 6th day of April, 1917, a resolution of the Congress of the United States was adopted declaring that a state of war existed between the United States and Germany. Jas. H. Compton was subject to the terms of the Selective Draft Act and on the 1st day of December, 1917, was inducted into the service of the United States as an enlisted man. He was assigned to that branch of the army commonly known as the aviation branch, and was stationed at Ellington Field, Houston, Texas. While undergoing training there as an aviator he was killed, either by falling from his aeroplane or by the aeroplane falling while he was in it.

Section 42 of the constitution, laws and by-laws of the Sovereign Camp Woodmen of the World, as amended and adopted at its twelfth biennial session at Atlanta, Georgia, in July, 1917, provides:

"(a) Persons engaged in the following classes of business or employment shall not be admitted:

"Those employed in any department of ammunition factories where explosive compounds are made or handled, balloonists, aviators, aeronauts, aeroplanists, plow

grounders, sandstone cutters, grindstone turners, professional gamblers, saloon-keepers, bartenders or those engaged in the retailing of intoxicating liquors as a beverage; automobile drivers and mechanics in races, automobile speed testers, motorcycle riders in races, high divers into netting or into water, professional contortionists, marine divers, submarine divers, fireworks makers, horse jockeys, and oil or gas well shooters; also persons employed in the making, compounding, distilling, rectifying or brew of malt, spirituous, vinous or intoxicating liquors, or in the distributing or delivery of the same.

"(b) The beneficiary certificate of a member who shall engage in any prohibited occupation shall thereby become null and void unless such member shall within thirty days after engaging in such prohibited occupation notify the clerk of his camp in writing, of such change of occupation, and thereafter, while so engaged, pay an additional sum of fifty cents on each monthly installment of assessment for each $1,000 of his beneficiary certificate, or six dollars additional per annum on each $1,000 of his beneficiary certificate.

"(c) Provided, that if a member becomes or is employed as a saloon keeper, bartender, or is engaged in the retailing of intoxicating liquors as a beverage, legally or illicitly, and the possession of a United States revenue license may be taken as evidence thereof; or in the making, compounding, distilling, rectifying or brewing of malt, spirituous, vinous or intoxicating liquors, or in the distribution or delivery of the same, the camp of which he is a member may expel him therefor under the provisions of Division 'E' of the prescribed by-laws, in which event his beneficiary certificate shall be null and void."

Section 43 amended at the same time, is as follows:

"(a) Persons engaged in the following occupations, towit:

"Structural iron workers, circus riders and trapeze performers, conductors and brakemen on railway freight trains, locomotive engineers and firemen, switchmen,

hostlers and other similar railway or steamship employees, excepting agents, office men and those engaged in employment not more hazardous; those employed in mines not otherwise prohibited; sailors on seas, electrical linemen, employees in electrical current generating plants and enlisted men in the army and navy during the war, may be admitted to membership if accepted by the sovereign physician, but their certificates shall not exceed $2,000 each and their rates of assessment shall be $3.60 per annum for each $1,000 of their beneficiary certificate in addition to the regular rate while so engaged in such hazardous occupation.

"(b) If a member engages in any of the occupations or business mentioned in this section, he shall within thirty days notify the clerk of the camp of such change of occupation, and while so engaged in such occupation shall pay on each monthly installment of assessment thirty cents for each $1,000 of his beneficiary certificate in addition to the regular rate. Any such member failing to notify the clerk and make such payments as above provided shall stand suspended, and his beneficiary certificate shall be null and void; provided, that all members, officers and enlisted men now in good standing in the society, enlisted in the army or navy in defense of the United States, shall be exempt from additional premium herein required, and provided further, the Sovereign Executive Council is hereby authorized and empowered to ascertain and put into effect a rate of insurance which it may deem adequate and which shall apply only to members, officers and enlisted men of the army and navy, and to adjust and readjust same from time to time during the continuance of the war in which the United States is engaged. Provided, such rate shall apply only to persons who hereafter join the Woodmen of the World, or to certificates of increase of insurance, or for reinstatement; and provided, further, that this provision shall take effect immediately upon its passage."

The benefit certificates sued on was for the sum of $1,000 and was issued to Jas. H. Compton on the 12th

day of December, 1908. His father, W. G. Compton, was named as the beneficiary in the policy. His regular dues were paid up until the time of his death, but he did not pay or offer to pay the extrahazardous assessment required by section 42 of the constitution and by-laws which is set out above.

The case was tried before the court sitting as a jury and the court found the issues in favor of the plaintiff. Judgment was therefore entered in favor of the plaintiff against the defendant for the sum of $1,000 and interest. The defendant has appealed.

HART, J., (after stating the facts). (1-2) The Sovereign Camp Woodmen of the World is a mutual benefit association and in the certificate sued on it is provided that the constitution and by-laws of the order should be a part of the contract between the order and the member. It is well settled that compliance with the essential terms of the constitution and by-laws of a fraternal association is a necessary prerequisite to a valid contract of insurance with it. In other words, the constitution of a fraternal order becomes a part of the contract insuring its members and if not inconsistent with terms of the certificate will be binding as part of the contract. *Supreme Lodge K. & L. of H.* v. *Johnson,* 81 Ark. 512; *Woodmen of the World* v. *Hall,* 104 Ark. 538; *Supreme Royal Circle* v. *Morrison,* 105 Ark. 140; *Sovereign Camp Woodmen of the World* v. *Anderson,* 133 Ark. 441; and *Baker* v. *Mosaic Templars of America,* 135 Ark. 65.

The principal contention of the defendant is that the insured came within the provisions of section 42 of the constitution as amended at the twelfth biennial session of the order at Atlanta, Georgia, in July, 1917, and that the policy became null and void because the insured did not, within thirty days after entering the aviation branch of the United States army notify the clerk of his camp in writing of his change in occupation and thereafter pay an additional sum of fifty cents monthly. We cannot agree with counsel for the defendant in this contention.

We do not think that section 42, referred to, relates to those in the army and navy of the United States. The section, by its terms, refers to persons engaged in private occupations and the aviators, aeroplanists, etc., mentioned in the section referred to are persons engaged in that business as a private occupation and not those engaged in the aviation branch either of the army or the navy of the United States. No reference whatever is made to the army or navy of the United States in that section. The language is directed solely to persons engaged in private occupations.

This construction is made manifest when we consider it in connection with section 43. When the company decided to deal with the men in the army or navy of the United States, it mentioned them in specific terms and spoke of them as enlisted men in the army or navy in defense of the United States. Hence we think the circuit court was correct in holding that the insured did not come within the provisions of section 42 of the constitution of the order copied in our statement of facts.

(4) It is also contended by counsel for defendant that the benefit certificate is void under section 43 of the constitution as amended at the twelfth biennial session at Atlanta, Georgia, in July, 1917. They refer to that part of section (a) which provides that enlisted men in the army and navy during the war may be admitted to membership if accepted by the society and they pay the additional assessment prescribed by the section. We do not think, however, that section has any reference under the facts in the case at bar. It was intended to prescribe the terms upon which enlisted men in the army and navy might thereafter become members of the order, but it had no reference to members in good standing at the time the amendment to the constitution was adopted in July, 1917. This is shown in section (b).

Section (b) contains the proviso that members, officers and enlisted men now in the army or navy in the defense of the United States shall be ex-

empt from the additional premium required in the section. The evident purpose of this clause was to exempt members in good standing in the society at the time of the adoption of the amendment to the constitution in July, 1917, from its provision. This is further shown by the concluding part of section (b) that it authorizes the Sovereign Executive Council to put into effect a rate of insurance which should apply only to officers and enlisted men of the army and navy. This means those in the army and navy who might thereafter wish to become members of the society. This is made certain by the concluding proviso that such rates shall apply only to persons who hereafter join the society, or to certificates of increase of insurance or for reinstatement. The insured, Jas. H. Compton, was a member of the society in good standing at the time of the adoption of these amendments to the constitution in July, 1917, and his subsequent enlistment in the army of the United States did not have the effect to avoid the policy. The reason is that the notice and additional assessments have no application to members of the society in good standing at the time of the adoption of the amendments to the constitution, although they might thereafter join the army or navy of the United States.

It follows that the judgment will be affirmed.

PINE BLUFF TRANSFER COMPANY v. NICHOL.

Opinion delivered October 27, 1919.

1. AUTOMOBILES—CARRIERS OF FREIGHT AND PASSENGERS—TAX UPON.—Act 408 of 1919, authorizing the levying of a tax in Jefferson County upon automobiles carrying passengers and freight, *held* valid.
2. COUNTIES—CIVIL ENTITY.—A county is a civil division of a State for political and judicial purposes.
3. AUTOMOBILES—TAX ON CARRYING CAPACITY.—A tax is valid on motor driven vehicles, levied by Jefferson County, under act 408 of 1919, based on carrying capacity.

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

Coleman & Gantt, for appellant.

1. The act is unconstitutional and void. It is really a revenue measure and is unjust, unreasonable and discriminatory and is therefore void. It undertakes to delegate to the county judge the power to fix and levy the tax and to regulate the highways and fix a license fee contrary to article 7, section 28, Constitution. 6 R. C. L. 378-381.

2. It is class legislation. 102 Ark. 131; 112 Ill. App. 94.

3. It is discriminatory. 85 Ark. 509, 513; 110 *Id.* 204; 117 *Id.* 54; 75 *Id.* 542; 113 N. C. 697; 22 L. R. A. 472.

4. The Legislature can not delegate its power of taxation. 6 R. C. L. 164; 35 Ark. 64; 72 *Id.* 195; 120 *Id.* 277; 1 Cooley, Taxation (3 Ed.), 99; 92 Pac. 604; 98 N. E. 620; 37 Cyc. 725; 120 Ark. 277-286.

5. The rate must be fixed. An undetermined tax is no tax. 1 Cooley on Tax. (3 Ed.), 557; 104 Pac. 1055. See also 50 Atl. 475; 6 R. C. L. 168.

6. The act is void because it authorizes the county judge to regulate the use of highways, which is exclusively under the jurisdiction of the county court. Art. 7, § 28, Const.; 103 Ark. 571; 107 *Id.* 165.

7. Appellees should be restrained, as at the beginning of the year each of the appellants paid the fee required for a license. K. & C. Digest, § 6446; 238 U. S. 482.

Sam W. Trimble, for appellee.

1. The act is not unconstitutional nor void. 85 Ark. 171; 56 *Id.* 485; 92 *Id.* 612; 119 *Id.* 314; 70 *Id.* 549; 13 *Id.* 752; 46 *Id.* 475; 3 *Id.* 436.

2. It is not unreasonable, unjust nor discriminatory. Cooley on Taxation, pp. 75-77; 134 U. S. 594; 86 N. W. 1070; 68 L. R. A. 788; 1 L. R. A. (N. S.) 215; 170 U. S. 283.

3. There is no delegation of the power of taxation to the county judge, but to counties for their existence and

maintenance. 13 Ark. 752; 44 *Id.* 134; 46 *Id.* 479; 70 *Id.* 549; 124 *Id.* 346.

4. County judge is merely empowered to regulate the care of highways under our Constitution. 113 Ark. 40; 8 Am. Enc. Law, 22; 194 U. S. 194; 311 *Id.* 117; 209 U. S. 123; 70 Ark. 549.

STATEMENT OF FACTS.

The Pine Bluff Transfer Company and others brought this suit in equity against C. M. Nichol, collector of Jefferson County, Arkansas, to enjoin him from collecting certain license fees on automobiles under act 408 entitled "An Act to Regulate the Use of Motor Vehicles Upon Public Highways in the County of Jefferson, State of Arkansas, and for Other Purposes," approved March 27, 1919, on the ground that said act is unconstitutional and void.

The complaint admits that some of the plaintiffs are operating motor vehicles upon the streets of Pine Bluff in Jefferson County and upon the highways of said County for the purpose of transporting freight and passengers for hire; but they allege that others of the plaintiffs are only transporting their own freight to their own customers.

The complaint also admits that the license fee for the privilege of operating such motor vehicles upon the highways of said county or upon the streets of the city of Pine Bluff in said county is based upon the carrying capacity of the vehicles as follows:

"Capacity.	License Fee.
1 ton or less	$ 10.00
1½ tons to 2 tons	25.00
2 to 3 tons	50.00
3 to 3½ tons	75.00
4 to 5 tons	100.00
5 to 6 tons	100.00
All jitney cars, all rented or commercial cars	25.00"

The court sustained a demurrer to the complaint, and, the plaintiffs declining to plead further, their com-

plaint was dismissed for want of equity. The plaintiffs have appealed.

HART, J., (after stating the facts). The correctness of the chancellor's holding depends upon the constitutionality of act No. 408, approved March 27, 1919. Section 1 of the act provides, in substance, that all persons, partnerships, or corporations owning or operating motor vehicles upon the public highways of Jefferson County for the purpose of transporting freight or passengers for hire shall be deemed public carriers.

Section 3 provides that the county judge of Jefferson County shall be authorized and directed to fix a reasonable license fee for the privilege of operating any of said vehicles of not less than $10, nor more than $150 for each vehicle, taking into consideration the kind and character of the vehicle, the number of passengers to be carried, or the volume of freight to be transported by said vehicle.

Section 5 provides for the collection of the license fees by the collector of the county.

Section 6 provides that all funds derived from the license fees shall be applied to maintaining and improving the roads over which said vehicles are operated.

Section 9 provides that all persons, partnerships, or corporations, owning or operating motor vehicles for the purpose of hauling gasoline, oil, merchandise, meats, produce, logs, lumber, timber, staves, bolts, and manufactured timber products exclusively, over the public highways of Jefferson County shall be deemed public carriers.

(1) From a case note to 129 Am. St. Rep. at p. 284, in a discussion of the constitutional limitations on statutes of this kind, we quote the following:

"There is nothing unreasonable in such taxation, so long as it is not discriminatory nor so heavy as to be oppressive, for the use of vehicles tends to the detriment of streets, and in fact that is the occasion for their construction and maintenance. The tax is not, accurately

speaking, on the vehicle, but on the privilege of using it in the street, and hence the tax is not open to attack as double taxation. Neither can it be assailed as an unwarranted interference with the right of citizens to use the public thoroughfares. Taxes of this kind are aften graduated according to the number of horses required to haul the vehicle, or the number of passengers it carries; and there is no constitutional objection to this classification so long as it keeps within reasonable bounds."

In the case of *Fort Smith* v. *Scruggs,* 70 Ark. 549, it was held that the Legislature might authorize a municipality to levy a tax on the privilege of driving vehicles upon its public streets. It is further held in that case that a statute requiring persons keeping and using wheel vehicles in a city to pay a tax for that privilege, such taxes, when collected, to be appropriated exclusively for repairing and improving streets, does not authorize double taxation, although such property is also assessed in proportion to its value, and a tax levied thereon. The court said:

"The license fee imposed is, then, not a tax upon property, but is in the nature of a toll for the use of the improved streets. In other words, it is the privilege of using vehicles on the improved streets, and not the vehicle itself, that is taxed. We are therefore of the opinion that the statute is not subject to the criticism that it authorizes double taxation, and the contention of the defendant on that point must be overruled."

In *State* v. *Lawrence* (Miss.), 66 So. 745, Ann. Cas. 1917 E., p. 322, it was held that an act imposing a tax for the privilege of driving motor vehicles, is a pure privilege tax, and hence is not bad because there is a lack of uniformity applying only to *ad valorem* taxes. The court further held that the Legislature has full power over public roads, and can provide means by which they are to be improved and that imposing a privilege tax upon motor vehicles for the use of public roads and directing payment thereof into the road fund does not render the act invalid.

In re Harry S. Kessler (Idaho), 146 Pac. 113, L. R. A., 1915 D., p. 322, it was held that a license tax on motor vehicles for revenue purposes graduated according to the power of the machine does not violate a constitutional provision that all taxes shall be uniform upon the same class of subjects, since that provision does not apply to license fees.

In *Hendrick* v. *State of Maryland,* 235 U. S. 610, the Supreme Court of the United States held that, in the absence of Federal legislation upon the subject, a State may rightfully prescribe uniform regulations necessary for the public safety and order in respect to the operation upon its highways of all motor vehicles, including those moving in interstate commerce, and to this end may require the registration of such vehicles, charging therefor reasonable fees graduated according to the horse power of the engines; and this does not constitute a direct and material burden on interstate commerce. The holding in these cases is in accord with our own holding in the case of *Fort Smith* v. *Scruggs, supra.* In the last mentioned case the court said that the subject-matter of the statute comes within the general lawmaking power of the Legislature, and that our Constitution specially provides that the Legislature shall have power to tax privileges in such manner as may be deemed proper, citing the Constitution of 1874, art. 16, sec. 5, and art. 2, sec. 23.

Article 16, section 5, provides, in substance, that all property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. It provides further that the General Assembly shall have power to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper.

Article 2, section 23, provides that the State's right of eminent domain and of taxation is herein fully and expressly conceded; and that the General Assembly may delegate the taxing power, with the necessary restriction, to the State's subordinate political and municipal corpora-

tions to the extent of providing for their existence, maintenance and well being, but no further.

In the case of *Fort Smith* v. *Scruggs, supra,* the court held that this section of the Constitution has conferred upon municipalities the power to tax privileges. In the case at bar the power was delegated to the county judge. This brings us to a consideration of the question of whether the county is a subordinate political corporation of the State within the meaning of that clause of the Constitution just quoted above. In *Granger and Wife* v. *Pulaski County,* 26 Ark. 37, the court said:

"Counties are a political division of the State government, organized as part and parcel of its machinery, like townships, school districts and kindred sub-divisions. They do not derive any corporate powers they possess by a special charter. Their functions are wholly of a public nature, and their creation a matter of public convenience and governmental necessity, and in order that they may the better subserve the public interest, certain corporate powers are conferred on them." Continuing the court referred to counties as *quasi* corporations.

(2) Blackstone defines a county to be a civil division of a State for political and judicial purposes. Lewis' Blackstone's Com., vol. 1, pp. 113-116.

Professor Kent says: "A county is a public corporation, created by the government for political purposes, and invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are in general subject to the control of the Legislature of the State." 2 Kent, Com., 275.

These definitions were approved by the court in the case of *Patterson* v. *Temple,* 27 Ark. 202. Upon the subject the court said:

"The powers and privileges conferred upon counties are more limited and simple in their operation than upon towns. But though the amount and distribution differs, the nature of the power conferred on each, and the object of granting them, are the same. They belong exclusively to the class that relate to the general concerns of the peo-

ple, in their public, civil and political interests, in a word, to the good government of the place. It is only necessary to look into the internal organization of the counties, villages and cities, as defined and regulated by law, to confirm the general correctness of these observations."

Again in *Henry* v. *Steele, Judge,* 28 Ark. 455, the court said that a county is a public corporation created for governmental purposes. In *Cole* v. *White County,* 32 Ark. 45, the court recognized that counties are component and essential parts of the State and the necessary agents of its government.

In *Eagle* v. *Beard,* 33 Ark. 497, the court said that counties are not in any respect business corporations for private purposes, but that they are of a purely political character, and through them justice is administered, the revenue collected, and the local police rendered effective. To the same effect see *Nevada County* v. *Dickey,* 68 Ark. 160.

(3) Thus it will be seen that our court recognizes counties to be political corporations or *quasi* corporations, and we think that under the clause of the Constitution last quoted, the act in question is valid. The tax imposed is not unreasonable and oppressive. The classification made by the Legislature was a reasonable and proper one. The license fee was graduated according to the kind and character of the vehicle, the number of passengers to be carried, or the volume of freight to be transported by the vehicle. Such a classification is sustained as reasonable by the authorities above cited. See, also, *Brewster* v. *Pine Bluff,* 70 Ark. 28, and *Willis* v. *City of Fort Smith,* 121 Ark. 606.

Therefore, we are of the opinion that the statute is not unconstitutional and that the chancery court did not err in dismissing the complaint for want of equity.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY v. HILL.

Opinion delivered October 27, 1919.

1. PLEADING AND PRACTICE — REINSTATEMENT OF CAUSE AT SUBSEQUENT TERM.—A cause may be reinstated at a term of court, after having been dismissed at a preceding term, where the parties consent to the reinstatement.
2. SAME—SAME—VALIDITY OF REINSTATING ORDER.—Although a cause may have been improperly reinstated by a *nunc pro tunc* order, one of the parties who has appeared in the cause, procured a continuance, filed pleadings, and participated in a trial of the cause before a jury, without objection, will not be heard to complain that the *nunc pro tunc* order was improperly made.

Appeal from Miller Circuit Court; *George R. Haymie,* Judge; affirmed.

W. H. Arnold, for appellant; *Walter J. Terry,* of counsel.

The court should have set aside the *nunc pro tunc* order. The authority of a court to amend its record by *nunc pro tunc* order is to make it speak the truth but not to make it speak what it did not speak but ought to have spoken. 72 Ark. 21; 87 *Id.* 438; 92 *Id.* 305; 106 *Id.* 470; 93 *Id.* 234. The evidence is overwhelming that the order does not recite the facts. 56 Ark. 231; 79 *Id.* 288.

Danaher & Danaher, for appellee.

1. No matter how erroneous this *nunc pro tunc* order may have been, the court was powerless to vacate its own order after the lapse of the term at which the order was made. 29 Cyc. 1519.

2. At best this is an appeal from an order setting aside a dismissal, though filed more than two years and six months after the order was entered. Such an appeal will not lie at any time. 3 C. J. 504; 105 Ark. 324; 134 *Id.* 386; 92 *Id.* 101; 115 *Id.* 554. Since the order reinstating the case was not appealable, of course the order denying the motion to vacate the *nunc pro tunc* order was not appealable. 114 Pac. 838; 79 *Id.* 171; 33 *Id.* 1103; 87 N. W. 1091.

3. Appellant appeared and participated in the trial of the case, and thus waived all objections to the reinstatement. 9 Ala. 399; 26 *Id.* 582; 41 Ill. App. 140; 58 Iowa, 612; 217 Ill. 61. The procedure adopted amounts to raising the correctness of the order of reinstatement for the first time on appeal, which can not be done. 79 N. W. 83. The action of the court in overruling this motion is not appealable for the further reason that it was made after judgment. 3 C. J. 517. The order was not final.

4. Having appeared several times in the case since the order was made and participated in the trial, appellant is estopped. It is too late now. 16 Cyc. 795; 128 Ark. 141.

5. Appellant consented to the order of which it now complains, and the court had power to reinstate even at a subsequent term. 57 Ill. App. 521; 198 Mo. App. 512.

6. There is no evidence that the order reinstating was not actually entered before the adjournment of court for the term, and appellant agreed to the reinstatement over the 'phone.

SMITH, J. This is the second appeal in this case. *Hill* v. *Southwestern Tel. & Tel. Co.,* 117 Ark. 104. On this first appeal the opinion was delivered February 15, 1915, and the cause was then remanded for a new trial, and on November 23, 1915, the cause was dismissed by the circuit court on its own motion for want of prosecution.

On the afternoon of December 16, 1915, attorneys for appellee, being at Pine Bluff, called attorney for appellant at Little Rock and asked him to call the court at Texarkana for the purpose of having the order of dismissal set aside. They were told that the said attorney would do this and if he found the court willing the attorney would consent. Repeated efforts to reach the court failed, and the call was carried over to the following day, when appellant's attorney had a long distance talk with the judge, resulting in the suggestion that if the attor-

neys would send a signed agreement to the clerk to this effect the case would be reinstated. The court had adjourned on December 17, but this was not known to the attorney for appellant nor to the other parties. The agreement was mailed to the clerk of the court on December 18, and on the authority of this agreement the clerk redocketed the case at the following June term. At the June term the cause was continued.

On November 27, 1916, without notice to the appellant or its attorney, attorneys for appellee filed a motion for a *nunc pro tunc* order to reinstate the case, and on the same day the motion was granted and the order entered.

On the same day, and in the absence of any one representing the appellant, there was a jury trial and a verdict for $6,300 for the plaintiff. On the following day the court granted the appellant time in which to file pleadings in the case. On December 8, 1916, the court granted the appellant a new trial. At the following June term, 1917, the cause was continued on motion of appellant. On November 27, 1917, there was a jury trial and verdict for the plaintiff in the sum of $6,000. Motions for a new trial were duly filed and overruled.

On November 25, 1918, the appellant filed its motion to set aside the *nunc pro tunc* order referred to. On December 11, 1918, the court overruled the motion to set aside said order, and this appeal has been prosecuted to review that action.

Counsel for appellant question the authority of the court to make the *nunc pro tunc* order upon the ground that the court was not in session at the time the alleged order reinstating the cause was made and insist, therefore, that no subsequent order of the court directing the entry, *nunc pro tunc,* of the reinstating order could validate an order which the court could never in the first instance have made, because it was not in session at the time it was made.

(1-2) This may be true, but it does not follow on that account that the court did not reacquire jurisdiction of the

cause. We know of no reason why a cause might not be reinstated at one term after having been dismissed at the preceding term where the parties consent to its reinstatement. It is true the conversation in which the consent was given related to the reinstatement of the cause at the term at which it was dismissed, but subsequently thereto appellant voluntarily appeared in the court below, filed pleadings in the cause, obtained a continuance from one term of the court to another, had a default judgment set aside, and finally participated in a trial before a jury, without having raised any question about its presence in court, and it cannot, therefore, now be prejudiced by the *nunc pro tunc* order showing the jurisdiction of the court to try the cause, whether that order was properly made or not, because, without reference to it, the court had acquired jurisdiction of the case through the proceedings above mentioned. Judgment affirmed.

CARTER v. MARKS.

Opinion delivered October 27, 1919.

1. APPEALS FROM PROBATE TO CIRCUIT COURT—HOW REGULATED.—Appeals from the probate to the circuit court are granted and regulated under Kirby's Digest, § 1348.
2. SAME—SAME—IMPROPER AFFIDAVIT.—An affidavit for appeal from the probate to the circuit court is insufficient, when the affidavit does not recite that the affiant swears to it, nor the jurat recite that he has done so, and no effort has been made to amend.
3. SAME—SAME—MANNER OF TAKING.—Sections 1352 and 1353 of Kirby's Digest, relating to the taking of appeals from the probate to the circuit court, while directory are not to be ignored in the taking of such appeals.
4. MANDAMUS—LIES WHEN—APPEAL FROM PROBATE COURT.—Mandamus lies only when the party applying for it has a clear legal right to the relief which he asks; one has no clear legal right to an appeal from an order of the probate court who does not comply with the statute regulating these appeals; the purpose of the writ is not to establish a legal right, but to enforce one already established.

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

E. W. McGough, for appellant.

1. There was no affidavit and prayer for appeal. Kirby's Digest, § 1348; 2 Cyc. 4 A, 24 (3). The affidavit was not sufficient under our law. Kirby's Dig., § 1348; 28 Ark. 297.

2. The petition for mandamus was not sworn to. 26 Ark. 237.

3. The petition for mandamus was not filed in time. He wanted too long. 26 Cyc. 395; Kirby's Dig., § 5090; 166 S. W. 546.

T. Nathan Nall, for appellee.

1. There was no defect in the affidavit for appeal. If the word *swear* was omitted, it was in unintentional omission—a mere clerical error and amendable. 2 Cyc. 4 A. Kirby's Digest, § 6145; 2 Cyc. 32.

2. The affidavit required by section 1348, Kirby's Digest, was filed in due time under the law and was sufficient. No bond was required. Kirby's Dig., § 1349.

3. No other remedy at law was available to petitioner, as it was too late to appeal. An affidavit to a petition for mandamus is not necessary in the absence of court requiring it. 25 Ark. 261.

4. The appeal is premature and should be dismissed.

SMITH, J. Appellee filed a petition in the Bradley Circuit Court, praying that a writ of mandamus issue directing the probate court of that county to grant him an appeal from an order of that court disapproving a settlement filed by him as executor of an estate which he was administering. In his petition therefor he alleged that on March 16, 1917, the court had passed upon and had disapproved his settlement, and that on October 8, 1917, he had filed with the clerk of the probate court the following affidavit for an appeal to the circuit court: "Before T. A. Carter, probate judge. *Birt Marks* v. *F. K. Marks, Executor.*

"I, F. K. Marks, executor in the above entitled cause, do solemnly that the appeal taken by me from the judgment herein rendered is not taken for the purpose of delay or vexation but that justice may be done me. (Signed) F. K. Marks.

"Subscribed and sworn to before me this the 26th day of September, 1917.

"O. L. Nall, County Clerk
of Grant County, Arkansas."

That on October 10, 1917, the court made an order refusing to allow the appeal for the reasons that the affidavit was not sufficient and that no bond for appeal had been filed.

The petition for the writ was filed August 7, 1918, and appears to have been the first step taken to prosecute an appeal after the prayer therefor had been denied in the probate court.

A demurrer to this petition was filed upon the grounds that it did not show that petitioner was entitled to the relief prayed; that it did not show that a proper affidavit was filed; and did not show that petitioner had no adequate remedy at law. The circuit court permitted petitioner to amend his petition by alleging that he had no adequate remedy at law, the time for appeal having elapsed; but no offer was made or had been made to amend the affidavit. The demurrer was overruled, whereupon the following testimony was heard:

Petitioner testified that he went to the clerk of the probate court and told him he wanted to appeal from the order disapproving his settlement, and the clerk drew up the affidavit set out above, and he signed it and filed it with the clerk. The attorney representing petitioner in the probate court testified that he asked the probate judge why he had not granted the appeal and was told that that action was taken because no bond for costs had been filed.

The probate judge testified that he did not grant the appeal because no affidavit was filed and that he so wrote petitioner's attorney, who replied that it made no difference as he intended to make a settlement with the de-

visees, and that before the twelve months had expired he personally called the attention of the attorney to the fact that no proper affidavit had been filed for an appeal.

Upon this record the court found that the prayer of the petition should be granted and so ordered and overruled the demurrer, and this appeal has been duly prosecuted to review that action.

(1) Appeals from the probate court to the circuit court are granted and regulated by section 1348 of Kirby's Digest, which reads as follows:

"Section 1348. Appeals may be taken to the circuit court from all final orders and judgments of the probate court at any time within twelve months after the rendition thereof by the party aggrieved filing an affidavit and prayer for appeal with the clerk of the probate court, and upon the filing of such affidavit the court shall order an appeal at the term at which such judgment or order shall be rendered, or at any term held within twelve months thereafter. The party aggrieved, his agent or attorney, shall swear in said affidavit that the appeal is taken because he verily believes that he is aggrieved, and is not taken for the purpose of vexation or delay."

After quoting this section in the case of *Walker* v. *Noll,* 92 Ark. 151, the court said: "It will be seen from this that the probate court must grant the appeal at a term of the court, and that as a prerequisite to the granting of such appeal it is necessary that an affidavit for appeal must be filed. It is essential that the affidavit for appeal be made and filed before the probate court can grant the appeal, and that the probate court must itself act on such affidavit and prayer for appeal and grant same by an order."

And in the same case it was said that an affidavit to which no jurat was attached was not sufficient as an affidavit for appeal. See also *Tharp* v. *Barnett,* 93 Ark. 263; *Matthews* v. *Lane,* 65 Ark. 419.

(2) It will be observed that the purported affidavit for appeal does not recite that the affiant swears to it, nor does the purported jurat recite that he had done so. It

is no doubt true that either or both might have been amended; but it is also true that neither was amended, and no offer to amend was made.

(3) Section 1352 of Kirby's Digest, which relates to appeals from the probate court, provides that all appeals allowed ten days before the first day of the term of the circuit court next after the appeal allowed, shall be determined at such term, unless continued for cause, and by section 1353 it is provided that if the appeal be not allowed at the same term at which the judgment is rendered, the appellant shall serve the appellee at least ten days before the first day of the term at which the cause is to be determined with a notice in writing, notifying him of the fact that an appeal has been taken from the judgment therein specified.

Of course, these sections are directory; but they are not on that account to be ignored, and one who desires to appeal from a judgment of the probate court must take notice of the fact that statutes are in existence for the purpose of expediting the hearing of such appeals.

The terms of the probate court in Bradley County are begun on the second Monday in January, April, July and October; and the terms of the circuit court in that county are begun on the first Monday in January and August. So it appears that three terms of the probate court were held as well as one of the circuit court after the probate court had made its order refusing the appeal, because no proper affidavit had been filed, before any action was taken.

(4) Petitioner had a full year in which to perfect his appeal, yet, without complying with the requirements of the statute by filing an affidavit for appeal, he waited until after the expiration of the year and then applied for a discretionary writ upon the ground that his year had expired and that he had no other adequate remedy. Mandamus lies only when the party applying for it has a clear legal right to the relief which he asks. *State* v. *Board of Directors,* 122 Ark. 337; *Rolfe* v. *Spybuck Drain. Dist.,* 101 Ark. 29; *Automatic Weighing Co.* v. *Carter,* 95 Ark.

118. One has no clear legal right to an appeal from an order of the probate court who does not comply with the statute regulating these appeals. The purpose of the writ is not to establish a legal right but to enforce one already established. *Vance* v. *Little Rock*, 30 Ark. 435.

The petition was therefore demurrable, and the demurrer to it should have been sustained, and the judgment of the court below will therefore be reversed, and the petition dismissed.

KILGO *v.* CONTINENTAL CASUALTY COMPANY.

Opinion delivered October 27, 1919.

1. WITNESSES—PRIVILEGED COMMUNICATIONS—LETTER OF FORMER ATTORNEY TO DEFENDANT.—A letter written by plaintiff's attorney to defendant insurance company is admissible in evidence to show that plaintiff's contention as to the insurer's misrepresentations was an afterthought.
2. INSURANCE—RELEASE PROCURED BY FRAUD—NOT VOID, WHEN.—A release procured by an accident company from the insured, who had sustained an injury, is not void, although procured by fraud; such release is voidable at the instance of the policy holder, but is binding until avoided.
3. SAME—SAME—SAME—RETURN OF CONSIDERATION.—A release, procured by an accident company, by fraud, is binding, until rescinded by the insured, by returning the consideration or by bringing suit.
4. RELEASE—REPUDIATION FOR FRAUD—TIME.—One who has been induced by fraud to give a release has a reasonable time, after discovery of the fraud, to repudiate the same; what is a reasonable time is a jury question.

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk*, Judge; affirmed.

Emerson, Donham & Shepherd, for appellant.

1. The court erred in permitting T. M. Mehaffy to testify as to communications between him and plaintiff. These communications between a client and his attorney were privileged and incompetent without the consent of plaintiff. Kirby's Digest, § 3095; 33 Ark. 774. The court erroneously adopted the view or theory that plaintiff communicated the facts to Colonel Mehaffy for the

purpose of having him communicate them to the defendant company. This view or theory is not warranted by the evidence. The testimony shows that plaintiff employed Mehaffy as his attorney and placed his case in his hands for whatever action he saw fit to take. He did not ask him to write the letter and denies that Colonel Mehaffy informed him that defendant claimed it held a release for any claim under the policy sued upon. The letter was privileged and the testimony incompetent. Cases *supra.*

2. Plaintiff did not have a fair and impartial trial, because one of the jurors, A. J. Graham, was a brother-in-law of Colonel Mehaffy, and under the peculiar circumstances here was biased against plaintiff and he did not know this until the jury had retired.

3. The court erred in giving defendant's instruction No. 4. If plaintiff was defrauded as he alleged he had three years after discovering the fraud within which to bring suit. Kirby's Digest, § 5064; 92 Ark. 618. The suit was filed in time. 20 Cyc. 94; 12 R. C. L. 412; 43 Atl. Rep. 1052; 108 N. W. 884; 122 N. E. 826; 93 S. W. 124; 187 *Id.* 681; 163 *Id.* 1038; 83 Ark. 575.

4. Money paid as a consideration for a release from liability under a policy of insurance obtained by fraud does not have to be returned as a condition precedent to suit, but the amount may be credited on the judgment. 83 Ark. 575; 103 *Id.* 341.

Said instruction No. 4 is also erroneous in that it is inconsistent with our statute. Kirby's Digest, § 4380. Also because it told the jury that before plaintiff could recover he must have offered to return the money paid him or brought suit within a reasonable time after discovering that defendant claimed that the release was in full settlement of all claims. 83 Ark. 575; 103 *Id.* 341; 73 *Id.* 42; 81 *Id.* 264.

Manton Maverick, of Chicago, Ill., and *Cockrill & Armistead,* for appellee.

1. There was no error in permitting T. M. Mehaffy to testify as to communications with plaintiff while he was

his attorney. 112 Ark. 277; 40 Cyc. 2375. The letter was not privileged. 43 Ark. 307, 316.

2. There was no error in giving instruction No. 4 complained of. It correctly states the law. 115 Ark. 238-249; 24 A. & E. Enc. 320; 71 Fed. 21, 27; 34 Cyc. 1065; 13 Ill. App. 206; 64 Fed. 293; 93 U. S. 55-63; 141 *Id.* 429; 92 S. W. 855; 30 Atl. 308; 10 S. W. 403.

SMITH, J. On January 22, 1914, appellee, hereinafter referred to as the company, issued to appellant, hereinafter referred to as plaintiff, a policy of insurance which provided that if plaintiff should receive an injury through external, violent and purely accidental means, rendering him unable to perform any labor, the company would pay him an indemnity of fifteen dollars per week during the time he was so disabled but not to exceed one hundred and four consecutive weeks.

Plaintiff offered testimony to the effect that on September 19, 1915, and while the policy was in full force, he sustained an injury of the kind covered by the policy, and as a result of said injury was unable to perform labor of any kind for more than one hundred and four consecutive weeks subsequent to the accident. The testimony was conflicting as to the length of time during which the disability continued, but before it had continued for as much as twenty-four weeks and at a time when, according to the company, plaintiff had fully recovered, a settlement was made for that period and the sum of $360 paid and the following release was executed by the plaintiff:

"Received of the Continental Casualty Company the sum of $360 for the following purposes: In full compromise, payment, satisfaction, discharge and release of any and all claims that I myself, my heirs, executors, administrators, assigns, or beneficiaries, now have or may hereafter have against said company under policy No. 2,979,645, for or on account of all injuries sustained by me on or about September 19, 1915, or any loss that may hereafter result from said injuries."

Plaintiff testified that he was an illiterate man and could write nothing but his name, and that he signed the release under the representation that it was a receipt for the amount due him for the said twenty-four weeks, and that the company's agent who made the settlement with him stated that if he had not fully recovered by the end of the twenty-four weeks the accruing payments would thereafter be made as provided by the policy. The testimony on this point was in irreconcilable conflict.

After the expiration of the twenty-four weeks plaintiff demanded additional payments, which were refused by the company upon the ground that the claim had been settled in full, and in March, 1916, plaintiff took the policy and the correspondence in regard thereto to Mr. Mehaffy, an attorney in Little Rock, and directed the attorney to take the matter up with the company. Mr. Mehaffy wrote the company under date of March 15, and received in reply a letter dated March 18, 1916, in which the release was quoted in full and the statement there made that a full and final disposition of the claim had been made with the plaintiff and any additional liability denied.

Thereafter no further action was taken until August 22, 1918, when this suit was brought.

Mr. Mehaffy was called as a witness by the company and, over plaintiff's objection, was required to read in evidence his letter to the company. The objection made and now insisted upon was that the letter was a privileged communication. It reads as follows: "Gentlemen: We represent Mr. Wm. M. Kilgo who was a brakeman for the Chicago, Rock Island & Pacific Railway Company and who had a policy in your company. He was injured as you know, and a settlement was made with him by your representative. Your representative, however, at the time, according to Mr. Kilgo's statement, represented that the policy was void, and that they did not owe him anything and thereby induced the settlement which was made. We are writing to know if you are willing to

take the matter up and adjust it or, if you claim that your settlement made in the manner that it was is final.

"Won't you kindly let us hear from you?

"Yours very truly."

At the request of plaintiff the court gave five instructions presenting the law applicable to his theory of the case; but over his objection and exception gave an instruction numbered 4, which reads as follows:

"IV. You are instructed that a person who was fraudulently induced to sign a release or make a settlement in full can waive his right to rescind the release or settlement and in that way be bound and barred by the release. The duty devolved on him to rescind within a reasonable time after discovery of the fraud, and a failure to do so defeats a recovery. To accomplish a rescission, plaintiff must have offered to return the money paid him, or brought his suit without offering to do so, within a reasonable time after discovering that defendant claimed that said release was in full settlement of all claims. What is a reasonable time under the particular facts and circumstances is for you to determine."

Other assignments of error are argued, but we do not consider it necessary to discuss them.

There was a verdict and judgment for the company, and plaintiff has appealed.

(1) We think no error was committed in requiring Mr. Mehaffy to identify and read in evidence the letter set out above. The letter was written at the suggestion and for the benefit of the plaintiff, and the information there contained was intended when given by him to the attorney to be communicated to a third person. The rule applicable in such cases was stated by this court in the case of *Vittitow* v. *Burnett,* 112 Ark. 277, where it was said: "The object of the rule (section 3095 of Kirby's Digest, which provides that an attorney shall be incompetent to testify concerning any communication made to him by his client in that relation, or his advice thereof, without the client's consent) is to secure freedom in communication between attorney and client in order that the former

may act with full understanding of the matters in which he is employed; but, as the rule tends to prevent a full disclosure of the truth, it should be strictly construed and limited to cases falling within the principle on which it is based. 40 Cyc. 2361, 2362. There is no privilege as to statements by a client to his attorney for communication to a third person. 40 Cyc. 2375. Vittitow employed Carpenter to assist him in purchasing the land from Burnett, and directed him to write to Burnett, making him an offer for the land. It was intended that the matters embraced in the letter written by Carpenter to Burnett should be communicated to Burnett in order to be acted upon. Therefore, the letter falls within the rule that communications made to an attorney by a client and intended by the latter to be imparted to a third party for the benefit of the client do not come within the rule laid down in the statute."

The difficult question in the case is whether or not instruction numbered 4 correctly declares the law.

In the case of *Bowden* v. *Spellman,* 59 Ark. 259, it was said: "Our own court has long ago announced the rule that a party defrauded must, 'within a reasonable time after the fraud is discovered, elect to rescind, if such be his purpose. And he can only rescind by returning, or offering to return, whatever he may have received, under the contract, of value to either party.' *Desha* v. *Robinson,* 17 Ark. 240; *Seaborn* v. *Sutherland, Id.* 603; *Bellows* v. *Cheek,* 20 *Id.* 438; *Hynson* v. *Dunn,* 5 *Id.* 395; *Davis* v. *Tarwater,* 15 Ark. 286; *Johnson* v. *Walker,* 25 *Id.* 204; *Benjamin* v. *Hobb,* 31 *Id.* 151; *Merritt* v. *Robinson,* 35 *Id.* 483; *Hanger* v. *Evans,* 38 *Id.* 334; *Berman* v. *Woods,* 38 *Id.* 351."

The authority of that case and the correctness of the declaration of law quoted has not been questioned insofar as it announces the general rule applicable to a party seeking to rescind a contract for fraud practiced in its procurement. But certain exceptions to the rule have been recognized, and in the case of the *Pekin Cooperage Co.* v. *Gibbs,* 114 Ark. 559, we quoted and reviewed our

own cases dealing with exceptions to this rule with special reference to suits brought upon causes of action which had previously been settled and released without first returning the sums paid by way of consideration for the releases. We there said: "A discussion of the same principle is found in 34 Cyc., p. 1071, in the article on the subject of Releases, and in the discussion of the necessity for the restoration of the consideration as a condition precedent to attacking a release, it was there said: 'It is generally held that if a person enters into a release and afterward seeks to avoid the effect of it on any ground that will entitle him to rescind it, he must first restore what he has received, although there is some authority to the effect that such restoration or tender need not be made, and that it is sufficient to credit the amount paid with interest on the judgment recovered.'

"After this statement of the rule there follows, on page 1073, a statement of the exceptions to it, where it was said:

" 'When a releasor who is himself free from negligence is deceived as to the nature of the instrument executed by him, as, for instance, where the release is represented to be a receipt for a gratuity, or for expense, for loss of time, for wages, to indicate absence of any ill-will, or that it was a partial release, as that it was a release for damages to clothing or property and in fact included personal injuries, the consideration received need not be restored or tendered. Likewise, according to some cases, where the releasor was mentally incapable of executing the release. Nor is a releasor required to return that which in any event he would be entitled to retain, either by virtue of the release itself or of the original liability, but credit must be given on the judgment. Furthermore, the releasor is entitled to retain the consideration received by him from the releasee by virtue of a transaction independent of the release. It has been held that, if the releasor be an infant, he may repudiate his release without restoring or tendering the consideration. * * *.'"

But in none of the cases there collected has it ever been said that the right of rescission may be exercised at any time before the bar of the statute of limitations has fallen against the original cause of action.

Plaintiff cites the case of *Conditt* v. *Holden,* 92 Ark. 618, and similar cases, to the effect that where there has been a fraudulent concealment of the existence of a cause of action the statute of limitations does not begin to run until the discovery of the fraud; and he also cites authorities to the effect that delay short of the period fixed by the statute of limitations will not defeat the right to recover damages in an action of deceit, and he argues, therefore, that he had the full time in which to sue that he would have had had the release not been executed. In other words, that he might sue at any time before his cause of action on the policy would be barred and that as that period was three years and three years had not elapsed between the time of executing the release and instituting this suit, he has the right to maintain the present action.

(2-3) Answering this contention, it may be said that this suit is not one for deceit, nor has there been any concealment of the existence of a cause of action. The suit is predicated upon a contract of insurance and presumptively the right to maintain that suit did not exist because that cause of action had been compromised and settled. The lease was not void, even though it may have been obtained by fraud practiced in its procurement upon the plaintiff. It was voidable at his instance, but was binding until avoided. Under the decisions of this court he was not required to return the consideration paid for its execution if it had in fact been procured by fraud; but, until it has been rescinded by returning the consideration or by bringing suit, it bound him. The instruction complained of told the jury that a rescission could have been accomplished by a return of the money paid plaintiff, or by the institution of a suit without an offer to return the money, provided that action was taken within a reasonable time after the discovery of the fraud

—and further, that what was a reasonable time under the facts and circumstances of the case was a question for the jury to determine.

(4) That instruction finds full support in the language quoted from the case of *Bowden* v. *Spellman, supra.* There are exceptions to the rule there announced that the consideration must be returned upon the rescission of a contract and those exceptions are shown in the cases cited in the case of *Pekin Cooperage Co.* v. *Gibbs, supra,* but we have not decided that one must not rescind a contract of settlement procured by fraud within a reasonable time after the discovery of the fraud. When one has made a contract compromising his cause of action, he must in some manner repudiate it, and he has a reasonable time after the discovery of the fraud in which to take that action, and as to what is a reasonable time is a question of fact to be determined by the jury upon a consideration of the circumstances of the particular case—as the jury was here told.

In the case of *Missouri Pacific Ry. Co.* v. *Brazil,* 10 S. W. 403, a passenger injured on a train executed a release of his claim for damages for the sum of five hundred dollars. In his complaint for damages he anticipated the fact that the release executed by him would be pleaded in bar of his suit, so he recited the circumstances under which it had been obtained, showing that it had been procured through fraud and undue influence. Upon that issue the railway company asked the following instruction:

"No. 4. If you find from the evidence that plaintiff was insane when he signed the release, or that the release was invalid under the rules of law given you by the court, but further find from the evidence that the plaintiff, after he became conscious and was informed of the release, and that he had released defendant from all claims of damage for $500 paid to him, continued to use the money, or if he had used it in the payment of debts, and did not promptly, or within a reasonable time after he became conscious, repudiate or disaffirm the contract, then you will find for defendants."

It will be observed that this instruction imposed exactions not contained in the instruction under review, and we are not, therefore, called upon to approve it in its entirety; but the Supreme Court of Texas held that it should have been given as requested and in so holding said: "Contracts only voidable are only obligatory until in some manner repudiated or annulled, and may, at any time, be ratified, and thereby the right to annul them be lost. That there was an express ratification of the contract, evidenced by the release, is not claimed, and the question before us is, were there facts in evidence from which ratification might be legally inferred? If from the evidence the jury might have found that, subsequently to the execution of the release, appellee had mental capacity sufficient to comprehend the nature, purpose, and effect of the contract evidenced by it, and knew that he had executed it, that the money in his possession came through it, and with this knowledge, without repudiating the contract, used the money, may ratification be legally inferred from these facts, taken with appellee's surroundings? If so, a charge similar to that numbered 4 should have been given. In passing on this question it must be remembered that the contract was executed, continuing in its character or force until repudiated, and therefore one not requiring any express assent on the part of appellee, subsequent to the making of the contract, to give it validity. Whether appellee, subsequently to the making of the contract, at the time when he had sufficient mental capacity to have made such a contract not voidable, consented that the contract should stand and be obligatory, may be determined by his acts as well as by declarations of intention. If by his acts, done at a time when he had mental capacity to have made a contract absolutely releasing appellants, appellee clearly evidenced his intention to be bound by the contract he had made, then he ought to be held bound, and no subsequent change of intention ought to affect the rights of the parties. Consent to be bound by a contract only voidable is ratification, however that

consent may be shown. Ratification of a voidable contract, once made, cannot be recalled. Many contracts made by infants are held to be voidable, and so, upon the presumption of want of sufficient mental capacity to make contracts absolutely binding, are contracts made by adults; and the same rules in reference to the evidence of ratification of contracts made by minors apply to the ratification of contracts made by persons laboring under mental derangement. The Supreme Court of Massachusetts, in speaking of the evidence sufficient to show the ratification of a contract made during minority, said: 'If, after coming of age, he retains the property for his own use, or sells, or otherwise disposes of it, such detention, use, or disposition, which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by it the property became his own, is evidence of an intention to affirm the contract from which a ratification may be inferred.' *Boyden* v. *Boyden,* 9 Metc. 521." And further that: "The inquiry in any case in which it is claimed that a voidable contract has been ratified is, has the person whose right it was to annul it, either by word or act, when he had mental capacity sufficient to contract, and knowledge of what he had previously done, evidenced his consent that the contract shall stand? In many cases it has been held that retention of property acquired under a voidable contract, by the person entitled to avoid it, if long continued, would authorize a finding of ratification."

Many other cases to substantially the same effect are cited in appellee's brief.

A general statement of the law is found in volume 2 of Black on Rescission and Cancellation of Contracts, in the chapter dealing especially with Releases, Compromises, and Settlements, where, at section 397, the author says: "Though a release may be voidable for fraud or other legally sufficient cause, yet it may be ratified by the releasor, and if this is done, he will afterwards be estopped from repudiating it; and such ratification may

be inferred from long acquiescence in the existing state of affairs, amounting to laches. But ratification presumes knowledge of the facts, and one not informed of the whole of a transaction cannot ratify it."

In addition to the case of *Bowden* v. *Spellman, supra,* another case announcing the duty of one who desires to rescind a cotract procured by fraud is that of *Fitzhugh* v. *Davis,* 46 Ark. 337, and which deals with the question in detail. The third syllabus in that case is as follows: "Where a party desires to rescind a contract for fraud or mistake, he must, upon discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continues to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract as if the fraud or mistake had not occurred." See, also, *Wilson* v. *Strayhorn,* 26 Ark. 28.

We think the instruction given was a correct declaration of the law as applied to the facts of this case.

No prejudicial error appearing, the judgment of the court below is affirmed.

The CHIEF JUSTICE and HUMPHREYS, J., dissent.

GALLUP *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Opinion delivered October 27, 1919.

1. CARRIERS—OVERCHARGE OF FARE—REFUND—PRINCIPAL AND AGENT.—Where by agreement, appellant's traveling salesman was entitled, as between them, to retain all refunds for excess passenger fares charged by a railroad, appellant can not recover same from the railway, when the salesman neglected to do so.
2. SPOLIATION, DOCTRINE OF.—The doctrine of spoliation is applicable where documents have been wilfully, intentionally and wantonly destroyed by the spoliator, to prevent their being used as evidence.
3. SPOLIATION — LACK OF INTENT — DESTRUCTION OF PAPERS.—In a action against a carrier for overcharges on freight shipments, defendant carrier will not be charged with spoliation, where it permitted some of its records to be destroyed, in the absence of

the showing that the documents were intentionally destroyed, or that the lost documents were the best evidence.

4. CARRIERS—OVERCHARGE IN FREIGHT RATES—LIEN ON ROADBED.—An overcharge, by a carrier, in freight rates does not entitle the person overcharged to a lien on the carrier's roadbed.

Appeal from Baxter Chancery Court; *Lyman F. Reeder,* Chancellor; reversed in part; affirmed in part.

Allyn Smith, for appellant.

1. Appellant was entitled to recover for the excess passenger fares exacted not from Gallup himself but from his traveling salesman, Tindell, as he furnished the money to pay their passenger fares, and the court erred in holding that only Tindell could recover for the excess passenger fare. Gallup was the principal and Tindell only the agent; the principal was the real party in interest, and as the agent makes no claim, the principal was entitled to recover as upon a contract made by Gallup's agent. 78 Ark. 241.

2. She is entitled to recover the full $5,000 for excessive freight charges under the maxim, "*omnia praesumantur in odium soliatoris.*" The doctrine of liability for spoliation of records and evidence should have been applied. 1 Stra. 505; 1 Greenl. Ev., § 37; 2 Russ. Ch. 73; 1 Taylor Ev., § § 130, 116; 1 P. Wins. 731; Broom's Legal Max. 998; 1 Phill. Ev. 731; 24 Beav. 679; 40 Mich. 457; 17 How. St. Tr. 550; 12 Wind. 173; Cowper 86; 77 Mo. 64-85-87. The destruction of the records in the manner they were destroyed and at the time was a confession by the railroad company that if they had been properly preserved they would show full proof of Gallup's claims. 77 Mo. 64 (l. c.) 85 to 87, and cases *supra.*

3. Gallup was entitled to a lien upon the railroad. Kirby's Digest, § 6651; 93 Ark. 34; K. & C. Dig., § § 8172-4.

Geo. A. McConnell, for appellee and cross-appellant.

1. Gallup could not recover for excess fares paid by Tindell, as Tindell purchased his own tickets and paid for them with his own money and was entitled to any re-

fund. The contract was between him and the railway company, and there was no privity between Gallup and the railway company. 38 Sup. Ct. Rep. 186.

2. Plaintiff was not entitled to recover the full amount of overcharges in freight rates, but only the amount actually overcharged, as shown by the evidence and as found by the master and the court.

The spoliation doctrine does not apply in this case, and the cases cited by appellant are not in point and have no application. 56 Miss. 136; Wigmore, Ev., par. 291; 10 R. C. L., p. 884; Jones on Ev., pp. 128-133; 28 W. Va. 773; 238 Fed. 444; 241 *Id.* 967.

3. Plaintiff was not entitled to a lien on the railroad. 65 Ark. 183-187; 59 *Id.* 81; 70 *Id.* 262; 71 *Id.* 126; 74 *Id.* 528-535; 68 *Id.* 171; 66 Fed. 809; 127 Ark. 246, 252.

Plaintiff, if entitled to a lien, did not bring suit in time, one year. 124 Ark. 307; 108 *Id.* 219. Furthermore, plaintiff did not ask for a lien and the St. Louis, Iron Mountain & Southern Railway Company's property was sold under foreclosure and bought in and is owned by the Missouri Pacific Railway Company, free of all liens not asserted within the one year period.

HUMPHREYS, J. On October 28, 1913, Howard H. Gallup brought suit against appellee in the Baxter Chancery Court to recover $1,000 for overcharges in passenger fare, and $5,000, overcharges in freight rates, alleged to have been unlawfully exacted from him during the period dating from September 3, 1908, to July 18, 1913. It was alleged that during that period, under an injunctive order of the United States District Court for the Eastern District of Arkansas, wrongfully procured by appellee, the rate for carrying passengers was raised from the lawful rate of two cents to the unlawful rate of three cents per mile; and the lawful freight rate promulgated by the Railroad Commission of the State of Arkansas was unlawfully raised thirty-three and one-third per cent; that, by reason of said unlawful raise in rates, appellee overcharged said Gallup $1,000 in passenger

fares, and $5,000 in freight rates; that the books and papers showing such excess freight rates were in the hands of appellee who would not grant Gallup's demand to inspect same, and, by reason of said refusal, it was impossible to state the exact amount of the excess freight charges.

On the application of appellee, the United States District Court for the Eastern District of Arkansas enjoined Gallup from prosecuting this suit. The injunction remained in force until the 17th day of June, 1917, at which time, it was dissolved on appeal to the Supreme Court of the United States. Immediately thereafter, appellee filed answer, denying all material allegations in the bill filed in the Baxter Chancery Court. During the pendency of the injunction suit in the Supreme Court of the United States to prevent Gallup from prosecuting the case, he died, and the cause in the Baxter Chancery Court was revived in the name of Jennie Gallup, executrix of the last will and testament of Howard H. Gallup, deceased.

Upon motion, containing an allegation that the bill filed in the Baxter Chancery Court was in the nature of a bill of discovery and that the books, papers, bills of lading and other documents necessary to be used as evidence in order to prove the amounts of overcharges in freight and passenger rates, for which suit was instituted, appellant procured an order from the chancery court requiring appellee to produce the books and papers showing said overcharges. Appellee was unable to produce all the books and papers at Cotter, showing the overcharges during said period, because the records prior to the 31st day of December, 1910, had been shipped to St. Louis and destroyed, in accordance with custom and by permission of the Interstate Commerce Commission; and others were injured by rats and so mixed up and misplaced on account of the construction of a new depot at Cotter that they could not be found. For the same reason, the books and papers at Buffalo, showing the overcharges in freight, could not be produced.

A master was appointed to take evidence and state the amount of overcharges exacted from Gallup in the way of passenger fares and freight rates, from September 3, 1908, to July 18, 1913.

The cause was submitted to the court, upon the pleadings, evidence and report of the master, from which it was found and decreed that the appellee was indebted to appellant for $44.83 on account of excess passenger fares, and $644.32, on account of excess freight rates. The court also decreed a lien on the roadbed of appellee for overcharges in freight. Appellants, being dissatisfied with the amount of recovery on overcharges for passenger fares and freight rates, appealed from that part of the decree; and appellee has prosecuted a cross-appeal from that part of the decree fixing and declaring a lien on the roadbed for the overcharges in freight, which brings the whole case before this court for trial *de novo.*

The facts, in substance, are as follows: Under injunctive proceedings in the United States District Court for the Eastern District of Arkansas, appellee exacted three cents a mile for railroad fare from its passengers and a thirty-three and one-third per cent. increase over the freight rate promulgated by the Railroad Commission from its shippers in this State, between September 3, 1908, and July 18, 1913. The injunction was wrongfully issued and enforced during that period and was dissolved by the Supreme Court of the United States. the mandate from the Supreme Court being filed and becoming effective in the United States District Court for the Eastern District of Arkansas, on July 18, 1913. Between the dates September 3, 1908, and July 18, 1913, appellee had illegally exacted, directly from Gallup, excess passenger fares, and had also illegally exacted from his traveling salesman, Charles S. Tindell, excess passenger fares to the amount of $83.57 which had never been refunded to him. Charles S. Tindell traveled from September 3, 1908, to January 1, 1911, on credential books and received a refund of one cent a mile on said books from appellee. Under the terms of his contract with

his employer, Howard H. Gallup, he appropriated the rebate to his own use. It was the custom of the traveling men using credential books to retain the rebate themselves, and it was also the agreement between Tindell and Gallup. After January 1, 1911, to July 18, 1913, Tindell traveled on tickets and retained the coupons instead of purchasing credential books. He did this because the rebate on credential books was reduced at that time from one to one-half cent a mile. He lost or destroyed the coupons or return receipts on tickets purchased by him, and never made a claim himself against appellee for the one cent per mile excess passenger fares exacted from him during the time he traveled on tickets. His contract with Gallup was for a fixed salary and expenses.

Howard H. Gallup ran a wholesale mercantile establishment at Cotter and he had a retail store at Buffalo during the period in question. He purchased most of his goods for his wholesale house in Little Rock and shipped them intrastate from Little Rock to Cotter over appellee's railroad. He supplied his retail store at Buffalo from his wholesale house at Cotter and shipped the goods intrastate from Cotter to Buffalo over appellee's railroad, also. When this suit was commenced, the proof tends to show that Gallup had all the original expense bills in his possession. They were kept in pasteboard boxes on the shelves in the Cotter store. After the death of Gallup in 1916, Mr. Laskey, Gallup's brother-in-law, came to Cotter to assist the widow, Mrs. Jennie Gallup, in winding up the estate, and, without realizing or knowing the importance of the original expense bills, burned most of them. Such as were left were delivered to J. W. Wooley, who made a statement of the excess overcharges during the period from these and such books and papers as could be found in the possession of appellee. All the records in appellee's possession up to and including December 31, 1910, had been destroyed on application of appellee, without reference to, or thought of, the pendency of this suit, to the Interstate Commerce Commis-

sion, pursuant to an existing custom of destroying all duplicate expense bills over six years old. The records not destroyed had been injured by rats, inadvertently mixed up and confused with other records until it was impossible to find them all.

The confusion of the records resulted partly from moving them when the depot at Cotter was rebuilt. There was nothing to indicate that the records were purposely or intentionally destroyed, injured, confused or misplaced to prevent their use in this suit, neither does the evidence reveal that any special care was taken of the record by the employees of appellee after this suit was instituted. The first intimation appellee had that the original expense bills had been burned was when that fact developed in taking the evidence. After the discovery of the loss of the original expense bills every opportunity was furnished J. W. Wooley, who was selected to state the amount of overcharges, to search for records and papers in the possession of appellee relating to the overcharges of freight rates.

The statement of overcharges for freight during the period in question was made up by J. W. Wooley from the expense bills, books and papers which could be found. More records were found showing the amount of freight paid on outbound shipments during the year beginning September 9, 1912, and ending September 9, 1913, and for incoming shipments during the year 1911, than for any other year between September 3, 1908, and July 18, 1913. The testimony tended to show that the freight paid during these years on incoming and outbound intrastate shipments was a fair average covering the years from September 3, 1908, to July 18, 1913. The court used the shipments between these periods as a general average from which to ascertain the shipments during the whole period claimed, and rendered judgment accordingly.

The questions raised on direct appeal are whether, first, the chancery court erred in refusing to allow and decree to appellant $83.57, unlawfully exacted from Tindell, as passenger fare; second, in refusing to allow and

decree to appellant, as excess freight rates, the sum of $5,000 prayed for. The question raised on cross-appeal is whether the court erred in declaring and decreeing a lien on the roadbed of appellee for the overcharges in freight rates allowed by the court.

(1) Both by contract and custom existing between Tindell and Gallup, Tindell was entitled to a refund for the excessive passenger fares exacted from Tindell by appellee from January 1, 1911, to July 18, 1913. Gallup permitted him to retain the refund of one per cent on credential books purchased prior to that time, and no different arrangement was made with reference to the coupons or return receipts covering the excessive passenger fares after he began to travel on tickets. Tindell did not deliver the coupons to Gallup, nor did Gallup require him to do so. The clear inference from his testimony is that he retained them as his own property, as a prerequisite incident to his employment, with full knowledge and acquiescence on the part of Gallup.

(2) Because it appeared from the record in a general way that Howard H. Gallup shipped and received large shipments of merchandise intrastate, between September 3, 1908, and July 18, 1913, and necessarily expended a much larger sum in payment of the freights than was allowed him by the master and for which he received a decree by the court, and because appellee destroyed and permitted its records to be damaged, injured and misplaced after the institution of the suit in the Baxter Chancery Court for overcharges on freight rates, from which papers and records a statement of the overcharges could have been ascertained, it is insisted by appellant that the spoliation doctrine should have been applied by the chancellor, and judgment rendered for the full amount claimed. The ground for the application of the doctrine of spoliation is that the document was wilfully, intentionally or wantonly destroyed by the spoliator to prevent it from being used as evidence. The doctrine is founded on the fraudulent act of the party in whose possession it is. The case of *Pomeroy* v. *Benton,*

77 Mo. 64, as well as the other cases cited by appellant in support of her contention that this is a proper case in which to apply the doctrine of spoliation, clearly indicates that the law indulges the presumption that the documents destroyed would establish the demands or claims of parties plaintiff, if the destruction of the documents by defendants is for the purpose of defrauding them. In the instant case, the documents destroyed, injured or misplaced, were at best secondary evidence. The expense bills issued by appellee to Gallup constituted the original and best evidence. These original expense bills were in the possession of Gallup at the time he instituted this suit and remained in his possession until his death, and in the possession of his partner after his death, until destroyed by Laskey, who had come to Cotter to assist appellant in winding up her husband's estate.

(3) The allegation in the bill was not sufficiently definite and specific to carry knowledge to appellee that the books and papers then in its possession were the only documents from which an account might be stated of the overcharges in freight rates. It was not alleged in the bill by Gallup that he had lost or destroyed the original expense bills. Had this notice been carried home to appellee, it would perhaps have imposed a higher degree of duty in caring for the records then in its possession. A reading of the evidence, however, leads to the inevitable conclusion, and counsel for appellee admit, that the evidence falls short of showing that appellee or its officers intentionally destroyed the papers and records in question for the purpose of preventing them from being used as evidence. We do not think the court erred in refusing to apply the spoliation doctrine in the instant case.

(4) It is contended on cross-appeal that an overcharge in freight rates does not entitle the person overcharged to a lien on a railroad's roadbed. The right to the lien must exist, if at all, under the provisions of section 6661 of Kirby's Digest, and under the following

clause contained in said section: "And every person who has sustained loss or damage to person or property from any railroad for which a liability may exist at law, * * * shall have a lien on said railroad."

The words "loss or damage," as used in the section, mean loss or injury to the thing itself; that is, to a person or to property. We think it has no reference whatever to an excess payment of freight rates. We have placed that construction upon the words "loss or damage" as used in a bill of lading. *C., R. I. & P. Ry. Co.* v. *Cunningham,* 127 Ark. 246.

The decree of the chancellor is affirmed in all things except in declaring the judgment for overcharges in freight rates a lien on the roadbed. In that particular, it is reversed and remanded with directions to render a decree in accordance with this opinion.

A. B. SMITH LUMBER COMPANY v. PORTIS BROTHERS.

Opinion delivered October 27, 1919.

1 TRIAL—CONTINUANCE—ABSENCE OF WITNESS IN MILITARY SERVICE OF THE GOVERNMENT.—Appellees brought suit against appellant on account, the issues were made up, but when the case was called the court granted appellant's motion for a continuance on the ground of the absence of a material witness who was in the service of the military branch of the United States Government. At the next term of court appellant moved for a continuance on the same ground. *Held,* the trial court properly refused to grant a continuance, because appellant had failed to exercise due diligence to secure the said witness' deposition.

2. TRIAL—REQUEST BY DEFENDANT FOR DIRECTED VERDICT—SUBMISSION OF CAUSE TO THE COURT.—Where appellant asked only for a directed verdict, and the court gave a peremptory instruction in favor of the appellee, it is tantamount to a submission of the case to the court, and the court's finding becomes a verdict, as much as if it had been rendered by a jury upon the issues and evidence.

3. SAME—SAME—SAME.—Where both parties to an action request only a directed verdict, the issue will be treated as submitted to the court, sitting as a jury, and on appeal, the question is

whether there was any legal evidence to support the finding of the court, and not whether there was sufficient evidence to warrant the court sending the case to the jury.

Appeal from Poinsett Circuit Court, First Division; *R. H. Dudley,* Judge; affirmed.

