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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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T. D. CRAWFORD
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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
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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

BARBER *v.* SAGER.

Opinion delivered November 24, 1919.

1. JUDGMENTS—DECREE SUSTAINING DEMURRER—CONCLUSIVENESS.—In an action for specific performance, a decree sustaining a demurrer, after the time for correction for mistake under Kirby's Digest, section 4432, has expired, is final and conclusive, in a subsequent suit to set it aside, as to all the allegations in the complaint, but is not conclusive of other matters.
2. JUDGMENTS—FRAUD IN PROCUREMENT—VACATION.—In an action to set aside a decree in an action for specific performance at a previous term, allegations that the decree was rendered in plaintiff's absence, sustaining a demurrer which had been filed two weeks before the term and after a withdrawal of the answer, without plaintiff's knowledge, plaintiff having been led to expect a trial on the merits, *held,* not to show fraud practiced upon the court in the procurement of the decree, under Kirby's Digest, section 4431.

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

James E. Hogue and *George M. Heard,* for appellant.

1. The decree should be set aside, under Kirby's Digest, section 4431, subdivision 4. Appellant's showing of fraud or mistake is complete. Appellant was deprived of his day in court. 128 Ark. 50. An act of the court should prejudice no man. Broom, Legal Maxims 99. The act of the court deprived appellant of his right to be heard by the court to which he had applied for relief. It closed the door of justice to him. 128 Ark. (*Montague* v. *Craddock*). Any act of the court, however innocent, which deprives parties of their rights under the statutes

constitutes a fraud in law against which equity will relieve. 128 Ark. 59; 123 *Id.* 443; 105 *Id.* 266; 128 *Id.* 269.

2 On the intervention, Sanders and Devore were not parties to the suit; they intervened without notice to plaintiff and took a decree without notice to him. If not a fraud, it was certainly taking judgment without notice. 31 Cyc. 132; 63 Ark. 254; 2 A. & E. Enc. of L., p. 180. The demurrer should be overruled, and the judgment reversed.

John W. Moncrief, for appellees Sanders and Devore.

1. If fraud was practiced as alleged, appellant's remedy was by appeal. 86 Ark. 524. The Sagers had the right, with the permission of the court, to withdraw the answer and file a demurrer. If any error was committed the remedy was by appeal. Appellant was not prevented from being heard upon the demurrer. He was not told, nor claimed that anyone told him, that no questions of law would be raised; nor was he told to remain away from court; nor was he told that no demurrer would be filed. 114 Ark. 493.

2. When fraud is charged the facts or particulars must be set forth; general allegations of fraud or deception are not sufficient, nor is it sufficient to allege that the court made an error as to its opinion of the law. 90 Ark. 170; *Ib.* 263. The remedy, if any, is by appeal. 63 Ark. 254. If the dismissal was premature, erroneous or irregular, the remedy is by appeal. 105 Ark. 406-410.

Where a demurrer is determined, the judgment is final, unless leave is granted to amend the pleadings. 31 Cyc. 351; 23 *Id.* 670-1. See also 105 Ark. 406, 410.

The last complaint stated no cause of action, alleged no fraud and the question is *res judicata.*

C. L. O'Daniel, for appellees William and Rebecca Sager.

1. No fraud is shown and fraud is never presumed; it must be alleged specifically and proved. 11 Ark. 378; 38 *Id.* 419-427; 63 *Id.* 22.

2. Fraud sufficient to vacate a decree must be a fraud extrinsic of the matter tried in the case. 104 Ark. 308. The fraud must be in the procurement of the judgment itself. 118 Ark. 449. The fraud must be upon the court in procuring the decree or judgment. 75 Ark. 424; 73 *Id.* 444.

3. The decree was valid and the Sagers committed no fraud upon anyone. The demurrer to the original complaint was properly heard and sustained. Kirby's Digest, § 6096. The original complaint filed by Barber should have been dismissed on demurrer. Its allegations were not sufficient. 27 Ark. 369; 23 *Id.* 200; 17 *Id.* 279; 38 *Id.* 598. A contract within the statute of frauds will be presumed to have been made in writing. 38 Ark. 598. Exhibits not the foundation of the action or defense can not be considered on demurrer. 53 Ark. 479; 99 *Id.* 222; 104 *Id.* 459.

4. Judgment on demurrer is final until reversed on appeal. 63 Ark. 258.

5. Appellant's motion to vacate the decree is barred. Kirby's Digest, § 4432.

SMITH, J. This suit was brought by appellant Barber for the purpose of enforcing the specific performance of a contract to convey land and for vacating a decree previously pronounced in another suit between Barber and William Sager and his wife under the provisions of section 4431 of Kirby's digest. This previous suit had itself been brought for the purpose of compelling the Sagers to specifically perform a contract to convey land to Barber.

The first complaint against appellee Sager and his wife was filed on June 24, 1917. William Sager filed an answer to this complaint in vacation on July 14, 1917, but his wife filed no answer. No notice of the filing of this answer was given and Barber and his attorney were not advised of that fact until about two weeks before the beginning of the term of court to which the suit was brought and which convened on September 24. As soon as Barber's attorney was advised that this answer had

been filed he took up by correspondence with Sager's attorney the question of obtaining an agreement by which the testimony on both sides might be taken in open court and the cause heard at the September term. No agreement had been reached when court convened, and on that day Sager appeared through other attorneys and withdrew his answer and filed a demurrer and also a separate motion to dismiss the complaint for want of a bond for costs.

On the second day of the term appellees, Devore and Sanders, who had not been made parties to the first suit (but were made defendants in this), appeared, through still other attorneys, and filed an intervention, which was in the nature of an answer to the complaint and cross-complaint, against both Barber and Sager and his wife. This pleading contained an allegation that Barber was a nonresident of the State, and that he refused to give a bond for costs, and that Barber had not and would not prosecute his suit, and that the complaint did not state a cause of action.

On the day this intervention was filed a decree was rendered sustaining the demurrer and granting the interveners the relief prayed by them against the Sagers —the intervention being in the nature of a suit for specific performance to compel the conveyance of the same lands described in Barber's complaint.

On March 18, 1918, Barber filed his second complaint, making the Sagers and Devore and Sanders defendants, which recited the facts set out above, and in this complaint he asked that the decree rendered at the preceding term be vacated and that the Sagers be compelled to specifically perform by conveying him the lands described.

On May 1, 1918, the defendants in the last complaint filed separate demurrers, which were sustained on February 3, 1919, and this last complaint dismissed for want of equity. From this decree Barber has prosecuted this appeal. The pleadings and the decree in the first suit are made exhibits to the complaint in the second suit.

All the proceedings referred to were had in the chancery court for the Southern District of Arkansas County. The court in that district convenes on the first Monday in February and the fourth Monday in September of each year.

Appellant Barber insists that the decree which he seeks to vacate was procured by fraud practiced upon the court. His insistence is that his first complaint was filed on June 24, 1917, and under the Pleading and Practice Act the answer was due to be filed by noon of the first day of court after the service of the summons and no trial could have been had, except by consent, until ninety days after the pleadings were completed and that in any event he could not have demanded a trial until long after the time for the court to meet. That the answer of Sager was filed with the clerk in vacation on July 14, 1917, but to make it effectual, as if filed in court on that date, it was necessary for Sager to give the notice called for by section 6118 of Kirby's Digest and that the filing of this answer made up the issues so far as Sager was concerned and, in the absence of any time being fixed by the court for taking depositions, appellant had forty days after the answer was filed in court, or after notice that it had been filed in vacation, in which to take his proof. And, further, that the title to this land was in Mrs. Sager, who had not answered, and she had until noon of the first day in which to answer, in which event appellant would have had forty days from the filing of her answer in which to take his proof.

Appellant says these facts led him to believe that the complaint was deemed sufficient, not to be demurrable, and that the case would come to trial on its merits and that it was a fraud to file an answer which led him to believe that the case would be tried upon the issues made by the complaint and answer and to thereafter file a demurrer and to take a decree sustaining the demurrer, in the absence of the plaintiff, and without notice to him that this would be done.

The concession is made that "there were no agreements in this case as to when the case should be taken up nor for any notice to be given by one party to the other of any desire to call it up for trial," but the contention is made that "the law itself spoke the rights of the parties in plain and unmistakable terms, and that after the pleadings had been made up and the issues joined the statute itself gave the parties time in which to take their proof," and that it was a fraud in law to disappoint this expectation without giving notice that the answer would be withdrawn and the demurrer filed.

In opposition to granting the relief prayed it is pointed out that the motion to dismiss for want of a bond for costs had been filed for two months before the sitting of the court and that it is recited in the last complaint that Barber was advised on October 1, 1917, that the demurrer had been sustained and his complaint adjudged not to state a cause of action.

Appellees also say that appellant is precluded by section 4432 of Kirby's Digest from saying that the decree on the demurrer was prematurely rendered. That section reads as follows:

"Section 4432. The proceedings to correct misprisions of the clerk shall be by motion, upon reasonable notice to the adverse party, or his attorney in the action. The motion to vacate a judgment because of its rendition before the action regularly stood for trial can be made only in the first three days of the succeeding term."

The decree was rendered September 25, 1917, and the next ensuing term of the court convened on the first Monday in February and the complaint and motion to vacate were filed March 8 thereafter. So that if relief is to be granted it must be granted upon the ground that fraud was practiced upon the court in obtaining the decree.

Appellees discuss the allegations of the first complaint and insists that it was demurrable for the reason that the contract sued on was void under the statute of frauds and that the demurrer was properly sustained. Attention is also called to the fact the complaint alleges

that before court convened appellant's solicitor wrote to counsel who had filed the answer for the Sagers, and received no reply to this letter, whereupon appellant's counsel called the other attorney over the telephone and was advised by that attorney that he no longer represented Sager but that other counsel had been employed, who had filed a demurrer and perhaps other pleadings.

(1) It is unnecessary to determine here whether the demurrer was properly sustained or not; any error committed in that respect could have been cured by appeal. On the other hand, only those matters are concluded by the decree on the demurrer which were within the allegations of the complaint. The decree in so far as it adjudged the relative rights of the Sagers and the interveners under the intervention was not, and is not, binding on Barber, as he was not properly made a party to any controversy between them; but the decree is final and conclusive as to all the allegations contained in the complaint against the Sagers. *Luttrell* v. *Reynolds,* 63 Ark. 254; *Stewart* v. *Wood,* 86 Ark. 504. In the case of *Stewart* v. *Wood, supra,* a syllabus is as follows:

"Kirby's Digest, section 4431, sub-division 4, providing that 'the court in which a judgment or final order has been rendered shall have power, after the expiration of the term, to vacate or modify such judgment or order. * * * Fourth, for fraud practiced by the successful party in the obtaining of the judgment or order,' does not authorize the court at a subsequent term to set aside a judgment duly rendered for mere errors of law committed by the court."

(2) We are, therefore, powerless to grant relief except upon a finding that fraud was practiced upon the court in procuring the decree; and we think the allegations of the complaint insufficient to support that finding. Appellant was advised that the Sagers had changed attorneys and that a demurrer and possibly other pleadings had been filed. There is no allegation that any agreements were broken or deception practiced. Sager had the legal and moral right to file a demurrer and to press

it to a decision, and that decision was rendered at the regular term of the court then being held pursuant to the statute. The decree of the court below is, therefore, affirmed.

ROSSELOTT v. ROAD IMPROVEMENT DISTRICT NO. 1 OF LAWRENCE COUNTY.

Opinion delivered November 24, 1919.

1. DRAINS AND DITCHES — DAMAGE TO LAND — NEGLIGENCE OF CONTRACTOR.—Although contractors construct a drainage ditch, under plan and in accordance with contract, if they injure the property of another through the negligent exercise of their right, they are responsible therefor, and must respond in damages.
2. SAME—SAME—SAME—COMPLAINT.—The complaint, in an action for damages for the negligent construction of a drainage ditch, alleged that the failure to leave openings in the work was negligent. *Held,* that allegation rendered the complaint valid, and a demurrer to the complaint was improperly sustained.

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

W. P. Smith, for appellant; *Lester L. Gibson* and *Beloate & Anderson,* of counsel.

The complaint stated facts sufficient to constitute a cause of action grounded upon negligence. It stated facts and not merely a conclusion of law. 83 Ark. 78; 118 *Id.* 1.

J. D. Head and *Ponder & Gibson,* for appellee.

Appellee was a contractor, building a road under a contract with the commissioners of Road Improvement District No. 1, a body politic and corporate under act No. 338, Acts 1915, and not liable for negligence except for negligence or unskillfulness in constructing the improvement. 110 Ark. 116; 118 *Id.* 1; 83 *Id.* 78. Under these decisions the court was correct in sustaining the demurrer.

HUMPHREYS, J. Appellant instituted suit against appellees in the Eastern District of the Lawrence Circuit

Court, to recover damages in the total sum of $850, on account of damages to his crops and land, occasioned by the alleged negligence of the contractor in constructing a road along the east side of section 22, township 17 north, range 2 east, in said county. The allegation of negligence contained in the complaint is as follows: "That the defendants, their agents, servants and employees carelessly, negligently and without regard to the interests and welfare of plaintiff constructed a dump or levee along said line, whereby three natural watercourses were filled, causing the water to remain on plaintiff's said land, upon which he undertook to make a crop for the year 1918, whereby he was greatly inconvenienced, annoyed and his said crop of corn and cotton, and other farm products ruined and damaged, and his premises rendered untenable during even ordinary rains, and for a long time thereafter. Whereas, if opening had been left in said levee at each of the natural drains, as should have been done, he would not have suffered such injuries." A demurrer was sustained to this allegation of negligence, on the ground that it stated a mere conclusion of law and not facts sufficient to constitute negligence on the part of an independent contractor.

Appellant stood upon his complaint; whereupon the court rendered judgment dismissing it. From the judgment sustaining the demurrer and dismissing the complaint an appeal has been duly prosecuted to this court.

Appellant insists that the complaint stated facts sufficient to constitute a cause of action grounded upon negligence. Appellee Newman B. Gregory Construction Company insists that the allegation of negligence in the complaint is merely a conclusion of law, and cites the case of *Wood* v. *Drainage District No. 2, Conway County,* 110 Ark. 416, in support of its contention. The rule laid down in the Wood case, as to the sufficiency of an allegation of negligence as a basis for recovery against an independent contractor, is that the allegation must disclose facts that would show an improper or unskillful construction of the road. It was said, in substance, in

that case that no facts were set out in the complaint inconsistent with a proper or skillful construction of the road. The allegation of negligence in the instant case is distinguishable from the allegation in the Wood case for the reason that it does set up facts alleged to be inconsistent with a proper and skillful construction of the road. It is alleged in the complaint that appellee, Newman B. Gregory Construction Company, in constructing the road, carelessly and negligently failed to leave openings at each of three natural drains across the land where they intersected the levee for the waters to escape, thereby causing the lands to overflow from ordinary rains to such an extent that it destroyed his crops in the sum of $350, according to an itemized statement contained in the complaint, and injured his lands in the sum of $500. Even if appellee construction company built the road in accordance with plans and specifications of the district but did it in an improper or unskillful manner, it would be responsible to appellant for damages resulting to his crops and lands from overflows occasioned by such negligence. This court said in the case of *Stanton-White Dredging Co. v. Braden,* 137 Ark. 127, that (quoting the first syllabus): "Though contractors construct a drainage ditch, under plan and in accordance with contract, if they injure the property of another through the negligent exercise of their right, they are responsible therefor, and must respond in damages."

It is alleged in the complaint that the failure to leave such openings was a negligent construction of the road. For the purposes of the demurrer, this allegation is conceded, and it was error for the court to sustain it.

For the error indicated, the judgment is reversed and the cause remanded with directions to overrule the demurrer to the complaint.

SLAYTOR *v.* STATE.

Opinion delivered November 24, 1919.

1. ASSAULT WITH INTENT TO KILL—INTENT—MALICE.—An intention to kill may be conceived on the instant; malice, while necessary, may be implied. Implied malice may rise out of the circumstances of an assault.
2. SAME—SAME—SAME.—Malice and intent to kill will be inferred where the accused advanced upon witness remarking that he would "cut his heart out," held an open knife in his hand, and did in fact cut witness two or three times.
3. SAME—SAME—SAME.—It is error to charge the jury that defendant is guilty of an assault with intent to kill, if he assaulted a certain person with a knife with intent to take his life, but the error is rendered harmless, when the court, in other instructions, told the jury that defendant would not be guilty if he acted in necessary self-defense, nor if the assault were under provocation sufficient to make the passion irresistible.
4. SAME—SAME—SAME—SELF-DEFENSE.—One who is the aggressor can not invoke the doctrine of self-defense until he has, in good faith, endeavored to withdraw from the conflict.

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

D. A. Bradham and *B. S. Herring,* for appellant.

1. The evidence shows that the cutting was the result of a mutual combat without the slightest malice or intent to kill on part of appellant. Blankenship was the initial mover in the whole matter, he used the first insulting language, struck the first blow and threw brickbats at Rufus Slaytor as he ran off. There is no proof of malice or intent to kill; both are necessary, 88 Ark. 579.

2. It was error to give instruction No. 1 for the State. 82 Ark. 64; 88 Ark. 579. The instructions given are abstract, as there was no evidence upon which to base them and they assume that a homicide had been committed. No. 1 is not the law of this case. None of the instructions cure the vice of these abstract ones and Nos. 1 and 20 were palpably prejudicial.

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

1. Malice and intent to kill were both shown by the evidence. Malice may be express or implied. 96 Ark. 52; 82 *Id.* 64; 117 *Id.* 432.

2. Taking all the instructions together, they contain no error and justify a conviction. 82 Ark. 64; 93 *Id.* 409; 62 *Id.* 307; 99 *Id.* 580. On the whole case there is no error.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Bradley Circuit Court, for an assault with intent to kill one E. P. Blankenship, by cutting him with a knife on or about March 4, 1919. His punishment was assessed at two years' imprisonment in the State penitentiary. From the judgment of conviction, an appeal has been duly prosecuted to this court.

(1-2) It is insisted by appellant that the undisputed evidence showed that the cutting was the result of a mutual combat, without the slightest malice or intent to kill on the part of appellant. Both intent to kill and malice were necessary elements of the crime for which appellant was convicted, and the cause should be reversed unless both essentials are inferable from the evidence. While an intent to kill is a necessary essential, it may be conceived on the instant. *Davis* v. *State,* 115 Ark. 566. While necessary for the assault to have been inspired by malice, it need not have been express malice; it may be implied. Implied malice may arise out of the circumstances of an assault. *Allen* v. *State,* 117 Ark. 432. E. P. Blankenship, the subject of the assault, testified, in substance, that he had sold appellant an organ on time; that appellant had moved without paying him for it; that, when he accosted and accused appellant on the streets of Warren with having moved his home and carried the organ with him, the negro denied the charge; that he told the negro he was lying about not moving, for he had sent some boys over to the house and found that he had gone; that appellant responded, "God damn you, I'll cut your heart out," and started at him with an open knife; that, as the negro advanced, he hit him with an ear of corn; that the negro

picked the corn up and threw it back at him, continued to advance, grabbed and cut him two or three times; that, when the crowd gathered, the negro broke loose and ran. The evidence clearly indicated a specific intent to take life with a deadly weapon, because one could not intend to cut another's heart out without intending to kill him, and the aggressiveness and viciousness of the attack, which immediately followed the use of the language, was sufficient to justify the finding of implied malice.

(3) It is also insisted by appellant that the court erred in giving instruction No. 1, which is as follows: "If you believe from the evidence that defendant, Rufus Slaytor, assaulted E. P. Blankenship with a knife with the intent to take the life of E. P. Blankenship, then you will find him guilty with intent to kill, as charged in the indictment."

This instruction was erroneous because it eliminated the right to kill in necessary self-defense and to mitigation if the assault was made under provocation sufficient to make the passion irresistible. This instruction, however, did not stand alone, but was qualified by other instructions to the effect that one could not be convicted of an assault with intent to kill if engaged at the time in necessary self-defense, nor if the assault was due to a sudden heat of passion without malice, either express or implied. In the case of *Satterwhite* v. *State,* 82 Ark. 64, the trial court gave two instructions, Nos. 12 and 14, which were, in substance, the same as instruction No. 1 given by the court in the instant case. The court upheld the verdict in that case because the jury must have understood they could not convict of assault with intent to kill if the assault was the result of a sudden heat of passion without malice, when instructions 12 and 14 were read in connection with other instructions so qualifying them. We think, after carefully reading all the instructions given by the court, and treating them together as the whole law of the case, the jury could not have concluded that they should convict appellant if the assault was made in necessary self-defense, or under a sudden

heat of passion without malice. In an oral instruction, the court told the jury that, in order to constitute an assault with intent to kill, the evidence must show that appellant would have been guilty of murder in the first or second degree. In other instructions, murder in the first and second degrees and manslaughter, voluntary and involuntary, were defined. Then, at the request of appellant, the following qualifying instruction was given: "The court further instructs you that where two men engaged in a sudden brawl or encounter or fight, and one of them kills the other under the excitement or passion aroused suddenly, and without malice, and in consequence of the sudden brawl, encounter or fight, that such killing would only amount to manslaughter, and in all cases where the killing, if it ensued, would only amount to manslaughter, the assault would be no higher than a simple assault. On the other hand, if you believe from the evidence that defendant was acting only in his self-defense from what appeared to him as a reasonable person that he was about to receive a great bodily injury or was about to lose his life, and that such danger was so urgent and pressing that it was necessary or appeared so to him, as a reasonable man, to strike with his knife, and that he did not provoke or bring on the difficulty and used all reasonable means at his command to avoid the assault, you will find him not guilty."

Instruction No. 1, thus limited and qualified, could not have led a jury of average intelligence to believe that it was proper to convict appellant if he committed the assault in necessary self-defense, or if the assault was the result of a sudden heat of passion without malice. Appellant also insisted that the court erred in giving the following instruction:

"You are instructed that the law of self-defense does not imply the right of attack. If you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, armed with a deadly weapon, sought the deceased with a felonious intent to kill him, or sought, brought on, or voluntarily entered into, a difficulty with

the deceased with the felonious intent to kill him, then the defendant can not invoke the law of self-defense, no matter how imminent the peril in which he found himself placed; unless you should further find that the defendant actually and in good faith endeavored to abandon and withdraw from the conflict before the fatal blow was given."