C. T. Carpenter, for appellant.

1. It was reversible error to refuse the continuance. Eaker was defendant's only witness; he could not be present; due diligence was used to have him present and to procure his deposition. 9 Cyc. 105.

2. It was error to take the case from the jury and direct a verdict for plaintiffs. The undertaking was collateral and within the statute of frauds, and the question was one for a jury. 97 Ark. 438; 76 *Id.* 88; 99 *Id.* 490. Where there is any evidence tending to establish the issue, it is error to take the case from the jury. 63 Ark. 94; 77 *Id.* 556; 103 *Id.* 425; 108 *Id.* 574; 98 *Id.* 334; 11 Wall. 438.

R. P. Maddox, for appellee.

1. All the evidence shows that the account was an original undertaking and not within the statute of frauds. 76 Ark. 1. There was no case for a jury.

2. The continuance was properly refused. Due diligence was not shown and the supplemental motion did not comply with Kirby & Castle's Digest, section 7613. There was no abuse of discretion by the court. 71 Ark. 62.

HUMPHREYS, J. On the 26th day of October, 1917, appellee instituted an attachment suit against appellant in the Poinsett Circuit Court, to recover $648.02 upon account.

Appellant answered, denying the indebtedness, and pleading the statute of frauds.

On May 6, 1918, a day of the May term of said court, appellant filed a motion for continuance on account of the absence of a witness, E. C. Eaker, who was in the military service of the United States and absent from the

State of Arkansas. A continuance was then agreed upon between the parties under a stipulation that appellant would file a cross-bond and waive all damages growing out of the attachment proceeding. The appellant complied with the stipulation, and the cause was passed until the December term, 1918, at which time appellant again asked for a continuance on account of the absence of the same witness, E. C. Eaker. On the same day, a supplemental motion for continuance was also filed. The substance of the allegations of the two motions was that E. C. Eaker was appellant's only witness, and, if present, would testify that the appellant was not indebted to appellee; that he, Eaker, did not buy the goods nor contract the indebtedness set forth in the complaint and itemized statement, nor authorize any one else to purchase the goods for appellant; and that no such proposition was discussed between Eaker and appellee; that the said Eaker was in the military service of the United States Government, and that his business, of lumber inspector, carried him from place to place in the United States; that Eaker was unable to get a leave of absence and attend the trial, and that diligent effort had been made to take his deposition. The motion was overruled by the court and exceptions were properly saved to the ruling by appellant.

The cause then proceeded to a hearing upon the pleadings and evidence. When the evidence was concluded, appellant requested a peremptory instruction, and no other. The court refused the instruction over the objection of appellant, and, on its own motion, instructed the jury to return a verdict in favor of appellees for the amount of the account, over the objection and exception of appellant. Thereupon, the jury returned the following verdict: "We, the jury, find for the plaintiffs in the sum of $648.02, together with interest thereon from the 19th day of July, 1917, at the rate of six per cent. per annum."

The court rendered judgment in accordance with the verdict, from which an appeal has been duly prosecuted to this court.

(1) It is insisted by appellant that the court committed reversible error in refusing to grant a continuance. The court granted a continuance at the preceding term on account of the absence of the same witness. While the witness was in the military service, he remained in this country. The issues were made up more than a year before the case was tried. Appellant understood the need of the witness from the time the suit was instituted. Under the proof offered to sustain the motion, the only attempt to take the deposition of the witness consisted in counsel for appellant mailing a set of interrogatories to counsel for appellee. We think appellant failed to show due diligence in getting the deposition of the witness, and, for that reason, the court did not abuse its discretion in overruling the motion for continuance.

(2) Appellant insists that there was sufficient evidence in the record to warrant the jury in drawing the conclusion that the undertaking on the part of appellant was collateral and not original, and, for this reason, the cause should have been sent to the jury under appellant's plea that the contract was void under the statute of frauds. Appellant invokes the rule that "when the testimony on a material issue is such that different conclusions might reasonably be drawn, the issue is for the jury." *St. L., I. M. & S. R. Co.* v. *Coleman,* 97 Ark. 438. This rule, however, is not applicable in the instant case, because, at the conclusion of the evidence, appellant itself asked for a peremptory instruction, and the court, on its own motion, gave a peremptory instruction for appellee. The request for a peremptory instruction by appellant and the giving of the peremptory instruction by the court for the adverse party was tantamount to submitting the case to the court sitting as a jury, and the court's finding became a verdict as much so as if it had been rendered by a jury upon the issues and evidence.

(3) It was said in the case of *St. Louis S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71, that "it is also true that the parties had the right to waive a jury and submit the matter to the court for trial in the first

instance, and, each having requested the court to direct a verdict in his favor, and not having requested any other instruction, they in effect agreed that the question at issue should be decided by the court, and waived the right to the decision of a jury, and the court's decision and direction has the same effect as would have been given to the verdict of the jury upon the question at issue, without such direction." The action of the parties and court brought the instant case within the rule announced in the Mulkey case, *supra*. So the question presented by this record is not whether there was sufficient evidence in the record to warrant the court in sending the case to the jury upon the issue of whether or not the undertaking was collateral, but the question is, Was there any legal evidence to support the finding of the court that the undertaking was original? The record disclosed that appellant was a lumber company and that appellees were merchants; that E. C. Eaker, representing appellant, bought a lot of piling from Charles McRiley; that as a part of the purchase price, he paid McRiley's mercantile account to appellees with a draft on appellant company; that he requested appellee to continue the credit to McRiley as before, as he had made arrangements to buy McRiley's output of piling; that appellee refused to do so without security; that Eaker then told him to let McRiley have goods to the amount of $400 every two weeks, and he would pay for them. Charles McRiley gave testimony to the same effect. There was, therefore, sufficient legal evidence in the record to support the finding of the court that the undertaking on the part of appellant was original.

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

WOOD v. WOOD.

Opinion delivered November 3, 1919.

1. DIVORCE—WIFE'S SUIT—TEMPORARY ALLOWANCE.—It is necessary, in order to warrant a temporary allowance, in a wife's suit for divorce, to introduce testimony sufficient to show merit in the wife's case; but it is not essential that her testimony on that question should be corroborated; a preponderance of the testimony is sufficient, and on appeal this court will not set aside an order of allowance unless it is against the preponderance of the testimony.
2. DIVORCE—RESIDENCE OF COMPLAINANT.—The divorce statute requires that the complainant have an actual and not constructive residence within this State.
3. DIVORCE — WIFE'S SUIT — TEMPORARY ALLOWANCES—AMOUNT.—A temporary allowance in a wife's suit for divorce, of $400 for attorney's fees, and $200 per month alimony, held not to be excessive.

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

James D. Head, for appellant.

1. The court was without jurisdiction as the testimony shows that the wife was not an actual resident of Arkansas for one year prior to the commencement of the suit. The statute contemplates *actual* rather than *constructive* residence. 128 Ark. 543.

2. No *prima facie* case of cruel and inhuman treatment was made under our law. 104 Ark. 381; 118 *Id.* 582; 53 *Id.* 484; 44 *Id.* 429; 31 N. W. 956; 82 *Id.* 871; 57 N. W. 651; 97 Mass. 373; 60 S. W. 318; 9 L. R. A. 487; 3 N. E. 736; 75 Iowa, 211; 113 N. W. 99; 12 L. R. A. (N. S.) 820; 69 Atl. 646; 105 Pac. 347; 80 S. E. 846; 14 Cyc. 604; *Ib.* 608; *Ib.* 601.

3. There is no showing of merit in the complaint; it was subject to demurrer as it fails to allege specific acts constituting cruelty but alleges mere legal assumptions and presumptions. 114 Ark. 516; 86 *Id.* 469; 63 *Id.* 128.

4. An appeal will lie from an allowance of alimony, suit money and attorney's fees. 86 Ark. 469; 79 *Id.* 473.

5. The allowances here were excessive and erroneous. 87 Ark. 175; 31 N. W. 956; 16 Am. Dec. 597; 21

L. R. A. 310; 143 S. W. 584; 86 Ark. 469; 101 *Id.* 86; 98 *Id.* 193; 63 *Id.* 128; 79 *Id.* 473.

6. Nothing should be allowed for suit money or attorney's fees and only $100 per month for maintenance so long as she remains absent from her home against defendant's will. Cases *supra.*

Taylor, Jones & Taylor, for appellee.

1. *During the pendency* of an action of divorce maintenance, suit money and attorney's fees may be allowed the wife by appropriate orders of court. Kirby & Castle's Dig. 2893.

2. The allegations of the complaint show merit and that the wife is without separate estate and without means to prosecute her suit. The allowances are all reasonable and the complaint shows marriage, a legal cause for divorce, her inability to support herself and prosecute her suit and the husband's ability to contribute to her needs. 86 Ark. 472; 14 Cyc. 749; 18 Ga. 273; 63 Am. Dec. 289; 60 *Id.* 664; 44 Ark. 46; 80 Ark. 481.

3. The evidence shows a proper case for all the allowances made. 9 Ark. 517; 18 *Id.* 126; 44 *Id.* 430. A proper showing for divorce, alimony and allowances was made here, and none of the allowances were excessive. Cases *supra;* 90 Ark. 40; 114 *Id.* 516.

McCULLOCH, C. J. The plaintiff, Irma Wood, instituted this action in the chancery court of Jefferson County against her husband, W. L. Wood, Jr., to secure a decree for divorce and alimony. The complaint contains a prayer for allowance of attorney's fees, suit money and temporary alimony. The defendant responded to the petition for temporary allowance, and on the hearing the court allowed the plaintiff $400 for attorney's fees, $100 suit money, and $200 per month temporary alimony for support of herself and her child. An appeal has been prosecuted by the defendant from that allowance.

It appears from the allegations of the complaint and the testimony adduced that the parties lived together

in the city of Texarkana until the month of May, 1918, when plaintiff left defendant's home and returned to Pine Bluff, which was formerly her home, where her parents resided up to the time of their deaths. The ground for divorce set forth in the complaint is that the defendant has been guilty of such cruel treatment of plaintiff as to render her condition intolerable, and the complaint sets forth that the cruel treatment consisted of frequent instances of abusive and contemptuous language, studied neglect and indifference and malignant ridicule "and every other plain manifestation of settled hate, alienation and estrangement, both of word and action."

(1) Testimony was heard by the court directed to the issue of merit in the plaintiff's cause of action and to defendant's financial condition with respect to his ability to respond to an allowance in favor of plaintiff. It must be conceded that the proof in the present state of the record would not be sufficient to justify a decree for divorce, for the reason that the testimony of the plaintiff was not sufficiently corroborated. It is necessary in order to warrant a temporary allowance in a wife's suit for divorce to introduce testimony sufficient to show merit in the plaintiff's suit (*Slocum* v. *Slocum,* 86 Ark. 469), but it is not essential that her testimony on that question should be corroborated. A preponderance of the testimony is sufficient, and on appeal this court will not set aside an order of allowance unless it is against the preponderance of the testimony. We are of the opinion that the testimony is sufficient to show merit, as it tends to establish a cause of action for divorce under the decisions of this court. *Rose* v. *Rose,* 9 Ark. 517; *Haley* v. *Haley,* 44 Ark. 429; *Kientz* v. *Kientz,* 104 Ark. 381.

(2) It is insisted that the chancery court is without jurisdiction for the reason that the proof fails to show that plaintiff resided in the State of Arkansas. The statute conferring jurisdiction in such cases contemplates actual and not constructive residence, as was held in *Wood* v. *Wood,* 54 Ark. 172, and *Vanness* v. *Vanness,* 128 Ark. 543, but the proof is sufficient to show that plaintiff resided

in Jefferson County, Arkansas, where the suit was brought, and that she had never removed from this State, but that her absence of a few months on a visit to her sister in Mississippi was only temporary.

(2) This brings us to a consideration of the contention of learned counsel for defendant that the allowance of the chancellor was excessive with respect to both the attorneys' fees and temporary alimony. It is shown that the defendant is getting a salary of $5,200 per annum as manager or superintendent of a public service corporation in the city of Texarkana; that he owns a residence of the value of from $3,000 to $5,000, mortgaged to a building and loan association, and also owns a farm now worth about $5,000, with a probable increase in value within the next year or two to $7,000 or $8,000 in value. The farm is undeveloped as yet and yields very little income. It is not shown in the record whether the allowance of $400 for attorneys' fees was to cover the entire services in the case of the attorneys, but we assume that it was so intended, including those services to be rendered in the further progress of the case, and in this view of the matter, we can not say that the allowance is excessive. *Slocum* v. *Slocum, supra.* Neither can we say that the allowance of $200 per month to plaintiff for the support of herself and child is, under the circumstances, excessive. This is less than half of defendant's monthly income, and in addition to that he has his home in Texarkana. It is true that the proof shows that defendant is spending a considerable amount annually in developing the farm and paying taxes thereon, but that is a matter of investment and not a fixed charge against his income.

It is claimed also that sums paid monthly to the building and loan association as dues should be deducted from defendant's income in considering the amount of allowance to be made, but that, too, is an investment in the way of removing an encumbrance from the home. Of course, this matter is determined at present merely as a temporary allowance and might be viewed in a different light if made permanent on a final hearing of the case.

We confine ourselves now merely to a decision that under the proof adduced, the allowance is not excessive as a temporary one during the pendency of the suit for divorce. It is not contended that the allowance of $100 as suit money is excessive.

Decree affirmed.

SIMS v. SOUTHEAST MISSOURI TRUST COMPANY.

Opinion delivered November 3, 1919.

1. APPEAL AND ERROR—TESTING COURT'S FINDINGS.—In testing the correctness, on appeal, of the trial court's findings, this court will view the evidence in its aspect most favorable to the appellee.
2. CORPORATIONS—KNOWLEDGE OF OFFICE—NOTICE.—The knowledge of an officer of a corporation which comes to him through his private transactions outside of the range of his official duties, is not imputable to the corporation itself, so as to charge the corportation with constructive notice of the information received by the officer.

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

W. A. Leach, for appellant.

1. The machine was defective and worthless, and the appellee had notice and was not an innocent purchaser without notice and for value. Hemmelberger was a director in all three corporations and the corporations were all charged with notice to its officers. 48 L. R. A. (N. S.) 65; 13 N. Y. 114; 1 Howard (U. S.), 13 Lawy. Ed. 965.

2. The court erred in holding that appellee was a bondholder without notice and in refusing to permit appellant to make the defense of failure of consideration. Cases *supra.*

Oliver & Oliver, Thos. C. Trimble, Thos. C. Trimble, Jr., and *Ross Williams,* for appellee.

Appellee was an innocent purchaser of the note without notice. The knowledge of Hemmelberger, the direc-

tor, was not notice to the corporations of which he was a director. 182 S. W. 521; 196 *Id.* 119; Cook on Mortgages (7 Ed.), § 727; 132 Mo. App. 257; 7 R. C. L., § 656; 20 L. R. A. 600; 122 Mo. 332; 76 Mo. App. 356; 37 *Id.* 145.

McCULLOCH, C. J. This is an action instituted by appellee to recover on a note executed by appellant to the Freeze Threshing Machine Company, a foreign corporation. The payee assigned the note before maturity, for a valuable consideration, to Cape Manufacturing Company, another corporation, which in turn assigned it, for a valuable consideration, to appellee. Each of the three corporations are domiciled at Cape Girardeau, Missouri, and J. H. Himmelberger is one of the directors in each of them.

The note was executed for the purchase price of a threshing machine, and the defense tendered by appellant in the trial below is that the consideration for the note had failed in that the machine was unfit for the use for which it was sold. It is also alleged that the Freeze Threshing Machine Company was aware of the defective condition of the machine, and that the Cape Manufacturing Company, as well as appellee, had knowledge of appellant's defenses to a suit on the note, and that neither of those parties were innocent holders of the note for valuable consideration. There was a trial of the issues before the court sitting as a jury, and the court found in favor of appellee and rendered judgment in its favor for the amount of the note.

(1) In testing the correctness of the court's finding we must accept the evidence in its aspect most favorable to appellee.

(2) According to the testimony, Cape Manufacturing Company and appellee had no actual knowledge of the alleged grounds for the defense to the note and purchased the same for a valuable consideration. It must also be treated as settled by the finding of the trial court that Himmelberger, who was director in each of the corporations, had no actual knowledge of any such infirmity in

the note, and the only contention on the part of counsel for appellant is that, on account of Himmelberger's position as director in each of the corporations, knowledge of the Freeze Threshing Machine Company was imputable to him, and that each of the other two corporations in which he was a director was chargeable with such imputed knowledge. This contention of counsel is untenable. We pass over the question whether or not the knowledge of the Freeze Threshing Machine Company is imputable to Himmelberger as director therein, and rest the decision of this case entirely on the proposition that the knowledge of Himmelberger, acting for himself or in the interest of the first named corporation, was not imputable to the other corporations which subsequently purchased the note. This court is committed to the doctrine that the knowledge of an officer of a corporation which comes to him through his private transactions outside of the range of his official duties is not imputable to the corporation itself so as to charge the corporation with constructive notice of the information received by the officer. *Home Insurance Co.* v. *North Little Rock Ice & Electric Co.,* 86 Ark. 538; *Bank of Hartford* v. *McDonald,* 107 Ark. 232. This seems to be in accord with the weight of authority on the subject. 10 Cyc. 1065; 7 R. C. L., § 656.

There being no proof showing that appellee was not an innocent purchaser of the note, the judgment of the circuit court in its favor was correct.

Affirmed.

KENNEDY v. BURNS.

Opinion delivered November 3, 1919.

1. TAX DEED—INDEFINITE DESCRIPTION—COLOR OF TITLE.—Where the description in a tax deed is too indefinite to identify the property, the deed does not constitute color of title to support a plea under the two years statute of limitations.

2. LIMITATIONS—RIGHT OF HEIRS ACCRUES, WHEN—DOWER.—The right of the heirs does not accrue until after the death of the widow to whom the land was assigned as dower, and limitations does not begin to run against them until their right accrues.

3. CONFIRMATION OF TITLE—PRIMA FACIE TITLE.—Kirby's Digest, sections 656 *et seq.*, only authorize a decree of confirmation on *prima facie* title where the proceedings are not controverted.

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

Jas. H. McCollum, for appellants.

1. The tax deed did not carry the title; the description is too indefinite. 50 Ark. 484; 56 *Id.* 172; 99 *Id.* 460; 69 *Id.* 357.

2. Appellants are not barred. 126 Ark. 1. The doctrine of *laches* does not apply. The transfer to chancery was done without objection and deprived appellants of no rights. 26 Ark. 59; 51 *Id.* 259; 60 Ark. 70.

3. Appellee is not entitled to recover for improvements, as neither Dougherty nor Burns was a *bona fide* occupant. It was the duty of the life tenant to pay the taxes. 33 Ark. 267; 42 *Id.* 215; 44 *Id.* 504; 98 *Id.* 320; 133 *Id.* 441.

The confirmation statute of 1899 does not apply here.

Graves & McFadden, for appellee.

Defendant has been in possession and paid taxes under color of title for more than 20 years, and appellants are barred by limitation and *laches.* Kirby's Digest, § § 656 etc., 649-660-657; 83 Ark. 154.

McCULLOCH, C. J. Appellants instituted this action against appellee in the circuit court of Hempstead County to recover possession of a tract of land containing 106 acres in that county, title to which is asserted by inheritance from their ancestor, W. H. Kennedy, who died on September 7, 1857, the owner of that tract and other lands in Hempstead County. W. H. Kennedy left surviving his widow, Martha E., to whom the tract of land in controversy was duly assigned as her dower. The widow subsequently removed to the State of Georgia

and intermarried with one Rickerson, and died on November 22, 1914, and this action was instituted March 31, 1917. In the year 1874 Martha E. Rickerson sold and conveyed her assigned dower interest to one Huckabee. The land was returned delinquent for nonpayment of taxes for the year 1879, and pursuant to the act of March 14, 1879 (Acts of 1879, page 69), providing in substance that lands returned delinquent and remaining unredeemed by the owner for a period of one year should, by the county clerk, be conveyed to any other person who pays the taxes, penalty and cost, the clerk of Hempstead County on June 6, 1882, conveyed this tract to J. D. Jones and W. A. Jett, who subsequently sold and conveyed it to T. J. Daugherty, who in turn sold and conveyed it to appellee W. H. Burns. In the clerk's tax deed to Jones and Jett the land is described as "part of the southeast quarter of section eight (8), township 14 south, in range twenty-four (24) west, containing 106.75 acres, more or less." Daugherty took actual possession of the land under his purchase from Jones and Jett and occupied it until the conveyance to appellee, and the latter actually occupied the land continuously up to the commencement of this action, paying taxes thereon and making valuable improvements.

Appellee pleaded the two-year statute of limitations (Kirby's Digest, § 5061), as an occupant of the land under the tax deed to Jones and Jett, and also pleaded the general statute of limitation of seven years. Appellee also pleaded the payment of taxes and the making of valuable improvements on the land and claimed reimbursement therefor under the betterment statute. After the answer of appellee was filed, appellants filed a motion for transfer to the chancery court for the purpose of having an accounting between them and appellee of rents and profits of the land and the amount of taxes paid by appellee and Daugherty and the value of the improvements. The cause was transferred to the chancery court without objection and proceeded to a final hearing, which resulted in a decree dismissing the complaint of appellants for want of equity.

(1-2) The right of action of appellants was not barred by adverse possession, under either of the statutes pleaded. The description of the land in the tax deed was too indefinite to identify it, and the deed for that reason does not constitute color of title in support of the plea under the two-year statute of limitations. *Hershey* v. *Thompson,* 50 Ark. 484; *Schattler* v. *Cassinelli,* 56 Ark. 172; *Dickerson* v. *Arkansas City Improvement Co.,* 77 Ark. 570; *Woodall* v. *Edwards,* 83 Ark. 334; *Halliburton* v. *Brinkley,* 135 Ark. 592. Appellants' right of action did not accrue until the expiration, upon the death of the widow, of the life estate under the assignment of dower, and the statute of limitations did not begin to run against them until the right of action accrued. *Hayden* v. *Hill,* 128 Ark. 342. This action was instituted within seven years after the expiration of the estate of the life tenant and it is not barred by the statute of limitations.

(3) Counsel for appellee defend the decree on the ground that the occupancy of the land by appellee and Daugherty, and the payment of taxes, constituted a *prima facie* right and title to the land which was sufficient to authorize the confirmation of his title by a chancery court under the statute providing for confirmation of titles (Kirby's Digest, § 656, *et seq.*), and that the chancery court could have confirmed his title notwithstanding there was no bar of the statute of limitations against appellants by reason of the fact that the right of action did not accrue until the death of the life tenant. In other words, the contention is that under the statute authorizing confirmation there may be a decree against remaindermen where *prima facie* title is proved by occupancy and payment of taxes for the statutory period of limitations. Such is not the effect of the statute, which only authorizes a decree of confirmation on *prima facie* title where the proceedings are not controverted.

We are of the opinion, therefore, that the chancery court erred in dismissing the complaint of appellants for want of equity. Under the undisputed evidence in the case, the decree should have been in favor of appellants for recovery of possession of the land.

The chancellor did not make any findings on the question of the right of appellee to reimbursement for taxes paid and for the value of improvements, hence we do not pass on any of those questions now.

The decree is reversed and the cause remanded with directions to enter a decree in favor of appellants for recovery of the land in controversy, and to proceed to a determination of the rights of the parties concerning the recovery of rents and profits by appellants, and the recovery by appellee for reimbursement for taxes and improvements.

DRURY v. ARMOUR & COMPANY.

Opinion delivered November 3, 1919.

1. SALES—DAMAGE TO CONSUMER—PURCHASE THROUGH INTERMEDIARY—CAVEAT EMPTOR.—In the sale of provisions by one dealer to another in the course of general commercial transactions, the maxim *caveat emptor* applies, and there is no implied warranty or representation of quality or fitness.
2. SALES — MANUFACTURER, TO DEALER TO CONSUMER — DAMAGES TO CONSUMER.—Where a manufacturer sold sausages to a dealer who sold the same to plaintiff, and plaintiff's wife died as a result of eating said sausages, plaintiff can not maintain an action against the manufacturer on a warranty of wholesomeness of the sausages and for a breach thereof.
3. SAME—SAME—SAME—NEGLIGENCE IN PREPARATION.—But there is a cause of action in favor of the ultimate consumer against the manufacturer upon allegations and proof of negligence in the preparation of the sausages or other foods.
4. NEGLIGENCE—SALE OF FOOD—PTOMAINE POISONING AND DEATH.—Appellant purchased bologna sausage from a retail dealer who had purchased same from appellee, the manufacturer. Through the evidence was not certain, it appeared that appellant's wife ate some of the sausage, was shortly thereafter stricken with ptomaine poisoning, and died. In an action against the manufacturer by appellant, there was sufficient evidence to warrant a submission to the jury of the question of negligence in the manufacture of the sausage.

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

Brundidge & Neelly and *J. J. McKay,* for appellant.

1. The court erred in compelling plaintiff to elect, as plaintiff had the right of action on both causes or either of them.

2. Plaintiff's testimony makes a full and complete cause of action for negligence on part of defendant company in the preparation or inspection of its food products. 76 Ark. 352; 114 *Id.* 145.

3. It was error to take the case from the jury, as negligence was proved. 200 Fed. 322; 247 *Id.* 921; 96 Mich. 245; 55 N. W. 812; 21 L. R. A. 139; 93 Kan. 334; 144 Pac. 334; L. R. A. 1915 C. 179; 120 Fed. 865-870; 57 Am. Dec. 455; 135 Mich. 57; 97 N. W. 152; 63 L. R. A. 743; 106 Am. St. 384; 19 L. R. A. (N. S.) 923; 57 Ark. 435; 86 *Id.* 81; 20 R. C. L. 590. *Res ipsa loquitur. Ib.* 590 (b); Ann. Cases 1916 C. 122; 57 Am. Dec. 455; 83 Ga. 457; 10 S. E. 118; 20 Am. St. 324; 5 L. R. A. 612; 33 Wash. 87; 73 Pac. 797; 99 Am. St. 932; 229 Fed. 230; 19 L. R. A. (N. S.) 923. The evidence presented a case for a jury. *Supra.*

Cul L. Pearce and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

1. Defendant's motion to require plaintiff to elect was properly sustained. 124 Ark. 206; 69 *Id.* 209; 58 *Id.* 140; 32 Harvard Law Rev. 71.

2. There was no privity of contract and a suit on an implied warranty would not lie. 207 S. W. 62; 76 Ark. 352-355.

3. No negligence being shown, a peremptory instruction was correct. 76 Ark. 352; 139 Wis. 357; 23 L. R. A. N. S.) 876; 120 Fed. 865; 61 L. R. A. 303; 114 Ark. 140; 207 S. W. 58-63; 247 Fed. 921-931; 105 Atl. 55.

4. There was no evidence of negligence to warrant a recovery and no case for a jury. *Supra.* 11 Ark. 212, 235-6; 1 Thompson on Negl., § 403; 108 Pac. 101; 200 U. S. 484; 2 Chamberlayne on Mod. Law of Ev., § 1029. See also 47 N. E. 971; 88 *Id.* 71-73.

5. The doctrine of *res ipsa loquitur* has no place here. 8 Enc. of Ev. 872, 874; 89 Ark. 581-588; 75 *Id.* 491; 121 *Id.* 351-6; 4 Wigmore on Ev., § 2509 (3); 29 Cyc. 591-2; Wigmore on Ev., § 2509; 1 Thomps. on Neg., § 15; 6 *Id.* 7635-6; 59 Atl. 923; 70 S. W. 376; 84 S. E. 893-5; 106 N. E. 367; 114 S. W. 658; 64 S. E. 93-97-8; 127 S. W. 397; 98 N. E. 975; 66 S. E. 135; 119 Fed. 572; 112 N. E. 1025; 61 S. E. 745; 92 Pac. 40; 81 N. W. 397; 84 *Id.* 860; 166 Fed. 651; 102 N. W. 258-260; 114 Ark. 140; 100 N. E. 1978, etc.

McCULLOCH, C. J. Minnie Drury, the wife of appellant, died on March 23, 1918, and appellant instituted this action against appellee to recover damages accruing by reason of the death of his wife, which is alleged to have resulted from eating poisoned sausage prepared and sold by appellee. It is alleged in the complaint that appellee prepared the sausage for sale by retail dealers for immediate consumption, and that appellee "maintains a place of business in Helena, Arkansas, and other towns in said State, representing and holding out to the general public that its goods are wholesome, pure and fit for food." It is further alleged in the complaint that appellee "was guilty of negligence in manufacturing and preparing said sausage so purchased in that the same contained a nauseating poisonous substance." Appellant sues in his own right for damages sustained by him on account of the death of his wife, and also sues as administrator of his wife's estate.

Appellee filed a motion to require plaintiff to elect whether he would prosecute the action upon the alleged breach of implied warranty or on the allegation of negligence in the preparation of the sausage. The court sustained the motion, over appellant's objection, and he thereupon elected to try the case on the allegation of negligence contained in the complaint. Appellee answered, denying that it was guilty of negligence in preparing the sausage and denied that the sausage contained any poisonous substance, or that Minnie Drury was made

sick or died from eating the sausage. The case proceeded to trial before a jury, but at the conclusion of appellant's introduction of testimony the court gave a peremptory instruction in favor of appellee, and judgment was rendered accordingly in appellee's favor.

(1-2) It is contended, in the first place, that the court erred in requiring appellant to make an election as to the cause of action in the complaint he would stand upon. It is argued that notwithstanding the fact set forth in the complaint that the sausage was not purchased by the consumer directly from appellee, but through an intermediate retail dealer, there was a warranty of the wholesomeness of the food product, and that plaintiff could maintain an action for the damages resulting from a breach of the warranty. This question is decided against appellant's contention in the case of *Nelson* v. *Armour Packing Co.,* 76 Ark. 352, where Judge BATTLE, speaking for the court, said: "In the sale of provisions by one dealer to another in the course of general commercial transactions, the maxim *caveat emptor* applies, and there is no implied warranty or representation of quality or fitness." Liability was denied in that case on the ground that "there was no privity of contract between appellant and appellee, and no warranty passed with the property from appellee to appellant through his vendor." The doctrine of that case has been aproved by this court in *Colyar* v. *Little Rock Bottling Works,* 114 Ark. 140, and *Heinemann* v. *Barfield,* 136 Ark. 500. We adhere to the doctrine now and treat the question as settled.

(3) The complaint in the case of *Nelson* v. *Armour Packing Company, supra,* contained an allegation of negligence, but the subject was not treated in the opinion, which dealt solely with the question of the plaintiff's right of action on a breach of implied contract of warranty. In the later cases, cited above, we held that there is a right of action in favor of the ultimate consumer under such circumstances against the manufacturer upon allegations and proof of negligence in the preparation of foods, this being upon the theory that where food prod-

ucts are prepared by a manufacturer for sale to retail dealers for consumption by the ultimate purchaser, it is to be reasonably anticipated that injury will result to the consumer from the use of the unwholesome food thus placed on the market. Many of the cases cited on the brief of counsel for appellant sustain that view. *Salmon* v. *Libby,* 219 Ill. 421; *Park* v. *Yost Pie Co.,* 93 Kan. 334; *Tomlinson* v. *Armour & Co.,* 75 N. J. L. 748; 19 L. R. A. (N. S.), 923; *Craft* v. *Parker,* 96 Mich. 245; *Haley* v. *Swift,* 102 Wis. 570; *Wilson* v. *Ferguson,* 214 Mass. 265, 101 N. E. 381. The court did not err in requiring the election.

(4) The remaining question for our consideration is whether or not there was evidence legally sufficient to go to the jury as to the cause of Mrs. Drury's sickness and death, and on the charge of negligence against appellee in preparing the sausage and putting it on the market for purchase by consumers. Appellee maintained a place of business at Helena, Arkansas, for distribution of its food products throughout the adjacent commercial territory, and the sausage alleged to have been eaten by Mrs. Drury came from that place of business maintained by appellee, who sold it to C. M. Parham, a retail merchant at Bald Knob, Arkansas, who in turn sold it to appellant for family consumption.

Appellant resided with his family at a lumber camp a few miles distant from Bald Knob and on Saturday, March 23, 1918, he purchased from Parham several articles of food, including two sticks of bologna sausage, each weighing about four and one-half pounds. The purchase was made for appellant by Mr. Bridgeman, one of his neighbors, who returned from Bald Knob with the purchased foodstuffs about 8 o'clock on the evening of the day mentioned. When the bill of goods was being purchased from Parham, Bridgeman called for the sausage and was informed by Parham that he had none in stock, but that there was a consignment due, which was perhaps then at the railroad station, and he sent down to the station and the box containing the sausage was

brought to the store and opened in Bridgeman's presence. The box contained four sticks of equal size and weight, two of which were, as before stated, sold to Bridgeman for appellant.

When Bridgeman delivered the goods to appellant, the latter's family had eaten the evening meal about 6 o'clock, which, according to the testimony, consisted of fried potatoes, rice, bread, coffee, mince pie and home-grown strawberries and apple butter. Appellant and his wife had two children, the oldest about seven years old, and the whole family partook of all of the above mentioned articles at the evening meal. Mrs. Drury became ill about 10:30 o'clock that night and began vomiting about 1 o'clock and continued ill until the following Sunday, when she died. She was treated by a physician during her illness and the physican testified as a witness in the case.

There is no direct testimony that Mrs. Drury ate any of the sausage, but there are circumstances relied on by appellant as sufficient to establish that fact. There was no one in the house that night except appellant and his family, and he testified that the next morning when he went out to prepare breakfast for himself and children he found that one of the sticks of sausage had been cut through and a portion of the meat had been used, and he also testified that after his wife began vomiting he examined the discharge in the bucket in which she vomited and saw particles which he identified as undigested bits of the sausage. He testified that he cooked some of the sausage for breakfast the next morning which was eaten by himself and children and also for dinner, and that none of them became sick. He testified that when he began the preparation of the meal the next day he cut some of the sausage from one of the severed parts of the stick found in the kitchen, and when he cut into it he discovered "a green, slimy piece about as big as your thumb," which was wet and soggy, and that there was a bad odor from it.

The physician who attended Mrs. Drury testified that her illness resulted from ptomaine poisoning. Other physicians testified as experts, and their testimony tended to show that Mrs. Drury's illness and death was caused by ptomaine poisoning.

It is earnestly and very forcefully argued by counsel for appellee that the proof falls short of establishing either the fact that Mrs. Drury ate the sausage and was poisoned on account of it, or that appellee was guilty of negligence in the preparation and handling of the sausage, but we are of the opinion that the testimony, when analyzed and given its strongest probative force, is sufficient to warrant a submission of the issues to the jury. It is argued that, notwithstanding appellant's testimony that he discovered bits of the sausage in the vomit discharged by his wife from her stomach, this could not be true for the reason that sausage being made of ground meat, it could not be identified in a mass of other matter which came from the stomach. This is indeed a strong argument against the truth of appellant's testimony, but it can not be said as a matter of law that the testimony is irreconcilably in conflict with the physical fact, and must be wholly disregarded as untrue. It may seem improbable that there was an identification of the bits of sausage in the vomit, and yet it might be true; at least, it can not be said that the witness stated an impossibility.

The testimony warrants a conclusion that the sausage was eaten, if at all, at least two hours after any other food was taken into the stomach, and, while we know that sausage is made of ground meat, it is compressed into a compact mass, and when it has not been properly masticated and remains undigested in the stomach, it might be identified. At least, we can not say that it is absolutely impossible to identify it under those circumstances. There are other circumstances tending to show that Mrs. Drury ate some of the sausage that night.

It was according to the testimony, eaten by some one, and there was no one else in the house to get it except appellant and one of the small children. The testimony of

appellant also was sufficient to warrant a finding that the sausage contained a poison and the testimony of the attending physician and other experts tended to establish the fact that this caused Mrs. Drury's sickness and death. Ptomaine is a putrefactive alkaloid generally found in the form of malignant poison in canned meats or fish, and sometimes found in less harmful form in preserved vegetable matter. The testimony of the experts is to the effect that the poison in preserved meats results either from the diseased condition of the slaughtered animal caused by the bacteria in the live animal or resulting from the improper preparation or handling of the meat. One of the witnesses, Doctor Pace, states in his testimony that the diseased condition of the animal which caused putrefaction could be detected by proper inspection, and that the bacteria which produced the alkaloid could not get into preserved meat if properly prepared and handled.

We think the testimony as a whole is sufficient to warrant a submission of the question of negligence to the jury. This is not building a presumption or an inference of fact upon a presumption, but the circumstances are such as fairly warrant the inference that Mrs. Drury ate the sausage, that the sausage contained a poison, and that it caused her sickness and death, and that appellee was negligent either in failing to discover the disease which produced the poisonous alkaloid or in failing to properly prepare or handle the meat, thereby causing it to become a poisonous substance.

The proof practically excluded any idea of the meat becoming contaminated after it left the possession of appellee. It was received by the local dealer from the public carrier and taken from the original package on the day it was eaten by Mrs. Drury, and then contained a poisonous substance.

These facts are established, not by positive testimony, but by proof of circumstances which fairly and reasonably warrant this inference. These facts then being established by circumstantial proof and not merely by in-

dulging presumptions, a state of facts is established which warrants a further inference that appellee was negligent either in failing to discover the diseased condition of the slaughtered animal from which the meat was taken or in failing to properly prepare the meat and handle it. In other words, we have presented a chain of circumstances which show that Mrs. Drury's illness was caused from eating sausage; that the sausage remained in the control of appellee up to a short space of time before it was consumed by Mrs. Drury, the proof excluding any probability of it having become contaminated after it left the hands of appellee, and that the presence of the poisonous substance in the sausage could not have occurred in the ordinary course of things if appellee had exercised proper care in its preparation.

Appellee's method of slaughtering animals and preparing and packing meat for distribution and sale were matters entirely within the knowledge of its own employees, and the circumstances proved in this case were at least sufficient to make a *prima facie* case and shift to appellee the burden of proving that there was no negligence in this respect. It is not a case where the thing speaks for itself so as to create a presumption of negligence, but there are circumstances which warrant such an inference and casts upon appellee the burden of clearing itself of the charge by showing that ordinary care was observed in the preparation and distribution of the food, the consumption of which caused the injury complained of. *Southwestern Tel. & Tel. Co.* v. *Bruce,* 89 Ark. 581; *Commonwealth Public Service Co.* v. *Lindsay,* 139 Ark. 283; *Chiles* v. *Fort Smith Commission Co.,* 139 Ark. 489.

Our conclusion, therefore, is that the court erred in taking the case from the jury, and the judgment is reversed and the cause remanded for a new trial.

HART, J. I dissent from that part of the opinion which holds that there is no privity of contract between the manufacturer of canned goods and of those put up in

sealed packages, and the ultimate consumer. Canned goods and sealed packages prepared by the manufacturer for use of the consumer are in such common and universal use at the present time that we may judicially know that the contents are sealed up not to be opened until they are used and they are not then susceptible to any practical test except the one of eating. When the manufacturer puts such goods upon the market for sale and consumption, he in effect represents to each purchaser that the contents of the can or sealed package are sound and fit for food. Under these circumstances there is no room for the fundamental condition upon which the common law doctrine of *caveat emptor* is based; for the buyer has no opportunity to look out for himself. It is obvious that in cases of this kind the retailer is generally free from fault, and sound public policy, with due regard to the public good, demands that when an article of food or medicine is prepared by a manufacturer in sealed packages and thrown into the current of trade on the faith of the public that it is what the manufacturer represents it to be, there is an implied warranty that it is sound and fit for the purpose sold and that this covenant runs with the property through any number of hands and inures to the benefit of the ultimate consumer. It is true this rule is opposed to one laid down in *Nelson* v. *Armour Packing Co.*, 76 Ark. 352, but a careful consideration of that opinion leads one to the conclusion that it is unsound and the rule laid down is wholly unsuited to the conditions existing at the present time. There is no rule of property in that case, and no reason exists why it should not be overruled if unsound. The opinion itself shows that the line of cases directly in point on the subject were not considered.

I also think the opinion is cloudy upon what is necessary for the plaintiff to prove in an action for negligence in such cases. The Federal Act of June 30, 1906, prohibits interstate shipments of adulterated foods or drugs and makes a violation of the act a misdemeanor.

One section of the act defines adulteration in the case of meats as consisting "in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter."

The Federal Act of March 4, 1907, provides that any person who shall "sell or offer for sale or transportation for interstate or foreign commerce any meat or meat food products which are diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human food, knowing that such meat food products are intended for human consumption, he shall be guilty of a misdemeanor."

This statute was passed for the protection or benefit of the ultimate consumer and the manufacturer is liable to him for damages resulting from his failure to comply with the statute. Therefore, a *prima facie* case is made out for the plaintiff by proof that the meat was sold in the original package, was diseased, and caused the death of plaintiff's wife.

Justice HUMPHREYS concurs.

PREWITT v. LADD.

Opinion delivered November 3, 1919.

1. ROADS AND ROAD DISTRICTS—PROVISION FOR MAINTENANCE.—A public road may be maintained and the expense thereof paid for by local assessments, and so an assessment may be levied for the repairs and maintenance of public roads.
2. SAME—SAME.—Section 7 of act 69 of 1919, providing for the maintenance of a road already constructed, *held* valid.

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

E. W. Brockman, for appellant.

The act is unconstitutional and void because it undertakes to fix the benefits to accrue from the contemplated maintenance of the road at a per cent. of the as-

sessments fixed by the assessors and because it neither definitely fixed the benefits nor left the commissioners free to do so. The section 7 is vague and indefinite. The Legislature exceeded its powers in the act.

Danaher & Danaher, for appellee.

The act is constitutional and the Legislature had the right to determine the benefits would be proportionate. 96 Ark. 410. The decree is correct and should be affirmed.

HART, J. P. H. Prewitt brought this suit in equity against E. P. Ladd, T. S. Lovett and H. D. Palmer, commissioners of Maintenance District No. 1 of Lincoln County, Arkansas, to enjoin them from assessing benefits on his lands under an act passed by the Legislature of 1919 for the maintenance of a public road in Lincoln County, Arkansas, on the ground that the act is unconstitutional. The plaintiff is the owner of lands within the district and alleges that, unless restrained from doing so, defendants will proceed to make assessments which will become liens upon his lands and proceed to collect the same.

The court sustained a demurrer to the complaint and, the plaintiff declining to plead further, his complaint was dismissed for want of equity. The plaintiff has appealed.

The act complained of is No. 69, and was passed at the regular session of 1919. An improvement district had been originally formed to build a road, and after the road had been constructed the act in question was passed for the purpose of maintaining it. The section which it is claimed is unconstitutional is section 7, and reads as follows: "At their first meeting after the passage of this act, the commissioners shall determine what repairs will be necessary to the roads, culverts and bridges constructed or improved by the original district to put them in a good state of repair, and shall make plans for the making of such repairs, subject to the approval of the county court; and, when said plans have been made, the commissioners

shall ascertain the benefits that will be derived by the several tracts of land in the district from the making of said repairs and shall equalize the same by fixing such a per cent of the original assessment of benefits as will represent the benefits that will be realized by the lands of the district from the making of said repairs, and shall enter in a book, which they shall provide for this purpose, the assessment of benefits against the several tracts of land in the district which will be realized from the carrying out of their plans to place the roads, culverts and bridges in a good state of repair, and they shall provide that said assessment of benefits shall be paid in such annual installments as they shall designate. The provisions of this section shall apply to the first repairs made by said district after the passage of this act."

(1) We do not think the section in question renders the act unconstitutional. This court has held in several cases that the same land may be included in several improvement districts. *Harrison* v. *Abington, ante,* p. 115, and cases cited. In accordance with the principles laid down in these cases, a public road may be maintained and the expense thereof paid for by local assessments, and so an assessment may be levied for the repair and maintenance of public roads. Assessments for local improvements are justified upon the theory that the lands upon which they are laid are especially benefited by such improvements and for that reason ought to bear the burden rather than property generally. The theory is that the property subject to the special assessments will be enhanced in value by such improvements to the extent of the benefit imposed. A separate improvement district has already been organized for the purpose of constructing the road in question in this case and an assessment of benefits has been made thereunder. There is no allegation in the complaint that the assessment of benefits so made is arbitrary, unreasonable or oppressive.

(2) In the case at bar another improvement district was organized for the purpose of maintaing a public road which had already been constructed under a separate im-

provement district. The law-makers recognizing that it would not cost as much to maintain the road as it did to construct it in the first instance, and that the benefits to be derived from the maintenance of the road would be in proportion to the benefits which accrued to the lands in building the road, enacted the section under consideration. The plain meaning of the section, when read from its four corners, is that each tract will be benefited by the maintenance proportionately to the benefits derived from the construction of the road in the first instance. This was a valid exercise of legislative power. See *Shibley* v. *Fort Smith & Van Buren Dist.*, 96 Ark. 410, and *Alcorn, Collector,* v. *Bliss-Cook Oak Co.*, 133 Ark. 118.

The decree will therefore be affirmed.

SIMS v. BEST.

Opinion delivered November 3, 1919.

1. CONTRACTS—WRITING—CONSIDERATION—ORAL PROOF.—Where the consideration clause in a contract is itself a part of the contract, and not merely a receipt, oral evidence to vary or contradict the writing is inadmissible.
2. SPECIFIC PERFORMANCE—CONTRACT OF SALE—WRITING—ORAL TESTIMONY.—Where a contract for the sale of land was in writing definitely specifying the purchase price, and the manner of payment, oral evidence that there was a further consideration provided for by an oral agreement is inadmissible.
3. SPECIFIC PERFORMANCE — DECREED, WHEN — DISCRETION.—Specific performance of a contract to sell land will be decreed where the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party. While the chancellor has a discretion to enforce a contract specifically, under the above facts it is his duty to so enforce it.
4. SPECIFIC PERFORMANCE—LAND UNDER MORTGAGE—MORTGAGEE'S CONSENT.—The owner of land, which was subject to a mortgage held by C. Co. agreed to sell the same to B. C. Co. did not assent to the mortgage, but the managing officer of C. Co. testifying said that the company would assent if the entire purchase price were paid it (C. Co.'s mortgage covering other lands also). *Held* this

amounted to a ratification of the transaction by C. Co., and that in B.'s suit against the owner for specific performance, the latter could not defend on the ground that the land was under mortgage.

5. SPECIFIC PERFORMANCE—SALE OF LANDS UNDER MORTGAGE—APPLICATION OF THE PURCHASE MONEY.—S. owned lands and mortgaged them to C. Co. for a large sum; he then sold a small tract to B. for a certain consideration without the consent of C. Co. B. then brought an action for specific performance, and C. Co. then consented to the sale on the condition that the whole consideration be paid to it, and applied on the mortgage, and, exercising his discretion, the chancellor decreed specific performance upon those terms. But B. had already paid to S. $1,500, but had not seen to it that that sum was applied on the mortgage. *Held*, that B. must pay the entire purchase price into the registry of the court, but that he have an action against S. for the $1,500 paid to him and not applied by S. on the mortgage.

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

A. B. Shafer and *L. C. Going*, for appellant.

Appellant in 1917 violated his contract deliberately and without cause, and the consideration for the sale was just as appellant contends it was, and appellee breached his contract; if not, appellee was not entitled to specific performance. 26 Cyc. 619; 47 Ark. 519; 1 S.W. 869; 4 Ark. 452; 23 *Id.* 704; 121 *Id.* 302; 18 Am. Rep. 84; 91 S. W. 183; 9 S. W. 500; 59 Atl. 648; 19 S. W. 527; 86 N. Y. 736. Appellee deliberately violated his contract and relieved appellant from all his obligations and the complaint should be dismissed.

Hughes & Hughes, for appellee.

1. The evidence does not sustain appellant in his contention. No contract was proved, or if it was it was oral and within the statute of frauds and besides was unilateral, and defendants' evidence was inadmissible. 1 Warvelle on Vendors (2 Ed.), § 114; 102 Ark. 326; 109 *Id.* 82; 124 *Id.* 73; *Ib.* 308; note to 25 L. R. A. (N. S.) 1194-1207; 83 Ark. 163; 14 Wall. 570.

2. On the cross-appeal Best is entitled to recover $6,500 and interest and entitled to specific performance.

STATEMENT OF FACTS.

Benjamin O. Best brought this suit in equity against Geo. W. Sims and Rena A. Sims, his wife, and the Wm. R. Compton Bond & Mortgage Company, for the specific performance of a contract of sale of 160 acres of land. The contract was between Best and Sims and the Bond & Mortgage Company was made a party to the suit because it had a mortgage on the land at the time the contract was executed. The defendant, Sims, denied that the plaintiff was entitled to a specific performance of the contract.

The Bond & Mortgage Company filed an answer in which it set up that it had a valid mortgage on the land at the time the contract between the parties was executed and that the contract was entered into without its consent.

The facts, as proved by the plaintiff, are substantially as follows:

Geo. W. Sims was a saw mill man and owned a large tract of timber land in Crittenden County, Arkansas. He owned and operated a saw mill there, and B. O. Best was his manager. On the 1st day of November, 1914, B. O. Best and G. W. Sims entered into a contract in writing for the sale of 160 acres of land which is as follows:

"Know all men by these presents, that I, G. W. Sims, of Shelby County, Tennessee, am held and firmly bound unto B. O. Best, of Crittenden County, State of Arkansas, in the penal sum of eight thousand dollars ($8,000); for that whereas the said B. O. Best has this day purchased from me a certain tract of land hereinafter described, and has contracted and agreed to pay the sum of eight thousand dollars ($8,000) by installments, and for this purpose has executed and delivered to me fifty-three promissory notes bearing even date with this bond and each for the sum of one hundred fifty ($150) dollars payable respectively on the 1st day of March, 1915, and each three months thereafter, with interest payable semi-annually.

"The said land so purchased and sold contains one hundred sixty acres (160a) more or less, situated and being in the County of Crittenden and State of Arkansas, viz.: (Here follows description of land.)

"Now, if I, the said G. W. Sims, should make or cause to be made to the said B. O. Best, his heirs or assigns, a good general warranty deed conveying title to said premises, with the usual covenants, upon payment of the several promissory notes aforesaid, with interest, then this obligation to be null and void, otherwise to remain in full force and virtue.

"In testimony whereof, I have hereunto subscribed my name this 1st day of December, 1914."

The contract was signed by the parties, and in pursuance of it Best went into possession of the land. He cleared and put into cultivation about 80 acres of the land and built three tenant houses on it. One house is worth about $350, another about $200 and the other about $100. Best paid the taxes on the land and the installments of purchase money as they matured, aggregating $1,500 and interest. He offered to pay the one that was due September 1, 1917. Sims refused to allow Best to pay this installment or any subsequent one on the ground that Best had quit his employment in violation of their contract. Best then offered to pay all that remained due on the land and tendered the same to Sims and the latter refused to accept the payments. Hence this lawsuit.

According to the testimony of the defendant, Sims, he was indebted to the William R. Compton Bond & Mortgage Company in a large sum and, to secure the same, gave it a mortgage on a large quantity of timber and cut-over lands owned by him, including the land in controversy. His only hope to pay the mortgage indebtedness was in the successful operation of his saw mill. His health became so bad that it required him to leave home for long periods of time, and, desiring that his mill should continue to be operated, he made a verbal contract with Best and his other employees that they were to stay with him and operate the mill for him until he should liquidate

his indebtedness with the Bond & Mortgage Company and in consideration therefor he would increase their monthly salaries and also enter into a written contract with them to sell to each of them 160 acres of land. The written contract above set out was then executed by Sims and Best in pursuance of the verbal agreement just stated. The testimony of Sims in regard to the verbal contract was corroborated by that of his stenographer and another employee. Best denied that any such verbal contract had been entered into and said that the written contract for the sale of the land was all the contract that was made between the parties. Other evidence will be stated or referred to in the opinion.

The court found the issues in favor of the plaintiff, and a decree for specific performance was accordingly entered, and the plaintiff was directed to pay into the registry of the court $8,000, being the entire amount of the purchase price of the land and the clerk was directed to pay this sum to the Wm. R. Compton Bond & Mortgage Company. The plaintiff complied with the directions of the court.

The defendants have appealed and the plaintiff has cross-appealed.

HART, J., (after stating the facts). The main reliance of counsel for the defendant for a reversal of the decree is, that a preponderance of the evidence shows that the real transaction between the parties was that Best should remain in the employment of Sims as manager of his saw mill until Sims paid his indebtedness to the Bond & Mortgage Company and that the written contract for the sale of the land was executed pursuant to that agreement; and that the agreement of Best to remain in the employment of Sims at his saw mill was a part of the consideration for the execution of the written contract for the sale of the lands. Their argument is based on the rule of permitting oral evidence to be introduced to show the true consideration of a deed or other written contract in opposition to that recited; or, where only part of the contract is reduced to writing, to prove

the portion which the parties have allowed to rest in parol.

An illustration of the first kind of case is *Magill Lumber Co.* v. *Lane-White Lumber Co.,* 90 Ark. 426, and an illustration of the second, is *St. Louis & North Arkansas Railroad Co.* v. *Crandell,* 75 Ark. 89. A clear statement (and one much referred to) explaining the rule of permitting oral evidence to be introduced to show the true consideration of a written instrument as well as the limitation of the rule, is given by Judge Robertson in *Gully* v. *Grubbs,* 1 J. J. Marsh. 387. A brief and correct condensed statement of his reasoning is given in the case of *Baum* v. *Lynn* (Miss.), 30 L. R. A. 441. It is as follows:

"Wherever, in a deed, the consideration, or an admission of its receipt, is stated merely as a fact, that part of the deed is viewed as a receipt would be, and the statement is subject to be varied, modified, and explained; but, if the stated consideration is in the nature of a contract—that is, if by it a right is vested, created, or extinguished—the terms of the contract thereby evidenced may not be varied by parol proof, but the writing is its own sole exponent."

In discussing the question in *Gully* v. *Grubbs, supra,* Judge Robertson, in part, said:

"Another principle, and one more universal than the former in its application, is, that wherever a right is vested, or created, or extinguished, by contract or otherwise, and writing is employed for that purpose, parol testimony is inadmissible, to alter or contradict the legal and common sense construction of the instrument. But that any writing, which neither by contract, the operation of law, nor otherwise vests or passes or extinguishes any right, but is only used as evidence of a fact, and not as evidence of a contract or right, may be susceptible of explanation by extrinsic circumstances or facts. Thus a will, a deed or a covenant in writing, so far as they transfer or are intended to be evidence of rights, can not be contradicted or opposed in their legal construction, by

facts '*aliunde.*' But receipts and other writings, which only acknowledge the existence of a simple fact, such as the payment of money for example, may be susceptible of explanation, and liable to contradiction by witnesses."

(1) In *Armstrong* v. *Union Trust Co.,* 113 Ark. 509, the court held that parol evidence is admissible for the purpose of showing what the real consideration is in a written contract; but it can not be introduced to show that there was no consideration, or to show a consideration that would have the effect to render the writing void. In other words, the rule is that where the consideration clause is itself a part of the contract and not merely a receipt, the general rule as to the inadmissibility of oral evidence to vary or contradict a written contract prevails. *Williams* v. *Chicago, Rock Island & Pacific Ry. Co.,* 109 Ark. 82; *Mott* v. *American Trust Co.,* 124 Ark. 73, and *Harris* v. *Trueblood,* 124 Ark. 308. The rule is illustrated in *Barnett* v. *Hughey,* 54 Ark. 195, which was an action upon a covenant of warranty in a deed. The court held that in such an action parol evidence is admissible to show that the actual consideration was greater or less than that expressed in the deed; but not to defeat the deed or a recovery on the covenants.

(2) In the application of the rule to the case at bar we do not think the oral testimony offered was admissible. The bond for title is a written contract complete in itself and the purchase price of the land is fixed in it at $8,000, evidenced by fifty-three promissory notes of even date with the bond for the sum of $150 each. The bond, in effect, provides that Sims should make a warranty deed to Best upon the payment of these promissory notes with interest. In other words, Sims covenanted with Best to make him a warranty deed upon the payment of the notes recited in the bond for title together with the accrued interest. To allow the oral testimony offered by Sims on the pretense that it had a bearing upon the consideration named in the bond for title would defeat its covenants.

Neither can it be said that the agreement offered in proof is collateral to the bond for title and for that rea-

son admissible under the doctrine that where the contract is oral and only a part of it is reduced to writing it is permissible to prove that part which the parties have allowed to rest in parol. The alleged parol agreement was made at the same time the bond for title was executed and was made between the same parties. The parties failed to incorporate it in their written agreement, or to make any reference whatever to it. The offered evidence had no purpose except to change the terms of the bond for title, and as such it was not admissible. The parties have reduced their contract to writing and the instrument is free from ambiguity or uncertainty. It would be dangerous to purchasers of land if parol evidence should be permitted to vary or contradict a writing complete in itself.

(3) Finally, it is insisted that the right to specific performance is not absolute, but is a matter of discretion with the chancellor. While this is true, the discretion is a sound judicial discretion, controlled by established principles of equity, and where the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach. Pomeroy's Eq. Jur. (3 Ed.), vol. 4, sec. 1404. Tested by these principles, we think the chancellor was right in decreeing the specific performance of the contract which is the basis of this lawsuit.

(4) Again, it is insisted that the court should not have granted the relief because the Bond & Mortgage Company had a valid mortgage on all the lands of the defendant, Sims, including the lands in controversy, and that a large sum of money was due and unpaid upon this mortgage. It was shown that the Bond & Mortgage Company did not give its assent to the execution of the contract sued on; but the managing officer of the corporation testified in the case and said that if Sims and Best would

join in asking the company to receive the whole $8,000 for which this land was sold, the company would consent to it. The court decreed a specific performance of the contract upon condition that Best should pay in the entire $8,000 of the purchase money into the registry of the court to be paid to the Bond & Mortgage Company, notwithstanding Best had already paid $1,500 of the purchase money to Sims. This was done by Best. Under the circumstances we think this amounted to a ratification of the transaction on the part of the Bond & Mortgage Company and that the company is no longer in an attitude to object to the contract being carried out. Certainly this action results in no prejudice to Sims and he cannot complain.

(5) On the cross-appeal but little need be said. Best was not entitled as against the Bond & Mortgage Company to recover the $1,500 which he had previously paid to Sims. He knew that the Bond & Mortgage Company had a mortgage on the lands and yet paid Sims $1,500 without seeing to its application toward the payment of the mortgage indebtedness. As we have already seen the granting of the relief of specific performance was a matter resting in the sound judicial discretion of the chancellor, and he properly imposed the condition that Best should pay the whole amount of the purchase money into court for the benefit of the Bond & Mortgage Company in order that its rights might not be prejudiced. As against Sims, Best was entitled to judgment for the $1,500 and accrued interest, and to this extent the decree is reversed and judgment entered here in favor of Best against Sims. In all other respects the decree will be affirmed.

WHIPPLE v. DRIVER.

Opinion delivered November 3, 1919.

1. CONTRACTS — IMPOSSIBILITY OF PERFORMANCE.—Impossibility of performance of a contract sufficient to excuse the non-performance upon the part of either party means an impossibility consisting on the nature of the thing to be done, and not in the inability of the party to do it, and it must be shown that the thing required under the contract can not be accomplished, and the burden of showing this is upon the defendant.
2. EVIDENCE—BREACH OF CONTRACT—ACTS OF DEFENDANT.—A lessor brought an action of unlawful detainer against his tenant. At the trial testimony was introduced showing a desire by the lessor to get rid of the lessee as a tenant, and *held*, testimony that the lessor had said that the lessee had improperly avoided military service, and should have gone into the army, was admissible, not as original testimony but by way of impeaching the lessor, and showing his interest and bias.

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

Sloan & Sloan, for appellant.

1. Under the undisputed evidence the lease was terminated by failure of the tenant to pay the overdue rent within the three days after the service of notice. Steel & McCampbell's Digest, Ark. Ter., p. 262, § 7; Rev. Stat. Ark. Ch. 63; 4 Ark. 147; Acts 1845, p. 103, amended by Act December 3, 1846, and January 19, 1855; Ark. Civil Code, 150-155; Act December 16, 1868, § 11, par. 11; 27 Ark. 460; Act March 27, 1871, pp. 343-348.

2. Non-payment of rent was not made basis of action until Mansfield's Digest, section 3348; Acts 1875. p. 196; Kirby & Castle's Dig., § 2, p. 6, § 3958; Kirby's Digest, § 3630; Sand. & Hill's Digest, § 444; 1 Wall. (U. S.) 274, 381, 17 Lawy. Ed., 536; 24 Cyc. 1427; 65 Ark. 521-530; 41 Cal. 360; 84 Ark. 320; 120 Am. St. 29, 51; 70 Ga. 284; 57 Ark. 301; 65 *Id.* 521; 47 S. W. 238; 53 *Id.* 567; 125 Ark. 108.

3. The court erred in refusing to give instructions "H" and "I" for plaintiff and in giving No. 5 for defendant. 78 Ark. 574-7; 24 Cyc. 1089; 134 Ark. 588; 99 *Id.* 193; 25 Ark. 168; 55 Ark. 360.

4. The court erred in giving No. 4 of its own motion and in refusing Nos. "C" and "D" for plaintiff. 7 Ark. 123-131; Aleyn 26.

5. Bad weather conditions do not constitute impossibility of performance. Clark on Cont. (2 Ed.), p. 472; 13 C. J. 639; 1 Elliott on Cont., § 1891; 27 N. J. L. 513, 519; 72 Am. Dec. 373; 222 Mass. 530; 111 N. E. 399; 107 Me. 279; 78 Atl. 288; 87 Ore. 576; 170 Pac. 530; 1 Q. B. D. 244.

6. If bad weather conditions constitute impossibility of performance the court erred in refusing "C" and "D" for plaintiff. 95 Cal. 353; 30 Pac. 555-6; 43 Ore. 429; 73 Pac. 329-337.

7. The court erred in admitting improper testimony of J. R. Jones.

Lamb & Frierson, for appellee.

1. The court did not err in refusing to give appellant's requests. 59 Ark. 405; 65 *Id.* 521.

2. The instruction given at the request of appellant embodies the entire controversy between the parties, and if error was invited error, and he can not complain. 93 Ark. 472-478; 74 *Id.* 72 (49); 80 *Id.* 376; 70 *Id.* 401 (406).

3. No error in refusing "H" and "I" nor in giving No. 5 for appellee.

4. The court did not err in giving No. 4 of its own motion nor in refusing "C" and "D" for appellant.

5. There was no error in the admission of testimony. The case was fairly tried upon the merits, and no errors appear.

SMITH, J. The parties to this litigation entered into a written contract whereby Whipple, the land owner, rented to Driver, the tenant, a certain farm for the annual rental of fifteen hundred dollars, payable on November 15 of each year, and expiring with the year 1920. The contract is a very lengthy one and imposed many conditions upon the tenant, after the enumeration of all of which the following clause was inserted:

"It is further agreed that the failure of the said second party (Driver) to keep any of the covenants and conditions on his behalf herein contained shall be ground for declaration by the said first party (Whipple) of the forfeiture and termination of this lease."

The contract also provided " * * * No subsequent offer or tender of the said rental money (after failure to pay at maturity) shall suffice to restore the right of the first party to insist upon the remainder of the term of this lease."

Whipple filed a complaint in unlawful detainer on January 11, 1919, in which he alleged a failure to pay the rent when due and other grounds of forfeiture on the part of Driver. There was a trial before a jury and a verdict and judgment in Driver's favor, and Whipple has appealed.

As grounds for the reversal of the judgment it is insisted:

1. That the lease was terminated through the failure of the tenant to pay the overdue rent within three days after service of the statutory notice to quit.

2. That error was committed in giving and in refusing to give instructions dealing with the duty to repair fences.

3. That error was committed in giving and in refusing to give instructions dealing with the question of the impossibility of the performance of the contract.

4. That improper testimony was admitted.

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

The rent was not paid when due and notice to quit was served on January 7, 1919, and the balance due on rent was not paid until January 11. An instruction was asked which told the jury to find for Whipple, if they found the facts so to be, but the court declined to give it. Concession is made by counsel for Driver that the instruction was proper and should have been given, but for the fact that there was testimony amply sufficient to support a finding by the jury that the payment of the

rent when due had been waived and the question of waiver was submitted under appropriate instructions.

There was testimony that the fences were in need of repair and that in April, 1918, Driver set some grass afire which resulted in burning a considerable portion of a certain rail fence, and that Driver took the rails which did not burn and repaired other fences, and used certain rotten rails for stove wood. Concerning the fences the lease provides: "It is further agreed that the said second party shall keep all fences around and about said lands in good repair."

Upon this subject instructions were asked to the effect that it was Driver's duty to repair and replace the fences whether the fire was caused by his negligence or not, and that if Driver had failed to repair any of the fences such failure constitutes ground for declaring the lease terminated. There was a conflict in the testimony as to the state of repair of the exterior fences, the testimony in Driver's behalf being to the effect that they were in good repair. The rail fence which burned enclosed a pasture which appears not to have been in use as such at the time of the fire and the fence was of no value to the place at the time of its destruction. Driver testified, however, that it was his intention to repair that fence, and there was testimony that by the custom of the country these repairs were made in the winter and early spring, and Driver testified that he intended when he finished gathering his crop to make these repairs in the customary way.

Having agreed to keep these fences in repair, it was Driver's duty to do so, and the fact that portions of them may have burned without fault on his part did not relieve him from the duty of keeping them in repair. *Bradley* v. *Holliman,* 134 Ark. 588. But we think the court properly refused the instructions asked for the reason that they did not take into account the customs of the country and the requirements of good husbandry as to the time within which these repairs should be made; and, as the contract did not specify the time within which repairs

should be made, and an instruction given by the court exonerated Driver from a failure to immediately repair in the event only that the destruction of the fence "did not impair the usefulness of the farm," we think no error was committed in the refusal to give the requested instructions.

Certain work had not been done within the time limited by the contract, and there was proof that certain arable land had not been cultivated, and other portions had not been properly cultivated in the manner required by the contract. In some respects these failures were admitted by Driver, but he sought to excuse his failure by showing that unfavorable weather conditions had made it impossible to cultivate all the land or to cultivate properly all of it put in cultivation.

Upon this subject the court gave the following instruction: "No. 4. The contract as entered into by and between the parties fixed their rights and liabilities, and each is required to perform it, unless performance of the contract be impossible. Impossibility of performance of a contract sufficient to excuse the non-performance upon the part of either party means an impossibility consisting in the nature of the thing to be done and not in the inability of the party to do it, and it must be shown that the thing required under the contract cannot be accomplished, and the burden of showing this is upon the defendant."

We think this is a fair and reasonably full statement of the law on the subject of the impossibility of the performance of a contract as applied to the facts of this case and that the court did not err in refusing the instructions asked by Whipple, which were to the effect that "It must be shown that the thing could not by any means be effected. Nothing short of this will excuse non-performance."

It is finally insisted that the court erred in admitting testimony to the effect that before the commission of the alleged breaches of the contract Whipple had said that Driver's claim of exemption from military service should

not have been allowed and that Driver should have been required to serve in the army. We do not agree that the admission of this testimony injected into the case the question whether Driver was a slacker as is contended by counsel for Whipple and involved a trial of that issue. It was contended on Driver's behalf that he had substantially complied with his contract and that Whipple had made captious and technical objections to the manner of its performance. It was shown that the rent Driver was required to pay was only five dollars per acre per annum and the rent of similar land had advanced to ten dollars per acre, and it was insisted that Whipple was endeavoring to find a method whereby he could get Driver off the farm. Whipple testified in his own behalf and proved to be a very material witness.

We think the testimony complained of would not have been admissible as original testimony, but that it was competent by way of impeachment of the testimony of Whipple as tending to show his bias and his interest. *McCain* v. *State,* 129 Ark. 75. Moreover, we do not think it so prejudicial as that the judgment must be reversed on account of its admission.

Finding no prejudicial error, the judgment is affirmed.

DOBBS v. HOLLAND.

Opinion delivered November 3, 1919.

1. EQUITY JURISDICTION—REISSUANCE OF COUNTY WARRANTS.—The chancery court has jurisdiction of a suit brought by a tax payer to restrain the county judge, clerk, and treasurer from reissuing county warrants for a purpose not authorized by law.
2. PROSECUTING ATTORNEY—COMPENSATION.—Act 1919, p. 248, is not invalid as creating a permanent office; the act merely provides a compensation for the prosecuting attorney, in lieu of fees, and provides for the payment of this compensation.
3. CONSTITUTIONAL LIMITATIONS—CONSTRUCTION OF DOUBTFUL STATUTES.—Any doubt about the constitutionality of a statute must be resolved in favor of its validity; and the language of a statute will be given a construction which makes it valid if it is reasonably susceptible of such construction.

4. PROSECUTING ATTORNEYS — FEES AND SALARY — CONSTITUTIONAL LIMITATIONS.—Act of 1919, p. 248, providing for the payment of fees normally payable to the prosecuting attorney to the county, and the payment to said attorney of a fixed sum, is not invalid under the Constitution of 1874, article 19, section 11.

Appeal from Sebastian Chancery Court, Greenwood District; *J. V. Bourland,* Chancellor; affirmed.

A. M. Dobbs, for appellant.

1. The court has jurisdiction because (1) plaintiff has no adequate remedy at law; (2) it will prevent multiplicity of suits, and (3) plaintiffs and defendants occupy the relation of *cestui que* trust and trustee, and equitable remedy is sought to prevent the wrongful use of trust funds. Kirby's Digest, § 1493; 4 Ark. 302; 8 *Id.* 57; 146 Fed. 8; 134 U. S. 338; 30 Ark. 109; art. 16, sec. 13, Const. 1874; 34 Ark. 603-7; 4 Pom. Eq. Jur. (4 Ed.), Ch. 18, § § 1762, 1778, 1767; 101 U. S. 601; 53 Ark. 37; 52 *Id.* 541.

2. The act is void because (1) it is a special law where a general law could be made applicable and suspends a general law for the benefit of a particular individual in violation of article 5, section 24, Constitution. (2) It creates a permanent State office in violation of the Constitution, article 16, section 9. 114 Ark. 212. (3) It usurps the original and exclusive jurisdiction of the county court in matters of county taxes and disbursements of county funds for county purposes in violation of article 7, section 28, and requires quorum courts to make appropriations for purposes other than county purposes in violation of article 7, section 20, Constitution. 11 Ark. 108; 85 *Id.* 89; 107 S. W. 1183; 114 Ark. 278; 169 S. W. 964; 188 *Id.* 82; 125 Ark. 350. (4) It requires the payment of money out of the treasury before an appropriation has been made in violation of article 16, section 12, Constitution. Kirby's Digest, § § 1499, 1503. (5) It arbitrarily fixes the salary and expenses of the prosecuting attorney for the Fort Smith and Greenwood districts, thus encroaching upon and usurping the duties of quo-

rum courts in violation of article 13, section 5, and article 4, sections 1 and 2 of the Constitution. (6) It increases the salary of the present prosecuting attorney during his term of office and above the maximum allowed by article 19, section 11, Constitution. 4 Pom. Eq. Jur. (4 Ed.), § 1339.

Earl U. Hardin, Edwin P. Hardin, Geo. W. Dodd and *Covington & Grant,* for appellees.

1. The contention of appellant that he has no adequate remedy at law and that chancery should interfere to prevent multiplicity of suits, etc., is without merit. 30 Ark. 109; 106 *Id.* 508.

2. No general law is superseded by a special act. 103 Ark. 529.

3. The Constitution does not prohibit the increase in salaries of prosecuting attorneys. Art. 19, § 11, Constitution; 85 Ark. 89.

4. All doubts should be resolved in favor of the act. 112 Ark. 346; 89 *Id.* 459; 60 *Id.* 343.

5. The act provides for deputies or assistants, which is not against our Constitution. 114 Ark. 212.

6. Our Constitution does not define the phrase, "county purposes." 18 So. 339-343; 36 Fla. 196; 33 Tenn. 637, 663; 62 Am. Dec. 424. The Legislature has carried out the object and purpose of our Constitution, and by this act counties are required to share their proportionate burden in this behalf, and the clause, "fees, costs, perquisites of office, or other compensation," is sufficiently broad to authorize the passage of this act.

SMITH, J. (1) This action was instituted by appellant as a taxpayer of Sebastian County, which is in the 12th Judicial Circuit, to enjoin the issuance and payment of warrants out of county funds to the prosecuting attorney for salary and expenses of his office under an act of the General Assembly approved March 22, 1919 (Acts 1919, p. 248), placing that officer on a salary and making certain allowances for the expense of his office and for the services of deputies. This suit questions the constitu-

tionality of that act. Several grounds of attack involve the questions which have been so frequently and for so long a time settled that we do not review them again. The question of the jurisdiction of the chancery court is raised, but that question may be considered settled by the opinion in the case of *Quinn* v. *Reed,* 130 Ark. 116, wherein it was held that the chancery court had jurisdiction of a suit brought by a taxpayer to restrain the county judge, clerk and treasurer from reissuing county warrants for a purpose not authorized by law.

(2) One objection made to the act is that it creates a permanent State office in violation of article 16, section 9, of the Constitution. This objection is met by the statement that the act does not create a new office, for the office of prosecuting attorney is created by the Constitution itself. The act merely provides a compensation for that officer in lieu of fees and provides for the payment of this compensation.

It is said the act is an infringement upon the jurisdiction of the county court, in that it undertakes to disburse county funds. In reply to this contention, it may be answered that a similar contention was disposed of in the case of *Cain* v. *Woodruff County,* 89 Ark. 456. There the constitutionality of an act fixing the fees for keeping county prisoners was questioned of being in conflict with section 28, article 7, of the Constitution, and the court said: "The fees and salaries that are paid by the respective counties to their respective officers are matters of local concern to the respective counties; and yet no one doubts that the Legislature has the power to fix the amount of those fees and salaries, and does. It is because the exercise of that power is not in conflict with the provision of the Constitution relied herein upon by appellee. And so, too, the provisions of Act No. 136 of the General Assembly of 1907 are not inhibited by that provision of the Constitution." Moreover, the money disbursed is that entitled by way of fees under the authority of an act itself, as we hereinafter decide.

The serious question in the case is whether the act is in conflict with section 11 of article 19 of the Constitu-

tion. It is there provided that the Governor and certain other State officers shall each receive a salary to be established by law which shall not be increased or diminished during their respective terms, "nor shall any of them, except the prosecuting attorneys after the adoption of this Constitution, receive to his own use any fees, costs, perquisites of office or other compensation; and all fees that may hereafter be payable by law for any service performed by any officer mentioned in this section, except prosecuting attorneys, shall be paid in advance into the State treasury. Provided, that the salaries of the respective officers herein mentioned shall never exceed per annum * * * ; for prosecuting attorney the sum of $400."

The act under review designates the compensation of the prosecuting attorney as salary and provides that the Greenwood District of Sebastian County shall pay $900 and the Fort Smith District shall pay the sum of $1,800 and that Scott County shall pay the sum of $300 as salary to the prosecuting attorney, and that said sums shall be in lieu of all fees allowed by law for his services. Certain allowances for expense are also made together with allowances for the services of deputies, which compensation is paid in the same manner and in lieu of fees. No change is made in the fees of the prosecuting attorney, but the act provides that these fees shall be paid into the treasury of the respective counties.

Section 7 of the act provides that the quorum courts shall annually appropriate the sums sufficient to cover the expenses provided for in the act, and that until a meeting is held by said quorum courts the respective county clerks shall issue upon vouchers approved by the respective county judges monthly warrants to cover the expense therein provided for and that at the first meeting of the quorum court an appropriation shall be made to cover such back warrants.

(3) It is familiar law that any doubt about the constitutionality of any statute must be resolved in favor of its validity and that the language of a statute will be given

a construction which makes it constitutional if it is reasonably susceptible to such construction.

We must assume, therefore, that the Legislature had it in mind that a maximum salary of $400 for prosecuting attorneys had been fixed in the Constitution and had enacted the act under review to conform thereto. It will be observed that this section 11 of article 19 does not fix the maximum compensation of prosecuting attorneys; upon the contrary, the exception is expressly made that prosecuting attorneys may receive to their own use any fees, costs, perquisites of office or other compensation which may be allowed by statute.

Now, no change is made in the fees of the prosecuting attorneys; they remain the same and are to be collected as they formerly were, but, instead of being paid to the prosecuting attorney, they are paid into the county treasury. The Legislature was no doubt advised what fees had formerly been collected by the prosecuting attorney in this judicial circuit, and no doubt assumed that those fees would hereafter equal the compensation fixed by the act, and we think it a fair construction of the act to say that the Legislature intended that the compensation fixed in the act should be paid out of the fees which the act provided should be collected and paid into the county treasury.

Section 23 of article 19 of the Constitution provides that no officer of this State, nor of any county, city or town shall receive, directly or indirectly, for salary, fees and perquisites more than $5,000 net profits per annum, and that all sums in excess of this amount shall be paid into the State, county or city treasury as shall be directed by appropriate legislation.

In the case of *Griffin* v. *Rhoton,* 85 Ark. 89, it was held that this section of the Constitution applied to prosecuting attorneys, but it was there also held that it was not self-executing and could become effective only after appropriate legistlation had been enacted for that purpose. Evidently the legislation under review was enacted for that purpose. Section 3 of the act provides, "That

in addition to the salary above mentioned said prosecuting attorney shall receive as a salary from the State the sum of $200 annually," this being the salary fixed by law for all other prosecuting attorneys and payable out of the State treasury. The act allows the prosecuting attorney of the 12th circuit the same salary which all other prosecuting attorneys receive; and, in lieu of all fees allowed by the act and collected under it, a compensation there specified, which does not exceed the maximum amount fixed by section 23 of article 19 of the Constitution.

It is true the act designates the compensation there fixed as salary, but that designation is not determinative of the fact that a salary has been fixed and we consider the act as a whole to determine its intent and meaning.

We conclude, therefore, that the salary of the prosecuting attorney has not been increased beyond the constitutional limitation but that a compensation has been fixed payable out of the fees which he earns, and that the act does not, therefore, offend against the Constitution.

McCULLOCH, C. J., (dissenting). I am unable to find language in the statute under consideration which justifies the construction that the salary fixed by the statute is to be out of fees collected and paid into the treasuries of the respective counties or that the payment by any of the counties of its allotted proportion of the prosecuting attorney's salary is not to be exceed the amount of such fees paid into the county treasury. Certainly the statute does not contain any words to that express effect. It reads that the fixed salary is payable in lieu of all fees—not out of the fees collected—which means that the salary is to be paid in the place of fees, and I think it necessarily follows from that language that the lawmakers meant to give the prosecuting attorney of the 12th Judicial Circuit the amount of salary fixed in the statute, regardless of the fees paid into the treasury. I do not feel at liberty to read into the statute a restriction which the language used does not imply. If it had been intended

to confine the salary to the amount of fees collected it could have very easily have been so expressed in appropriate words. On the contrary, the lawmakers have employed a term which negatives the idea that the salary is to be paid out of the fees collected, for they have expressed it, that the salary is to take the place of fees—to be in lieu of the fees. The fact that the statute makes no provisions for the disposition of the balance, if any, of the fees collected, after paying the salary of the prosecuting attorney and fixes no period within which the fees are to accumulate, shows that the framers of the statute did not contemplate that the salary should be paid out of the accumulation of fees, but that it should be paid regardless of the amount of the fees collected, and all of the fees, whether more or less than the salary, should go into the general revenues of the counties.

If the statute be construed as authorizing the payment of salary of the prosecuting attorney out of county revenues, regardless of the amount of fees collected and paid into the county treasury, then it is void for the reason that the prosecuting attorney is a State officer (*Griffin* v. *Rhoton,* 85 Ark. 89), and it is beyond the power of the Legislature to impose on a county the burden of paying the salary of a State officer. *Cotham* v. *Coffman,* 111 Ark. 108.

KING v. TUGGLES.

Opinion delivered November 3, 1919.

SCHOOLS AND SCHOOL DISTRICTS — ADDITION TO SCHOOLHOUSE — AUTHORITY OF DIRECTORS.—The directors of a school district may build an addition to the existing schoolhouse, without authorization from the annual school meeting.

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

Brundidge & Neelly, for appellants.

The directors should be empowered, as they have no power to build the addition to the school house without

first submitting the matter to the electors of the district on proper notice given. This is a special statute and must be strictly construed, and the directors are not authorized to build the addition without first giving notice and getting a vote as provided by law. Mansf. Digest, § § 6197-9, 6210-13-23; 49 Ark. 94; 16 Col. 255; Fields' Ultra Vires 352.

Cul L. Pearce and *Miller & Yingling,* for appellees.

Under the law the directors have no power to select a new site and build a new building without the notice and vote of the electors, but they have the power to make needed improvements and repairs on a building already constructed, according to law, to preserve the property from waste or damage. 102 Ark. 263; Kirby's Digest, § 7614. The school funds were properly and judiciously expended and not contrary to law and the decision below was right and should be affirmed. No error is shown.

SMITH, J. Appellants seek by this suit to enjoin the directors of Common School District No. 51 of White County, Arkansas, from building a room or an addition to the school building of the district without first submitting the matter to the electors of the district.

From the agreed statement of facts in the case it appears that the district owned a schoolhouse twenty by thirty-four feet, which answered the purposes of the district until the school attendance had so far increased that another room became necessary. The matter of its construction was discussed at the annual school meeting, but no action thereon was taken by the electors, although a tax of seven mills was voted for general school purposes. Thereafter, without any authorization from the electors, the directors undertook to erect an addition or an L to the school building, the same being eighteen by twenty feet, and this suit was brought to enjoin that action. The complaint was dismissed for want of equity, and this appeal has been duly prosecuted.

The district directors claim that authority for their action is found in section 7614 of Kirby's Digest. It is there provided that the directors shall have charge of the school affairs and of the school educational interests of their district, and shall have the care and custody of the school houses and grounds, the books, records, papers and other property belonging to the district, and shall carefully preserve the same, preventing waste and damage. It is there also provided that they shall purchase or lease such schoolhouse site as may be designated by a majority of the legal voters at the district meeting, and shall hire, purchase or build a schoolhouse with funds provided by the district for that purpose, and may sell or exchange such site or schoolhouse when so directed by a majority of the electors of any legal meeting of the district.

This statute was construed by this court in the case of *Fluty* v. *School District,* 49 Ark. 94, where it was held that the directors of a school district had no power to build a schoolhouse with the funds of the district unless authorized so to do by the annual school meeting, and upon the authority of that case appellants insist that the same authorization is necessary to build a portion of a building as is required to build a complete building.

We do not think, however, that the powers of the directors are thus circumscribed. Certain things stated above may not be done by them until authority to act has been first conferred by the electors; but the directors are given charge of the school affairs and of the educational interests of their district subject to the limitations stated.

The directors here are not proposing to select a site for the building, nor to build a schoolhouse, within the meaning of the statute, but are only making needed improvements upon the building already on the grounds, and we are of the opinion that this is one of those incidental things contemplated in the general grant of authority to have charge of the school affairs and of the school educational interests of their district. Decree affirmed.

MASTELL v. SALO.

Opinion delivered November 3, 1919.

1. APPEAL AND ERROR—RAISING ISSUES IN DISPUTE—LABOR UNIONS.—In a controversy between an operator of a mine and the union, over the payment of sum claimed to be due a union member, it is proper for a committee of the union to raise the issues involved, where he ratifies the same.
2. ARBITRATION—BINDING EFFECT.—Where a controversy has been submitted to arbitration, the finding of the arbitrator on the question submitted is final, in the absence of a showing of fraud or gross mistake.
3. MASTER AND SERVANT—SUBMISSION OF STATEMENTS TO SERVANT—AMOUNTS DUE.—An employee was a member of a labor union and as such entitled to a sum of money for certain work. The employee was ignorant of this until a committee of the union told him, when he made the claim. Meantime the employer had submitted to him certain statements of accounts due, omitting the disputed sum. *Held,* the employee could recover the same.
4. EVIDENCE—FORMER COMPROMISE.—Where one adjusts a controversy by paying the sum claimed or any other, such fact can not be proved against him in a similar subsequent controversy.

Appeal from Sebastian Circuit Court, Greenwood District; *Paul Little,* Judge; reversed.

Geo. W. Johnson, for appellant; *A. M. Dobbs,* of counsel.

1. Instruction No. 1 given for plaintiff is erroneous, as it assumes that all of Salo's work was done under the contract of November 2, 1916, with the United Workers of America. It is misleading and evades the province of the jury. No. 2 is open to the same objection. 128 Ark. 535.

2. The award is too indefinite to be enforced and the instruction based on it was misleading. 1 Ark. 206.

3. Instruction No. 1 asked by defendant should have been given. The rendition of an account and its retention by the party to whom given without objection for a reasonable time gives it the effect of an account stated. This issue was raised by the pleadings and the proof justified its submission to the jury. 41 Ark. 502; 16 *Id.* 202; 68 *Id.* 534.

4. Instruction No. 2 for defendant should also have been given to complete No. 1 given for plaintiff. 98 Ark. 17; 120 *Id.* 206.

5. The court erred in admitting the testimony of Dan McSpadden and Dee Coker to the effect that Mastell had previously paid yardage in this mine under similar circumstances. 130 Ark. 491. Compromises, as here, are always encouraged by the courts. 85 Ark. 337. The undisputed evidence shows that Salo and Mastell had an understanding wherein Salo agreed to drive the room on the tonnage basis and receive pay on that basis without objection. The evidence does not support the verdict; the burden was on plaintiff and he has not discharged it, as it was his duty to show how much work he did under the contract. The award, if valid, determined nothing under the contract of November 2, 1916. Cases *supra.*

Covington & Grant, for appellee.

1. There was no error in the instructions given or refused.

2. Plaintiff did the work for which he claims compensation. According to the contract the United Mine Workers should be paid for the work and Salo did not waive his right to compensation. The arbitration settled his rights, as there was no fraud or mistake or bad faith. 83 Ark. 136; 88 *Id.* 213; 36 *Id.* 327; 3 *Id.* 324; 76 *Id.* 153.

3. The court properly refused defendant's request No. 1. There was no account stated. 74 Ark. 277; Anderson's Law Dictionary 17. Instruction No. 2 was properly refused, as it was covered by No. 1.

4. There was no error in admitting testimony. 130 Ark. 491; 95 *Id.* 449; 98 *Id.* 421; 104 *Id.* 466. There is no evidence that the payment of yardage by Mastell was on account of compromises with employees. The judgment is right and should be affirmed.

HUMPHREYS, J. Appellant operates a coal mine, and, upon opening it up, he contracted with the United Mine Workers of America (of which appellee was a member) to employ only members of the union in his mining

operations and to settle any controversies which might arise in accordance with the provisions of a certain contract known as the Interstate Joint Agreement, and hereafter referred to as the joint agreement, the same being the joint contract entered into between the United Mine Workers of America, District No. 21, and the coal operators' association.

The coal operators' association is an organization composed of coal operators in District No. 21 (embracing the States of Arkansas, Oklahoma and Texas) created by the operators for the purpose of dealing with the union. Appellant did not belong to the operators' association, but dealt with the union as an independent operator, his own contract with the union providing, however, that the joint agreement should govern in the adjustment of all controversies between himself and the miners employed by him.

This agreement contained provisions for the arbitration of all controversies between the operators and the miners, and appellee's insistence was that under its terms it was appellant's duty to pay yardage for what is known as "entry work" in his mine. This work is explained as follows: When appellee went to work in the mine for appellant, he was to be paid so much per ton for each ton of coal mined in his working place. If appellant should later decide to convert appellee's working place into an entry through which to haul coal mined by other miners from other working places in the mine, it then became the duty of the appellant to pay, in addition to the tonnage, a yardage of $2.49 per yard according to the terms of the joint agreement. This would compensate appellee for removing the rock, dirt, etc., from the place. Appellee worked in this place until he had mined the coal out of a place 127 feet long, and at this time appellant decided to convert it into an entry and turn rooms off from appellee's place and to haul coal out of those rooms through appellee's working place.

Appellant sold the mine, and after he had done so it was brought to the attention of the officers of the local

to which appellee belonged that appellee had not been paid his yardage, and upon demand therefor appellant refused to pay it. A conference was held between appellant and appellee and the officers of the union having the matter in charge, and it was then agreed that their differences should be arbitrated, and the parties accordingly prepared and submitted a statement in writing of their respective contentions to the president of District No. 21, United Mine Workers of America, this action being taken pursuant to the terms of the joint agreement. There appears to have been no controversy as to the amount of the yardage, nor its price per yard, the sole dispute being whether appellant should pay it at all or not. The district president made a finding in writing in which he held that appellant should pay the yardage. Payment was refused, and this suit was brought to enforce payment, and this appeal has been prosecuted from a judgment finding appellant liable for the yardage.

(1) It is first insisted that appellee did not raise the issue involved in this lawsuit and that the pit committee of the union which did raise it had no right to do so. This statement may be answered, however, by saying that the pit committee assumed to act for appellee as one of its members, and he has adopted and ratified their action. It is true he did not testify at the trial, but that fact is explained by the statement that he is an illiterate Italian who does not speak the English language and he was present at the trial.

(2) It is next insisted that the so-called award is unenforceable, as it decided nothing and did not determine the amount due appellee. It has been shown, however, that liability for the yardage was the only question to be determined, and, that having been decided in appellee's favor, the sum due could be arrived at by a calculation which any one could make.

Appellant contended at the trial below that he had a private agreement with appellee whereby appellee waived his right to charge yardage. This issue was not submitted for arbitration, but that defense was made at the

trial in the court below, and the court told the jury that if there was such a private agreement appellee could not recover.

It may here be said that this instruction disposes of appellant's argument that an individual employee and his employer are not restricted in their right to contract with each other by the fact that the rules of the union to which the employee belonged prohibited the employee from making that contract and imposed a penalty for doing so. The jury must necessarily have found there was no such private agreement between appellant and appellee. Nor is it important to consider here the duty of appellant to submit controversies for arbitration as provided in the joint agreement, or the effect of his failure to do so, as it is undisputed that he did submit the controversy to arbitration, and the court therefore properly told the jury that the finding of the arbiter on the question submitted was final, in the absence of a showing of fraud or gross mistake.

(3) The testimony was to the effect that for a long period of time appellant had rendered statements twice each month to appellee showing the sums due him, and that none of these statements included the yardage now claimed, although they covered the period of time during which that work was performed, and an instruction was asked which told the jury that if they so found the failure to object to the accounts so rendered would be regarded as an admission of their correctness by appellee. It was shown in appellee's behalf, however, that he did not know that he was entitled to this yardage until his attention was called to that fact by the pit committee, whereupon he then claimed it and now claims it, and the instruction was properly refused because it took no account of the issue that appellee did not know when he received these statements that he had the right to claim the yardage.

Over appellant's objection the court permitted McSpadden and Coker, officers of the miners' union who acted for appellee in the attempt to adjust the claims for yardage with appellant, to testify that appellant had pre-

viously paid yardage in his mine after a controversy had arisen with other miners in which the circumstances were similar to the case at bar. The admission of this testimony is defended by appellee upon the ground that the payment of entry yardage at appellant's mine was required both by contract and by custom, and that the testimony objected to tended to show that fact. Appellant admitted that he had twice made such payments, but he denied that he was liable therefor in either case, and testified that he had done so, not because he was liable, but to prevent the possibility of a strike. There was no connection between the two previous controversies and the one with appellee, and it was, therefore, improper and prejudicial to admit testimony in regard to them. One may adjust a controversy by paying the sum claimed or any other sum without thereby becoming liable to have the fact of the adjustment proved against him in similar subsequent controversies, and for the error in admitting that testimony the judgment is reversed and the cause will be remanded for a new trial.

LONG v. STATE.

Opinion delivered November 3, 1919.

1. BURGLARY AND LARCENY—SUFFICIENCY OF THE EVIDENCE.—The evidence held sufficient to support a finding that the accused participated in a burglary and larceny.
2. BURGLARY AND LARCENY—DESCRIPTION OF PROPERTY FROM WHICH STOLEN GOODS WERE TAKEN.—Property was stolen from the light plant in Searcy, which was operated as an improvement district. In the indictment the light plant was described as a corporation. *Held,* the place from which the goods were stolen was sufficiently identified and that there was no variance.
3. CRIMINAL LAW—UNEXPLAINED POSSESSION OF RECENTLY STOLEN PROPERTY.—The unexplained possession of recently stolen property is a fact from which an inference of guilt may be drawn.
4. APPEAL AND ERROR—EXCEPTION TO INSTRUCTIONS EN MASSE.—An exception *en masse* to instructions can not avail unless all the instructions are erroneous.

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

Cul L. Pearce and *Harry Neelly,* for appellant.

1. The evidence fails to connect defendant with breaking and entering a house as charged in the indictment. At most the only charge made against defendant would be receiving stolen property. There is nothing tending to show the connection of defendant with the burglary. 100 Ark. 188. Mere suspicion is not proof. 68 Ark. 529; 85 *Id.* 360.

2. The court erred in its instructions as to possession of stolen property. 83 Ark. 194. Instruction No. 5 should not have been given. 44 Ark. 39.

3. The State failed to prove a material allegation in the indictment that the Searcy Electric Light District was a corporation.

John D. Arbuckle, Attorney General, and *Robert C. C. Knox,* Assistant, for appellee.

1. The evidence is sufficient to sustain the verdict and it is conclusive. 91 Ark. 492; 101 *Id.* 473; 1 Sup. Ct. Rep. 14.

2. The instruction as to possession of stolen property is correct. Cases *supra.*

3. There was sufficient proof of the corporation, as improvement districts in cities are corporations, but the allegation in the indictment was unnecessary and need not be proved. 9 C. J. 1047; 116 Ala. 437; 76 Cal. 445; 74 Ga. 499; 89 Mo. 257; 102 Iowa 651; 40 N. J. L. 169; 65 So. Rep. 548; 68 Ga. 822; 3 Bishop, Cr. Proc., § 138.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the White Circuit Court of grand larceny and burglary. His punishment for the larceny was fixed at one year in the penitentiary, and for the burglary at three years in the penitentiary. An appeal has been duly prosecuted to this court, and a reversal of the judgment of conviction and assessment of penalties is sought upon the following grounds:

First. Because the evidence fails to connect appellant with breaking and entering the house, as charged in the indictment.

Second. Because the State failed to prove that the Searcy Electric Light Improvement District No. 1 was a corporation.

Third. Because the court erred in instructing the jury as to the effect of the possession of recently stolen property.

(1) The indictment, in the first count, charged, in substance, that appellant feloniously did break and enter a house used and possessed by the Searcy Electric Light Improvement District No. 1, a corporation, with the felonious and burglarious intent to steal and carry away personal property, over the value of $25, of Carlyle Pettey; and, in the second count, charged the larceny of the personal property aforesaid in apt words and form.

The evidence showed that appellant, in company with his brother, Will Long, went from Little Rock to Searcy on the evening before the burglary, reaching Searcy at about 7 o'clock. They left Searcy together early on the morning of March 4. Between 12 and 1 o'clock on the night of the burglary, appellant was seen in company with his brother, who confessed to the crime, in about a block of the light plant. His brother, Will Long, at the time had a bundle under his arm. The property stolen consisted of an overcoat, a pair of trousers, and two flash lights, and belonged to Carlyle Pettey. The burglary and theft occurred on the night of the 3d day of March, 1919, the house being entered by pushing open a window which had not been latched or bolted. The house entered was in the possession and occupied by the Searcy Electric Light Improvement District No. 1. Early in that month, appellant sold the overcoat in question to his uncle, F. P. Long, and one of the flash lights to his cousin, W. D. Bateman. The trousers were found in the home of his uncle, F. P. Long. Appellant explains his possession of the goods by saying he got them from his brother. His brother, Will Long, testified that appel-

lant was not with him at all on the night of the burglary. Appellant admitted, however, that he was with him on that night in Searcy.

We can not agree with the appellant that the evidence is insufficient to connect him with the crime. He was in company with his brother near the scene of the burglary and larceny at a late hour on the night the crimes were committed. They came to Searcy from Little Rock together, reaching there about 7 o'clock P. M. on the 3d of March, and left together early the next morning. His brother confessed to the commission of the crime on that night, and soon thereafter the possession of the property was traced to appellant, who converted a part of it to his own use by sale thereof to his kinsmen. On the night of the burglary, appellant and his brother were seen at a late hour near the house that was burglarized, and, at the time, appellant's brother had a bundle under his arm. We think this evidence sufficient to support a finding that appellant participated in the burglary and larceny.

(2) It developed in the testimony that the house which was burglarized was owned by the Searcy Electric Light Improvement District No. 1, and that said electric light company was known, under the statutes of Arkansas, as an improvement district. It is insisted by appellant that there is a variance between the evidence and the indictment, for the reason that said company is described in the indictment as a corporation. The purpose of the charge and proof was to identify the particular house burglarized as belonging to some person or entity capable of owning or possessing property. The proof that the company was an improvement district sufficiently establishes it as such an entity, and, for that reason, the kind or character of the entity is immaterial. Section 2233 of Kirby's Digest reads as follows: "Where an offense involves the commission, or an attempt to commit, an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured, is not material."

In the construction of this statute, it has been held that, "An indictment for receiving stolen property belonging to a partnership is sufficient if it correctly names the partnership, though error is made in giving the initials of one of the partners." *Andrews* v. *State,* 100 Ark. 184. And in the later case of *Ivy* v. *State,* 109 Ark. 446, in construing the same statute, this court said: "The court, having already held that it is not a variance from the allegations of the indictment to prove the names of the partners, other than as alleged, is of the opinion that the failure to prove the names of the individuals at all as alleged is not a fatal variance." In the instant case, the house burglarized was sufficiently identified or described by naming the possessor or owner thereof as the Searcy Electric Light Improvement District No. 1, which the proof shows is an entity capable of owning and occupying property; so an erroneous allegation in the indictment to the effect that it was a corporation is immaterial.

(3) The instruction complained of as erroneous by appellant told the jury that "the possession of property recently stolen affords presumptive evidence of guilt." The instruction is justified by learned counsel for the State by the language used in the case of *Douglass* v. *State,* 91 Ark. 492. The language referred to is as follows: "But the possession of property recently stolen does raise a presumption tending towards guilt," etc.

The language used by the learned judge who handed down the opinion in that case was inaccurate. The rule is that the unexplained possession of recently stolen property is a fact from which an inference of guilt may be drawn. The instruction complained of in the instant case was clearly an instruction on the weight of the evidence. This court said in the case of *Duckworth* v. *State,* 83 Ark. 192 (quoting from the syllabus): "It was error to instruct the jury in a larceny case that the unexplained possession of recently stolen goods, corroborated by other evidence, is sufficient to convict, it being the exclusive province of the jury to determine when the evidence is sufficient to convict."

The same rule was announced in the cases of *Sons* v. *State,* 116 Ark. 357, and *Mitchell* v. *State,* 125 Ark. 260.

(4) Appellant, however, is not in a position to take advantage of this error. The erroneous instruction is one of several contained in the oral charge. The exception to it was in the following form:

"Note also our exception to the entire oral charge."

This exception was preserved by a request for a new trial in the following language: "Because the court erred in his oral charge to the jury."

The exception and preservation thereof are clearly an exception in gross. An exception *en masse* to instructions can not avail unless all the instructions are erroneous. *Wells* v. *Parker,* 76 Ark. 41; *K. C. Sou. Ry. Co.* v. *Morris,* 80 Ark. 528; *Ward* v. *Sturdivant,* 86 Ark. 103; *H. D. Williams Cooperage Co.* v. *Clark,* 105 Ark. 157. The other instructions contained in the oral charge were correct.

The judgment is therefore affirmed.

McGuigan v. Rix.

Opinion delivered November 3, 1919.

1. Equitable mortgage—form.—Every instrument intended to secure payment of money, whatever name and form it have, is in equity a mortgage.
2. Same—same.—One H. executed an instrument naming a trustee and purporting to grant, bargain, sell, etc., certain land, to be used upon a debt of H., but the writing invested no power of sale in the trustee nor had it a defeasance clause. *Held,* while not technically a legal mortgage, it would be treated as a mortgage in equity.
3. Same—recording statutes.—Equitable mortgages are not controlled by the recording statutes of the State.
4. Judgment creditors — equities of third parties.—Judgment creditors are not innocent purchasers; their liens are subject to existing equities of third parties in the land.
5. Executive sales—caveat emptor.—The rule of *caveat emptor* applies to purchases at execution sales.

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

Chas. C. Sparks, for appellants.

1. The effect of the contract was to give J. E. Hogue a half interest in the property. 130 Ark. 21; Kirby's Digest, § § 4458-4460; 123 Ark. 473.

2. The title to the property and the right to rents was finally determined to be in the Rushing estate and the contract vested in Hogue a half interest. Pom. Eq. Jur., par. 1290, p. 2585; 5 C. J. 912.

3. In the present case the Arkansas National Bank is not an innocent purchaser for value, as it was given for a pre-existing debt. The power of attorney to sell and appropriate the proceeds to certain indebtedness and no title passed except the power to sell and pass title and was revocable. It was an unexecuted trust to dispose of a subject-matter contingent. 36 Ark. 591.

4. Appellants' liens are prior to those of Rix and the bank and the decree should be reversed. *Supra.*

L. E. Sawyer, for appellee.

1. Hogue had no such interest at the rendition of the judgment that gave him a judgment lien, and if the instrument to Rix is an equitable assignment the judgment lien is subordinate to the assignment. If the instrument to Rix is a mortgage, then it was filed for record before Hogue had any ownership or legal interest in the property. If these judgments created no liens until final decree, then if a mortgage it was on file when the decree was rendered and then attached. 15 Ark. 73. It is true that an equitable mortgage given to secure a precedent debt has no equity superior to that of a creditor having a valid subsequent judgment at law, but between such contestants the first perfected title prevails. The rule would be otherwise if the consideration for the mortgage is paid at the time of the mortgage, as in such case equity regards the equitable mortgagee as a *bona fide* purchaser. 1 Jones on Mort., § 470; 24 N. J. Eq. 552.

2. The lien of a judgment depends on the right of execution and if on a judgment an execution issue the lien is on the property only that can be sold under the execution. The lien attaches no further than the debtor has power voluntarily to transfer or alienate his lands in satisfaction of his debts. 22 Am. Dec. 236; 50 Am. St. 782; 20 L. R. A. 400; 88 Am. St. 875; 10 N. J. Eq. 535; 64 Am. Dec. 469. If these judgments did not create a lien on Hogue's inchoate interest then the execution lien is subject to all prior legal or equitable liens, and this mortgage was of record long before the execution issued. The execution did not create an independent lien. 15 R. C. L. 251.

A judgment lien is but a security for a debt, and is not a property right in the land itself, and the judgment creditor obtains no interest in the property. 15 R. C. L. 254.

There is nothing showing fraud in the instrument to Rix. But if made to defraud creditors, if an absolute sale, the judgments would not have been a lien. 50 Ark. 108; 67 *Id.* 325; 81 *Id.* 78; 84 *Id.* 525; 111 *Id.* 140; 113 *Id.* 109.

Hogue had an interest in his client's cause of action and a lien thereon from the commencement of the suit, and when he obtained his judgment then a lien on the recovery. 123 Ark. 473. If Hogue's assignment was to pay a debt, then it was a mortgage and not a sale, and he had the right to redeem. 18 Ark. 85; 71 *Id.* 505. See also 31 Ark. 437; 52 *Id.* 41; 83 *Id.* 185.

Hogue could mortgage his conditional interest to secure the bank. Our statute says the judgment lien attaches only to property owned by the judgm nt debtor at the time of the judgment, and Hogue was not, at the time of the judgment of Mrs. McGuigan, the owner of this property except on conditions, and he could not sue for or possess any legal rights until he performed the conditions, and these were not performed until the court rendered its decree December 13, 1917, in favor of the Rushings, and prior to this Rix's mortgage was filed

for record. Black on Judgm. 432, 460, 445, 423. The instrument to Rix was intended to secure Hogue's debt, but it did not pay it, and there was no agreement that it should release it. Rix thereby became a trustee. 54 Ark. 184. To be an absolute sale it must be irrevocable and indefeasible. The instrument was not enforceable by Rix, for it was not for his benefit, and Hogue could in equity have canceled the same. K. & C. Digest, § 826. A judgment creditor is not a purchaser. 44 Ark. 458; 110 *Id.* 495.

Under sections 3542-3, K. & C. Digest, real estate, to be subject to execution, the judgment debtor must be seized in law or equity on the day of the rendition of the judgment. Hogue only had an equitable lien on his cause of action when he made the mortgage to Rix and when the judgments were rendered. There was nothing upon which the judgment liens could attach. Hogue's contracted interest was assignable and assigned to Rix. Jones on Mortg. 136; Eaton's Equity, § § 243-4.

Power, before the same is assigned, is a mere potential interest and not subject to execution. 11 Ark. 212-236. See also 31 *Id.* 434. If Hogue had no right to redeem, he had no interest in the property sold. In equity before foreclosure the grantor would be permitted to redeem, or judgment creditor might redeem if the instrument was to raise money to pay debts. 18 Ark. 508 is a clear case showing when property under a deed of trust may be subject to execution. Our statute, K. & C. Dig., § 5167, says the judgment lien shall attach only on the estate "owned" by the defendant, and "owner" means absolute owner in fee. 80 S. W. 897. Hogue never was the owner, but only had a lien. K. & C. Dig., § 3542. A valuable consideration was paid by Rix to Hogue for the assignment, and it was an absolute conveyance and the title vested in Rix. The decree is right. 5 C. J. 842; *Ib.* 708, § 77.

HUMPHREYS, J. The appeal now before this court grows out of a controversy between Alice McGui-

gan, T. T. Marsh and Henry Shank, on the one side, appellants herein, and C. N. Rix *et al.* on the other side, appellees herein. All of said parties intervened in the original case of *Taylor Rushing et al.* v. *Susie Horner et al.,* twice before this court on appeal. In the first appeal, on May 28, 1907, this court reversed the decree of the chancery court and remanded the cause for a new trial, upon material issues which had not been fully developed on the first trial in the lower court. In the second appeal, the decree of the chancery court was affirmed July 8, 1918. The purpose of the intervention filed in the original case was to determine whether appellees, C. N. Rix *et al.,* had a prior and paramount claim to that of appellants, Alice McGuigan, T. T. Marsh and Henry Shank in an undivided one-half interest in lot 15, block 54, in the second subdivision of the Hot Springs Land & Improvement Company in the city of Hot Springs, Arkansas, except a portion of the lot which had theretofore been sold and conveyed to the Little Rock, Hot Springs & Western Railroad Company. Both appellants and appellees claim an undivided one-half interest in said lands acquired by James E. Hogue on account of legal services rendered the Rushings in the original suit, styled *Rushing* v. *Horner,* and reported in 130 Ark. 21, and 135 Ark. 201. In order to test the priority of their respective claims to Hogue's interest, he was made a cross-defendant in the interventions. Appellants claim Hogue's undivided interest in said lands by virtue of judgments obtained against him in the chancery and circuit courts of Garland County of date September 16, 1916, September 18, 1916, and January 8, 1917. Appellees claim Hogue's undivided one-half interest in said lands by virtue of the following written instrument:

"ASSIGNMENT AND POWER OF ATTORNEY.

"Know All Men by These Presents:

"That, whereas, I, the undersigned, James E. Hogue, domiciled and residing in the city of Hot Springs, in the State of Arkansas, have, as attorney for Taylor Rushing and James Rushing, filed a suit in the Garland Chancery

Court to recover from Scott-Mayer Commission Company and Susie A. Horner and others a certain lot lying and being in the city of Hot Springs, in the State of Arkansas, and described as lot numbered 15 of the Hot Springs Land & Improvement Company's subdivision in block 54, said block 54 being according to the plat of the Hot Springs Reservation as made by the Hot Springs commission, and said subdivision being according to the plat on file in the records of deeds and mortgages for Garland County, Arkansas, except that portion of said lot heretofore sold and conveyed to the Little Rock, Hot Springs & Western Railroad Company; and,

"*Whereas,* The purpose of said suit is also to recover back rents on said property; and,

"*Whereas,* I have a contract with the guardian of said minors which has been approved and confirmed by the probate court by the terms of which contract I am to have for my services and fees one-half of said property, and one-half of any and all sums that may be collected as back rent on same; and,

"*Whereas,* I am indebted to the Arkansas National Bank as is evidenced by my various promissory notes which have in the past been renewed from time to time and may in the future be renewed; and,

"*Whereas,* I am further indebted to the said Arkansas National Bank for office rent;

"Now, for and in consideration of the sum of one dollar to me in hand paid by Chas. N. Rix, I, the said James E. Hogue, do hereby grant, bargain, sell, transfer and assign to the said Chas. N. Rix all my rights and interest in said contract and all my rights and interest in said property that may come to me by virtue of this contract or otherwise, and I hereby nominate, constitute and appoint Chas. N. Rix my true and lawful attorney in fact, for me and in my name, place and stead, to collect and receive all my interest in said property; to execute receipts and acquittances therefor, the same as I might or could do in person, and I hereby ratify and confirm all the acts of my said attorney done in this behalf, making

them effectual and binding on me as if done by me in person.

"Out of such proceeds as my attorney may receive or collect by virtue of this power of attorney, I hereby authorize and direct him to pay all my indebtedness to the Arkansas National Bank evidenced by promissory notes, or by account for rent and to turn the balance, if any, over to me, or as I may direct.

"Witness my hand and seal on this 1st day of August, 1916.

"James E. Hogue.

"Witness: I. B. King.

"Acknowledgment.

"State of Arkansas,

"County of Garland.

"Be it remembered, That on this day, the first day of August, 1916, appeared before me, an acting notary public, within and for the county and State aforesaid, James E. Hogue, to me known as the person who signed and executed the above instrument in writing, for the purpose and consideration therein mentioned and set forth.

"Robert Neill, Notary Public.

"My commission expires June 16, 1919.

"Filed July 20, 1917."

The above instrument was executed and acknowledged on the first day of August, 1916, prior in point of time to the rendition of the judgments in favor of appellants against Hogue, but was not recorded until July 20, 1917, subsequent in point of time to the rendition of said judgments against him.

The chancery court construed the instrument in question to be an equitable mortgage and a superior lien to the judgment liens of appellants. A decree was rendered in accordance with the construction and finding of the court and is before us on appeal for trial *de novo*.

(1-2) The nature and character of this instrument is the first question to be determined. So far as the instrument relates to the real estate described therein, it pur-

ports to grant, bargain, sell, transfer and assign it to a trustee to be applied on a pre-existing indebtedness of James E. Hogue to the Arkansas National Bank of Hot Springs, Arkansas. It invests no power of sale of said lands in the trustee, nor does it contain a defeasance clause. It is therefore lacking in these necessary essentials to make it a technically legal mortgage. It is manifest, however, that it was intended by the parties thereto as a security for pre-existing indebtedness of Hogue to said bank. This court has held, in substance, as follows: "Every instrument intended to secure payment of money, whatever name and form it have, is in equity a mortgage." *Turner* v. *Watkins,* 31 Ark. 429; *Bell* v. *Pelt,* 51 Ark. 433. The chancellor correctly interpreted the instrument as being an equitable mortgage.

(3-5) The next and last point for determination is whether or not the lien created by the instrument in question is paramount to the lien of the judgments of appellants. Judgment creditors are not innocent purchasers. Their liens are subject to existing equities of third parties in the land. The rule of *caveat emptor* applies to purchasers at execution sales. Equitable mortgages are not controlled by the recording statutes of this State. *Martin* v. *Schichtl,* 60 Ark. 595; *Priddy & Chambers* v. *Smith,* 106 Ark. 79. The instrument, being prior in point of time to the judgment liens, is therefore prior and paramount to them.

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

WHITLEY v. STATE.

Opinion delivered November 10, 1919.

1. CRIMINAL LAW — INFORMATION — OBJECTIONS TO, MADE WHEN.— Where an information might have been amended to conform to the proof, and at the trial below no objections were raised to its form or substance, and no objection made to testimony offered on the ground of variance, it is too late, on appeal, to raise the objection that the information charged separate offenses.

2. LIQUOR—TRANSPORTATION OF IN THE STATE FOR ANY PURPOSE.—Under the act of February 17, 1919, page 75, it is unlawful to transport intoxicating liquors into this State from another State, or from one place to another in this State, for any purpose whatever except as specified in section 17 of the act, which relates to the use of wine for sacramental purposes, and the use of alcohol for medicinal, industrial or scientific purposes.

3. LIQUOR—ILLEGAL TRANSPORTATION.—The evidence held sufficient to warrant a conviction for transporting liquor illegally, under Act of 1919, page 75.

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

Brundidge & Neelly, for appellant.

1. The use of the two prepositions, "into" and "in," in the information constitutes a mere redundancy and merely charges the transporting of liquor into this State from another State, and the court erred in its oral instruction to the jury, as defendant was not charged with transporting liquor from one place in this State to another place in this State, and even if it had, the instruction was error, for it was not shown by the evidence that the whiskey was for another person and no one testified when or where the whiskey was put on the train, if it was put on by the defendant. 213 S. W. Rep. 11; Bone Dry Act No. 87, as amended, § § 1 and 8, etc.; 195 S. W. 376; 129 Ark. 106.

2. The verdict is not supported by any evidence, for there is none that defendant ever transported any liquor or put any liquor in the locker of the caboose, and the peremptory instruction asked by defendant should have been given. Bone Dry Act, § 8.

John D. Arbuckle, Attorney General, and *Robert C. Knox*, Assistant, for appellee.

1. The information does not charge two offenses and was sufficient after verdict, as defendant did not raise the question and it was waived. 77 Ark. 426; 84 *Id.* 136.

2. Defendant was tried for transporting liquor from one place in this State to another in this State, and the evidence shows at least that he transported it from Kensett to Beebe, both in this State. Act 87, Acts 1919, § § 1-8, as amended; 213 S. W. 11; 135 Ark. 470.

3. The evidence supports the verdict and the instructions were correct. 56 Ark. 420-425, and *supra.*

McCULLOCH, C. J. The appellant, Albert Whitley, was arrested and convicted under an information filed by the prosecuting attorney charging him with violation of the act of January 24, 1917 (Acts of 1917, p. 41), as amended by act of February 17, 1919 (Acts of 1919, p. 75), prohibiting the transportation of intoxicating liquor. The information was filed before a justice of the peace of White County, through which county the liquor is charged to have been transported, and the trial before the justice of the peace resulted in the conviction of appellant, and an appeal was duly prosecuted to the circuit court of White County.

(1) The language of the charge contained in the information filed by the prosecuting attorney is that appellant transported whiskey "into and in the State and county," but the case was submitted to the jury in the trial in the circuit court on the issue of transportation of liquor from one place to another in this State. The contention now is that the use of the two prepositions in the language referred to above constituted a mere redundancy and that the adoption of either of the words made the charge of transporting whiskey into this State from another State. We do not agree with counsel in this interpretation of the language, for if the preposition "in" had been used without the use of the other, it would have clearly constituted a charge of transporting liquor in the State—a somewhat imperfect charge, but sufficient to sustain a conviction if no objection should be made in the trial. The information could have been amended or treated as amended to conform to the proof. *Bond* v. *State,* 56 Ark. 444. No objections were raised in the trial

below to the form or substance of the information, and no objection was made to the testimony on the ground of variance, and it is too late to raise the objection here for the first time that the information charged separate offenses.

Section 1 of the act of January 24, 1917, *supra,* as interpreted by this court, made it unlawful for any person or corporation to transport any liquor into this State for the purpose of delivery to another person or corporation. *Rivard* v. *State,* 133 Ark. 1; *Winfrey* v. *State,* 133 Ark. 357. Section 8 of the same statute made it unlawful "to convey or transport over or along any public street or highway any of said liquors, bitters or drinks for another," and this court construed the statute to mean that the transportation must be for another, and not for the use of the carrier himself, in order to constitute a violation. *Lacey* v. *State,* 135 Ark. 470; *Edwards* v. *State,* 139 Ark. 97.

Section 1 of the act of February 17, 1919, amended Section 1 of the former statute so as to read as follows:

"That it shall be unlawful for any person, firm, corporation or association in any manner to transport into this State or from one place to another place in this State, or for any railroad company, or express company or other common carrier, or any officer, agent or employee of any of them, or any other person, to ship or to transport into, or to deliver in this State in any manner or by any means whatsoever, any alcoholic, vinous, malt, spirituous or fermented liquors or any compound or preparation thereof commonly called tonics, bitters, or medicated liquors, except as provided in section seventeen (17)."

(2) It is seen from a consideration of the language of this amendment that it works a radical change in the law as declared by this court in the decisions referred to above, not only with respect to transportation of intoxicating liquor into the State, but also with respect to transportation from "one place to another place in this State." To this extent the section amends section 8 of

the former statute by necessary implication, and under the law as it now stands it is unlawful to transport intoxicating liquors into this State from another State, or from one place to another in this State, for any purpose whatever, except as specified in section 17 of the statute, which relates to the use of wine for sacramental purposes and the use of alcohol for medicinal, industrial or scientific purposes.

(3) It is earnestly argued that the testimony is not sufficient to sustain the charge. There is abundant testimony that whiskey was transported in the caboose of a local freight train on which appellant was a passenger. The train ran from Newport to Argenta, and appellant boarded the train at Russell, a station in White County south of Newport. The sheriff received information that whiskey was being transported on the train and he met the train and boarded it at Kensett, but made no search there for the liquor. The sheriff testified that he saw appellant at the depot at Kensett while the train was there. The sheriff went to Beebe, another station, and met the train there and boarded the caboose and found two suitcases filled with bottles of whiskey.

When the sheriff went into the car appellant was there but left immediately, and when the search was made the whiskey was found locked up in the locker of the caboose. The sheriff applied to the trainmen for a key and opened the locker and found whiskey there. Appellant, after leaving the train, started through the woods followed by two of the deputy sheriffs. After going through the woods about three-quarters of a mile he came back to the railroad, and as the train came along he gave the engineer a signal to slow down, but the sheriff was in the cab of the engine and required the engineer to stop the train. Appellant was then arrested, and when he was put under arrest by the officer he reached his hand in one of his pockets and drew out a key and dropped it on the ground. The sheriff picked up the key and went back to the caboose and found that it fitted one of the suit cases. The testimony

is abundant, as before stated, to establish the fact that the whiskey was being unlawfully transported and the circumstances warranted the finding that appellant was the one who was transporting the whiskey, though there was no direct testimony to show who put the whiskey into the locker of the caboose. Some of the trainmen testified, but disclaimed any knowledge of the presence of the whiskey there. Appellant was a passenger on the caboose, but fled as soon as the sheriff boarded the caboose at Beebe for the purpose of making a search. He ran through the woods followed by the deputy sheriffs and came back to the train at a point on the track between stations, and when arrested he surreptitiously took the key out of his pocket which fitted the lock on one of the suit cases.

We think the evidence as a whole was sufficient to sustain the conviction, and the judgment is, therefore, affirmed.

WALLACE v. WATSON.

Opinion delivered November 10, 1919.

1. HUSBAND AND WIFE—JOINT DEPOSIT—TITLE—ORIGIN OF FUND.—At the time of the death of one A. two time deposits stood in her name in two banks. The funds represented by the one were derived from the sale of a piece of property belonging to her, and deposited in her name by J., her husband. The other was from dividends collected by J. in a policy of insurance on his life, payable to his wife, and deposited by him in her name. *Held*, these time deposits were the property of A. and not of her husband, J.
2. SAME—SAME—CHECKING ACCOUNT—GIFT INTER VIVOS.—Where a husband changed his checking account to his wife's name, giving her possession of the bank book, this constitutes a gift *inter vives* between the husband and wife, although the husband continues to draw on the account signing his wife's name "by" his own. But the account will be held still to be the property of the husband, where the evidence clearly shows an intention on the part of both parties that that be so.

Appeal from Saline Chancery Court; *J. P. Henderson,* Chancellor; reversed in part.

Mehaffy, Reid, Donham & Mehaffy, for appellants.

1. The money on deposit is shown by the evidence to belong to Mrs. A. B. Watson. The earnings of a married woman arising from her services done and performed on her account become her separate property. 47 Ark. 485.

The wife did not permit her husband to have the control or management of the time deposits and she never parted with her title, for the presumption is that the husband was acting as trustee or agent of the wife. Kirby's Digest, § 5227; 84 Ark. 355. Her right to same is not prejudiced by her failure to schedule. Kirby's Digest, § 5226; 42 Ark. 69. The money was absolutely the wife's. 79 Ark. 69. The husband never drew any checks in his own name but always drew in the name of his wife by J. B. Watson. The time deposits and the checking account belonged to the wife and she at no time parted with the title to the same. The $500 in the First National Bank was the wife's, because it was derived from the sale of her property and immediately deposited in her name, and so remained at her death. The $500 in the Bank of Benton was also hers because deposited in her name two or three years before her death and remained unmolested and unused by appellee or anyone else until after her death. The checking account was hers also, because it was made up of funds belonging to her and deposited in her name and derived from her business and rentals from her real estate. The husband recognized her title at all times and all checks were drawn in her name and in the conduct of her business. Appellant, Maude Wallace, is her sole heir, and all these deposits belong to her. If they belonged to the husband, he parted with his title when he deposited them in her name. The deposits became a gift to the wife. 79 N. Y. S. 592; 21 N. E. 692; 27 S. E. 32; 67 Pac. 331. It was a gift *inter vivos.* 67 N. E. 232; 51 S. W. 169; 51 Atl. 249; 55 Atl. 684. Delivery of the deposit book to the wife vested the title in her. 39 Atl. 201; 24 Pick. 241; 129 Mass. 425; 36

Conn. 88; 63 Me. 364; 26 N. E. 627; 25 Atl. 598; 2 N. Y. Supp. 425; 40 Vt. 597. In the first instance the deposit in the wife's name constitutes a completed gift to the wife. Cases *supra.*

2. There is another reason why appellee can not assert title to these bank deposits. He began taking title to real estate in his wife's name because his business was burned at Bauxite and he desired to place it beyond his creditors, as he was in debt. He is estopped to claim the funds. 7 Ark. 516; 33 *Id.* 294; 53 *Id.* 150; 47 *Id.* 311; 16 Cyc. 145; 26 N. W. 498; 62 *Id.* 990; 66 S. W. 160; 62 Am. Dec. 359; 38 S. E. 181; 23 S. E. 571; 16 *Id.* 371; 46 *Id.* 732; 6 *Id.* 142; 10 R. C. L. 389.

3. Fraudulent transfer of property is valid as between the parties. 20 Cyc. 610; 98 N. W. 604; 40 N. E. 223. Voluntary conveyances if executed in fraud of creditors are valid between the parties. 19 Ark. 650; 77 *Id.* 60; 52 *Id.* 171; *Ib.* 389; 59 *Id.* 521; 188 S. W. 552; 47 *Id.* 301; 106 *Id.* 9. It can only be avoided by creditors. 11 Ark. 411; 67 *Id.* 325. The decree should be reversed and the deposits given to Maude Wallace, appellant.

The appellee, *pro se.*

The evidence shows that Mrs. Watson did not let her husband use the money on deposit as his own, but as hers. She had nothing to do with the time deposits nor certificates issued; he handled the money deposited as he did the checking account, and she did not allow him to use it as his own but as her's. By the deposits the money became her own and the decree below is right. There is no estoppel and the moneys belonged to appellee, and the decree is right. See authorities cited by chancellor, and also 30 Ark. 79; 73 *Id.* 338; 74 *Id.* 161; 81 *Id.* 328; 84 *Id.* 328; 93 *Id.* 93; 92 *Id.* 625; 115 *Id.* 416; 101 *Id.* 451; 121 *Id.* 550; 21 Cyc., par. 111, p. 1498; 21 Cyc. 1409, par. B, and *Ib.* 1412, par. C. The decree should be affirmed.

STATEMENT OF FACTS.

Mrs. A. B. Watson died intestate December 27, 1916, at Benton, Arkansas. She left surviving, her husband.

J. B. Watson and by him one child, Mrs. Maud Wallace. At the time of her death there was a time deposit in the "First National Bank" of Benton, in the sum of $500 and in the "Bank of Benton" the sum of $500; there was also at that time a balance on a checking account in her name in the sum of $926.25.

This action was instituted by J. B. Watson against Maude Wallace and W. C. Wallace.

The complaint alleged in substance that, although the money in these banks was in the name of A. B. Watson at the time of her death, the money was deposited in his wife's name by J. B. Watson but with no intention to transfer title to the property to her and that the money was in fact his property; that his daughter, Mrs. Wallace, and her husband were claiming the same.

Maude Wallace and W. G. Wallace answered admitting the deposits and setting up in substance that the money on deposit was the property of A. B. Watson at the time of her death, and hence belonged to Maude Wallace as her daughter and only heir.

The testimony material to the issues is substantially as follows: M. F. Scott testified that he was assistant cashier of the First National Bank of Benton from November, 1909; that J. B. Watson had an active checking account in that bank up to June, 1911, when the account was garnished; that the next morning thereafter Watson came to make a deposit and was told about the garnishment and informed that if he kept on depositing in his own name that the deposits would go the same as the balance he had had to his credit, and he then opened up an account in his wife's name; that the account thus opened was handled just like the first account by J. B. Watson only the checks were signed A. B. Watson by J. B. Watson.

Witness became cashier of the Bank of Benton when it was organized in November, 1911; not long thereafter an account was opened with that bank by J. B. Watson in the name of A. B. Watson; at the time of the death of Mrs. A. B. Watson the checking account

amounted to $926.25 and the time deposit amounted to $500; after the death of Mrs. Watson, J. B. Watson wished to change the account to his name; Mrs. Wallace objected to the change claiming that the money belonged to her mother; the account up to the time of Mrs. Watson's death was subject to check by either of them; the writ of garnishment directed against the First National Bank to garnish the funds of J. B. Watson on deposit in that bank was served some time after Watson had gone out of the Benton Feed & Grocery Company; at no time after this garnishment did J. B. Watson have an account in the First National Bank in his own name; it was all in the name of his wife; the first deposit made in the Bank of Benton was November 18, 1911, and the last deposit was made December 22, 1916, with 56 intervening deposits, all made in the name of A. B. Watson; there was a time certificate deposit of $500 which was in her name at the time of her death.

The cashier and former bookkeeper of the First National Bank of Benton testified that J. B. Watson made all of the deposits after the garnishment proceedings in his wife's name and had the interest accumulations added to the account in her name; that at the death of Mrs. Watson, December 27, 1916, there was an outstanding certificate for $500 in her name. This certificate was dated October 8, 1915, and was numbered 511 and so remained in her name under the same certificate number until after her death; that April 17, 1917, the certificate of Mrs. A. B. Watson was turned in and a certificate for that sum was issued to J. B. Watson who also deposited an additional $500 and another certificate was issued for that sum in the name of Edward Watson; that these certificates were changed on April 17, 1918, to the names of J. B. Watson and Rose Watson; that the account with Mrs. A. B. Watson in the First National Bank was opened June 10, 1911, on which date the first deposit in her name was made and the last deposit was made on May 28, 1912; that there were several intervening deposits; that the account was closed and checked out August 9,

1913; that J. B. Watson opened his personal checking account January 3, 1910, and closed it June 24, 1911.

One witness testified that he rented the LaGrande Hotel building from Mrs. A. B. Watson in 1913; that he always made out a check to Mrs. A. B. Watson and usually handed it to J. B. Watson; that the lease contract was not signed by J. B. Watson and all the rental checks were made payable to Mrs. Watson, the one from whom witness understood he was renting it.

Another witness testified that he was engaged in a partnership business with J. B. Watson known as the Benton Feed & Grocery Company; that when they quit business they owed an implement company something like $1,000; that the partnership was sued for the balance of that sum and judgment was obtained against it.

Mrs. Wallace testified that she was married to W. C. Wallace August 24, 1912; that about the first of September thereafter she and her husband assumed control and management of the hotel; that the agreement was made with her father and mother; that her mother died December 27, 1916, and that the moneys that were in the two banks at the date of her mother's death belonged to her; that the funds were on deposit in her name; that the money was made by her, most of it; that she always kept boarders and ran a store while witness' father was running the gin; that she did as much as he did; that her mother was the proprietor of the hotel until the property was let to witness and her husband; that when her mother and father first went into the hotel business her mother rented it and afterwards bought it; that the hotel register and the hotel stationery shows that Mrs. A. B. Watson was the proprietor of the hotel from October 3, 1905, up to the time the same was rented to witness and her husband. Witness considered the bank deposits her mother's because her mother made the money by keeping the hotel and also by renting the houses that belonged to her; that the title to the rent houses and also the hotel was in her name.

J. B. Watson testified substantially as follows: That he married his first wife by whom he had one child, to-

wit, Mrs. Maude Wallace; that they lived in Alexander, Arkansas, about 23 years; they were in business there; that he moved to Bauxite, was in business there for three or four years until his business was burned out and he then moved to Benton about 1905; that he was the proprietor of the business at Alexander and Bauxite and also of the business at Benton called the Benton Feed & Grocery Company; that when he bought the hotel at Benton he had the same deeded to his wife.

He stated that he did not keep the hotel business separate; they ran the business as one. Witness says "what was mine was hers and what was hers was mine." He opened an account in the name of A. B. Watson, his wife, in the First National Bank; that he did this under the advice of the cashier who told him that his individual account had been garnished, and if he didn't want the balance of his money tied up to put it in his wife's name; that it was witness' money with which he opened this account in his wife's name; that he drew checks upon it by signing the name A. B. Watson by J. B. Watson, and that continued until after her death; that there were no funds of A. B. Watson deposited in the account; that after his wife's death he did not want to continue writing her name and he checked it out and put it in his name; that he did this by writing A. B. Watson by J. B. Watson; that his wife, A. B. Watson, never wrote a check in her life unless witness asked her to; when she wrote one she signed A. B. Watson; that he and his wife earned the money jointly that went into the account by running the hotel, feed business and other business that he had and collecting the rents from the buildings; that it all went in together and witness exercised complete control over it.

In regard to the $500 time deposit he testified: "The $500 on time deposit in the First National Bank I got from Mr. Glynn. I sold Mr. Glynn a piece of property and got $500. The property was in my wife's name and with the $500 I took out the time deposit in the First National Bank in the name of my wife, A. B. Watson; it was not changed to my name until May after her death."

Further along in his testimony with reference to this particular deposit he states that the $500 was deposited in the First National Bank of Benton and was derived from property that was in his wife's name. It was deposited in the bank just as quick as he sold the property, about two years before the death of his wife, and since her death he had changed the account and put the same in his own name and in the name of his present wife. He also testified that he had not had a bank account in his own name in the First National Bank from the time the garnishment was served until after the death of his wife. His wife had an account in her name but the funds were his. He stated, however, that the funds were derived from the rental of houses, the title to which stood in her name, and from the hotel business, which was in her name, and from other moneys as they would come in; that soon after the Bank of Benton was opened up witness discontinued the bank account in his wife's name in the First National Bank and transferred it to the Bank of Benton. At the time of his wife's death there was a time deposit of $500 in the Bank of Benton in his wife's name derived from the dividend on a policy which he had in the New York Mutual, and in addition to this there was a checking account in the bank in her name of $713, which he drew. After her death he collected $500 on a life insurance policy and put the same in the Bank of Benton and had a certificate of $500 issued to himself and one in the name of Edward Watson. His testimony tends to show that for some two years after the death of his first wife his daughter did not make any claim to the moneys on deposit in the banks in the name of A. B. Watson, and that the controversy concerning this arose between them because of objections made by her and her husband to his second marriage.

There was much more testimony in the record, but the above is all that is material to the issue presented by this appeal.

The chancellor entered a decree awarding to the appellee "the moneys in the banks at the time of the death

of Mrs. A. B. Watson which were deposited in her name." This appeal has been duly prosecuted.

WOOD, J., (after stating the facts). The only issue on this appeal is whether or not the money on deposit in the banks in the name of A. B. Watson at the time of her death was her property or the property of J. B. Watson, her husband. The learned chancellor rendered an elaborate opinion which shows that he has thoroughly considered every phase of the testimony presented by this record. Concerning the title to the money on deposit in the banks in the name of appellee's wife at the time of her death he says: "By the conduct of the wife and the plaintiff all the moneys deposited in the wife's name to her death must be held as the husband's moneys, for she permitted him to so deposit and use the same."

(1) As to the time deposits the trial court, as we view it, by the above conclusion clearly misapprehended the facts. The $500 time deposit in the First National Bank which was made on October 8, 1915, and for which a certificate was issued in the name of A. B. Watson (No. 511) was funds derived from the sale of real estate, the title to which, the undisputed evidence shows, was in the name of Anna B. Watson. The appellee, himself, testified that this sum was the proceeds from the sale of a piece of property which belonged to his wife and which he sold to Mr. Glynn and the money was deposited in his wife's name as quick as he sold the property which occurred about two years before her death. This money which was a time deposit and for which the certificate was issued was never used or changed by the appellee from the name of his wife to his own, nor was it changed in any way, but remained as originally deposited under certificate number 511 until sometime after Mrs. A. B. Watson's death.

True, the appellee also testified that the property which he sold to Mr. Glynn was property which he had purchased with his own funds and to which he had had the title made in the name of his wife, A. B. Watson.

When asked why he had done this, he stated that he commenced that way when he came to Benton; he wanted his wife to have title to the real estate.

Section 5225 of Kirby's Digest provides, in substance, that any person who shall give any property to a married woman may schedule and record the same as the separate property of such married woman with the same and like effect as though such had been done by such married woman, and any conveyance shall have all the effect of a schedule filed by the married woman herself.

Section 5226 provides that the separate estate and property of a married woman shall not be forfeited nor shall her right and title thereto be prejudiced by a failure or neglect to file the schedule, but such failure in a suit relating to said property only has the effect of placing the burden upon the married woman to show that the same was her separate property.

As to the $500 time deposit in the Bank of Benton, this was derived from the dividends on an insurance policy which appellee carried on his own life in favor of his wife, Mrs. A. B. Watson, and which he had collected some two or three years prior to her death and immediately deposited in his wife's name in the Bank of Benton. The fund so deposited remained in her name under the same certificate number until after her death.

The testimony of the appellee himself shows that these time deposits were made by him for his wife and certificates taken in her name because he had several years before concluded to put the title to the property acquired by him in her name. Therefore, it appears from the undisputed evidence that these time deposits were really the funds of Mrs. A. B. Watson by gift from her husband before they were deposited by him in the banks and that when he so deposited them he was merely depositing her own funds.