(4) It is contended that the first sentence in this instruction destroys the right of self-defense, because one can not defend himself without making an attack. The rest of the instruction is explanatory of the sense in which the court used the word "attack" in the sentence referred to. It is quite clear from a reading of the whole instruction that the court used the word in the sense of being an aggressor, and not in the sense of striking, using a weapon, etc. Of course, one could not defend himself without physical exertion of some kind, but he can not invoke the doctrine of self-defense, if the aggressor, until he has first endeavored to withdraw in good faith from the conflict. The word "attack" used in this sense, as reflected by the balance of the instruction, did not preclude appellant from getting the benefit of the evidence tending to show that in cutting E. P. Blankenship he was merely protecting himself against great bodily harm or death. It is also contended that the latter part of this instruction and certain other instructions given by the court were abstract and misleading. We are unable to agree with learned counsel in this contention. The instructions were responsive to the issues growing out of the evidence and were therefore in no sense abstract.

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

SMEDLEY v. MAUNEY.

Opinion delivered November 24, 1919.

SET-OFF—MAY BE PLEADED, WHEN—WHAT MAY BE SET-OFF—TIME OF ACQUISITION OF CLAIM.—The doctrine of set-off between a failing debtor and creditor is only applicable as to demands and counter-demands existing between them at the time of failure; it has reference to mutual accounts only, existing between the parties at that time; claims purchased or acquired after the failure of the insolvent can not be offset against a debt due said insolvent.

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

W. S. Coblentz, for appellant.

The overdraft of W. J. Mauney can not be offset by a deposit acquired by him after the insolvency of the bank. 3 R. C. L. 253; 21 L. R. A. 280, 647; 14 *Id.* 656.

Langley & Johnson, for appellees.

The set-off was properly allowed and there is no error. 98 Ark. 294.

HUMPHREYS, J. Appellees, sons and heirs of M. M. Mauney, deceased, who was a director and stockholder before his death in the Diamond State Bank in the town of Kimberly, brought suit against the appellants, all of whom were stockholders, and a part of whom were directors, in said bank, to recover out of the assets of the bank $150 paid by them on the indebtedness of said bank, alleging that said bank owned personal property out of which said indebtedness could be paid; also, alleging the necessity of a master to state an account, in order to determine the rights and equities of the several appellants. The prayer of the bill was for the appointment of a master, the sale of the property and a division of the proceeds thereof according to the respective rights and equities of the several parties.

A separate answer was filed by W. C. Rodgers, one of the appellants, denying that he was a stockholder in said bank at the time it failed, and, by way of cross-bill, claiming an indebtedness due him from the bank on ac-

count of a deposit in the sum of $115. Appellants, S. L. Smedley and W. M. Kizzia filed a joint answer and cross-complaint, consenting to a sale of the property, and alleging that at the time of the failure of the bank it owed S. L. Smedley $69, and W. M. Kizzia $71, on account of deposits; that, at the time of the failure of the bank, appellee, W. J. Mauney was indebted to the bank in the sum of $300 on account of an overdraft. The prayer of the cross-bill was that W. J. Mauney be required to pay the defunct bank his overdraft of $300.

W. J. Mauney admitted the overdraft, but claimed the right to an offset on account of owning a one-half interest in a deposit of $925 which the bank owed his father, M. M. Mauney at the time the bank failed.

The cause was submitted to the court upon the pleadings and the following agreed statement of facts: "The Diamond State Bank was insolvent at the time it closed its doors, April, 1913; that M. M. Mauney, the father of the plaintiffs, was one of the directors and defendants, Kizzia and Smedley, were depositors and directors; that M. M. Mauney and these defendants borrowed money to pay other depositors and that the plaintiff paid the balance of $150 and interest, making $181; that M. M. Mauney has since the time of the failure of the bank, died, and the plaintiffs were two of his heirs, and that they purchased the interest of the other heirs in M. M. Mauney's estate, and there was six heirs of M. M. Mauney; that at the time of the failure of the bank that defendant Kizzia had on deposit $71, and defendant Smedley had on deposit $69; that M. M. Mauney had on deposit $925.

"That the property asked to be sold in plaintiff's complaint sold for $200. That W. C. Rodgers has a valid claim of $115.

"That at the time of the failure of the bank, plaintiff W. J. Mauney had an overdraft with said bank of $300."

The court found that W. J. Mauney was entitled to offset his overdraft of $300 against his one-half interest in the $925 deposit of his father, which amount the bank

owed his father at the time it failed, and refused to give judgment against W. J. Mauney for the amount of $300 overdraft and interest thereon, less $77.57, on account of one-half of the proceeds from the sale of the assets of the bank, after paying the officers $44.85 as costs accumulated in the proceedings.

The only issue presented by the appeal is whether or not the court erred in permitting the overdraft of W. J. Mauney to be offset by the one-half interest in the deposit of $925, a part of which he inherited from his father, and a part of which he bought from the other heirs after the bank failed. The doctrine of set-off between a failing debtor and creditor is only applicable as to demands and counterdemands existing between them at the time of failure. It has reference to mutual accounts only, existing between the parties at that time. Claims purchased or acquired after the failure of the insolvent cannot be offset against a debt due said insolvent. 3 R. C. L., pp. 253 and 647; 14 R. C. L. 656; 21 L. R. A. 280.

On account of the error indicated, the decree is reversed and the cause remanded for decree in accordance with this opinion.

LONOKE v. BRANSFORD.

Opinion delivered November 24, 1919.

1. WORDS AND PHRASES—"PRICE."—"Price" implies value, usually in money.
2. WORDS AND PHRASES—PUBLIC UTILITY FRANCHISE—"AT THE SAME STIPULATED PRICE."—A renewal franchise to a water company provided that water was to be furnished "at the same stipulated price." No specific or definite amount was fixed. *Held*, the phrase referred to that rate fixed by the franchise which this one was superseding.
3. PUBLIC UTILITY — WATER RATES — DISCRIMINATION.—A franchise which required that water be furnished to all residences and business houses at $1 a month and to livery stables at $1.50 a month, irrespective of the amount of water used, is not discriminatory.

4. PUBLIC UTILITIES — CONTRACT WITH MUNICIPAL CORPORATION — RATES—CONFISCATION.—Contracts between municipal corporations and public utilities are placed in the same category with contracts between individuals. The enforcement thereof can not be interrupted upon the ground that they will result in the bankruptcy of the utility any more than the enforcement of contracts by individuals could be interrupted on such ground. The only remedy for such a condition is a modification of the rate by mutual agreement or consent by the municipal corporation and the public utility.

5. PUBLIC UTILITIES—REVISION OF RATES.—Kirby's Digest, sections 5445-48, confer upon a municipal corporation the power only to revise downward an unreasonable rate established in a franchise without the consent of the public utility.

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

Trimble & Trimble and *Chas. A. Walls,* for appellant.

1. The decree should be reversed because (1) there was a *bona fide* contract between Bransford & Son and Lonoke whereby water was to be furnished during the life of the contract at a stipulated price and (2) Kirby's Digest, sections 5445-5448, inclusive, do not authorize appellee or the court to fix arbitrarily his own rates, and (3) there has been no mutuality of contract between the town of Lonoke and Bransford & Son upon any other rate than that set out in the original contract and neither the court nor appellee could arbitrarily fix a rate without the consent of the town council. To "stipulate" means to make an agreement, bargain, settle terms, etc. 7 Words & Phrases, 6659; 113 Fed. 718. See also 88 N. E. 785. "Stipulated" as used in the contract of 1905 clearly referred to some amount that had been definitely fixed and agreed upon. This is conclusive of the fact that $1 a month for residences was the *stipulated* price referred to.

2. The rates having been fixed by the city council, the presumption is that they are reasonable, and the burden of proof is upon the company to show affirmatively that they are not. 99 Ark. 178; 54 *Id.* 112.

3. The finding of the court is that the contract is not governed by the rules applicable to contracts of individuals is not according to law. 80 Ark. 108; 211 S. W. 664; 206 U. S. 768. The court erred in enjoining the council from enforcing the rate which has been in force for 18 years.

J. B. Reed and *Carmichael & Brooks,* for appellees.

1. It becomes a mere matter of ordinance provision as to the fixing of the rate, and if it is unreasonable the court has a right to enjoin it. 3 Dillon on Mun. Corp. (5 Ed.), § 1327; 80 Ark. 108; 99 *Id.* 178. The law is clear that a franchise can not be repealed by a contract between a member of a town council and a public utility. 211 U. S. 265.

2. If there was a contract, as appellant claims, it would be inconsistent with the franchise and beyond the power of the committee of the town council to make and could not mean that the public utility should furnish an unlimited amount of water to one person and a smaller amount to another at the same price. The committee was not given power to fix the price at $1 and the rate of $1 was erased. It put the contract in the language of the resolution.

3. The court had a perfect right and full power to enjoin the carrying out of such a contract. If the rates were unreasonable and confiscatory the court had the right to set them aside. There must be mutuality in the contracts, not only in the making but enforcement thereof. Kirby's Digest, § 5445. The council may raise or lower the rates, but courts can modify a contract at the instance of a public utility. A binding contract must be binding on both parties. 101 Ark. 223. The statute gives the town the right to fix the rate. 99 Ark. 178 settles this case in favor of appellee. 204 S. W. 386. See also 225 Fed. 920; 206 U. S. 496; 194 *Id.* 517; 246 *Id.* 178; 248 *Id.* 429; 244 *Id.* 13; 204 S. W. 1074; 207 *Id.* 799; 199 *Id.* 999; 205 *Id.* 36; 192 *Id.* 958; 102 Atl. Rep. 901; 211 S. W. 664.

HUMPHREYS, J. Appellee instituted this suit against appellant in the Lonoke Chancery Court to enjoin the city and its officers from enforcing a water rate of $1 per month for residences, $1.50 for livery stables, and $2 for hotels and inns, upon the grounds, first that appellee had not entered into a contract with appellant to furnish water at the rates specified; second, that, if such a contract was made, it was inconsistent with the franchise granted to the predecessors of appellee; and, third, that, if such a contract were made, and was consistent with the franchise, it was confiscatory of appellee's property, and not enforceable as a contract. Appellant filed answer, denying each material allegation in the complaint.

The cause was submitted to the court upon the pleadings, ordinance No. 33 granting a water franchise to A. J. Edmondson and W. H. England, predecessors of appellee, the written contract between appellees and appellant pertaining to the water rate, certain minutes and records of the town, and the testimony of certain witnesses, upon which the issues were found for appellees and a judgment rendered by the court perpetually enjoining the enforcement of the rates fixed by the town council of Lonoke. From the findings and decree of the chancery court, an appeal has been prosecuted to this court, and the cause is before us for trial *de novo*.

It is first insisted by appellant that, according to the weight of the evidence, the predecessors of appellees entered into a contract with the town of Lonoke to furnish the inhabitants thereof water at the rate of $1 for residences, $1.50 for livery stables and $2 for hotels and inns, and that appellee renewed the contract at the same rate in 1905. The written contract entered into between appellant and appellee in 1905 contains the following provision: "It is further agreed that said parties of the second part will continue to furnish water at the same stipulated price until the termination of their franchise."

R. L. Sawyer, serving as an alderman when the water franchise was granted to Edmondson and England,

appellee's predecessors, testified that the rate was fixed by resolution at $1 per month for residences, and later amended by fixing the rate on livery stables and hotels at $1.50 per month.

Charles G. Miller, who procured the franchise for Edmondson and England, testified that it was procured on the understanding that the public utility would furnish water at the rate of $1 per month for residences and business houses, and $1.50 per month for hotels and livery stables; that the town refused to grant the franchise on any other condition; that he subsequently negotiated the sale of the plant to Bransford and Daniels for $1,000 less than the original price asked, on account of the low water rate theretofore agreed upon.

T. M. Fletcher, mayor in 1905, 1906 and 1907, testified that the town owned the plant at the time he was mayor, and fixed the rate at $1 a month to the consumer; that, about three years after he retired as mayor, the town sold the plant; that, after the change, the rate remained the same, except for livery stables and hotels.

J. M. Gates, mayor of Lonoke for five years, testified that he was familiar with the water rates fixed by the council, the same being $1 per month for residences and business houses, and $1.50 per month for livery stables and hotels.

The mayor of Lonoke, at the time he gave his evidence, testified that W. Y. Bransford discussed the question of raising the water rates with him in June, 1918; that the rate had always been $1 per month for residences.

According to the record, the plant was originally owned by the town until 1900. In that year, it passed by sale from the city to Edmondson and England; then, to Bransford and Daniel; then to Bransford and Hicks; then to appellee, a partnership. From 1895 until the institution of this suit, each successive owner furnished water to residences at the rate of $1 per month.

E. M. Spencer, Charles G. and Jesse Miller all testified that the clause "at the same stipulated price," used in the Bransford and Daniels contract of 1905, had reference to the rate agreed upon and fixed by resolution of the town council at the time the franchise was granted, and as amended thereafter.

The minutes and records of the town, prior to 1905, were destroyed.

W. Y. Bransford testified that no rate was ever agreed upon or fixed by resolution or ordinance; that, at the time the contract of 1905 was entered into, the rate of $1 per month for residences was inserted in the original draft but was stricken out before he signed the contract.

The franchise contained the following provision: "A. J. Edmondson and W. H. England shall furnish free of cost to said town of Lonoke any and all water it may need for use, and furnish water to the citizens of the town of Lonoke at a uniform rate and without discrimination between persons."

(1-2) We think it established by the weight of evidence that the clause "at the same stipulated price," used in the contract of April 24, 1905, related to some fixed, definite amount theretofore existing. Price implies value, usually in money. The ordinary meaning of the words "stipulated price" is an agreed or fixed amount of money for a commodity, and preceded by the word "same" necessarily mean a definite amount or rate prevailing in the past. No specific or definite amount was fixed in the franchise. Free water must necessarily be without price, and a uniform, non-discriminatory rate lacks the element of an amount certain, indicated by the use of the words "stipulated price." So we think the only reasonable conclusion deducible from the evidence is that the clause "at the same stipulated price," as used in the Bransford and Daniels contract, related to the rates fixed in the lost resolution or ordinance and amendments thereto. According to the evidence, that rate was $1 per month for residences and business houses, and $1.50 per month for livery stables and hotels.

(3) Appellee, however, upholds the decree of injunction on the theory that such a contract is unenforceable as being in conflict with the provision of the franchise requiring water to be furnished at a uniform rate and without discrimination. The record disclosed that the amount of water used by the consumers ranged from 500 to 55,000 gallons per month. From the fact that one citizen might obtain 500 gallons and another 55,000 gallons per month for $1, the conclusion is drawn by appellee that the rate is not uniform, but discriminatory. According to the evidence of Charles G. Miller, the town council refused to amend the franchise until the rate of $1 for residences and business houses was agreed upon, and granted the charter upon that condition only. His statement in this regard is supported by the great weight of the evidence. The phrase "uniform and without discrimination," used in the charter, must be read in the light of this evidence. When so read, it clearly means that every residence and business house using water must pay $1 per month for water, irrespective of the amount used. In other words, that the public utility could not discriminate in price between consumers on account of the quantity of water used by each. We are unable to find anything in the record from which an inference may be drawn that the words were used in the franchise in contemplation of metering the town.

(4) An attempt is made by the appellee to sustain the injunction on the ground that it would work a confiscation of appellee's property. Appellee is not sustained in this position by the adjudications in this State. Under the adjudications of this State, contracts between municipal corporations and public utilities are placed in the same category as contracts between individuals. The enforcement thereof can not be interrupted upon the ground that they will result in the bankruptcy of the utility any more than the enforcement of contracts by individuals could be interrupted on such ground. *Lackey* v. *Fayetteville Water Co.*, 80 Ark. 108; *Little Rock Ry. & Elec. Co.* v. *Dowell,* 101 Ark. 223; *Arkansas Light & Power Co.* v. *Cooley,* 138 Ark. 390.

(5) The only remedy for such a condition is a modification of the rate by mutual agreement or consent by the municipal corporation and public utility. Sections 5445-48, inclusive, of Kirby's Digest, only confer the power upon a municipal corporation to revise downward an unreasonable rate established in a franchise without the consent of the public utility. It therefore follows that the public utility must acquiesce in the water rates agreed upon in its contract with the city, unless it can obtain relief by application to the proper authorities.

For the error indicated, the decree is reversed, and the cause is remanded with directions to dissolve the injunction and dismiss the petition.

Mr. Justice SMITH dissents.

ARKADELPHIA MILLING COMPANY v. CAMPBELL.

Opinion delivered December 1, 1919.

1. PRINCIPAL AND AGENT—FINDING OF JURY.—A finding by the jury that A., in a certain transaction, was not acting as the agent of B., where supported by sufficient evidence, will not be disturbed on appeal.
2. PRINCIPAL AND AGENT—APPARENT AUTHORITY.—Appellee sent his agent A. to superintend the work of constructing certain buildings for a college; *held*, this did not give A. authority, either actual or apparent, to enter into a contract for the construction of another building of a different character and for another person.
3. SAME—SAME—RATIFICATION.—Appellee held the contract to erect certain buildings for a college, and sent his agent A. to superintend the work. A., then, on his own account entered into a contract with B. to erect a warehouse for him. *Held*, the trial court properly submitted to the jury the question of ratification.
4. APPEAL AND ERROR—SINGLING OUT CIRCUMSTANCES—CORRECT DECLARATION OF LAW.—While it is not good practice to single out circumstances established in a trial, and make them the subject-matter of separate instructions, yet a judgment will not be reversed for such action where the principles of law declared are correct.

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

McMillan & McMillan, for appellant.

1. It was prejudicial error to refuse instruction No. 4 for plaintiff. The evidence shows that W. S. Campbell was in absolute control of the work of construction and was to get all the profit, but that A. O. Campbell was the contractor and responsible for the obligations. An agent's contract for his principal is binding from the time it is made, if the principal clothed the agent with apparent authority and a third person contracts with the agent for the principal on the faith of the apparent authority. 96 Ark. 456; 87 *Id.* 377; 93 *Id.* 521.

2. It was also error to refuse No. 2 for plaintiff. W. L. Campbell was the agent of defendant and not a volunteer, and if his contract to erect the building in payment of material was in excess of his authority, his principal, having notice and accepting the material, was bound by the contract as a ratification. 96 Ark. 505; 87 *Id.* 377.

3. It was error to refuse the 3rd for plaintiff. A principal can not ratify a contract made for him by an agent without also ratifying and becoming bound by the terms and conditions upon which it is made, although unauthorized. 114 Ark. 9; 87 *Id.* 377.

4. It was error to give No. 6 for defendant. It invades the province of the jury and directs them as to the weight to be given the testimony. 58 Ark. 108.

5. There was error in admitting evidence as to what E. C. Nowlin did, as there is no evidence that Nowlin had anything to do with the settlement of this difference with A. O. Campbell or that he was talking to Campbell on behalf of plaintiff; no evidence that he was acting for plaintiff in making these statements. 78 Ark. 381; 52 *Id.* 78, 168.

6. The trial court invaded the province of the jury in its oral charge and remarks. 58 Ark. 282; 46 Mich.

623; 10 N. W. 14; 29 N. E. 909; 42 Ind. 420; 12 *Id.* 568; 14 S. W. 538.

Callaway & Huie and *Cockrill & Armistead,* for appellee.

There is no error in the instructions given or refused and the evidence supports the verdict. There is no proof of damage that would support a verdict against W. S. Campbell. A. O. had no interest in the contract. The verdict settles all questions of fact and there was no error of law committed.

McCULLOCH, C. J. This is an action instituted by appellant against appellee to recover damages on account of alleged faulty construction of a warehouse for appellant. It is alleged in the complaint that appellee, A. O. Campbell, acting through his agent, W. L. Campbell, entered into a written contract with appellant for the construction of the warehouse and undertook to perform the contract, but that some of the work was so defective that it had to be done over again at a cost to appellant of $750, the amount sued for.

The written contract is exhibited with the complaint, and shows on its face that it was executed, not by A. O. Campbell, but by W. L. Campbell. The body of the contract recites that it is the undertaking of W. L. Campbell, who subscribed his own name to it. It is, however, alleged in the complaint that, although the contract was executed by W. L. Campbell in his own name, he was acting as the authorized agent of A. O. Campbell, the appellee. The answer of appellee contains denials of all the allegations of the complaint. There was a trial of the issues before a jury which resulted in a verdict in favor of appellee.

The building in question was constructed in the year 1914. Appellee resided in Oklahoma City, but was engaged in taking contracts for constructing buildings, and entered into a contract to construct certain additional buildings for Henderson-Brown College at Arkadelphia. W. L. Campbell was sent to Arkadelphia as appellee's

agent to superintend the construction of those buildings with authority to purchase material, employ labor and do everything to further the construction of the buildings. Appellant was engaged in the manufacturing business in Arkadelphia, and through its Little Rock agent, Mr. Nowlin, sought a contract for furnishing some of the mill work for the Henderson-Brown College buildings. The bill for that material amounted to the sum of $5,200. Appellant planned the construction of a warehouse, and procured estimates of the cost, one from W. L. Campbell, who signed the letter or memoranda submitting a bid in the name of A. O. Campbell, by him as agent. When this matter was submitted to A. O. Campbell he declined to have anything to do with the construction of the warehouse, and W. L. Campbell thereupon proceeded to enter into a contract with appellant in his own name for the construction of the warehouse for the price of $5,200, the same as the amount of the bill for material to be furnished by appellant for construction of the Henderson-Brown College buildings. The contract between appellant and W. L. Campbell contained the following clause:

"Said first party is to charge second party on account of all mill work now being furnished by said second party to first party on the administration building and girls' dormitory for Henderson-Brown College, at Arkadelphia, should there be a balance due either party after the completion of this contract same shall be paid in cash to the other party."

Appellee was not a party to this contract so far as it appears on the face of it, but it is conceded that he was advised of the existence of the contract between W. L. Campbell and appellant, and that he paid to W. L. Campbell the price of the material furnished by appellant, with the knowledge that W. L. Campbell was paying for the material under his contract for constructing the warehouse. According to the undisputed evidence, W. L. Campbell had not, prior to his being sent to Arkadelphia to superintend the construction of the Henderson-Brown College buildings, acted as the agent of A. O. Campbell in

any way for the past twenty years, and that he has not, subsequent to that transaction, acted for A. O. Campbell in any way. In constructing the warehouse for appellant W. L. Campbell used some of the construction machinery owned by A. O. Campbell and used in the construction of the Henderson-Brown College buildings, and also employed the same labor and the same bookkeeper and timekeeper. Appellee and W. L. Campbell each testified that the contract was that of W. L. Campbell alone, and that he was not acting as the agent of appellee, and that appellee was not interested in that contract. Appellant's manager testified that he thought when he entered into the contract that W. L. Campbell was the man who had the contract to construct the Henderson-Brown College buildings. The evidence tended to show that there was faulty construction of the warehouse building, and that appellant expended the sum of $750 in repairing the defects.

(1) The court submitted to the jury the question of alleged agency of W. L. Campbell and his authority to act for appellee, and that issue must be treated as properly settled by the jury, there being sufficient evidence to sustain the verdict.

(2) The court refused to give an instruction submitting the question of apparent authority of W. L. Campbell to act for appellee, or rather the court gave an instruction which excluded that question from the consideration of the jury. We think there was no error of the court in this respect, for there was no evidence to justify the submission of the question whether or not the contract entered into by W. L. Campbell with appellant was within the apparent scope of his authority as the agent of appellee. In the first place, W. L. Campbell did not pretend to act for appellee in the transaction. The contract shows on its face that he was acting for himself, and this necessarily excludes the idea that he was acting within the apparent scope of his authority as agent for some one else. That fact did not prevent appellant from showing that, notwithstanding W. L. Campbell executed the con-

tract in his own name, he was in fact acting as agent for appellee, but it can not be said that the contract executed in his own name was within the apparent scope of his authority as agent for some one else. In the next place, there is no proof to justify a finding that, if there was no actual authority, the contract for the construction of the warehouse was within the apparent scope of authority. W. L. Campbell was sent to Arkadelphia for the purpose of superintending the construction of the buildings for Henderson-Brown College and to purchase the material and employ labor for that purpose. This did not give him authority, either actual or apparent, to enter into a contract for the construction of another building of a different character and for another person. So we think that the trial court was correct in holding that the question of apparent authority was not an issue in the case.

It is next contended that the court erred in refusing to properly submit the issue of ratification by appellee of the contract between W. L. Campbell and appellant. The court refused to give an instruction on this subject, requested by appellant, but gave instruction No. 2 at the request of appellee, which reads as follows:

"You are instructed that the plaintiff is suing the defendant on a written contract, which is not signed by the defendant, but which is signed by one W. L. Campbell, alone, and plaintiff admits that A. O. Campbell did not sign the contract, but it is contending that W. L. Campbell when he signed it, although he signed his own name, yet in reality he was acting as the agent of A. O. Campbell, the defendant. Before you can consider any question of the violation of the contract or as to any damage with reference thereto, you must find from a preponderance of the evidence that A. O. Campbell authorized W. L. Campbell to sign the contract as his agent. The burden of proof is on the plaintiff to show by a preponderance of the evidence that A. O. Campbell authorized W. L. Campbell to sign the contract as his agent, or afterwards ratified the same as his contract, and that he,

A. O. Campbell, was the party contracting to erect the warehouse and not W. L. Campbell; and, unless you are convinced by a preponderance of the evidence that this is true, your verdict will be for the defendant."

(3) This instruction is illy framed, but it certainly is sufficient to submit to the jury the question of ratification by appellee. The first sentence omits the question of ratification, but it is clearly embraced in the second sentence, and both of the sentences were to be read together and must have been considered by the jury as submitting the issue of ratification of the contract. There was only a general objection made to it by appellant, and the defects ought to have been called to the attention of the court by a specific objection. It is doubtful, to say the least of it, whether the question of ratification is properly in this case under the proof adduced. The real issue in the case is whether or not W. L. Campbell had actual authority to enter into the contract and was acting for his principal in the transaction. There was no direct proof of the existence of such authority, but there were certain circumstances in the case which would have warranted the jury in so finding. But, if there was no actual authority, there was no ratification. W. L. Campbell was not holding himself out as the agent of appellee in the transaction and it can not be said that appellee ratified the transaction by allowing W. L. Campbell to hold himself out as such agent. Neither is there any proof that appellee received any benefit from this contract. He purchased and paid for the material used in the Henderson-Brown College buildings, and the fact that the payment was made to W. L. Campbell under his contract with appellant did not confer any benefit on appellee so as to make him a party to the contract for the construction of the warehouse.

The court gave the following instruction over appellant's objection:

"You are instructed that if you believe from the evidence that W. L. Campbell was the foreman and agent of A. O. Campbell in the construction of Henderson-

Brown College and acting as such agent purchased the necessary material for Henderson-Brown College, this fact alone is not sufficient evidence that he had any authority to enter into a contract binding A. O. Campbell, to build a warehouse for the plaintiff as payment for any material purchased."

It is argued that this instruction invaded the province of the jury, but we do not think this is true for the reason that it is correct to say that the facts recited in the instruction were not of themselves, when standing alone, sufficient to constitute the creation of the relation of agency in the transaction between appellant and W. L. Campbell. Appellee was, therefore, entitled to a declaration of law on that subject. It is not good practice to single out circumstances established in the trial of a case and make them the subject-matter of separate instructions, but we do not reverse judgments on account of the giving of such instructions where the principles of law declared are correct. *Hogue* v. *State*, 93 Ark. 316.

There are assignments of error with respect to other rulings of the court which we do not find of sufficient importance to discuss.

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

FIELD v. VIRALDO.

Opinion delivered December 1, 1919.

1. DAMAGES—INJURY RECEIVED BY ATTACK FROM A BULL.—Where appellee was attacked by appellant's bull, knocked down and rendered unconscious, a verdict for $300 damages is not excessive.
2. ANIMALS—KEEPING VICIOUS ANIMAL—KNOWLEDGE—NEGLIGENCE.—Where one knowingly keeps a vicious or dangerous domestic animal, he is liable for injuries inflicted by such animal without proof of negligence as to the manner in which the animal was kept. The mere keeping of such an animal, knowing its vicious and dangerous qualities, is at the risk of the owner (except as to trespassers) and renders him liable in damages to anyone injured by such animal.

3. SAME—SAME—SAME—SAME.—The gist of the above rule of law, on the issue of liability, is the known vicious propensities of the animal, and not the kind of animal in other respects.

4. SAME—SAME—SAME—TRESPASSING ANIMAL.—The owner is responsible for the acts of a trespassing animal, whether he knows of its vicious propensities or not, and he is liable for injuries inflicted by a vicious animal, not trespassing, only in case of knowledge of its propensities.

5. SAME—SAME—SAME—STATUTORY LIABILITY.—Kirby's Digest, section 7897, refers only to stallions and unaltered mules running at large, and has no application to bulls.

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk,* Judge; affirmed.

J. A. Watkins, for appellant.

1. Appellant was the only person in his section that had a fence and kept this bull in a pasture enclosed by a lawful and secure fence; and the animal was out on this occasion without his knowledge or consent, though he used due care and caution. The law does not require that appellant should keep the bull within an enclosure. 37 Ark. 568; 46 *Id.* 208; 48 *Id.* 366; 94 *Id.* 458; 61 *Id.* 197. Here appellant intended and did keep the bull enclosed, though not required to do so. 83 N. W. 988.

2. There is no testimony to show a vicious disposition of the bull at any time. 24 L. R. A. (N. S.) 1189-1193. Instruction No. 2 asked by appellant should have been given, as also No. 1½.

George W. Hays, for appellee.

1. The judgment should be affirmed, because defendant failed to abstract the motion for new trial. 133 Ark. 196; 87 *Id.* 368; 105 *Id.* 63. Nor is the testimony properly abstracted.

2. The court properly refused to instruct a verdict for defendant. Plaintiff was not guilty of contributory negligence, and such a defense must be specially pleaded affirmatively, and this was not done. 72 Ark. 23; 168 N. W. 852. The jury settled the contention of defendant against him, as the court specifically instructed the jury

on the subject. Plaintiff was not guilty of contributory negligence as a matter of law. 1 R. C. L., par. 31, p. 1087; 168 N. W. 852.

3. Under the issues made by the pleadings, the jury was properly instructed and the testimony abundantly supports the verdict. The evidence was conflicting, and there is no error in the instructions and the verdict will not be disturbed. 48 Ark. 495; 97 Atl. 440; 175 N. Y. S. 16.

4. The law applicable to this case is well settled. 116 Ark. 433-440-1; 1 R. C. L., par. 34, p. 1091. Defendant had knowledge that the bull was vicious. 48 Ark. 366-9; 6 Penn. St. 472; 5 Atl. 458; 65 N. Y. 54; 52 Vt. 251; L. R. 2 C. P. 1; 1 Starkie 285; Cooley on Torts 344; 5 Strobh. 196; 65 Ill. 235; 4 Denio 500; L. R. 9 C. P. 647; Abbott Trial Ev. 645; Sherman & Redfield on Negl., § 190. The cases cited for appellant have no application. The law supports plaintiff's contention. 99 U. S. 645; 124 Mass. 24; 3 C. J. 89. 168 N. W. 852 is directly in point here. As to evidence of peaceable disposition of animal, see 259 Ill. 382; 102 N. E. 782; Am. Ann. Cases, 1914 B, 1272.

5. There were no errors in the instructions. Cases *supra,* and 86 Pac. 1125; 6 L. R. A. (N. S.) 1164 and note, 1169; *Ib.* 1170-1, 1166; 26 N. Y. Weed Digest 236; 4 N. Y. S. 373. The judgment on the whole case is right. 90 Ark. 524.

6. The verdict is not excessive. The amount was for the jury to say, and they have settled it. 130 Ark. 30-37.

7. The abstract is not a compliance with our rules. 105 Ark. 63.

Gardner K. Oliphint, of counsel, for appellee on the brief.

McCULLOCH, C. J. This is an action instituted by Mrs. Mattie Viraldo, the appellee, against appellant to recover compensation for personal injuries received by

being attacked and knocked down by a bull owned by appellant and alleged to be vicious. The issues were tried before a jury and the trial resulted in a verdict in favor of appellee for recovery of damages in the sum of $300.

(1) Appellee and her husband resided on a farm in Pulaski County, near appellant's farm. There were no fences in that locality except such as were maintained by farmers to enclose yards, lots and pastures. The house in which appellee lived was not enclosed by any fence. Appellant owned the bull in question, and it attacked appellee one night at her home immediately in front of the house. Appellee testified in her own behalf and described the attack made by the bull and the extent of her injuries. She testified that the bull came to her house one night and attacked a mare belonging to her husband and hooked the mare down. That occurred about ten days before the incident which forms the basis of this litigation. She testified that she was awakened about 12 o'clock at night by a noise in front of the house and she found that the bull was "bothering" her cow, which was chained to a post, and she immediately dressed herself and went out and drove the bull away, using a switch with dry leaves on it which made a noise when threshed against the ground which scared the bull. She untied the cow and started to the barn with it and the bull came with a rush and butted her down and seriously injured her. She was unconscious and was carried to the house and suffered pain and inconvenience for a considerable length of time. There is no doubt that the injuries received were sufficient to warrant the amount of damages assessed by the jury. Appellee testified that after the injury occurred she went up to appellant's house and had a conversation about it in which appellant admitted that the bull was unruly and vicious; that "it took six men to get it home on his place" and "hooked everything down; hooked his own mules down."

The court instructed the jury, in substance, that if the bull had vicious propensities, known to appellant, there was liability on the part of appellant for the inju-

ries inflicted "regardless of whether or not the defendant was negligent in the manner in which the animal was kept by him." The court refused an instruction requested by appellant which would have declared the law to be that if the owner of the bull "exercised over said bull that degree of care and caution that a reasonably prudent and experienced person would have exercised under like circumstances" there was no liability for the injuries inflicted.

The evidence, was, we think, legally sufficient to sustain the finding that the bull was vicious and that its propensities in that respect were known to appellant. Appellee testified about the vicious acts of the bull on two different occasions and the testimony of another witness tends to show that the bull, while at large, showed vicious tendencies. The admissions of appellant made to appellee, according to the latter's testimony, were sufficient to sustain a finding that appellant was advised of those vicious propensities of the bull. The testimony adduced by appellant tended to show that he usually kept the bull in a pasture and did not allow the bull to run at large. The jury might have found, therefore, if the issue had been submitted, that appellant was not guilty of negligence in allowing the bull to get at large.

(2-4) This brings us to the question whether or not the court erred in its instruction in telling the jury that if the bull was vicious, and that those propensities were known to appellant, he would be liable for the injuries inflicted by the bull. There is not entire accord in the authorities on this question, but this court is committed to the rule expressed in the recent case of *Holt, Receiver,* v. *Leslie,* 116 Ark. 433, that if one knowingly keeps a vicious or dangerous domestic animal, he is liable for injuries inflicted by such animal without proof of negligence as to the manner in which the animal was kept. We said in that case: "The mere keeping of such an animal, knowing its vicious and dangerous qualities, is at the risk of the owner (except as to trespassers) and renders him liable in damages to one injured by such animal." This was

said with respect to a vicious dog, and many of the authorities on the subject relate to the keeping of dogs or animals wild by nature. However, the turning point of the question of liability in such cases rests upon the known vicious propensities of the animal, and not to the kind of animal in other respects. The rule established by the weight of authority is that the owner is liable for a trespassing animal whether he knows of the vicious propensities or not, and is liable for injuries inflicted by a vicious animal, not trespassing, only in case of knowledge on the part of the owner of such propensities of the animal. The liability in one case rests on the fact that the animal is trespassing, and in the other on the known vicious propensities of the animal, the law placing on the owner the duty of restraining the animal of known vicious propensities, likely to result to injury to others. *Johnson* v. *Mack,* 65 W. Va. 544, 24 L. R. A. (N. S.), 1189; *Harris* v. *Carstens Packing Co.* (Wash.), 6 L. R. A. (N. S.), 1164, 1 R. C. L., p. 1089.

(5) Appellant relies on the case of *Briscoe* v. *Alfrey,* 61 Ark. 197, but that was a case where liability was sought to be imposed under a statute of this State (Kirby's Digest, § 7897), which prohibits the running at large of stallions and unaltered mules. We held in construing that statute that running at large meant the permissive or negligent act of the owner in allowing the animal to run at large. The later case of *Fraser* v. *Hawkins,* 137 Ark. 214, deals with the same statute. The statute referred to changes in the law with respect to liability as to the animals mentioned, and to that extent only. It places liability on the owner of those animals who permits them to run at large whether the animals are trespassing or whether such animals possess known vicious propensities. The statute, in other words, singles out animals of that character and imposes liability on the owner for vicious acts of the animal, but only in case they are allowed to run at large.

We are of the opinion that the court instructed the jury in accordance with the law as announced by this

court, and that there was no error in the proceedings. The judgment is, therefore, affirmed.

DEAN v. CALDWELL.

Opinion delivered December 1, 1919.

1. FOREIGN CORPORATIONS — NONCOMPLIANCE WITH STATE LAWS.— Neither a foreign corporation, which has not complied with the laws of the State, nor its assignee may maintain a suit in the courts of this State.
2. SAME—SAME—ACTION ON NOTES—INTRASTATE BUSINESS.—Appellant, a foreign corporation, entered into a contract with appellee, to assist it in a "trade campaign." Certain goods were shipped by appellant to appellee, for which appellee gave its notes. Appellant had not complied with the laws of this State. *Held*, the transaction between the parties involved only intrastate commerce, and that appellant could not maintain an action on appellee's notes.

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

T. P. Winchester and *W. R. Martin*, for appellant.

It was error to instruct a verdict for defendant. The foreign corporation was not doing business in this State without complying with Act No. 313, Acts 1907. 136 Ark. 52. The court's authority for its action does not sustain its ruling nor do the cases cited in the majority opinion. In that case this court follows the language of the act, but found the intention of the Legislature to be to include in the punishment not only the corporation doing business in the State but the innocent holder of the contract. Until this court recedes its declaration in that case, it must govern, but the court, we think, nullifies the negotiable instrument law passed six months later. But the facts of this case do not bring it even within the class condemned in the Hogan case. Here the foreign corporation was located for business in Tennessee and sent a salesman to sell a plan for increasing the trade of merchants and certain articles to be used in further-

ance of this plan. The contract is entitled, "Exclusive Contract, Fort Smith." It was signed in Fort Smith, Arkansas, and the notes made payable to the order of Parten Manufacturing Company and executed in settlement of this contract. C. P. Boles, who signed as traveling salesman and only solicited orders, which were sent to the company in Tennessee for acceptance and only when accepted and approved did they become binding. This was no violation of the act, as the corporation was not doing business in Arkansas. It was a Tennessee contract. 247 U. S. 21 is directly in point. See also 246 U. S. 147; 220 *Id.* 187; 90 Ark. 73; Acts 1907, p. 741. The instructions asked by plaintiff should have been given.

Warner, Harding & Warner, for appellee.

The court properly held that the contract and transactions constituted doing business in Arkansas contrary to our law and that the notes could not be enforced. There is nothing in the record to show that the business dealing involved an interstate commerce transaction and this is fatal to plaintiff's contention. The fact that it was an interstate transaction must be shown affirmatively. 136 Ark. 52. The burden was on plaintiffs (appellant) to show this, and having failed there is nothing to sustain their contention. 257 Fed. 785. The shipment of goods and sale was strictly a local transaction in the State of Arkansas by a foreign corporation and was not the subject of interstate commerce. 233 U. S. 16; 246 *Id.* 500; 247 *Id.* 21; 87 S. E. 598; 196 S. W. 1132; 95 Ark. 588. The question here is presented squarely in 233 U. S. 16 and is conclusive. See also 246 *Id.* 500 and the Hogan case, *supra.*

McCULLOCH, C. J. This is an action instituted by appellant on negotiable notes executed by appellee to Partin Manufacturing Company, a foreign corporation, which has not complied with the laws of this State with respect to filing copies of articles of incorporation, etc. Appellant is trustee for the assignees of Partin Manufacturing Company.

The notes were executed by appellee pursuant to a written contract between him and Partin Manufacturing Company, as follows:

"Exclusive Drug Contract for Fort Smith.

"Form 10.

"Partin Manufacturing Company.

"Chicago. (Incorporated) Des Moines.

General Offices

"Bank of Commerce and Trust Building,

"Memphis, Tennessee.

"Date 3-27-17.

"Partin Manufacturing Company:

"Gentlemen:

"Please ship to us at your earliest convenience, f. o. b. factory, the following goods as described below:

"Capital Prize, automobile, 2 passenger, 4 cylinder roadster. The purchaser is to deliver winner in this trade campaign the winner's choice of one of the following automobiles:" * * * (Here follows articles to be used as prizes, including one automobile, and various articles of jewelry and silverware.)

"Printed and Advertising Matter.

"Twenty-five two color large, illustrated banners; one thousand hand bills; one set of display sign cards; one set of campaign rules for conducting campaign; one set of nominating letters; one set of follow up letters; one thousand trade cards; forty thousand certificates.

2-11-17.

"(1) The undersigned purchaser warrants that his sales for the past twelve months were $21,906.29. On this warranty of sales, Partin Manufacturing Company hereby agrees to increase the purchaser's sales and collections not less than $15,000 in the next twelve months. Partin Mfg. Co. agrees to refund six cents on every dollar the purchaser falls short of the $15,000 increase and agrees to send their bond to purchaser's bank in the sum of $900 to guarantee this agreement. Partin Mfg. Co. reserves the right to increase the number of premiums without cost to the purchaser, if in their opinion it is nec-

essary to bring about the above guaranteed increase. Partin Mfg. Co. reserves the right to require a first and second choice of cars. Partin Mfg. Co. agrees to send a personal representative to assist in getting candidates and helping start this trade campaign.

"(2) To make this contract binding on Partin Mfg. Co. and as conditions precedent to any recovery under the provisions of paragraph (1) the undersigned purchaser agrees to accept the goods described above promptly on arrival; keep the goods well displayed in his place of business, to pay all obligations entered into under this contract at maturity; to report every thirty days his gross sales for one year; follow out instructions and furnish such other information as Partin Mfg. Co. may desire, including verified final reports furnished by Partin Mfg. Co.

"(3) Terms: All the above named goods are to be included in the purchase price of $900. Three per cent off, cash in ten days. By special agreement the above can be paid in four installments of two hundred and twenty-five dollars ($225) each, in one, two, four, six, eight months, if notes attached hereto properly signed accompanying this contract, and Partin Mfg. Co. is authorized to detach same on acceptance of same. If contract is not accepted notes are to be canceled and returned to purchaser.

"(4) In consideration of the special methods set forth in your plan and the terms and agreements herein contained, this contract can not be countermanded, but to stand as given on day and date hereof. Any verbal or written agreement not embraced herein will not be binding on Partin Mfg. Co. This contract is given with a full and complete understanding of the conditions herein and after reading same.

"Campaign closes (club) each 40 days."

The trial court gave to the jury a peremptory instruction in favor of appellee on the ground that Partin Manufacturing Company was a foreign corporation which had, without having complied with the laws of this

State, transacted the business in the State out of which appellee's obligation arose. The contention of appellant is that the transaction between appellee and Partin Manufacturing Company constituted interstate commerce and was not within the control of State laws.

The decision of the case turns, therefore, on the question whether or not the transaction was interstate commerce. It seems clear to us that the contract was not interstate commerce. It was not for the sale of goods to be shipped from another State. The sale of certain articles of merchandise was a mere incident to the main purpose of the contract which was one whereby Partin Manufacturing Company undertook to carry on, for appellee's benefit, what is designated in the writing as a "trade campaign." Appellee was a merchant in the city of Fort Smith, and his sales for the previous year had been $21,926.29, and Partin Manufacturing Company undertook in the contract, for a consideration, to provide a plan and the means to increase appellee's annual sales not less than $15,000. Partin Manufacturing Company agreed to furnish these articles for the prices and the printed literature for advertising purposes, and to "send personal representative to assist in getting candidates and helping start this trade campaign." The campaign was to be carried on in Fort Smith where appellee was doing business, and the amount of compensation to be received by Partin Manufacturing Company was dependent on the amount of increase in appellee's sales. The transaction was purely local. The business was *intra*- and not *inter*-state, and the sale of goods was merely an incident. The contract did not necessarily imply a shipment from outside of the State, but, even if it did, that would not alter the character of the main transaction, to which the sale of goods was a mere incident.

This conclusion is supported by the decisions of the Supreme Court of the United States in *Browning* v. *Waycross,* 233 U. S. 16, and *General Railway Signal Company* v. *Virginia,* 246 U. S. 500. The question arose in a different form in those cases, but the principles announced are the same as in the instant case.

The case of *York Manufacturing Co.* v. *Colley,* 247 U. S. 21, on which learned counsel for appellant rely, is not applicable.

Under our statutes, not only the offending corporation, but its assignee is prohibited from maintaining suit in this State without having first complied with the laws of the State. *Hogan* v. *Intertype Corporation,* 136 Ark. 52.

Judgment affirmed.

GRIFFIN *v.* STATE.

Opinion delivered December 1, 1919.