While he testified that "what was his was hers and what was hers was his," yet his conduct with reference to these time deposits clearly shows that he did not withdraw them and place them on the general checking ac-

count, did not check against them but by allowing them to remain on deposit in the name of his wife he treated them as the separate property of his wife. The facts disclosed by the record do not warrant the conclusion that Mrs. Watson permitted her husband to have the absolute custody, control and management of these time certificates. The burden was upon the appellee to show by some affirmative act with reference to these funds that he did have custody, control and management thereof with the right to use the same as his own before it could be said that his wife had made a gift to him of the funds. Such being the case, if she had permitted him to have the custody, control and management thereof, this fact under the statute would not have been sufficient evidence that she had relinquished her title to the property, but in such case his custody, control, and management under the statute would only create a presumption that he was acting as her agent.

Under such a state of facts the burden would be upon Watson to overcome this presumption by showing that his wife had made a gift of the property to him. See section 5227, Kirby's Digest.

There is no evidence to warrant any such conclusion as to these time deposits, but the undisputed evidence, as we have already observed, is to the contrary.

(2) The checking account stands on a different footing from that of the time deposits. The testimony of Mrs. Wallace shows that her mother was in the possession of the bank deposit books after the transfer of the checking account to her name. This, coupled with the fact that such account was changed by J. B. Watson to the name of his wife, was sufficient to establish the completed gift *inter vivos* by J. B. Watson to A. B. Watson. *In re Holmes,* 79 N. Y. Supp. 592; *Goelz* v. *People's Savings Bank,* 67 N. E. 232; *Barker* v. *Harbeck,* 2 N. Y. Supp. 425; *Watson* v. *Watson,* 39 Atl. 201, and cases there cited; *Wickford* v. *Corey,* 55 Atl. 684; *Halowell Savings Inst.* v. *Titcomb,* 51 Atl. 249. See also *King, Admr.* v. *Allen,* 132 Ark. 54.

Nevertheless, we are convinced that the preponderance of the evidence also shows that Mrs. A. B. Watson after the transfer of the funds in the checking account in her name did not intend to hold or use the same as her sole and separate property. On the contrary the evidence is practically undisputed that she permitted her husband to have the custody, control, and management of the property precisely the same as he had done when the account was in his own name.

Before the garnishment proceedings were had the appellee had a general checking account in his own name in which he deposited the money of his own and also the moneys derived from sales and rentals of property which belonged to his wife and all the funds that represented their joint efforts. He drew on this account to pay for the general expenses of the family and had the custody, control and management of all their separate and joint funds just as if the same were all his own. After the garnishment proceedings the testimony of the appellee shows, and there is no evidence to the contrary, that he abandoned the account in his own name and opened the account in his wife's name without her knowledge and without consulting her. He continued thereafter to deposit moneys and to check on this account just as he had done before except that the checks were signed A. B. Watson by J. B. Watson.

Appellee testified that his wife never drew a check for any purpose unless he asked her to. His testimony shows that the transfer of the account from his name to that of his wife was at the suggestion of the cashier of the bank, and that it was understood between him and the bank that the account was to be handled the same as it had been before the transfer except that the checks were signed A. B. Watson by J. B. Watson. His testimony shows that his wife was cognizant of these facts. After the death of his wife, Watson continued to deposit his own money in her name for several months.

The above facts are sufficient to overcome the statutory presumption that he was acting as an agent or

trustee in dealing with the funds of his wife and warranted the inference that she had made a gift of these funds to her husband and that she intended for him to use the money as his own.

The case as to the funds in the checking account comes well within the doctrine of *Lishey* v. *Lishey,* 2 Tenn. Ch. 5, quoted by us in *Wyatt* v. *Scott,* 84 Ark. 355-8, as follows: "The weight of authority undoubtedly is that if the husband and wife living together have for a long time so dealt with the separate income of the wife as to show that they must have agreed that it should have come to the hands of the husband to be used by him (of course, for their joint purposes), that would amount to evidence of a direction on her part that the separate income which she otherwise would be entitled to should be received by him."

We also said in the above case, "But a gift may be and will be inferred when the proof shows that the money was received by the husband and used with the knowledge and consent of the wife in such manner as to preclude the idea or inference that she expected him to account for same to her as agent or trustee."

It follows that the decree of the chancellor awarding the amount of the funds in the checking account, to-wit, the sum of $926.25 to the appellee will be affirmed, but the decree, in so far as it awards the title to the amount of the funds of the time deposits, to-wit, the sum of $1,000, to the appellee, will be reversed and the cause remanded with directions to enter a decree in accordance with this opinion and for such other and further proceedings according to law as may be necessary to protect the respective rights of the parties.

WILLIAMS v. ALEXANDER.

Opinion delivered November 10, 1919.

1. EQUITY JURISDICTION—RELIEF AGAINST JUDGMENT—UNAUTHORIZED APPEARANCE.—Equity has power to relieve against a judgment rendered upon the unauthorized appearance of an attorney.

2. SAME—SAME—SAME.—The records of a court, regular upon their face, have a large degree of sanctity attached to them, and are not to be lightly overcome; and when the appearance of the parties is entered by regular practicing attorneys, the evidence of a want of authority must be clear and satisfactory in order to warrant a court of equity in relieving against the judgment.
3. EQUITY JURISDICTION—RELIEF AGAINST JUDGMENT—NO MERITORIOUS DEFENSE.—Equity will not interfere to relieve against a judgment obtained without service when the defendant has no meritorious defense to the action in which such judgment was obtained.

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

Will G. Akers, for appellants.

The appellants were not served with process, nor were they present at the trial or sale, and the decree and sale should be set aside, not only as to Robert but also as to John Henry Jefferson, Ada, Annie and Esther, as they were not served with process, nor were they present at the trial or sale or represented by counsel. These heirs are willing to pay appellee all sums expended on account of the land purchased, improving it and taxes on it. The attorneys did not represent these appellants, and they were not served, nor was any defense made for them and the decree was void as to them.

Trimble & Trimble, for appellees.

The appellants were duly represented by attorneys and defense made for them. 103 Ark. 513. The appearance of attorneys as here raises a *prima facie* presumption of authority. 26 Ark. 17; 25 *Id.* 476; 36 *Id.* 462; 40 Ark. 124. Counsel was employed and represented them. 22 Ark. 164; 104 *Id.* 1. Walls & Reed represented them. 104 Ark. 322; 123 *Id.* 156; 109 *Id.* 82. The findings are correct and the decree should be affirmed.

STATEMENT OF FACTS.

Appellants instituted this suit in the Lonoke Chancery Court against appellees to set aside a decree in that court which they allege had been obtained without service

upon them or any authorized appearance on their behalf. The facts are as follows:

Gabe Williams, a colored man, had executed a mortgage on 200 acres of land to secure certain advances and supplies furnished him. He had given a separate mortgage on forty acres of land to secure an indebtedness for advances and supplies. These mortgages were given to the same person. Gabe Williams died and left surviving him his widow and eleven children. A dispute arose between them and the mortgagee as to the amount due under the mortgage. Early in 1912, the mortgagee threatened to bring suit against them for the 200-acre tract of land, and they entered into a written agreement with Jas. B. Reed and Charles A. Walls, practicing attorneys, to defend them in the suit. By the terms of the agreement they were to give them one-half of the land in the event it was recovered for them.

Louise Prioleau, the mortgagee, instituted two suits against them to recover the 200-acre tract of land, one being an action of unlawful detainer, and the other an action of ejectment. Both actions were carried to the Supreme Court. The first case was commenced early in 1912, and is reported in 104 Ark., p. 322, under the style of *Prioleau* v. *Williams*. The second suit is reported in 123 Ark., p. 156, under the style of *Williams* v. *Prioleau*. The Williams heirs and their attorneys had numerous conversations with regard to the defense of the suits for the 200 acres of land, and they talked of the probability of a suit being instituted against them for the 40-acre tract of land. Their attorneys told them that the same accounts were involved in both mortgages and that the same defense would have to be made in each case. A suit to foreclose the mortgage on the 40-acre tract of land was instituted by Louise Prioleau against the widow and heirs of Gabe Williams, deceased, early in 1913, and a decree of foreclosure was entered of record on the 7th day of July, 1913. No service was had upon the defendants, but Reed and Walls appeared for them and vigorously contested the suit. They secured a postponement of the

sale of the land until the 27th day of December, 1913, in order that the Williams heirs might have an opportunity to pay off the mortgage and prevent the sale. The land was sold on the day last mentioned, and C. N. Alexander became the purchaser at the sale. Most of the Williams heirs were present at the sale. Alexander went into possession of the land and has been in possession ever since, claiming to be the owner and making valuable improvements on the land. The present suit was instituted on the 6th day of November, 1916; and the lands at that time had greatly enhanced in value.

It is the contention of appellants, who are the plaintiffs in the present suit, that Reed and Walls were not authorized to enter their appearance to the foreclosure suit against the 40-acre tract of land, and that they did not know that they had done so.

On the other hand it is the contention of appellees, who are the defendants in this action, that Reed and Walls were employed by the Williams heirs to represent them in the foreclosure suit in question, and that pursuant to that authority they entered their appearance to the suit.

The widow of Gabe Williams is dead. They had eleven children, all of whom signed the contract with Reed and Walls for the defense of the suits against the 200-acre tract of land. Nine of them testified in the case at bar. They said that their mother employed Reed and Walls to defend in the suit to foreclose the mortgage on the forty-acre tract; that she had no authority to represent them in the matter, but only had authority to represent herself and two others of the children. They testified positively that no service of summons was ever had upon them and denied that they had ever authorized their mother, or any one else, to employ counsel in the case for them, or to enter their appearance to the action.

On the other hand, both Reed and Walls testified that they had been employed by the Williams heirs to represent them in the suit to foreclose the mortgage on the forty-acre tract, and that pursuant to that authority

they entered their appearance to the action and made a vigorous defense thereto.

According to their testimony, the same items were included in the mortgage on the forty-acre tract that were in the mortgage on the 200-acre tract. The same defense was made in each case and a material reduction of the accounts was secured by them. They had numerous conversations and meetings with the Williams heirs and planned to defend the suit against the forty-acre tract as well as those against the 200-acre tract. The foreclosure suit against the forty-acre tract was heard on oral testimony. All of the Williams heirs were present, and some of them testified in the case. All of them were present at the sale.

Judge Trimble was attorney for the mortgagee and testified that, while he could not recollect definitely, he thought that most, if not all, of the Williams heirs were present when the foreclosure suit was heard and determined. He also stated that he thought that most, if not all, of them were present at the sale. His testimony is corroborated by that of a son of the mortgagee. C. N. Alexander, the purchaser at the foreclosure sale, also testified that he thought that most, if not all, of the Williams heirs were present at the sale. Other facts will be stated or referred to in the opinion.

The chancellor found the issues in favor of appellees and it was decreed that the complaint be dismissed for want of equity. The case is here on appeal.

HART, J., (after stating the facts). (1-2) The power of the chancery court to act in a proper case to relieve the party against a judgment rendered against him upon the unauthorized appearance of an attorney is not a new thing in this State. In the early case of *Sneed* v. *Town*, 9 Ark. 535, this court recognized that a court of chancery would relieve a party from a judgment rendered against him in consequence of the totally unauthorized acts of an attorney. The general rule is that a defendant against whom a judgment has been rendered on an unauthorized appearance may be relieved against it. 3 Cyc. 532. The

records of a court regular upon their face have a large degree of sanctity attached to them and are not to be lightly overcome. Hence where the appearance of the parties is entered by regular practicing attorneys, the evidence of a want of authority must be clear and satisfactory in order to warrant a court of equity in relieving the party against the judgment. *Wheeler* v. *Cox* 56 Iowa, 36, and *Harshey* v. *Blackmarr,* 20 Iowa 161; 89 Am. Dec. 520, and *Winters* v. *Means,* 25 Neb. 241, 13 Am. St. Rep. 489.

(3) In *State* v. *Hill,* 50 Ark. 458, this court held that equity will not interfere to relieve against a judgment obtained without service where the defendant has no meritorious defense to the action in which such judgment was obtained. This rule has been uniformly followed ever since. In that case the court also said that one who is aggrieved by a judgment rendered in his absence must show not only that he was not summoned, but that he did not know of the proceedings in time to make defense, in order to get relief in equity.

Tested by the well known principles just announced, we are of the opinion that the chancellor was right in denying the appellants the relief prayed for. It is true there were nine of them and they each testified in positive terms that they were not served with summons; that they did not employ Reed and Walls and did not authorize them to enter their appearance to the action. It seems to us, however, that they are contradicted by the facts and circumstances in the case. They admit that they employed Reed and Walls to represent them in the suits against the 200 acres of land and that their attorneys made a vigorous defense to these actions. During the pendency of these actions, numerous consultations were had between the attorneys and their clients. The suit to foreclose the mortgage on the forty-acre tract was brought during the pendency of these actions. The defense in the two cases was largely the same. It was natural that they should have employed the same attorneys to represent them in both suits. The attorneys so testi-

fied, and they were corroborated in this respect by the attorney for the plaintiff in the foreclosure suit and by the son of the plaintiff who attended to her interest in the matter. The purchaser at the sale also testified that most, if not all of them, were present at the sale. The parties made a common defense to the suits involving the 200-acre tract of land, and it is not natural that only a part of them should have employed attorneys in the suit to foreclose the mortgage on the forty-acre tract. The parties all lived within the jurisdiction of the court, either living in the county where the suit was pending, or in adjoining counties. It was shown that one of the appellants accepted his share of the proceeds of the sale, while others admitted being present at the foreclosure sale, and some of them admitted being present at the trial.

When the whole record is read and considered together, we are of the opinion that the appellants have not made out their case by that clear and satisfactory proof which is required in cases of this sort.

It follows that the decree must be affirmed.

KILGORE LUMBER COMPANY v. HALLEY.

Opinion delivered November 10, 1919.

1. PLEADING AND PRACTICE—DEMURRER.—If the facts stated in a complaint, together with every reasonable inference therefrom, constitute a cause of action, a demurrer thereto should be overruled.
2. SPECIFIC PERFORMANCE—SALE OF TIMBER—DEMURRER.—In an action for specific performance of contract for sale of timber, the complaint alleged that the parties had entered into a contract for the purchase and sale of certain timber on certain land for a stated sum, and that plaintiffs agreed to furnish an additional sum of money for the purpose of placing a mill on the said land; and that it was agreed that the defendant should secure the indebtedness due by him to the plaintiff by a mortgage on the mill and timber. *Held,* a demurrer to the complaint was improperly sustained.
3. CONTRACT—ORAL AGREEMENT—SUBSEQUENT WRITING.—Where the terms of a contract are agreed upon orally, the same become ef-

fective, although it is further agreed that the terms of the undertaking are to be embodied subsequently in a written instrument, and signed.

4. SALE OF TIMBER—STATUTE OF FRAUDS.—An oral contract for the sale of timber is taken out of the statute of frauds, where the seller furnished the buyer money with which to erect a mill, and where the buyer entered the land and did erect the mill with the said money.

Appeal from Cross Chancery Court; *A. L. Hutchins,* Chancellor; reversed.

Killough, Lines & Killough, for appellant.

The complaint states a cause of action and it was error to sustain the demurrer. 122 Ark. 508 and citations. Furthermore answer was filed; the demurrer was thereby abandoned and should not have been acted upon by the court.

J. C. Brookfield, for appellee.

No cause of action was stated in the complaint. The demurrer was not abandoned by filing an answer at the same time. Ample time was given plaintiff to show a cause of action in equity and upon the failure to do so the complaint was properly dismissed.

STATEMENT OF FACTS.

This is an action by J. D. Kilgore, doing business as the J. D. Kilgore Lumber Company, against J. W. Halley for the specific performance of a contract of sale for the merchantable timber on 600 acres of land. The body of the complaint is as follows:

"That plaintiff, J. D. Kilgore, is doing business under the firm name of J. D. Kilgore Lumber Company.

"That defendant J. W. Halley is indebted to the plaintiff in the sum of $2,874.45 with interest thereon.

"That plaintiff J. D. Kilgore Lumber Company on or about the 19th day of June, 1917, contracted to sell the defendant J. W. Halley, and defendant agreed to buy the merchantable timber on the following described land situated in Cross County, Arkansas, towit: (Here follows description of the land) containing in the aggregate

600 acres more or less. That the agreed price and consideration for the said contract to sell was the sum of $1,350, which sum is a part of the said debt hereinbefore mentioned.

"That the remainder of the debt hereinbefore mentioned was contracted for the purpose of placing thereon a mill on the said property and was to be secured by a mortgage on said mill and timber; that said mill is situated on section 4 hereinbefore mentioned.

"Plaintiff is informed that said Halleyis about to sell said mill to one Jack Spencer of Fair Oaks, Arkansas, for the sum of $1,000, and that, if said sale has been already made, plaintiff alleges that it is a subterfuge for the purpose of avoiding the debt of the plaintiff, without consideration and void and fraud upon this plaintiff, and defendant refuses to perform said contract to buy said timber and to execute a mortgage on said mill and timber to secure the debt herein.

"Plaintiff further alleges that defendant Halley does not have sufficient funds in the State of Arkansas or any other place to pay his debts and that he is insolvent.

"Wherefore plaintiff J. D. Kilgore and J. D. Kilgore Lumber Company pray judgment against the defendant in the sum of $2,874.45, said money advanced by plaintiff, with interest thereon, that a writ attachment issue on said mill, or in case said mill has been sold a writ of garnishment issue against said Jack Spencer, and, in case said sale, if made, is held valid, said defendant Halley be enjoined from selling any notes he may have, covering deferred payments or otherwise transferring any evidence of indebtedness he may have from the said Jack Spencer, and that the said Jack Spencer be required to account for the said $1,000 or any other amount that may be due and owing from him to the said J. W. Halley, and that plaintiff be subrogated to all rights of said Halley therein if said contract can not be enforced and for all other proper relief."

The court sustained a demurrer to the complaint, and, the plaintiff electing to stand upon the demurrer,

his complaint was dismissed for want of equity. The plaintiff has duly appealed.

HART, J., (after stating the facts). (1-3) The court erred in sustaining a demurrer to the complaint. The rule is that if the facts stated in the complaint, together with every reasonable inference therefrom, constitute a cause of action, the demurrer should be overruled. *Cox* v. *Smith,* 93 Ark. 371, and *Sallee* v. *Bank of Corning,* 122 Ark. 502. In the application of this rule to the facts stated in the complaint it can not be said that no cause of action is stated. It is fairly inferable from the language of the complaint that the parties entered into a contract for the purchase and sale of the timber on 600 acres of land at a stated sum and that the plaintiff agreed to furnish an additional sum of money for the purpose of placing a mill on the timber lands. It was further agreed between the parties that the defendant should secure the indebtedness due by him to the plaintiff by a mortgage on the mill and timber. Where the terms of a contract are agreed upon orally the same become effective, although it is further agreed that the terms of the undertaking are to be embodied subsequently in a written instrument and signed. *Emerson* v. *Stevens Gro. Co.,* 95 Ark. 421; *Friedman* v. *Schleuter,* 105 Ark. 580; *Skeen* v. *Ellis,* 105 Ark. 513, and *Alexander-Amberg & Co.* v. *Hollis,* 115 Ark. 589.

(4) According to the allegations of the complaint, the plaintiff furnished the defendant an additional amount of money for the purpose of erecting a mill on the timber lands, and pursuant to the contract the defendant entered into possession of the lands and erected the mill thereon with the money furnished by the plaintiff. This constituted such performance of the contract as to take it out of the statute of frauds. *Moore* v. *Gordon,* 44 Ark. 334.

It follows that the court erred in sustaining a demurrer to the complaint and in dismissing the plaintiff's complaint for want of equity. For that error the decree will be reversed and the cause remanded for further proceedings according to the principles of law and equity and not inconsistent with this opinion.

AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, LIMITED, v. WOOD.

Opinion delivered November 10, 1919.

PRINCIPAL AND AGENT—AUTHORITY TO NEGOTIATE AND TO COLLECT LOANS.—While the authority to negotiate loans raises no presumption of authority to collect such loans without possession of the securities, yet where the custom of the parties has been such as to lead others to believe that the agent had such authority, a payment to the said agent, without a surrender of the securities, will be deemed a payment to the principal.

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

Charles T. Coleman, for appellant.

1. Payment to an agent who neither has the note nor is authorized to collect the note, does not bind the principal unless the money actually reaches him. Payment to an agent who does not hold the securities for collection is at the risk of the payer. 54 Ga. 52; 60 *Id.* 90; Mechem on Agency (2 Ed.), § § 937-940; Story on Agency, § 98; 75 Minn. 316; Smith's Merc. Law, p. 68; 31 Cyc. 1370. One who pays a note to another to protect himself must see to it that when he pays the money he receives the note. 105 Ark. 152-157; *Taylor* v. *Oliver,* 137 Ark. 515.

2. Authority to collect interest does not raise the presumption of authority to collect the principal where the notes and securities are not entrusted to the collection of the agent. 105 Ark. 152; *Taylor* v. *Oliver,* 137 Ark. 515, 8 S. W. 595.

3. The money paid Rose never reached the company. He did not have possession of the notes at the time of payment and had no authority to collect the notes, and the payment was at the risk of the payer. Cases *supra;* 105 Ark. 152. The Freehold Company never received the money, and there was no ratification by it by accepting the money, as the transcript of Rose's account with the Worthen Company Bank shows. The evidence utterly fails to show that the money collected from Wood with-

out authority ever actually reached the hands of the Freehold Company.

4. The funds, if trust funds as claimed at all, were never so impressed as "trust funds" for the defendant. 232 Fed. 847; 157 *Id.* 49; 236 *Id.* 909; 222 U. S. 707; 99 Ark. 553-557; 104 Ark. 550-560.

5. Payments out of a trust fund to innocent parties can not be recovered. 92 Fed. 745; 131 Mass. 397; 17 Mass. 563; 56 N. Y. 187; 180 U. S. 284; 78 N. W. 238; 79 N. Y. 183; 114 U. S. 401; 180 *Id.* 284; 107 Ark. 232.

6. Rose had no actual authority to collect the notes and the collection was not within the apparent scope of his authority. Cases *supra.*

Mehaffy, Reid, Donham & Mehaffy, for Deming Investment Company.

1. Under the contract between appellant and Rose, the latter had express authority to collect the principal and, second, the money actually reached the principal, as shown by the evidence. 2 C. J. 420. Rose was acting for the Freehold Company under his contract with it. He had the notes in his possession duly endorsed to him and the chancellor so found, and the finding is sustained by the evidence.

2. The testimony shows conclusively that every dollar of the money received from the Deming Investment Company was paid to appellant.

3. Under the contract Rose had authority to collect both principal and interest and the principal is bound whether Rose had the notes or not, and he had them, but appellant failed to ask for them when the payment was made, and the principal is bound; the payment to him was within the actual or apparent scope of his authority. 74 S. W. 72; 90 N. W. 646; 89 *Id.* 264; 88 *Id.* 653; Hoffcutt on Agency (2 Ed.) 65; Bigelow on Estoppel (5 Ed.) 565; 110 U. S. 7; 122 *Id.* 457. See also 64 N. W. 1100; 50 L. R. A. (N. S.) 663; 75 Col. 159; 16 Pac. 762; 65 Neb. 632; 91 N. W. 540; 65 N. E. 36; 182 Mass. 177; 68 N. W. 1055; 70 *Id.* 938; 45 *Id.* 415; 72 N. Y. 87; 89 N. W. Rep.

169-171; 77 *Id.* 1087; 76 *Id.* 213-215; 90 *Id.* 233; 64 *Id.* 1058; 95 *Id.* 615; 43 *Id.* 975; 57 Atl. 409; 170 Mass. 337; 49 N. E. 651; 152 N. W. 668; 46 S. W. 615.

4. Ratification by the appellant was shown by the acts of the company. 1 Parson's Esq. Cases 180; 13 Ky. Law Rep. 969; 22 N. W. 276; 37 S. E. 670. The proof abundantly shows that the acts of Rose were within the apparent, at least, scope of his authority and plaintiff is bound. Cases *supra.*

5. Where one of wo innocent parties must suffer, the one whose negligence or mistake made the mistake possible must bear the loss. 158 Pac. 976; 165 *Id.* 82; 122 *Id.* 623.

SMITH, J. In 1909 appellee, Fred A. Wood, became indebted to The American Freehold Land Mortgage Company of London, Limited, hereinafter referred to as the mortgage company, in the sum of $6,200, evidenced by ten principal notes and a like number of interest notes, one principal note and one interest note being payable on the first day of November from 1909 to 1918, and secured by a deed of trust on lands owned by appellee. Appellee paid the interest up to the first day of November, 1914, and paid $415.35 on the principal, and on May 5, 1915, owed a balance of $6,494.95. At that time Wood negotiated a loan from the Deming Investment Company of eight thousand dollars for the purpose of paying the debt due the mortgage company and two other debts which were secured by mortgage liens on his lands, and the investment company sent to J. D. Arnold, its local agent at Little Rock, a draft payable to J. M. Rose, the Arkansas representative of the mortgage company, for the amount due the mortgage company. Arnold's instructions were to deliver the draft to Rose on the surrender of the canceled notes held by the mortgage company and the delivery of a duly executed release of the mortgage. Arnold delivered the draft to Rose without taking up the notes, but he did receive from Rose what purported to be a valid release of the mortgage. This release was properly executed by the duly author-

ized officers of the mortgage company, but it is said that, as originally executed, it related to another mortgage and that it had been changed after its transmission to Rose to describe appellee's mortgage. Rose deposited the draft with a local bank to the credit of his individual account (all funds collected by him for the mortgage company were thus deposited) and thereafter made various remittances of this money and other collections for the benefit of the mortgage company to a bank in New York City as his contract with the mortgage company required him to do. The letters accompanying these remittances gave directions for the application of the payments so remitted, but in none of these letters was the mortgage company advised to give credit on appellee's mortgage. Rose died, and a representative of the company took charge of his affairs and his papers, and upon an audit of his books he was found to be largely indebted to the mortgage company.

Suit was brought to foreclose appellee's mortgage; and in the answer and cross-complaint which was filed payment was alleged and the cancellation of the mortgage was prayed.

Rose's agency contract was offered in evidence, and the court below held that, by its terms, express authority was conferred on Rose to collect the sum due on appellee's mortgage, and the court canceled the mortgage as having been paid, and the company has prosecuted this appeal.

Appellee insists, for the affirmance of the judgment, first, that the court properly construed the agency contract; second, that appellee's money actually reached the company and the debt was thereby paid; and, third, that, if Rose did not have actual authority to make the collection, that action was within the apparent scope of his authority.

Of the second ground it may be said that a very plausible argument is made to support it. But we think it sounder to say that in receiving appellee's money Rose was acting within the apparent scope of his authority.

The agency contract is a lengthy one and covers many matters of detail, and we do not, therefore, set it out, but the fourth paragraph—on which the decision of the court below was based—reads as follows:

"The agent hereby undertakes to carry on the business contemplated by this agreement, viz.: The making of mortgages for and on behalf of the company, collecting of principal, interest and charges, etc., and doing all the work incidental to the conduct of the mortgage business in an efficient and business-like manner, and also to do and perform all reasonable things and to render all reasonable things and to render all reasonable services conducive, incidental, or essential thereto, and to the adequate protection of the company's interest in all respects."

Another paragraph designates the agency as a special agency and recites that Rose is to have no other or different power or authority, either expressed or implied, than is defined and limited by the contract.

A study of these paragraphs in connection with the remainder of the contract leaves us in doubt whether the court below was correct in the construction given it; but, when it is read in the light of the testimony in the case, and the contract and that testimony are considered together, we think the receipt of appellee's money by Rose was within the apparent scope of Rose's authority, and the company was, therefore, as completely bound as if express authority had been conferred.

This testimony may be summarized as follows: Rose became the company's agent in 1898 for the State of Arkansas, and thereafter made a great many loans and acted for the company in an infinite number of transactions between the company and the borrowers growing out of these loans. The applications for the loans were made to Rose, and these applications with the abstracts of the title to the lands offered as security for the loans were delivered to Rose and forwarded by him to the company, and when the loans had been approved the deeds of trust

were written by Rose on blank forms bearing his name as agent and thereafter the borrower dealt with no one but Rose upon all questions of extension of time, of payment of either principal or interest, or of cancellation of the deeds of trust after payment had been made. It was the custom of the company to send releases to Rose, who delivered them to the borrowers upon the payment of their loans. The release which Rose was said to have altered was sent to him in this manner by the company, according to the testimony in its behalf, for the purpose of releasing a different loan.

The agency contract does not recite that Rose had authority to collect notes which had not been sent him for collection, but it contained no denial of that authority, and it is undisputed that he collected a great many notes, both for principal and interest, for the company. It is said, however, that in each case where that authority existed the notes had been sent to Rose for collection.

It was shown, however, that Rose had in his possession at all times a large number of the company's notes, each of which contained the following endorsement:

"To John M. Rose for collection and cancellation on our account.

(Signed) "The American Land & Mortgage Company of London, Limited,

"By W. B. Smith, Secretary."

Notes were sent to Rose for collection from sixty to ninety days before their maturity, and he had in his possession at all times for collection a large number of the company's loan notes. Indeed, at the time Arnold delivered the draft for the amount of appellee's mortgage Rose had in his possession appellee's notes due in the years 1909, 1910, 1911, 1912, 1913 and 1914, and the authority to collect those notes is conceded, but Rose did not then have in his possession the notes which had not matured. It thus appears that appellee had obtained much indulgence in the matter of extension of time and these extensions were granted to appellee, as were similar extensions to other borrowers, by Rose.

The mortgage company invokes the doctrine of the case of *Taylor* v. *Oliver,* 137 Ark. 515, and of other cases there cited, to the effect that authority to negotiate loans raises no presumption of authority to collect such loans without possession of the securities, and counsel quotes from that case the following statement of the law:

"The doctrine of those cases is conclusive of this. Rose did not have the notes for collection at the time the payments were made; and we think the testimony does not show that Mrs. Taylor was guilty of any conduct which warranted Oliver in assuming that Rose had the authority to make these collections. The testimony is conflicting as to whether Rose was the agent of Mrs. Taylor, or of Oliver, in negotiating the loan; but, if it be assumed that Rose was the agent of Mrs. Taylor in this respect, it does not follow that he was also her agent for the purpose of receiving money in payment of this loan. Upon the contrary, the law is that authority to negotiate loans raises no presumption of authority to collect such loans without possession of the securities. The note to *Campbell v. Gowans,* 23 L. R. A. (N. S.), 414, cites many cases to that effect."

It will be observed, however, that we there said that "we think the testimony does not show that Mrs. Taylor (the mortgagee) was guilty of any conduct which warranted Oliver (the mortgagor) in assuming that Rose had the authority to make these collections."

And just here the instant case is distinguishable from that case. We think the testimony set out above would have warranted a person of ordinary prudence and acquaintance with business usages—such as the testimony shows Arnold to have been—to believe, as Arnold did believe, that Rose had full authority in all matters relating to the extension and collection of these notes and the satisfaction of the deeds of trust securing them; and, that being true, payment to such an agent must be deemed payment to the principal. Bigelow on Estoppel (6 Ed.), 612, 613; *Martin* v. *Webb,* 110 U. S. 7; *Travelers' Ins. Co.* v. *Edwards,* 122 U. S. 457; *Johnson* v. *Milwaukee & Wyo.*

Inv. Co., 46 Neb. 480, 64 N. W. 1100; *Dispatch Ptg. Co.* v. *Nat. Bank of Commerce*, 109 Minn. 440, 124 N. W. 236, 50 L. R. A. (N. S.), 663; *Quinn* v. *Dresbach*, 75 Cal. 159, 16 Pac. 762; *Harrison Nat. Bank* v. *Austin*, 65 Neb. 632, 91 N. W. 540; *Fitzgerald* v. *Beckwith*, 182 Mass. 177, 65 N. E. 36; *Thompson* v. *Shelton*, 49 Neb. 644, 68 N. W. 1055; *Hare* v. *Bailey*, 73 Minn. 409, 76 N. W. 213.

The decree of the court below adjudging that appellee's deed of trust had been paid and canceling it on that account is therefore affirmed.

WING v. DAVIS.

Opinion delivered November 10, 1919.

REAL ESTATE BROKERS—COMMISSIONS.—A broker wrote appellant, the owner of certain land, asking a price and permission to sell the same; as a result of the ensuing correspondence appellant gave the broker a price at which he might sell the land within a period of six months, provided that appellant did not, himself, first sell the land. *Held* under these facts, when appellant made a binding executory contract to sell the land to another party before the broker made a similar contract, that the broker could recover no commission from the appellant.

Appeal from Monroe Circuit Court; *George W. Clark*, Judge; reversed and dismissed.

Lee & Moore, for appellant.

1. The court erred in overruling defendant's motion for a directed verdict at the conclusion of plaintiff's testimony. Davis was not Wing's agent; the terms had never been agreed upon; the most that could be said was that he had an option to buy at $30 per acre, $2,000 cash. Wing's offer was never accepted by Davis or Van Natta.

The terms of an offer must be accepted unconditionally. This case falls within the rule in 104 Ark. 465, and defendant was entitled to a directed verdict under the proof. 104 Ark. 267.

2. The court erred in overruling the motion for a directed verdict at the close of the evidence for both

plaintiff and defendant. Plaintiff was not entitled to recover under the proof. 105 Ark. 526.

3. The court erred in submitting to the jury on its own motion the interrogatories which they answered. Plaintiff was not entitled to recover under the proof and it was the court's duty to direct a verdict. 105 Ark. 526. The interrogatories to the jury were confusing and clearly against the evidence. There was no verdict here upon which the court could enter judgment. Kirby's Digest, § 6207; 38 Cyc. 1919; 9 Ark. 66; 105 N. E. 467; 5 Ind. 457; 8 Blackf. 469; 9 Ark. 62-67; 39 Mich. 710; 33 Am. Rep. 447; 7 Words & Phrases 6596; 116 Iowa 84-89; 89 N. W. 105-107. See also 101 Ind. 75; 37 *Id.* 440; 5 Am. Rep. 221.

4. Davis was not Wing's agent or broker. The evidence shows it and defendant was entitled to an instructed verdict.

C. F. Greenlee, for appellee.

1. Counsel for appellant did not object to the special interrogatory nor save exceptions.

2. The letters between the parties and the oral evidence show that appellee had a contract to sell the land for $31.50 per acre, of which appellant was to receive $30 per acre, leaving $1.50 per acre as commission, which makes $480, for which the court properly gave judgment after the jury had answered the interrogatory, and the judgment is right and should be affirmed.

SMITH, J. This is a suit by a real estate broker to recover commissions upon the sale of a tract of land belonging to appellant. The contract was made by correspondence, the material portions of which are as follows:

"December 26, 1917.

"Mr. M. Wing, Oelwein, Iowa:

"Dear Sir: Some time ago I wrote you asking you for a price on some of your lands here, including the east half of section 10. Having no answer to my letter, I am again asking you to give me your best price on these

lands, giving your best terms with rate of interest on deferred payments. * * *

"I do not know that I can sell any of your lands, but will try if you will give me a chance. I do not ask you for an exclusive right to sell your lands, but want a chance if I can find a buyer, as we are trying to settle this country up with good people who will work and help to improve same."

"Oelwein, Iowa, December 29, 1917.

"Mr. J. T. Davis, Roe, Ark.:

"Dear Sir: Your letter received. I don't care to give contract for selling land as I reserve the right to sell if buyers come to me. My price on the east half of section 10, township 1 south, range 4 west, is $30 (thirty dollars) per A. net to me. Should want about $2,000 paid down, the balance on six or eight years' time, interest six per cent., payable annually. * * *

"On any of this should want a payment down, the balance in six or eight years time. Most of this is rented for this coming year. With the exception of the first mentioned would pay a commission as we might determine later. These prices hold good for six months."

"January 15, 1918.

"Mr. M. Wing, Oelwein, Iowa:

"Dear Mr. Wing: * * *

"Now, Mr. Wing, I think your letter was all right, only it may be a little misleading as to my commission in case I was to sell any of your lands, now I will carry out your instructions to the very best of my ability, all I want to understand is how you want to pay my commission in case I should sell some of your farms. Are the prices you give me your net prices and do you want me to get my commission above your price to me or will you pay me my commission out of these prices?

"If you want me to get my commission above the price you gave me, I will endeavor to get my commission above your cash payments if I do not get all cash. However, will submit any offer to you any time I have one

for your consideration, but will do the very best for you at all times that I can."

"Oelwein, Iowa, Jan. 21, 1918.

"J. T. Davis:

"Just received your letter. I have made Mr. Trotter an offer on the east half of section 10 and can't tell until I hear from him again in regard to commission if you have any chance to sell it out of them if you can, and you can write me and we will talk commission if any is sold. I expect you to get your commission out of the first money that is paid in on it. * * *

"If I don't deal with Trotter, thirty dollars would be my lowest price on the east half of section 10 without commission that is the best thing I got take and don't know whether I sell it or not."

"January 24, 1918.

"Mr. M. Wing, Oelwein, Iowa:

"Dear Sir: I am writing to inform you that I have closed a deal for the east half of section 10, township 1 south, range 4 west. I have sold same according to your instructions to me in your letter of December 29, $30 net to you, am getting my commission five per cent above this price.

"Please make out deed to Mr. J. O. VanNatta and send deed and abstract to Bank of Clarendon or to Mr. Trotter as you like. Mr. VanNatta will pay cash $2,000 and will want eight years to pay balance, with six per cent. interest as per your offer.

"The cash payment of $2,000 is in the bank for you when deed and abstract is ready."

The court, over the objection of appellant, submitted to the jury the following interrogatory:

"Do you find from the evidence in this case that on the 28th day of January, 1918, M. Wing had made a contract of sale for the lands involved in this suit to Trotter & Minnis?"

The jury answered, "No," to the interrogatory, and the court thereupon rendered judgment in favor of appellee for the commissions claimed.

The action of the court is defended by appellee upon the authority of the case of *Hardwick* v. *Marsh,* 96 Ark. 23, where the court said:

" 'Those cases do not, however, announce the controlling principle in this case, for here the contract expressly stipulated for a definite period of time within which the agent might make a sale. In such case the contract implies an exclusive right to sell within the time named, without the right of the principal to revoke the agency unless there is a reservation to the contrary.'

"'* * * 'Now, if the principal can not, under a contract of this kind, stipulating a definite time which the sale may be made, revoke the agency directly, it follows that he can not do so indirectly by making a sale of the property himself, thereby putting it beyond the power of the agent to perform the contract. The revocation of the agency, either directly or by making a sale of the property, is a breach of the contract on the part of the principal, and renders him liable to the agent for damages which the latter sustains thereby.' "

But the doctrine of that case has no application here, because appellant had expressly reserved the right to sell the land himself. It is true appellant stated in one of his letters that "these prices hold good for six months," but that statement is to be read in connection with other statements found in the correspondence, and we think this correspondence must be interpreted as meaning that a price was given which was to hold good for six months at which appellee might sell provided appellant did not in the meantime make a sale of the land himself. This right was not only expressly reserved, but appellee's letters show conclusively that he took the agency to sell the land subject to that condition. The law of that subject is stated in the case of *Hill* v. *Jebb,* 55 Ark. 574. There a landowner had employed a broker to sell real estate, reserving the right to make a sale himself, and the broker, without knowledge that the owner had previously made a sale, found a purchaser and sued to recover a commission. In denying the right of recovery, the court said:

"Nor does it matter that, after an independent sale by the proprietor, the broker, without notice thereof, found a purchaser; for his agency had then expired by the terms of its creation, and, as he accepted the terms, he could not complain of the result. (Citing cases.)

"If it be a hardship that a broker who has found a purchaser should lose his commissions, the fact is due to his accepting employment liable to be terminated at any time by a sale made without his agency."

Now, appellee did not deposit the two thousand dollars with the bank and the testimony shows that no deposit was made until January 28, at which time VanNatta, who was the purchaser to whom appellee had contracted to sell, deposited three hundred dollars in the bank, and the court treated this deposit as a binding offer by appellee's purchaser. But the undisputed testimony shows that on January 15 appellant had made a binding contract to sell the land to Trotter & Minnis, who previously had had an option to buy the land, and this option was closed with an offer to buy on January 15. The abstracts were not sent to appellee as requested by him, but were sent to Trotter & Minnis, and, upon the approval of the title by them, the contract was consummated by the delivery of the deed to Trotter & Minnis on February 8. Appellant's letter of the 21st did not state these details, but appellant was shown to be an old man and in poor health, and his letter was written three days before appellee's letter of the 24th advising a sale by appellee to VanNatta; but upon receipt of appellee's letter of the 24th appellant wrote that he was negotiating with another party and could not write definitely what he would do until he had heard from that party.

We think there was no question for the jury, and that there are no circumstances in evidence which would authorize the jury to disregard the testimony of Trotter, who was not a party to this litigation, and who has no interest in its outcome, as he had received his deed before he knew any other person was trying to buy the land, and who testified that he exercised his option to buy the land

by a letter to that effect on January 15. It is true that Trotter's contract of January 15 was executory, and his obligation to perform by paying the purchase money was dependent on the subsequent approval of the title; but so also was the offer by appellee, as his letter advising that he had made a sale requested that the abstract of title be forwarded for examination.

Appellee argues that he had come to terms with his purchaser before he received appellant's letter of the 21st and that he had no notice of a sale prior thereto.

The case of *Johnston* v. *Fuqua,* 105 Ark. 358-363, as well as that of *Hill* v. *Jebb, supra,* is authority for the statement that appellant was not required to give him notice before making a sale. But appellant's good faith in the transaction is shown by the fact that while his contract with Trotter & Minnis was still executory—in the sense that the title had not then been examined, and before he had received appellee's letter announcing that he had found a purchaser—he wrote appellee about his pending deal.

A fair construction of the correspondence set out above is that appellant gave appellee a price at which he might sell land within six months from the time that price was given, provided appellant did not, himself, first sell the land; and the undisputed testimony, which it would be arbitrary to disregard, is that appellant had made a binding executory contract to sell the land before appellee had made a similar contract.

The court should not, therefore, have submitted the case to the jury, but should have directed a verdict in appellant's favor, and the judgment will, therefore, be reversed and the cause dismissed.

BOON v. MABERRY.

Opinion delivered November 10, 1919.

CANCELLATION OF DEEDS—MISTAKE OF THE PARTIES—DESCRIPTION.—A deed was properly canceled which in its description embraced lands which the seller did not intend to sell, nor which the buyer intended to buy.

Appeal from Woodruff Chancery Court, Southern District; *A. L. Hutchins,* Chancellor; affirmed.

J. F. Dyson, for appellant.

1. Under the law and testimony in this case the court was not justified in finding that there was such a mistake in the conveyance as would justify the finding for appellee. To entitle a party to reform a deed on the grounds of mistake merely, it must be shown that the mistake was common to both parties and that the deed as executed expressed the contract as understood by neither. 71 Ark. 614; 74 *Id.* 336. The proof of mutual mistake must be clear, unequivocal and decisive. *Ib.* Under the law as above the proof was not sufficient to justify the cancellation of the deed. 19 Ark. 522; 46 *Id.* 336. If the means of information are alike accessible to both parties so that with ordinary prudence or vigilance the parties might respectively rely on their own judgment, they must be presumed to have done so; or if they have not so informed themselves, they must abide the consequences of their own inattention and carelessness. 11 Ark. 66; 83 *Id.* 414; 95 *Id.* 528; 101 *Id.* 603.

2. The claim that appellee was mentally incapable of transacting business at the time the deed was made was an afterthought and not sustained by the evidence. The evidence to overcome the written memorial must be clear, unequivocal and decisive. 96 Ark. 264; 14 *Id.* 167; 46 *Id.* 164; 71 *Id.* 614; 75 *Id.* 72; 100 *Id.* 569.

The proof is wholly insufficient, and it is nowhere shown that appellant could be placed *in statu quo* if cancellation was decreed, nor has appellee offered to do so. 15 Ark. 286; 25 *Id.* 196.

Harry M. Woods, for appellee.

1. The cases cited by appellant as to reformation of a deed for mutual mistake correctly state the law and also sustain the contention of appellee as to fraud on part of plaintiff and incapacity of appellee Maberry. In addition to cases cited for appellant, see 135 Ark. 293; 132 *Id.* 227; 105 *Id.* 44; 84 *Id.* 490.

2. The evidence upon the question of mutual mistake is conclusive, and the chancellor was fully warranted in setting aside *the whole transaction.*

3. Maberry was incapable from disease and lack of mentality at the time of conveyance of managing or handling his affairs. The testimony proves this, and the decree should not be reversed. 71 Ark. 643; 81 *Id.* 609; *Ib.* 622; 129 *Id.* 301; 84 *Id.* 490.

HUMPHREYS, J. Appellant instituted suit against appellees in the Southern District of the Circuit Court of Woodruff County to recover possession of about fourteen acres of land in the south part of lot 1, section 16, township 5 north, range 3 west, in said county.

The complaint alleged that the appellant was the owner of said real estate, by purchase from appellee, A. F. Maberry, evidenced by a warranty deed of date November 29, 1916, from said appellee and his wife; that appellee and his lessee, R. J. Carter, were in the unlawful possession of said property.

Appellee filed an answer, denying the material allegations of the complaint and a cross-bill alleging—

First. That the land sold, and intended to be conveyed, was cut-over timber land, but, by mutual mistake, the land conveyed on the 29th day of November, 1916, and described as lot 1 in said section, township and range, embraced seven or eight acres in "Kates Camp Farm," which latter acreage was in cultivation and had upon it two or more buildings.

Second. That on the 29th day of November, 1916, on account of an extended illness, appellee did not have the mental capacity to execute a deed.

Third. That the deed was induced by the false and fraudulent representation of appellant that lot 1 in said section, township and range contained only forty acres of cut-over timber land.

Based upon the aforesaid allegations, appellee offered to refund the purchase money, taxes, interest, etc., to appellant, and prayed for a cancellation of the deed, and requested that the cause be transferred to the chancery court.

At the same time, appellee, R. J. Carter, answered, denying all the material allegations of the complaint, and, by way of affirmative defense, set up that he held that portion of "Kates Camp Farm" which was embraced in lot 1 of said section, township and range, under a lease from A. F. Maberry, of date September 12, 1916; that, at the time the deed in question was executed by A. F. Maberry to J. R. Boon, he was in possession of and cultivating seven or eight acres in the south part of lot 1 in said section, township and range, and had constructed two houses and was constructing others thereon. Over the objection of appellant, the cause was transferred to the chancery court. In the chancery court, appellant filed a reply, denying the material allegations in the cross-complaint of appellee A. F. Maberry, and the allegations in the answer of appellee R. J. Carter, setting up new matter.

The cause was submitted to the chancery court upon the pleadings and evidence, which resulted in a finding for appellees. In accordance with the findings, the deed was canceled and a judgment rendered in favor of appellant for $600, with interest from the 29th day of November, 1916, and all taxes, with interest thereon, which had been expended by appellant. The cause was retained by the court for the purpose of ascertaining the value, if any, of such permanent improvements as had been made in the meantime by appellant.

From the findings and decree, an appeal has been prosecuted to this court, and the cause is before us for trial *de novo*.

Upon the issue joined as to whether or not the deed embraced a portion of the land known as "Kates Camp Farm," appellee testified he was under the impression that lot 1 in said section, township and range, contained 40 acres of cut-over timber land; that he sold the land on the basis of 40 acres at $15 per acre, or a total of $600; that appellant understood he was buying that number of acres and that character of land from him; that neither understood that lot 1 embraced any open land in cultivation or upon which houses had been built.

Appellant testified that at the time he made the purchase and the deed was executed, he knew that lot 1 in said section, township and range, contained 54.83 acres and that he so informed appellee; but his testimony as a whole reflected that both he and appellee understood that said description embraced only cutover timber land and extended on the south to the land which was open, in cultivation and in possession of appellee, R. J. Carter, who had constructed two and was constructing other houses thereon. In the course of the examination of appellant, the following interrogatories were propounded and responses given:

"Q. You didn't know you were buying those houses, did you?

"A. No, sir.

"Q. You didn't intend to buy them, did you?

"A. No; I bought lot 1.

"Q. At the time you bought lot 1 did you expect or intend to buy any open land?

"A. No, sir.

"Q. And you didn't know you were buying any open land, did you?

"A. No, sir.

"Q. And as you said awhile ago, you thought you were buying timber and cut-over land and that is what he thought he was selling you?

"A. Yes, sir.

"Q. And that is the way he sold it, isn't it?

"A. Yes, sir.

"Q. You really feel like if you have any title whatever to that land it was a mistake, don't you?

"A. Well, yes.

"Q. And you think so now, don't you?

"A. Well, it wasn't his intention.

"Q. And it wasn't yours?

"A. No, sir.

"Q. Then don't you admit that any title you may have to the open land is the result of a mutual mistake on the part of you and Mr. Maberry?

"A. Well, yes."

The evidence on the part of appellant showed that the seven or eight acres in cultivation, included within the description in the deed, were worth from $25 to $30 per acre, and the evidence of appellee showed that the same lands were worth from $75 to $100 per acre. The undisputed evidence showed that the cut-over lands were worth about $15 per acre. These values indicate that appellant did not intend to buy, and appellee did not intend to sell, the seven or eight acre tract included within the description used to describe the lands sold and purchased.

We are convinced from a careful reading of the whole testimony responsive to the issue of mutual mistake that the description used to identify the land intended to be sold did not properly describe it. Both were under the impression that the description embraced certain cut-over timber land north of the land in possession of appellee R. J. Carter, and being cultivated by him. So the use of the description to designate the land sold was a mutual mistake on the part of appellant and appellee. To our minds the proof is clear, unequivocal and decisive to the effect that the description, "Lot 1, section 16, township 5 north, range 3 west," was used by the parties under the impression that the description covered the lands and only the lands intended to be sold and conveyed, but that, as a matter of fact, said description embraced lands which the appellee did not intend to sell and which the appellant did not intend to buy. The mistake was common to

both parties, and the deed did not express the contract as understood by either.

Under this view of the evidence, we deem it unnecessary to summarize the evidence responsive to the other issues in the case.

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

GREENHAW *v.* WILLIAMS.

Opinion delivered November 10, 1919.

1. APPEAL AND ERROR—EVIDENCE NOT IN RECORD.—In a chancery appeal the decree recited that the court heard the case upon the pleadings and evidence. *Held,* where the evidence heard does not appear in the transcript, it will be presumed that the findings of the chancellor were supported by the evidence.
2. PLEADING AND PRACTICE—SUFFICIENCY OF ANSWER—ACTION FOR CUSTODY OF CHILD.—In an action for the custody of a child, the response alleged that the petitioner abused the child in the appellee's presence till he told petitioner not to further abuse her. *Held,* under this allegation appellee could introduce testimony of petitioner's conduct toward the child.

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

W. C. Rodgers, for appellant.

The court erred in overruling the demurrer to the response. The *onus* was on the defendant to fortify by a preponderance of the testimony all the affirmative defenses he set up. 84 Ark. 325. But there is not even an allegation that plaintiff or anyone by his direction or consent maltreated, whipped or beat the girl with a window stick, etc. This statement is a mere conclusion and vulnerable to demurrer. 35 Ark. 109, 110; 43 *Id.* 296, 305; 72 *Id.* 478, 484; 121 *Id.* 194-6. And even this is all hearsay and incompetent. It was the duty of the chancellor to consider the competent testimony. 127 *Id.* 438-446. The cause should be reversed with directions to sustain the demurrer of plaintiff.

The appellee, *pro se.*

The evidence sustains the findings of the chancellor. The best interests of the minor child is the criterion, and the finding of the chancellor that the foster mother, Mrs. Greenhaw, was a woman of fitful temper and an unfit person to rear and educate the girl and the decree should be affirmed or appeal dismissed.

HUMPHREYS, J. Appellant, foster father of Vivian McLaughlin, instituted *habeas corpus* proceedings against appellee, the grandfather of said Vivian McLaughlin, in the Howard Chancery Court, to obtain the custody of said child.

The bill, in substance, alleged that appellant had adopted Vivian McLaughlin at the April term, 1912, of the probate court in said county; that at the time of the adoption she was seven years old; that early in the year 1919, Vivian McLaughlin left appellant's and went to appellee's home, where she has since remained, through the encouragement and advice of appellee; that appellee is unlawfully harboring and refusing to surrender the custody of said child to appellant.

Appellee filed a response, denying the allegation of the complaint charging that he is unlawfully harboring and refusing to surrender the custody of said child; and, in justification, alleged that he is the grandfather of Vivian McLaughlin, who had in the first instance come to his house as a visitor; that she informed him that appellant and wife had maltreated her by whipping and beating her with a window stick; that appellant came to his premises after her, and, when she refused to return to him, appellant abused the child in his presence until he interfered and prevented further abuse; that said child is now fourteen years old and of sufficient intelligence to choose her own guardian; that appellee is able and willing to keep, maintain and educate her.

To this response, appellant filed a demurrer, on the ground that no defense was stated therein. The demurrer was overruled by the court, over the objection and exception of appellant.

Thereupon the court proceeded to hear the cause upon the bill, response and evidence, from which it found the issues in favor of appellee and dismissed the bill for the want of equity.

From the judgment of dismissal, an appeal has been duly prosecuted to this court.

It is insisted that the court erred in overruling the demurrer to the response, because, it is said, the response only sets up hearsay matter as an affirmative defense. The following portion of the response is clearly hearsay: "Your respondent says that she, the said Vivian McLaughlin, declared her intention of not returning to the home of Mr. Greenhaw and wife, saying that they had maltreated her, whipped her and beat her with a window stick. * * * ." But the response contained the following allegation which is not hearsay: "Mr. Greenhaw abused Vivian in his (appellee's) presence till he told him not to further abuse her." While the latter allegation is general, it is more than a mere conclusion. It is a defense defectively stated. If appellant desired to be more specifically informed as to the nature and character of the abuse offered by him to the child in the presence of appellee, he should have filed a motion to require appellant to make this allegation more definite and certain. This allegation opened the way for proof, and it is recorded in the judgment that the court heard the case upon the pleadings and evidence. The evidence is not set out in the transcript. It is shown by the pleadings that appellant was of no blood kin to the girl, and that she was fourteen years of age. The evidence may have revealed that appellant was an improper person to have the control and custody of a girl child of her age on account of the character of treatment offered her by him in the presence of appellee. The inference must be indulged that the findings and decree of the chancellor were supported by the weight of the evidence.

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

HILL v. ECHOLS.

Opinion delivered November 17, 1919.

1. ROADS AND ROAD DISTRICTS—DESCRIPTION OF ROUTE—IDENTIFICATION.—The roadway provided for in act 402, page 1693, of the Acts of 1919, is, from the terms of the act, capable of identification, and the statute is not uncertain in that respect.
2. ROADS AND ROAD DISTRICTS—WOODRUFF COUNTY—JURISDICTION OF COUNTY COURT.—Act 402, Acts 1919, *held* to provide that the county court of the Southern District of Woodruff County, at Cotton Plant, have jurisdiction of the proceedings in the creation of the road district therein provided for.
3. IMPROVEMENT DISTRICTS — COUNTY IN TWO DISTRICTS — JURISDICTION.—Although the Legislature, by statute has divided a county into two judicial districts, the Legislature may withdraw the divided jurisdiction of the courts provided for and confer exclusive jurisdiction upon one of the courts, of matters relating to a road district, running through both judicial districts.
4. ROADS AND ROAD DISTRICTS — COLLECTION OF ASSESSMENTS.—The courts of either district of Woodruff County have authority to enforce collection of assessments of the district created by act 402 of 1919.
5. IMPROVEMENT DISTRICTS—EXEMPTION OF CERTAIN LANDS.—The exemption of benefited lands, and not the mere failure to include all such lands within the prescribed limits of an improvement district, operates as an unjust discrimination, and invalidates the creation of an improvement district.
6. SAME—SAME.—Act 402 of 1919, creating a road district in Woodruff County, failed to include certain lands in the town of Cotton Plant, but provided that the commissioners could include such lands if they thought proper. *Held,* the provision did not invalidate the statute.
7. SAME—LANDS IN ADJACENT COUNTY.—Act 402 of 1919 is not invalid because it fails to include within the district thereby organized lands in Monroe County which abut upon the road, and which are benefited thereby.

Appeal from Woodruff Chancery Court, Southern District; *A. L. Hutchins,* Chancellor; affirmed.

Ross Mathis, for appellants.

1. The description of the road to be improved is too vague and indefinite for identification. The agency provided for approving the plans and for levying assess-

ments is not sufficiently designated and the court to enforce the assessments is not definitely specified.

The act does not designate with certainty an agency to make the levy nor the court to collect the assessments. 36 Ark. 331. The authorities are too numerous to cite. The act does not provide for the collection of delinquent assessments on the land of both districts of Woodruff County and is void.

2. The description of the route is so vague and indefinite and uncertain that the legislative intent can not be ascertained. See act 402, § 2; 120 Ark. 277; 125 *Id.* 325.

The proof shows that there are two or more roads between Cotton Plant and Jelks that might have been improved and it does not appear from the act which was intended. Cases *supra.*

3. The exclusion of the lands in the town of Cotton Plant is arbitrary and discriminatory, so as to render the act invalid. It excludes certain lands in the district. Act 402, § 3; 130 Ark. 75; 214 S. W., p. 56.

4. The failure to include the Monroe County lands is arbitrary and discriminatory and makes the act invalid. 213 S. W. 768; 214 Id. 23. So, because of the uncertainty of the route and the failure to designate the agency and court and the discrimination as to lands and failure to include lands in Cotton Plant and Monroe County, the act is invalid. Cases *supra.* 130 Ark. 75; 214 S. W. 47; 1 Sup. Ct. Rep. 103.

Coleman, Robinson & House and *Roy D. Campbell,* for appellees.

The act is valid. The description of the roads to be improved is not vague nor indefinite, nor is it invalid for the exclusion of lands in Cotton Plant or Monroe County. 130 Ark. 70-97. The map describes and points out the lands. 214 S. W. 47; 125 Ark. 325; 131 *Id.* 59; 133 *Id.* 380; 214 S. W. 23; *Ib.* 767. The attacks on the district and act are without merit. *Supra.*

McCULLOCH, C. J. Appellants are owners of land in a road improvement district in Woodruff County, created by a local statute enacted by the General Assembly of 1919, at the regular session (Act 402, p. 1693), and they instituted this action against the commissioners of the district to restrain proceedings on the ground that the statute is void and unenforceable.

(1) One of the grounds for the attack on the validity of the statute is that the description of the road to be improved is too vague for identification. The clause of the statute describing the road reads as follows:

"Beginning at the east corporate limits of the city of Cotton Plant, thence running in an easterly direction about one mile, thence in a northerly direction to the town of Jelks. Also a road beginning at the intersection of the Old Military Road with St. Francis and Woodruff counties, thence in a southwesterly direction through Hunter; thence continuing westerly so as to intersect the road first above described at a point to be selected by the commissioners and approved by the county court. The improvements to be made in the said district are to be made along the route designated by this act."

It is shown on the map introduced in evidence and verified by testimony adduced that there are two parallel public roads to Jelks, intersecting the roads running east out of Cotton Plant, and it is argued that the statute does not identify the particular one to be improved and that this renders the statute void. The description in the statute is that the road to be improved is one that leaves the road running east about a mile from Cotton Plant, and only one of the parallel roads shown on the map answers that description. It follows, therefore, that the road to be improved is capable of identification from the language of the statute. The statute is not uncertain in this respect, and the attack upon it on that ground is unfounded.

It is next insisted that the statute is void for the reason that the agency providing for approving the plans and for levying assessments is not sufficiently designated,

and that the court for the enforcement of the collection of assessments is not definitely specified.

The statute provides that the plans and assessment lists shall be filed in the office of the clerk of the county court, which court is authorized to approve the same. It also provides that suits to enforce the assessments shall be instituted in the chancery court.

Woodruff County was, by a statute enacted in the year 1901 (Acts 1901, p. 249, as amended by the act of 1909, p. 937), divided into two districts in which separate courts, chancery, circuit, probate and county, are held, and the county clerk is required to maintain an office in each of the districts. The respective courts are held at Augusta, the county seat, which is in the Northern District, and at Cotton Plant, in the Southern District. The territory embraced in the road improvement district, and the road to be improved, lie in both of the court districts, and the contention in this case is that the statute is void for uncertainty because it fails to specify which of the courts is to take jurisdiction of the proceedings.

(2-3) It is plain from the language of the statute that the county court for the Southern District at Cotton Plant is the one to have jurisdiction over the proceedings, for in section 8 of the statute prescribing the form of notice to landowners the county court at Cotton Plant is the one mentioned. This supplies the omission to mention the particular court in other sections of the statute, for it shows definitely what was in the minds of the lawmakers with respect to the proper court. The fact that some of the affected territory and the roads to be improved lie in the Northern District does not constitute an attempt to give the county court at Cotton Plant extraterritorial jurisdiction, for the division of the county into separate districts results only from the force of a statute, and the legislative authority which separated the judicial system of the county could withdraw it for the purpose of conferring exclusive jurisdiction on one of the county courts.

(4) Now, the provision for the collection of assessments by decree of court refers to another statute (Act 1909, p. 829), concerning drainage districts, and that statute provides for suits *in rem* in the chancery court of the county where the lands lie. This confers jurisdiction on either of the chancery courts of Woodruff County, for some of the lands lie in each district. The statute, *supra,* creating separate districts in Woodruff County provides that each district shall be treated as a separate county for the purpose of determining the jurisdiction of courts. But, even if the statute was indefinite in this respect, either of those courts would have jurisdiction under general statutes to enforce liens on land. Kirby's Digest, § 6060.

(5-6) Another specified ground of attack on the statute is that lands in the town of Cotton Plant, lying adjacent to the proposed improvement, are exempted from the operation of the statute, whilst other lands more remote from the road to be improved are expressly embraced in the district. The doctrine announced by this court in *Heinemann* v. *Sweatt,* 130 Ark. 75, and in *Milwee* v. *Tribble,* 139 Ark. 574, is invoked as sustaining the contention of appellants.

It is not true that the lands inside of the town of Cotton Plant are exempted from the operation of the statute. Certain rural tracts of land lying west and northwest of the town are embraced in the district and the language describing those tracts refers to parts of designated subdivisions as "not embraced in the corporate limits of the town of Cotton Plant." But this language does not affirmatively exclude the lands in the town from the operation of the statute, as was the case in the statute under consideration in *Harrison* v. *Abington, ante* p. 115, where entirely different language was employed. Lands in the town of Cotton Plant are, it is true, excluded from the boundaries of the district, but the statute contains a provision that "if the commissioners conclude that lands not within the boundaries of the district, as heretofore laid out, will be benefited by the im-

provement of the roads, they shall assess the benefits and damages to such lands," etc. This operates as authority for the assessment of all lands benefited by the improvement and prevents discrimination arising from mistakes on the part of the lawmakers in failing to include in the boundaries of the district all lands benefited. It is the exemption of benefited lands, and not the mere failure to include all such lands within the prescribed boundaries of the district, that would operate as an unjust discrimination and invalidate the creation of an improvement district. Such is not the case here.

(7) Finally, it is insisted that the statute is discriminatory and void because it applies only to lands in Woodruff County and excludes lands in Monroe County abutting on the road to be improved. The road running east about a mile from Cotton Plant is on the line between the two counties, and there is no provision, it is conceded, for assessing the lands in Monroe County.

The question is ruled, we think, by the decisions of this court in several recent cases, notably in *Van Dyke* v. *Mack,* 139 Ark. 524, and *Cumnock* v. *Alexander,* 139 Ark. 153, as well as other cases cited in the brief of counsel for appellees. It must be conceded that undisputed facts in this case furnish strong reasons for the contention that the lands in Monroe County abutting on the road will be substantially benefited by the improvement, and that the exclusion of those lands was arbitrary—that the legislative determination was erroneous—but those reasons are not conclusive. It is the duty of the courts to respect legislative ascertainment of facts upon which laws are based unless such determination is obviously erroneous, and there may be facts and existing circumstances which we are not at liberty to inquire into for the purpose of reviewing the decision of the lawmakers. The lands lie in a different county and the arrangement of the roads, serving as means of travel to and from the commercial, social and educational centers of that county and its various community units, may be such as to justify the conclusion that a road between two points in another

county will not prove to be of sufficient benefit to warrant the taxation of those lands to pay the cost of making the improvement. *VanDyke* v. *Mack, supra.*

This question in the case is, confessedly, not free of doubt, but it is our duty to resolve all reasonable doubt in favor of upholding the legislative decision.

Decree affirmed.

MERCHANTS BANK OF VANDERVOORT *v.* AFFHOLTER.

Opinion delivered November 17, 1919.

1. PRINCIPAL AND AGENT—PURCHASE OF LIBERTY BONDS—PROCUREMENT OF WRONG SORT.—Appellee subscribed for liberty bonds of the fourth issue, and on his subscription card provided that they were to be registered bonds; this card was given to the appellant bank. Appellee then deposited with the bank the purchase price of the bonds. Appellant then procured coupon bonds, but upon delivery to appellee, they were stolen. *Held* under the facts that appellant bank was liable to appellee for the amount deposited by appellee to pay for the bonds.
2. SAME—RELATION OF BANK AND PURCHASER OF BONDS.—The bank having accepted funds for the purchase of bonds, it was responsible to the subscriber, either for the return of the money or for the delivery of bonds designated in the subscription contract.
3. SAME—DEPOSIT OF COUPON BOND FOR SAFE KEEPING—THEFT—LIABILITY OF BANK.—Appellee deposited with appellant bank, a coupon liberty bond, payable to bearer, for safe keeping. The bank placed the bond, with others, including some owned by it, in an iron safe, but not in a burglar-proof part of that safe. The iron safe was blown open, and appellee's bond stolen. In an action by appellee against the bank for the value of the bond, *held,* that as between the parties appellant was a gratuitous bailee, and was liable only for gross negligence, and *held,* further, it was a jury question whether appellant was grossly negligent in not placing a bond of that character in its burglar-proof compartment.
4. JURISDICTION—TEST OF—AMOUNT—FRAUD.—The test of jurisdiction is found in the allegations of the complaint, and if those allegations are made merely for the purpose of giving jurisdiction in fraud of the rights of the parties, it may be reached by special plea setting up the fraud.

5. NEGLIGENCE—BAILMENT—LOSS OF RES—JURISDICTIONAL AMOUNT SUED FOR.—In an action in the circuit court, the complaint alleged that appellee had given a liberty bond of the value of $100, and $2 accrued interest, to appellant for safe keeping, and that the same was stolen as a result of appellant's negligence. *Held,* the complaint brought the cause within the jurisdiction of the circuit court, notwithstanding that in its verdict the jury found the bond to be of less value than $100; and in the absence of proof tending to show fraud upon the jurisdiction of the court, an objection to the complaint should not be sustained.

Appeal from Polk Circuit Court; *James S. Steel,* Judge; affirmed.

Prickett & Pipkin, for appellant.

1. The court erred in instruction No. 1 for plaintiff in assuming that defendant became the agent of appellee with specific instructions and ignores material issues about which the evidence was conflicting and was misleading and prejudicial. 95 Ark. 108; 93 *Id.* 564. Instruction No. 2 ignores appellant's contentions and theory.