1. INCEST—INSTRUCTION.—Where the undisputed evidence showed defendant to be a married man, no prejudice could result to him from an instruction, which assumed as a matter of law, that accused, at the time of the incestuous adultery, was a married man.
2. WITNESSES — CREDIBILITY — TESTIMONY MAY BE DISREGARDED BY JURY, WHEN.—An instruction properly declares the law, which charges that if the jury believed that any witness had wilfully testified falsely to any material fact in the case, they were at liberty to disregard the whole of such testimony, if they believed the same to be false.

Appeal from Lonoke Circuit Court; *Geo. W. Clark,* Judge; affirmed.

J. B. Reed and *House, Rector & House,* for appellant.

1. The court erred in its instructions in assuming as proven certain facts which were in issue. Under our statute and decisions an indictment for adulterous incest must allege that the defendant was a married man; this is a material allegation and must be proved to the satisfaction of the jury (not the court) and beyond reasonable doubt. 58 Ark. 3; 113 *Id.* 257. The indictment alleged the marriage but there is no express proof of the fact and it was a question for the jury. The instruction took away from the jury this question and was clearly an in-

vasion of the exclusive domain or province of the jury. Const. Ark. 1874, art. 7, § 23; 36 Ark. 117; 59 *Id.* 417; 92 *Id.* 421; 103 *Id.* 87.

2. The court erred in its charge to the jury with reference to the effect to be given the testimony of an impeached witness. 127 Ark. 523; 82 *Id.* 540. See also 56 *Id.* 242; 68 *Id.* 331.

3. The court erred in its charge with reference to the test to be applied to defendant's testimony in his own behalf.

4. The court erred in refusing instruction No. 1 for defendant. It is bad for ambiguity. 61 Ark. 88; 69 *Id.* 177; 81 *Id.* 589; 67 *Id.* 416; 117 *Id.* 296.

5. The evidence fails to establish the guilt of defendant.

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

1. The evidence that defendant was a married man is ample and defendant admitted the fact, and therefore the court should not have submitted that question to the jury. Kirby's Digest, § 1811; 95 Ark. 233. The case in 58 Ark. 3 was delivered when our courts followed the common law technical rules, and no longer applies, and should be overruled.

2. It was the duty of defendant to have asked an instruction on this issue, and failing to do so, he can not complain. 114 Ark. 398.

3. The instruction as to swearing falsely was properly given. 56 Ark. 242; 125 *Id.* 567; 72 *Id.* 436; 110 *Id.* 402. It may not be as clear as it ought to have been, but is sound and there was no specific objection to it but only a general one. Defendant took the stand in his own behalf and the court properly instructed the jury as to the weight of his testimony. It is in conformity with our decisions. 58 Ark. 353; 61 *Id.* 88; 69 *Id.* 558; 120 *Id.* 30.

4. There was no error in overruling defendant's instruction No. 1. 117 Ark. 296; 83 *Id.* 192; 32 *Id.* 226; 85 *Id.* 360; 68 *Id.* 529; *Bartlett* v. *State* ms.; *Bost* v. *State*

ms. 10-20-1919. The evidence sustains the verdict conclusively.

WOOD, J. The appellant was convicted of the crime of incest. The indictment alleged that he was a married man. One of the grounds urged for reversal is that the court erred in ignoring the issue as to whether appellant was a married man.

The appellant was asked, "When were you married?" He answered, "1890." He was asked, "What does your family consist of?" He answered, "My little boy, my wife, my daughter Jossie, and little boy about ten years old."

The above testimony was undisputed. It shows conclusively that appellant was a married man.

There was no prejudicial error, therefore, in the instruction which told the jury that the only issues were did the appellant have sexual intercourse in Lonoke County, Arkansas, within the statutory period.

(1) Counsel for appellant argue that the instruction in effect told the jury that it was unnecessary for the State to establish that appellant was a married man and that the instruction was, therefore, contrary to the holding of this court in *Martin* v. *State,* 58 Ark. 3, and *Knowles* v. *State,* 113 Ark. 257. But not so. Since the testimony of the appellant himself proved conclusively that he was a married man, no prejudice could have resulted to him because of the instruction which assumed, as a matter of law, that appellant, at the time of the incestuous adultery, was a married man.

(2) Counsel for appellant contend that the court erred in giving the following instruction:

"If you believe that any witness has wilfully sworn falsely to any material fact in the case, you are at liberty to disregard the testimony of that witness either in whole or in part, or believe it in part and disregard it in part, taking into consideration all of the facts and circumstances of the case."

There was no specific objection to the instruction. Counsel say that the instruction in this form authorized

the jury to disregard any part of a witness' testimony, although they might believe same to be true, provided they also believed that the witness had wilfully sworn falsely to some other material fact in the case.

In *Johnson* v. *State,* 127 Ark. 524, speaking of a prayer for instruction which the court refused because it contained inaccurate language, we said: "In other words under the latter part of the instruction it might appear to the jury that if any witness had wilfully testified falsely concerning any material fact, it was their duty to disregard his whole testimony unless corroborated by other evidence regardless of the fact of whether they might believe the remaining part of his testimony. The jury had the right to believe such portions of any witness' testimony as they believed to be true, rewardless of the fact of whether they believed other portions of it. In short, it was their duty to accept such portions of the witness' testimony as they believed to be true, and reject that part of it they believed to be false." See *Frazier* v. *State,* 56 Ark. 226; *Taylor* v. *State,* 82 Ark. 540; *Bruder* v. *State,* 110 Ark. 402.

While the instruction is not aptly worded and is not as clear in its statement of the law as it should have been, we do not think it susceptible of the construction which counsel give it. Taking the instruction as a whole, its purpose, as we view it, was to tell the jury that if they believe that any witness had wilfully testified falsely to any material fact in the case, they were at liberty to disregard the whole of such testimony if they believe the same to be false, or any part of the same which they believed to be false." But it does not tell the jury that they were at liberty to disregard any part of the witness' testimony which they believe to be true, notwithstanding that there were other parts of the testimony which they believed to be wilfully false.

To say the least, if counsel conceived at the trial of the cause that the instruction is open to the suggestion which he here urges against it, it was his duty to have called the attention of the trial judge to such construction by a specific objection. If they had done this the court

doubtless would have so framed the instruction as to have contained the exact language, the omission of which they now insist renders the instruction erroneous.

The instruction is not one so inherently defective as to fall under the condemnation of being an erroneous and misleading declaration of law. In the absence of specific objection, the giving of the instruction as written was not a reversible error. *Bruder* v. *State, supra; Reinman* v. *Worley,* 125 Ark. 567.

Appellant complains that the court erred in one of its instructions in singling out the testimony of the defendant and subjecting it to a different test concerning credibility from that applied to other witnesses.

It is unnecessary to set out the instruction. We have examined it and find that it is in conformity with the law in all essential particulars as announced by this court in many cases, beginning with *Vaughan* v. *State,* 58 Ark. 353, and as recent as *Whitener* v. *State,* 120 Ark. 30.

It is insisted that the court erred in refusing to give the following instruction:

"You are instructed that the State relies upon circumstantial evidence for a conviction in this case. Circumstantial evidence is legal and competent evidence in this case, but before you would be justified in convicting the defendant on this evidence, the State must prove beyond a reasonable doubt that the commission of the crime charged in the indictment cannot be explained away on any other hypothesis other than the guilt of the defendant."

The prayer for instruction was erroneous for two reasons. *First,* because it assumes that the State relied wholly upon circumstantial evidence which is not borne out by the record. *Second,* because it omits the word "reasonable" before the word "hypothesis." This word was necessary to make the instruction a correct declaration of law. *Davis* v. *State,* 117 Ark. 296; *Bost* v. *State,* 140 Ark. 254; *Bartlett* v. *State,* 140 Ark. 553.

The evidence was sufficient to sustain the verdict and there was no prejudicial error in the instructions.

Judgment affirmed.

TURNER HEIRS v. TURNER.

Opinion delivered December 1, 1919.

1. ADMINISTRATION—PAYMENT OF DEBTS—LAPSE OF YEARS.—One A. died in 1894 leaving 250 acres of land, and a widow and children. The widow was assigned 190 acres as dower and homestead, the remaining 60 acres being valueless apart from the 190-acre tract. Two of A.'s sons were appointed administrators. Certain claims were filed against the estate, but nothing paid, nor were the administrators discharged. In 1918 the widow died. *Held*, the ten-year statute of limitation in Kirby's Digest, section 5073, requiring that an action in all judgments and decrees shall be commenced within ten years after the cause of action shall accrue, does not bar a judgment in favor of a creditor of the estate, while the estate is in course of administration and before an order of pyament is made.
2. HOMESTEAD—RIGHTS OF CREDITORS.—Under the Constitution, the right of creditors to subject lands constituting a homestead to the payment of their debts is suspended until the homestead rights of the widow and minor children have ceased.
3. ADMINISTRATOR—CLAIMS AGAINST ESTATE—ACTION IN—LAPSE OF TWENTY-FOUR YEARS.—Under the facts detailed in syllabus No. 1, *supra*, it was not unreasonable for the creditors and administrators to wait twenty-four years, or until the death of the widow, to begin proceedings to enforce their claims, probated against the estate.

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

John C. Ashley, for appellants.

1. The debts or claims are barred by limitation. Kirby's Digest, § 5073; 23 Ark. 169; 48 *Id.* 282; Kirby's Digest, § § 79, 186. The contention of appellants is certainly true as to the 60 acres over and above homestead and dower. 37 Ark. 155; 47 *Id.* 475.

2. Petitioners are barred by laches. 63 Ark. 409; 37 *Id.* 160. The lands were assets in the hands of the administrator to pay debts. Kirby's Digest, § § 79, 186. The plaintiffs are barred by 20 years laches. *Supra.*

Woods & Sherrill and *Elbert Godwin*, for appellees.

The cases cited by appellant defeat their contention as to the statute of limitation and of laches. 37 Ark. 159; 48 *Id.* 252; 54 *Id.* 68; 63 *Id.* 405; 86 *Id.* 389; 97 *Id.* 189.

WOOD, J. T. P. Turner died about the year 1894. He left surviving him a widow and several children by her and of former marriages. S. H. Turner and George Turner, two of his children, were appointed administrators of his estate. He was seized of 250 acres of land, 190 acres of this were set apart to the widow as her homestead and dower. The remaining 60 acres were barren and rocky land which separate and apart from the other lands was of little if any value. Turner also left some personal property.

In 1895 and 1896 claims were presented and allowed against the estate in the sum of $535.15. The personal assets were duly administered. There were certain debts owing the estate, but only the sum of $50 was collected which came into the hands of the administrators in 1918. The other debts were worthless, and the administrators took credit for them in their account current. The last account current which was approved by the probate court in 1899 showed a balance of $57.50 of doubtful notes due the estate in the hands of the administrators. Nothing was paid on the debts probated and allowed against the estate for the reason that there were no assets in the hands of the administrators at the time to pay the same. The administrators made no effort to sell the 60 acres, which alone were subject to the debts, for the reason that in the judgment of the administrators, separate and apart from the other tract, if put up and sold, it would not have brought enough to have paid the expenses of the sale.

In July, 1918, the widow of T. P. Turner died. No effort was made by the creditors or the administrators until the death of the widow to have the claims which had been probated against the estate paid. In September, 1918, after the death of the widow, the administrators filed a petition in the probate court asking for sale of all the land of the estate for the payment of the debts which had been probated against the same. Certain heirs of Turner resisted the petition, setting up the statute of limitations and laches.

The probate court rendered judgment denying the petition of the administrators and on appeal to the circuit court the cause was tried anew and that court entered a judgment directing that the lands be sold for the purpose of paying the debts probated against the estate and for paying costs of administration. From which judgment is this appeal.

The only question for our determination is whether or not the appellees were barred either by limitations or laches from having the land described in their petition sold for the payments of the debts of the estate.

In *Mays* v. *Rogers,* 37 Ark. 159, we said: "And as payment of claims can be enforced only as directed by the statute and after the court has found upon a settlement of the administrators that there is money in his hands for the payment of them and has ordered their payment in full, or pro rata as it shall suffice, the allowance cannot be barred by the statute of limitations."

The statute applicable to the settlement of administrators and payment of claims is found in sections 142 to 159 inclusive of Kirby's Digest.

(1) It does not appear from the record that there has been any order of the probate court showing the settlement of the administrators at which it was found that there was any money in their hands sufficient to pay the claims probated and allowed against the estate and an order made by the probate court for their payment in full or pro rata, etc. The administration is still pending. While a pro rata allowance is a judgment within the meaning of section 5073, Kirby's Digest, requiring that an action on all judgments and decrees shall be commenced within ten years after the cause of action shall accrue and not thereafter, yet under the above decision this statute does not operate to bar such a judgment while the estate is in course of administration and before an order of payment is made. *Brown* v. *Hanauer,* 48 Ark. 277-82.

In *Mays* v. *Rogers, supra,* we also said: "The heirs should not be forever deterred from making improve-

ment on the property or prevented from selling by the possibility that it may be sold for the debts of the estate. The power of the administrator must be exercised within a reasonable time and will be lost by gross laches or unreasonable delay." See, also, *Stewart* v. *Smiley,* 46 Ark. 373; *Graves* v. *Pinchback, Admr., etc., et al.,* 47 Ark. 470.

So the next question is, were the administrators of the estate of T. P. Turner or the creditors barred by laches?

(2) The homestead provisions of our Constitution suspend the right of creditors to subject lands constituting the homestead to the payment of their debts until the homestead right of the widow and minor children have ceased. *Abramson* v. *Rogers,* 97 Ark. 189.

(3) It appears that the widow of Turner occupied the lands constituting the homestead until her death in July, 1918, and that the proceedings to subject these lands were begun the following September. Whether or not the administrators and creditors have waited an unreasonable time must depend upon the circumstances. It is manifest from the undisputed facts of this record that the 60 acres not constituting a part of the homestead were of little if any value considered separate and apart from the homestead and dower tract; and it is equally clear that the sale of the reversion in the homestead and dower tracts would not have yielded sufficient proceeds to pay the debts, and, so far as results are concerned, would have been a fruitless proceeding.

As was said in *Killough* v. *Hinton,* 54 Ark. 65, "To have sold them before her death would have been a sacrifice of the interests alike of the creditors and heirs."

In *Roth* v. *Holland,* 56 Ark. 633, we held that a delay "for more than seven years is not reasonable and therefore defeats the rights of the creditors or an administrator in his behalf unless there is something to excuse the delay." The delay of more than twenty years after claims were probated and allowed against the estate before the proceedings were commenced to enforce their payment would defeat the lien of creditors on the ground

of laches or unreasonable delay "unless there be something to excuse the delay." *Brogan* v. *Brogan,* 63 Ark. 405.

But here the fact that the only asset of the estate in the hands of the administrator for the payment of debts was a piece of land valueless if sold separate and apart from the homestead and dower tracts, and that these were occupied by the widow and could not be sold until within three months before these proceedings were begun, constitutes a sufficient excuse for the delay of appellees.

Affirmed.

GILLEYLEN *v.* HALLMAN.

Opinion delivered December 1, 1919.

ADMINISTRATION — EMPLOYMENT OF COUNSEL — DISTRIBUTION OF SUM COLLECTED.—Although an administrator is authorized by the probate court, to institute suit to recover in the proper forum an amount due the estate which he represents, the tribunal in which the suit is instituted has no jurisdiction to distribute or administer the funds adjudged by it to belong to the estate; for the funds when recovered become the property of the estate and must be administered by the probate court which has exclusive jurisdiction of the estates of deceased persons, administrators, etc.

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

Verne McMillen and *Charles T. Coleman,* for appellants.

Our decisions on attorneys' fees and compensation authorize the chancery court to take jurisdiction of the case at bar. 35 Ark. 247, 268; 133 *Id.* 422; 103 N. W. 1068. See also *Baxter County Bank* v. *Davis,* 137 Ark. 459, and *Johnson* v. *Mo. Pac. Ry. Co.,* 139 Ark. 507; 85 N. Y. 283. See also as to attorneys' liens, 168 U. S. 311; 27 N. Y. Supp. 687; 51 Am. St. 254; 2 R. C. L., § 170 and note; 64 Ark. 443; Kirby & Castle's Digest, § 5189; 47 Ark. 86; 56 *Id.* 324; 85 *Id.* 106. The case in 128 Ark. 416

is in conflict with the above decisions. 2 R. C. L., sec. 160. See 72 Am. St. 815; 11 L. R. A. (N. S.) 631.

Edward B. Downie, for appellee.

The *Carpenter-Hazel* case, 128 Ark. 416, is decisive of the issues here and the decree should be affirmed.

WOOD, J. On the 8th day of January, 1918, W. R. Fisher and J. E. Fisher, father and son, were assassinated in Montgomery County, Arkansas. W. R. Fisher carried a policy of life insurance in the Home Life & Accident Company in the sum of $5,000. H. L. Watkins was appointed administrator of the estate of W. R. Fisher and K. E. Hallman administrator of the estate of J. E. Fisher, by the probate court of Pike County, Arkansas. During the time that H. L. Watkins was acting as administrator of the estate of W. R. Fisher, and K. E. Hallman as administrator of the estate of J. E. Fisher, the insurance company interpleaded in the Pulaski Chancery Court, making both the administrators parties to its interplea, and deposited in the registry of said court the proceeds of the policy of W. R. Fisher and asked that the administrators of the respective estates be required to litigate as to who was entitled to the money due on the policy. At this juncture it was suggested that, since the death of the Fishers occurred in Montgomery County, the administrators should be appointed by the probate court of that county, which in due form was done.

Before the trial was had on the issue raised on the interplea in the Pulaski Chancery Court a petition was filed by K. E. Hallman in the probate court of Montgomery County praying that he as administrator of the estate of J. E. Fisher, deceased, be authorized and directed to employ Otis Gilleylen and Carmichael & Brooks, as lawyers to represent him in Pulaski Chancery Court either upon a contingent or fixed fee as might be agreed upon and approved by the court.

On the 10th day of April, 1919, the probate court of Montgomery County entered an order reciting that K.

E. Hallman as administrator of the estate of J. E. Fisher had on the 9th day of June, 1918, filed a petition asking authority to employ the above attorneys for the purpose mentioned. The order recites that the granting of the petition was overlooked but is granted now for then; that the attorneys, however, had done the work under a contract with the administrator believing that the petition had been granted. The decree was rendered in the original cause in the Pulaski Chancery Court between the administrators directing that the money in the registry of the court should be paid to K. E. Hallman, the administrator or his attorneys of record, and this court affirmed the decree of the Pulaski Chancery Court.

This suit was instituted by the appellants in the Pulaski Chancery Court against the appellee, setting up in substance the above facts and alleging that they had been employed by the appellee who had agreed to pay them a contingent fee of one-third the amount recovered and that they had faithfully performed the services and had recovered for the estate of J. E. Fisher the sum of $4,709.84. They allege that the order of the probate court of the 10th of April, 1919, approved, ratified and confirmed the employment of the appellants and that such order was made as an allowance to the administrator for expenses in administering the estate and was made as a partial distribution of the moneys collected. They alleged that the appellee refused to perform its contract and prayed that they have judgment for the amount due them and the sum of $15, which they had paid out for costs and that their fee be declared a lien on the funds in the hands of the court.

To the complaint the appellee demurred on the ground that the chancery court of Pulaski County was without jurisdiction to render judgment in the cause because exclusive jurisdiction over the subject-matter was in the Montgomery Probate Court.

The court sustained the demurrer and plaintiffs below, appellants here, declined to plead further, whereupon the court entered a decree dismissing the complaint, from which is this appeal.

In the case of *Carpenter* v. *Hazel,* 128 Ark. 416, one Phillips, administrator of the estate of Mary Person, employed one Carpenter, an attorney, to enter suit against a railroad company to recover damages sustained by the estate of Mary Person on account of the alleged negligent killing of Mary Person by the agents of the receivers, who were operating the railroad. The contract specified that the attorney was to receive a certain portion of the amount recovered. The attorney entered suit in the circuit court and recovered, and the amount of the judgment was paid to the clerk of the court where the judgment was rendered. At a subsequent term of the circuit court the attorney filed a petition asking that a lien be declared on and that the clerk be required to pay over to the attorney his portion of the amount recovered. Hazel, at that time the administrator of the estate of Person, resisted the petition. The circuit court decided that it had no jurisdiction of the subject-matter and entered an order directing the clerk to pay over the funds in his hands to the administrator of the estate of Person. From that order an appeal was prosecuted to this court, and we held that "the circuit court was correct in holding that it had no jurisdiction to adjudicate the amount payable to the attorney and to declare a lien on the amount recovered from the defendants in the original action." We quoted the following from *Tucker* v. *Grace,* 61 Ark. 410: "An administrator has no power to enlarge, by his contract, the liability of the estate that he represents. Whether he contracts as an administrator or not, it is his own undertaking, and not that of the decedent, and he incurs a personal liability. An attorney employed by the administrator of an estate has no claims against the estate, although his services may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him."

But counsel for appellants contend that in the case at bar the probate court authorized the administrator to employ the attorneys (appellants) to bring suit to recover the sum due on the insurance policy for the estate of J. E. Fisher. The allegations of the complaint show

that the administrator was not authorized by the probate court to employ counsel to bring suit but that court only "approved, ratified and confirmed the employment" after "the services had been rendered and the money collected."

However, that fact is wholly immaterial. The fact that an administrator is authorized by the probate court to institute suit to recover in the proper forum an amount due the estate which he represents does not give the tribunal in which the suit is instituted jurisdiction to distribute or administer the funds adjudged by it to belong to the estate. For the funds when recovered become the property of the estate and must be administered by the probate court which has exclusive jurisdiction of "the estates of deceased persons," "administrators," etc. Art. 7, sec. 34, Const. 1874.

As we said in *Carpenter* v. *Hazel, supra,* "An amount paid to an attorney for conducting litigation for the benefit of an estate is a part of the expenses of administration, and payment of the amount is a distribution of a part of the assets of the estate. It is necessarily a part of the jurisdiction of the probate court which is exclusive over that subject, and no other court can invade that jurisdiction."

We cannot agree with learned counsel for appellant in the contention that an order of the probate court authorizing the administrator to employ counsel to bring suit to recover money for an estate upon a contract for a fee fixed at a definite sum, or contingent upon recovery and for a certain per cent. of the amount recovered is tantamount to a distribution in advance by the probate court of the funds so recovered, and a separation of these funds from the general assets of the estate. We have no such case before us, but, if we had, counsel are mistaken in the position assumed.

The recovery of funds is one thing, their distribution when recovered is an entirely different matter.

This case is ruled by *Carpenter* v. *Hazel, supra.* There is no distinction in principle between them.

Affirmed.

BROOKS v. STATE.

Opinion delivered December 1, 1919.

1. HOMICIDE—KILLING PERSON NOT INTENDED.—A defendant will be guilty of murder or manslaughter according to the circumstances of the killing, who, in the attempt to kill one person, by mistake kills a third person, although there was no intent or design to kill such third person.
2. SAME—SAME.—A., intending to shoot B., shot and killed C. *Held,* under the evidence that a verdict of guilty of murder in the second degree was warranted by the evidence.
3. SAME—SAME — INTENT—MALICE — ALLEGATIONS IN INDICTMENT.—When the accused shoots at one man and kills another, malice will be implied as to the latter, and a felonious intent will be transferred; and the indictment must allege that the assault was made on the party actually murdered, in all respects, just as if the party killed had been the party shot at.
4. HOMICIDE—INSTRUCTION—OMISSION OF ELEMENT OF MALICE.—In a prosecution for homicide, accused shot at B. but hit and killed C. *Held,* an instruction is erroneous which directed a verdict against the accused if he unlawfully, wilfully and feloniously killed deceased, leaving out the element of malice; but, *held,* any prejudice resulting may be cured by fixing defendant's punishment at two years in the penitentiary, the lowest punishment for manslaughter.
5. HOMICIDE—SECOND DEGREE MURDER—MALICE.—The leading characteristic of murder in the second degree is the presence of malice distinguishing it from manslaughter and the absence of premeditation and deliberation. No killing is murder unless it is done with malice.

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

A. H. Hamiter and *Stevens & Stevens,* for appellant.

Under the indictment and evidence we contend:

1. That the court erred in allowing the witnesses for the State to give evidence of an assault by Will Brooks on John Law and in refusing instructions 1, 2 and 6 for defendant. On the State's theory Will Brooks killed Irene Crawford in a felonious attempt to kill John Law, but the evidence clearly shows that the killing of Irene was an accident, not intended. The attempt here

failed and the only offense towards John Law was an attempt to commit a felony which failed and the only offense defendant committed was the evil intent he had in making the attempt and this should have been charged. 10 Enc. of Pl. & Pr. 491; 6 Ark. 525; 32 Cyc. 329; 60 Ark. 185; 34 *Id.* 275. The intent is the gist of the offense and must be proved as charged. 22 Cyc. 329; 6 Ark. 519; Kirby's Digest, § 2227. They certainly should be alleged. 33 Ark. 561; 38 *Id.* 519; 93 *Id.* 82; 34 *Id.* 263; 29 *Id.* 68.

2. Instructions 1, 2, 3, 4, 5, 6, 7 and 8 for the State are misleading or at least abstract. 13 Ark. 317.

3. The whole theory of defendant is that if the fatal shot was fired by him the killing was by accident and the evidence proves it was by accident. 3 L. R. A. (N. S.) 1152; 64 S. W. 550; 92 Ga. 601; 27 Fla. 370. In this case it devolved on the State to prove it was not an accident. 3 L. R. A. (N. S.) 1161; 33 S. W. 124; 42 W. Va. 253; 51 Ohio St. 331; 58 S. W. 1013; 59 *Id.* 1114.

4. Instruction No. 11 for the State was prejudicial. There was no evidence to support it and it assumes that defendant killed the woman, and it fails to tell the jury if they believe defendant, that if there was no malice or intent to kill, etc., they should acquit, or at least find a less degree of homicide.

5. Instruction 12 for the State is not justified by the evidence.

6. Instructions directing a verdict for murder must contain the word malice or its equivalent. Kirby's Digest, § 1761; 46 S. W. 675.

7. The court erred in not giving instruction No. 3 for defendant. 74 Ark. 262.

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

1. If a person while attempting maliciously to kill another, unintentionally kills a third person towards whom he had no malice, it is murder, and where one shoots and kills deceased in an effort to shoot another

person, his guilt or innocence is determined by the same consideration that would have governed had he shot such other person. 1 Bishop, New Cr. Law, sec. 336; 74 Ark. 264; 53 Atl. 354; 97 N. W. 992; 90 Mo. 220; 139 *Id.* 220. See also 69 Ark. 177; 38 N. Y. 80; 33 N. E. 739; 76 Ark. 517-518; 55 *Id.* 556; 29 *Id.* 248; 113 *Id.* 142; 8 Montana 432; 22 Pac. 688. 34 Ark. 275, cited for appellant, is in harmony with our own decisions and practically all the States in the American Union.

2. Instructions 1 to 8 and 9 are not error. The latter is based on Kirby's Digest, sec. 1765. These instructions are based upon the evidence which supports them. Only general objections were made by defendant. The word "malice" has often been defined. 1 Bishop Cr. Law 429; 83 S. W. 964. The objections should have been specific. 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. No error in refusing instruction No. 3 for defendant, as the court was not submitting the question of involuntary manslaughter to the jury at all, and on the whole case the judgment is right.

HART, J. In the case at bar Will Brooks prosecutes an appeal to reverse a judgment of conviction against him for murder in the second degree. The killing occurred in the night time just before Christmas in Lafayette County, Arkansas.

According to the testimony of John Law, a witness for the State, he started home with Irene Crawford from a party or ball at Sip Harrison's house. On their way home Terry Collins ran up to John Law and tried to take a pistol from him, saying that he was in a row with Willie Rushing and wanted the pistol on that account. Law refused to give Collins the pistol and Collins tore Law's raincoat in trying to take the pistol away from him. Will Brooks ran up and with an oath asked Law what he wanted to shoot Terry Collins for. Law answered that he did not want to shoot him. Brooks in reply said, "You are a God damn liar; if you do not be-

lieve Mr. Brooks will do what he says he will, I will show you.'' About that time Brooks fired his pistol and shot Irene Crawford in the stomach. When Brooks walked up to Law and commenced talking to him, Irene Crawford was standing by the left side of Law with her arm on his shoulder. She said to Law, ''Let's go,'' and back-stepped in front of him. Just at that time Brooks fired his pistol and the ball struck her in the stomach. She said, ''Oh, Bud (referring to Will Brooks), you shot me in the stomach,'' and fell. Brooks shot again and then Law pulled his pistol in order to save his own life and shot at Brooks. After Irene Crawford fell she was carried into a house near by and died in a short time as the result of her wound. Law said that he had not done anything to Brooks and gave him no cause for shooting at him. There were several eye-witnesses to the killing who corroborated the testimony of Law in every respect.

Will Brooks was a witness for himself. According to his testimony, John Law, Irene Crawford and Terry Collins were standing in the road fussing about something when he approached them. He asked them what was the matter with them. Law had his pistol in his hand and said, ''What in the hell have you got to do with it?'' Brooks told him that he had nothing to do with it, and Law again cursed Brooks. Brooks then told Law not to curse him and Law pulled the woman to one side and shot at Brooks. Brooks then stepped to the side of Irene Crawford and shot at Law. Law then made two more shots at Brooks. As soon as the woman said that she was shot, Brooks put his pistol in his pocket and went off to get a doctor. Other witnesses testified for the defendant and corroborated his testimony.

(1) At common law, if a person shot at another with malice and by accident or mistake killed a third person, the offense was murder. Under our statute a person will be held guilty of murder or manslaughter according to the circumstances of the killing, who, in the attempt to kill one person, by mistake kills a third person, although

there was no intent or design to kill such third person. *Ringer* v. *State,* 74 Ark. 262; 21 Cyc. 712, and cases cited; Wharton on Homicide (3 Ed.), par. 360, and Michie on Homicide, vol. 1, sec. 17. The rule in such cases is comprehensively stated in volume 1, section 17, of Michie on Homicide, as follows:

"If a man attempt to kill another without justification, without provocation and not under circumstances of mitigation, and in pursuance of that effort hits and kills a third person, his guilt is measured by the same standard as though he had killed the person originally intended. Whether defendant who shot at one person and killed another is guilty of homicide in any of its grades, or not, depends on the character of his act, and his intent, whether criminal or not, as applied to the person whom he intended to shoot. The thing done follows the nature of the thing intended to be done, and the guilt or innocence of the slayer depends upon the same considerations that would have governed had the blow killed the person against whom it was directed. In determining the criminality of the act of killing it is immaterial whether the intent was to kill the person killed or whether the death of such person was the accidental or otherwise unintentional result of the intent to kill some one else. The purpose and malice with which the blow was struck is not changed in any degree by the circumstances that it did not take effect upon the person at whom it was aimed. The purpose and malice remain, and if the person struck is killed, the crime is as complete as though the person against whom the blow was directed had been killed, the lives of all persons being equally sacred in the eye of the law, and equally protected by its provisions. The general rule is that when one person is killed by mistake or accident, the character of the offense is the same that it would have been if the person intended had been killed."

(2) The doctrine of *Lacefield* v. *State,* 34 Ark. 275, to the effect that when one intending to kill A, shoots and wounds B, he cannot be convicted of an assault with intent to kill B, does not apply in cases where the homicide

was committed. Where there is no killing the act fails of effect and the presumption does not arise that every person is presumed to contemplate the ordinary and natural consequences of his acts. It follows that the evidence for the State, if believed by the jury, fully warranted it in returning a verdict of guilty of murder in the second degree.

(3) It is next insisted that the indictment is defective because it charges Will Brooks with killing Irene Crawford with a pistol, "with the wilful, malicious, premeditated and deliberate intent then and there to kill and murder her, the said Irene Crawford," etc. There was no error in the indictment. An indictment for homicide in a case like this must allege the assault as made on the person killed. Where the accused shoots at one man and kills another, malice will be implied as to the latter; and a felonious intent is transferred, on the same ground, as where poison is laid to destroy one person and is taken by another. Hence the felonious intent is thus transferred and the indictment must be drawn accordingly. That is to say, it must allege that the assault was made on the party murdered, etc., in all respects just as if the party killed had been the party shot at. *State* v. *Clark*, 147 Mo. 20; 47 S. W. 886, and Wharton on Homicide, (3 Ed), par. 359.

(4-5) The next assignment of error is that the judgment should be reversed because the court gave instruction No. 13, which is as follows: "You are further instructed that if you believe from the evidence in this case beyond a reasonable doubt that the defendant, in Lafayette County, Arkansas, and within three years before the return of the indictment herein into the court, unlawfully, wilfully, feloniously, but without premeditation or deliberation, shot at witness, John Law, and killed the deceased, you will find him guilty of murder in the second degree, and assess his punishment at some period of time in the penitentiary, not less than five nor more than twenty-one years."

It is insisted that the instruction is erroneous because it directs a verdict, if the jury should find that the

defendant unlawfully, wilfully, and feloniously killed the deceased and leaves out of consideration the element of malice in the killing. Section 1761 of Kirby's Digest defines murder as the unlawful killing of a human being, in the peace of the State, with malice aforethought, either express or implied. The leading characteristic of murder in the second degree is the presence of malice distinguishing it from manslaughter and the absence of premeditation or deliberation. *Reed* v. *State,* 102 Ark. 525. No killing is murder unless it is done with malice. *Sweeney* v. *State,* 35 Ark. 585.

It follows that the court erred in giving the instruction and it was necessarily prejudicial to the right of the defendant because, if the instruction had not been given, the jury might have found him guilty of manslaughter. It does not follow, however, that this prejudice cannot be cured.

The jury found the defendant guilty of murder in the second degree and fixed his punishment at five years in the penitentiary. They would have been warranted in finding the defendant guilty of manslaughter and any prejudice resulting to him may be cured by fixing his punishment at two years, the lowest punishment for manslaughter. If the Attorney General so elects, the judgment will be modified so as to sentence the defendant for manslaughter for a term of two years.

We have examined the other instructions given by the court and find no prejudicial errors in them. The case was fully and fairly submitted to the jury under proper instructions upon competent evidence.

For the error in giving instruction No. 13 as above set forth, the judgment will be reversed and the cause remanded for a new trial, unless the Attorney General within fifteen days elects that the judgment be modified so as to sentence the defendant for manslaughter and fix his punishment at two years in the State penitentiary.

SHORES-MUELLER COMPANY v. PALMER.

Opinion delivered December 1, 1919.

1. GUARANTY—RIGHT TO REQUIRE CREDITOR TO SUE DEBTOR.—One K. purchased goods from appellant, and appellees, in writing, guaranteed the honest and faithful performance of the same by K. K. was adjudged insane, and appellees notified appellant to commence action on the contract, which appellant did not do within thirty days after notice. *Held*, appellees, guarantors under the contract, were sureties within Kirby's Digest, sections 7921 and 7922, and that appellant's failure to sue within thirty days after notice, relieved appellants of liability.
2. GUARANTY AND SURETYSHIP—DISSIMILARITY.—A contract of surety starts with the agreement, and the liability of a guarantor is established for the first time with the default of the principal debtor.
3. SAME—BREACH.—A guarantor is a surety within the meaning of Kirby's Digest, sections 7921 and 7922.
4. CONFLICT OF LAWS—INTERPRETATION OF CONTRACTS.—Matters bearing upon the interpretation, execution and validity of a contract are to be determined by the laws of the place where the contract was made.
5. CONFLICT OF LAWS—BREACH OF CONTRACT—ENFORCEMENT OF REMEDY—GOVERNED BY WHAT LAW.—When a party comes into court to enforce his remedy upon a contract, that remedy will be enforced in accordance with the laws of this State regulating the remedy, and not according to the remedy of the State when the contract was made.
6. GUARANTY AND SURETYSHIP — LIABILITY — NOTICE TO PRINCIPAL DEBTOR—WHAT LAW GOVERNS.—The statutory right of a surety to require the creditor to institute suit within a given time, upon a contract in which he has become surety, only matures when a right of action has accrued to the creditor, and such a statute is one regulating the remedy and is not a part of the contract.
7. INSANITY—CONTRACT OF INSANE PERSON.—The fact that a person was adjudged insane after he had made a certain contract, does not establish his insanity at the time he made the agreement.
8. SALES—FOREIGN CORPORATION—RIGHT TO SUE.—When a foreign corporation sold goods to K., the contract of sale not being made inside this State, said corporation may sue on the same, in this State, although it has not complied with the laws of Arkansas.

Appeal from Phillips Circuit Court; *J. M. Jackson*, Judge; reversed in part and affirmed in part.

R. B. Campbell and *Sam Latkin,* for appellant.

1. It is obvious that both the agreements between Kindel and appellant and appellees had appellant were made and to be executed in Iowa, and the laws of that State, and not Arkansas, should govern this case. 134 Ark. 495. The law of the place governs, as interpreted by the courts of that State. *Ib.;* 44 Ark. 230; *Ib.* 213; 47 *Id.* 54; 126 *Id.* 14; 13 C. J. 250 and note 24; 110 Pa. 478; 1 Atl. 532. The obligation and effect of a guaranty executed in a State must be construed by the laws of that State. 3 Ark. 96; 6 *Id.* 442; 47 *Id.* 54.

2. Insanity of the principal debtor is no defense to sureties or guarantors. 62 Ark. 387; 22 *Id.* 375; 17 Iowa 393; 106 *Id.* 542; 69 Tex. 34; 17 Ann. Cases 556.

3. Appellant was not engaged in intrastate business and not obliged to comply with our laws as to foreign corporations doing business in this State. 98 Ark. 605.

4. The insanity of W. G. Kindel is no defense to his liability. 67 Pac. 506; 54 Am. Dec. 614; 38 N. E. 42. See note to 34 Ann. Cases 867.

Moore & Vineyard, P. R. Andrews and *J. G. Burke,* for appellees.

1. Kirby's Digest, sections 7921-2, are applicable here. They are the *lex fori* and govern. 6 Ark. 317-355; 15 Ark. 132. Sureties for the payment of money will be exonerated if the obligee fails to sue the principal within the time provided by statute of Arkansas. 48 Ark. 254. The fact that the parties are called "guarantors" does not make the statute inapplicable. 126 Ark. 535.

2. The *lex fori* controls as to all matters pertaining to remedial rights. 6 N. E. 622; 7 Ark. 231; 26 *Id.* 356; 18 *Id.* 384; 134 *Id.* 495. See 110 Pa. 178. Even though the Iowa statute is not applicable, *Tenant* v. *Tenant,* 1 Atl. 532, is not binding on this court because it is in direct conflict with our decisions cited in appellee's brief.

Appellees can not maintain this cause of action because they have not complied with the laws of Arkansas.

There is no error in the judgment of the Phillips Circuit Court in dismissing appellant's action for failure to comply with Kirby's Digest, sections 7921-2, and 3064-5 of Iowa statutes.

STATEMENT OF FACTS.

Shores-Mueller Company, an Iowa corporation, brought this suit against W. J. Palmer, John Palmer, W. B. Jarrett, Walter G. Kindel and L. E. Kindel, guardian of Walter G. Kindel, to recover the price of certain merchandise. On the 4th day of March, 1913, the Shores-Mueller Company, an Iowa corporation, entered into a written contract with W. G. Kindel of Marvell, Arkansas, to sell him certain toilet goods, household medicines, veterinary remedies, and other goods manufactured by said company. The company agreed to sell the goods to Kindel at wholesale prices and the latter agreed to pay his account in monthly installments. The company agreed to furnish him, free of charge, on board the cars at its factory in Iowa, a reasonable amount of advertising matter, report and order blanks and to give him, free of charge, instructions and advice through letters and bulletins as to the best methods of selling its products to customers. Throughout the contract Kindel is called the salesman. The contract was accepted by the company at its home office in Cedar Rapids, Iowa. W. J. Palmer, John Palmer, and W. B. Jarrett signed the following, which was attached to the contract and became a part of it.

"In consideration of Shores-Mueller Company extending credit to the above named person we hereby guarantee to it, jointly and severally, the honest and faithful performance of the said contract by him, waiving notice of acceptance and all notices, including notice of salesman's default, and agree that any extension of time or change of territory shall not release us from liability hereon."

On the 30th day of March, 1916, the probate court of Phillips County, Arkansas, adjudged Walter G. Kindel to be an insane person and committed him to the State

Hospital for Nervous Diseases where he has since been confined. L. E. Kindel was appointed his guardian and duly qualified as such. On the 12th day of September, 1916, W. J. Palmer, John Palmer and W. B. Jarrett gave the Shores-Mueller Company notice in writing to require it to commence suit against Walter G. Kindel at once. The said company failed to comply with this notice within thirty days after it was served upon it.

The circuit court dismissed the suit against the defendants, W. J. Palmer, John Palmer, and W. B. Jarrett on the ground of plaintiff's failure to comply with sections 7921 and 7922 of Kirby's Digest. The circuit court dismissed the suit against L. E. Kindel, as guardian of Walter G. Kindel, on the ground that the subject-matter of the suit was business transacted in this State by the plaintiff and that it had failed to comply with the laws of the State with regard to foreign corporations doing business here. The case is here on appeal.

HART, J., (after stating the facts). The court was right in dismissing the suit as to W. J. Palmer, John Palmer and W. B. Jarrett and wrong as to dismissing it against L. E. Kindel, as guardian of Walter G. Kindel, an insane person. In the first place it may be stated that appellant could sue appellees in one action and that the contract signed by W. J. Palmer, John Palmer and W. B. Jarrett was a contract of guaranty. *Fluhart* v. *W. T. Rawleigh Co.,* 126 Ark. 307. These parties gave appellant notice in writing to bring suit at once against the principal debtor under sections 7921 and 7922 of Kirby's Digest. The sections read as follows:

"Section 7921. Any person bound as surety for another in any bond, bill or note, for the payment of money, or delivery of property, may, at any time after the action hath accrued thereon, by notice in writing require the person having such right of action forthwith to commence suit against the principal debtor and other party liable.

"Section 7922. If such suit be not commenced within thirty days after the service of such notice, and proceeded in with due diligence, in the ordinary course of

law, to judgment and execution, such surety shall be exonerated from liability to the person notified."

(1-3) This brings us to the consideration of the question of whether or not a guarantor under a contract like the present one is a surety within the meaning of the statute. It is true that there is a difference between the contract of a surety and that of a guarantor in this, that the contract of a surety starts with the agreement and that the liability of a guarantor is established for the first time with the default of the principal debtor. At the same time a breach of a guaranty contract is generally regarded as a breach of suretyship and the effect of the reasoning in the case of *Hall* v. *Equitable Surety Co.,* 126 Ark. 535, is to hold that a guarantor is a surety within the meaning of sections 7921 and 7922 of Kirby's Digest. In that case the court held that the sureties on a bond in an indemnity contract did not come within the statute, but treated guaranty contracts as coming within the provisions of the statute.

It is the contention of counsel for appellant that the contract sued on is an Iowa contract and that the notice to sue must be given in accordance with the laws of that State and that the court erred in dismissing the cause of action because appellant did not bring suit within thirty days after notice given under the statute of Arkansas. The record shows that the contract sued on is an Iowa contract and this court has held that matters bearing upon the interpretation, execution, and validity of a contract are to be determined by the law of the place where the contract is made. *J. R. Watkins Medical Co.* v. *Johnson,* 129 Ark. 384, and cases cited. The authorities on the question of giving notice are divided. In *Tenant* v. *Tenant,* 110 Penn. St. 487, the court held that the right of a surety to discharge his obligation by a disregarded notice to the creditor to pursue the principal debtor is a matter affecting the obligation of the contract and must therefore be determined by the law of the place of the contract. The court said that the right of a surety to discharge his obligation by notice to the creditor to pursue

the debtor is a part of the law of the contract and is therefore a part of the contract itself.

(4-6) The court further said that it is the qualification of the obligation of the contract, reducing it from a peremptory and absolute obligation to one of a qualified or conditional character. One the other hand in *Scales* v. *Cox* (Ind.), 6 N. E. 622, the statutory right of a surety to require the creditor to institute suit within a given time upon a contract in which he has become surety only matures when a right of action has accrued to the creditor and the court recognized that such a statute was one regulating the remedy against sureties and was not a part of the contract. We think this holding is in accord with our own decisions on the question. In discussing the statute in *Hempstead & Conway* v. *Watkins,* 6 Ark. 317, at p. 355, the court said: "The statute is but declaratory and an extension of an existing and ordinarily equitable remedy, and it has been adopted and converted by courts of law into a subject of legal cognizance. The statute extends the original remedy or so qualifies it that the surety is not bound to show the injury resulting from the subsequent insolvency of the principal to entitle himself to a discharge from his suretyship."

In *Wilson* v. *Tebbetts,* 29 Ark. 579, the court held that the discharge of one of several sureties by the failure of the creditor to sue within thirty days after notice under the statute is personal to him, and will not affect the liability of his co-sureties. In discussing the statute the court said: "The office of the statute is to impose a duty on the creditor to come to the relief of the surety in case of apprehended danger of liability, by reason of the inability of the principal creditor to pay. It confers a privilege upon the surety to be thus released from his suretyship, and as a consequence of neglect of the creditor to sue, the loss of his remedy against such surety. We have repeatedly held that the surety who gives such notice is discharged from the payment of the debt, unless suit is brought within the time prescribed by the statute."