2. There was also error in the admission of Mrs. Secklyter's evidence and that of appellee's wife and others as pointed out in the motion for a new trial. 33 Am. Rep. 767. Cases *supra.*

Lake & Lake, for appellee.

1. There was no error in the instructions given or refused. 69 Ark. 632; 89 *Id.* 178; 95 *Id.* 178; 95 *Id.* 506; 93 *Id.* 140; *Ib.* 457. See also 59 Ark. 431; 99 *Id.* 926; 93 589; 23 *Id.* 115; *Ib.* 519; 111 *Id.* 550; 1 U. S. (Law Ed.) 878; 2 C. J. 717.

2. There was no error in the admission of evidence and on the whole case the verdict was right and sustained by ample testimony.

Prickett & Pipkin, for appallant.

1. In addition to points and authorities in first brief, contend that the instructions were error. 33 Am. Rep. 767.

2. The demurrer to appellee's second cause should have been sustained. 7 R. C. L., § 88; 61 Ark. 564. For numerous errors in the instructions and ignoring material issues the judgment should be reversed.

McCULLOCH, C. J. A. B. Affholter and his wife, Leni Affholter, instituted separate actions in the circuit court of Polk County against appellant, a banking corporation doing business at Vandervoort, in that county. to recover sums of money deposited with appellant for the purchase of United States Government bonds of the Fourth or Liberty Loan issue. The complaint of Mrs. Affholter sought recovery on another item which will be discussed separately, but on the issue referred to above the cases were identical and will be disposed of together in this opinion.

Affholter and his wife each subscribed for the purchase of bonds in the sum of $150, and the subscriptions were given through a canvasser or solicitor who procured their signatures and deposited their subscription cards with appellant bank. Each of the cards signed by appellees, Affholter and wife, contained an agreement to take a bond of the denomination of $100 and one of the denomination of $50, making a total of $150, and registered bonds were designated in the subscription cards as the kind to be purchased. The cards contained printed directions designating two kinds of bonds, one registered bonds and the other coupon bonds, and the word "coupon" had a line drawn through it, leaving the designation of registered bonds as the kind selected by the appellees.

The following day after the subscriptions were taken, Mrs. Affholter called at the bank and deposited sufficient funds to cover the subscriptions of herself and husband and received from the bank a deposit slip reciting the names of the depositors, the amount deposited, the date thereof, and the words "deposited by Fourth Liberty Loan." The bonds were ordered by the bank and received, but before they were called for by said

purchasers the bank vaults were robbed in the night time and the bonds were stolen. This occurred on November 13, 1918, three or four days after the bonds had been received by the bank. The bonds ordered and received by the bank were coupon bonds and not registered bonds, and the theory upon which appellees sought to recover the money from the bank was that they subscribed for registered bonds and deposited the funds to cover the purchase price of that kind of bonds, but that the bank failed to carry out the instructions, and that the coupon bonds received by the bank in violation of the instructions did not become the property of appellees.

On the other hand, the contention of appellants in the trial below was that the subscription cards were not delivered to the officials of the bank for the purpose of designating the character of bonds to be ordered, but were merely left at the bank for safe-keeping for the sales director of the Liberty Loan drive, and that no directions were given to the officials of the bank by appellees as to the kind of bonds to be ordered, and that the coupon bonds were ordered pursuant to the practice there for subscribers to accept coupon bonds.

(1) That was the issue presented in the trial below, and the court submitted it to the jury on instructions which stated, in substance, that if appellees deposited the money with instructions to appellant to purchase registered bonds and appellant failed to procure that character of bonds, it was liable for the money so deposited. The evidence was the same in each case and was sufficient to sustain the findings in favor of appellees. The printed subscription cards contained an agreement on the part of the subscriber to call at the bank at once and pay the subscription, and it also designated the character of bonds to be purchased. The cashier testified that the subscription cards were not delivered to the officers of the bank for the purpose of giving directions concerning the furnishing of bonds, but were merely kept there for the benefit of the sales director. There were, however, no other directions given concerning the kinds of bonds

to be purchased, and the jury were warranted in finding that the officers of the bank knew, or ought to have known, that the character of bonds desired was designated on the face of the subscription cards. That being true, it was the duty of the bank to take notice of the designation and order the character of bonds so designated. Failure to follow the instructions in that respect made the bank responsible for the return of the money in the event the designated bonds were not delivered to the subscribers.

(2) Error of the court is assigned in giving an instruction which it is said assumed the existence of the relation of agency between the bank and appellees in the purchase of the bonds, but we do not think that the instruction assumed the existence of that relation. If it did, however, there was no error, for it was undisputed that the money was deposted with the bank for the purpose of purchasing bonds. It is unimportant whether the bank was acting strictly as the agent of the subscriber or whether it was acting as a promoter of the loan drive, for, if it accepted funds for the purchase of bonds, it was responsible to the subscriber either for the return of the money or for the delivery of bonds designated in the subscription contract.

There was no error of the court in the submission of the issues to the jury, nor was there any other prejudicial error occurring at the trial.

The other branch of the suit instituted by Mrs. Affholter involved the question of liability for a coupon bond of the denomination of $100, delivered by her to the bank for safe-keeping. She purchased the bond, and afterwards delivered the same to the bank for safe-keeping, and it was placed in the bank safe, which was burglarized on the night of November 13, 1918, and that bond, together with many others belonging to other persons, was stolen. The bank kept a large iron safe with a combination lock on it and inside of it was a manganese steel drawer or compartment which was burglar-proof, and was used for the safe-keeping of money. The bonds —the one belonging to Mrs. Affholter and those belong-

ing to numerous other persons, including officials of the bank—were not kept in the burglar-proof compartment, but were kept inside of the safe. The burglary was discovered the next morning after it occurred, and on examination it was found that the combination lock on the outside of the safe had been chopped off with an axe and that explosive material had been inserted inside the lining of the door, which, when exploded, blew off the door or lock and permitted entrance. The money drawer or compartment was not entered. The testimony introduced by appellant was to the effect that all the bonds kept by the bank, including those which were the property of the bank itself and its officials, were kept in the same manner, and that that was the customary way to keep the bonds. There was also testimony to the effect that there was not room inside the money drawer to keep the bonds.

(3) It is earnestly insisted that there is no evidence to sustain the finding of negligence on the part of the bank for the loss of the bonds. We are of the opinion, however, that the evidence was legally sufficient. These bonds were coupon bonds, payable to bearer, and negligence is inferable from the fact that they were kept, not in the burglar-proof compartment of the safe, but in the part of the safe which was insufficient to resist the attack of a skillful burglar. Appellant was, with respect to the keeping of this particular bond for Mrs. Affholter, a gratuitous bailee and was liable only for gross negligence. *Wear* v. *Gleason,* 52 Ark. 364; *Baker* v. *Bailey,* 103 Ark. 12. But it was a question for the jury to determine whether or not under the circumstances it did not constitute gross negligence to keep in an insecure place Government bonds, payable to bearer, which could not be readily identified. We can not say that the jury were not warranted in drawing the inference of gross negligence from the circumstances in the case. The court submitted this feature of the case to the jury on instructions which permitted recovery on the finding by the jury of failure of appellant to exercise ordinary care,

but the same kind of instructions were requested and given at the instance of counsel for appellant, and it is unnecessary for us to determine whether or not those instructions were correct. We have examined the instructions carefully and do not find anything prejudicial to appellant's rights.

(4-5). Another point made in the case is that the second paragraph of Mrs. Affholter's complaint, seeking recovery for the loss of the single bond of the denomination of $100, did not state a cause of action within the jurisdiction of the circuit court, or rather that it constituted a fraud on the jurisdiction of the court in that the bond was not of the value of $100. There was a demurrer to the second paragraph, which the court overruled.

The test of jurisdiction must be found in the allegations of the complaint, but if those allegations are made merely for the purpose of giving jurisdiction in fraud of the rights of the parties, it may be reached by a special plea setting up the fraud. *Neale* v. *Smith,* 61 Ark. 564. There was no effort to show fraud in the conduct of the plaintiff in joining this cause of action with the other and in instituting the action in the circuit court. The allegation of the complaint was that the lost bond was of the denomination of $100 and that with accrued interest it was of the value of $102. This was sufficient to come within the jurisdiction of the circuit court, and, notwithstanding the fact that the jury found the value of the bond to be less than $100, in the absence of proof tending to show fraud upon the jurisdiction of the court, an objection to the complaint should not have been sustained.

We find no error in either of the judgments, and the same are, therefore, affirmed.

J. R. WATKINS MEDICAL COMPANY v. MONTGOMERY.

Opinion delivered November 17, 1919.

1. PRINCIPAL AND SURETY—FRAUD—LIABILITY OF SURETY.—M. entered into a contract with W. and procured the signature of A. to the same as his surety. In an action by W. against M. and A. for breach of the contract, A. can not escape liability to W. on the ground that, as between M. and himself, his signature was procured by fraud.
2. SAME—SAME—SAME.—In the same action, A. can not defend on the ground that the name of a witness to his signature was forged, because a witness was not necessary to the validity of his agreement.
3. SAME—SIGNATURE OF SURETY BY MARK—WITNESSES—VALIDITY.—A signature to a suretyship contract made by mark and properly witnessed by two witnesses, makes the same a *prima facie* signature under the statute.
4. SAME—DENIAL OF SIGNATURE BY SURETY—UNQUALIFIED DENIAL.—One charged as surety must deny the same by unqualified denial by affidavit, in order to take advantage of Kirby's Digest, section 3108.
5. SAME—SAME—SAME.—The purpose of Kirby's Digest, section 3108, is to permit the party who files a written instrument with his pleadings to introduce it in evidence as genuine unless its genuineness is first denied under oath.
6. SAME—SAME—SAME.—A mere denial by a surety of the genuineness of his signature to the contract puts that proposition in issue before the jury, and places on the plaintiff the burden of establishing his cause of action, but when the affidavit provided for in Kirby's Digest, section 3108, has not been filed, plaintiff may introduce the writing in evidence without other proof of its execution.

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

Strait & Strait, for appellant; *Tawney, Smith & Tawney*, of counsel.

1. Under the facts and circumstances here appellant was entitled to a directed verdict as against Warren. 44 N. Y. 640; 11 Utah 29; 130 U. S. 643.

2. However, if a case was made for a jury at all, it was error to give No. 4. The contract was not that of principal and agent, but of purchase and sale, and was

not to become effective until signed by Montgomery and his sureties, Warren and Hall. The relation between Montgomery and plaintiff was that of debtor and creditor and therefore conflicting, and Montgomery was acting for himself and not as agent of plaintiff. 199 S. W. 779; 146 N. W. 329; 66 N. Y. 326; 58 *Id.* 315; 127 *Id.* 417-423; 28 N. E. 402-4; 82 N. Y. 121-7; 51 Conn. 310; 50 Am. Rep. 21; 89 Ill. 237; 113 Ind. 521; 16 N. E. 196; 110 Va. 286; 67 S. E. 182; 135 Am. St. 937; 92 U. S. 93, 100.

3. It was error also to refuse Nos. 5, 7 and 8 for appellant. Cases *supra.*

Hall's signature fully complies with our statute. Kirby's Digest, § § 7709, 6120-2, 3108; 65 Ark. 324; 68 Minn. 108; 156 N. W. 265; 63 N. W. 95; 61 Minn. 40; 110 Minn. 82; 124 N. W. 637. The statute made the notes *prima facie* evidence that they had been duly executed. 155 N. W. 214. See also 61 Minn. 40; 112 N. W. 889; 155 *Id.* 214.

4. The joint answer of defendants verified by defendant Hall is not such a denial as is required by statute, and the court erred in taking the case from the jury. The defendant, Warren, knew or is charged with notice of Montgomery's authority and power to bind plaintiff. 126 Ala. 535-551; 28 So. Rep. 517; Bigelow on Estoppel, 558; 38 Mich. 475; 16 Cyc. 681; 199 S. W. 779; 146 N. W. 329; 82 N. Y. 121-7; 66 *Id.* 326; 51 Conn. 310; 50 Am. Rep. 21; 127 N. Y. 417-423; 28 N. E. 402-4; 89 Ill. 237; 113 Ind. 521, etc.; 92 U. S. 93-100. See also 134 N. C. 415; 101 Am. St. 845-850; 90 *Id.* 177-194; 183 Mo. 386; 105 Am. St. 496 and note, 7 B, p. 512; 166 Pac. 1072; 5 Elliott on Cont. 393; 101 U. S. 633. There was no evidence to show that Montgomery was in any way authorized to make any statements or representations binding plaintiff in procuring defendants Warren and Hall to sign as sureties; that the plain and unambiguous terms of the contract negative such a conclusion; that the joint answer and verification of defendant Hall on belief only were not sufficient, and plaintiff was entitled to a directed verdict against both defendants, Hall and Warren.

J. Allen Eads, for appellee Hall.

1. Hall did not sign the contract nor did appellant prove his signature. His answer denies it under oath. No additional oath was necessary. 35 Ark. 203; Kirby's Digest, § § 6120-6122; 38 Ark. 278; 49 Ark. 19; 126 N. W. 1108; 26 Am. Ann. Cases 193.

2. One who relies on a writing has the burden of proving genuineness of the signature thereto. The burden was on plaintiff here. 239 Ill. 595; 88 N. E. 178; 5 Me. 204; 44 Mich. 344; 6 N. E. 178; 6 N. E. 823; 19 Okla. 55; 91 Pac. 839; 40 S. W. 185; 30 Neb. 104; 46 N. W. 276; 88 *Id.* 954; 147 S. W. 739; 41 Ala. 626; 76 *Id.* 466; 163 *Id.* 603; 50 N. E. 1027. The verdict is correct and should be affirmed.

Edward Gordon, for appellee Warren.

1. Under the law plaintiff, appellant here, did not make out a case, as it failed to introduce and prove the contract properly, and improper evidence was introduced which should have been excluded, because it is improper to permit an instrument in evidence where there has been an alteration without first explaining the alteration, which plaintiff did not do nor undertake to do. Warren and Hall were guarantors only and not sureties, and their contract was a separate one and not entered into by their principal, Montgomery, who was the agent of appellant, and it was bound by his fraud and misrepresentations. The forgery was a material alteration of the contract, and Warren was released from all liability. Brandt on Sur. & Guar., § 1.

2. Warren demurred to the complaint, and his demurrer should be treated as a motion to dismiss, as he and Montgomery should not have been joined in one suit. 4 W. Va. 29; 7 Metc. 518; 36 Am. St. 210.

3. Montgomery was the agent of the appellant and represented it in procuring this guaranty and requested Warren to sign. 111 Ark. 436. And appellant is bound by its agent's fraud, forgery and misrepresentations. 34 Fed. 104; 5 Ark. 380; 49 *Id.* 48; 35 *Id.* 154; 102 Ark. 302.

The contract was void as to Warren by the alterations made. 48 Am. Dec. 412; 70 Miss. 157; 11 So. Rep. 567; 30 Am. St. 631; 10 Am. Rep. 232; 47 Am. Dec. 299; 24 L. R. A. (N. S.) 1155 and note.

4. The addition to a note of a new signature is a material alteration which avoids it. 90 Ala. 553; 12 L. R. A. 140; 127 Ala. 292; 51 L. R. A. 403; 87 Am. Dec. 451 and note; 57 A. S. R. 281; 33 Am. Dec. 479; 86 A. S. R. 94, note; 2 C. J. 1207, § 58; 34 Fed. 109.

5. Any material alteration avoids a note. 5 Ark. 377; 79 Am. Dec. 506; 47 N. W. 692; 25 Am. Rep. 76; 47 *Id.* 69, note; 12 L. R. A. 140; 3 *Id.* 724, note; 22 Am. Dec. 92. See also 11 Am. Rep. 363; 26 *Id.* 536; 72 Am. Dec. 263; 79 Am. Dec. 745 and note; 3 L. R. A. 724 and note; 22 Am. Dec. 92.

The proof is clear that the contract was materially altered and void and appellant failed to make out a case and the judgment should be affirmed.

McCULLOCH, C. J. Appellant instituted this action in the circuit court of Conway County against N. E. Montgomery to recover the sum of $1,887.23, alleged to be due on contract for the purchase price of certain articles sold and delivered to the latter by appellant, and against appellees, W. L. Warren and J. J. Hall, as sureties on the contract of Montgomery with appellant. There was a recovery below in favor of appellant against Montgomery, from which judgment there has been no appeal.

Warren defended in the trial below on the ground that he was induced to sign the contract of suretyship by fraudulent misrepresentations of Montgomery, and the verdict of the jury was in his favor.

Hall defended on the ground that he did not sign the contract of suretyship, and that his name subscribed to the contract was a forgery. The court took the case from the jury as to the liability of Hall and an appeal has been prosecuted by appellant as to the judgments in favor of Warren and Hall.

(1) The testimony of Warren tended to show that he was induced to sign the contract of suretyship by false and fraudulent misrepresentations made to him by Montgomery, and the court instructed the jury that if the signature of Warren was procured by such fraudulent misrepresentations he was not bound by the contract. This was error. Montgomery was the principal in the contract with appellant, and Warren was one of the sureties. Regardless of the nature of the contract between appellant and Montgomery, whether it was one creating the relation of agency between them as to their transactions or whether it was a contract for the sale and delivery of merchandise, Montgomery was not the agent of appellant in the procurement of sureties in the performance of his contract with appellant. In procuring sureties Montgomery was necessarily acting for himself and not for appellant.

(2) It is also urged on behalf of appellee Warren, apparently for the first time here, that there had been a material change in the contract in that, according to the testimony adduced, the signature of one of the witnesses to his (Warren's) signature to the contract was a forgery, or at least was unauthorized, and that this constituted a material alteration which discharged the sureties. It is undisputed that Warren signed the contract of suretyship in his own handwriting and the unauthorized addition of the name of a witness was not an alteration of the instrument itself. The signature of Warren to the contract needed no witness, for it was complete and valid without a witness and the unauthorized signature of the witness added nothing to it. This is discussed in view of the reversal of the judgment on the ground set forth above.

(3) Appellee Hall in his answer filed jointly with the other defendants denied the execution of the contract, and the answer was verified by the affidavit of Hall, being a verification on belief as provided by statute with reference to verification of pleadings. Kirby's Digest, § 6120. On the trial of the cause, appellant introduced

the contract, but there was no other testimony introduced either tending to support or dispute the genuineness of the writing so far as it concerned appellee Hall, and on the final submission of the case to the jury the court gave a peremptory instruction in Hall's favor. Hall's signature to the contract was by mark and was witnessed by the signatures of two persons whose name appeared written near the name of Hall. This was sufficient to make a *prima facie* signature under the statute. Kirby's Digest, § 7799. We have a statute which reads as follows:

(4) "Where a writing purporting to have been executed by one of the parties is referred to in, and filed with, a pleading, it may be read as genuine against such party, unless he denies its genuineness by affidavit before the trial is begun." Kirby's Digest, § 3108.

(5-6) This statute was not complied with by appellee Hall, for it will be observed that an unqualified denial in the affidavit is required by the statute, whereas the affidavit in the verification of his answer was merely on belief. The purpose of the statute is to permit the party who files a written instrument with his pleadings to introduce it in evidence as genuine unless its genuineness is first denied under oath. *St. Louis, Iron Mountain & Southern Railway Co.* v. *Smith*, 82 Ark. 105. The answer of appellee Hall denying the genuineness of his signature to the contract was sufficient to put the question at issue before the jury and place the burden of proof on the plaintiff in the case to establish the cause of action, but the affidavit required by statute not being filed, appellant had the right to introduce the writing in evidence without other proof of its execution. If other testimony had been introduced attacking the genuineness of the signature, it would have still been a question for the jury to determine whether or not the instrument was genuine, with the burden still on appellant to establish its case by a preponderance of the evidence.

Our conclusion, therefore, is that the court erred in withdrawing this issue from the jury.

The judgments in favor of Warren and Hall are, therefore, reversed, and the cause is remanded for a new trial.

WHITTEMORE v. TERRAL.

Opinion delivered November 17, 1919.

1. CONSTITUTIONAL LIMITATIONS—AMENDMENT NUMBER TEN—REFERENDUM—RATIFICATION OF AMENDMENT TO FEDERAL CONSTITUTION. —Amendment No. 10 to the Constitution of Arkansas of 1874, does not provide for a referendum on the action of the General Assembly of Arkansas in ratifying an amendment to the Federal Constitution.
2. CONSTITUTIONAL LIMITATIONS—REFERENDUM—SCOPE OF THE PROVISION.—The referendum power of the people under Amendment No. 10 relates only to laws enacted by the General Assembly.
3. SAME—SAME — "LAW" — "ACT"—"MEASURE."—Under Amendment No. 10, the words "act," "measure" and "law," are used interchangeably, and the power granted relates to the enactment of laws, and not to the exercise of other functions by the legislative body.
4. SAME—SAME—RATIFICATION OF FEDERAL AMENDMENT.—The action of the General Assembly, pursuant to the power conferred by the Federal Constitution, ratifying a proposed amendment to that Constitution, is not the enactment of a law.

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

Cohn, Clayton & Cohn, for appellants.

1. The Federal Constitution does not restrict the power of the States so as to prohibit them from controlling the action of their representative legislative assemblies by referendum to the people or otherwise, but relates to the ultimate legislative authority of the States expressed and the action of the Legislature ratifying the amendment falls within the terms of Amendment No. 10 providing for the referendum. Art. 5, U. S. Const. "Legislature" does not mean legislative assemblies, but allows the people to concur or ratify by referendum vote. 94 Ohio St. 154; 114 N. E. 55; Webster's

New Int. Nat. Dict., "Legislature," Cent. Dict. *verbum;* 1 Bryce Am. Commonwealth, p. 461; 241 U. S. 567, 565-8; 127 N. W. 848; 44 Ore. 118; 53 *Id.* 163; 241 U. S. 565-569; 223 U. S. 118; Cooley, Const. Lim., p. 59, note 3; Dwarris 704; 9 Wheat, 1-7; 223 U. S. 118; Const. 1874, art. 2, § § 1-29; 104 Ark. 563-5.

The people are at least part of the Legislature within article 5 of the United States Constitution and a reference to the people of an act, H. R. No. 1, does not contravene that Constitution.

2. The act was subject to a referendum vote, comes within the 10th Amendment. 119 Ark. 314; 171 S. W. 871; 173 *Id.* 1099; 76 Ark. 303; 60 *Id.* 343; 26 *Id.* 281-285; 119 Ark. 322; 76 *Id.* 303; 9 *Id.* 270; 51 *Id.* 534; 11 S. W. 878. The provisions of Amendment No. 10 must be liberally construed to effect the purpose of the people. 103 Ark. 48-57; 162 U. S. 197; 3 How. 24; 1 Wheat. (U. S.) 120; 91 U. S. 72; Endlich, Int. Stat., § 29; 57 Fed. 426; 62 62 Atl. 1035; 71 Kan. 811; 81 Pac. 450; 70 L. R. A. 450; 6 Am. Cases 298; 23 Mich. 499; 130 Mo. App. 687; 108 S. W. 1095.

By the terms of the 10th Amendment the power is reserved in the people to approve or reject any act of the legislative assembly. The word "act" means any "action" taken. 1 A. & Eng. Enc. Law. (2 Ed.) 575; 1 Bouvier 102; Funk & Wagnell New Stand. Dict., p. 29; Webster New Int. Dict., p. 22, subd. 2; *Smith* v. *Strothers,* 8 Pac. 852; 68 Cal. 194.

The effect and substance of an act and not the name are to be considered. 181 Pac. 920; 66 Ore. 70-78; 130 S. W. 689; 86 Ore. 390; 45 S. E. 821; 206 U. S. 276; 232 U. S. 548-556. See also 106 Ark. 506-509-10; 104 *Id.* 583-591; 105 *Id.* 380; 103 Ark. 48-52-57; 104 Ark. 583; 53 Mich. 681; 176 U. S. 581-602; 123 *Id.* 623-661; 117 Ark. 582.

The initiative and referendum amendment is self-executing and needs no act of the Legislature to effect its purpose. 103 Ark. 48-52; 104 *Id.* 583, etc.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

The term "Legislature" as used in article 5 means the General Assembly of the State. 3 How. (U. S.) 24; 23 Mich. 499; 121 U. S. 12. The power of ratification conferred by the Federal Constitution relates solely to the legislative assemblies of the States and can not be brought within the reserved legislative authority of the people themselves, and the language of Amendment No. 10 does not apply the referendum to the action of the General Assembly in ratifying the amendment to the Federal Constitution. 2 How. 24; 121 U. S. 12; 146 *Id.* 1; 45 N. H. 601; 4 Elliott's Debates, 407; 119 Ark. 314; 26 S. D. 5; 223 U. S. 117; 3 Howard 24; 23 Mich. 499; 121 U. S. 12. The words "act of the Legislature," as used in Amendment No. 10 to our Constitution, does not contemplate resolutions but means acts passed by the Legislature, and the word "act" means "law" duly passed, and does not include a joint resolution. Cases *supra.*

McCULLOCH, C. J. The General Assembly of this State, during the last session thereof, adopted a joint resolution ratifying the proposed amendment to the Constitution of the United States prohibiting "the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all the territory subject to the jurisdiction thereof, for beverage purposes," and appellants and other legal voters constituting more than five (5) per centum of the voters of the State filed their petition with the Secretary of State in apt time asking for a referendum to the people of said resolution in accordance with the provisions of Amendment No. 10 to the Constitution. The Secretary of State refused to certify the referendum, and this action was instituted by appellants in the circuit court of Pulaski County to compel him to do so.

The contention of appellants is (1) that the Federal Constitution, in providing for the ratification of amend-

ments by "the Legislatures of three-fourths of the several States," does not restrict the powers of the States so as to prohibit them from controlling the action of their representative legislative assemblies by referendum to the people or otherwise, but that it relates to the ultimate legislative authority of the States, in whatever form expressed; and (2) that the action of the General Assembly of this State ratifying the amendment falls within the terms of Amendment No. 10, providing for the referendum.

On the other hand, it is contended by the Attorney General, who appears on behalf of the Secretary of State, that the power of ratification conferred by the Federal Constitution relates solely to the legislative assemblies of the States, that it can not be brought within the reserved legislative authority of the people themselves, and that the language of Amendment No. 10 does not apply the referendum to the action of the General Assembly in ratifying an amendment to the Federal Constitution.

We proceed to a consideration of the last of the propositions stated, and since our conclusion on that is found to be decisive of this case, we need go no further.

(1) Amendment No. 10 does not, in our opinion, provide for a referendum on the action of the General Assembly in ratifying an amendment to the Federal Constitution. That portion of our Constitution reads as follows:

"The legislative powers of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people of each municipality, each county and of the State, reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls as independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than 8 per cent. of the legal voters shall be required to propose any measure by such petition, and every such

petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon.

"The second power is a referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety), either by the petition signed by 5 per cent. of the legal voters or by the legislative assembly as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial regular general election, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become a law when it is approved by a majority of the votes cast thereon and not otherwise. The style of all bills shall be, 'Be It Enacted by the People of the State of Arkansas.' This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for the office of Governor at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal votes necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he and all other officers shall be guided by the general laws and the acts submitting this amendment until legislation shall be specially provided therefor."

(2-3) An analysis of this provision of our Constitution reveals the fact that the reserved referendum power of the people relates only to laws enacted by the General Assembly. The word "act," as there used, means an en-

acted law—a statute. This is clearly manifested by that part of the language used which provides that referendum petitions must be filed not more than ninety days after adjournment of the session "at which the bill on which the referendum is demanded," and that a "measure referred to the people shall take effect and become a law when it is approved by a majority vote thereon." The words "act" and "measure" and "law" are used interchangeably, showing plainly that the power relates to the enactment of laws, and not to the exercise of other functions by the legislative body. The word "act" is not so frequently used in our Constitution as to give a fixed definition to it, but in one instance it is made use of in such a way as to clearly indicate the reference to a statute. Sec. 31, art. V. But, aside from any definition fixed in the Constitution, and aside from the technical definition given by lexicographers, we know that the term "act of the Legislature" not only has a fixed popular meaning, but that the unbroken custom in the enactment of laws is to make use of the term "act" in the caption or title to a statute. In turning through the printed statutes, we find, without exception, that the form of caption used is "An Act to Provide" or "An Act to Amend," etc., showing the universal legislative practice to treat the set form as expressive of the meaning that an act of the Legislature relates to a law and not to other proceedings of the Legislature. Amendment No. 10 was adopted to change the Constitution only with respect to those things in conflict with the amendment (*Hodges* v. *Dowdy,* 104 Ark. 583), and the language of the amendment must be understood in the meaning in which it was used in the Constitution and in the legislative customs.

(4) Now, the action of the Legislature, pursuant to the power conferred by the Federal Constitution, ratifying a proposed amendment to that Constitution is not the enactment of a law. It possesses none of those elements. Laws are enacted only when the legislative will is accomplished. They may be proposed by legislative bills or resolutions, according to constitutional provisions

prescribing the method of exercise of the legislative functions, but they do not become laws until the enactment is consummated. The ratification by the Legislature of an amendment to the Federal Constitution is but a step in the enactment of a law, and that step does not amount to a law even though it results, with the joint action of other States, in the adoption of the proposed constitutional amendment.

The Attorney General, in his brief, very appropriately likens it to a roll call of the States upon the question of ratification, and he adds that the action of the Legislature of a single State is of itself "no force as a law, makes no rule of conduct or government, and provides no penalty." This is correct. The action of the General Assembly in the ratification of an amendment to the Federal Constitution is not a law, and our conclusion is that such action does not fall within the provisions of Amendment No. 10.

It is interesting to note that the Supreme Court of Oregon reached the same conclusion in deciding this question under the referendum provision of the Constitution from which the precise language of Amendment No. 10 was borrowed. *Herbring* v. *Brown,* 180 Pac. 328. We approve the reason of the court given in that case for reaching the same conclusion which we now reach.

The Supreme Court of the State of Washington reached the opposite conclusion in the case of *Mullen* v. *Howell,* 181 Pac. 920, in construing somewhat similar language in their constitutional provision concerning the reserved referendum power; but we do not agree with that court in its process of reasoning, nor in the result reached.

It follows that the circuit court was correct in its decision, and the judgment is affirmed.

LINEBACK v. SMITH.

Opinion delivered November 17, 1919.

PARENT AND CHILD—SERVICES RENDERED BY CHILD—COMPENSATION.—A child can not recover for domestic services rendered its parent, unless there is a contract, express or implied, to pay for such services. Where a child brings a suit for services rendered its parent, the burden is upon the child to prove that the services were of such extraordinary character, that the parent would not expect the child, under the circumstances, to render such services without compensation; they must be of such nature that they could not be attributed to any filial duty or obligation.

Appeal from Benton Circuit Court; *W. B. Holyfield,* Special Judge; reversed.

A. L. Smith, for appellant.

1. The court erred in giving the instructions asked by appellee and in refusing those asked by appellant. The services were rendered by a member of the family of the intestate, and there was no contract, express or implied, to pay for his services rendered his mother, and there was no liability for the services rendered. 82 Ark. 136; 18 Atl. 129; 18 S. W. 517; 47 Penn. St. 534; 96 N. C. 149; 75 Ark. 191; 82 *Id.* 136; 2 S. E. 453.

2. All that part of the claim of appellee which had not accrued within three years of the mother's death was barred by limitation. Kirby's Digest, § 5064; 187 S. W. 664; 47 Ark. 317; 64 *Id.* 26; 27 *Id.* 343. The statute was plead expressly.

D. C. Shannon and *McGill & McGill,* for appellee.

1. The evidence shows an implied contract by appellee to live and care for his mother and he was entitled to recover for his services on same and the allowance was reasonable and just. 187 S. W. 664.

2. Instruction No. 5 given was approved in 56 Ark. 382; 75 *Id.* 191; 82 *Id.* 136.

3. The evidence supports the verdict fully. 82 Ark. 136. The verdict is right and reasonable and should be affirmed.

WOOD, J. Appellant's intestate was twice married. Her first husband was named Smith, by whom she had appellee. Her second husband was named Bell by whom she had several children, who are adults and all living.

After the death of Bell in the year 1910, Mrs. Bell lived on the home farm, her son Zeph Bell residing with her for two years. In the fall of 1912 she bought a small home in Siloam Springs and lived there until her death. Zeph Bell, after a few years, moved away. Mrs. Bell received the rents from the home farm until she died.

Appellee's father died when he was small and after his father's death he continued to live with his mother, making the Bell home his home until he married, after which he moved away with his family for three or four years. The wife and two children of the appellee left him and he had no knowledge of their whereabouts for twenty years. After this separation from his wife and children appellee returned and lived with his mother and Bell until Bell died and then he moved with his mother to the place she purchased in town in August, 1917. Appellee had no property of his own. After his mother moved to town he would occasionally work in the harvest fields of Kansas and work at odd jobs at other places, but had no regular occupation. When appellee was at home with his mother he assisted around the house, in the garden, cutting wood, and assisting in washing and doing other household duties. After the death of Bell, Mrs. Bell drew a pension of $12 per month. This with the rents from the farm was the sole income. At the time of her death she had notes and cash amounting to $529.44 and the home she lived in. In the latter part of her life she was afflicted with rheumatism and some months before her death she had three attacks, the last resulting fatally. On the occasion of the second of these attacks, her daughter, Mrs. Mills, who was residing in Missouri, came down and nursed her mother and when she returned to her home left a hired woman to look after her mother. During the last attack she returned to her mother's bedside and nursed her until she died. At that time the two other children were present.

The home in town was bought with money which Mrs. Bell derived from the estate of her last husband.

After the death of Mrs. Bell the appellant was appointed administrator and the appellee through his attorney presented to the administrator his claim as follows:

"For living with and caring for deceased from January 1, 1913, to December 31, 1915, at 50c per day	$ 547.50
"From January 1, 1916, to August 23, 1917, (date of death) at $1.00 per day (she being practically helpless during this time)	600.00
	"$1,147.50"

This claim was duly verified. The administrator refused to allow the same, and the appellee filed the claim with the probate court of Benton County. The administrator appeared in the probate court and resisted the allowance of the claim, setting out that the claim was not just and that his intestate, Irene Bell, was not indebted to the claimant in the sum stated or in any other sum. The administrator alleged that the claim for services charged for prior to the 23d day of August, 1914, was barred by the statute of limitations, which he specifically pleaded. He further claimed that the appellee practically all his life had lived with Mrs. Bell; that he was never employed to care for her at any time; that Mrs. Bell shared her home with the appellee and provided him with food, for which he paid nothing; that if he ever earned or came into possession of any money or property he used it as his own and spent nothing in caring for or supporting his mother, Mrs. Bell.

The probate court disallowed the claim and appellee appealed to the circuit court, where upon the same issues, a jury returned a verdict in favor of the appellee in the sum of $300.

From a judgment entered in appellee's favor is this appeal.

The appellee testified that he had been living with his mother at the time of her death about six years. Her husband, Bell, had been dead three or four years. Witness was in Kansas when his mother bought the home place. He came from Kansas to live with his mother in Arkansas. He was working for wages in the harvest fields of Kansas, earning from $3.50 to $4 per day. He came home and from that time on lived with his mother. He helped to move his mother from the farm to Siloam Springs, and also moved his own "trunk and other traps" to his mother's home. He always left them at her home when he worked out. When he didn't have work he made his mother's home his home until his mother died. Witness lived with his step-father and mother until he was 18 or 19 years old. Witness was the only child by his mother's first marriage. With the money witness earned he put some in provisions and in clothes for himself and helped support himself and mother. His testimony shows that he did the customary work around the premises.

Witnesses testified to the effect that while the appellee was in Kansas, Mrs. Bell told them she wrote for the appellee to come, stating that she would buy the place in town if she thought appellee would come back and live with her. After she moved to town Mrs. Bell was in poor health and during the last year of her life was not very strong. During that time there was no one else except the appellee on the place caring for her and doing her work, except during her last illness.

One of the witnesses stated that during the whole period of appellee's living with his mother and the different work he did for her in the condition she was in, witness would not want to wait on her for less than $1 to $2 a day. The day before the night on which appellee's mother died, appellee went with witness fishing on the river. Every time Mrs. Bell got real sick some or all her daughters would come down.

Another witness stated that in a conversation with Mrs. Bell she spoke about not wanting to live with her son Zeph, but wanted appellee to come and take care of

her and was willing to buy a home and leave it to him if he would come. Appellee did come and Mrs. Bell told witness that she wanted Louie to have the property after her death.

The above and other witnesses testified that they never heard Mrs. Bell say anything about an agreement to have appellee stay with her and pay him 50 cents per day.

There is much other testimony of the same character in the transcript, but after a careful consideration of it we have reached the conclusion that there is no testimony which under the law applicable in such cases would warrant the verdict and judgment in favor of the appellee.

The law is stated by this court in *Williams* v. *Waldon*, 82 Ark. 136-142, as follows:

"The presumption is that services rendered by members of the same family, and especially between father and son, are gratuitous. Such services are enjoined by the reciprocal duties of the family relation, and are always presumed to have been prompted by natural love, rather than by the promise or the hope of pecuniary reward. Courts are reluctant to infer a pecuniary recompense from the performance of filial or parental duties such as humanity enjoins. Hence the burden is upon him who claims a money recompense for personal services performed, whether voluntarily, or upon the request of the other, to establish a contract expressed or implied, for such consideration."

In the case of a child rendering domestic services to a parent there can be no recovery unless there is a contract either expressed or implied to pay for such services. Where a suit is brought by a child for services rendered the parent the burden is upon the child to prove that they were of such extraordinary character that the parent would not expect a child under the circumstances to render such services without compensation. They must be of a nature that they could not be attributed to any filial duty or obligation.

There is no evidence of a substantial character which tends to show that the services rendered by the appellee to his mother were different from those which a son might be reasonably expected to render his mother in the situation in which they were placed after the death of Bell and during the time appellee continuously made his home with her, although at times temporarily absent. The services were not of the extraordinary kind from which a promise will be implied to make compensation therefor. Expressions of preference for the appellee on the part of his mother after the death of her husband, Bell, to the effect that if he would come and live with her he should not lose anything and that she expected him to get what she had at her death, would not raise an implied contract to remunerate him for the services which might well be attributed to the affection and loyalty of a dutiful son to his mother. *Zimmerman* v. *Zimmerman,* 18 Atl. 129; *Reynolds* v. *Reynolds,* 18 S. W. 517; *Leidig* v. *Cooper,* 47 Penn. St. 534; *Dodson* v. *McAdams,* 96 N. C. 149.

As we view the evidence, there being neither an expressed nor an implied contract to pay appellee for the services for which he claims, the judgment awarding him compensation for such services is erroneous.

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

ASHCRAFT v. STATE.

Opinion delivered November 17, 1919.

1. TICK ERADICATION—FAILURE TO DIP CATTLE.—By proper order appellants were directed to dip their cattle at a certain time. The dipping vats had been blown up, and appellants did not rebuild them on the ground that they might be blown up again. *Held,* under the facts that appellants were liable for their failure to obey the order to dip their cattle.
2. SAME—ARBITRARY OR UNREASONABLE ORDER.—A cattle owner is not required to obey the arbitrary or unreasonable order, or one that is physically impossible to fulfill, made by the Board of Control.

Appeal from Perry Circuit Court; *Guy Fulk*, Judge; affirmed.

J. H. Bowen and *Reid, Burrow & McDonnell,* for appellants.

The testimony shows that the vats were blown up and tended to show a physical impossibility to comply with the rules promulgated and the court erred in refusing a jury trial and in excluding all testimony except that which tended to show that appellants failed to dip their cattle. Appellants were certainly entitled to a jury trial, fairly and impartially under proper instructions. The indictment charged a misdemeanor only, and the judgment should be reversed, as appellants were, under the Constitution, entitled to a jury trial.

G. W. Emerson, Prosecuting Attorney, and *G. B. Colvin,* Deputy Prosecuting Attorney, for appellee.

This is a misdemeanor and the only defense was that the vats had been blown up. The trial judge therefore was authorized, after hearing the evidence, in directing a verdict of guilty. This is not a violation of a State law but only of the rules promulgated by the State Board of Control. The act vests the board with full power to promulgate the necessary rules and regulations for dipping cattle to enforce the penalty, a mere fine. No legal reasons were shown for failure to dip and there was no question for a jury, and hence no error.

WOOD, J. The appellants were convicted of the crime of failing to dip their cattle under the rules promulgated by the Board of Control of the Agricultural Experiment Station requiring all persons owning or having charge of any cattle to dip the same every fourteen days after having been notified by the duly authorized inspector having supervision thereof, to dip the cattle at a specified time in a vat or disinfecting station provided for that purpose.

The cases were consolidated and tried as one in the court below and there is a stipulation in the record by which it is agreed that the indictment in the case of

Lee Ashcraft is the same as that returned in all the other cases. It is agreed that the records introduced in the various cases should be considered as one cause in this court. By the stipulation, however, the statement made by each defendant might be considered as disclosing the facts of his particular case as the same were offered in proof in the trial court and which that court excluded.

The appellants were tried before the court sitting as a jury. The appellants demanded a jury trial which was refused.

The appellants offered to introduce the testimony which is as set forth in the bill of exceptions in each particular case, and which was to the effect that the appellants had failed to dip their cattle for the reason that the vats had been blown up and they were consequently unable to dip.

One of the appellants testified that before the time came to dip the vat was blown up, then it was put off until the first of August. "The vat was never fixed any more and we never tried to fix it back because we thought it would be blown up again and everybody was busy with his crops when news came we would not dip until after court."

The testimony of all the appellants to this point is substantially the same.

The act vests the Board of Control with power to enforce the law providing for tick eradication and to this end clothes them with authority to promulgate the necessary rules and regulations for that purpose and provides that any person violating the rules and regulations promulgated by the Board of Control shall be deemed guilty of a misdemeanor and fined not less than $1 nor more than $50. Act 39 of the Acts of 1917, amending Act 86 of the Acts of 1915.

The Board of Control promulgated a rule requiring all persons owning or having charge of any cattle to dip all their cattle every fourteen days under the supervision of the duly authorized inspector of the Board of Control, unless they received written notice that they were not required to dip their cattle.

It will be observed that the rule promulgated by the Board of Control did not make any provision whereby the parties required to dip cattle may be excused for a failure to comply with the rule.

However, if the Board of Control should promulgate rules that were so arbitrary and unreasonable that it would be a physical impossibility for any one to comply with same, such rules would be unconstitutional and void, because no man could be judged a criminal and punished by a fine for the violation of a law which it would be physically impossible for him to obey. Such a law would be in plain derogation of article 2, section 9, of our Constitution, which provides that excessive fines shall not be imposed or cruel or unusual punishment be inflicted.

The indictment charges that the appellants "unlawfully and wilfully violated said rule," etc. There could be no wilful or unlawful violation of a rule which requires one to do an act that it would be physically impossible for him to perform. But the record in this case presents no such state of facts. Here the undisputed evidence shows that, after the vats were destroyed, the appellants made no effort to rebuild because "they thought they would be blown up again and everybody was busy with his crops." Such was not an excuse which the law would tolerate.

The offense of which appellants were convicted is only a misdemeanor punishable by fine. If the cause had been tried before a jury and the jury under the evidence had returned a verdict of acquittal, the court could have set aside the verdict and directed a new trial, or the court could have instructed the jury upon the undisputed evidence to return a verdict of guilty. Therefore, it is manifest that there was no prejudicial error to the appellants in the refusal of the court to require a jury trial.

The judgments are correct, and are affirmed.

JOHNSON v. DITLINGER.

Opinion delivered November 17, 1919.

1. PLEADINGS AND PRACTICE—MISJOINDER—MUST BE PLEADED, WHERE.—An objection to the misjoinder of causes of action must be made in the court where the action was instituted.
2. PARTIES—DEFECT—MISJOINDER—JURISDICTION OF JUSTICE.—A defect as to parties plaintiff or as to the allegations of the complaint showing a misjoinder of a cause of action does not affect the jurisdiction of the justice over the subject-matter.
3. MONEY HAD AND RECEIVED—ACTION FOR LIES, WHEN.—An action for money had and received lies when the defendant, not being the mere servant or agent of the plaintiff, has received actual money belonging to the plaintiff.
4. SAME—STATEMENT OF A CAUSE OF ACTION.—A complaint states a cause of action for money had and received, which states that the defendant collected a certain sum, witness fees and mileage in a certain case, without the authority of the plaintiffs, and unlawfully and wrongfully withholds same from the plaintiffs, although demand has been made therefor.

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

Allyn Smith, for appellant.

1. The judgment was void for want of jurisdiction and the execution should be quashed and the judgment vacated. The complaint does not state a cause of action over which the justice of the peace had jurisdiction. Const., art. 7, sec. 40. The Constitution confers no jurisdiction on justices of the peace in matters *ex delicto* but only *ex contractu.* Jo Johnson was liable, if at all, for a *tort.* The fees here belonged to the plaintiff in the case and not to the witnesses. 37 Kan. 235. Johnson was not liable to the Ditlingers and Johnson was not liable. 76 Ark. 599; 90 S. W. 17; 87 Ark. 313.

2. The judgment of the justice of the peace was absolutely void, as no cause of action was stated. 87 Ark. 313; 112 S. W. 881-2. The justice having no jurisdiction, the circuit court had none on appeal. *Ib.*

3. There was a misjoinder of plaintiffs. K. & C. Digest, § § 3437, 7443. If the fees were Mrs. Ditlinger's,

they were hers; if they were Pete Ditlinger's they were his and a separate action must be brought. There was no joint action. Kirby & Castle's Digest, § § 3447, 7443-5. The rights of the parties, Pete Ditlinger and wife, were separate and they could not be united in one suit, and there was a misjoinder, and the court had no jurisdiction and the suit should be dismissed.

4. The complaint does not state facts to constitute a cause of action and is a nullity.

Geo. W. Johnson, for appellees.

1. The bill of exceptions does not contain all the evidence. 94 Ark. 115, 124. The judgment is presumed to be correct. 124 Ark. 388. The court had jurisdiction of the parties and the subject-matter. The misjoinder of parties can not be raised here for the first time. 51 Ark. 441; 70 *Id.* 197; 50 *Id.* 97. It is not the duty of this court to search for errors; appellant must show that the judgment is wrong. 120 Ark. 499.

2. Appellant has not abstracted his petition to quash, the response thereto, the execution, the judgment nor the testimony, and all defenses are waived. 101 Ark. 404 and cases *supra.*

WOOD, J. This action was instituted by the appellees against the appellants in a justice court. The appellees alleged in their complaint, as follows:

"That on or about the ..... day of ....., 1915, the defendant, Jo Johnson, collected the sum of $70, witness fees and mileage in the case of *Sadie Miller* v. *St. L., I. M. & S. Ry. Co.,* without the authority of these plaintiffs and unlawfully and wrongfully withholds same from the plaintiffs, although demand has been made for the same.

"Wherefore, plaintiffs pray judgment against defendant for the sum of $70 and all of their costs herein laid out and expended."

Judgment was rendered against the appellant in the sum of of $70. Appellant took an appeal to the circuit court where judgment was again rendered against him

by default. An execution was issued on the judgment of the circuit court.

Appellant filed a petition in the circuit court in which he set up the proceedings had before the justice and circuit courts resulting in the judgment rendered against him which he alleged was void for want of jurisdiction in the justice of the peace over subject-matter of the action. He prayed to have the execution quashed and the judgment vacated.

The allegations of the petition were denied by the appellee.

The court after hearing the testimony on the issue raised by the petition and answer thereto entered a judgment dismissing the petition, from which is this appeal.

The only question is whether or not the justice of the peace had jurisdiction of the subject-matter of the action.

(1) The complaint filed before the justice plainly shows a misjoinder of the parties plaintiff and of causes of action because the witness fees alleged to have been collected by Johnson were not the joint property of the plaintiffs, but each was entitled only to his or her own fees and neither was entitled to the aggregate amount. Therefore, the cause of action, if any, was separate and not joint. But objections as to misjoinder of causes of action could and should have been raised in the court where the action was instituted.

(2) A defect as to parties plaintiff or as to the allegations of the complaint showing a misjoinder of a cause of action did not affect the jurisdiction of the justice over the subject-matter.

(3-4) The appellant contends that the complaint stated a cause of action *ex delicto* and that therefore the justice had no jurisdiction.

In *Fordyce* v. *Nix*, 58 Ark. 138, we said: "Under the reform procedure, courts regard the substance rather than the form." "The character of the action must be determined by the nature of the grievance rather than by the form of the declaration."

Now the allegations of the complaint although inartistically drawn and technically defective, nevertheless, stated a cause of action for money had and received. Whatever defects there were might have been cured by motion to make the same more specific, or by amendment if the complaint had been demurred to.

An action for money had and received lies where the defendant, not being the mere servant or agent of the plaintiff, has received actual money belonging to the plaintiff. "There need be no privity of contract except that which results of one man having another's money which he has not a right conscientiously to retain." 2nd Chitty on Pleading, 29-31.

"Where one has obtained money by deceit or fraudulent practices the loser may bring his action for the tort analogous to the action on the case or may sue upon an implied contract for money had and received." Bliss on Code Pleading, section 15, and notes.

"Where one has in his possession money which belongs to another the law implies a contract that he will pay it over to the rightful owner on demand." *Ark. Nat. Bank* v. *Martin,* 110 Ark. 578, syllabus one.

According to the above authorities the complaint although defective states a cause of action for money had and received. The justice, therefore, had jurisdiction and the judgment of the circuit court dismissing appellant's petition is correct.

Judgment affirmed.

JACKSON *v.* LADY.

Opinion delivered November 17, 1919.

1. DEEDS — CONSTRUCTION. — Deeds are construed most strongly against the grantor and in favor of the grantee.
2. SAME—SAME.—A deed must be so construed that all of its parts may be harmonized and stand together, if the same can be done, and yet carry out the manifest intention of the parties.

3. SAME—SAME—INTENTION OF PARTIES.—Endeavoring to ascertain the intention of the parties, the court will look not only to the contents of the deed, but will consider the relation of the grantor to the property conveyed.

4. SAME—SAME—SAME.—Intention is to be gathered from the whole instrument, and not from praticular clauses, but in case of repugnancy between the granting and habendum clauses, the former will control the latter so as not to defeat the grant.

5. SAME—SAME—GRANTING CLAUSE.—If the language of the granting ing clause is so plain that it can not be misunderstood, then there is no room for construction, and other clauses must harmonize with or yield to it.

6. SAME—SAME—HARMONIZING CLAUSES.—The above rule never applies when reconcilement between the clauses is possible upon consideration of the whole instrument, so as to carry out the grantor's intention.

7. SAME—SAME—AMBIGUITY.—If there is any ambiguity or uncertainty as to the intention of the parties, when the instrument is considered as a whole, then the court may consider in connection with the instrument a bond for title, when the deed itself or the extraneous facts show that the deed was executed in compliance with the bond.

8. DEEDS—BOND FOR TITLE—MERGER.—As a general rule, a deed made in execution of a contract for the sale of land merges the provisions of the contract therein, and all prior negotiations leading up to the execution of the deed.

9. DEEDS — CONSTRUCTION — AMBIGUITY — BOND FOR TITLE.—When a deed is so ambiguous as to require construction, a bond for title previously executed by the parties to the deed, may be considered in determining the question of intention, and to explain any uncertainty or ambiguity in the deed.

10. DEEDS—AMBIGUITY IN DESCRIPTION—INTENT.—In an action to quiet title to land, based upon a deed describing it as "part of the S. E. N. W. 9.23 A., section 21, township 16 north, range 1 west," evidence *held* sufficient to support a finding that the grantors intended thereby to convey certain described lands, justifying a decree covering such lands.

Appeal from Lawrence Chancery Court, Eastern District; *Lyman F. Reeder,* Chancellor; affirmed.

W. A. Cunningham, for appellant.

1. The will of Henson Kenyon gave the fee title to Emeline Owens and the limitation over in case of her

death without issue was void; the deed to Lady was only sufficient to pass any title which she may have had at the time the deed was executed and would not pass after-acquired title; all transactions between the parties prior to the deed were merged in the deed and could not avail by estoppel or otherwise. Under the granting and habendum clauses of Kenyon's will Emeline Owens took a fee title. All the words necessary to convey the fee were used, the word "heirs" clearly giving an estate of inheritance and the words "assigns forever" expressing the intention that the estate should be unlimited as to duration. There are two well established rules of construction of wills: (1) that the intention of the testator shall be gathered from the whole instrument, and (2) that where a fee is granted (as here) with absolute power of disposal in the first taker any limitation over the remainder is void because repugnant to the existence of the preceding fee. 40 Cyc. 1585; 108 Pac. 88; 110 *Id.* 276; 20 Am. St. 409; 24 *Id.* 656; 81 Ark. 480; 82 *Id.* 209. The wording of the will here comes clearly within the rules. The title did not pass to Lady under Kirby's Digest, sections 731-734.

2. The subsequent title acquired did not pass by the deed from Phelps and wife to Lady. The chancellor failed to distinguish between the substance and the shadow. The deed was a quitclaim deed and after acquired title does not pass by it a quitclaim deed. 76 Ark. 417; 94 *Id.* 306; 72 *Id.* 80; 1 Devlin on Deeds, 43; 2 *Id.* 1571.

3. The description in the deed under which Lady claims is not a sufficient description to convey the land. It is too uncertain to even cast a cloud upon the title. 117 Ark. 151. On the whole case the chancellor erred in dismissing the complaint and in decreeing title in appellee. Cases *supra.*

W. M. Ponder and *Ponder & Gibson,* for appellees.

1. Under the devise to Mrs. Owens an estate tail at common law was created in Mrs. Owens, which under sec-

tion 735, Kirby's Digest, operated to vest a life estate in Mrs. Owens, with the remainder over in fee simple to the person such estate would have first passed to according to the course of the common law and, Mrs. Owens never having had any bodily heirs and dying without issue, the remainder vested in Victoria Phelps and Mary Vinson, which remainder passed under the deed from Mrs. Phelps to Lady, the defendant. Regardless of whether Mrs. Phelps took under the will or by inheritance, the deed to Lady, being in legal effect a warranty deed, operated to vest in Lady all the title Mrs. Phelps had at the time the deed was executed or all title afterwards acquired, and, on account of the facts pleaded and proved, the plaintiff is estopped to maintain the suit. All portions of a will must be harmonized and no portion treated as surplusage. 51 Atl. 865; 95 Ark. 333; 115 Ark. 400; 400 *Id.* 445. Mrs. Owens certainly took the fee under the will. 2 Ark. 583; 2 Howard 43; 11 S. E. 172; 51 Atl. 865, 540; 40 Cyc. 1382; 115 Ark. 400; 104 *Id.* 445. Where land is devised by a will by words importing a fee, the fee may be cut down to a lower estate by other portions of the will showing such an intention of the testator. 52 Atl. 340; 57 *Id.* 178; 52 Pa. St. 257; 115 Ark. 400; 40 Cyc. 1577, and cases cited; 6 N. J. Eq., *Kent* v. *Armstrong;* 127 N. W. 26; 15 So. Rep. 644; 31 Atl. 501; 35 *Id.* 357; 39 *Id.* 420; 45 *Id.* 395; *Ib.* 945; 76 *Id.* 661; 10 *Id.* 577; 75 Ga. 540; 102 Tex. 376; 117 S. W. 425; 132 Am. St. 886; 112 Am. St. 182; 27 L. R. A. (N. S.) 1047; 3 Am. Dec. 24; 119 S. W. 800; 122 *Id.* 159.

The word "provided" indicates an intention to give contingently. 51 Atl. 865. The cases cited for appellant do not apply. From the above cases it is clear that the intiention of the testator that Emeline Owens should take nothing except a life estate. See also 115 Ark. 400; 104 *Id.* 445; 95 *Id.* 333.

2. Under the devise to Mrs. Owens an estate tail was created under section 735, Kirby's Digest, and carried only a life estate, remainder over to the person to

whom such estate would pass according to common law, and she dying without issue the remainder passed to Victoria Phelps and Mary Vinson, with remainder (as to Mrs. Phelps) which passed under the deed to Lady.

The estate devised was an estate tail. 52 Atl. 340; 57 *Id.* 178; 18 Am. Rep. 592; 78 Am. Dec. 399; 40 Cyc. 1595-6; 44 Ark. 458; 67 *Id.* 516; 117 *Id.* 24; 98 *Id.* 570; 78 *Id.* 336; 117 *Id.* 366; 75 *Id.* 19; 116 *Id.* 233; 40 Cyc. 1502; 110 Ga. 707; 50 L. R. A. 216. See also 40 Cyc. 1597-9; 95 Ark. 333; 71 N. J. Eq. 626; 64 Atl. 460; 70 N. H. 152; 46 Atl. 1053; 63 N. H. 445-460; 3 Atl. 625; 14 *Id.* 73; 45 *Id.* 576. A remainder may be vested subject to be divested on the death of the first taker having children or on birth of issue of another. 16 S. W. 346; 98 Ark. 570; 116 Ark. 233.

The deed form Mrs. Phelps to Lady was a warranty deed, in effect, and vested in Lady all the title Mrs. Phelps had or afterwards acquired. Cases *supra;* Kirby's Digest, § 734; 5 Ark. 693; 33 *Id.* 251; 15 *Id.* 73; 84 *Id.* 527; 95 *Id.* 253; 27 *Id.* 523; 3 *Id.* 18; 15 *Id.* 703; 93 *Id.* 5; 55 *Id.* 104. The legal effect of the deed was to convey a fee simple title by warranty deed. 18 C. J. 268; 22 Col. 28; 1 Cowen 613; 3 Paige, Chy. 254; 141 Pa. St. 390; 13 Cyc. 614-15.

When the title bond was executed an equitable title was created in Lady. 44 Ark. 196; 100 *Id.* 544.

3. Plaintiff is estopped to maintain the suit. 116 Ark. 233; 40 Me 24; 3 Metcalf 121; 70 Ky. Rep. 259; 59 Ind. 39; 23 S. E. 523. On the whole case the decree is right and should be affirmed.

W. A. Cunningham, for appellant, in reply.

Cites 127 N. W. 26; 15 So. Rep. 644; 123 N. W. 299; 117 S. W. 425; 35 Atl. 987; 39 Atl. 987; *Ib.* 359; 77 N. E. 458. There is no repugnancy between the granting and habendum clause. 94 Ark. 117. See also 131 Ark. 134. See also 13 Cyc. 608. The deed was only intended as a release of any claim Victoria Phelps had in the lands of her sister and was not intended as a conveyance of title.

WOOD, J. This action was instituted by Mary F. Jackson and Victoria Phelps against the appellee in the chancery court of Lawrence County on the 2nd of October, 1917.

The plaintiffs alleged that they were the owners in common of certain tracts of land in Lawrence County which they described in their complaint and which contained in the aggregate 89.26 acres more or less. They alleged that their father, Henson Kenyon, devised the land described to Emeline Owens who immediately upon the death of her father entered into the possession and remained in possession of the lands until her death; that at her death the plaintiffs entered into possession of the same claiming to be the owners thereof by inheritance from their sister; that the defendant, Lady, claiming to have some kind of title or interest in the lands had attempted to enter upon the same and was now threatening by force or stealth to enter upon the lands for the purpose of taking possession thereof. They prayed that the defendant be enjoined and that their title be quieted.

The defendant answered, admitting that Henson Kenyon was the father of the plaintiffs and that he had executed a will as set up in the complaint and that he had died. He admitted that Emeline Owens, later Lady, later Bush, had died, but he denied that plaintiffs were her sole heirs at law and denied that plaintiffs had entered into possession of the lands claiming it as the heirs of their sister. He admitted that Emeline Owens went into the possession of the land after her father's death, but denied that her possession was adverse to him.

He alleged that in the year 1870 J. M. Phelps and Henson Kenyon were in business as partners; that Kenyon died in 1877, never having settled the partnership accounts and that Phelps brought suit against his administrator and heirs for $8,100; that defendant, who had in the meantime had married Emeline Owens, and J. M. Phelps, the husband of Victoria Kenyon, settled the lawsuit after the same had been discussed by all the parties and the desire had been ex-

pressed by them for such settlement; that by this settlement defendant contracted to buy the lands devised to Victoria Phelps by her father, including the lands in controversy and 60 acres more which had been devised to Emeline Owens; that in pursuance of the agreement Phelps and his wife Victoria on October 28, 1884, executed their bond for title, which was made an exhibit to the answer, and defendant executed notes in the sum of $3,600, the purchase money, as the consideration of the settlement; that Phelps was to dismiss and did dismiss the lawsuit; that afterwards the defendant carried out the settlement on his part by making full payment of all the notes, and that Phelps and Victoria Phelps by their warranty deed duly conveyed to the defendant all the lands embraced in the settlement including the lands in controversy; that the deed from Phelps and wife was executed in pursuance of the terms of the title bond and for the purpose of giving force and effect thereto; that, by virtue of the execution of the instruments and the death of Emeline Bush, without bodily heirs, the defendant became the owner in fee of the undivided one-half interest in the lands in controversy and is entitled to the possession thereof.

Defendant further alleged that the heirs of Henson Kenyon who were living at the time of the above settlement and of the execution of the bond for title and deeds in pursuance thereof were fully advised of the purposes of the settlement which resulted in the dismissal of the lawsuit, and that by reason of the execution and delivery of the title, bonds, and deeds and settlement of the lawsuit and family dispute they are in equity and good conscience estopped from making any claim to the lands in controversy.

The defendant prayed that plaintiffs be denied the relief sought; that the lands be partitioned; that his title be quieted; and "for all other proper, general and specific, legal and equitable relief."

After the institution of the suit Victoria Phelps died intestate, leaving Mary F. Jackson her co-plaintiff

and sole heir at law and in whose name the cause was revived and proceeded to trial.

The cause was heard upon the pleadings and the exhibits thereto and upon depositions, and the court found that the defendant was the owner and entitled to the possession of the undivided one-half interest of that part of the S. E. ¼ of the N. W. ¼, section 21, township 16 north, range 1 west, lying south and east of the private survey No. 36 and containing 9.26 acres, more or less, and the S. ½ of the N. E. ¼ of section 21, township 16 north, range 1 west, containing 80 acres, more or less.

The court entered a decree dismissing the complaint for want of equity and in favor of the defendant according the above finding, from which decree is this appeal.

The facts are substantially as follows: Henson Kenyon died in 1877, leaving a will by which he divided his lands, amounting to 445 acres, among his three daughters, Emeline Owens, Mary F. Vinson and Victoria Phelps. The devise to Mrs. Owens contained the clause, "to have and to hold the same to her the said Emeline Owens, and unto her heirs and assigns and to their proper use and behoof forever; provided, however, that if the said Emeline Owens should die leaving no bodily heirs the above lands to revert to her sisters, Victoria Phelps and Mary Vinson or to their heirs." The lands devised to Emeline consisted of 146.26 acres.

Appellee in 1881 married Emeline Owens, formerly Kenyon. At the time of this marriage a lawsuit was pending between J. M. Phelps and the estate of Kenyon in which the administrator and heirs of Kenyon were made parties defendant.

J. M. Phelps had married Victoria Kenyon. Phelps and Kenyon had been engaged in a partnership business. For some reason Phelps left the State and during his absence Kenyon died. On Phelps' return to the State he claimed that on an accounting of the partnership business the estate of Kenyon was due him a balance of $8,100 and this claim was disallowed by the administrator and Phelps instituted a suit in the chancery court to recover that amount.

The appellee testified that this suit was discussed frequently among the Kenyon heirs. They desired a settlement. Two or three years after the appellee's marriage with Emeline the suit was settled by appellee and Jim Phelps. It was understood between Phelps and the appellee that if the appellee would buy out the interest of Phelps' wife in the estate he would dismiss the suit. By the terms of the settlement and agreement Phelps was to buy 60 acres of the land which had been willed by Kenyon to his daughter Emeline and deed the same to the appellee. Appellee was to pay $3,600 as the consideration and was to get 180 acres of land that belonged to Victoria Phelps individually in addition to the 60 acres that had been willed by Kenyon to his daughter Emeline, and also the undivided one-half interest of Mrs. Phelps in the other land devised by Kenyon to his daughter Emeline, which it was supposed belonged to Mrs. Phelps at Emeline's death.

Concerning the 60 acres the understanding was that the appellee was to get an immediate fee title and hence a deed to this 60 acres was executed to Phelps by appellee and his wife and by Mary Vinson and her husband, E. A. Vinson. The reason this was done they considered that all the land devised to Emeline belonged to her for her life and at her death it went to her two sisters. The two sisters signed the deed to Phelps in order that when he signed the deed to appellee, appellee would have the fee title to all the lands owned by Victoria Phelps, including the 180 acres willed to her in her own right and the one-half interest in remainder which they supposed she had in the lands devised to her sister Emeline for life.

On the same day that the deed to the 60 acres was executed by Emeline Lady and the appellee and Mary Vinson and her husband to Phelps, Phelps and his wife executed a bond for title to all the lands covered by the agreement except the 60 acres.

The bond for title recited that, in consideration of the sum of $3,600 evidenced by promissory notes to be

paid by H. L. Lady, in four installments of $900 each, to J. M. Phelps and Victoria Phelps, the latter upon the payment of said notes "would make and execute to him, Lady, a good and sufficient deed of conveyance" to the lands described in the bond. Among other lands described in the bond are the lands in controversy. The deed to the 60 acres was of date October 21, 1884, and the bond for title was dated October 22, 1884.

Appellee paid the notes and there was executed to him a warranty deed, of date September 30, 1889, by J. M. Phelps and Victoria Phelps. This deed recites that, "We, James M. Phelps and Victoria Phelps, his wife, for and in consideration of the sum of $3,600 paid and to be paid to us by H. L. Lady do by these presents bargain, sell, and convey to H. L. Lady the following lands lying in Lawrence County, Arkansas, viz. Then, after describing certain lands, is this further recital: "Whatever interest the said Victoria Phelps may have in part of the S. E. of the N. W. (9.23 A.) and the S. ½ of the N. E. ¼ of section 21, township 16 north, range 1 west. The last five tracts being the sole property of the said Victoria Phelps and which she conveys as *feme sole.*" Then follows the habendum, "to have and to hold the same to the said H. L. Lady and to his heirs and assigns forever," and a covenant, "to warrant and defend the title to said land to him against the lawful claims of all persons whomsoever."

After the appellee's purchase of the land in controversy no claim was made thereto by Victoria Phelps until the institution of this suit. Emeline Bush died in the fall of 1917 and this suit was instituted soon thereafter.

Mrs. Phelps testified that she was married to J. M. Phelps in her 17th year and never had any business to transact for herself until after his death. She did not know anything about land numbers and would not know from reading numbers anything about how much land was supposed to be conveyed nor where same was located. She knew that her husband claimed that her father's estate was indebted to him but knew nothing about the

settlement. She knew that her husband sold her interest in her father's estate to Lady but she did not sell any interest in her sister's land. She did not know she had any interest in it while her sister lived, never thought of it. The first intimation she had that her interest in her sister's lands was embraced in the deed to Lady was after her sister's death. She signed the bond for title and the deed. Her husband never told her that Lady had paid for the land. If the deed had been read over to her she would not have known about it because she did not know anything about land numbers.

Mrs. Jackson, the appellant, testified that she and her sister, Victoria Phelps, were the only heirs at law of Emeline Bush; that when Emeline Bush died that the two of them were left; that she and her sister Victoria were in possession of the lands in controversy.

The appellant contends that under the will of Henson Kenyon Emeline Owens at his death took the title in fee to the lands in controversy; that at the time of the deed of Victoria Phelps to the appellee Lady, Emeline Lady was still living and therefore Victoria Phelps had no title which she could convey; that the deed of Victoria Phelps to Lady "conveying whatever interest said Victoria Phelps may have" would not pass title which she acquired to the lands in controversy by inheritance from her sister Emeline Lady at her death; that the bond for title and all the transactions by which the lands in controversy were to be deeded to the appellee Lady merge in the deed, and therefore could not avail the appellee. Therefore, appellant was not estopped by the deed and prior transactions from asserting title.

It is immaterial whether Victoria Phelps acquired the lands in controversy through the will of her father or by inheritance from her sister Emeline, for a majority of us are convinced that the deed which she and her husband executed to the appellee, under the facts of this record concerning that transaction, should be construed as a warranty deed to these lands which under our statute and decisions conveyed all the title which Mrs. Phelps

had or which she afterwards acquired. Section 734, Kirby's Digest; *Cocke* v. *Brogan and Thorn,* 5 Ark. 693; *Watkins & Trapnall* v. *Wassell,* 15 Ark. 73; *Holland* v. *Rogers,* 33 Ark. 251-55; *Bradway* v. *Sidway,* 84 Ark. 527; *Colonial and U. S. Mort. Co., Ltd.* v. *Lee,* 95 Ark. 253.

(1-4) In the construction of a deed like any other contract it is the duty of the court to ascertain, if possible, the intention of the parties, especially that of the grantor. The whole deed is to be looked to and every sentence and word of it made to take effect if possible. Deeds are construed most strongly against the grantor or most favorably for the grantee. A deed must be so construed that all of its parts may be harmonized and stand together, if the same can be done, and carry out the manifest intention of the parties. Endeavoring to ascertain the intention of the parties the court will look not only to the contents of the deed, but will consider the relations of the grantor to the property conveyed. The intention is to be gathered from a consideration of the whole instrument rather than from particular clauses, but if there is a repugnancy between the granting clause and the habendum, the former will control the latter so as not to defeat the grant.

The above are but hornbook rules of construction which have been announced and uniformly adhered to by our court from almost its very beginning to the present time. See *Doe* v. *Porter,* 3 Ark. 18; *Gullet* v. *Lamberton,* 6 Ark. 109; *Malin* v. *Rolfe,* 53 Ark. 107; *Jenkins* v. *Ellis,* 111 Ark. 220; *Mt. Olive Stave Co.* v. *Handford,* 112 Ark. 527, and other cases to like effect cited in 2nd Crawford's Digest, Deeds, 3 Construction and Operation 1639.

(5-6) Of course it is also one of the cardinal rules of construction that if the language of the granting clause is so plain that it can not be misunderstood then there is no room for construction and other clauses must harmonize with this or yield to it. See *Swain* v. *Vance,* 28 Ark. 285. But this rule never applies where reconcilement between the clauses is possible upon consideration of the whole instrument so as to carry out the intention of the grantor

in making the deed. See *Swain* v. *Vance, supra,* and other cases cited *supra;* 13 Cyc. 618 and 19, Deed.

(7-9) Another well settled rule of construction is that if there is any ambiguity or uncertainty as to the intention of the parties when the instrument is considered as a whole then the court may consider in connection with the deed a bond for title, where the deed itself, or the extraneous facts, show that the deed was executed in compliance with the bond. Undoubtedly as a general rule a deed made in execution of a contract for the sale of land, merges the provisions of the contract therein and all prior negotiations leading up to the execution of the deed. Second Devlin on Real Estate, p. 1570, section 850, Deed. But if there is such uncertainty and ambiguity in the language of the instrument as to require construction in order to ascertain the meaning of the parties thereto, then a bond for title, previously executed by the parties to the deed, may be considered in determining the question of intention and to explain any uncertainty or ambiguity in the deed.

"The question of merger has also been declared to be one of construction to be gathered from a consideration of the entire contents of the instrument, and the agreement upon which the deed is founded may be admissible or referred to, to explain any uncertainty or ambiguity in the latter." 13 Cyc. 616-17-18-19.

Now, applying the above rules to the deed under review, it will be readily seen that the deed is a warranty deed executed by J. M. Phelps and his wife Victoria Phelps conveying six different tracts of land to the appellee. The language of the granting clause is, "We, James M. Phelps and Victoria Phelps, his wife, for and in consideration of $3,600 paid and to be paid to us by H. L. Lady do by these presents grant, bargain, and convey unto the said H. L. Lady the following land." Then follows a description of the tracts. The fifth tract is the land in controversy and at the end of the deed is, "And whatever interest the said Victoria Phelps may have in the S. E. of the N. W. (9.23 A.) and the S. ½ of the N. E. ¼, section 21, township 16 north, range 1 west."

Following the description of lands is this recital, "The last five tracts being the sole property of the said Victoria Phelps and which she conveys as *feme sole.*"

The habendum is "to have and to hold the same to the said H. L. Lady and to his heirs and assigns forever." The warranty is, "to warrant and defend the title to said land to him against the lawful claims of all persons whomsover."

The granting clause, it will be observed, conveys the lands and the covenant of warranty is to defend the title to said lands and furthermore the statement is made concerning the last five tracts that same are the sole property of Victoria Phelps and she so conveys them. If the clause, "And whatever interest the said Victoria Phelps may have," etc., stood alone, there would be some plausible ground for upholding the contention of the appellant that Victoria Phelps only intended to execute a quitclaim deed because she was in doubt as to whether she had any interest at all in the lands, or if any interest, what such interest was. But, as we have seen, the granting clause conveys the land and the clause following the description is an unequivocal declaration that the five tracts including the lands in controversy are her "sole property."

In the acknowledgment she again declares that the land which she conveys, as a *feme sole,* "relates to the land belonging to her."

There is certainly sufficient ambiguity in the various clauses of the deed to justify a resort to the bond for title and the facts connected with the transaction, as the source from which this deed sprung, to determine what was the intention of the parties in its execution.

It is the duty of the court to place itself as nearly as possible in the position of the parties when the instrument was executed, to construe its origin and source and all the attendant circumstances. *Wood* v. *Kelsey,* 90 Ark. 272-77.

Appellant relies upon the case of *Reynolds* v. *Shaver,* 59 Ark. 300, to sustain his contention that the words

"whatever interest the said Victoria Phelps may have" constituted the deed in suit a quitclaim only. But the language of the granting clause in that case was "do grant, bargain and sell unto Dennis Reynolds all our right, title, claim and interest in and to the following described land," etc., and the covenant of warranty was "warrant and defend the same unto the said Dennis Reynolds." The deed in that case purported to convey only the "right, title, claim, and interest in and to the land," and "to warrant and defend same," etc.

The court in the above case was called on to construe only the meaning of the words, "all our right, title, claim, and interest in and to the following described land." These words stood out alone with no other apparent conflicting or qualifying clauses or words that would render their meaning uncertain or ambiguous. The facts of that case thus clearly distinguish it from the case under consideration.

While Mrs. Phelps testified that she did not sell any interest in her sister's land and did not know that she had any interest while her sister lived, yet the bond for title which she and her husband executed to Lady flatly contradicts her. Furthermore, the testimony of the appellee, Lady, and the conduct of the parties at the time the settlement was made, which was in the nature of a family settlement, show clearly that she did at that time believe that she had title in remainder of the lands devised to her sister, which title she afterwards intended to convey with full covenants of general warranty to the appellee. See *Cox* v. *Simmons*, 55 Ark. 104.

The finding of the court, therefore, that Victoria Phelps had deeded the land in controversy to the appellee, that appellee was the owner of the land, and that his title thereto should be quieted, is correct.

While Victoria Phelps and the appellant in their complaint set up title by adverse possession in their sister Emeline, yet this was denied in the answer, and appellant introduced no proof to sustain the allegation. True, the appellee testified that he took possession of it

by reason of his marriage with Emeline Owens and about a year thereafter purchased the lands and kept possession as long as he lived with her and when they separated he surrendered possession of that particular part of the land and had never had possession of the same since. But there is no affirmative evidence that, after the appellee surrendered possession of the land to Emeline, she had the open, continuous, and adverse possession thereof for a period of seven years prior to her death. Indeed, the appellant makes no claim here to title by adverse possession.

The plaintiffs below, Victoria Phelps and Mary Jackson, were asking affirmative relief to have their title quieted and to have an injunction against the appellee, restraining him from taking possession of the lands in controversy and interfering with their title.

The burden was upon the plaintiffs to show that they were entitled to such relief. We are convinced that a decided preponderance of the evidence shows that Victoria Phelps had no title to the lands in controversy, and that the trial court ruled correctly in dissmissing their complaint for want of equity, and in entering a decree in favor of the appellee, describing the lands as they are described therein, and quieting his title thereto.

The decree is therefore affirmed.

WOOD, J., (on rehearing). (10) In the original opinion we affirmed the decree of the chancery court in which the lands were described as that part of the southeast quarter of the northwest quarter of section 21, township 16 north, range 1 west, lying south and east of private survey No. 36, containing 9.26 acres, more or less, and the south half of the northeast quarter, section 21, township 16 north, range 1 west. This is the same description as that contained in the complaint.

The appellant contends on rehearing that the deed under which the appellee claims described certain of the land as "part of the southeast northwest, 9.23 acres, section 21, township 16 north, range 1 west. That this de-

scription is void for uncertainty, citing *Graysonia-Nashville Lumber Co.* v. *Wright,* 117 Ark. 151.

While the description of this tract as contained in the deed is void for uncertainty, the testimony of Lady detailing the circumstances of the settlement and other testimony in the case showed unequivocallly that it was the intention of J. M. Phelps and Victoria Phelps by their deed to include in the deed the above tract of land.

The testimony fully warranted the court in so finding and in correctly describing the land in the decree. The testimony would have been sufficient to have justified the court in reforming the deed so as to have embraced this tract.

The decree of the court was tantamount to granting such relief to the appellee and it was upon that theory that we said in the opinion, "The finding of the court, therefore, that Victoria Phelps had deeded the land in controversy to the appellee, that appellee was the owner of the land, and that his title thereto should be quieted is correct."

McCULLOCH, C. J., (dissenting). I am wholly unable to find any distinguishing features between this case and the case of *Reynolds* v. *Shaver,* 59 Ark. 300, with respect to the interpretation of deeds of conveyances involved. In the former case the deed purported to convey the "right, title, claim and interest in and to the land" described, and concluded with a clause whereby the grantors undertook to "warrant and defend the same." This court decided that the deed was only a quitclaim and that the warranty applied only to whatever interest the grantee had at that time. In the present case that the deed, so far as concerns the land in controversy, only purported to convey "whatever interest the said Victoria Phelps may have in part of the southeast of the northwest (9.23 acres), and the south half of the northeast quarter of section 21, township 16 north, range 1 west;" and according to the doctrine of *Reynolds* v. *Shaver, supra,* it ought to be decided that the warranty

applied only to whatever interest Victoria Phelps had at that time. In fact the present case is the stronger one of the two with respect to applying the warranty to the interest conveyed, for there were four other tracts described in the deed and they are conveyed absolutely, and the warranty clause can appropriately be applied to them so as to give full effect to it.

The deed in question was only a quitclaim and did not, under Kirby's Digest, section 734, carry an after-acquired title. *Blanks* v. *Craig,* 72 Ark. 80; *Wells* v. *Chase,* 76 Ark. 417; *King* v. *Booth,* 94 Ark. 306.

Under any interpretation of Henson Kenyon's last will, Mrs. Phelps acquired no vested interest in the land prior to the death of Emeline Owen and her deed to appellee conveyed no title to the land in controversy.

McKINNEY v. STATE.

Opinion delivered November 17, 1919.

1. HOMICIDE—CONDUCT OF DECEASED—SPECIFIC OBJECTION TO INSTRUCTION.—In a homicide case the court instructed the jury that "no threats, language or *conduct,* however abusive, * * * will excuse" a homicide. Where the court instructed the jury on the theory of "appearance of danger," an objection to the above instruction for the use of the word *conduct,* should be made specifically.
2. HOMICIDE—UNJUSTIFIED KILLING—CONDUCT AND CHARACTER OF DECEASED.—Neither threats nor real or imaginary grievances, nor abusive language, however insulting, nor the bad character of deceased, will justify a killing.
3. HOMICIDE—DUTY TO RETREAT.—Where the accused brought on a difficulty, resulting in his killing the deceased, in order to invoke the doctrine of self-defense, he must, in good faith, abandon the difficulty, as far as possible, and do all in his power to avoid the danger, and avert the necessity of killing.
4. TRIAL—INSTRUCTIONS—ALL PHASES OF CASE.—It is impractical to cover all phases of a case in one instruction.
5. HOMICIDE—SELF-DEFENSE.—An instruction that if accused brought on an altercation with deceased, intending to kill him, and did

kill him, that he can not then plead self-defense, is proper, where the court in another instruction properly charged the jury upon the issue of self-defense.

6. SAME—SAME—CHARACTER OF DECEASED.—An instruction that deceased's bad character would not justify a homicide, but that self-defense was the only justification, *held*, not prejudicial.

7. TRIAL—INSTRUCTIONS—REJECTION—MODIFICATION.—In a homicide trial, *held* certain instructions asked by defendant were properly rejected, and others properly modified.

8. APPEAL AND ERROR—EXCLUDED TESTIMONY.—The exclusion of testimony can not be considered on appeal, where the record does not show what the answer of the witness would have been.

9. EVIDENCE—CHARACTER—SPECIFIC ACTS.—Neither good or bad character can be proved by specific acts.

10. CRIMINAL LAW—THREATS.—Threats are only admissible for the purpose of showing who is the aggressor in a conflict.

Appeal from Sevier Circuit Court; *Jas. S. Steel*, Judge; affirmed.

Abe Collins and *Lake & Lake*, for appellant.

1. It was error to give the 12th instruction for the State, as there was no testimony upon which to base it and ignores defendant's right to act in necessary self-defense.

2. It was error to give the 13th for the State, as there was nothing to show that defendant could have retreated, and it wholly ignores the fact that in case the assault is so fierce as to make it apparently as dangerous to retreat as to stand, it is not his duty to retreat but may stand his ground and if necessary to save his life or prevent great bodily injury, may slay his assailant. 49 Ark. 543.

3. It was also error to give the 14th for the State, as there was no evidence upon which to base it. No way is shown by which defendant could have avoided the danger to himself and have averted the necessity of the killing in case he honestly believed himself without fault or carelessness upon his part in arriving at such conclusion that the danger was imminent and pressing at the time of the fatal shot.

4. It was error to give the 18th for the State, as there was no evidence to sustain it or that defendant shot because of his bad character. It was highly prejudicial. 29 Ark. 248.

5. It was error to give the 19th, as it takes from the defendant the right to act upon appearances to him at the time and makes his right of self-defense depend upon whether or not deceased was offering to do defendant any injury at the time. 59 Ark. 132.

6. It was also error to give the 20th, because it cuts off defendant's right to act in necessary self-defense after having in good faith withdrawn from the conflict. 58 Ark. 544.

7. It was error to give the 21st for the State, for the reason that the jury should have been told that threats might be considered in determining the motives of deceased, as well as of defendant, instead of limiting them to the motives of defendant.

8. It was error to modify defendant's third request and give it as modified. 114 Ark. 398; 69 *Id.* 449.

9. It was error to refuse defendant's 4th request. It is the law and was not otherwise covered. It was also error to modify defendant's 7th request. 59 Ark. 132; 115 *Id.* 494.

10. It was error to refuse defendant's 10th request, as defendant had the right to go peaceably about his own business and was not required to neglect it.

11. It was also error to refuse defendant's 11th request, as it covers defendant's entire theory and is clearly the law.

12. It was error to modify defendant's 13th.

13. The court erred in excluding Joe Hammett's testimony and Mrs. Autry's, also Roy Selman's and defendant's, that deceased about a year before had cursed and abused and threatened him, etc.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. There was no error in giving or refusing instructions. 62 Ark. 307; 99 *Id.* 580.

2. Instruction No. 14 was a proper one. 84 Ark. 121. This instruction should be read in connection with Nos. 5, 6 and 9 given for defendant and state the law correctly. 100 Ark. 132.

3. Nos. 18 and 19 were properly given, as was No. 20. 23 Ark. 130; *Smith* v. *State,* 139 Ark. 356; 114 Ark. 398.

4. No. 21 was properly given. 119 Ark. 57.

5. There was no error in refusing the defendant's instructions, nor in their modification. 104 Ark. 616; 93 *Id.* 409.

6. There was no error in the testimony excluded and the verdict is amply sustained by the competent testimony.

STATEMENT OF FACTS.

Will McKinney was indicted for murder in the first degree charged to have been committed by killing Jim Copass. The facts are as follows:

According to the testimony of a witness for the State, Will McKinney shot and killed with a pistol, Jim Copass in front of a storehouse at Chapel Hill in Sevier County, Arkansas. The killing occurred on Saturday morning at about 10 o'clock. Copass with others was standing on a porch in front of the store when McKinney came up. McKinney went on into the store walking behind Copass. When he came up, McKinney said, "Howdy do." Copass did not say anything. While McKinney was in the store Copass went over and sat down by a telephone pole about 20 or 30 feet from the store. McKinney stayed in the store for about five or ten minutes and then came out to where Copass sat. When he got in about six or eight feet of Copass, McKinney asked him what he was hunting him with a 30-30 rifle for. Copass said, "I wasn't hunting you with a 30." McKinney replied, "Don't tell me that." Copass repeated what he had said and further said, "Go, on, Will, I don't want to have any more trouble with you." McKinney had his pistol in his right-hand pants pocket and began to pull it out. He took the pistol in both of his hands and pointed it at Copass

and snapped it. Copass was beginning to rise when McKinney snapped the pistol at him and was a little better than half way up when McKinney shot him. The pistol fired immediately after it snapped. The bullet entered Copass' head right back of his ear and came out in his left cheek. The bullet wound resulted in the death of Copass.

According to the testimony of another witness for the State, Copass was sitting on a telephone pole and when McKinney got up to within eight feet of him he asked Copass why he had been looking for him with a 30-30 rifle. Copass replied, "I wasn't hunting for you with a 30." McKinney then said, "Don't tell me that." Then Copass said, "Go on, Will, I don't want any trouble with you." McKinney replied, "I know you don't." Just as he made this remark, Copass started to get up and as he did so, put his hands on his legs sliding them up towards his pocket. Copass began to get up just as McKinney reached for his pistol. The pistol first snapped and then fired. Copass was about two-thirds up at the time the pistol fired. McKinney was holding the pistol in both hands at the time he fired it. Copass did not put his hands in his pocket. He simply put them on his thigh as he started to get up. After Copass' death, his body was examined and no pistol or other weapon was found in his pockets or on his body.

Other witnesses who saw the killing corroborated the testimony of these witnesses.

Will McKinney was a witness for himself. According to his testimony he was foreman at a lumber camp and Copass was driving a team for the company. Copass first accused McKinney of making insulting remarks to his wife and threatened to beat him up. McKinney denied having made the remarks attributed to him and told Copass he had better quit and leave the camp if he thought any such thing. They had several quarrels about the matter which resulted in McKinney discharging Copass twice. Each time he took Copass back at the latter's request. When McKinney discharged him the third time he told him that he would not take him back any more.

After McKinney discharged him, they had a fight on Thursday afternoon. The killing occurred on the following Saturday morning.

On Friday preceding the killing McKinney was informed that Copass was hunting for him with a 30-30 rifle and was threatening to kill him. When McKinney walked in the store he spoke to all the crowd on the porch including Copass. Copass did not speak. McKinney wanted to have the matter settled without any further trouble and concluded he would go out to where Copass was and have a friendly conversation about it. As he approached Copass he said, "What were you hunting me with a 30-30 for?" Copass said, "I wasn't." McKinney said, "Don't tell me you wasn't hunting me with a 30-30." Copass then said, "Go on, Will, I don't want to have no trouble." When he said this he was sitting down on an old telephone pole and leaning against a telephone post. When Copass said, "Go on, Will, I don't want to have no trouble," he slammed his hand in his pocket and started to get up. When Copass started up, McKinney put his hand in his pocket and drew his pistol and threw it down on Copass. The pistol first snapped and McKinney pulled the hammer back and then it fired. Copass was facing McKinney and when the pistol fired he fell face downward. McKinney then turned around and walked back to the store porch. He said that he shot Copass simply because he thought Copass was going to shoot him or jump on him with a knife. The brother of Will McKinney corroborated his testimony.

Other witnesses for the defendant testified that Copass armed himself with a rifle after their first difficulty on Thursday and was looking for McKinney threatening to kill him. Some of the witnesses testified they communicated these threats to McKinney. Quite a number of witnesses testified that Copass bore the reputation in the community of being a quarrelsome, overbearing and turbulent man. Other witnesses testified that the reputation of McKinney was that of a quiet, peaceable and law-abiding man.

The jury returned a verdict of guilty of murder in the second degree and fixed the punishment of McKinney at five years in the penitentiary. The case is here on appeal.

HART, J., (after stating the facts. (1) The first assignment of error is, that the court erred in giving instruction No. 11, which is as follows: "You are instructed that no threats, language or conduct, however, violent, abusive or insulting, will excuse the taking of a human life, nor will it reduce the grade of homicide from murder to manslaughter."

It is claimed that the use of the word "conduct" takes from the consideration of the jury the doctrine of appearance of danger to the defendant. The court at the request of the defendant gave full and complete instructions to the jury on the doctrine of the appearance of danger and if counsel for the defendant thought that the instruction in question was misleading as ignoring that defense, it should have made a specific objection to the instruction. A similar objection was made in the case of *Manasco* v. *State,* 104 Ark. 397, and the court held that the verbiage of the instruction should have been met with a specific objection.

(2) It was also insisted that the court erred in giving instruction No. 12, which reads as follows: "You are instructed that if you find and believe from the evidence in the case, beyond a reasonable doubt, that the defendant, Will McKinney, killed the deceased on account of any real or imaginary grievance, which he might have had against the deceased, or on account of any threats the deceased might have made against him, or on account of any insulting language which the deceased might have used towards the defendant, or on account of the bad character of the deceased, or if you should believe beyond a reasonable doubt that he was actuated by all of these in killing the deceased, then you will convict the defendant of murder in the first or second degree, according as you may find and believe that he acted with or without

deliberation and premeditation when he killed the deceased."

It is first claimed that the instruction is erroneous because there was no evidence tending to show that the defendant killed deceased because of any real or imaginary grievance or on account of any threats or insulting language or on account of the bad character of the deceased. The instruction would have been probably clearer to the jury if the court had instructed it that neither threats nor real or imaginary grievances, nor abusive language, however insulting, nor the bad character of the deceased would justify the killing. This is what the instruction means, and if counsel for the defendant thought that it was faulty in language they should have made a specific objection to the instruction, and, not having done so, they can not now complain.

In the next place it is claimed that the instruction is erroneous because it ignores the defendant's right to act in his necessary defense. As we have just pointed out, the instruction is not directed to that phase of the case. The court in other instructions fully covered the right of the defendant to kill deceased in his necessary self-defense, and in these instructions covered fully the doctrine of appearance of danger to the defendant.

(3) It is next insisted that the court erred in giving instruction No. 13, which is as follows: "If you believe from the evidence in the case, beyond a reasonable doubt, that the defendant provoked or voluntarily entered into or that he sought out the deceased for the purpose of settling a difficulty, and, when he did so, brought on a difficulty and killed his assailant, he can not shield himself on the plea that he was defending himself. He can not take advantage of a necessity produced by his own unlawful or wrongful act after having provoked or excited or sought the attack, if you find from the evidence, beyond a reasonable doubt, that he did so, he can not be excused or justified in killing his assailant for the purpose of saving his own life or preventing great bodily injury, unless he had in good faith withdrawn from the combat

as far as he could, and did all in his power, to avoid the danger and avert the necessity of the killing."

The objection to this instruction assigned is that there is nothing to show that the defendant could have retreated and that it wholly ignores the fact that in case the assault is so fierce as to make it apparently as dangerous for the person assaulted to retreat as to stand, it is not his duty to retreat.

According to the evidence of the State the defendant approached the deceased and himself brought on the difficulty. In such case he would have to in good faith abandon the difficulty as far as he could do so and do all in his power to avoid the danger and avert the necessity of the killing before he could justify the killing. *Carpenter* v. *State,* 62 Ark. 286, and *Taylor* v. *State,* 99 Ark. 576.

(4) It is insisted that the court erred in giving instruction No. 19, which is as follows: "You are instructed if you find from the testimony in the case, beyond a reasonable doubt, that the defendant and deceased had a fight a day or so before the killing; that the defendant heard that Jim Copass had threatened his life and had been looking for him with a gun, and on that account the defendant at the time and place mentioned in the indictment, armed himself with a pistol, went out to where the deceased was sitting, and shot and killed the deceased at a time when the deceased was not offering to do the defendant any injury, you will convict the defendant of murder in the first or second degree as you may believe he acted with or without deliberation and premeditation."

It is claimed that this instruction takes away from the defendant the right to act upon the appearance of danger to him at the time and makes his right to act in his self-defense depend upon whether or not deceased was offering to do defendant any injury at the time. We do not think the instruction constitutes reversible error. As we have already pointed out, the court at the request of the defendant fully and completely instructed the jury on the doctrine of appearance of danger. It has been fre-

quently said by the court that it is impractical to cover all phases of the case in one instruction. The instruction in question deals with an entirely different phase of the case. The object of the court in this instruction was to present to the jury the State's theory of the case. The defendant and the deceased had had a fight on Thursday before the killing occurred on Saturday morning. After the fight was over, the defendant heard that deceased had threatened his life and had been looking for him with a gun. The defendant admits in his testimony that he armed himself with a pistol on this account and that he went out to where the deceased was sitting and commenced to talk with him about their previous difficulties, intending to adjust them. The court was dealing with his right to kill under such circumstances and in using, in the instruction, the phrase "when the deceased was not offering to the defendant any injury," meant to convey the idea to the jury, when the deceased was not apparently attempting to injure the defendant. In other words, in this instruction the court was again dealing with the theory of the State that the defendant armed himself and brought on the difficulty and shot the deceased at a time when the latter had not contemplated renewing the difficulty.

(5) It is insisted that the court erred in giving instruction No. 20, which reads as follows: "If you believe from the testimony, beyond a reasonable doubt, that the defendant armed himself with a pistol, and sought out the deceased, Jim Copass, with the felonious intent of killing him, and sought out, brought on or voluntarily entered into a controversy with the deceased with the felonious intention of killing him, then the defendant can not plead self-defense, no matter how imminent the peril in which he found himself placed."

It is claimed that this instruction cuts off defendant's right to act in his necessary self-defense after having in good faith withdrawn from the combat. There was no error in giving this instruction. Again the court was dealing with the theory of the State that the defend-

ant armed himself and voluntarily entered into a controversy with the deceased with the felonious intention of killing him. As we have already seen, the court fully covered the defendant's theory of self-defense in other instructions given to the jury and in another instruction given to the jury for the State, which is substantially the same as the instruction here set out, told the jury that if the defendant in good faith undertook to withdraw from the combat after having provoked it, that he might plead self-defense. If counsel for the defendant thought the instruction in question was faulty in the respect just stated, he should have made a specific objection to the instruction. This would have called the court's attention to the defect and the court would doubtless have corrected it to conform to the language of the other instruction on the same point given for the State.

(6) It is claimed that the court erred in giving instruction No. 18, which reads as follows: "You are instructed that, even though the defendant believed the deceased to be a man of bad character, this did not authorize the defendant to kill him; he could only kill him in self-defense as defined in these instructions."

The objection to the instruction is that it singles out the testimony and unduly emphasizes it. The court should not do this, but it has been held by this court that it is not error to do so where the court in other instructions presented to the jury for their consideration every phase of the case. In the case at bar the instructions to the jury were full and complete, and, when considered as a whole, we can not think that the jury were misled by the instruction complained of. *Hogue* v. *State,* 93 Ark. 316.

(7) Counsel for the defendant also calim that the court erred in refusing certain instructions for the defendant and in modifying others asked by him. We do not deem it necessary to set out these instructions. We have read and considered them. The matters embraced in the refused instructions are fully covered by other instructions given by the court. The modification of the

instructions consists in omitting certain parts of them as requested. The court was correct in doing this, for the modified parts were either a repetition of the part allowed to stand, or they presented the same matter in argumentative form.

(8) It is next insisted that the court erred in not permitting Mrs. Autry, a witness for the defense, to answer certain questions asked her. We need not set out the question for the record does not show what the answer of the witness would have been. In such a case the alleged error can not be considered on appeal. *Lincoln Reserve Life Ins. Co.* v. *Morgan,* 126 Ark. 615.

(9) It is next insisted that the court erred in refusing to allow defendant to testify that about a year before the killing the deceased had cursed him and threatened to stamp him into the earth because defendant had stated to the sister of the deceased that it was not Preacher Moss who had been arrested for disloyalty, but another Moss. It is insisted that this testimony was competent as tending to show the arbitrary and insulting character of the deceased. Neither good nor bad character can be proved by specific acts. *Campbell* v. *State,* 38 Ark. 498; *Shuffield* v. *State,* 120 Ark. 458, and *Biddle* v. *State,* 131 Ark. 537. This quarrel had no connection whatever with the killing and was too remote to be considered as shedding any light on it.

(10) The defendant stated on cross-examination that on Friday before the killing he asked deceased if he was going to bring his wife up to the trial at Chapel Hill the next day. He was further asked if deceased had not told him he would not do so, that it added more cost, that he had paid his fine for the fight they had had the day before and that so far as he was concerned it was over with. The defendant replied that no such conversation had taken place.

In rebuttal the State was allowed to prove by Roy Selman that he was present on the occasion just referred to and heard the deceased tell the defendant that there was no need of his wife coming up there the next morn-

ing for the trial and that he was through with the matter himself. Selman was a witness for the defendant and had testified that about 10 o'clock on Friday morning before the killing he had heard the deceased make the threat that he intended to kill the defendant. The defendant offered to prove by Selman that the conversation he heard between defendant and deceased as testified to in rebuttal was a conversation had before the threats which he had testified to in his examination in chief. They insist that it was material because it tended to show the state of mind the deceased was in. It may be said in the first place that the threats were only admissible for the purpose of showing who was the aggressor. The testimony of Selman that he heard the conversation in question between the defendant and the deceased was only admitted for the purpose of impeachment and the court so stated at the time the excluded testimony of the witness was offered. The excluded testimony would have been relative to a collateral matter and the court was right in not admitting it to go to the jury.

We have carefully examined the record and find no prejudicial errors in it. It follows that the judgment must be affirmed.

SCHMIDT v. DRAINAGE DISTRICT NO. 17.

Opinion delivered November 17, 1919.

1. DRAINS AND DITCHES—ASSESSMENT OF DAMAGES.—A land owner can not complain of a failure to assess damages to his land, by the directors of a district created by act 103 of 1917, where his complaint does not show that he gave the notice required by the statute.
2. PUBLIC LANDS—EMINENT DOMAIN.—The public lands of the United States situated within a State, and held for sale or settlement, are subject to the eminent domain of the State.
3. PUBLIC LANDS—DAMAGES TO—RIGHT OF HOMESTEADER.—A homesteader upon public lands has, from the date of making a formal entry of his claim at the public land office and paying the sum required by law, such a vested right of property therein as will permit him, before the issuance of a patent, to recover damages for an injury to the land.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. H. Dudley,* Judge; affirmed.

The appellant, *pro se.*

The court erred in sustaining the demurrer, the appellant was not bound to file complaint with the county court at the first term after the publication of the notice of assessment. Act No. 103, Acts 1917, p. 485. His lands were United States homestead lands, and he had not received a patent therefor, and they were not subject to assessment. They were taken wrongfully, to his great damage.

Davis, Costen & Harrison, for appellee.

The complaint does not show that plaintiff gave the board, within 30 days after the assessment was filed, notice in writing that he demanded an assessment of damages by a jury and in fact no such notice was given. The identical question here was passed on by this court in 213 S. W. Rep. 334.

HART, J. Joe Schmidt brought this suit against Drainage District No. 17 to recover damages for land taken and injured by said district.

In his complaint he alleges that he entered certain lands under the homestead laws of the United States and was in possession thereof prior to the creation of Drainage District No. 17; that he has complied with the laws of the United States in regard to the entry of said lands and in due time will receive a patent to said lands from the United States. It is also alleged in the complaint that the drainage district entered upon said lands and destroyed timber thereon and also took a part of said lands for the purpose of constructing a drainage ditch. The complaint also alleges that the board of directors of the drainage district failed to view and assess the damages to his lands as provided by section 9 of Act 103 of the Acts of 1917. The court sustained a demurrer to the complaint and the complaint was dismissed. The case is here on appeal.

The drainage district was organized under Act 103 of the Acts of 1917. See Acts of 1917, page 485. Section 9 of the act provides for the assessment of benefits. The section in part is as follows:

"The board shall also assess all damages that will accrue to any land owners by reason of the proposed improvements, including all injury to lands taken or damaged; and where they return no such assessment or damages as to any tract of land, it shall be deemed to be a finding by them that no damage will be sustained."

The section further provides for a hearing in the county court by the owner of real property who feels himself aggrieved by the assessment of benefits.

Section 10 provides that any property owner may accept the assessment of damages in his favor made by the board; or acquiesce in their failure to assess damages in his favor, and shall be construed to have done so unless he gives to the board, thirty days after the assessment is filed, notice in writing that he demands an assessment of his damages by a jury, etc.

(1) The complaint does not show that the plaintiff complied with section 10 of the statute in regard to giving notice. A statute in all respects similar to the one now under consideration was upheld by this court in *Dickerson* v. *Tri-County Drainage Dist.*, 138 Ark. 471. There as here the commissioners made no assessment of damages to any particular tract and the court held that no finding need be reported where no damages are found or those found are exceeded by the benefits. The case at bar is ruled by that case and reference is made to it for the reasoning of the court.

It is also insisted that the plaintiff had entered the lands as a homestead under the laws of the United States and had not yet received a patent thereto and for this reason that the court erred in sustaining the demurrer.

(2) In Lewis on Eminent Domain (3 Ed.), vol. 2, par. 414, (264), it is said that the public lands of the United States situated within a State and held for sale or settlement are subject to the eminent domain of the State.

(3) In a case note to 17 L. R. A. (N. S.), p. 958, it is said that a homesteader upon public lands has, from the date of making a formal entry of his claim at the public land office, and paying the sum required by law, such a vested right of property therein as will permit him, before the issuance of a patent, to recover damages for an injury to the land; and many cases are cited in support thereof.

It follows that the judgment must be affirmed.

AMERICAN HARDWOOD LUMBER COMPANY *v.* MILLIKEN-JAMES HARDWOOD LUMBER COMPANY.

Opinion delivered November 17, 1919.

1. CONTRACTS—SALE OF LUMBER—RESCISSION.—A. sold lumber to B., and when the same arrived B. notified A. that it was of inferior grade, and declined to accept it. A. wrote B. expressing surprise that B. had unloaded the lumber if it looked bad, and that if B. did not want it to rebill it. A. also wired B., "without waiving any of our rights, if you do not want the car of lumber, will ask that you reload same and consign to J." *Held,* the court properly submitted the issue of a rescission of the contract, and that a finding that there was no rescission was supported by the testimony.
2. SALES—EXAMINATION BY BUYER.—As a general rule in case of an executory contract of sale, the buyer is entitled to a fair opportunity to inspect or examine the goods tendered, to see if they conform to the contract, and if they do not do so, may reject them.
3. SALES—LUMBER—INSPECTION—EFFECT OF UNLOADING.—Under a contract made by letter and telegraph, A. shipped a car of lumber to B., giving B. the right to unload and inspect the lumber. When the car arrived, before unloading, B.'s foreman reported that the same was "kindling wood and not worth the freight." *Held,* B.'s act thereafter, in unloading the lumber, operated as an acceptance of the same.
4. SALES—LUMBER OF INFERIOR GRADE—SET-OFF.—When lumber of an inferior grade was shipped to a purchaser, he may accept same and plead a set-off in an action for the purchase price.

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

McMillan & McMillan, for appellant.

1. A verdict should have been directed for defendant (1) because the uncontradicted evidence shows that more than one-third of the lumber was different from that ordered and that the shipment was promptly refused and plaintiff promptly notified and (2) the evidence shows that the contract was mutually rescinded. 13 Corp. Jur., sec. 4, p. 2634 *et seq.;* 47 Ark. 519; 57 *Id.* 257. The contract was rescinded.

2. A material part of the lumber was not shipped in compliance with the contract, and within a reasonable time defendant refused the shipment and promptly notified plaintiff of his refusal. 81 Ark. 459; Wharton on Sales (1909), sec. 473; Benjamin on Sales (6 Ed.), p. 600 (Am. note); 35 Cyc. 221-225.

3. If goods are sent to a buyer of a grade or quality which he never agreed to take, the seller is a mere volunteer, and the buyer is in the position of a bailee who has goods thrust upon him without his assent; he must take reasonable care of the goods, but nothing more can be demanded of him. He is under no obligation to return the goods to the seller, and after notice that the goods have not been and will not be accepted, the seller must assume the burden of removing them. Williston on Sales (1909), sec. 407. The cost of inspection, etc., if the goods are not what the contract calls for, would be a reasonable element of damage in an action against the seller for breach of contract that reasonable expense was incurred in examining the goods and detecting their insufficiency. *Ib.,* sec. 477.

4. It was reversible error to give instruction No. 3 for plaintiff and to modify No. 4 for defendant. Defendant had the right to unload the car and hold the lumber until the freight was refunded. 45 Ark. 284.

Collaway & Huie, for appellee.

On the whole case, the case was properly tried and there was no error in the instructions given or refused. 53 Ark. 159; 81 *Id.* 561; Benjamin on Sales, sec. 901.

STATEMENT OF FACTS.

Appellee sued appellant to recover $537.64 alleged to be due it for a car of lumber. Appellant defended the suit on the ground that the car of lumber did not conform to the contract of purchase and that on that account it did not accept the lumber. The facts are as follows:

The Milliken-James Hardwood Lumber Company, appellee herein, is a corporation located at Arkadelphia, Arkansas, and operates a mill which saws hardwood timber. The American Hardwood Lumber Company is a foreign corporation engaged in the business of buying and selling hardwood lumber by the wholesale and is located at St. Louis, Missouri. It has an office and yard at Benton, Arkansas, and has complied with the laws of the State with regard to foreign corporations doing business in this State. In May, 1918, by telegrams and letters, a contract was entered into whereby appellee agreed to ship to appellant a car of two-inch edged hickory flitches two inches thick No. 2 common and better at $45 per thousand f. o. b. Arkadelphia, Arkansas. Appellee was directed to load and ship the same to appellant at St. Louis, Missouri. On May 21, 1918, appellee wrote to appellant stating that the car of hickory was now being loaded for shipment and that it would be glad to have appellant look the lumber over carefully when it was unloaded in its yards. The car of lumber was duly shipped by appellee and delivered by the carrier to appellant at its yards in St. Louis, Missouri. In relation thereto on June 6, 1918, appellant wrote to appellee as follows:

"Gentlemen: The car of hickory is in and inspected by the National Hardwood Lumber Association's inspector, and we enclose said inspector's report. Car No. 14786. When the car first was opened our foreman reported back that it was "kindling wood," and not even worth the freight; but we of course unloaded the stock, and the report shows this is about right.

"We bought No. 2 common and better, log run stock, but you will note that you have no doubt shipped the good stock out and this practically No. 2 and No. 3 common.

"We have paid your draft for 80 per cent. because we have dealt with you gentlemen before and felt that you were very honorable. We feel sure some mistake has been made. We can not use the stock. Out of 11,000 feet over 4,600 is No. 3 common, and less than 800 feet of No. 1 common. Balance No. 2 common, No. 1 and 2nds ¾. It is quite evident the best has been shipped elsewhere or else you cut up the cull and mill cull logs. Kindly send us check for the draft we have paid and we will hold the car here for you until you can make some disposition of it, without cost to you.

"Thanking you for prompt compliance with this request, we remain."

On June 10, 1918, appellee wrote to appellant the following:

"We received your letter Saturday, too late to answer same. We are certainly surprised, for we can not understand why you wanted to unload the car if it looked bad to you. We have the lumber sold. You should not unload any lumber for us because we are not going to stand for any shuffling up, and if you do not want the car just like we loaded it for you, then rebill. We really did not have the hickory to spare, but we felt like we were accommodating you. Now, if you will rebill the car we will get out of your way."

On the same day appellee also sent to appellant the following telegram:

"Without waiving any of our rights, if you do not want car of lumber will ask that you reload same and consign to J. W. Black Lumber Company, Minneapolis, Minn."

According to the testimony of I. W. Milliken, the manager of appellee, he entered into a contract on May 20, 1918, to sell a car of hickory lumber to appellant for appellee. There was nothing less than No. 2 common that went from the mill out to the piles from which the car was loaded. The demurrage on a car of lumber is $3 for the first three days, $6 for the next four days and $10 a day thereafter. After the present suit was brought

by appellee against appellant, appellant attached the car of lumber in a suit before a justice of the peace in St. Louis for the freight and cost of loading and unloading the lumber and the lumber was sold for these items.

Dave Hughes was lumber inspector for appellee and testified that he inspected the car of lumber as it was loaded and that the lumber placed in the car strictly came up to the specifications of the contract. On cross-examination he stated that he could not step in a car where it was loaded and grade it without examining every piece of it. The reason given was that you could not tell what was in a board by looking at a load of lumber in a car. A board might be good at the end and be rotten three feet from the end. He stated that there was nothing in the car below the grade of No. 2. His testimony was corroborated by that of R. C. Cessor, another employee of appellee. He edged the lumber and helped load it in the car and said that the grade of lumber put in the car was No. 2 and better.

According to the testimony of Geo. H. Cottrill, secretary of appellant, his company had purchased lumber from time to time from appellee. Appellant had had a branch office and yard at Benton, Arkansas, for fourteen or fifteen years. Appellant advanced the freight charges on the car of lumber in question in the sum of $133.08. This was according to the rules of the Terminal Association on whose tracks appellant's lumber yard is located and appellant paid the freight in the ordinary course of business on this account. Cottrill was familiar with the grades of hardwood lumber, having had twenty years experience. He saw the car of lumber in question and said the lumber was not of the grade specified in the contract.

Appellant did not reload and rebill the lumber because the railroad would not accept it without payment of the freight charges, and appellee refused to pay this as well as the cost of unloading and reloading the car of lumber.

Other witnesses who had had experience in inspecting hardwood lumber, testified that it did not come up to the grade specified in the contract.

The jury returned a verdict for appellee and to reverse the judgment rendered upon the verdict appellant prosecutes this appeal.

HART, J., (after stating the facts). (1) It is earnestly insisted by counsel for appellant that the court should have given a peremptory instruction for it. The court submitted to the jury under proper instructions the question of whether or not the lumber shipped came up to the grade specified in the contract and the jury decided that question in favor of appellee. Counsel for appellant concede that there was sufficient testimony to support the verdict in this respect, but claim that appellant was entitled to a directed verdict because the correspondence between the parties resulted in a contract rescinding the original agreement under which the lumber was sold. They rely on the letter written by appellee to appellant on June 10, 1918. In that letter appellee stated that it was surprised at appellant unloading the car if it looked bad to it. It further stated that appellee had the lumber sold and that if appellant did not want the car, to rebill it. On the same day appellee sent to appellant a telegram as follows:

"Without waiving any of our rights, if you do not want car of lumber will ask that you reload same and consign to J. W. Black Lumber Company, Minneapolis, Minn."

This telegram must be read in connection with the letter of the same date. When this is done, the jury might have found that the appellee did not offer to rescind the contract unless appellant reloaded the lumber and rebilled it as directed and that appellant did not court properly submitted to the jury the question of comply with the offer so made by appellee. Hence the court properly submitted to the jury the question whether or not there was a rescission of the contract and there was testimony sufficient to support the finding of the jury that there was no rescission of the contract.

(2-3) It is next insisted that the court erred in giving instruction No. 3 for appellee and in modifying instruc-

tion No. 4 asked by appellant. These assignments of error relate to the same thing and may be considered together.

Instruction No. 3 reads as follows:

"You are instructed that if you find from the evidence that the defendant when it first opened the car saw and knew that it did not come up to the contract that defendant had no right to unload the car, and if it did unload the car thereafter it amounted to an acceptance, and you will find for the plaintiff."

Instruction No. 4 as modified reads as follows:

"The court further instructs you that when the car of lumber reached the defendant, the defendant had the right to inspect same and to unload the car, and the court instructs you that by paying the freight on the car and unloading same and inspecting same the defendant will not be held to have accepted the car, unless you further find that defendant, before unloading the car, knew that the lumber was not of the kind and quality provided for in the contract."

The modification consisted in adding the qualification at the end of the instruction so as to make it conform to instruction No. 3. As a general rule in case of an executory contract of sale the buyer is entitled to a fair opportunity to inspect or to examine the goods tendered, to see if they conform to the contract, and if they do not do so, may reject them. *Deutsch* v. *Dunham,* 72 Ark. 141. In the case at bar the contract was made by telegrams and letters. On the 21st of May, 1918, appellee wrote to appellant that the car was being loaded for shipment and stated that appellee would be glad to have appellant look it over carefully when it was unloaded in its yard. This of itself gave appellant the right to inspect the lumber in the car and to unload it for the purpose of inspection if necessary to do so. Appellee had already inspected the lumber as it was loaded in the car. The inspection at appellant's yards was therefore entirely for the benefit of appellant and it might accept the lumber with or without inspection or by making such inspection as it saw

fit to make. In its letter of June 6, 1918, appellant stated to appellee that when the car was first opened its foreman reported back that the lumber was "kindling wood" and not even worth the freight. If appellant knew by the examination of the lumber in the car that it did not conform to the contract, it was in a position to decide whether or not it would accept the lumber and the court properly instructed the jury that if it saw and knew that the lumber did not come up to the contract, it had no right to unload the car, and if it did unload it, this amounted to an acceptance. Knowledge that the lumber did not conform to the contract was all that was necessary to enable appellant to exercise its right to refuse or accept the shipment on that account.

It is next insisted that instruction No. 3 is erroneous because the letter of May 21st, from appellant to appellee says, "In regard to the car now being loaded for you, we should be glad to have you look over it carefully when it is unloaded in your yards." As above indicated, this letter was a part of the contract between the parties and gave appellant the right to inspect the car of lumber before accepting it and to unload it for that purpose if necessary. However, as above stated, the appellant might accept the lumber without inspecting it at all, or after giving it such an inspection as it deemed necessary. If it knew after its foreman had inspected the lumber in the car that it did not conform to the contract it was in possession of all facts necessary for it to determine whether or not it would accept the car of lumber and the court was right in instructing the jury that if appellant, when it first opened the car saw and knew that the lumber did not come up to the contract, it had no right to unload the car and if it did unload the car thereafter, it amounted to an acceptance.

It is also suggested that appellant had a right to unload the car for the purpose of inspecting the lumber because an inspector for appellee, Dave Hughes, testified that a man of his experience could not step in a car of loaded lumber and grade it without examining every

piece of it, because you can not tell what is in a board by looking at a load of it; that it might be good at the end and rotten three feet from the end. It was not necessary for appellant to grade the lumber if it already knew that the lumber did not come up to specifications and that it was not going to accept it on that account. The lumber was in a box car and an examination of the lumber in the car showed the condition of the lumber on the top and from the bottom to the top on the side of the car when the doors were open. So while each piece of lumber could not be graded without unloading it, it was possible that the foreman of the appellant could tell by examining the lumber in the car that it did not conform to the contract. Appellant admitted in its letter to appellee that it knew the lumber did not conform to the contract before it unloaded the same, and this, together with the attendant circumstances, constituted evidence upon which to predicate the instruction. Appellant might have accepted the lumber without asserting its right of inspection, and have relied on its legal right to ask for a reduction of the price in case the lumber was of inferior quality. That is to say, it might have recovered such damages in a cross-action if it had already paid the purchase price, or it might have set such damages up by way of recoupment if suit was brought by appellee for the price of the lumber.

The court at the request of appellant gave instruction No. 2, which is as follows:

"The court instructs you that the defendant had the right to unload the car to inspect it, and if you find that a material portion of the lumber was not in accordance with the order, the defendant would have the right to hold the lumber until the freight and unloading charges were paid the defendant."

It is claimed that the instruction is inconsistent with instructions Nos. 3 and 4, above set out and considered. We do not think so. It is well settled in this State that the court can not be required to cover every phase of the case in one instruction. In instruction No. 2 the court

was submitting to the jury appellant's theory of the case. Under the contract appellant had the right to inspect the lumber before accepting it and to unload it for that purpose. Then if appellant found that the lumber did not come up to grade it would have the right to reject it, and it need not have returned the lumber, but might have held it until the freight advanced by it and the cost of unloading were paid.

(4) On the other hand, the right of inspection being to enable appellant to ascertain if the lumber conformed to the contract before accepting it, if it knew by examining the lumber while in the car that it was so defective that it did not conform to the contract, appellant was then put to its election and if it unloaded the lumber such act amounted to an acceptance of it. If appellant accepted the lumber it could not hold it for the freight and cost of unloading, but on the other hand it was its duty to have paid the purchase price. Of course, as explained above, it might have accepted the lumber, although of an inferior grade and have set off the damages in a suit for the purchase price. No such issue was made in this case. It was the claim of appellee that the lumber came up to grade and the jury was expressly told that appellee was not entitled to recover anything unless the lumber was of the kind and grade specified in the contract.

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

BARTLETT v. STATE.

Opinion delivered November 17, 1919.

1. CRIMINAL LAW—BURGLARY—VARIANCE—WAIVER.—Defendant was charged with stealing property from the Missouri Pacific Railway Company, and the testimony showed that it was the Missouri Pacific Railroad Company. *Held*, if this constituted a variance, in the absence of a waiver of the point, proof was admissible that the owner of the goods would have been recognized in the community as either the Missouri Pacific Railway Company, or Railroad Company.

2. CRIMINAL LAW—PRINCIPALS AND ACCESSORIES.—Persons present, aiding and abetting, or ready and willing to aid and abet, are principals and indictable as such.
3. SAME—ACCOMPLICE—CORROBORATION.—An accused can not be convicted upon the uncorroborated testimony of an accomplice.
4. BURGLARY—ACCOMPLICE—ENTERING THE BUILDING.—One may be convicted as an accomplice to a burglary, although he does not enter the building, but stayed outside and watched, while his accomplice entered the building, and carried away the stolen goods.
5. CRIMINAL LAW—PROOF OF GUILT.—The law does not require that the guilt of the accused be established to the exclusion of every other hypothesis than that of guilt.

Appeal from Howard Circuit Court; *James S. Steel,* Judge; affirmed.

D. B. Sain, for appellant.

1. The court erred in giving instruction No. 1 for the State, because there is no proof that the gun taken was the property of the United States Government, except the conclusion testified to by Mr. Beavers, and there is a variance between the indictment and the proof, as the proof shows that the depot was the property of the Missouri Pacific Railroad Company and so was the money, and not that of the Missouri Pacific Railway Company.

2. No. 2 for the State should not have been given. There was error also in giving the 3rd instruction for the State and in refusing the 4th, 7th and 8th for defendant.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. There was no variance between the indictment and proof. This was waived really, but if not there was no real variance. 117 Ark. 296.

2. There was no error in giving instruction No. 2. *Harris* v. *State, ante* p. 46.

3. No. 3 was not error, if read in connection with No. 5 for defendant. Together they state the law, and only a general objection was made. 74 Ark. 431; 94 *Id.*

169; 95 *Id.* 100; 66 *Id.* 264; 80 *Id.* 225; 116 *Id.* 357; 108 *Id.* 508; 106 *Id.* 362; 110 *Id.* 402; 129 *Id.* 180.

3. There was no error in No. 5 given. 58 Ark. 353; 61 *Id.* 88; 69 *Id.* 558; 120 *Id.* 30.

4. No. 6 given was proper and has often been approved. 54 Ark. 489; 68 *Id.* 336; 91 *Id.* 570; 108 *Id.* 508.

5. There was no error in modifying instruction No. 2 as to corroboration by an accomplice nor in refusing No. 6 for defendant. 86 Ark. 23; 64 *Id.* 247.

6. No. 7 refused properly. It is not the law. 36 Ark. 117; 58 *Id.* 353; 63 *Id.* 310; 75 *Id.* 540. It is bad also because there was no evidence upon which to base it, at least the first part of it.

7. There was no error in refusing Nos. 8 and 10 for defendant.

8. No error in the admission of the testimony of the officers who arrested the boys, as the Shillings boy substantially repeated their testimony.

SMITH, J. Appellant seeks by this appeal to have reversed the judgment of the Howard Circuit Court sentencing him to a term of three years in the penitentiary upon a charge of burglary. The indictment charged that the property which appellant intended to steal was an iron chest of the value of $10 and $125 in gold, silver and paper money, all being the property of the Missouri Pacific Railway Company, a corporation, and one gun, the property of the United States Government, of the value of $25. The indictment also alleged that the building broken into was "a certain station house owned and occupied by the Missouri Pacific Railway Company, a corporation."

(1) In stating the case to the jury instruction No. 1 referred to the stolen chest and money as the property of the Missouri Pacific Railway Company, whereas the testimony showed that this was the property of the Missouri Pacific Railroad Company, and objection is made that there was a variance between the allegation and the testimony. The objection was made at the trial but was

waived at the time by counsel representing appellant at the trial, but it is now insisted that only the appellant himself could waive the point.

In the case of *Brown* v. *State,* 108 Ark. 336, the indictment alleged that the stolen property belonged to the St. Louis Southwestern Railroad Company and the proof showed that at the time of the larceny the goods were in the possession of the St. Louis Southwestern Railway Company, and it was there insisted that there was a fatal variance between the allegation of ownership and the proof thereof. It was shown by the testimony, however, that the alleged owner was sometimes spoken of as the railroad and at other times as the railway, and that persons living in the community understood what company was used when it was referred to by either designation. We there said that "the alleged variance between railway company and railroad company did not prejudice the substantial rights of the defendant on the merits. The allegation was sufficient to advise appellant of the name of the owner of the goods which he is alleged to have received."

So here if the difference between the allegation and the proof constituted a variance it must be assumed that, if the point had not been waived at the trial, proof could and would have been offered that the alleged owner of the goods would have been recognized in that community, as the same corporation, under the designation of a "railway company" or as a "railroad company."

The testimony shows appellant to be a boy seventeen years old and his accomplice was a boy named Shillings, who was about the same age. Shillings became a witness and admitted his own guilt and testified that appellant assisted him in the commission of the crime.

Over appellant's objection, the court gave an instruction No. 2, which reads as follows:

"If you find, beyond a reasonable doubt, that Charles Shillings entered the depot and stole the property alleged in the indictment, and that the defendant was present, aiding and abetting or ready and willing to aid and abet, you will convict the defendant."

(2) The objection to this instruction is that it directs the jury to find appellant guilty under testimony which would only constitute him an accessory when he was indicted as a principal and when the testimony shows that, if guilty at all, he was a principal. But persons present aiding and abetting, or ready and willing to aid and abet, are in fact principals and are indictable as such. Kirby's Digest, § 1563; *Harris* v. *State, ante* p. 46.

(3) It is insisted that the jury was not fully and properly instructed as to the corroboration of an accomplice necessary to sustain a conviction. On that branch of the case, however, the court gave at appellant's request an instruction No. 5, which reads as follows:

"You are instructed that the accused could not be convicted on the uncorroborated testimony of an accomplice, and that the testimony must be corroborated by other evidence, direct or circumstantial, tending to connect the defendant with the commission of the offense charged, and unless the State does so prove you will acquit the defendant."

We think this instruction meets the requirement of the statute in regard to the corroboration of an accomplice.

(4) Error is assigned in the refusal of the court to give the following instruction:

"You are further instructed that unless you believe beyond a reasonable doubt that the defendant entered the depot of the Missouri Pacific Railroad Company in the night time, and at the time he entered the said depot it was with the felonious intent of committing a felony, then your verdict will be for the defendant."

It was not error to refuse this instruction because it directed a verdict for defendant unless it was shown that he entered the depot when in fact and in law he would have been guilty had he stayed outside the depot and watched while his accomplice entered the building and carried away the stolen goods.

(5) An instruction, No. 10, which is predicated upon the idea that the testimony in the case is of a circumstantial nature told the jury that before they could convict they must believe beyond a reasonable doubt and to the exclusion of every other hypothesis that appellant committed the offense as charged in the indictment. But this instruction was properly refused because the testimony was not wholly nor chiefly of a circumstantial character. Nor would it have been proper had this been the case. A similar instruction was condemned by us in the recent case of *Bost* v. *State, ante* p. 254, where we said that the law did not require that the guilt of the accused be established to the exclusion of every other hypothesis than that of guilt.

Objection is made to the admission of the testimony of the officers who made the arrests and who detailed what the Shillings boy said at the time. This could not have been prejudicial, as the Shillings boy substantially repeated that testimony at the trial.

Other errors are assigned, but we think it unnecessary to discuss them.

No error appearing, the judgment is affirmed.

HORSTMANN v. LAFARGUE.

Opinion delivered November 17, 1919.

1. PLEADING AND PRACTICE—ALLEGATION OF INSOLVENCY—FAILURE TO DENY.—Where a complaint alleged that the defendant was insolvent, and the answer did not deny the allegation, it is unnecessary to prove it.
2. FRAUD—MORTGAGE TO DEFRAUD CREDITORS.—The evidence *held* to show that the mortgagor of certain property, had mortgaged it for the purpose of defrauding creditors.
3. FRAUDULENT CONVEYANCES—RIGHT OF CREDITOR—EQUITY JURISDICTION.—The benefits of Kirby's Digest, section 6297, are conferred upon any one who, before the statute, would have had the right, after his cause of action had been reduced to judgment, to sue to set aside the fraudulent conveyance. (The statute provides that in suits to set aside fraudulent conveyances and to obtain equitable garnishments, it is not necessary for the plaintiff to

obtain judgment at law in order to prove insolvency. Only one suit is necessary.)

4. FRAUDULENT CONVEYANCES—INSOLVENCY—EQUITY JURISDICTION—ONE SUIT.—In an action to set aside a fraudulent conveyance, it is necessary to show that the remedy at law is inadequate, by showing that the debtor has no other sufficient means from which the claim of the creditor may be satisfied, or showing other facts sufficient to call for the interference of a court of equity.

5. EQUITY JURISDICTION—FOR ALL PURPOSES.—When equity has acquired jurisdiction of a matter in suit for one purpose, all matters in issue will be adjudged and complete relief afforded.

6. FRAUDULENT CONVEYANCES—COMPLETE RELIEF.—In order that complete relief be granted under Kirby's Digest, section 6297, it is necessary that the chancery court have jurisdiction of the subject-matter before granting the relief provided by the statute.

7. EQUITY JURISDICTION — FRAUDULENT CONVEYANCES — CLAIMANTS FOR DAMAGES FROM TORTS.—Claimants for damages arising from torts are within the protection of statutes against fraudulent conveyances, and are regarded as creditors within the meaning of such statutes.

8. SAME—SAME—SAME.—One holding a claim against another for a tort is a creditor, and has a right to sue to set aside a fraudulent conveyance, and as an incident to that right, under Kirby's Digest, section 6297, equity has jurisdiction to adjudicate his claim and to reduce it to judgment.

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

Geo. W. Hays and *W. F. Terral,* for appellants.

1. There was no evidence to justify the finding that the mortgages were given or kept on record to cheat or defraud plaintiff or any one else. In order to set aside a conveyance for being fraudulent as to future creditors, it must be shown that the debtor reasonably had in mind or contemplation the contracting of future debts at the time the conveyance is made. Plaintiff failed to show that defendant did not have enough property left to pay all his debts after the mortgages had been executed, hence no evidence of his insolvency. It is shown that defendants retained enough property to pay all existing creditors at the time the conveyances were made. 96 Ark. 538; 8 *Id.* 470; 23 *Id.* 494; 29 *Id.* 407; 56 *Id.* 73, 253. Before

a voluntary conveyance can be set aside at the instance of subsequent creditors, the evidence must show that such conveyance was made to defraud such creditors. 38 Ark. 427; 50 *Id.* 42. Insolvency must be shown. 56 Ark. 256; 63 *Id.* 416.

2. Under the act of March 31, 1887, it is not a prerequisite to a suit in equity by a creditor to annul a fraudulent conveyance that the creditor should reduce his claim to judgment at law and have execution issue with a return of *nulla bona.* It is still necessary to prove insolvency of the debtor. 66 Ark. 486; 63 *Id.* 412. A voluntary conveyance by an insolvent debtor is fraudulent as to subsequent as well as existing creditors if the debtor reasonably had in contemplation the contracting of such future debts at the time the conveyance was made. 56 Ark. 69; 118 *Id.* 232.

3. The chancery court did not have jurisdiction to hear and determine the personal injury case involved. The allegations were not sufficient to give the court jurisdiction to determine the question of damages for personal injuries. 37 Ark. 292-3; 1 *Id.* 42; Pom. Eq. (4 Ed.), par. 237, p. 374; 140 U. S. 111; Pom. Eq. (4 Ed.), p. 373; 619 par. 327; *Ib.,* p. 156, and p. 222, par. 175; *Ib.,* p. 630, 372; 185 N. Y. 408; 78 N. E. 272; 28 R. I. 496; 14 L. R. A. (N. S.) 900; 68 Atl. 421; 45 N. Y. Supp. 982, 19 App. Div. 201; 140 U. S. 111; 92 Fed. 709-10; art. 7, sec. 5, Const. 1874; Kirby's Digest, § 1285. Consent of parties, express or implied, can not give a court jurisdiction. 33 Ark. 31. See also 88 Ark. 6; 203 Ill. 98; 124 Ill. 517. Jurisdiction can not be waived by consent. 100 Ark 373; 118 *Id.* 310; 79 *Id.* 293; 120 *Id.* 530.

John W. Moncrief, for appellee.

1. Insolvency is alleged and is not denied, therefore insolvency is established and can not now be questioned. Defendants admitted the amount of damages. 66 Ark. 419.

2. All parties agreed that the case be tried in the chancery court, and no jury was asked for, and there can

be no question of the right of the chancery court having the right to assess unliquidated damages by the agreement of parties. 114 Ark. 425-6; 79 *Id.* 499; 74 *Id.* 104; 57 *Id.* 589; 1 *Id.* 235; 106 *Id.* 123, 125; 105 *Id.* 669-671; 102 *Id.* 326; 111 Ark. 329; 112 *Id.* 572-581; 75 *Id.* 400; 98 *Id.* 329. The amount of damages was admitted; defendants only deny that they caused or contributed to the damages, a question of fact which a chancery court is competent to pass on. The damages were also proved by the evidence and the fraud was also amply proved. 32 Ark. 337-346. The trial in equity was agreed to and there was no question of unliquidated damages, but if so the court had jurisdiction to assess them as damages *in tort.* Kirby's Digest, § § 3658, 7801, 3313. The statute is remedial and can be liberally construed. 56 Ark. 476; *Ib.* 451-456. The injured party in tort is a creditor. 811 Am. St. 62-67-8. The mortgage was void as to subsequent creditors. 64 Ark. 415; 14 A. & E. Enc. L. (2 Ed.) 268. It was a "continuing fraud" upon creditors, both prior and subsequent. 59 Ark. 614; 63 Ark. 244.

3. Having assumed jurisdiction for one purpose, courts of equity will retain it for all and grant all the relief legal and equitable to which the parties are entitled. 113 Ark. 100, 111. They certainly have jurisdiction of fraudulent transfers to defeat creditors. *Supra,* and 186 S. W. 302; 92 Ark. 15; 99 *Id.* 438-446. Having jurisdiction for one purpose, the court acquired it for all and should grant all necessary relief. 84 Ark. 140; 26 Am. St. 523. The provision of our Constitution as to jury trial relates to trials in civil or common cases at law and not to trial issues in equity. 26 Am. St. 523; 63 Vt. 221; 36 N. J. Eq. 118. Having obtained jurisdiction, courts of equity should grant all the relief the parties show themselves entitled to. 26 N. J. Eq. 118; 39 S. E. 225; 6 Am. St. 169-170-1; 7 Cranch. 69; 27 Am. St. 724; 33 N. E. 700. See also 50 N. E. 692; 27 S. E. 288, 291-2. Our statute of 1887 eliminates the necessity of first suing at law and chancery had jurisdiction to prevent multi-

plicity of suits. 16 Ann. Cases 690; 45 So. Rep. 861; 22 Ann. Cases 801; 119 N. E. Rep. 376. Courts of chancery have jurisdiction to assess damages in connection with other relief asked. 13 Am. Rep. 366; 87 N. E. 613; 94 *Id.* 933; 95 *Id.* 345; 65 *Id.* 1081; 30 L. R. A. (N. S.) 176-179; 32 *Id.* 117-123; 136 Am. St. 651, 656; 32 Ind. App. 38; 99 Am. St. 427; 20 Cyc. 392-3; 63 Ark. 412; 118 *Id.* 229.

As to jurisdiction see also 6 Pom. Eq. Jur., § § 873-4; 108 N. E. 1082-3; 32 *Id.* 300-302; 25 Am. Rep. 276; 1 Gilm. 397.

As to equity jurisdiction to determine legal issues, see 143 U. S. 79; 119 *Id.* 322; 134 *Id.* 338; 96 *Id.* 193; 9 How. 390; 160 U. S. 1; 4 Wheat. 108; 172 U. S. 1; 130 *Id.* 505; 156 *Id.* 680; 138 *Id.* 49; 12 Peters 178; 63 Am. St. 382.

This court will not disturb the findings of a chancellor unless clearly against the preponderance of the evidence. Here it clearly sustains the decree. 101 Ark. 368-375; 91 *Id.* 69. The findings are not excessive and the court has done exact justice.

SMITH, J. This suit was filed by appellee, E. B. LaFargue, on March 12, 1917, in the Arkansas Chancery Court against Henry Horstmann, Sr., Henry Horstmann, Jr., and Annie Horstmann, the wife of Henry Horstmann, Jr., to recover damages for personal injuries and to uncover certain real estate alleged to have been mortgaged by Henry Horstmann, Jr., in fraud of his creditors. Horstmann, Sr., who lived with his son as a member of his family, died before the rendition of the final decree, but the cause was properly revived against his administrator and judgment was rendered against all the defendants for the amount sued for and the conveyances attacked by appellee were canceled as having been executed in fraud of creditors.

This appeal raises no question that the damages recovered were excessive or that the testimony did not support the finding of liability, but a reversal is asked upon two grounds, first, that the evidence is not sufficient to

sustain the finding that the mortgagor was insolvent at the time the mortgages were executed, and, second, that the chancery court did not have jurisdiction to hear and determine the personal injury case involved here.

(1) Upon the question of insolvency, it may be said that the answer contained no denial of that allegation, and it was therefore unnecessary to prove it. *Slayden-Kirksey Woolen Mills* v. *Anderson,* 66 Ark. 419. However, the chancellor found that allegation was supported by the testimony, and we can not say that the finding to that effect was clearly against the preponderance of the evidence.