We are of the opinion that the statute affects the remedy of the creditor and that it is not a part of the contract. It is well settled in this State that when a party comes into court to enforce his remedy upon a contract, that remedy will be enforced in accordance with the laws of this State regulating the remedy and not according to the remedy of the State where the contract was made. *Lawler* v. *Lawler,* 107 Ark. 70, and *Huff* v. *Iowa City State Bank,* 134 Ark. 495.

(7-8) The court was wrong in dismissing the complaint as to L. E. Kindel, as guardian of Walter G. Kindel, an insane person. The record does not show that Walter G. Kindel was insane at the time he executed the contract sued on. The fact that he was subsequently adjudicated to be insane does not establish insanity at a prior time. This is conceded by counsel for appellees, but they contend that the subject-matter of the contract sued on was doing business in this State and that appellant is not entitled to recover because it is a foreign corporation and did not comply with the laws of this State with regard to foreign corporations doing business here. We have not set out the contract sued on in full and do not deem it necessary to do so; for it is very similar to other contracts which have been construed adversely to the contention of appellees. It is true Walter G. Kindel is called the salesman in the contract and that appellant agreed to give Kindel instructions about selling its manufactured products, but these matters when considered in connection with the other parts of the contract do not make it a contract of agency. When it is construed from its four corners, the contract in plain terms sells to Kindel certain toilet goods, household medicines, veterinary remedies, and other goods manufactured by appellant and it is a contract for the sale of these goods in the State of Iowa. Therefore it was not necessary for appellant to comply with the regulations concerning foreign corporations doing business in this State before bringing suit on the contract. *J. R. Watkins Med. Co.* v. *Johnson,* 129 Ark. 384.

It follows that the judgment, in so far as it dismisses the complaint against W. J. Palmer, John Palmer and W. B. Jarrett, is affirmed; and in so far as it dismisses the complaint against L. E. Kindel, as guardian of Walter G. Kindel, the judgment will be reversed and the cause remanded for further proceedings according to law.

CHICKASAW COOPERAGE COMPANY *v.* YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Opinion delivered December 1, 1919.

1. CARRIERS — BILL OF LADING — CAR ON SIDING — INTERSTATE COMMERCE ACT.—Where a carrier's bill of lading provided, that when goods are received for shipment on a private or other siding, such goods are at the owner's risk until the car is attached to a train, such bill of lading is not rendered invalid by the Cummins amendment to the Interstate Commerce Act.*
2. CARRIERS—BILL OF LADING—DELIVERY ON PRIVATE OR OTHER SIDING. —Under a bill of lading which provides that when goods are received for shipment on a private or other siding, they shall be at the owner's risk until attached to a train, the carrier's liability as a common carrier is not limited, but the bill of lading merely defines the time of delivery to the carrier, and is a valid contract.
3. CARRIERS—BILL OF LADING—TIME OF DELIVERY OF GOODS—LIABILITY OF CARRIER FOR LOSS.—Under a bill of lading providing that goods were at the owner's risk when received by a carrier for shipment on a private or other siding until the car is attached to a train, where the car had been loaded and sealed and the carrier notified thereof, *held,* the carrier has a reasonable time, after receipt of notice, in which to take charge of the property before it will be liable for damages thereto by fire sustained prior to the removal of the car.
4. CARRIERS—DAMAGE TO FREIGHT IN CAR ON SIDING.—A bill of lading, covering certain heading, which had been loaded on a car on a siding, provided that delivery was not complete until the car was attached to a train; the car was burned, before the carrier took charge of the car, by a fire breaking out in a neighboring yard. *Held,* it was a question for the jury whether the carrier was guilty of negligence in failing to move the car when notified.

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*U. S. Compiled Statutes, §§ 8592-8604a. Act approved March 4, 1915.

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

E. L. Westbrook, for appellant.

1. The provision in the bill of lading that when goods are received on private or other sidings, they shall be at the owner's risk until the car is attached to a train, is of no effect under the Cummins Amendment to Interstate Commerce Act. 38 U. S. Stat. at L., pp. 1196-7. This amendment does not prohibit contracts limiting the liability of the carrier for loss or injury to an amount not greater than that designated in the contract and it has had a far-reaching effect on the right of carriers to limit their liability on interstate shipments by special contract and the limitation pleaded is sustained in cases arising prior to the act but in none since. The cases in 163 N. Y. Supp. 111 and *Ib.* 114 sustain appellee's position, but even these and all others are decisions upon causes of action arising prior to the law, as it was when the shipment here was made, but there is not a case that sustains the ruling of the court below. The opposite view is maintained and the Cummins Act sustained in 252 Fed. 664; 93 S. E. 1048; 174 Pac. 607.

2. The loss of the car of heading was caused by appellee's negligence in refusing to remove to a place of safety. Having a locomotive and a crew on the scene, it refused to so remove it after being requested to pull the car to a place of safety. 10 C. J. 130, sec. 161, *et seq.;* 23 Atl. 643; 93 S. W. 849; 26 Atl. 370; 46 N. W. 428; 4 R. C. L., sec. 491; 25 Pac. 702; 235 Fed. 856. The testimony shows negligence and it was error to direct a verdict for defendant.

Fink & Dinning, for appellee.

1. As to interstate shipments a common carrier may limit its common law liability by reasonable stipulations except as to loss or damage by its own negligence or that of its servants, and its power to so do is not abridged by the Carmack amendment as amended. 3 Wall. (U. S.) 107; 226 U. S. 491; 227 *Id.* 639; 223 *Id.* 97;

240 *Id.* 632; 241 *Id.* 319; 244 *Id.* 332; *So. Pac. Ry. Co.* v. *Stewart,* advance sheets U. S. Sup. Ct., Feby. 15, 1919, p. 176.

2. The shipment being interstate, the rights and liabilities of the parties "depend upon acts of Congress, the bill of lading and the common law rules as applied in Federal tribunals." 241 U. S. 319; 244 *Id.* 332.

3. A shipper and carrier may lawfully contract so as to postpone the time when the liability of the carrier as an insurer shall attach, and in such case for loss occurring after the bill of lading is issued, but before the time for the liability as insurer to begin, the carrier will not be responsible unless such loss is due to its negligence. 125 Fed. 273; 8 Ga. App. 677; 70 S. E. 174; 163 N. Y. Supp. 111-144; 122 N. E. 456; 95 Atl. 1002; L. R. A. 1916 C, 606.

4. The phrase, "private or other siding," in section 5 of the bill of lading, includes and contemplates a side track of the kind involved in this case. 8 Ga. App. 677, 70 S. E. 174; 163 N. Y. Supp. 111-114; 122 N. E. 456; 95 Atl. 1002; L. R. A. 1916 C, 606.

5. At common law, as interpreted by the Federal courts, a common carrier may lawfully contract for exemption from liability except as against negligence. 3 Wall. (U. S.) 107; 194 U. S. 427; 194 *Id.* 432.

6. A stipulation in a bill of lading exempting the carrier from loss or damage will be limited to loss or damage not proximately due to its negligence. It is not necessary that the stipulation contain express words so limiting it, but they will be implied by the usual rules of judicial construction. 125 Fed. 273; 93 U. S. 174; 133 *Id.* 387; 168 *Id.* 104.

7. The delay, if any, in moving the car from the side track where loaded, even though resulting from defendant's negligence, was not the proximate but only the remote cause of the loss by fire and such delay does not render the carrier liable. 10 Wall. 176; 104 U. S. 427; 76 Miss. 855.

8. Extracts from the tariff and classifications of defendant, made public records by the filing thereof with the Interstate Commerce Commission under section 16 of the act to regulate commerce as amended, duly certified under seal, are receivable in evidence with like effect as the originals to prove rates, rules and regulations. 8 U. S. Comp. Stat. 1916, sec. 16 and sec. 8584 subsec. 12.

9. The provision of the bill of lading which fixes the time when liability of the carrier commences is a valid agreement. 10 C. J. 137. There is no reason why a shipper and carrier should not be permitted to agree as to the time when liability of the carrier begins. 86 Ark. 179; 93 *Id.* 537; 70 S. E. 154.

Receiving and delivering freight on spur track of private individuals is purely a matter of contract to which each party may attach any condition desired. 10 C. J. 251. A common carrier may limit or restrict its liability as an insurer by contract with the shipper where such limitation does not include exemption against negligence of the carrier or its servants and a reduced rate is a sufficient consideration to support the limitation. 3 Wall. 108; 194 U. S. 427; *Ib.* 432; 112 *Id.* 331. This right is not taken away by the Carmack amendment. 226 U. S. 491, approved in 227 *Id.* 639; 233 *Id.* 97, 508; 240 *Id.* 60; 241 *Id.* 319; 244 *Id.* 332; *So. Pac. Ry. Co.* v. *Stewart,* adv. sheets U. S. Sup. Ct. Rep. Feb. 15, 1919, p. 1766; 205 Mass. 254; 28 L. R. A. (N. S.) 293; 158 Pac. 591; 4 R. C. L., § 360. In this case we have a general stipulation that where the shipment is loaded on a "private or other siding" it shall remain at "owner's risk" until it is taken into the actual possession of the carrier. 125 Fed. (C. C. A). 273. See also 93 U. S. 174; 133 *Id.* 387; 168 *Id.* 104. The shipment had been delivered to the carrier and the contract signed, but under the terms of the contract the carrier's liability as insurer except as against negligence was postponed for a consideration until the car had been attached to a train. This provision is reasonable. 163 N. Y. Supp. 111; *Ib.* 114; 122 N. E. 456. The exemption

from liability for loss by fire is fair, reasonable and valid. 3 Wall. (U. S.) 107; 194 U. S. 427-432; 104 Atl. 144; 125 Fed. 273.

10. The appellee owed no duty to the appellant to protect the property from loss due to the negligence of the agent of appellant. 93 Ark. 537-546; 154 U. S. 155. The judgment below should be affirmed because (1) the stipulation in the bill of lading is a valid and binding agreement; (2) that appellee was under no legal obligation to protect the property from fire; (3) that the burden of proving negligence was on appellant and it failed; (4) the proximate cause of the injury was the act of some trespasser, for whose negligence appellee was not responsible.

STATEMENT OF FACTS.

The Chickasaw Cooperage Company brought suit against the Yazoo & Mississippi Valley Railroad Company for the value of a car of heading which was burned on a sidetrack in the yards of the company connected with the railroad company's line of railway. In August, 1915, the Hudson & Dugger Company was operating a heading factory at Clarksdale, Mississippi, and it had in its yards a sidetrack or spur which connected with the main line of the defendant's railroad. A car of heading was loaded about 11 o'clock in the daytime and a bill of lading presented to the agent of the railroad company for his signature at 1:30 in the afternoon. The car had been placed there by the railroad to be loaded. The agent of the railroad company signed the bill of lading when it was presented to him and the car was sealed up and ready to be transported by the railroad company. The car of heading was consigned to the plaintiff, Chickasaw Cooperage Company. About 11 o'clock that night a kiln in the factory of Hudson & Dugger Company caught on fire and the flames extended to the car of heading and burned it up. The origin of the fire was unknown.

According to the testimony of the plaintiff, the railroad company had a switch engine there which was in part used in transferring cars from the sidetrack on the

factory yards of Hudson & Dugger Company to the main line of the railroad company. This engine was in use on the night of the fire, and the employees of the Hudson & Dugger Company asked the engineer to pull the car of heading to a place of safety, and the engineer in charge of the switch engine refused to do so. There was plenty of time for the engine to have been attached to the car of heading and to have drawn it to a place of safety before it caught on fire.

On the other hand, according to the testimony of the railroad company a piece of hose was stretched across the track and it was forbidden by the fire company to run its engine across the hose. The hose was placed across the track for the purpose of trying to prevent the fire from spreading to a lot of lumber which was there, and much more valuable than the car of heading. The shipment was an interstate one and the bill of lading on the back contained a clause as follows: "Property destined to or taken from a station, wharf or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, and when received from or delivered on private or other sidings, wharves or landings shall be owner's risk until the cars are attached to and after they are detached from trains."

At the conclusion of the testimony the court directed a verdict for the defendant and plaintiff has appealed.

HART, J., (after stating the facts). It is first earnestly insisted by counsel for the plaintiff that the provision in the bill of lading that when goods are received on private or other sidings they shall be at the owner's risk until the car is attached to a train, is of no effect under the Cummins amendment to the Interstate Commerce Act, which was approved March 4, 1915.

(1-2) We think counsel are mistaken in this contention. The only effect of the Cummins act was to prevent common carriers from limiting their liability as to the amount to be recovered when goods are lost or destroyed in transportation except

in certain instances where goods are hidden from view; and the amendment also makes it unlawful for any such common carrier to provide by contract for a shorter period of time for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months; and for the institution of suits than two years. This is shown by the express language of the amendment, and we do not deem it necessary to set out the language of the Cummins amendment, for the language relied upon by counsel for the plaintiff to sustain their present contention is contained in the Interstate Commerce Act as it existed before the Cummins amendment was adopted. The clause of the bill of lading relied upon by the railroad company to exempt it from liability in the case at bar is that property when received on a private siding for shipment shall be at the owners' risk until the car or cars containing it are attached to a train. This contract does not undertake to limit the railroad company's liability as a common carrier, it merely defines the circumstances under which delivery for shipment and acceptance by the railroad company shall be understood as having taken place between the parties. The liability of the railroad company, under the Interstate Commerce Act, attaches as soon as the goods are delivered to the carrier for immediate shipment and are accepted by it. By the clause in question the parties undertook to agree when the delivery and acceptance were complete, and the meaning and intent of the clause in question was that the delivery for shipment and acceptance should be complete when the car was removed from the siding and attached to a train. This was a valid agreement under the principles of law decided in *St. Louis, I. M. & S. R. Co.* v. *Jones,* 93 Ark. 537. In that case the court held that under the Interstate Commerce Act carriers may stipulate with shippers of live stock that the latter shall assume all risks and expense of caring for the live stock until loaded in the cars. In that case the cattle had been placed in a pen of the railroad company at its station for immediate shipment, and a bill of lading had been executed by the railroad

company. There was a clause in the contract which provided that the shipper should assume all care and risk of the cattle while in the pen and that the railroad should not become liable for them until they were loaded on its train. The court held that the contract was a valid one. The contract of shipment did not provide that the cattle were to be transported within any specified time, but the court held that it was the duty of the railroad to transport the cattle with all convenient dispatch, with such suitable and sufficient means as it was required to provide in its business, that is to say, in a reasonable time.

(3) We think the principle there announced controls here. It is true that under the facts of the case at bar the car had been loaded and sealed up. The railroad company had been notified of that fact and had issued its bill of lading for the car of heading. The object of the agreement, however, was to give the railroad company a reasonable time after this to come and take charge of the property before it will be deemed to have accepted it for transportation and its liability as a common carrier commenced. This brings the case within the principles announced in *St. L., I. M. & S. R. Co.* v. *Jones, supra.* To the same effect see *Bainbridge Grocery Co.* v. *Atlantic Coast Line R. Co.* (Court of Appeals, Ga.), 70 S. E. 154; *Standard Combed Thread Co.* v. *Pennsylvania R. Co.* (N. J.), L. R. A. 1916 C, 608; *Siebert* v. *Erie R. R.,* 163 N. Y. S. 111, and *Bers* v. *Erie R. Co.,* 163 N. Y. S. 114.

(4) It is next contended by counsel for the plaintiff that the railroad company was guilty of negligence in refusing to remove the car to a place of safety during the fire, and that on this account the judgment should be reversed. In this contention we think counsel are correct. The testimony for the plaintiff shows that the car had been loaded and sealed up; that it was on a siding connected with the railroad company's main track; that it had notified the railroad company that the car was ready for movement and that it had issued a bill of lading therefor. The car was there waiting a reasonable time for the railroad company to place it in a train. Under these

circumstances the car was under the control of the railroad company and it was not a volunteer when it was requested to remove the car to a place of safety during the fire and refused to do so. It had a switch engine at the scene of the fire with steam up manned by a crew.

According to the testimony of the plaintiff the railroad company had ample time to have removed the car to a place of safety after the crew was requested to do so and before the hose was stretched across the track. This testimony, if true, under the circumstances, constituted negligence on the part of the railroad company, and the court erred in not submitting that question to the jury.

For that error the judgment will be reversed and the cause remanded for a new trial.

SECURITY MORTGAGE COMPANY *v.* WESTERN UNION TELEGRAPH COMPANY.

Opinion delivered December 1, 1919.

1. TELEGRAPHS AND TELEPHONES—SENDING MESSAGE ERRONEOUSLY—DAMAGES AS AFFECTED BY PLEADING—LOSS OF PROFITS.—A telegraph message was delivered to the telegraph company, in which the sender offered a client a loan of $8,000; the company erroneously transmitted the message to read $3,000. *Held,* in an action by the sender against the telegraph company, no recovery for the loss of profits could be had where the plaintiff did not allege in his pleadings that the sendee of the message would have accepted his offer, if it had been correctly transmitted.
2. TELEGRAPH AND TELEPHONE COMPANIES—ERRONEOUS TRANSMISSION OF MESSAGE—STEP IN NEGOTIATION—NOMINAL DAMAGES.—A. delivered a message to defendant offering to loan B., the sendee of a message, the sum of $8,000. The company sent and delivered the message to read $3,000. In an action by A. against the telegraph company only nominal damages may be recovered, because the message constituted only a step in negotiations for a loan.

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

Gustavus G. Pope, for appellant.

The court erred in sustaining the demurrer and dismissing the complaint. The telegraph company was lia-

ble for the loss occasioned by its mistake in the telegram. 132 Ark. 339; 106 *Id.* 122; 126 S. W. 629; 71 So. 183; 133 Ark. 184. It was liable for the money actually lost but also for the $240 profits to reimburse it for the overhead expenses and time and efforts in closing the loan after the acceptance by J. B. Montgomery, the purchaser. 92 Ark. 133; 110 *Id.* 144.

Francis R. Stark, Charles S. Todd, and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

The demurrer was properly sustained because:

1. Plaintiff's loss was not the direct, immediate or reasonable result of the change made in the message as delivered, but a remote, indirect, improbable and not to be anticipated result, of a result at all. The expenses were not recoverable. 37 Cyc., p. 1760, par. 2; 133 Ark. 184; Jones on Telegraphs, etc., p. 694, sec. 535; 169 S. W. 1026; 100 N. W. 13; 44 S. E. 309; 47 So. 412; 48 *Id.* 408; 51 S. E. 290-3.

2. The loss is not recoverable because defendant had no notice that plaintiff would suffer it by reason of the error in transmission. 53 Ark. 434-443; 74 *Id.* 358-360; 103 *Id.* 160; 115 *Id.* 142-153; 118 *Id.* 406.

SMITH, J. This case is here on an appeal from a judgment sustaining a demurrer to the following complaint:

"That on or about January 13, 1918, the Security Mortgage Company delivered to the office of the Western Union Telegraph Company at Texarkana, Arkansas, for transmission to J. B. Montgomery, at Springfield, Mo., the following telegram, towit:

" 'Do you want a choice $8,000, 7 per cent. loan, three years, secured by Texarkana Broad street property, best located in the city, conservative value $20,000? Well rented and insured for $6,000. Payment guaranteed by us if you desire. Answer.

(Signed) " 'Security Mortgage Company.'

"That through the negligence of the employees and servants of said Western Union Telegraph Company said

telegram when delivered by said telegraph company to said J. B. Montgomery, at Springfield, Mo., erroneously gave the amount of said loan at $3,000 instead of $8,000 as contained in the original telegram delivered to said telegraph company at Texarkana, Ark., for transmission.

"That said J. B. Montgomery, upon receipt of said telegram giving the amount of the loan as $3,000, wired acceptance, without giving the amount of the loan according to the telegram delivered to him, and the Security Mortgage Company, the plaintiff, relying upon the defendant Western Union Telegraph Company to correctly transmit said message accepted the loan from the customer in the sum of $8,000, and prepared the necessary papers and advanced the money, and that said Security Mortgage Company would not have made said $8,000 loan as set out in the telegram copied herein if same had not been accepted by J. B. Montgomery as herein alleged; that they had no other purchaser agreeing to take such loan; that the loan was closed with the customer in Texarkana before the plaintiff knew that an error had been made in the transmission of said telegram as alleged; that the plaintiff borrowed the money to close the loan with the customer and was not able to dispose of said loan until March 8, 1918; and paid out $69.33 interest on such borrowed money; paid out brokerage fees in handling said loan, attorney's fees, etc., $160; telegrams over wires of defendant company trying to sell said loan to some other purchaser $6;that said loan was sold for $8,000 flat and the purchaser to have accrued interest up to March 8, 1918, and that said J. B. Mongtomery buys all loans from plaintiff herein at a sufficient premium to net him 6 per cent. on the money invested, and said plaintiff thereby lost an additional sum of $240 which plaintiff would have received if the loan had been sold to J. B. Montgomery.

"The said J. B. Montgomery refused to make the $8,000 loan, and plaintiff was compelled to find another purchaser for this mortgage, which they did at a loss of $465, and that this loss is the direct result of the negli-

gence of said telegraph company as hereinbefore set out and alleged. And that said defendant was duly notified of plaintiff's claim for said loss.

"Wherefore plaintiff prays judgment against the Western Union Telegraph Company in the sum of $475, together with interest from January 13, 1918, at the rate of 7 per cent. per annum until paid, and costs of suit and all proper relief."

It will be observed that judgment is asked both on account of actual expenses incurred in the making of the loan and for profit lost on account of not consummating a sale of the loan to the sendee of the message.

All of the judges are of the opinion that no recovery can be had on account of lost profits for the reason that it was not alleged that the sendee would have accepted the loan had the message been correctly transmitted. The contrary is affirmatively alleged. The $8,000 loan referred to in the message as sent was tendered to the sendee and declined by him.

The majority of the court are also of the opinion that only nominal damages can be recovered and that there can be no recovery of the items of expense mentioned in the complaint. We arrive at this conclusion because in our opinion the telegram—had it been correctly transmitted—would have been only a step in the negotiations. The rule in such cases is stated in 37 Cyc. p. 1760, par. 2, as follows: "Where the message relates to a proposed contract between plaintiff and another person, but is neither an acceptance of a previous offer nor itself a definite offer, but only an invitation to submit an offer or to meet or correspond with the sender for the purposes of further negotiation, the failure duly to deliver the message is not, as a matter of law, the proximate cause of the failure of the negotiations to result in a binding contract, and damages for the loss of a contract which might or might not have resulted from further negotiations being too remote and uncertain, only nominal damages can be recovered. This rule applies to messages not containing a definite offer but merely inquiring

whether the addressee will accept a certain price, or will accept a certain position, or desires a position or employment, or requesting a quotation of prices, and particularly to a message which is in effect a discontinuance of pending negotiations."