The personal injury for which compensation was asked grew out of the shooting of appellee in May, 1916, by one Peters as the result of a conspiracy to which the Horstmanns were shown to have been parties. The Horstmann who was the mortgagor in the conveyances attacked had been cast in a suit in replevin for the costs of the suit and was much aggrieved at that judgment and announced his purpose never to pay these costs. Appellee was at the time the sheriff of the county, and after failing in his efforts to induce Horstmann to pay these costs, undertook to make a levy under a fee-bill on a horse belonging to Horstmann and was shot while attempting to do so.

The two mortgage conveyances here attacked were each dated December 28, 1914. One recited a consideration of $3,960 and the other $10,800. The mortgagee was Fritz Horstmann, a brother of the mortgagor and a nonresident of this State. The attorney appointed to represent the nonresident mortgagee applied to the mortgagor for the postoffice address of his brother and this information was refused, the statement being made at the time that counsel had been employed by the mortgagor to defend the suit.

It appears to be reasonably certain that there was no consideration for the execution of these mortgages, yet the consideration recited was much greater than the value of the land. Horstmann, the

mortgagor, encumbered his personal property with a chattel mortgage on September 28, 1914, and with a second chattel mortgage on the same property on January 1, 1915. A mortgage on a portion of the lands in question securing $1,200 was executed on June 14, 1912, to the New England Securities Company, and the validity of that mortgage was not questioned. The debt there secured was not paid, and there was a decree of foreclosure, and at the sale thereunder the lands sold for a sum in excess of the mortgage debt and that excess has been impounded by the decree here appealed from. Six days before these mortgages were executed a suit was brought against Horstmann by the Weber Implement Company for a debt of $1,600 due upon a sale of machinery, and a decree for that sum was finally rendered and the machinery ordered sold, and at its sale brought $625, which was credited on the decree of sale. The balance has not yet been collected. On November 17, 1914, C. W. Waters brought suit against Horstmann for a settlement of their partnership farming operations, and witnesses speak of other suits, the particulars of which are not given. Horstmann admitted that he had no property out of which creditors could secure satisfaction except the lands conveyed by the mortgages.

(2) We think this testimony warranted the finding made by the court below that Horstmann was insolvent at the time of the execution of the mortgages and that they were executed for the purpose of defrauding his creditors.

We are thus brought to the decision of the question of the jurisdiction of the court to render a decree for damages. Authority for this suit is said to be found in section 6297 of Kirby's Digest, which reads as follows:

"Section 6297. In suits to set aside fraudulent conveyances and to obtain equitable garnishments, it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency, but in such cases insolvency may be proved by any competent testimony, so that

only one suit shall be necessary in order to obtain the proper relief."

(3) From what has been said it appears that this is a suit to set aside fraudulent conveyances and to obtain an equitable garnishment of the sum remaining in the hands of the commissioner upon a sale under the decree of foreclosure of the mortgage in favor of the New England Securities Company, and it will be noted that the statute says that in such suits "it shall not be necessary for *the plaintiff* to obtain judgment at law in order to prove insolvency, * * *" etc., thus indicating that the character of the suit in which the relief is asked is immateral, and the words, "the plaintiff," must be interpreted as if they read *any plaintiff*. The benefits of the statute are conferred upon any one who, before the statute, would have had the right, after his cause of action had been reduced to judgment, to sue to set aside the fraudulent conveyances.

In the case of *Davis* v. *Arkansas Fire Insurance Company,* 63 Ark. 412, Mr. Justice RIDDICK, in construing the statute, said:

"Formerly, the rule was that the creditor must first recover judgment at law, and have execution issued and returned *nulla bona,* before he could come into equity to ask that a transfer of property made by his debtor should be set aside as fraudulent. The courts of equity required the creditor to show in this way that the ordinary legal remedies were inadequate. The statute of 1887 dispenses with the necessity of obtaining a judgment before commencing a suit to set aside a fraudulent conveyance, and provides that in such cases 'insolvency may be proved by any other method.' Sections 3134 and 5919, Sandels & Hill's Digest. The former decisions requiring judgment, execution and return of execution unsatisfied were based on the rule that equity will not lend its aid when the remedy at law is full and adequate. It would therefore seem that, following the same reason, it is still necessary to show that the remedy at law was inadequate, by showing that the debtor has not other sufficient means

from which the claims of the creditor may be satisfied, or showing other facts sufficient to call for the interference of a court of equity."

Again interpreting this statute in the case of *Euclid Avenue National Bank* v. *Judkins,* 66 Ark. 486, the court said:

"The design of this act was, not to do away with the necessity of showing insolvency to entitle one to equitable relief, but only to broaden the methods of proving it. The statute makes unnecessary the expense and delay incident to obtaining judgment and the issuing and returning of process thereon when insolvency—the ultimate fact to be established—may be proved by other and more direct methods. *Riggin* v. *Hilliard,* 56 Ark. 481. The old and familiar rule that, before one can seek relief from a court of equity, he must show that he does not have a complete and adequate remedy at law, still prevails in this State."

This statute had previously been given effect and relief awarded under it in the cases of *Riggin* v. *Hilliard,* 56 Ark. 451, and *Rudy* v. *Austin,* 56 Ark. 69.

Later cases in which the plaintiff has been given complete relief in a single suit under this statute are *Fluke* v. *Sharum,* 118 Ark. 229, 237, and *Davis* v. *Beauchamp,* 99 Ark. 404.

The more recent case of *Martin* v. *Manning, Emerson & Morris,* 124 Ark. 74, was one in which the chancery court fixed an attorney's fee in a suit *quantum meruit* and in the same suit uncovered certain lands which had been fraudulently conveyed.

(4-5) As pointed out by Judge RIDDICK in the case of *Davis* v. *Arkansas Fire Ins. Co., supra,* it is still necessary to show that the remedy at law is inadequate, by showing that the debtor has no other sufficient means from which the claims of the creditor may be satisfied, or showing other facts sufficient to call for the interference of a court of equity. So that, in effect, the statute is a declaration of the doctrine that, when the chancery court has acquired jurisdiction of a matter in suit for one purpose, all matters in issue will be adjudged and complete relief

afforded. We have numerous cases in which chancery courts, when giving the equitable relief to which the parties have shown themselves entitled, have, at the same time, adjudged matters otherwise cognizable only in the courts of law but which were disposed of as incidents in the cases. For instance, in the case of *Nichol* v. *Stewart*, 36 Ark. 612, Mr. Justice EAKIN, speaking for the court, said:

"It is true that, in an equity case involving matters appropriate to chancery jurisdiction, damages from malfeasances, misfeasances or nonfeasances regarding the subject-matter, may be estimated incidentally, for the purpose of closing all litigation in one suit. They are not of themselves, however, proper subject of chancery jurisdiction when they constitute the whole, or principal ground, of the relief sought. They should in all cases be affirmatively shown with some tolerable degree of certainty, or they should not be taken into the adjustment of matters arising from contract, or affecting property. Jurisdiction to award compensation for damages has been assumed by courts of equity with great caution, and manifest reluctance."

Appellants state their position as follows: "The damage did not come out of, nor was it an incident of any matter which was alleged as an equitable claim."

The answer to that contention appears to be that the statute makes the amount due "an incident of a matter which is alleged as an equitable claim."

(6) Chancery courts have always had jurisdiction to set aside conveyances made in fraud of creditors and this statute was enacted, as was said in the cases set out above construing it, to prevent circuity of action by directing the court to ascertain the sum due upon the plaintiff's demand—whatever the nature of the demand may be—and to render judgment for that sum as an incident to the awarding of complete relief and closing out the litigation.

Of course it is essential, as said by Judge RIDDICK in the opinion quoted from above, that chancery courts

have jurisdiction of the subject-matter before granting this incidental relief, and that jurisdiction exists in the instant case only because it appears from the testimony that a fraudulent conveyance was made which in equity should be set aside.

The case of *Carpenter* v. *Osborne*, 7 N. E. 823 (a decision of the Court of Appeals of New York), was a suit to cancel fraudulent conveyances. Part of the demands in suit were liquidated and in judgment, while some of the demands had not been reduced to judgment. It does not appear that there existed in that State (New York) a statute like our section 6297 of Kirby's Digest set out above. The plaintiff there had recovered judgment in the court below for certain installments of income due her on articles of separation which were not in judgment when the action was commenced, as well as certain installments which had been reduced to judgment; but the court there said:

"We are, however, of the opinion that the court, having acquired jurisdiction to decree such conveyances fraudulent and void as to judgments previously recovered, was authorized to grant such further relief, within the scope and meaning of the issues made, as the parties might be equitably entitled to in connection with the transaction under investigation."

And, as its authority for that action, the court said:

"The rule relating to the subject is comprehensively stated by the author of the most recent work on Equity Jurisprudence, as follows:

" 'If the controversy contains any equitable features, or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights, and grant legal remedies, which would otherwise be beyond the scope of its authority.' Pomeroy, Eq. Jur., § 181; *Rathbone* v. *Warren*, 10 Johns. 596; *Hawley*

v. *Cramer,* 4 Cow. 717; *Crane* v. *Bunnell,* 10 Paige 333; *Bradley* v. *Bosley,* 1 Barb. Ch. 152.

"This principle has been applied in many cases in awarding judgment for pecuniary damages, even when the party had an adequate remedy at law, if the damages were connected with a transaction over which the courts had jurisdiction for any purpose, although for the purpose of collecting damages merely they would not have had jurisdiction. *Bradley* v. *Bosley, supra; Clarke* v. *White,* 12 Pet. 188; *Franklin Ins. Co.* v. *McCrea,* 4 Greene (Iowa), 229; *Brooks* v. *Stolley,* 3 McLean 523."

(7-8) It is not questioned by appellant that appellee became a creditor upon receiving his injury, and if such denial were made it is swept away by the decision of this court in the case of *Papan* v. *Mahay,* 106 Ark. 230, in which we held that claimants for damages arising from torts are within the protection of statutes against fraudulent conveyances and are regarded as creditors within the meaning of such statutes.

So we conclude that appellee was a creditor who had the right to sue to set aside the fraudulent conveyances, and, as an incident to this right, section 6297 of Kirby's Digest, quoted above, gave the court jurisdiction to adjudicate appellee's claim and to reduce it to judgment, and it follows, therefore, that the decree of the court below must be affirmed, and it is so ordered.

MACLAFFERTY *v.* PAYNE.

Opinion delivered November 17, 1919.

REAL ESTATE BROKERS—COMMISSION—RIGHT OF OWNER TO RAISE PRICE.—When the owner of property has listed the same for sale with a broker, he may raise the price demanded for the property at any time before the broker produces a purchaser, ready, willing and able to buy.

Appeal from Polk Circuit Court; *James S. Steel,* Judge; reversed.

Prickett & Pipkin, for appellant.

Upon the evidence defendant was entitled to a peremptory instruction to return a verdict for him. There is no evidence that appellee produced a purchaser, ready, willing and able to pay $3,500 cash. The court's instruction was error, and the verdict is contrary to the evidence, and the court should have directed a verdict for defendant.

Norwood & Alley, for appellee.

The agent did not find a purchaser, ready, able and willing to purchase on the terms offered, but only ready to buy with *bonds* instead of *cash.* 29 Cal. 393; 21 L. R. A. (N. S.) 329. Appellee was entitled to an instructed verdict under the evidence. The judgment is right.

HUMPHREYS, J. Appellee instituted suit against appellant before S. H. Smith, a justice of the peace in Center township, Polk County, Arkansas, to recover $175 as a commission for producing a purchaser for a business building in Mena, owned by appellant, which had been listed with him for sale at $3,500. The trial in the magistrate's court resulted in a judgment for appellee, from which an appeal was taken to the circuit court of said county. In the circuit court, the cause was submitted to a jury upon the evidence and instructions of the court, which resulted in a verdict and judgment for $175 in favor of appellee. From that judgment an appeal has been duly prosecuted to this court.

The evidence on behalf of appellee showed that appellant was the owner of a brick building in Mena, which he listed with appellee, a real estate agent, for sale at a net price of $3,500 in cash; that on the morning of October 2, 1918, appellee pointed out and priced the property at the listed price to a prospective purchaser by the name of Stevens; that Stevens showed an interest in the property and made an appointment to return in the afternoon; that at noon, as he went to dinner, appellee notified appellant that he had a prospective purchaser for the property at the listed price; that appellant raised the

price at that time to $4,000; that when the purchaser returned in the afternoon, he informed him that appellant had raised the price from thirty-five hundred to four thousand dollars; that appellee then introduced the prospective purchaser to appellant; that the purchaser offered appellant $3,500 in government bonds, which was refused, not because the offer was in bonds instead of cash, but because he had raised the price of the property from thirty-five hundred to four thousand dollars; that several counter-propositions passed between appellant and the purchaser, but the matter was postponed until a later date; that on the next day, in the presence of appellee, the purchaser offered to pay the commission and give appellant $3,500 in government bonds for the property, and that appellant accepted the offer; that appellee thereupon directed them to go to the bank and enter into a written agreement to that effect; that they went to the bank for that purpose, where they became involved in a dispute as to the terms of the deal and failed to consummate it.

Over the objection of appellant, the cause was sent to the jury upon the theory that appellant would be responsible for the commission if appellee produced a purchaser, ready and willing to pay appellant $3,500 net, in government bonds for said property, if appellant at the time expressed himself as being satisfied with bonds in lieu of cash. This was an erroneous theory upon which to submit the case, because appellant had a perfect right to raise the price at any time before appellee produced a purchaser ready and willing to take the property at the listed price. Appellee himself testified that, before any offer was made by the purchaser, appellant informed him that he had raised the price from thirty-five hundred to four thousand dollars. The only issue presented by the evidence for submission to the jury was whether or not the purchaser offered, and the appellant agreed, to accept $3,500, net, in government bonds for said property, after they were introduced to each other by appellee, and whether the deal failed through the fault of ap-

pellant. Appellee testified that appellant and the prospective purchaser entered into such an agreement in his presence, and that, through his advice, they went to the bank to have a written contract prepared to that effect. C. E. Nance, cashier of the Farmers & Merchants Bank, where the parties went to have the contract prepared, testified that the deal was not consummated on account of a dispute arising between the parties as to the price to be paid for the property. Appellant's responsibility for the commission would depend upon whether he or the purchaser was at fault in terminating the deal before consummation.

The cause was submitted to the jury upon a theory not warranted by the evidence, and, on account of the error indicated, the judgment is reversed and the cause remanded for a new trial.

Justice SMITH dissents.

Missouri Pacific Railroad Company v. Ault.

Opinion delivered November 17, 1919.

1. Master and servant — agreement as to work on Sunday — breach of employment.—A contract of employment between appellant and appellee required the latter to work on Sundays. *Held*, where the parties agreed that appellee might substitute another in his place on Sunday, appellant can not contend that appellee's failure to work in person on Sundays operated as a breach of the contract.
2. Master and servant—discharge of servant.—Appellee was employed by appellant, as freight trucker at twenty-five cents an hour. Appellant then refused to continue that employment and offered appellee work as porter or baggageman at a salary of $45 a month. *Held*, appellant's action was tantamount to a discharge from and a refusal to further employ appellee in his original position within section 1, act 210 of 1905.
3. Railroads—promise to pay discharged employee.—When the foreman of a discharged railway employee, told the latter that he would be paid his money at a certain place, where a regular agent was kept, it is equivalent to a request by the employee, to be paid at that place, and is sufficient to entitle him to recover the statutory penalty for failure to send the money.

4. RAILROADS—GOVERNMENT CONTROL—RIGHT TO SUE AND BE SUED.—The meaning of the act of Congress of March 21, 1918, authorizing the taking over of certain railroads by the Government, is that, so far as suing and being sued is concerned, railroads occupied the same status after being taken over by the Government as before.

5. SAME—SAME—DIRECTOR GENERAL.—The Director General of Railroads under Federal control was not in the position of a receiver of the said road. This attitude was that of an agent for the Government, taking over the railroads as a necessity of war, under congressional and presidential authority.

6. SAME — SAME — SAME — ENFORCEMENT OF JUDGMENT AGAINST THE PROPERTY OF THE RAILWAY COMPANY.—A judgment may be enforced against a railroad company, while in the hands of the Director General under Federal control.

7. SAME—SAME—SAME—SAME—CONSTITUTIONALITY OF FEDERAL ACT.—The act of Congress of March 21, 1918, taking over the railroads *held* constitutional.

Appeal from Hot Spring Circuit Court; *J. C. Ross,* Judge; affirmed.

E. B. Kinsworthy and *W. R. Donham,* for appellant.

1. Appellee was not discharged; he quit of his own accord. A reduction of wages under the proof was not a discharge. 208 S. W. 790.

2. Appellee made no demand as required by statute that his money or a valid check be sent to a station where a regular agent was kept and was not entitled to any penalty. 128 Ark. 312; 87 Ark. 132; 88 *Id.* 277.

The cause of action should have been dismissed as to the railroad company. 254 Fed. 880.

D. D. Glover and *Jabez M. Smith,* for appellee.

Appellee was discharged without cause and was entitled to his pay and the penalty awarded. 131 Ark. 379. The court correctly declared the law, and the evidence sustains the judgment, and the judgment should be affirmed for the wages and penalty, and there is no error.

HUMPHREYS, J. Appellee brought suit against the Missouri Pacific Railroad Company, before D. M.

Noble, a justice of the peace in Fenter township, Hot Spring County, Arkansas, to recover the sum of $50 as wages, and a penalty prescribed by Act 210 of the Acts of the Legislature of 1905, amending section 6649 of Kirby's Digest. The act, insofar as it relates to this case, is as follows: "Whenever any railroad company or corporation or any receiver operating any railroad engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge with or without cause or refuse to further employ any servant or employees thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ, any such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept, and if the money aforesaid, or a valid check therefor, does not reach such station within seven days from the date it is so requested, then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ at the same rate until paid."

Default judgment was rendered in favor of appellee in the magistrate's court for $50 and $2.50 per day as a penalty for nonpayment of the wages from July 9, 1918, until the payment of said sum. An appeal was taken from that judgment to the circuit court in said county, and, on the 20th day of January, 1919, the Missouri Pacific Railroad Company filed an answer, denying the indebtedness or liability for a penalty, the discharge or refusal to continue appellee in its employment, any request or demand by appellee on his foreman or time keeper to send the amount claimed to be due him as wages, or a valid check therefor within seven days to the agent at Malvern, or that appellee applied to said agent, after seven days, for his wages, or a valid check therefor.

On the 29th day of January following, appellee filed a motion to substitute in his place, as defendant, Walker D.

Hines, Director General of Railroads. Over the objection of appellant, the court refused to make the substitution, but made the Director General a party defendant. The cause then proceeded to trial and was submitted to a jury upon the pleadings, evidence and instructions of the court. The jury returned the following verdict: "We, the jury, find for the plaintiff in the sum of $50 as debt for labor; also $2.50 per day as penalty from the 28th day of July, 1918, until the present date. J. M. Caldwell, Foreman." Thereupon, a judgment was rendered against appellants for $50 debt, and $390 penalty. From that judgment an appeal has been duly prosecuted to this court.

(1) Appellants first insist that the undisputed evidence showed that appellee voluntarily quit the service of appellants and that it was error to render judgment against them for a statutory penalty on the theory of a discharge or refusal to further employ appellee. It is said that because the contract required appellee to work on Sunday, his failure to work in person on the Sabbath day amounted to a breach of his contract. The evidence tended to show that appellee and his employer had agreed that he might substitute, at his own expense, some one else to work on the Sabbath day. Under such an arrangement, a failure to report in person and work on the Sabbath day would not constitute a voluntary cessation of appellee's duties under the contract. It was a question for the jury to say whether or not such an arrangement was made under the contract of employment.

(2) Again, it is said that, because appellee refused to accept employment as a porter or baggage man at $45 per month, therefore he voluntarily quit the service of said railroad company. The evidence disclosed that in the month of July, 1918, appellee was employed by W. W. Jones, station agent at Malvern as a freight trucker at the rate of twenty-five cents an hour, or $2.50 a day for a ten-hour day; that after about ten days, W. W. Jones entered the army and was succeeded by E. B, Williams; that, on or about the 27th day of July, appellee received

information that Williams had placed him on the roll as porter, or baggageman, at a salary of $45 a month, and intended to pay him only $1.50 per day for the entire time he had worked; that he went to see Williams, who turned to the record, under the heading "porter," and told appellee he could not allow him more than $45 a month, and that it was up to him to accept or refuse that money; that appellee contended he had not been working as porter and could not support his family on that amount; that Williams responded he could not allow more, whereupon appellee informed him that he might have the job as soon as he paid him off; that the agent sent a man to take his place, but appellee refused to let the new man go to work until he received his pay.

The appellee then consulted an old employee, who advised him that he could not keep the new man from going to work; that on the next day, Sunday, his substitute was displaced by the new man. We think the refusal of appellants to allow appellee to work longer in the capacity of freight trucker, at 25 cents an hour, and their offer to retain him as porter or baggageman, at a salary of $45 per month, was tantamount to a discharge from and a refusal to further employ appellee in his original position, within the meaning of section 1, act 210, of the Acts of the Legislature of 1905. Under this construction of said act, as applied to the facts in this case, it can not be said that appellee voluntarily quit the service of appellants.

(3) It is next insisted that appellee was not entitled to a penalty because the undisputed evidence showed that he did not bring himself within that provision of said act which required the employee, when discharged or when refused employment, to request his foreman or keeper of his time to send the money due him, or a valid check therefor, to a station agent, at a station where a regular agent is kept. Appellee testified that, after he made up his mind not to prevent the new man from taking his place, he demanded the wages due him from E. B. Williams, his immediate employer, and the man who kept

his time; that Williams responded that the money would be here in seven days. The undisputed evidence also showed that this conversation occurred in the Malvern depot, where appellee had been working and where E. B. Williams was employed as the regular station agent. This court held, in the case of *Biggs* v. *St. Louis, I. M. & S. R. Co.*, 91 Ark. 122 (quoting the sixth syllabus) that:

"Where, at the time a servant was discharged by a railroad company, his foreman notified him that his money would be sent to a station named where a regular agent was kept, to which the servant acquiesced, this was equivalent to a request by the servant to have the money due him sent to the station, and sufficient to entitle him to recover the statutory penalty for failure to send the money."

We think the evidence in this case brings it clearly within the rule laid down in *Biggs* v. *St. Louis, I. M. & S. R. Co., supra.*

Lastly, appellant insists that it was erroneous to render any judgment against the Missouri Pacific Railroad Company, for the reason that the undisputed evidence showed that at the time of the employment and discharge of appellee the railroad was being operated by Walker D. Hines, Director General of Railroads in the United States of America, and not by said railroad company. Under authority granted by Congress on August 29, 1916, the President issued a proclamation on December 26, 1917, for the Director General to take possession of certain railroads in the United States, including the Missouri Pacific Railroad Company. On March 21, 1918, thereafter, Congress passed a statute to the effect that, "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except insofar as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by

law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

(4-5) If the word "carriers" used in this act had reference to the Director General, who was operating said railroad, then it was improper to render a judgment against the Missouri Pacific Railroad Company. We are unable to find anything in the language or context used that indicates that the word "carriers" refers to the Director General. On the contrary, the plain meaning is that, so far as suing and being sued is concerned, the railroad occupied exactly the same status after being taken over by the Government as before. The case of *Rutherford* v. *Union Pacific Rd. Co.*, 254 Fed. 880, cited by appellant in support of its position that the statute in question had reference to the Director General, and not to the original corporation, argued that the Director General occupied the same position with reference to the railroad as receivers do. We do not think the position occupied by the Director General is analogous to that of a receiver. The attitude of a receiver is that of a trustee for the benefit of creditors. The attitude of the Director General is that of an agent of the Government taking over the railroads as a necessity of war, under congressional and presidential authority. A receivership implies insolvency; the operation of the railroad under a director general does not carry such an implication. We think the later case of *Jensen* v. *Lehigh Valley Rd.*, 255 Fed. 795, is the better reasoned case. It was said by Judge Hand in the latter case: "It appears to me that Congress pretty clearly meant, by the term 'carriers,' the corporations themselves, and that the right to sue them must remain certainly till it is changed by some valid provision."

(6-7) It may be contended that the statute in question is unconstitutional, because, if the claim is reduced to a judgment and enforced against the property of the corporation, it would amount to a taking of private property

without due process of law from the corporation to pay a liability incurred by the act of the Federal authorities operating the road. We do not understand that such would be the effect of the act. Immunity from loss, as well as assurance of a reasonable return upon the investment, was guaranteed the railroad corporations by the government. Act March 21, 1918, c. 25, 40 Stat. 451. Under such a guarantee the enforcement of judgments against the property of the railroad corporations during the control by Federal authorities could not have the effect of confiscating their property. Immunity from loss and assurance of gain are a complete answer to any contention that the enforcement of such judgments would be the taking of private property without the process of law, or the taking of private property for public purposes without just compensation. We think the act constitutional.

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

McBROOM v. McBROOM.

Opinion delivered November 17, 1919.

LOST INSTRUMENTS—RESTORATION—EXCHANGE OF DEEDS.—Appellee was sued for breach of promise, and in order to protect his property executed a warranty deed thereto to appellants; appellants to give a quitclaim deed back. *Held,* under the evidence appellee delivered the warranty deed to appellants, and subsequently appellants executed a quitclaim deed to appellee. The latter was lost or destroyed. *Held,* appellee was entitled to have his title in the lands quieted, as against the appellants.

Appeal from Benton Chancery Court; *Ben F. McMahan,* Chancellor; affirmed.

Walker & Walker, for appellants.

A parent may deed his land to his son in consideration of support and maintenance during his life, strengthened by the fact that the father was to receive a certain sum of money and one-third of the proceeds of the farm. 67 Ark. 526; 86 *Id.* 169; 97 *Id.* 13; 96 *Id.* 589.

The evidence is conclusive that appellee, old and afflicted as he was, selected appellant and his wife as the ones to care for him and made disposition of the property to compensate them for the care and maintenance. The court erred in its decree, and it should be reversed on trial *de novo* and the cross-bill of appellant sustained and the mortgage of Williams canceled and the bill dismissed.

Tom Williams and *A. L. Smith,* for appellees.

Delivery of the deed was necessary, and due delivery was proved in this case. 13 Cyc. 561. Recording the deed was not sufficient delivery and did not vest title where the deed is retained by the grantor. 8 R. C. L. 1007, 978. The evidence does not show that Thos. McBroom owed Edna Ridgway anything but shows he did not and there never was an actual conveyance except for a moment, and, if fraudulent as to creditors, it could not be taken advantage of by appellants unless that fact was set up in their answer, and it was not. 71 Ark. 302; 32 *Id.* 97; 96 *Id.* 184; 139 N. Y. 389; 90 Mo. 343; 9 Enc. Pl. & Pr.

There was no delivery of the deed; having been once delivered at the time it was made, there could be no second delivery, as there was no intention of passing title nor was the use of the paper requested for that purpose. T. J. McBroom took possession of the deed again and E. R. McBroom made no attempt to keep it. The decision of the chancellor is good on either of two grounds, viz., that the deed from T. R. to E. R. McBroom and the deed of E. R. to Thos. J. McBroom operated at the same time, so there was instantaneous passage of title back to Thos. R. McBroom as soon as he had deeded it away, and in legal effect that the title had never been out of him; or that if for any reason the quitclaim deed of E. R. McBroom failed to operate as a reconveyance at the time, the circumstances were such that a resulting trust arose, or even a trust *ex maleficio.* 73 Ark. 310; 84 *Id.* 189; 92 *Id.* 55. The decree of the chancellor is supported by

a great preponderance of the evidence and should be affirmed.

HUMPHREYS, J. Appellee, Thomas J. McBroom, instituted suit against appellants in the Benton Chancery Court to restore a quitclaim deed from appellants to him, conveying 340 acres of land in said county, particularly described in the complaint. The bill alleged, in substance, that appellee owned said lands; that, on account of said appellee's reputed wealth, Edna Ridgway, a resident of Kansas City, Missouri, for mercenary purposes only, had entangled him in a contract of marriage; that appellee, after consultation with appellants, his son and daughter-in-law, entered into an arrangement with them whereby he would convey the lands in controversy to them and they, in turn, reconvey them to him, so that the first deed might be placed of record when advisable in order to prevent Edna Ridgway from annoying and harassing him; that, pursuant to such an agreement between appellee and appellants, appellee executed and delivered a warranty deed, describing said real estate, to appellants on the 11th day of June, 1915, and, on the next day, appellants executed and delivered a deed, describing said real estate to appellees; that, due to an investigation of appellee's financial affairs by Edna Ridgway, at a later date, the first deed was recorded on April 24, 1917; that the deed from appellants to appellee was lost after the first deed was recorded, and was never placed of record; that appellees refuse to execute another conveyance of said real estate to appellee; that appellee has been in the continuous possession of and enjoyed the rents and profits from said lands; that appellants are asserting ownership under deed of date June 11, 1915.

Appellants answered, admitting that they executed a quitclaim deed to appellee for said lands on the 12th day of June, 1917, but asserting that at the time they had no title thereto for the reason that the warranty deed from appellee to them had not at the time been delivered; that they acquired title to said lands on the 24th day of

April, 1917, at which time appellee placed the warranty deed, executed by him to them of date June 11, 1915, on record, thereby intending to deliver said deed to them.

Appellants also filed a cross-bill, setting up that, after the delivery of said warranty deed by the act of recording same, appellee executed a mortgage on the land in controversy to Tom Williams, for $500, without right or authority, thereby casting a cloud upon their title.

Appellants prayed for a dismissal of the original bill and a cancellation of the mortgage. Tom Williams entered his appearance to the cross-bill, and the cause proceeded to trial upon the pleadings, depositions and exhibits thereto, which resulted in a decree, establishing and quieting the title to said real estate in appellee, and sustaining the mortgage of Tom Williams as a valid and subsisting lien thereon. From that judgment, an appeal has been prosecuted to this court, and the cause is before us for trial *de novo*.

The incidents leading up to the execution of the deeds in question are as follows: Appellee, a widower seventy years of age, obtained information that Edna Ridgway, a woman of forty years of age, residing in Kansas City, was matrimonially inclined. A courtship by correspondence ensued, which resulted in an engagement to marry, and a marriage contract binding appellee to pay Edna Ridgway one thousand dollars and deed her forty acres of land in Boone County, Arkansas. During the period of courtship lasting from May until October in the year 1914, the money was advanced in installments. According to arrangements by correspondence, appellee met Edna Ridgway at a Kansas City depot and accepted an invitation to her home. He remained in Kansas City quite a while, and boarded for some days in Edna Ridgway's home, during which time he provided edibles for the table. Before the visit was concluded, appellee discovered that his fiancee was not to his liking and refused to marry her. Thereupon, she instituted a suit for $30,000 against him in the circuit court in Kansas City, for

trifling with her affections. After this sudden termination of the short courtship, he returned home and employed attorneys to defend the breach-of-promise suit. Later, he sought advice from Squire Hays. The squire advised him to convey the valuable farm in question to his son, E. R. McBroom, and record the deed, and, in self-protection, to take a conveyance back from his son and wife. Such an agreement was entered into by said appellee and appellants. On June 12, 1915, appellee, Thomas J. McBroom, and the appellants met in the office of Squire Hays at Siloam Springs, Arkansas, for the purpose of passing the title to said real estate by deed from Thomas J. McBroom to E. R. McBroom, so that it might be recorded when necessary to prevent annoyance or the further prosecution of the breach-of-promise suit by Edna Ridgway; and for the further purpose of taking a quitclaim deed from appellants to appellee, Thomas J. McBroom, so that he might have it recorded after the storm had passed.

The incidents thus related are gleaned from the undisputed evidence in the case. It is also undisputed that the warranty deed was prepared and retained by Squire Hays on the day before the meeting, and that the quitclaim deed, executed by appellants to said appellee, was signed, acknowledged and delivered to appellee on the day of the meeting, after Squire Hays parted with the custody or possession of the warranty deed.

Thomas J. McBroom testified, with reference to the disposition of the deeds, as follows:

"Q. What was done with that deed (referring to the warranty deed executed by him to E. R. McBroom) on that day?

"A. Squire Hays give the deed to E. R. McBroom.

"Q. You say that this deed was delivered by Squire Hays to E. R. McBroom in Squire Hays' office?

"A. Yes, sir.

"Q. How was it delivered to him?

"A. He passed it over to him.

"Q. That is, Squire Hays passed it over to him?

"A. He throwed it over on the table and said, 'Here's your deed, Ray.'

"Q. What did Ray do with it?

"A. He didn't do anything.

"Q. What became of it?

"A. After he had left the room, I picked the deed up after he had taken their acknowledgments of the other deed.

"Q. You say Squire Hays gave you the deed they had made to you?

"A. Yes, sir. He filled it out after they had left the room.

"Q. When you left there, you took both deeds with you?

"A. Yes, sir. He was some few minutes taking the acknowledgments and filling it out as a notary would, and they left while he was doing that."

G. C. Hays, the justice of the peace who prepared the deeds, testified as follows:

"Q. I now present to you an instrument in writing marked Exhibit 'D' to the deposition of Thomas J. McBroom, and I will ask you what it is.

"A. This is the deed I made out to Ray.

"Q. You said that you made another deed conveying the same land from E. R. McBroom and his wife back to T. J. McBroom, did you?

"A. Yes, sir.

"Q. What was done with the two deeds when they were completed?

"A. I gave E. R. McBroom his deed and T. J. McBroom his deed, and it occurs to me that when they got through with them, Mr. T. J. McBroom took both of them.

"Q. You say you gave Ray's deed to him—you mean you gave this deed to Ray—the one that conveys the land to him?

"A. Yes, sir."

E. R. McBroom testified that his father told him that he had executed a deed to him for the land in ques-

tion, but that he never saw or had possession of the deed in Squire Hays' office before he and his wife executed the quitclaim deed to his father.

Lena McBroom testified that she joined her husband on or before the 11th day of June, 1915, in the execution of a quitclaim deed to the lands in question, after her father-in-law, Thomas J. McBroom, stated that he had made a deed for the same lands to her husband; that she never saw the deed made by him to her husband at that time, and that no deed was delivered to them at Squire Hays' office.

Appellants insist that there was no delivery of the warranty deed in Squire Hays' office, and that for this reason the title to said lands did not pass to appellants under it until long after the execution and delivery of the quitclaim deed from appellants to said appellee. It is true that there is a conflict in the evidence as to whether there was a manual delivery of the warranty deed on that occasion, but delivery of a deed is largely one of intention on the part of the grantor. In the case of *Russell* v. *May,* 77 Ark. 89, this court said: "A delivery of a deed is essential to its validity. It cannot take effect without delivery, and what is a delivery depends upon the intention of the grantor. Any disposal of a deed, accompanied by acts, words, or circumstances which clearly indicate that the grantor intends that it shall take effect as a conveyance, is a sufficient delivery."

Again, it is said in the case of *Graham* v. *Suddeth,* 97 Ark. 283, that: "In order to constitute a sufficient delivery thereof (referring to a deed) it is not necessary that there should be an actual manual transfer thereof to the grantee or a formal acceptance thereof by him. The question of a delivery of a deed is largely one of intent; and if it clearly appears from the words or acts of the grantor that it was his intention to treat the instrument as his deed and to make a disposal thereof, indicating that it should be effective, then the delivery is sufficient."

The rule thus announced was also approved in the subsequent case of *Maxwell* v. *Maxwell,* 98 Ark. 466.

In the instant case, both the grantor and grantee went to Squire Hays' office with the avowed intention of effecting a transfer of title to said real estate from appellee, Thomas J. McBroom, to his son, for the specific purposes of protecting said lands from possible seizure, growing out of the breach-of-promise suit pending in the Missouri court, and a reconveyance thereof for appellee's protection. These purposes could not have been accomplished without a delivery of both deeds. It is evident that the parties left the office believing both purposes had been effected. This belief that the purposes had been accomplished reflects that Thomas J. McBroom, the grantor in the warranty deed, intended that it should be operative from the date of its execution. This manifest intention is supported by the evidence of the grantor and G. C. Hays to the effect that there was a manual delivery of the warranty deed before the quitclaim deed was delivered. If the finding of the chancellor were sustained only by the evidence tending to show manual delivery of the deed, we could not say such finding was against the clear preponderance of the evidence. The finding, however, is not only supported by this character of evidence, but also by the avowed purpose of the parties and the inherent probabilities of the case.

The finding that the warranty deed was delivered before the quitclaim deed renders it unnecessary to discuss the second issue raised by the answer to the effect that the deed was delivered and became operative on the 24th day of April, 1917. For that reason, we have refrained from setting out the substance of the evidence responsive to such issue.

It will be observed that it was not necessary for appellee to allege and prove his own fraud in order to recover. The gist of his complaint was to restore the lost deed which the undisputed evidence shows was lost or destroyed; and was not for the purpose of canceling his own fraudulent conveyance.

The appellants having acquired title to said real estate under the warranty deed of date June 11, 1915, by

delivery thereof to them the following day, the quitclaim deed subsequently executed by them had the effect of reconveying the entire title to said real estate in appellee, Thomas J. McBroom.

It follows that the mortgage executed by appellee, Thomas J. McBroom, to Tom Williams, to secure an indebtedness of $500 is a valid and subsisting lien on said real estate.

The decree of the chancellor quieting the title to said real estate in appellee, Thomas J. McBroom, and declaring the mortgage a valid and subsisting lien thereon, is therefore affirmed.

JOHNSON v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered November 24, 1919.

1. ATTORNEY'S FEES—LIEN—WHEN ENFORCEABLE.—Act 293, page 892, of 1909, providing for a lien for attorney's fees upon his client's cause of action, contemplates that the fee shall be determined, and lien therefor enforced, in the court in which the original action was disposed of by settlement, compromise and verdict. The court in which said action may be pending at the time of settlement, compromise or verdict, has the jurisdiction to determine and enforce the lien.
2. SAME—SAME—SAME.—Under act 293 of 1909, an attorney who has a lien upon his client's cause of action, must follow any settlement, compromise or verdict in the court where the result of such settlement, compromise or verdict, is recorded, and the case finally disposed of, and have his claim for a lien there determined and enforced.

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

Allyn Smith and *Jo Johnson,* for appellant.

The Independence Circuit Court had jurisdiction to hear intervener's petition. The order of the Director General was void under the act of Congress. 174 N. Y. Supp. 60; 210 S. W. 283; Kirby's Digest, § 463. See also 5 Ark. 429; 27 *Id.* 315; 55 Kan. 331; 49 Ga 375; 77 Ark. 148; 91 S. W. 8; Kirby & Castle's Digest, § 7538; 8 Conn.

71; 29 *Id.* 515; 15 N. Y. St. Rep. 598; 65 N. C. 478; 69 *Id.* 189; 12 Ark. 369; 41 Kan. 152; 2 Tenn. Ch. 141; 27 Ark. 315; 5 *Id.* 427; 42 Ind. 395; 17 *Id.* 354; 49 Iowa 183; 14 Cal. 139. When appellant commenced the action in the Independence court his lien attached, and it was beyond the power of plaintiff to dismiss her suit so as to prevent her attorney from enforcing his contract for a fee.

Troy Pace, for appellee.

The Independence Court did not exceed its judicial discretion in denying appellant's motion to reinstate the causes formerly dismissed. The exhibits to the motion can not be considered, as they are not preserved in the bill of exceptions. 53 Ark. 479; 37 *Id.* 543; 34 *Id.* 554. There is absolutely no showing that the court abused its discretion in denying the motion. 117 Ark. 514.

Act 293, Acts 1909, page 892, provides that the enforcement of a lien by an attorney can be had and enforced only in the court where the action was pending that was settled. If in any other forum, it must be by independent suit. Sec. 2, Acts 1909, p. 892. After appellant was discharged as attorney, he had no right to continue the suit, and the judgment below is right. 117 Ark. 514; 128 *Id.* 471. The judgment in the Baxter Circuit Court is *res judicata.* 29 Ark. 80; 84 *Id.* 203. See also 1 R. C. L., sec. 24; 1 Cyc., § 275.

McCULLOCH, C. J. Mrs. Katherine King, as administratrix of the estate of her deceased husband through her attorney, Jo Johnson, instituted an action in the Independence Circuit Court against the Missouri Pacific Railroad Company to recover damages alleged to have accrued to the estate and next of kin by reason of the negligence of the railroad in the killing of James E. King.

After the filing of the complaint the Director General of Railroads required that suits be commenced in the county where the person injured by the railroad company resided or in the county where the accident occurred,

After this rule was adopted, the administratrix, through her attorney, Jo Johnson, instituted suit against the Missouri Pacific Railroad Company on the same cause of action in Baxter County, but the suit first instituted in Independence County was not dismissed upon the bringing of the second suit.

Afterwards the plaintiff, Mrs. King, compromised and settled the case with the railroad company and dismissed the suit pending in the circuit court of Baxter County against the railroad company.

Following the order dismissing the cause in the Baxter Circuit Court, the plaintiff also dismissed the case, involving the same cause of action, that was pending in the Independence Circuit Court at a special term of that court, November 25, 1918. At the December term of the Independence Circuit Court, Jo Johnson filed a motion to set aside the order of dismissal and asking that the cause be redocketed and also filed his petition asking that he be allowed to intervene, setting up in substance that he had a contract with the plaintiff for a fee, as her attorney, in the sum of $3,976.50, and that under his contract he was entitled to a judgment against the railroad company for the sum of $3,976.50, for which he prayed.

As grounds for his motion to reinstate the cause in the Independence Circuit Court, Jo Johnson, among other things, alleged that, after the dismissal of the case that was pending in the Baxter Circuit Court, he made inquiry of the clerk of the Independence Circuit Court as to the time the court would convene, and the clerk replied by letter: "There won't be any court before the term beginning the 30th day of December and these cases will be set for trial on Wednesday of the first week." That after receiving this information he (Johnson) relied upon the same and was misled thereby and without any fault on his part was thus prevented from appearing in the Independence Circuit Court on the day the cause was dismissed.

The petition of the intervener, Jo Johnson, was resisted by the appellee, and the court entered the following judgment:

"On this January 1, 1919, comes the intervener in person and the defendant by its attorney, Troy Pace, and intervener's motion to set aside dismissal and reinstate case and hear intervener's petition for fee comes on to be heard.

"It is agreed by counsel that during the pendency of this cause here this same plaintiff by her same attorney commenced her suit in the Baxter Circuit Court on her same cause of action, as here, and thereafter the plaintiff dismissed that said suit without the approval of her said attorney, said intervener here, and still later this same plaintiff in the same Baxter Circuit Court again filed her same suit against this defendant and settled same with defendant through other attorneys.

"Therefore, this court is of the opinion that no jurisdiction remains or could remain here to consider intervener's petition for fee as against defendant, and this court passes on no other question raised in intervener's said motion to set aside dismissal and reinstate case."

The court was correct in holding that the Independence Circuit Court had no jurisdiction to reinstate the cause for the purpose of adjudicating appellant's claim for a fee and enforcing judgment for the same.

(1) Act 293 of the Acts of 1909, page 892, providing a lien for attorney's fees upon his client's cause of action, contemplates that the fee shall be determined and the lien therefor enforced in the court in which the original action was disposed of by settlement, compromise or verdict. Section 2 of that act gives the court "in which said action may be pending at the time of settlement, compromise, or verdict," the jurisdiction to determine and enforce the lien.

In *St. Louis, I. M. & S. Ry. Co.* v. *Blaylock,* 117 Ark. 504-14, we said: "A client may dismiss his cause of action or may settle with the opposite party without consulting his attorney, but where there are any proceeds resulting from the litigation, either through settlement or compromise, or as the final result of the prosecution of the lawsuit to the end, the attorney has a lien on such

proceeds of which he can not be deprived by the parties to the lawsuit by any settlement they may make."

(2) Where an attorney seeks to have declared and enforce his lien for a fee in the same suit, which he instituted for his client and not in an independent action, it is the purpose of the statute to enable an attorney who has a lien upon his client's cause of action to follow any settlement, compromise or verdict in the court where the result of such settlement, compromise or verdict is recorded and the case finally disposed of and have his claim for a lien there determined and enforced.

It appears, under the facts recited in the judgment to which appellant agreed, that the cause of action upon which he claims a lien was finally settled on its merits in the Baxter Circuit Court. Appellant should have resorted to that court and no other and have his claim of lien adjudicated and enforced.

The judgment of the circuit court of Independence County overruling appellant's motion to redocket the cause of *Katherine King, Administrator,* v. *Missouri Pacific Ry. Co.* is correct.

Judgment affirmed.

JOHNSON *v.* WALLS.

Opinion delivered November 24, 1919.

ATTORNEY'S FEES—JUDGMENT—RES JUDICATA.—One J., as attorney, brought a personal injury action for an administrator in Independence County, and later, under order of the Director General of Railroads brought the same suit in Baxter County. The administrator thereafter dismissed J., settled the cause of action, and had both suits dismissed. J. then filed a petition for a fee in Baxter County, which was denied. *Held,* the judgment of the Baxter Circuit Court denying the petition was *res judicata* of the issue, and that J. could not have the cause redocketed in Independence County for the purpose of obtaining judgment for a fee there.

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

Jo Johnson, for appellant.

Makes the same points and cites the same authorities as in No. 2 *ante,* contending that the court erred in denying his petition to intervene and to reinstate the cause.

Troy Pace, for appellees.

The whole matter is *res judicata;* the judgment of the Baxter Circuit Court concludes the matter. 29 Ark. 80; 84 *Id.* 203. 1 R. C. L., sec. 24; 1 Cyc., sec. 275.

McCULLOCH, C. J. G. W. Walls, as administrator of the estate of J. W. Fulson, through his attorney, Jo Johnson, instituted this action against the Missouri Pacific Railroad Company in the Independence Circuit Court to recover damages for the death of Fulson, which the complaint alleged were caused through the negligence of the servants of the railroad company. After the complaint had been filed the Director General of Railroads ordered that suits against railroad companies should be commenced either in the county where the person injured by the railroad company resided at the time of his injury, or in the county where the accident occurred. After this rule was adopted, Walls, the administrator, through his attorney, Jo Johnson, instituted another suit against the Missouri Pacific on the same cause of action in the Baxter Circuit Court. But the suit in the Independence Circuit Court was not dismissed upon the institution of the second suit.

Afterwards the administrator of the estate of Fulson in succession to Walls compromised with the railroad company and settled for the sum of $10,000 and upon such settlement the administrator dismissed the cause pending in the Baxter Circuit Court. Following the order dismissing the cause in the Baxter Circuit Court the administrator, in succession, dismissed the case involving the same cause of action in the Independence Circuit Court at a special term of that court held on November 25, 1918.

At the December term of the Independence Circuit Court Jo Johnson filed a motion to set aside the order of dismissal and asking that the cause be redocketed and also filed his petition asking that he be allowed to intervene, setting up in substance that he had a contract with the administrator of the estate of Fulson and half expenses as plaintiff's attorney.

As grounds for his motion to reinstate the cause in the Independence Circuit Court, Jo Johnson, among other things, alleged that, after the dismissal of the case that was pending in the Baxter Circuit Court, he made inquiry of the clerk of the Independence Circuit Court as to the date the court would convene, and the clerk replied: "There won't be any court before the term beginning the 30th day of December, and these cases will be set for trial on Wednesday of the first week." That after receiving this information he (Johnson) relied upon the same and was misled thereby, and without any fault on his part was thus prevented from appearing in the Independence Circuit Court on the day the cause was dismissed. He also set up that he was misled by certain statements and correspondence made by the appellee's counsel and induced to believe that no action would be taken in the case of the administrator of the estate of Fulson against the Missouri Pacific and hence was not in attendance on the court at the time the case was dismissed.

The railroad company responded to the motion disclaiming and denying any responsibility for the act of the clerk and denying that any act upon its part or upon the part of its attorney or any other employee misled the petitioner and disclaiming responsibility for any act of the clerk in that particular.

The railroad company further alleged that the intervener, many months after the institution of this suit, without taking any further steps to prosecute the same, refiled the same complaint, setting up the same cause of action in the circuit court of Marion County, and therefore, in compliance with the order of the Director Gen-

eral of Railroads, filed copy of the same complaint setting up the same cause of action in the circuit court of Baxter County, the county where the accident occurred; that later the administration in succession, becoming dissatisfied with the services of Jo Johnson, the intervener, dismissed the cause of action and settled same with the appellee; that thereafter the intervener filed petition in his name and in the name of one F. B. Sizer, associate counsel, in the circuit court of Baxter County, for the allowance of attorney's fee on account of the prosecution of this same cause of action. This petition was heard upon the response of the appellee thereto, together with the evidence adduced and a judgment was rendered in the Baxter Circuit Court denying the right of Jo Johnson, the intervener, to claim or recover any fee and pleading such proceeding and judgment as *res judicata.*

The railroad company further alleged that all matters and things in connection with the original action and in connection with the intervention had been completely settled in the circuit court of Baxter County, and that, therefore, there was no reason for reinstating the case in the Independence Circuit Court. It further alleged that neither the plaintiff in the original action, nor the intervener, was a resident of Independence County, and that by virtue of the orders of the Director General of Railroads the circuit court of that county was without jurisdiction to hear or determine the cause, and that it would be useless, therefore, to redocket the case.

J. H. Fulson, administrator in succession, also filed a response in which he set up that immediately upon his appointment as administrator in succession he notified the attorney, Jo Johnson, by telegram and letter that his contract with Walls for attorney's fees would not be recognized and dismissed the cause of action and shortly thereafter made the settlement with the defendant railroad company for his father's death; that the intervener could not maintain his petition against the administrator in succession for the reason that G. W. Walls, the first administrator, had been removed, being a nonresident of

the State, and that a claim against an administrator could not be prosecuted outside of Baxter County, where the administration is pending. The respondent Fulson adopted the response of the railroad company, and further alleged that the intervener could not maintain an action against him even if no judgment were asked against the administrator in the petition for fee here and determination in the Baxter Circuit Court, for the reason that such proceeding would be a splitting of intervener's cause of action, which could not be legally done. The respondent further set up that, by the bringing of the suit in Baxter County, the cause was abated and by virtue of the attorney's lien statute no petition for fee could be heard except in the suit in the county where the suit was pending at the time of the alleged settlement. He further set up that no notice of the application to set aside the order of dismissal had been served upon him, and therefore the court could not rightfully entertain same.

The judgment overruling the appellant's petition for intervention and his motion to reinstate the cause contains the following recital: "It appearing that, while this cause was pending in this court, intervener, as attorney for plaintiff, commenced a suit of this same cause of action against defendant in the Baxter Circuit Court and thereafter that said Baxter Circuit Court suit was dismissed by plaintiff for the purpose of settling with defendant without the approval of plaintiff's attorney, the intervener here, and thereafter, towit, on September 11, 1918, intervener here filed his petition there for fee and charged and got that case redocketed and was there granted a hearing of said petition, all as to and against the defendant only and not as to or against the plaintiff. Said petition being there denied and the same being appealed to the Supreme Court and said petition there being for the same fee and charges as are now asked for by intervener in his petition here, the petition here being as against the plaintiff only and not against the defendant. Therefore, this court is of the opinion that no jurisdiction remains or could remain here to consider intervener's petition for fee as against plaintiff."

From the judgment dismissing intervener's petition and overruling his motion to reinstate is this appeal.

There is no bill of exceptions in this cause, and the above findings and recitals of fact made in the court's judgment must be held to be correct.

It appears from those findings that the appellant on September 11, 1918, filed his petition in the Baxter Circuit Court to have the cause of G. W. Walls, administrator of the estate of John H. Fulson, deceased, in which J. H. Fulson, administrator in succession, had been substituted as a party plaintiff and which had been dismissed for the purpose of settling the same with the railroad company to reinstate and redocket that case in order that he might have his claim for a fee adjudicated, and succeeded in having the cause redocketed and his petition heard as against the railroad company; that the petition for fee was denied and that the petitioner, Jo Johnson, appealed from the judgment denying his claim for a fee to the Supreme Court; that the petition heard in that cause was for the same fee and charges which the appellant is now seeking to have adjudicated by his petition against J. H. Fulson, administrator in succession, in this cause.

Such being the facts of the present case, the judgment in the Baxter Circuit Court denying the appellant the relief which he there sought is plainly *res judicata* of the issue raised by appellant in his petition to reinstate and redocket the cause in the Independence Circuit Court for the purpose of having his claim for a fee against the administrator in succession adjudicated.

The judgment of the Baxter Circuit Court was that of a court having jurisdiction of the subject-matter and of the parties, and it is final until set aside or reversed by the judgment of the Supreme Court. *Cloud, Admr.*, v. *Wiley et al.*, 29 Ark. 80; *Chicago Mill & Lbr. Co.* v. *Boynton*, 84 Ark. 203.

Appellant's claim for a fee and to have the lien therefor fixed and enforced against the railroad company in the proceeding instituted by him for that purpose in the

Baxter Circuit Court necessarily involved the issue as to whether or not he was entitled to a fee by contract with the administrator in succession of the estate of Fulson.

The findings of the court show that the appellant was seeking by his petition and motion in the present case to have his claim for the same fee and charges adjudicated as were passed upon by his petition in the Baxter Circuit Court. The judgment of that court being in force at the time the appellant's petition and motion herein were disposed of, the court was clearly correct in holding that same were *res judicata.*

The judgment of the Independence Circuit Court, denying appellant's petition and overruling his motion to reinstate, is correct, and is affirmed.

HELENA WATER CO. v. HELENA.

Opinion delivered November 24, 1919.

1. STATUTES—ENACTMENT—PRESUMPTION AS TO REGULARITY.—Where an act was duly signed by the Governor, deposited with the Secretary of State and published as a law, it will be presumed that every requirement was complied with in its passage.
2. SAME—SAME—SAME.—This presumption is not conclusive, and the courts, in determining the validity of a statute, may look to the journals and other records of the Legislature to ascertain whether or not the constitutional requirements with respect to the passage of bills have been observed.
3. SAME—SAME—SAME.—Mere silence of the legislative records concerning the successive steps in the passage of a bill, except as to matters of which the Constitution requires a record in the journals, is not sufficient to overcome the presumption of regularity in the passage of a bill arising from the enrolled copy which has been signed by the Governor and deposited with the Secretary of State; and evidence outside the record is not admissible to overcome the presumption.
4. SAME—SAME—SAME.—A bill, as introduced was amended fifteen times, which fifteen amendments were engrossed into the original bill, but the enrolled statute showed only thirteen of the fifteen amendments. The bill thus enrolled was signed by the Governor, and its passage endorsed by the Secretary of State. *Held,* the presumption arising from the enrolled statute is not overcome

by the recitals of the Senate journal that the two amendments in question were adopted, but the presumption will be indulged that the Legislature (Senate) receded from those amendments before the bill was finally passed.

5. CORPORATION COMMISSION—CREATION—VALIDITY.—Act 571 of 1919, abolishing the Railroad Commission, creating the Corporation Commission, and transferring the powers of the former to the latter, *held* valid.

Appeal from Phillips Chancery Court; *A. L. Hutchins,* Chancellor; reversed and dismissed.

Bevens & Mundt and *Carmichael & Brooks,* for appellant Helena Water Company.

The act was constitutionally passed and does not impair the obligation of a contract. 204 S. W. 497; 163 *Id.* 585; 168 *Id.* 1156-1159; 204 *Id.* 386, 1074; 207 *Id.* 799. The city had no vested rights. The Helena Water Company was only bound to furnish hydrants at certain rentals. Where not constitutionally inhibited, the power to fix rates is a legislative faculty which is delegable to a public service commission. 207 S. W. 299. The doctrine of this case has often been approved. 225 Fed. 920; 206 U. S. 496; 194 *Id.* 517; 246 *Id.* 178; 248 *Id.* 429; 244 *Id.* 13; 205 S. W. 36; 192 S. W. 958; 192 *Id.* 460; 209 *Id.* 552; 105 Atl. 132; 196 U. S. 539.

T. W. Campbell, for the Arkansas Corporation Commission.

1. Act 571, Acts 1919, was constitutionally passed. The presumption is in favor of its validity. 12 Ark. 321; 27 *Id.* 266; 39 *Id.* 353; 40 *Id.* 290; 54 *Id.* 513; 77 *Id.* 250. An act duly signed by the Governor and deposited with the Secretary of State and duly published as a law will be presumed to have been duly passed. 51 Ark. 359; 90 *Id.* 174; *Ib.* 600; 103 *Id.* 109; 110 *Id.* 269. The act should be sustained. 44 Ark. 536; 33 *Id.* 17; 40 *Id.* 200; 131 *Id.* 291; 214 S. W. 2. See also, in point, 40 Ark. 200; 131 *Id.* 291. Mere silence of the journals does not overcome the presumption of the act's due passage. *Supra; Perry* v. *State,* 139 Ark. 227.

2. The commission may grant indeterminate permits authorizing utilities to operate under terms other than those specified in municipal franchises existing at the time of the creation of said commission. 214 S. W. 71; 207 *Id.* 799; 121 N. E. 777; 117 *Id.* 915; *City of Pawhuska* v. *Pawhuska Oil & Gas Co.*; Sup. Ct. Adv. op. No. 17, p. 663; 173 Pac. 556; 177 *Id.* 361; P. U. R. 1919 D, 422; 159 Pac. 133; 105 Atl. 109; 135 N. W. 131; 161 Pac. 391; 130 N. W. 530; *City of Memphis* v. *Enloe,* ms. op., Sup. Court of Tenn., July 3, 1919. These cases show that the fixing of rates and directing the operation of public utilities is a matter within the *police power* of the State, and the State is free to exercise this police power in such way as the Legislature may direct or determine and that the Arkansas Corporation Commission, having been, by the statute creating it, empowered to act in such matters for the State, is free to fix the rates and direct the operations of public utilities, regardless of the provisions of municipal franchises and the chancellor erred in granting the injunction against appellants. Cases *supra.*

Fink & Dinning, P. R. Andrews and *J. G. Burke,* for appellee.

1. No law can be enacted unless both houses pass the same bill. The act No. 571, Acts 1919, is unconstitutional and void because the Senate passed a different bill from the one passed by the House. This is affirmatively shown by the journal of the Senate. Art. 5, sec. 21. Const. 1874. The journals of both houses show affirmatively that a majority of the Senate voted for one bill and the majority of the House for another. The courts may look beyond the enrollment of an act to the journals to see if the act was constitutionally passed. 44 Ark. 536; 40 *Id.* 200; 72 *Id.* 565; 90 *Id.* 174; 103 *Id.* 109. The records of the Senate and House are the *best* evidence, 132 Ark. 240, though the records required by section 3351, Kirby's Digest, to be deposited with the Secretary of State are evidence of the facts which they testify to. See also 72 Ark. 565. The journals are not only the *best* but the

sole and exclusive evidence of the facts in this case that the Senate passed a bill entirely different from the one passed by the House and deposited with the Secretary of State. 72 Ark. 565; 103 *Id.* 109, a case identical with this; 41 Ark. 471-5; 110 *Id.* 268; 103 *Id.* 109; 27 Ark. 266; Art. 5, sec. 11, Const. 1874; 33 Ark. 25.

2. The act approved by the Governor was not the same act passed by the Senate. 81 Atl. 170; 68 N. W. 759-762; 45 N. W. 493-6.

3. Amendments adopted by one House of the Legislature must be concurred in by the other or the bill will be invalid and of no force and effect. 72 Ark. 565; 41 *Id.* 471; 114 N. W. 767; 80 *Id.* 499; 29 So. 700.

4. The presumption of the validity of an act does not apply to this case because the Legislature failed to comply with the provisions of our Constitution and the presumption is overcome and does not apply, because the act here was not properly enacted by both branches of the Legislature as required by the Constitution. 103 Ark. 109; 14 Ill. 297; 110 Ark. 280 dissenting opinion. The facts here are materially different from those in 40 Ark. 200; 131 *Id.* 291 and 214 S. W. 2.

5. The act is void because it attempts to delegate to the commission therein created powers and duties which are not permitted by article 17 of the Constitution.

Section 10 of article 17 is amended by amendment No. 4. When the Constitution has spoken, the reserve powers of the legislative branch are thereby limited and must accord with the supreme law of the land. Pursuant to vested authority by this amendment, the Legislature did create a Railroad Commission and vested it with such powers as were provided for by the Constitution. By act 571 the name of the commission was changed to Arkansas Corporation Commission and its powers so enlarged as to embrace supervision of all public service corporations. Its powers and duties are defined, and the words are not ambiguous, and the Legislature has no right to invest it with powers and impose on it duties

that are in no wise related to powers and duties which it is authorized to discharge by the enactment which provided for its creation. 27 Ark. 176; 89 *Id.* 459; 90 *Id.* 10-15; 134 *Id.* 463; 49 *Id.* 518.

McCULLOCH, C. J. This action was instituted by the city of Helena attacking the validity of act No. 571 of the General Assembly of 1919 (regular session), creating the Arkansas Corporation Commission and defining its duties, and abolishing the Railroad Commission and transferring its powers and duties to said Arkansas Corporation Commission.

There are two points of attack involved in the action: (1) That the statute was not legally enacted by the two houses of the General Assembly, in that the same bill was not voted on by the two houses; and (2) that it is not within the power of the General Assembly to abolish the Railroad Commission or to transfer its powers and duties to another commission.

The bill for the enactment of the statute originated in the Senate as "Bill No. 133" and on second reading seventeen amendments were offered, fifteen of which, according to the journal entries, were adopted, and the bill as thus amended was ordered engrossed. The engrossing committee reported the bill on February 24, 1919, as properly engrossed, but the engrossed bill which we find on file in the office of the Secretary of State does not contain two of the amendments which, according to the recitals of the journal, has been adopted. One of these was an amendment to section 7 of the bill adding a provision, in substance, that the commission was empowered, when deemed proper, to require the filing of an additional bond by a corporation whose schedule of increased rates for public service has been temporarily suspended by the commission. The other amendment was to section 31 of the bill providing that the Railroad Commission should be abolished on January 1, 1921, and perform all the specified duties of the Arkansas Corporation Commission until that date, instead of the original provision of the bill to the effect that the Railroad Commission

should be abolished on April 1, 1919, and its powers and duties then transferred to the new commission. The journal of the Senate does not affirmatively show that the Senate at any time receded from either of those two amendments, and it recites the passage of the bill by the Senate February 25, 1919, on yea and nay vote duly recorded. The House journal recites the receipt of the bill on February 25, the reading of it the first and second times February 28, on suspension of the rules, and the third reading and final passage on March 7, 1919. Nothing appears on the journal of the House concerning any amendments. The bill as enrolled by the proper committee of the Senate and signed by the presiding officers of the two houses and by the Governor, does not contain those two amendments.

(1) It is settled by an unbroken line of decisions of this court that "where an act was duly signed by the Governor, deposited with the Secretary of State and published as a law, it will be presumed that every requirement was complied with in its passage. *Glidewell* v. *Martin,* 51 Ark. 559; *Mechanics Building & Loan Association* v. *Coffman,* 110 Ark. 269; *Perry* v. *State,* 139 Ark. 227.

(2) This presumption is not, however, a conclusive one, and the courts, in determining the validity of a statute, may look to the journals and other records of the Legislature to ascertain whether or not the constitutional requirements with respect to the passage of bills have been observed. *Chicot County* v. *Davies,* 40 Ark. 200; *Webster* v. *Little Rock,* 44 Ark. 536; *Rogers* v. *State,* 72 Ark. 565; *Butler* v. *Kavanaugh,* 103 Ark. 109; *Mechanics Building & Loan Association* v. *Coffman, supra.*

(3) Mere silence of the legislative records concerning the successive steps in the passage of a bill, except as to matters of which the Constitution requires a record on the journals, is not sufficient to overcome the presumption of regularity in the passage of a bill arising from the enrolled copy which has been signed by the Governor and deposited with the Secretary of State. *Smithee* v. *Garth,*

33 Ark. 17; *Harrington* v. *White,* 131 Ark. 291; *Perry* v. *State, supra.*

And evidence outside of the record is not admissible to overcome that presumption. *State* v. *Dorsey County,* 28 Ark. 378; *State Fair Association* v. *Hodges,* 120 Ark. 131; *Greene County* v. *Clay County,* 135 Ark. 301.

The question now under consideration was, we think, definitely settled against the contention of the plaintiff, in the recent case of *Perry* v. *State, supra,* where the records of the passage and enrollment of the statute were not materially different from the facts of the instant case. In that case the bill for the statute under consideration originated, as in the present case, in the Senate, and the journal showed an amendement which was duly engrossed by the committee and reported back. The only difference between the facts of the two cases is that in the Perry case the committee engrossed the amendment into a copy of the original bill and the endorsement of the secretary of the Senate showing the final passage of the bill was on the original bill, whereas in the instant case the committee engrossed into the original bill the fifteen amendments now found in the enrolled statute—omitting the two not shown in the enrolled statute—and the endorsement of the secretary showing passage is on the back of the original bill as so engrossed. In discussing the question in that case we said:

"It does not appear affirmatively that the bill, as engrossed, was read a third time and passed. The endorsement appears on the original bill and not on an engrossed bill. After being engrossed, it was within the province and power of the Senate to have ordered the bill placed back on its second reading for amendment and to have receded from the amendment engrossed into the bill, or to have stricken the amendment from the bill, and, should such course have been taken, it would not have been necessary to its validity to have entered these steps concerning the amendment on the journal. The silence of the record in this regard would not conflict with the presumption that such course was pursued by the Senate.

The silence of a legislative journal, on matters not required to be entered on the journal, can not conflict with the presumption of the regularity of the passage of a bill. It is only in matters where the journal does speak, or where it is required to speak, that it could conflict with such presumption. * * * The journals in the instant case only go so far as to show that the amendment was adopted and engrossed in the bill. It does not affirmatively appear that the engrossed bill passed, or that the Senate did not recede from the amendment. Under the rule announced in the cases referred to, the court must indulge the presumption that the Senate did recede from the amendment, and, for that reason, the amendment adopted in the Senate did not appear in the enrolled bill."

(4) So, in adhering to the rule announced in the case just cited, and in applying it to the present case, we must say that the presumption arising from the enrolled statute is not overcome by the recitals of the Senate journal that the two amendments in question were adopted, but on the contrary, we must indulge the presumption that the Senate receded from those amendments before the bill was finally passed. Indeed, the omission of those amendments from the engrossed bill as it now appears in the office of the Secretary of State, and its acceptance by the Senate as thus engrossed, raised the presumption that those amendments were withdrawn or receded from before the bill went to the engrossing committee.

(5) The next question with which we have to deal is whether or not the Legislature exceeded its powers in attempting to abolish the Railroad Commission or to transfer its powers to the newly created Corporation Commission.

The people of the State adopted, in the year 1898, an amendment to the Constitution which reads as follows:

"The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and excessive charges by railroads, canals and turnpike companies for transporting freight and passengers, and shall provide for enforcing such laws by adequate penalties and for-

feitures, and shall provide for the creation of such offices and commissions and vest in them such authority as shall be necessary to carry into effect the powers hereby conferred." (Amend. No. 2 to Const.)

The argument in this case is that the amendment to the Constitution restricts the powers of any office or commission created thereunder to those therein enumerated, viz., to the regulation of "excessive charges by railroads, canals and turnpike companies" and that it is beyond the authority of the Legislature to impose any further duties on any offices or commissions created for that purpose.

It will be observed that the Constitution does not specify by name the office or commission to be created. It primarily provides for the correction of abuses, unjust discriminations and excessive charges by transportation companies and authorizes the creation of "such offices and commissions" and the investment in them of "such authority as shall be necessary to carry into effect" that provision. It constituted a command to the law makers to carry out the provision to create such offices or commissions as might be found necessary. It is a grant, not a limitation of power, and the rule of exclusion of those things not expressed does not apply. It is, in other words, the power to correct abuses by transportation corporations, which is conferred by the Constitution, and not the creation of any particular offices or commissions, and the Legislature could, in the first instance, have created the present commission, and conferred on it the enumerated powers and others. The fact the Legislature first created a commission under the name of Railroad Commission did not exhaust its powers in that respect, and the power to create a commission under another name, with the authority enumerated and more, still existed.

We have decided that section 9, article 19, of the Constitution prohibiting the creation of permanent offices was directory to the law makers, so far as concerned a determination that the creation of a temporary office was necessary and that the legislative decision that the office created was temporary and not permanent was conclusive

on the courts. *Greer* v. *Merchants & Mechanics Bank,* 114 Ark. 212.

It may be that the people adopted Amendment No. 2 under the belief that the constitutional provision referred to above is mandatory and that it was deemed necessary to grant express authority for the creation of offices or a commission to carry out the provisions of the amendment. Even if that be the case, it does not warrant the interpretation of the language of the amendment that the powers of the commission created were to be restricted to those enumerated.

The conclusion of the majority of the court is, therefore, that the attack on the statute is unfounded. The decree of the chancery court is reversed, and the cause is dismissed.

WOOD, J., dissents.

HART, J., (dissenting). On account of our respect for a co-ordinate department of the government, and as well for the opinion of our brother judges and of those who have without question accepted office under the act creating the Arkansas Corporation Commission, Judge WOOD and the writer have deemed it proper not merely to voice our dissent on the record on the ground that the act is unconstitutional; but to give our reasons therefor in writing. It is a judicial saying that the Constitution is the paramount law of the land, and is the fortification within which the people have entrenched themselves for the preservation of their rights and privileges. In *Rison* v. *Farr,* 24 Ark. 161, it was further said:

"The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, the Constitution is the sun around which all legislative, executive and judicial bodies must revolve; and that, whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature repugnant to the Constitution is null and void."

This principle has been upheld in every decision since that time. In *Greer* v. *Merchants & Mechanics Bank,* 114 Ark. 212, the court had under consideration article 19, section 9, of the Constitution prohibiting the creation of permanent State offices not expressly provided for by the Constitution; and held that it did not apply to the act creating the State Bank Department. The court said:

"We attach little, if any, importance to the provisions of the statute limiting the time to twelve years, for we think that the Legislature has the power to determine whether an office to be created is permanent or temporary, whether expressly declared in the act or not. If it is created as a temporary office, we must assume that the Legislature found it to be such. The creation of the office implies a determination that it is temporary, and not permanent."

In concluding this branch of the discussion, the court said:

"We are of the opinion, therefore, that this provision of the Constitution, when rightly interpreted, constitutes a command to the Legislature, with authority to determine when temporary offices are needed, and that the determination of that question by the Legislature will be observed by the courts. It would be an usurpation of power by the courts to assume authority which had been delegated to the Legislature itself."

If the section of the Constitution as declared by the court in the language just quoted constitutes a command to the Legislature, it is plain that the section is mandatory and not merely directory. If the section is mandatory, it is equally clear that the Legislature could not create a permanent office in contravention of its provisions. Therefore it is manifest from the language used that the court upheld the statute on the ground and the Legislature regarded the State Bank Department as a temporary office, and that its decision was conclusive on the courts. The practical effect of the majority opin-

ion in the case at bar is that a constitutional office may be abolished and that its duties, although specifically defined by the clause of the Constitution providing for the creation of the office, may be attached to a temporary office. Such is not the law.

"Section 10, article 27, of the Constitution is amended by what is known as Amendment No. 4 to read as follows:

"The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and excessive charges by railroads, canals and turnpike companies for transporting freight and passengers, and shall provide for enforcing such laws by adequate penalties and forfeitures, and shall provide for the creation of such offices and commissions and vest in them such authority as shall be necessary to carry into effect the powers hereby conferred."

The amendment consists in adding the words, "and shall provide for the creation of such offices and commissions and vest in them such authority as shall be necessary to carry into effect the powers hereby conferred."

Pursuant to this amendment the Legislature of 1899 created the Railroad Commission of Arkansas, and defined its duties in accordance with the mandate of the Constitution. Three members were provided for and the office was made elective.

The Legislature of 1919 created the Arkansas Corporation Commission. Section 1 provides that it is created for thirty years, and that it shall consist of three members, who shall be elected by the people. The act gives the commission jurisdiction to regulate the rates of all public utilities in the State. Section 31 provides in express terms that the present Railroad Commission shall be abolished, and that the Corporation Commission shall exercise all the powers and duties possessed by the Railroad Commission. In short, the Legislature expressly abolished the Railroad Commission and trans-

ferred its duties to the Corporation Commission which the Legislature expressly declares is created for thirty years; and which, as we have already seen, must, according to the previous decisions of this court, be a temporary office.

It will be observed that it is the amendment to the Constitution which commands the Legislature to provide for an office or commission to carry into effect the powers conferred in the amendment, and these powers are enumerated. The Legislature could give the office a different name and vary the duties as by increasing or lessening the penalties, but the office itself being expressly provided for in the Constitution, when created, becomes a constitutional office; and its duties, being expressly and specifically provided for in the Constitution itself, can not be enlarged, diminished, or taken away by the Legislature. If this were not so, and the office could be abolished and the duties attached to another office, then the authority of the Constitution would be subject to the authority of the Legislature. The grant of the office is expressly fixed by the Constitution, its duties are specifically prescribed by the Constitution and there is necessarily an implied prohibition against interfering with it in these respects.

The effect of the majority opinion is to change by act of the General Assembly that which is ordained by the Constitution. The Legislature must act in subordination to the Constitution; and it does not do so, if it can abolish a constitutional office with defined duties and attach those duties to a temporary office. It would at least be a very vain and idle provision of a Constitution to secure to the people in mandatory terms an office or commission and to specifically define its duties, and at the same time leave it to the Legislature to abolish the office, or to attach its duties to a statutory office which might be abolished at any time. Such an intention should not be ascribed to the people in adopting the amendment in question. In short, when the Constitu-

tion expressly provides for an office and in specific terms defines its powers and duties, the Legislature is powerless to abolish, modify, enlarge, or diminish that which is established by the paramount law of the land.

In recognition of this principle, in *State* v. *Askew,* 48 Ark. 82, the court held that the Legislature was powerless to enlarge or abridge the constitutional term of an office and that any attempt to do so would be a plain usurpation. The principle was also recognized in *Falconer* v. *Shores,* 37 Ark. 386, where the court held that the office of collector of taxes was under legislative control because the Constitution provided that the sheriff should be collector of taxes until otherwise provided by law.

In the *Board of Equalization Cases,* 49 Ark. 518, the court said that the office of assessor was a constitutional office and that the Legislature could not abolish or make it a sinecure, for that would make the selection of the officer—a right guaranteed to the electors—an empty form. It was further held that the duties of the office might be varied by the Legislature because the Constitution creating the office provided that he might discharge "such duties as are now or may be prescribed by law."

Again in *Hutton, Collector,* v. *King,* 134 Ark. 463, an assessment statute which provided for two taxpayers to assist the assessor in making assessments was sustained on the theory that the act allowed the assessor to participate in making the primary assessment, and that because the provision of the Constitution providing for the office of assessor did not define its duties, but left it to the Legislature to define them, the act was not unconstitutional. Judge WOOD and the writer dissented in that case on the ground that the office of assessor existed and its duties were well known at the time of the adoption of the Constitution and that the framers of that instrument evidently intended that the assessor should make the primary or original assessment. We

recognized the principle laid down in *Hutton, Collector,* v. *King, supra,* that unless the Constitution otherwise expressly provides, the Legislature has power to increase or vary the duties of an office; but when the Constitution defines in specific terms the duties of an office, it has spoken, and to allow the Legislature to change or vary those duties would be to make the creator yield to its creature.

It is equally well settled that every constitutional officer derives his power from the Constitution, and that where the Constitution specifically defines his powers and duties, it is not within the power of the Legislature to change or add to them unless the power to do so is expressly or by necessary implication conferred by the Constitution itself. Cooley on Constitutional Limitaton (7 Ed.), p. 98, and *State* v. *Douglass,* 82 Nev. 92.

The result of our views is that the Legislature under the authority of *Greer* v. *Merchants & Mechanics Bank, supra,* might have created the Arkansas Corporation Commission with power to regulate water, gas, street car and telephone companies and might have transferred to it the duties of any or all of the commissions now constituting a part of the executive department of the State except that of Railroad Commissioners.

In regard to that office, or commission as above stated, it could only change the name and vary the duties within the limits prescribed in the amendment to the Constitution providing for the office; but because the Constitution has specifically defined its duties, the Legislature can not abolish the office, nor add to it other duties than the power to carry into effect the laws passed to correct abuses and prevent unjust discrimination and excessive charges by railroads, canals and turnpike companies, nor can it abridge the duties of the office or commission in respect to the power ordained by the Constitution. It is manifest that the only object of specifically defining the duties of an office in a Constitution is to limit or restrict the power of the Legislature

in this respect; otherwise, the amendment might just as well not have been adopted.

It was evidently intended by defining the duties of the office or commission to make them fixed and permanent, and thus to place the subjects to which they relate altogether beyond legislative control. If the Legislature has the power to abolish a constitutional office and add its duties to another office with other and foreign duties, it is evident that the Legislature could take away all or a part of the duties that naturally belong to the office. Under the majority opinion, if the next or any succeeding Legislature should repeal the statute creating the Arkansas Corporation Commission, without reviving by express words the statute creating the Railroad Commission, the latter office or commission would be abolished, although it is a constitutional office with well defined duties. Thus, indeed, by indirection, would the organic law of the land be superseded by the Legislature. It is no answer to this to say that no Legislature will likely do this; for we are dealing with the question of power and not that of the mind or will of the Legislature; and that no man may know.

BENHAM v. AMERICAN CENTRAL LIFE INSURANCE COMPANY.

Opinion delivered November 24, 1919.

1. INSURANCE — STIPULATIONS — CONSTRUCTION.—Stipulations in a policy of insurance, avoiding the same upon the happening of certain conditions, will be strictly construed against the company.
2. SAME—SAME—SAME—DEATH WHILE ENGAGED IN MILITARY SERVICE.—A stipulation in an insurance policy avoided the same if the insured met "death while engaged in military service in time of war." Held to mean death while doing, performing or taking part in some military service in time of war; that is, death caused by performing some duty in the military service.
3. SAME—SAME—SAME—SAME.—A policy of insurance contained this provision: "Death while engaged in military or naval serv-

ice in time of war, or in consequence of such service, shall render the company liable for only the reserve under the policy. * * *" The insured joined the aviation branch of the military service, and while *en route* from New York to Texas, in course of transfer, he contracted influenza and died. *Held,* deceased's death was not caused by performing any military service or in consequence of being engaged in military service, and that the policy was valid and enforceable.

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

E. D. Robertson, Mann & McCulloch and *Mann, Bussey & Mann,* for appellant.

1. The undisputed facts show that deceased was not "engaged" in the army or naval service at the time of his death in the contemplation of the contract, and under the provisions of the policies the company is liable for the full amount of the policies, and the insured had not reached a flying status in his training for a commission and consequently a permit was not necessary.

Forfeitures are not favored. 133 Ark. 174; 1 Cyc. 245; 65 Ark. 59; 60 Atl. 180; 155 N. W. 860. The contract will be construed most strongly against the insurer. 94 Ark. 417; 80 *Id.* 49; 89 *Id.* 471.

2. The clause, "death while engaged in the military or naval service in time of war," etc., is a restrictive clause, and the construction of it must be strict, and all doubts resolved in favor of the insured. 111 Ark. 167; 48 N. Y. 34; *Union Co.* v. *Hughes,* 60 S. W.

The purpose of the contract was to insure against the ordinary hazards of the ordinary life. Insured died from influenza, a nation-wide epidemic, and the war had no effect on the risk, and he did not die in consequence of the war. The contract should have been construed to limit liability only when death occurred while engaged in actual conflict or in consequence of injuries received while in actual conflict. The word "engaged" as used meant that death must occur while in a fight, struggle or battle, etc. 60 S. W. 850; 72 S. W. 1016; L. R. A. (N. S.) 1918 C, p. 130; 48 N. Y. 34.

3. It was error to direct a verdict, and the issue should have been submitted to a jury.

4. The letter written by the actuary to deceased was an estoppel to claim any forfeiture by reason of the death of insured while in the status he was at the time the letter was written.

Woolen, Cox & Welliver, of Indianapolis, and *Daggett & Daggett,* for appellee.

1. The death of the insured occurred while he was engaged in military service in time of war without the required permit of the insurer, and the company was only liable for the reserve which was tendered.

2. The company is in no way estopped to deny liability for the full amount of the policies and to rely upon the plain meaning of the terms and conditions of the policies.

It is plain that the insured died both "while engaged in military service in time of war" and also "in consequence of such service." The testimony shows he was engaged in the military service in time of war. Act Congress, September 2, 1914, secs. 514, 514u, 514uu, as amended by act October 6, 1917. The words "engaged in" have been often construed. 119 Col. 119; 51 Pac. 32; 26 Fla. 360; 7 So. Rep. 861; 104 S. W. 415; 207 S. W. 74. The case in 48 N. Y. 44 is an entirely different case from this.

Here the insured enlisted, was enrolled in a branch of the military service, took the oath and subjected himself to military orders, accepted war risk insurance, was given a military funeral and a record filed in the adjutant general's office showing him to be a private first class, aviation section. The language of the contract means and shows a clear intention to except from the policy death occurring from any cause whatsoever while employed in the military service. Cases *supra;* 68 Kan. 539; 75 Pac. 494.

The undisputed testimony shows that the insured was in the military service within the meaning of the pol-

icies at the date of his death and the court properly directed a verdict.

STATEMENT OF FACTS.

Julius Benham, Sr., administrator of the estate of Julius Benham, Jr., deceased, brought this suit against the American Central Life Insurance Company, of Indianapolis, Ind., to recover $4,000 on four policies of life insurance.

The company defended on the ground that the insured died while in the military service of the United States in time of war and that this exempted it from liability under the terms of the policy. On December 20, 1916, the American Central Life Insurance Company of Indianapolis, Indiana, issued four policies of life insurance for the sum of $1,000 each to Julius Benham, Jr., payable to his estate. Each of said policies was in the common form used by the insurance company and contained a restrictive provision which reads as follows: "After one year from the date hereof, this policy shall be incontestable, except for nonpayment of premiums and except for violation of its conditions as to military or naval service in time of war. * * *

"Death while engaged in military or naval service in time of war, or in consequence of such service, shall render the company liable for only the reserve under this policy, unless the company's permission to engage in such service shall have been obtained and such extra premium or premiums as the company may require shall have been paid."

On February 11, 1918, Julius Benham, Jr., enlisted in the aviation branch of the military service of the United States, at Memphis, Tennessee. Early in June he was on duty at an aviation camp at Dallas, Texas. Subsequently he was sent to Cornell University in the State of New York for special training in the aviation branch of the army and graduated from this course of training on October 5, 1918. He was at once ordered to report to the commanding officer of the concentration camp in Camp Dick, Texas, to await assignment to a

flying school for training. *En route* to Camp Dick, Benham contracted influenza, and upon his arrival at Dallas, Texas, he was transferred to St. Paul's Hospital, where he died on the 26th day of October, 1918. From the date of his enlistment to the date of his death the United States were at war with Germany and Benham was constantly subject to the military authority of the United States. He was buried with military honors at Marianna, Arkansas, where his remains were shipped for interment under a military escort. From the date of the issuance of his policy until his death, Julius Benham, Jr., paid the premiums and complied in all respects with the terms of his policies. Julius Benham, Sr., is the beneficiary under a policy issued to Julius Benham, Jr., under the War Risk Insurance Act of 1917.

It was proved that influenza was prevalent throughout all of the United States, and that civilians as well as soldiers had it; that it was not confined to any particular locality, nor to any special class of people.

At the request of the defendant the court directed the jury to return a verdict for the plaintiff for only the reserve accumulated under the policy sued on in the sum of $127.06.

Judgment was rendered upon the verdict and the plaintiff has appealed.

HART, J., (after stating the facts). The correctness of the holding of the trial court depends upon the construction to be placed upon the following provision which is contained in each policy sued on:

"Death while engaged in military or naval service in time of war, or in consequence of such service, shall render the company liable for only the reserve under this policy, unless the company's permission to engage in such service shall have been obtained and such extra premium or premiums as the company may require shall have been paid."

Counsel for the defendant seek to uphold the judgment upon the authority of *Miller* v. *Illinois Bankers' Life Association,* 212 S. W. 310. There the insured died

of pneumonia while he was in the military service of the United States during the war with Germany. The policy contained the following clause:

"It is expressly provided that death while in the service in the army or navy of the government in time of war is not a risk covered at any time during the continuance or reinstatement of this policy for any greater sum than the amounts actually paid to the company thereon."

(1-2) This court held that the clause in question exempted the company from liability for the death of the insured. The effect of this was to hold that the words, "death while in the service in the army or navy of the government in time of war," meant death during the period of service in the army and navy of the government in time of war. In other words, the court held that these words referred to the period of time during which the insured was in service in the army. We do not think that case controls here. It is well settled that stipulations of the character under consideration in policies of insurance are always construed strictly against the insurer. The reason is that policies of insurance are issued on printed forms prepared by experts at the instance of the insurer and the insured has no voice in their preparation. The words in the restricted clause now under consideration mean something more than death to the insured during the period of time he was in military service of the United States. The word "engaged" denotes action. It means to take part in. To illustrate, a servant injured while in the operation of a train, means that he must be injured while assisting or taking part in the operation of the train. An officer engaged in the discharge of the duties of his office is one performing the duties of his office. So here the words, "death while engaged in military service in time of war," means death while doing, performing, or taking part in some military service in time of war. In other words, it must be death caused by performing some duty in the military service. That is to say, in order to exempt the company from liability, the death must have been caused while the insured was doing something connected

with the military service, in contradistinction to death while in the service due to causes entirely or wholly unconnected with such service. This construction, we think, would be according to the natural and ordinary meaning of the words. By the use of the word "engaged" it must have been intended that some activity in the service should have caused the death in contradistinction to merely a period of time while the insured was in the service. This view is strengthened when we consider the words following. The words, "or in consequence of such service," relate to the word death. So that death in "consequence of such service" means death resulting from some act of the insured connected with the service whether such death occurred during the period of his service or afterwards.

(3) It is well known that there is more danger in performing the duties incident to naval or military service than other occupations. Hence after the world's war commenced, presumbly this restrictive clause was added in anticipation that the insured might join the army or navy, and recognizing that the duties of such a service imposed additional danger to the insured, it was provided that if death ensued while he was engaged in the performance of a military or naval service, that the company would be exempt from liability. The word "engaged" as used in the policy means an active or physical performance of some act or duty in connection with military service. As above stated, the rule applies that the clause should receive the interpretation most favorable to the plaintiff because the defendant is responsible for the language used.

In the case at bar the insured died from influenza and the record shows that this disease was prevalent throughout the United States and that soldiers and civilians alike contracted it and died from it.

The death of the insured then was in no sense caused by performing any military service or in consequence of being engaged in military service.

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

SMITH, J., dissents; McCULLOCH, C. J., not participating.

NEAL v. HARRIS.

Opinion delivered November 24, 1919.

1. LANDLORD AND TENANT—LEASE FOR ONE YEAR WITH REFUSAL FOR TWO MORE YEARS.—A lease of a farm for 1918 provided: "Said party of the first part agrees to give party of the second part the refusal of the above place for the years 1919 and 1920 at the above price, $7 per acre." *Held,* the agreement contemplated and provided for no new contract after 1918; and when the lessee exercised his option and gave the required notice, the parties were bound for the two additional years.
2. SAME—SAME—FORM OF NOTICE.—When the provision for renewal contains no requirement that the exercise of the option to renew shall be in writing or orally given, notice may be given either way.
3. LANDLORD AND TENANT—LEASE OF FARM—DESCRIPTION.—Parol evidence is admissible for the purpose of applying the description contained in a written lease in order to show that there are lands of that description; but such evidence is not admissible for the purpose of supplying or adding to the description, in order to make it comply with the requirements of the statute of frauds.
4. SAME—SAME—SAME—ORAL EVIDENCE.—Where the language used in lease shows that it was understood that A. was to have the place owned by B. in sections 4 and 9, township 2 north, range 2 east, oral evidence is admissible to show what was the place owned by B. there.
5. SAME—SAME—SAME—SAME.—B. leased lands to A., describing the same as "his place about ten miles west of Marianna * * * and situated in sections 4 and 9, township 2 north, range 2 east, containing about 275 acres in cultivation * * *." *Held,* the description was sufficient and that oral testimony was admissible for the purpose of further identifying the lands described.

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

R. D. Smith, R. J. Williams and *R. B. McCulloch,* for appellant.

1. The statute of frauds has no application, and appellee should not have been allowed to vary the terms of the written contract by showing that certain portions of the land were not included in the contract.

The court erred in sustaining objection to question asked witness J. E. Neal as to notice to exercise the option. The terms of the contract did not provide for an option to renew but granted to the lessee the privilege of extending the term. An option to renew contemplates a new lease will be executed. On the other hand, the covenant which grants the privilege of extending the term does not contemplate a new lease, but simply contemplates that, upon the exercise of the privilege by the lessee, he holds for the additional term under the same lease. The contract does not provide for a renewal contract, but grants the lessee the privilege of extending the term for two more years under the old lease; the word "refusal" means the option of renting for the period named on the same terms, etc. 7 N. Y. 472. The provisions for an extension of the term at the option of the lessee, upon the exercise of the privilege are treated as a present demise for the full term to which it may be extended. Ann. Cases 1913 C, 642; 24 Cyc. 1008; 109 Ill. App. 588; 49 S. W. 309; 27 Wis. 272; 109 Wis. 58.

2. The court erred in instructing the jury that if appellant wished to exercise his option of renewal of the rental of the place for two years he would be required to give appellee written notice to that effect. No express notice was necessary at all. 76 Ark. 251; 109 Ill. App. 588; 8 Kan. App. 421; 51 N. H. 415; 16 R. C. L. 297; 19 Ann. Cas. 399; Ann. Cases 1913 C, 641; 93 Ark. 252.

3. The court erred in permitting appellee to testify that he rented a less amount of land than that mentioned in the contract. The terms of a written contract can not be varied or contradicted by parol testimony. 10 R. C. L. 1016.

4. The court erred in sustaining objection made by counsel for appellee to question propounded witness J. E. Neal on redirect examination and remarking immediatel thereafter as follows: Q. How much did you have ploughed up when this suit was brought? The question was material, as it tended to show that appellant had elected to hold the land for the additional term. The fact that a lessee has exercised such an option may be shown by circumstances. Retaining possession and cultivating the land as under the original lease tended to show that appellant had exercised the privilege. The question was relevant and material. Furthermore it was highly prejudicial for the court to remark in the hearing of the jury that the answer would be immaterial. Such a statement was an expression of opinion.

5. The court erred in taking into account the statute of frauds which was not pleaded. 105 Ark. 638; 71 *Id.* 302; 96 *Id.* 184; 96 *Id.* 505.

Daggett & Daggett, for appellee.

1. There are two separate and distinct tracts of land involved here, and the testimony of Harris falls squarely within the rule that parol testimony is admissible to explain the terms of an ambiguous contract. The ambiguity arises in the meaning of the expression "his place" as two tracts or places in the Harris place. 93 Ark. 191; 103 *Id.* 260.

2. The intention of the parties gathered from the contract as a whole is the guide to proper construction. The terms of the contract did not grant to the lessee the privilege of extending the term of the original contract, but conceding the language is such as would grant a renewal privilege, only gave him the option to renew for the two years, that is, for the years 1919 and 1920. 16 R. C. L., sec. 399. The case in 93 Ark. 252 is not in point, nor is 71 *Id.* 251. If "refusal" means an "option to rent," Neal would have only an "unaccepted offer" binding Harris only, and it devolved upon Neal to accept the

offer and demand a contract for the term and the giving of a notice of renewal or extension would not suffice.

3. The contract for an additional term is vague and indefinite and incapable of enforcement without additional agreements. 6 R. C. L., secs. 38-59; 9 Cyc. 248 (c). Notice was served on Neal February 13, 1919, demanding surrender of possession, and the lands are described sufficiently to put him on notice that the contract was at an end.

4. There is nothing in the contention of a failure to plead the statute of frauds. The issue was made on the pleadings and the question was whether defendant could hold the lands under the contract relied on. There was nothing to submit to a jury and the judgment should be affirmed.

STATEMENT OF FACTS.

This is an action of unlawful detainer. The lease upon which the action is based is as follows:

"For and in consideration of the sum of one dollar cash in hand paid, said party of the first part (W. F. Harris) agrees to rent to said party of the second part (J. E. Neal) his place about ten miles west of Marianna for the year of 1918, and situated in sections 4 and 9, township 2 north, range 2 east, containing about 275 acres in cultivation for the price of $7 per acre, said acreage being subject to survey, and said survey to include yards and garden.

"Said party of the first part agrees to put all houses and cabins in first-class condition, also to put all fences in good repair, and said party of the first part agrees to have wells with water at the various houses on the above mentioned lands.

"Said party of the first part agrees to give party of the second part the refusal of the above place for the years 1919 and 1920, at the above price, $7 per acre.

"Said party of the second part agrees to put in all new ground possible for a crop for the year 1918, and said party of the first part agrees to pay said party of the second part the sum of $5 per acre for what new ground

he clears up and puts in, also crop for 1918; and if said party of the second part clears up said new ground and fails to cultivate same, then said party of the first part is under no obligations to said second party.

"Said party of the second part agrees not to permit any waste upon said land and to cut no timber therefrom, except for necessary firewood and repairs, without written consent of the party of the first part.

"Said party of the first part agrees to give said party of the second part possesssion of the above lands on or about January 1, 1918, and said party of the second part agrees to keep said premises, fences, etc., in the same repair and condition that the same are in when said second party takes possession."

In February, 1919, J. E. Neal, the lessee, having failed to vacate the premises, W. F. Harris, the lessor, gave him a written notice to quit and Neal refused to vacate the premises on the ground that he had exercised his option to extend the lease and for that reason was in lawful possession of the premises. Neal offered to prove that he gave Harris verbal notice to extend the lease for the years 1919 and 1920 at the price of $7 per acre as provided in the lease.

The court was of the opinion that the lessee was required to give written notice before the lease could be extended and refused to allow the offered testimony to go to the jury. At the conclusion of the testimony, the court instructed the jury to return a verdict for the plaintiff, Harris, for the possession of the land mentioned in the complaint. Other facts will be referred to or stated in the opinion.

Judgment was rendered upon the verdict and the defendant has appealed.

HART, J., (after stating the facts). In the first clause of the lease, W. S. Harris rented his place ten miles west of Marianna to J. E. Neal for the year 1918. A subsequent clause of the lease is as follows:

"Said party of the first part agrees to give party of the second part the refusal of the above place for the years 1919 and 1920, at the above price, $7 per acre."

The correctness of the decision of the court below depends upon the construction to be given that section of the lease which we have just copied. Both the text writers and the adjudicated cases make a distinction between a covenant in a lease for a renewal and a provision therein for the extension of the term at the option of the lessee. In the latter case upon the exercise of the option by the lessee there is granted a present lease for the full term to which it may be extended and not a lease for the lesser period with the privilege of a new lease for the extended term. In discussing the difference between the extension of a lease and the renewal thereof in Underhill on Landlord and Tenant, Vol. 2, par. 803, it is said:

"The question is always one of construction, depending wholly upon the language of the lease in each particular case. No general rule can be gathered from the cases by which one can distinguish between a present demise which shall determine at a fixed date or shall endure for a further period thereafter at the option of the tenant, and a lease for a definite term with an agreement to make a new lease when it shall have ended. Thus a lease for a term of five years, with a privilege of renting for another term, requires a new lease to be executed, and a mere holding over by the tenant is not a renewal. But in the same State it has been held that a lease for three years, with a privilege of five years, does not require any renewal for the exercise of the option by continuing in possession extends the lease. The lessee can either go out or stay in at the end of three years. So, where a lease gives the lessee a renewal at his election, and he elects to continue, a present demise is created which is subject to all the conditions and covenants of his former lease, and it is not necessary that a new lease should be executed. In the absence of an express provision that a new lease is intended to be executed, the presumption is that no new lease is intended, but that the lessee is to con-

tinue to hold under the original lease. The lease must clearly and positively show that the making of a new lease was intended. This must appear from the express language of the parties. The reason for the presumption is the fact that the making of a new lease will involve trouble and expense which should be avoided by the courts, if possible, unless it is very clear that the parties had expressly agreed to incur such trouble and expense."

To the same effect see 16 R. C. L., sec. 389, p. 885; Tiffany on Landlord and Tenant, Vol. 2, pars. 218-219, and pp. 1517-1518; Jones on Landlord and Tenant, sec. 340, and 24 Cyc. 1019. The rule itself is well settled, and the only difficulty is in the application of it to a given lease.

In *Kramer* v. *Cook,* 7 Gray (Mass.), 550, there was a lease for three years at a certain rent and at the election of the lessee for the further term of two years next after the term of the three years at an increased rent. This was held to be an extension and not a renewal. The court said:

"The provision in the lease is not a mere covenant of the plaintiff for renewal; no formal renewal was contemplated by the parties. The agreement itself is, as to the additional term, a lease *de futuro,* requiring only the lapse of the preceding term and the election of the defendant to become a lease *in praesenti.* All that is necessary to its validity is the fact of election."

In *Montgomery* v. *Board of Commissioners of Hamilton County,* 76 Ind. 362, 40 Am. Rep. 250, the lease describing the duration of the term is as follows: "The term of three years * * * with the privilege of five years at the same rate, at the option of the said board of commissioners." The court held that the termination of the lease depended upon the option of the lessee and that if the option was exercised the term continued for five years. The court said that there was to be no renewal, as the term was for either three or five years, its duration depending upon the lessee.

(1) So in the present case no new contract was provided for in the lease itself. The formal covenant of renewal usually provides specifically for the execution of a new lease. The extended term in the lease under consideration was fixed by and was a part of the original lease. When the lessee exercised his option and gave the required notice the parties were bound for the two additional years. No question as to the application of the statute of frauds arises and the court was wrong in so holding. If the lessee did not give a notice such as the law would enforce, his estate terminated at the end of the first period of one year; if he did give such a notice, it would continue to the end of the second period of two years. In either event, the lease itself created and defined the term and the statute of frauds had nothing to do with the case. *McClelland* v. *Rush,* 150 Penn. St. 57, and the authorities above cited.

(2) This brings us to a consideration of the character of the notice. The lessee offered proof of the giving of a verbal notice of his intention to extend the lease to the lessor. There was no agreement contained in the lease as to how the lessee should exercise his option of extending the lease, whether orally or by writing. It might therefore be shown either way, the same as any other fact not required to be in writing. This view is supported by the case of *Bluthenthal* v. *Atkinson,* 93 Ark. 252. In that case the lease provided for sixty days' notice, but did not state whether it should be given orally or in writing. The notice was given by a letter which miscarried in the mail and was not received by the lessor. The lessee sought relief in a court of equity on the ground that the failure to get the notice to the lessor was unavoidable. The court denied the relief, and in discussing the question said:

"The attempt to give the notice by letter was not a mistake on the part of the appellant. He intended to give it this way, but he knew he could give it orally or by sending notice through a messenger, or officer. He chose the mails. This was not a mistake at all, or, if so, cer-

tainly not one that a court of chancery will correct. It was the duty of appellant under the contract to give the lessor notice. Nothing short of the information which the contract specified, communicated in some manner to the lessor, would fulfill the requirements of the law. Appellant, having choice of a number of agencies to make the communication, is responsible if through the agency chosen he fails to make it. The failure in such case is but the failure at last of the one making the selection of methods, and equity can not relieve from the consequences of such failure on the ground of accident or mistake."

Other cases holding that in cases of this sort where no particular form of notice is prescribed by the lease oral notice is sufficient, are the following: *Broadway & Seventh Ave. R. Co.* v. *Metzger,* 15 N. Y. Sup. 662; *Darling* v. *Hoban,* 19 N. W. (Mich.), 545; *Stone* v. *St. Louis Stamping Co.,* 29 N. E. (Mass.), 623; *Quinn* v. *Valiquette,* 14 L. R. A. (N. S.), (Vt.), 962, and *Delashman v. Berry,* 20 Mich. 292.

(3-5) It is also claimed that the lease does not describe the land with sufficient certainty and for that reason is unenforceable. The contract states that Harris leased "his place about ten miles west of Marianna for the year 1918 and situated in sections 4 and 9, township 2 north, range 2 east, containing about 275 acres in cultivation for the price of $7 per acre, said acreage being subject to survey, and said survey to include yards and gardens."

It is indispensable that the premises leased should be properly described in apt words and clear terms so as to be capable of identification. Parol evidence is admissible for the purpose of applying the description contained in the writing in order to show that there are lands of the description contained in it; but such evidence is not admissible for the purpose of supplying or adding to the description, in order to make it comply with the requirements of the statute of frauds. Underhill on Landlord and Tenant, Vol. 1, sec. 237; Tiffany on Landlord and

Tenant, Vol. 1, sec. 266, and Jones on Landlord and Tenant, secs. 98, 99. See also *Miller* v. *Dargan*, 136 Ark. 237. The language used in the lease shows that it was understood that Neal was to have the place owned by Harris in sections 4 and 9, township 2 north, range 2 east. Oral evidence was admissible to show what was the place owned by Harris there. The lands were particularly described by section, township and range and the oral testimony was admissible for the purpose of further identifying the lands described.

It follows that the court erred in directing the jury to return a verdict for the plaintiff. For that error the judgment must be reversed and the cause remanded for a new trial.

FAUCETTE v. PATTERSON.

Opinion delivered November 24, 1919.

1. ROADS AND ROAD DISTRICTS—ARK.-MO. HIGHWAY—CREATION AND ORGANIZATION OF.—Act No. 82, Acts of 1919, *held* to operate as a repeal of act No. 213 of 1917.
2. SAME—SAME—SAME—ROAD IN WHITE COUNTY.—Act No. 82 of 1919 was expressly repealed by act No. 128 of 1919, or so far as it affects the construction of the proposed road in White County.
3. STATUTES—REPEAL—STATUTORY REVIVOR.—Where the first repealing act operates by way of implication and does not directly or expressly repeal the original act, the constitutional provision abolishing the doctrine of statutory revivor does not apply.
4. STATUTES—REPEAL BY IMPLICATION—REVIEW.—Under Kirby's Digest, section 7796, the repeal of a repealing statute does not operate to revise the original statute unless it is expressly so provided in the last repealing statute.
5. ROADS AND ROAD DISTRICTS—ARK.-MO. HIGHWAY—CREATION AND ORGANIZATION.—A highway district was created by act 213 of 1917. This act was repealed by implication by act 82 of 1919. Act 128 of 1919 expressly repealed act 82 of 1919 with respect to White County, and provided that the proposed road through White County should be constructed under the provisions of act 213 of 1917. *Held*, act 213 of 1917 was revived by express words of act 128 of 1919, and that act 213 of 1917 is in force as far as the construction of the road in White County is concerned.

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

Harry Neelly, for appellant.

1. Act No. 213, Acts 1917, was repealed by Act No. 82 (1919). It covers the whole subject-matter and clearly repeals it by implication. 76 Ark. 34; 82 *Id.* 306; 10 *Id.* 588; 27 *Id.* 419; 31 *Id.* 19; 43 *Id.* 425; 46 *Id.* 438; 47 *Id.* 488; 65 *Id.* 508; 70 *Id.* 25; 76 *Id.* 32; 1 Lewis' Sutherland Construction of Statutes, sec. 202; 6 B. Mon. 146; 40 N. J. L. 257; 105 Ark. 79; 88 *Id.* 324; 70 *Id.* 27.

2. Act 213 could not be amended by Act 128 (1919) for the reason it no longer existed, having been repealed by implication. 32 Ark. 294. It could not be revived by reference to same by title only. Art. 5, sec. 23, Const. 1874; 122 Penn. 627; 14 Hun. 438; 49 Ark. 131.

3. Act 213 is invalid because the House journals did not show the first and second readings. The allegation of the complaint as to the failure to show these readings is fatal and the act is void and the decree should be reversed with directions to overrule the demurrer.

W. D. Davenport, for appellee.

1. Special act No. 82, Acts 1919, does not repeal by implication act No. 213 of 1917. Repeals by implication are not favored. The acts must be upon the same subject and there must be a plain repugnancy in their provisions or the later act must cover the whole subject of the first act and embrace new provisions plainly showing that the later was intended as a substitute for the first. 92 Ark. 602; 101 *Id.* 244; 112 *Id.* 437; 123 *Id.* 187; 23 *Id.* 307; 76 *Id.* 443; 34 *Id.* 499. There must be irreconcilable conflict between the acts. 48 *Id.* 159; 56 *Id.* 45-47; 96 *Id.* 145; 120 *Id.* 530. Where there is no necessary conflict there is no implied repeal. 19 Ark. 630-633; 53 *Id.* 337; 54 *Id.* 346; 76 *Id.* 443. They must be so inconsistent that both can not have effect. 28 Ark. 317; 131 *Id.* 227; 132 *Id.* 481; 132 *Id.* 450. While these roads may have a common starting point they have an entirely different ending point, and there is no repeal by implication.

2. The act is not void because the House journal does not show the first and second reading of the bill. Article 5, section 22, of the Constitution of 1874, does not require the recording of the first and second reading of a bill on the journal, and the failure of the journal to show the reading of the bill does not render the act void. 36 Cyc., p. 950; 20 Colo. 1; 36 Kan. 545; 55 Minn. 451; 129 N. C. 275.

3. Where an act is duly signed by the Governor, deposited with the Secretary of State and published as a law it is presumed to have been duly passed unless otherwise shown. 103 Ark. 109; 131 *Id.* 291.

4. Act 128 of Acts 1919 is not a nullity by reason of the repeal of act 213 by No. 82, for act No. 82 never became a law so far as it applied to White County. See section 27 of said act. Any part of said act No. 82 that applied to White County was repealed by said act 128 before any petition and order of court could be had under act 82, and under act 82 there could have been a road district through Pulaski, Lonoke, White and Jackson Counties and which did not cover the same territory from North Little Rock to the Missouri State line without traversing the same route mentioned in act No. 213, which runs to Batesville, Arkansas.

Ponder & Gibson, amici curiae, for appellant.

1. The act was repealed by implication. See authorities cited by co-counsel. 36 Cyc. 1071-1072 and cases cited. The acts are repugnant and in conflict and the last act must govern. 36 Cyc. 1073, citing 57 Ark. 508; 6 *Id.* 24.

2. The later act covers the whole subject and embraces new provisions and the former is repealed, as the later act was intended as a substitute. 36 Cyc. 1078 and cases cited; 82 Ark. 103; 80 *Id.* 411; 65 *Id.* 508; 47 *Id.* 488. Comparing the two acts they are seen to be clearly repugnant. 123 Ark. 187; 214 S. W. 23. Act 213 of 1917 was repealed by No. 82 of 1919. The attempt to remake act 213 by reference to its title in act 128, Acts 1919, is futile and does remake the statute.

HART, J. C. C. Faucette, as a land owner in White County, Arkansas, within the limits of the North Arkansas Highway Improvement District No. 1, as laid out by act 213 of the Acts of the General Assembly for the year 1917, brought suit in equity against the commissioners of said highway improvement district for the purpose of enjoining them from proceeding with the construction of the road and from issuing bonds and collecting taxes.

The court sustained a demurrer to the complaint and, plaintiff declining to plead further, his complaint was dismissed for want of equity. The plaintiff has appealed.

The facts as alleged in the complaint are as follows:

The Legislature of 1917 passed an act creating North Arkansas Highway District No. 1. The district was formed for the purpose of improving a public road beginning east of the corporate limits of Argenta, or North Little Rock, and extending through the counties of Pulaski, Lonoke, White, Jackson and Independence to the corporate limits of Batesville. The act contained thirty-seven sections. It provided for the appointment of commissioners, the adoption of plans for the construction of the road, the assessment of benefits, and the collection of taxes to pay for the cost of construction. Acts of 1917, Vol. 2, p. 1149.

The Legislature of 1919 passed an act to create the Arkansas and Missouri Highway Districts, which was termed special act No. 82. The purpose of this act was to secure the construction of a highway from the city of North Little Rock, Arkansas, through the counties of Pulaski, Lonoke, White and Jackson. Four improvement districts were created by the act; one for each of the above named counties. The act contained twenty-eight sections and provided for the construction of the road, the assessment of benefits and the collection of taxes to pay for the same. The act contained the emergency clause and was approved February 14, 1919. At the same session of the Legislature special act No. 128, entitled an act to facilitate the building of a highway between Little Rock and the Missouri State line was passed.

It contained the emergency clause and was approved February 26, 1919.

Section 1 of the latter act provides that the Arkansas and Missouri Highway District in White County created by act No. 82 of the 1919 session, be abolished, in so far as White County is concerned, and it further provides that the proposed highway through White County shall be constructed under the provisions of act 213 of the General Assembly of 1917 above referred to.

Section 2 provides that the proposed highway from North Little Rock through Pulaski, Lonoke and Jackson counties be constructed under the terms of act No. 82 of the session of 1919 above referred to and that act 213 of the session of 1917 above referred to be repealed in so far as it relates to the construction of the highway through Pulaski, Lonoke and Jackson counties.

It is the contention of counsel for the plaintiff that special act No. 82 of the acts of the session of 1919 repeals by necessary implication act No. 213 of the Acts of 1917. This contention is based upon the ground that the later act makes a revision of the former one and frames a new statute relative to the same subject-matter and that from the framework of the act the Legislature designed a complete scheme for the construction and improvement of the road from the corporate limits of North Little Rock to a point in Jackson County where it would connect with another improved road running into the State of Missouri.

It will be noted that special act No. 82 of the session of 1919 is expressly repealed so far as it affects the construction of the road in White County by special act No. 128 passed at the same session and the repealing act provides that the proposed highway through White County shall be constructed under the provisions of act No. 213 of the General Assembly for the year 1917.

It is claimed by counsel for the plaintiff that the act in this respect is unconstitutional because it is in violation of article 5, section 23, of the Constitution of 1874. The section is as follows: "No law shall be revived,

amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

(1) Section 7796 of Kirby's Digest is as follows: "When a statute shall be repealed and the repealing statute shall afterward be repealed the first statute shall not thereby be revived unless by express words." Act No. 82 of the Acts of 1919 revises the whole subject-matter of act No. 213 of 1917, and is evidently intended as a substitute for it, although it contains no express words to that effect, and we think operates to repeal it. *Mears* v. *Stewart,* 31 Ark. 17, and *West. Union Tel. Co.* v. *State,* 82 Ark. 103.

Act No. 82 of the session of 1919 does not expressly repeal act No. 213 of the Acts of 1917 and it may be assumed that the earlier act is repealed by necessary implication by the passage of the later act and still the decision of the chancellor in sustaining the demurrer to the complaint was correct.

(2-3) It will be borne in mind that act No. 82 of the session of 1919, was expressly repealed by act No. 128 of the same session in so far as it affects the construction of the proposed road in White County. Where the first repealing act operates by way of implication and does not directly or expressly repeal the original act, the constitutional provision abolishing the doctrine of statutory revivor does not apply. *Home Ins. Co.* v. *Taxing Dist.,* 4 Lea (Tenn.) 644; *State* v. *King,* 104 Tenn. 156, 57 S. W. 150; *Zickler* v. *Union Bank & Trust Co.,* 104 Tenn. 277, 57 S. W. 341, and *Manchester Twp. Supervisors* v. *Wayne Co., Commrs.,* 257 Penn. 442, Ann. Cas. 1918 B.

In *Home Insurance Co.* v. *Taxing District, supra,* the court had under consideration a provision of the Constitution of Tennessee that, "All acts which repeal, revive or amend former laws shall recite in their caption, or otherwise the title or substance of the law repealed, revived or amended, and held that it did not apply to acts which by their positive provisions operate as a repeal of

previous acts by necessary implication. Judge Cooper, who delivered the opinion of the court, said: "The question, in this view, is not one altogether of first impression. Several of the State Constitutions contain similar provisions; that is, provisions designed for the same purpose, some of them couched in stronger language. A common provision in many of these Constitutions is thus worded: 'No act shall ever be revived or amended by mere reference to its title, but the act revived or section amended shall be set forth or published at full length. Cooley, Const. Lim., p. 151, n. 1.' "

"It has been uniformly held," says Judge Cooley, "that statutes which amend others by implication are not within these constitutional provisions, and that it is not necessary that they even refer to the acts or sections which by implication they amend."

In conclusion, Judge Cooper said: "That the constitutional provision under consideration does not apply to repeals by implication seems to be sustained by reason, as it certainly is by authority."

(4) In *People* v. *Mahaney*, 13 Mich. 481, the court held that a law which does not assume in terms to revise, alter or amend any prior act, but by various transfers of duties has an amendatory effect by implication, although it expressly repeals all inconsistent acts, does not conflict with section 25 of article 4 of the Constitution. Section 25, article 4, of the Michigan Constitution is exactly like section 23, article 5, of the Arkansas Constitution.

The court further held that it is not the meaning of this provision of the Constitution that, upon the passage of each new law, all prior laws which it may modify by implication shall be re-enacted, and published at length as modified. Judge Cooley, who delivered the opinion of the court, in discussing the subject said: "This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the pub-

lic, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

To the same effect see Cooley, Const. Lim. (7 Ed.), pp. 215 and 216. The contrary rule has been announced in *Stirman* v. *State,* 21 Texas 734. In that case and other cases of like character it is held that the law makes no distinction between express and implied repeals. However after due consideration we are of the opinion that the rule announced by Judge Cooley and by Judge Cooper should be followed. Both of them were judges of great learning, and their memories are reversed by the legal profession throughout the United States. Moreover, the holding is in accord with an opinion of our own court in *Scales* v. *State,* 47 Ark. 476. The opinion in that case was delivered by Chief Justice Cockrill, a distinguished judge of this court, and, in discussing the provision of the Constitution under consideration, he said that the provision does not prohibit the repeal of the law by reference to its title, and the prohibition can be extended by implication only. The learned judge further said that the power of the Legislature is not to be cut off by inference save where the inference is too strong to be resisted. In this connection it may be observed that the common law rule is that if a statute that repeals another, is itself repealed afterwards, the first statute is thereby revived, without any formal words for that purpose. *Commonwealth* v. *Churchill,* 43 Mass. 118, and case note to Ann.

Cas. 1918 B at p. 281. By statute it is now provided, in effect in this State that the repeal of a repealing statute shall not operate to revive the original statute unless it is expressly so provided in the last repealing statute. Kirby's Digest, section 7796.

In the case at bar the original act being act 213 of the Acts of 1917 was revived by express words in act No. 128 of the session of 1919, which in express terms repeals act No. 82 of the session of 1919, in so far as White County is concerned. It follows that the act No. 213 of the Acts of 1917 is in force so far as the construction of the road in White County is concerned. Hence the court was correct in sustaining the demurrer to the complaint, and after the plaintiff declined to plead further, in dismissing his complaint for want of equity. Therefore the decree will be affirmed.

E. O. BARNETT BROTHERS v. BROWN.

Opinion delivered November 24, 1919.

1. SALES—HORSE—WARRANTY OF TITLE—USABLE VALUE.—Appellant sold a horse to appellee with a warranty of title. Appellant had no title to the horse and the same was taken from appellee. *Held,* appellee could not be charged with the use of the horse for the time it was in his possession.
2. SAME—SAME—PAYMENTS.—Appellee could recover back payments made to appellant with interest thereon from the date the horse was taken from him.

Appeal from Hot Spring Circuit Court; *John C. Ross,* Judge; affirmed.

Oscar Barnett, for appellant.

The court erred in overruling the demurrer to the complaint. 50 Ark. 300. Appellant had the right to take the mare from Porter because he owed and would not pay. Appellant paid Porter $163 for use of the mare when she was rightfully ours. Mose Brown paid us $125 for the mare, and while he had her she was good and serviceable and if we should pay him back $125, Brown should

pay for the mare's use, as he was well advised of the conditions and received good service from her. The money paid was voluntarily paid by appellee to pay the purchase price after appellee was notified of the litigation. Money thus paid voluntarily can not be recovered back and falls within. 46 Ark. 217; 49 *Id.* 70; 102 *Id.* 152. One who purchases property in suit with notice of the litigation does so at his peril and must abide the result. 50 Ark. 300; 72 *Id.* 552; 86 *Id.* 175.

Andrew I. Rowland, for appellee.

1. No motion for new trial was filed and no bill of exceptions was ever filed and there was error in the record proper. Kirby's Digest, sec. 1233; 68 Ark. 75; 27 *Id.* 506; 27 *Id.* 549; 211 S. W. 140; 93 *Id.* 382.

2. There were no exceptions saved to the court's conclusions of law on the findings of facts preserved in the record and the findings and conclusions can not be reversed here. 60 Ark. 258; 70 *Id.* 420. One who sells personal property in his possession is held in law to warrant the title thereto and is liable for a breach. The findings of the court are as conclusive as the verdict of a jury, and the court's declarations of law are correct. 24 Ark. 222; 2 Sutherland on Damages (9 Ed.), § 774. There was a breach of title when appellee was deprived of the possession of the mare after this court had decided that appellants had no title. 97 Ark. 512; 35 Cyc. 416 and cases cited.

SMITH, J. Appellee, Mose Brown, sued the appellants, E. O. Barnett Bros., to recover the sum of $125, the purchase price of a horse bought by him from them, with interest from June 17, 1918, the date upon which the horse was taken from appellee's possession, alleging a breach of the warranty of title.

This cause was heard in the court below on an agreed statement of facts and in the judgment of the court there was incorporated a summary of these facts with accompanying declarations of law applicable thereto. From that judgment we copy the findings which there appear:

"The court makes the following findings herein:

"*First.* That at the time of the sale of the mare by defendants to the plaintiff here the defendants, E. O. Barnett Bros., had no title to the mare.

"*Second.* That at the time of the sale the plaintiff, Mose Brown, did not know of any litigation about the mare.

"*Third.* That at the time of the payments to the defendants by the plaintiff here for the mare the plaintiff, Mose Brown, was relying on the advice and instructions of his attorney, Oscar Barnett, of the firm sued here, that the title to the mare was in the defendants, Barnett Bros.

"*Fourth.* That at the time of the payments as above the plaintiff, Mose Brown, did not know, and could not know, that the title would be adjudged to be in Joe Porter, for the reason that the payments were made in October and November, 1917, and that the Supreme Court did not finally adjudicate the case until May 6, 1918.

"*Fifth.* That there was a breach of warranty in the sale of the mare by the defendants to the plaintiff."

These findings—which the agreed statement of facts appears to warrant—leaves but little for us to decide.

There was an implied warranty of the title; and that title failed.

Appellants say, however, that the horse had a usable value to appellee, which should have been assessed and credited upon the purchase price, and that this is especially true inasmuch as the usable value of the horse was assessed by the court and jury in litigation between appellants and Porter. But appellee here was not a party to that litigation, and his rights were not affected by it. It is true that appellee had the use of the mare from the time he purchased her until she was taken away from him at the conclusion of the Barnett and Porter litigation, and that this use had a money value, and that the court below refused to assess it and credit on the purchase price. But no error was committed in that respect.

In 35 Cyc. at p. 612, in the article on Sales, the law is announced as follows: "Where the goods have been delivered to and used by the buyer, who subsequently rescinds the sale and sues to recover the purchase price, it has been held that there should be no allowance to defendant for the value of such use or to plaintiff for the interest on his money, but that the one should offset the other."

The reason for the rule stated which is given in the cases cited in the note to the text is that the seller cannot, through the failure of the title, which he has impliedly warranted, change the attitude of the purchaser to that of a mere hirer.

It is also asserted that the payments of purchase money were voluntarily made and cannot, therefore, be recovered. But they were made, not only under an implied warranty of title, but under the assurance of a title which the Barnetts were vigorously asserting in litigation which they finally prosecuted to this court. These payments were made before the final termination of the litigation between the Barnetts and Porter and before the mare had been taken from appellee's possession and at a time when, according to the finding of the court below, appellee was relying upon the assurance of one of the appellants that the title was good notwithstanding the litigation.

The court below rendered judgment for the puchase price of the horse, with interest thereon, from the day she was taken out of appellee's possession, which judgment was correct and is, therefore, affirmed.

MILLER v. CHICAGO MILL & LUMBER COMPANY.

Opinion delivered November 24, 1919.

1. ADVERSE POSSESSION—VOID COMMISSIONER'S DEED—COLOR OF TITLE.—A commissioner's deed under decree of the chancery court constitutes color of title.

2. TENANCY IN COMMON—RELATIONSHIP.—If a void decree for the whole title to land constitutes the parties to the action tenants in common, such relationship does not exist between one of the parties thereto and innocent grantees from the purchaser.

3. ADVERSE POSSESSION—NOTICE OF CLAIM.—Where one claims land adversely under color of title, he need not give notice to another claimant residing in a distant State, that he is claiming the land, when he does not know of the other party, his whereabouts, or his claim.

4. LIMITATIONS—DISABILITY OF COVERTURE.—Defendant claimed title to wild lands under color of title, and paid taxes thereon from 1882 until 1917. *Held,* plaintiff's right, claiming an interest in the land, is barred under Kirby's Digest, section 5057, when plaintiff attained her majority in 1884, was married in 1891, obtained a divorce in 1897, and remained unmarried until 1906.

5. ADVERSE POSSESSION—PAYMENT OF TAXES ON WILD LANDS.—Payment of taxes on wild lands for a portion of the seven-year period, may be joined to actual adverse possession for the remainder of the period, so as to give title by limitation.

Appeal from Mississippi Chancery Court, Osceola District; *Archer Wheatley,* Chancellor; affirmed.

John H. Miller and *Wright, Miles, Waring & Walker,* for appellant.

1. The chancery court of Mississippi County had no jurisdiction to order a sale as to the plaintiff's interest because she was a non-resident and the probate court had jurisdiction; the deed made under said decree by her guardian to Mitchell was void and she never has been divested of title; the deed of Mrs. Todd and her daughters to Mitchell constituted plaintiff and Mitchell tenants in common and defendants are also tenants in common with plaintiff; that the payment of taxes being by a tenant in common inured to the benefit of plaintiff. There never was any actual ouster of plaintiff or adverse holding to plaintiff's knowledge by defendants and no statute of limitation has run against her, and the evidence shows no *laches.* Under the decree of May 8, 1882, the appellant was the owner of an undivided half interest in the lands and Mrs. Todd and her daughters the owners of the other half. To that extent the decree was valid, as the chancery court had jurisdiction and the decree

followed the articles of agreement entered into on May 1, 1882, between Mrs. Todd and Jarnigan, as guardian. Insofar as said decree adjudicated the rights of the respective parties it was valid, but that portion of the decree which ordered the sale of the minor's interest in the land was void.

2. While the decree of May 8, 1882, in case of Jones against Todd was good so far as it settled the ownership of the land; it was void so far as it ordered a sale of the minors' interest in the lands, as the chancery court had no jurisdiction, but only the probate court. Art. 7, sec. 34, Constitution 1874; 98 Ark. 63; 135 S. W. 461.

3. If that decree was void, the deed attempted to be made by Jarnigan was void and did not pass the title of Susie Kirk Jones. The deed was also void because of its improper form of execution. It was not signed in the name of the minor by the guardian.

4. The deed of July 28, 1882, from Jarnigan and the Todds to Mitchell, trustee, made in pursuance of the decree of May 8, 1882, was void as to the minor, Susie K. Jones, and did not convey her title but was valid as to the Todds. Mitchell acquired only the Todd title, a half interest, and Mitchell became a tenant in common with appelant, who owned the other half interest. The deed subsequently made by Mitchell was only a quitclaim deed and only conveyed such interest as he had and he did not undertake to convey the interest of the minor. Appellant was a tenant in common with Mitchell and his subsequent grantees, and unless she is barred she is entitled to prevail.

5. Plaintiff's claim is not barred by limitation. The lands are wild and unenclosed. For the rules as to tenancy in common, see 48 Ark. 135; 55 *Id.* 104; 18 Ala. 50; 52 Am. Dec. 212; 49 Am. Rep. 100; 65 Ark. 422; 98 *Id.* 422; 102 *Id.* 611. As to the character of the Mitchell deed, it did not pass the title of Susie K. Jones but only the Todd's interest and Mitchell and his grantees were tenants in common. There was no actual ouster or disseizin. 32 Col. 483; 30 Vt. 324; 145 S. W. 538; 22 Ark. 84; 57 *Id.* 97; 32 S. E. Rep. 269.

6. Defendants have not sustained the burden cast on them to bring home to plaintiff notice of adverse holding and of their claim to the *whole* property. 30 Vt. 324; 39 *Id.* 534; 46 Col. 539; 18 *Id.* 75; 138 S. W. 959.

While the seven-year taxpaying act of March 18, 1899, Kirby's Digest 5057, is constitutional as held by this court (74 Ark. 302; 78 *Id.* 95), it only applies to wild lands and has no application to others. 45 Ark. 81. There must be proof of adverse possession to start the statute of limitations. 57 Ark. 97. The payment of taxes under this act inured to the benefit of plaintiff, and the possession of one cotenant is that of the other, and all the exceptions as to minors, married women, etc., are not interfered with by the act. 94 Ark. 122; 105 *Id.* 309; 109 *Id.* 281. It was the duty of defendants and their predecessors to pay those taxes to protect their own interest and the payment protected the interest of their cotenant. Mere assertion of title is not proof of title. Something more must be done. 20 S. W. 814; 57 Ark. 97. They failed to show acts of adverse ownership brought home to the knowledge of plaintiff.

7. No laches of plaintiff were shown. 145 U. S 372; 152 *Id.* 416-17; 228 Fed. 378; 75 *Id.* 301. See also as to laches, 129 Ala. 619; 25 Fla. 886; 29 N. E. 866; 92 *Id.* 37; 72 Atl. 745; 130 Pac. 652; 32 N. E. 413, and many others.

Wm. C. Gilbert, W. R. Satterfield, Hughes & Hughes, Lamb & Rhodes, Hawthorne & Hawthorne and *Charles T. Coleman,* for appellees.

1. Courts of equity have always had jurisdiction in partition proceedings. 19 Ark. 233; 83 *Id.* 554. This case is very similar to 79 Ark. 19. If we treat the contract as admissible in evidence and regard the decree as the culmination of a suit brought for the sole purpose of carrying out the contract, the suit must have presented two grounds of equity jurisdiction, viz., the question of title to wild land and the matter of partition, but the decree must be construed without reference to the contract.

2. This is not an appeal from, but a collateral attack on, the decree of May 8, 1882. If it were not an appeal, as the pleadings and evidence are not of record, this court will presume the decree is correct and affirm it. 136 Ark. 376; 78 *Id.* 598; 63 *Id.* 516; 45 *Id.* 240. Susie K. Jones was the plaintiff in that decree as here. She brought the suit by guardian, and she is bound by the decree the same as if she had been an adult. 55 Ark. 22. The recitals show that the decree of May 8, 1882, was within the general jurisdiction of the court, and it is impervious to collateral attack. The presumption is that the court had jurisdiction. 18 U. S. (Wallace) 350; 66 Ark. 416. The burden is on plaintiff to show want of jurisdiction, as jurisdiction is presumed. 63 Ark. 513; 66 *Id.* 416; 77 *Id.* 497; 75 *Id.* 176; 79 *Id.* 16. In a collateral proceeding the judgments of domestic courts of general jurisdiction are presumed to be within jurisdiction unless from an inspection of the record itself, it can be clearly seen that they are without. 61 Ark. 474. See also 44 *Id.* 426, 270; 121 *Id.* 478. That decree recites a finding that plaintiff and defendants are entitled to liens on the lands to secure debts and ordered a sale to pay these debts, and it is affirmatively shown that the subject-matter of the suit was within the jurisdiction of the court. That decree is not assailable on collateral attack. 77 Ark. 504; 61 *Id.* 464; 75 *Id.* 176; 79 *Id.* 19; 135 *Id.* 362; 125 *Id.* 298; 1 Black on Judgments, § 271. Each of the defendants pleaded the seven years' statute of limitation. Appellant absolutely failed in her attack on that decree, and this disposes of her case. The other questions are unimportant.

3. The statute of limitation was pleaded, and plaintiff is barred by the statute and the payment of taxes by defendants did not inure to the benefit of plaintiff as a cotenant, but defendants have paid taxes for the necessary seven years and for four years preceding and plaintiff is barred by the tax act. 74 Ark. 302; 100 *Id.* 582; 96 *Id.* 524; 82 *Id.* 51.

The plea of cotenancy does not aid plaintiff's cause. A conveyance by a cotenant of the entire estate to a

stranger gives color of title, and if possession is taken and the grantee claims title to the whole, it amounts to ouster of the cotenant and the possession of the grantee is adverse. 102 Ark. 611. An ouster or disseizin is never presumed from the mere fact of possession, but it may be proved by such possession and a notorious claim of exclusive right. 148 S. W. 588. The claim of of absence and distance from the *locus in quo* and that the defendant gave her no notice is of no avail to plaintiff, as it was impossible for defendants to give notice, as they had no knowledge of her name or whereabouts and actual notice was not necessary, as the law does not require impossibilities. If the color of title is exclusive and the acts of the tenant in possession are in accordance with the color of title, this is all the law demands. 143 S. W. 588; 117 Ark. 128.

4. The Chicago Mill & Lumber Company or those under whom it claims obtained decrees obtained title confirming its title. A decree confirming title can not be assailed collaterally except for want of jurisdiction. 22 Ark. 118; 52 *Id.* 400; 59 *Id.* 15; 62 *Id.* 421; 75 *Id.* 175.

5. The doctrine of laches should be applied as the facts call for it. The claim is stale. 55 Ark. 85; 88 *Id.* 333; 83 *Id.* 385; 19 *Id.* 16; 14 *Id.* 62; 101 *Id.* 235; 55 *Id.* 93; 112 Ark. 473; 145 U. S. 368; 209 S. W. 653.

SMITH, J. This is a suit in equity brought by appellant to confirm and quiet title to an undivided half interest in certain lands situated in Mississippi County, Arkansas, which are alleged to be wild and unimproved. These lands are said to be worth now a million and a half dollars and several very interesting questions are discussed in the briefs, yet we think the legal principles which control the decision of the case are simple and well defined.

Appellant's right to the relief prayed is denied upon the grounds, among others, that her suit is barred by the statute of limitations and by laches, and while we think both defenses are well taken we do not discuss the question of laches, as a decision based upon that ground

would require a very lengthy recital of facts, and we regard it unnecessary to consider that defense, as the defense of limitations is equally decisive.

Certain depositions were taken and certain other facts were brought into the record by stipulation of counsel, from which we extract the following statement: Appellant was born February 22, 1866, and her father, from whom she inherited her title, died March 23, 1867, and one Jarnigan was appointed guardian of her person and estate on November 28, 1881. There was a decree of the chancery court of Mississippi County, to which appellant, through her guardian, was a party, rendered on May 8, 1882, ordering a sale of the lands in suit, and the deed to the purchaser under this sale was executed and delivered July 28, 1882. Appellant attained her majority on February 22, 1884, and married one Alfred Lacour on August 3, 1891. She obtained a divorce from Lacour in 1897 and thereafter remained unmarried until November 28, 1906, at which time she married John H. Miller, since which last date she has been a married woman. The present suit was filed July 28, 1917, which is more than thirty-five years after the date of the decree which she assails, and since its rendition and the sale thereunder there have been many conveyances—the number is said to run into the hundreds—of the various tracts of land there described.

This decree of sale is attacked upon the ground that the chancery court was without jurisdiction, and it is said that its effect was to render the parties to it tenants in common. It is only by asserting a tenancy in common that appellant seeks to avoid the operation of the statute of limitations.

That decree ordered a sale of the whole title and interest, and the commissioner's deed to the purchaser purported to convey the whole title, and each successive deed in the various chains of title from that purchaser have purported to convey the entire estate, and by stipulation it is agreed that the present claimants, who were defendants below and are the appellees here, have paid the

taxes on said lands while claiming the title thereto by virtue of the muniments set out in the various answers; but it was not admitted that such muniments constituted color of title.

(1) The failure to make an admission that the deeds constituted color of title is unimportant, as it is manifest they did constitute color of title. *Fletcher* v. *Joseph,* 105 Ark. 646.

A major portion of the lands are wild, while other parts have been in the actual adverse possession of some of the defendants for more than the statutory period, but it is stipulated that the lands have either been unimproved and unenclosed or have been in the actual possession of the defendants since 1882, during which time they and their predecessors in title have paid the taxes due thereon.

(2) We do not pass upon the validity of the decree of sale; nor do we stop to decide whether it constituted the parties thereto tenants in common or not, as we think the facts set out above disprove the existence of that relation between appellant and appellees—none of whom were parties to that decree.

(3) It is said in appellant's behalf that she lived in California, three thousand miles from the *locus in quo,* and had lived there since she was a small child, and that neither appellees nor their predecessors in title gave her any notice that their possession was intended to be exclusive and adverse, and that she had no knowledge of that fact. But her existence and whereabouts and claim of interest in the land were unknown to appellees, and it would have been impossible for them to give any notice except that constructive notice arising from the facts herein previously recited.

A similar contention in regard to the lack of notice was made in the case of *Wilson* v. *Storthz,* 117 Ark. 418; but we disposed of it there by saying:

"The facts which we have recited show that there was never any question with Storthz about the interest which he had purchased, nor that his holding was ad-

verse. It is true his co-tenants received no actual notice of this adverse holding, but none could have been given them. Storthz was unaware of their existence." See, also, other cases there cited.

As appellant and appellees are not tenants in common, it follows that appellees could, by actual possession of the cleared land, or by payment of taxes on the wild lands, acquire title against appellant, and this they appear to have done according to the recitals of the agreed statement of facts.

(4) Appellees and their predecessors paid the taxes each year from and after 1882, and appellant was discovert from the time of her divorce in 1897 until her remarriage in 1906, a period of nearly nine years. So that appellant's right to sue became barred by these payments of taxes for a period of more than seven years made during the time she was not under the disability of coverture. Section 5057 of Kirby's Digest.

(5) As has been said, actual possession of some of these lands has been taken by some of the owners made defendants herein; but that fact did not interrupt the running of the statute in their favor, as in the case of *Gaither* v. *Gage,* 82 Ark. 51, it had been held (to quote a syllabus) that "payment of taxes on land for a portion of the period of limitation of seven years, while the land was unimproved and uninclosed, may be joined to actual adverse possession for the remainder of the period so as to give title by limitation."

It follows that appellant's cause of action is barred and the decree dismissing it is, therefore, affirmed.

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