Upon a somewhat similar state of facts in the case of *Western Union Telegraph Co.* v. *Caldwell,* 133 Ark. 184, we denied the right of recovery upon the ground that an answer to the message would not have completed the contract as either party might have changed his mind before entering into a binding contract. So here no reply that could have been given to the telegram as sent would have constituted a binding contract. An affirmative reply that the sendee did desire to buy such a loan as that described in the message as sent would have required further negotiations to consummate it and either party might have changed his mind before the event was accomplished. After the transmission of an affirmative reply one party might have demanded a premium and the other a discount, and each would have had the legal right to do so without being liable to the charge of having breached the contract—these essential details not being covered by the telegraphic correspondence.

It follows, therefore, that the demurrer was properly sustained and the judgment is therefore affirmed.

McCULLOCH, C. J., (dissenting). It seems to me that the majority miss the point of the case in basing the decision on the ground that the message, if correctly transmitted, might not have resulted in a contract between the parties. The message constituted an explicit proposal for the sale of certain securities of a stated kind and amount, and if the proposal had been seasonably accepted it would have resulted in a definite contract. The fact that the proposal as originally worded was not accepted and would not have been accepted does not affect the right of the sender to recover damages. The message, as incorrectly worded when delivered to the sendee, was promptly accepted and this purported to establish a contract on which the minds of the parties ap-

peared to meet. The parties construed it to be a contract between each other and the sender, acting on the faith that the message had been correctly transmitted, incurred considerable expense in complying with the terms of the contract. This was caused by the negligence of the telegraph company and, according to the allegations of the complaint, a cause of action arose for damages.

I fail to see that the message lacks any of the elements of a definite proposal. It contained an offer to sell and stated the amount of the security, the rate of interest and other facts in description of the kind and value of the security.

Mr. Justice HUMPHREYS concurs in these views.

BOYER v. STATE.

Opinion delivered December 1, 1919.

1. STATUTES—AMENDMENT—REFERENCE—TICK ERADICATION.—Act of 1917, page 195, section 1, amending Act of 1915, page 338, creating the Northwest Arkansas Tick Eradication District and providing that the original act "be amended, to as to include the following named counties," does not violate Constitution, article 5, section 23, which provides that no law shall be revised, amended, or extended by reference to its title only.
2. TICK ERADICATION — DIPPING — EFFICACY.—The efficacy of dipping cattle is not a proper subject of inquiry in a prosecution for the violation of the tick eradication law; and evidence that dipping was inefficacious and injurious to the animals is inadmissible.
3. SAME — SAME — PROOF OF COMPOSITION USED FOR DIPPING.—In a prosecution for failure to dip cattle, evidence that the mixture offered to defendant, did not conform to the formula prescribed by the State Board of Control is admissible.

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

John N. Cook, for appellant; *Mahaffey, Keeney & Dalby* (of Texas), of counsel.

1. The tick eradication law was not properly passed, in so far as by the amendment thereto it was made to

include Little River County. Act 39 is amendatory, pure and simple, and section 1 violates every provision of article 5, section 23, of the Constitution. It attempts to extend the provisions of sections 1 to 6 of Act 86 (1915) by reference to its title only. 49 Ark. 131; 52 *Id.* 290; Cooley Const. Lim. (6 Ed.), p. 181; L. R. A. 1917 B, p. 176; 102 Tex. 170; 132 Ark. 29, 612.

2. It was error to give the peremptory instruction to find defendant guilty. Kirby's Digest, § 2387; 49 Ark. 449.

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

1. The dipping prescribed was being done under the direct supervision of the Board of Control and it must be presumed that the fluid used was satisfactory for the purpose used. The mere fact that it might not be exactly like the formula prescribed by some person connected with the Experiment Station of the University and inserted in their bulletin was no defense to this suit.

2. There was no error in refusing to permit defendant to prove that dipping had injured and killed cattle. The law requiring the dipping is for the good of the community and the fact that in a few cases it was injurious to cattle was no defense, where the whole community is benefited by systematic dipping. *Ashcraft* v. *State,* 140 Ark. 505. Defendant has not shown that the rules of the Board of Control were so arbitrary that it was an impossibility to comply with them. *Ashcraft* v. *State, supra.*

SMITH, J. Appellant was convicted of violating the Tick Eradication Law by failing to dip his cattle, and has prosecuted this appeal to review that judgment.

The trial was had in Little River County, and it is first insisted that the Tick Eradication Law was not properly passed in so far as by the amendments thereto it was made to include Little River County.

The General Assembly, by act No. 86, Acts 1915, page 338, created the Northwest Arkansas Cattle Tick

Eradication District, and section 1 named the counties there embraced. Sections 1 and 6 of this act were amended by act No. 39 of the Acts of 1917, page 195. Section 1 of this amendatory act reads as follows: "Section 1. That section 1 of act 86 of the Acts of 1915 be amended so as to include the following named counties in the Northwest Arkansas Cattle Tick Eradication District, namely: * * * Little River. * * *"

(1) It is said this method of extending the provisions of the act of 1915 offends against section 23 of article 5 of Constitution, which provides that no law shall be revived, amended or the provisions thereof extended or conferred by reference to its title only, but that so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length.

A decision adverse to appellant's contention was rendered by this court in the case of *Hermitage Special School District* v. *Ingalls Special School District,* 133 Ark. 157, where a substantially identical objection was made to the act there upheld.

(2) The court excluded testimony to the effect that cattle dipped at the vat in question were killed and greatly damaged as the result of being dipped, and that dipping throughout the county had the same effect. No error was committed in this ruling, as the efficacy of dipping was not a proper subject of inquiry by the court, as that is a question which has been passed upon by a board specially appointed to pass upon it and one presumptively especially qualified to decide that question.

This is a police regulation, enacted for the general good. We held in the case of *Davis* v. *State,* 126 Ark. 260, that noncompliance with the requirement to dip could not be excused by a showing that particular cattle were not tick infested, as this was a police regulation with which all persons affected by it must comply. So, now, it must be held that the duty to dip and the wisdom and benefits of doing so are not subjects to be inquired into upon the trial of one charged with a violation of that duty.

(3) Appellant offered testimony, however, which was excluded by the court to the effect that the mixture in which he was ordered to dip his cattle did not conform to the formula prescribed by the State Board of Control for use in the tick eradication work; and in this respect we think error was committed.

The legislation on this subject confers on the Board of Control of the Agricultural Experiment Station the power and authority to promulgate the necessary rules and regulations to make the work of tick eradication successful, and pursuant to this authority the board has adopted a formula for use in dipping. It was essential that the board do so to make the regulation effective, and it is only because the board has done so that it is not permissible to excuse a failure to dip by a showing that injury—rather than benefit—would have resulted from doing so. Only the Board of Control has authority to promulgate rules and regulations, and it was manifestly not contemplated that each inspector appointed to enforce the act might order and require the use of any mixture which appeared to him to be efficacious.

The action of the court below is defended upon the ground that presumptively the mixture was a proper one to use—and there is such a presumption—but there was offered here a witness who would have testified that he knew the formula prescribed by the Board of Control and that the mixture which it was here proposed to use did not substantially comply therewith. This testimony was competent, and for the error in excluding it the judgment will be reversed and the cause remanded for a new trial.

HUGGINS v. SMITH.

Opinion delivered December 1, 1919.

1. SALES—PARTNERSHIP INTEREST—GUARANTEE OF INVOICE.—A. purchased a partner's interest in a drug store, and gave his note therefor. In an action on the note, A. defended on the ground that plaintiff had guaranteed that the stock and fixtures would

invoice at a greater sum than in fact they had invoiced at; *held,* upon the issue of whether plaintiff guaranteed the invoice, testimony of the invoice of the stock at the time A. purchased the interest of another partner is admissible.

2. APPEAL AND ERROR—VERDICT ON APPEAL.—The verdict of a jury will not be disturbed on appeal if supported by any substantial legal evidence.

3. SALES—PARTNERSHIP INTEREST—GUARANTEE OF INVOICE.—Under the facts set out in syllabus No. 1, *supra,* the evidence held sufficient to sustain a verdict for the defendant.

4. SAME—SAME—SAME—COUNTERCLAIM—LIMITATIONS.—In an action on a note given for the purchase of a partner's interest in a drug store, where the defendant filed a counterclaim upon the seller's guarantee that the stock and fixtures would invoice at a certain sum, damages under the counterclaim *held* to accrue upon a discovery of a shortage in the invoice value.

5. LIMITATION OF ACTIONS — COUNTERCLAIM — GOOD FOR DEFENSE, WHEN.—A counterclaim may be good for the purposes of defense to an action brought, although itself barred by limitations.

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

Calvin Sellers, for appellant.

1. The verdict is not sustained by the evidence and the court erred in its instruction No. 1 as to what interest the note drew and the jury's finding that it drew interest from maturity was not justified by the evidence in the case.

2. The judgment on the counterclaim is not supported by the evidence. The burden of proving it was on defendant and he failed in his proof.

3. It was error to permit attorneys to ask and appellee to answer if the plaintiff, Higgins, stated anything to him in regard to the value of the stock at the time he bought Hinton out. This testimony was incompetent, for appellee did not contend in his counterclaim that he was damaged by any statement made by Higgins as to the value of the stock at the time he purchased Hunter's interest.

4. It was error to give instruction No. 2 which permitted the jury to find for defendant an amount in ex-

cess of note with whatever interest they might find to be due.

5. The counterclaim was barred. 98 Ark. 125, 128. After the passage of the act of 1917 as to counterclaims, this court held that it must arise out of the contract or transaction set out in the complaint. 135 Ark. 534. Our position is sustained by that decision and 134 *Id.* 311. The verdict is not sustained by the evidence and the cause should be reversed or the judgment reduced to an amount equal to whatever the court finds still due the appellant, with all costs.

J. H. Bowen and *John L. Hill,* for appellee.

1. The evidence amply supports the verdict and there is no error in the court's instructions. 89 S. W. 551; 102 Ark. 200; 74 *Id.* 16; Am. Enc. of Law (1 Ed.) 211.

2. The counterclaim was not barred by limitation. 22 Am. & E. Enc. Law (1 Ed.), p. 381; 71 N. C. 513; 22 Ark. 376-378.

HUMPHREYS, J. Appellant instituted suit against appellees on the 14th day of August, 1917, in the Perry Circuit Court to recover $300 and interest at the rate of ten per cent. per annum from November 15, 1914, on a promissory note executed on the latter date by appellee for a balance due on the purchase price of appellant's one-half interest in a drug store owned by appellant and appellee C. C. Smith, as partners, at the time of the sale and purchase of said interest.

Appellees answered, admitting the execution of the note, but denying liability on the ground that appellant had guaranteed the stock and fixtures would invoice $3,000, whereas they only invoiced $2,200, making a difference of $800, which amount was pleaded as a counterclaim against appellant.

Appellant filed a reply, denying any guaranty as to the invoice value of the stock, and pleading the statute of limitations against recovery on the counterclaim.

The cause was submitted to a jury upon the pleadings, instructions of the court and evidence. The jury

returned a verdict against appellees on the note for $300 and interest at the rate of ten per cent. per annum from maturity and against appellant for $700 on the counterclaim. A difference was struck and judgment rendered against appellant in favor of appellee, C. C. Smith, for $306, from which judgment an appeal has been duly prosecuted to this court.

Appellant and J. J. Hunter owned as equal partners a drug store in the town of Casa. On the first day of May, 1914, appellee, C. C. Smith, purchased Hunter's interest for $1,100. Over the objection of appellant, said appellee was permitted to testify that appellant induced him to buy Hunter's interest by showing him an entry of date January 6, 1916, in the books of the former partnership, to the effect that the stock invoiced $3,615.10, and stating that after the invoice more goods had been put in than sold out of the stock. The business was continued by the new firm with appellant as the principal manager, and appellee, C. C. Smith, as helper on Saturdays and rainy days, and occasionally when his farm duties would permit, until November 15, of the same year, at which time appellant sold appellee his one-half interest in the assets of the partnership for $300, cash, and a note signed by appellees for $300, due January 1, 1916, with interest at the rate of ten per cent. per annum, with the understanding that appellee, C. C. Smith, should pay the indebtedness of the firm. Appellee, C. C. Smith, testified that the note bore interest from maturity and that appellant guaranteed the stock had not been reduced more than $500 below the invoice of $3,615.10, entered in the former partnership book of date January 6, 1914. Appellant testified that the note bore interest from date and that he made no representation or guaranty as to the invoice value of the stock. Soon after the execution of the note, it was lost, found, and given to appellee C. C. Smith, who carried it in his pocket until nearly worn out, and then destroyed it. Appellant demanded the note from appellee, C. C. Smith, who refused to give it to him. On December 27, 1915, appellant sent said appellee a

statement, demanding payment of the note and thirteen months' interest, to which said appellee replied that he did not owe the note. He made no specific denial of the correctness of the interest demanded. Ralph McBride testified that a short time after the sale appellant, in the presence of himself and others, said either that he had guaranteed, or would guarantee, it to invoice about $3,000; that when Smith was asked what the stock would invoice his reply was, "Search me." The stock invoiced $2,200.

(1) It is insisted that the court erred in permitting appellee to testify that appellant represented the invoice value of the stock at $3,615.10 to him when he purchased Hunter's interest. The contention is made that the statement was incompetent because not pleaded as matter of damages in the counterclaim. We think it competent as a circumstance tending to corroborate the testimony of appellee to the effect that appellant guaranteed the stock had not been diminished more than $500 below the invoice of $3,615.10. The cross-bill clearly tendered the issue of whether such a guarantee was made by appellant, and we think the evidence tended to establish the issue.

(2-3) It is next insisted that the verdict sustaining the counterclaim to the extent of $700 is not supported by the evidence. Appellee testified that appellant induced him to make the purchase upon the guaranty that the stock would invoice about $3,100. His testimony was corroborated in a measure by that of Ralph McBride. The weight and effect of the evidence is a question within the exclusive province of the jury. On appeal the verdict of a jury will be sustained if there is any substantial legal evidence to support it. The evidence just detailed, in our opinion, is sufficient to sustain the verdict.

(4-5) Lastly, it is contended that the counterclaim was barred by the statute of limitations, and that it was error to render judgment over against appellant for $306. The damages resulting from the guaranty accrued immediately upon the discovery of the shortage in the invoice value, which was ascertained shortly after the sale, on

the 15th day of November, 1914, and a claim for it was not asserted until December 14, 1917, at the time appellees filed their cross-bill. More than three years had elapsed from the accrual of the cause of action before suit was instituted thereon, so the counterclaim, by way of cross-bill, in so far as it sought a judgment over against appellant, must be treated as an independent suit. The cause of action for a judgment over was therefore barred when the cross-bill was filed. This suit was instituted, however, on the 31st day of August, 1917, about two and a half months before the statutory bar attached. The counterclaim was good for defensive purposes even if the statutory bar had attached when the cross-bill was filed. It was said in the case of *State* v. *Arkansas Brick & Mfg. Co.,* 98 Ark. 125, that "A breach by the plaintiff, though barred as an independent cause of action, continues to exist for defensive purposes available to the defendant, so long as the plaintiff may sue upon any breach by defendant." At the time the decision was rendered from which the above quotation is taken, the law restricted the matter in a counterclaim to that which arose out of the contract or transaction sued upon, and that accounts for the use of the word "breach" in the quotation. Since the passage of act No. 267, Acts of the Legislature of 1917, amending section 6099 of Kirby's Digest, that restriction is eliminated and counterclaims may consist of any matter arising either out of contract or tort, whether it arose out of the contract or transaction sued upon or not. *Coats* v. *Milner,* 134 Ark. 311; *Smith* v. *Glover,* 135 Ark. 531. So a counterclaim arising out of tort, even if barred by the statute of limitations, may be used by way of recoupment against a suit for the recovery of money. It was error, therefore, for the court to render judgment over against appellant for any sum, as the counterclaim was barred when the cross-bill was filed, and also error not to grant the demand made by appellant to reduce the amount of the counterclaim recovered against appellant to the amount recovered by appellee, C. C. Smith, against him. The counterclaim was avail-

able for recoupment only. For that purpose, it existed as long as appellant's cause of action existed.

For the error indicated, the decree is reversed, and decree is directed here reducing the amount of the counterclaim to the amount of recovery by appellant against appellees, with direction that the costs be adjudged against appellees.

SUTTON v. SUTTON.

Opinion delivered December 1, 1919.

1. EVIDENCE—CONSIDERATION IN DEED—PAROL EVIDENCE TO VARY.—In order to recover the true consideration given, parol testimony contradicting the recital in a written deed is admissible; but such testimony is inadmissible for the purpose of destroying or invalidating the deed itself.
2. DEEDS—TESTAMENTARY DISPOSITION OF PROPERTY.—An instrument, in the form of a warranty deed, and acknowledged as such, and so headed, conveying land to a grantee, "and unto his heirs and assigns forever," but with an habendum clause making the instrument inoperative until the grantor's death, is a deed and not a will; the limitation does not defeat the passing of title, but does reserve possession to the grantor during his lifetime.
3. DEEDS—CONSTRUCTION—REPUGNANT CLAUSES.—Where an instrument is held to be a deed, and not a will, the rule is inapplicable that in construing repugnant clauses the last expression of the grantor will be given effect.
4. DEEDS—CONFLICT BETWEEN HABENDUM AND GRANTING CLAUSES.—Where there is a conflict in a deed between the granting and the habendum clauses, full effect will be given to the granting, clause, and the habendum clause rejected.
5. WRITTEN INSTRUMENTS—DETERMINATION OF CHARACTER OF.—Where a written instrument is apparently of a certain character, it should not, by interpolation, be converted into an instrument of another character, unless its provisions are, when harmonized, inconsistent with its apparent character.

Appeal from Pike Chancery Court; *James D. Shaver*, Chancellor; affirmed.

O. A. Featherston and *Pinnix & Pinnix,* for appellants.

1. The chancellor misconceived the grounds upon which relief was sought, as shown in his opinion, even if the writing was a deed the grantee takes upon a condition subsequent and upon breach the grantor is entitled to declare a forfeiture. 91 Ark. 407. The remedy at law in cases like this is inadequate, and resort is properly in chancery. There was error in the first place in assuming that this was a suit to defeat the deed. The conveyance was valid and if the grantee had performed his undertaking it would be upheld now. 125 Ark. 441 is not in point. 71 Ark. 494; 99 *Id.* 350. The recital of a consideration in a deed is only *prima facie* evidence and parol evidence is admissible to contradict it. 15 Ark. 275; 82 *Id.* 492; 66 *Id.* 645; 123 *Id.* 532; 90 *Id.* 287; 101 *Id.* 603; 130 *Id.* 167.

The statement of the amount of the consideration in a deed and the acknowledgment of its payment is no more than a receipt and it is only *prima facie* evidence of what it states, but not conclusive except that there was some consideration, but such a recited consideration is not contractual and works no estoppel as to amount or character and the time consideration may be shown by parol evidence. 96 Ind. 398; 66 S. W. 15; 71 *Id.* 444; 57 Atl. 46; 207 Penn. 620; 44 S. E. 405; 56 S. C. 252; 46 S. E. 553; 97 N. W. 497; 7 Ky. Law Rep. 441; 80 N. W. 339; 84 *Id.* 339; 66 S. W. 15; 35 N. W. 817; 89 Va. 895; 17 S. E. 558; 21 L. R. A. 133; 37 Am. St. 894; 81 N. W. 645; 99 *Id.* 128; 105 Am. St. 1039; 7 Ky. Law Rep. 441; 8 *Id.* 640; 2 S. W. 546; 25 L. R. A. (N. S.) 1197; 42 S. E. 279; 110 N. W. 232. See also 134 Ill. App. 418; 47 Tex. Civ. App. 619; 115 S. W. 830; 118 *Id.* 842. Evidence is admissible to show an agreement to support the grantor in addition to the consideration recited in the deed. 20 Am. Dec. 356; 7 Me. 175; 55 Iowa 759; 19 Ind. 40; 32 Pa. 18; 54 Am. Dec. 198. See also 28 N. C. 121; 108 Ark. 130; 116 *Id.* 162; 126 *Id.* 595, 591; 237 Ill. 620; 127 Am. St. 345; 176 Ill. 83; 152 *Id.* 471. Equity will set aside the deed

if there is a failure to furnish the support as called for as the consideration. 93 N. E. 324; 40 S. E. 17.

Abandonment by defendants of their contract to support the grantor for life entitles the grantor to cancellation. 23 Okla. 806; 138 Am. St. 856. See also 75 N. W. 156, etc. See also 2 Washb. Real Prop. 7; 57 L. R. A. 458; 57 N. W. 787; 13 Oh. St. 49; 4 R. C. L. 509; 134 Ark. 91; 86 *Id.* 251; 127 *Id.* 186; 134 *Id.* 91; 30 New Mex. 202.

2. The undertaking of the grantee was a personal one and could not be enforced against his heirs. Upon his death the grantors were clearly entitled to a rescission. 4 N. W. 775; 71 Pac. 546; 135 Ky. 405. Mere delay for a long time in asserting a cause of action in equity, working no injury or prejudice, bars relief only on the presumption of abandonment, which may be overturned by proof to the contrary. 23 L. R. A. (N. S.) 232. Laches is not mere delay, but delay working to another's disadvantage which may come from the loss of evidence, change of title, intervention of equities and other causes. 103 Ark. 25; 114 *Id.* 359; 121 *Id.* 423. Laches and estoppel have no application in this case. 114 Ark. 90; 5 Pom. Eq. Jur., § 33; 142 U. S. 417; 85 Fed. 517; 71 *Id.* 618; 91 *Id.* 191; 42 *Id.* 42; 42 U. S. App. 42; 26 S. W. 705; 87 *Id.* 126. See also 67 Ark. 526.

3. It was not necessary to allege fraud or mistake as to the consideration at the time of the procurement of the deed. If this court adheres to the Illinois doctrine that a failure to support raises a presumption of fraud *ab initio,* an allegation of entire failure to support justifies the court in making this inference. It is not necessary to plead legal conclusions or presumptions. 14 Ark. 304. Here it is alleged that during his lifetime the grantee failed to provide for the grantor's support and the presumption of fraud arises in the inception of the grant. If the Wisconsin rule is followed the rights of the parties would depend upon the breach and not upon fraud in procuring the deed. Plaintiffs are entitled to recover, no matter which theory is adopted. 176 Ill. 83; 16 *Id.*

48; 59 *Id.* 46; 72 *Id.* 449; 101 Am. St. 243. The intervention of equity is sanctioned in this State on the theory that neglect or refusal to comply with the contract to support raises a presumption that the grantee did not intend to comply with it in the first instance and that the contract was fraudulent in its inception and equity will relieve. 16 Ill. 48; 59 *Id.* 46; 72 *Id.* 449; 32 N. E. 267; 39 *Id.* 267; 51 *Id.* 559; 60 *Id.* 835.

4. Equity will not permit one to enjoy the fruits of a contract and refuse to perform its obligations. 87 N. E. 388; 47 N. W. 768; 138 Am. St. 1054. Equity will rescind conveyances by parents to children on breach of condition to support. 152 Ill. 471; 39 N. E. 267; 176 Ill. 83; 51 N. E. 559; 60 *Id.* 835; *Ib.* 835; 127 Am. St. 345; 22 N. C. 241; 23 S. E. 730; 33 *Id.* 266; 16 Ill. 48; 59 *Id.* 46; 39 N. E. 267; 127 Am. St. 118; 18 L. R. A. (N. S.) 1147; 12 N. W. 74; 53 S. W. 294; 83 Am. Dec. 527; 59 N. W. 837; 13 Oh. St. 49; 53 *Id.* 649; 130 *Id.* 1054.

Where a grantor conveys his property in consideration of care and support, etc., the consideration can not be measured by dollars and cents and equity will grant relief by decreeing reconveyance. See 113 Wis. 303; 57 L. R. A. 458; 75 N. W. 156.

In the cases below the agreement is treated as a condition subsequent. See 51 Atl. 854; 64 S. E. 1081 and the Illinois cases cited *supra;* 29 Ind. App. 277; 71 Ind. 434; 89 *Id.* 29; 37 N. E. 787; 82 S. W. 1009; 58 Me. 73; 64 *Id.* 97; 69 *Id.* 293; 93 Am. Dec. 75; 70 N. E. 49; 95 N. W. 740; 112 *Id.* 217; 22 Mo. 369; 25 S. W. 201; 57 *Id.* 726; 75 Am. Dec. 163; 77 *Id.* 700; 39 Barb. 79; 28 S. E. 513; 47 *Id.* 415; 53 *Id.* 616; 103 N. W. 644; 109 S. W. 1142; 64 S. E. 1019; 14 L. R. A. (N. S.) 1187. Courts of equity go to great lengths to remedy the mischief by rescission or other relief where justice requires it. 41 Wis. 209; 134 Ark. 91. See also 28 L. R. A. (N. S.) 918; *Ib.* 608; 12 Ann. Cases 898; 57 L. R. A. 458.

5. If the instrument is construed to be testamentary to take effect after death, see 1 Jarman on Wills, 26 and

notes; 28 Am. St. 495; 26 *Id.* 86; 51 Pa. 126; 85 *Id.* 495; 1 Jarman on Wills, p. 12; Redfield on Wills, p. 5. The form of the instrument is immaterial if testamentary in its substance. 103 Pa. 600; 71 *Id.* 458; 80 *Id.* 170; 98 *Id.* 159; 30 *Id.* 225; 62 Iowa 314; 66 Ga. 317; 62 Miss. 636; 54 Tex. 72; 38 Am. Rep. 620; 66 S. W. 636.

6. An instrument to be good as a deed must pass a present interest in the property and where it takes effect only on the death of the grantor it is testamentary and insufficient as a deed. Cases *supra.* 68 Mo. 584; 1 Devlin Deeds, par. 309; 76 N. W. 411; 51 Pa. 126; 17 N. W. 522; 15 S. E. 367; 41 Pac. 1080; 50 Am. St. 43; 61 N. W. 673; 26 Am. St. 86; 17 Am. Dec. 699; 50 N. Y. 88; 62 Miss. 366. 50 Ark. 374 is quite different from this and does not apply. See also 75 N. E. 297; 82 Ky. 379; 34 Am. St. 164; 66 S. W. 1023; 121 *Id.* 973; 24 L. R. A. (N. S.) 514; Ann. Cases 1913 B, 147. The habendum clause may be rejected only where there is a clear and irreconcilable repugnance to the granting clause. 78 Ark. 230; 8 Ann. Cases 443; 94 Ark. 615, and the habendum clause controls, as it is the last expression of the grantor. 34 Am. St. 162; 19 S. W. 9; Ann. Cas. B 1917, etc.

W. S. Coblentz, for appellees.

1. While the authorities cited by the chancellor hold that the consideration itself must have been inserted by mistake or fraud, yet see 125 Ark. 447; 71 *Id.* 494; 99 *Id.* 350. There is no allegation that the very consideration the grantor intended was not inserted, nor that there was either fraud or mistake on the part of any one. 103 Ark. 251; 114 *Id.* 359; 121 *Id.* 423. The complaint should have accounted for and explained the laches after nine years and death of grantor. 17 Enc. Proc. 431-2.

2. Appellant's claims were thus barred by laches. 10 R. C. L. 400; 69 Atl. 488; 57 Fla. 423; 124 S. W. 7; 253 Ill. 147; 145 *Id.* 162; 16 Cyc. 164-5; 142 S. W. 156; 101 *Id.* 230; 83 *Id.* 385; 95 *Id.* 179; 112 *Id.* 522; 131 *Id.* 103; 50 *Id.* 374; 96 *Id.* 589. The lower court properly sustained the demurrer.

HUMPHREYS, J. This suit was instituted on the 18th day of April, 1919, in the Pike Chancery Court, by appellants against appellees, to cancel an instrument of record, purporting to be a deed from appellants to James N. Sutton, because (1) the consideration failed, and (2) the instrument constituted a testamentary disposition of their property, revocable at their will. In substance it was alleged in the bill that appellants' son, James N. Sutton, the deceased husband of Etta A. Sutton and father of the other appellees, in his lifetime procured a deed for record from appellants, purporting to convey sixty acres of land in said county, the separate property of appellant Sarah A. Sutton, which had been, and was still, occupied by appellants as their homestead, in consideration of a verbal promise that he would care for and support appellants; that the said James N. Sutton, in his lifetime, and his widow and heirs after his death, failed to render them either care or support; that the consideration expressed in the granting clause of the instrument was as follows: "For and in consideration of divers covenants of value, and the further sum of two hundred ($200) dollars, to us in hand paid, the receipt of which is hereby acknowledged and confessed, and relying on the fidelity and integrity of James N. Sutton, their only son, do hereby grant, bargain, sell and convey unto the said James N. Sutton, and unto his heirs and assigns forever, the following lands lying in the county of Pike and State of Arkansas."

In the habendum the following provisions are found:

"To have and to hold the same unto the said James N. Sutton, subsequent to the death of said Sidney D. Sutton and Sarah A. Sutton, and unto their heirs and assigns forever, with all appurtenances thereunto belonging."

"It is hereby agreed and understood that this deed is inoperative prior to the death of the said Sidney D. Sutton and Sarah A. Sutton, but subsequent to their demise or death, this deed is to become absolute without question;" that it was the intention of the parties that

the instrument should have no force or effect until after the death of the grantors.

Appellees filed a general demurrer to the complaint, which was sustained by the court. The appellants refused to plead over, whereupon the bill was dismissed for want of equity. From the decree sustaining the demurrer and dismissing the bill, an appeal has been duly prosecuted to this court.

(1) It is first insisted by appellant that it was error to sustain the demurrer, because, it is said, even if it be conceded that the instrument was a deed, it contained a condition subsequent, a breach of which authorized the grantors to declare a forfeiture. The breach which it is contended worked a right of forfeiture in favor of appellants consisted in the failure of appellee, in his lifetime, or his widow and heirs after his death, to furnish care and support to said appellants. As the deed itself does not recite such a consideration, the determination of this question involves the right to make oral proof of the additional consideration and the failure thereof. The rule is well established that the true consideration in a deed may be shown by parol evidence, even though contradicting the written consideration expressed in the deed, for the purpose of recovering the consideration; but it can not be shown for the purpose of destroying or invalidating the instrument itself. *Davis* v. *Jernigan,* 71 Ark. 494; *Wallace* v. *Meeks,* 99 Ark. 350. It was said in the case of *Hampton* v. *Haneline,* 125 Ark. 441, that: "The grantor makes the deed. The presumption is that he had the real consideration recited therein, and in the absence of testimony tending to show that the pecuniary consideration named in the deed was inserted therein by mutual mistake or by some fraud practiced upon the grantor at the time he signed the deed, neither the grantor nor those claiming under him can be permitted to question the consideration named in the deed for the purpose of invalidating the same."

Again, in the same case it was said: "Hence the consideration can not be contradicted or shown to be dif-

ferent from that expressed when thereby the legal operation of the instrument to pass the entire interest according to the purpose therein designated would be defeated."

The purpose of the allegation in the bill, to the effect that an additional consideration not expressed in the instrument had been promised and that said consideration had failed, was to defeat the instrument as a deed in fee simple, or with a condition subsequent attached. The allegation, therefore, or any inference that might be drawn from it, failed to state a cause of action that could be established by oral evidence.

(2) It is next insisted that the instrument constituted a testamentary disposition of the real estate, revocable at the will of appellants, who were the grantors in the instrument, and that it is proper for a court of equity to cancel the instrument in aid of the desire of appellants to revoke it. The solution of this question involves a determination of whether the instrument is a deed or a will. The instrument was incorporated in the bill and made a part thereof. If not ambiguous in its terms, the instrument itself must control the allegation in the bill to the effect that the intention of the parties was for the instrument to become effective at the death of the grantors, and not before. In order to interpret the instrument, it is unnecessary to set it out in full. Suffice it to say that "Warranty Deed" appears at the head of the instrument; that it is referred to in the body of the instrument as well as the acknowledgment, as a deed; and that its form in all particulars is that of a warranty deed.

(3) It is suggested by learned counsel for appellants that the instrument must be interpreted a will because it is provided in the habendum that the grantee shall have and hold said real estate subsequent to the death of the grantors; and further that the deed is inoperative prior to the death of the grantors, but, subsequent to their death, is to become absolute, for the reason that this was the last expression of the grantors as to their intention. That is the rule for construing repug-

nant clauses in a will after it has been determined that the instrument is a will. The rule, however, does not apply in construing repugnant clauses in a deed, after it is ascertained to be a deed.

(4-5) Where there is an irreconcilable conflict between the granting and habendum clauses of a deed, the habendum is rejected and full effect given to the granting clause. Neither rule is the test for determining whether an instrument is a deed or a will. In order to determine the character of an instrument, each clause or part must be reconciled, if possible, with every other clause or part, and the intention of the parties gathered from reading the whole instrument thus harmonized. If an instrument appears on its face to be a deed, it should be upheld to be a deed, if possible. If apparently a lease or will, likewise it should be upheld as a lease or will, according to its appearance. The apparent character of an instrument should never be converted by interpretation into an instrument of a different character, unless its provisions, when harmonized, if possible, are wholly inconsistent with its apparent character. As stated above, the apparent character of the instrument before us for consideration is that of a warranty deed. In fact, it is alleged in the bill to be a deed in form. It bears the name of a warranty deed, and is referred to in both the body of the instrument and the acknowledgment as a deed. It contains a granting, habendum and warranty clause. Having every earmark of a warranty deed, it should be so construed. It is suggested, however, that effect can not be given the instrument as a deed because it is manifest from the habendum that it was not the intention of the parties to pass a present interest in the property attempted to be conveyed. The clauses may be read together and the apparent conflict between the granting and habendum clauses eliminated by referring the transfer of the legal title to the granting clause and the transfer of possession to the habendum clause. In other words, purpose and effect may be given to each clause and the instrument upheld as a deed by saying

that the title to said land passed through the operation of the granting clause, but that the possession was reserved to the grantors during their lives, through the operation of the habendum. Our construction, therefore, of the instrument is that it is a warranty deed, conveying the title to the grantee with the reservation of the possession for life in the grantors.

The decree is affirmed.

BECK v. STATE.

Opinion delivered December 8, 1919.

1. CRIMINAL LAW—EVIDENCE OF FORMER CONVICTION.—In a prosecution for selling intoxicating liquor, the fact that in a former prosecution for selling intoxicating liquor at another time and place the principal witness was cross-examined as to the sale which is the basis of the present indictment is no bar to this indictment where the sale which forms the basis of the present charge was not made an issue in the former trial.
2. CRIMINAL LAW—BURDEN OF PROOF OF FORMER CONVICTION.—A defendant who sets up former conviction as a defense to a charge of selling intoxicating liquor has the burden of proving that the sale which is the basis of the charge in the subsequent prosecution was made an issue in the former trial.
3. CRIMINAL LAW—HARMLESS INSTRUCTION.—An instruction on the subject of former conviction was harmless, if erroneous, where there was not sufficient evidence to warrant submission of the question of former conviction.
4. CRIMINAL LAW—HARMLESS EVIDENCE.—In a prosecution for the offense of selling intoxicating liquor, where defendant pleaded former conviction, evidence of jurors in the former trial that they never considered the sale which is made the basis of the present charge was harmless where there was not sufficient evidence to warrant submission of the question of former conviction.
5. CRIMINAL LAW—EVIDENCE OF JURORS AS TO FORMER CONVICTION.—In a prosecution for selling intoxicating liquor, where defendant pleaded a former conviction, evidence of jurors in the former trial that they had not considered the sale which formed the basis of a subsequent prosecution was incompetent, as it was unimportant what the jury actually considered.

6. INTOXICATING LIQUORS—EVIDENCE OF SALE.—Where the prosecuting witness laid money upon the counter, followed defendant into a back room, took a bottle of whiskey out of a barrel or box upon defendant lifting the lid thereof, and left the store taking with him the liquor and change which he found upon the counter, there was a "sale" of the liquor.

7. CRIMINAL LAW—CORROBORATION OF ACCOMPLICE.—Where one person gave another money to buy whiskey, and the latter procured the whiskey and delivered it to the former, the latter was an accomplice of the seller unless he acted only as agent of the buyer, and his testimony is not sufficient to convict unless corroborated.

8. CRIMINAL LAW—REFUSAL TO INSTRUCT AS TO TESTIMONY OF ACCOMPLICE.—In a prosecution for sale of intoxicating liquor where there was evidence tending to prove that the prosecuting witness was an accomplice, the court's refusal to instruct that there could be no conviction on such testimony if he was an accomplice unless he was corroborated by other testimony *held* reversible error.

9. CRIMINAL LAW—EVIDENCE OF OTHER SALES.—In prosecution for selling intoxicating liquor evidence as to sales made many years before the sale upon which the prosecution is based was incompetent, being too remote.

10. CRIMINAL LAW — INCOMPETENT EVIDENCE — INVITED ERROR.—In a prosecution for selling intoxicating liquors, where defendant, in response to a question by his counsel, stated that he had never at any time sold whiskey, the admission of testimony on behalf of the State as to sales made many years previously was error invited by defendant.

Appeal from Logan Circuit Court; *James Cochran,* Judge; reversed.

Evans & Evans, for appellant.

1. The court erred in giving the instructions for the State and in refusing those asked for defendant as to the plea of former conviction. The court virtually by its charge cut off the plea of former conviction. Art. 8, § 2, Const. 1874; 2 Wharton, Cr. Ev. (10 Ed.), § 578, pp. 1187-8; *Id.* secs. 580-1; 43 Ark. 68; 3 Gr. Ev. § 36; 65 Ark. 38; 72 *Id.* 419; 115 *Id.* 376; 130 *Id.* 325; 45 L. R. A. (N. S.) 977.

2. The general rule is that a conviction or acquittal for unlawfully selling intoxicating liquors bars a prosecution for any sale to the same person for which a con-

viction might have been had under the indictment, but that if the sales constitute separate and distinct offenses, conviction or acquittal of the one will not bar a subsequent prosecution for a prior sale. 92 Ala. 64; 53 Ga. 448; 21 Am. Rep. 269; 114 Ga. 265; 48 S. E. 234; 72 Ark. 419; 43 *Id.* 68; 65 *Id.* 38; 110 S. W. 918.

3. The testimony of the jurors on the former trial was not competent and it was error to admit their testimony. 29 Ark. 293; 59 *Id.* 132; 130 *Id.* 48; 127 *Id.* 254; 37 *Id.* 519; 70 *Id.* 244.

4. It was error to admit testimony as to sales twenty years ago. Jones on Ev. §§ 143-5; 54 Ark. 621; 93 *Id.* 260; 59 *Id.* 431. See also 135 Ark. 159.

5. Tate was an accomplice and it was error to refuse the instruction as to the necessity of corroboration. 90 Ark. 579; 45 *Id.* 361. See also 214 S. W. 36; 129 Ark. 106.

6. It was error to give instruction No. 3 on the court's own motion. 90 Ark. 579; 22 *Id.* 336; 50 *Id.* 305; 43 *Id.* 99.

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

1. Since no proof of the sale made in the Central Drug Store was made on the former trial, defendant could not plead former jeopardy.

2. The argument of the prosecuting attorney if improper did not entitle defendant to plead former conviction because not based upon any evidence or proof that defendant sold whiskey to the prosecuting witness at the Central Drug Store, and there was no need to submit the plea of former conviction to the jury and the demurrer of the State should have been sustained. The testimony in the former trial was introduced by defendant himself on cross-examination of Powell. 72 Ark. 419; 115 *Id.* 376.

There was no error in the instructions. 70 Ark. 74; 108 *Id.* 87; 110 *Id.* 432; 113 *Id.* 68.

3. There was no error in permitting jurors to testify, as no objections were made and the question can not be raised here for the first time.

4. Powell was not an accomplice. He was the purchaser and a principal, if guilty. 214 S. W. 36 is not in point.

5. No error in giving instruction No. 3 for the State. It was the duty of defendant to ask an instruction to cover the point and failing he can not complain. 114 Ark. 398.

McCULLOCH, C. J. This an appeal from a judgment of conviction of the offense of selling intoxicating liquor. Three indictments were returned against appellant at the August, 1918, term of the Logan Circuit Court, each charging the offense of selling whiskey. One of the cases was tried at that term of court and the trial resulted in appellant's conviction and sentence to the penitentiary. The present case was tried on one of the indictments at the August term, 1919. Appellant entered a plea of former conviction, as well as a plea of not guilty. To sustain the plea of former conviction, appellant attempted to show in the trial of the present case that the alleged sale on which the State relies in the present case for a conviction was made an issue in the trial of the other case at the August term, 1918.

The sale of whiskey charged in each of the indictments is shown to have been made to Ernest Powell, who was the principal witness in each of the trials. Powell testified that in each of the cases he purchased whiskey from appellant. In the present case the State relies on an alleged sale made by appellant to Powell at a drug store on a certain occasion. The other sales were made at another place.

The contention of appellant is that, although the State, in the former trial, first sought to convict appellant on proof of another sale, there was an issue introduced before the trial was completed concerning the sale at the Central Drug Store, which is the basis of the pres-

ent trial. The testimony tends to show that a sale of whiskey was made by appellant to Powell at the Central Drug Store, in Booneville, on or about April 17, 1918, and was sufficient to warrant the jury in so finding. Appellant was, according to the testimony, accustomed to stay in and about the Central Drug Store at that time. Powell testified, in substance, that he met Mathew Williams on the street in Booneville and that Williams requested him to get some whiskey for him, and gave him a five-dollar bill to use in buying the whiskey; that he took the money from Williams, went to the Central Drug Store and accosted appellant on the subject of buying some whiskey; and that appellant replied, saying: "I might find some." He testified that appellant led him through the storeroom into a back room and lifted the lid of a barrel or box, and that witness looked into the barrel or box, and, seeing bottles of whiskey there, took out a bottle and carried it away with him. He testified that when he accosted Beck at the counter in the drug store he laid the five-dollar bill down on the counter near the cash register, or that he gave it to Beck and that Beck laid it down on the counter, and that when he returned from the back room he found $1.50 in change where he had previously left the five-dollar bill. He testified that he returned the whiskey and $1.50 in change to Williams. Williams testified that he met Powell on the street and asked him to get whiskey for him and that he gave him a five-dollar bill, but his statement is that Powell never brought him the whiskey nor returned him his money, but came back a little later and told him that he had not been able to get any whiskey. Appellant denied that he had sold whiskey or had anything to do in procuring it for Powell.

Appellant introduced the record of the former trial in which appellant was convicted at the August term, 1918, of selling whiskey, and in order to show that the sale to Powell at the Central Drug Store was an issue in the former trial, Judge Evans, one of the attorneys for appellant, was introduced as a witness and testified that

on the former trial he interrogated Powell on cross-examination as to his testimony in the mayor's court in which he had stated that he bought whiskey from appellant at the Central Drug Store, and that Powell admitted that he had so testified in the former trial. This examination, Judge Evans said, was for the purpose of impeaching Powell by showing contradictory statements, and that was the only attempt to show that there was any testimony introduced at the former trial concerning the sale at the drug store.

In the closing argument the prosecuting attorney referred to the testimony drawn out by Judge Evans and stated to the jury that, no matter what the jury might think about the other alleged sale, counsel for appellant had drawn into the case the alleged sale in which Williams was interested, and that appellant had not been called as a witness to testify about it, and that the jury should convict on that, if nothing else. Judge Evans' testimony on the subject is, according to appellant's own abstract, as follows:

"The State did not ask Powell about the alleged sale made to him in which Mathew Williams was a witness, but on cross-examination I asked Powell about that for the purpose of showing that he had sworn before the mayor about that sale and had sworn in that examination that he had had nothing to do with any liquor bought from Beck at any other time. I drew that out on cross-examination and did not put Mr. Beck on the witness stand to deny it. In the concluding argument to the jury, Mr. Wofford, who represents the State, said to the jury in arguing the case: 'No matter what you think about these alleged sales on the night that Buster Kersey was at the restaurant with Powell,' that I had drawn into the case this alleged sale in which Mathew Williams was in interest, and that the defendant Beck did not deny it and Williams had not been called to testify about it and the jury could convict on that and nothing else, and it went to the jury that way, and the jury convicted Beck. These three sales that Powell testifies about here were all be-

fore the jury in that case. The State did not elect any special case to rely upon, but relied upon these three sales and got a conviction in that case.' ''

It is conceded that Judge Evans' narrative is correct as to the manner in which, and the purpose for which, he drew out this testimony from Powell on the former trial, but there is a slight difference between his testimony and that of the prosecuting attorney as to the precise language used by the prosecuting attorney in his argument. Of course, those differences might have been settled by the jury, but we are of the opinion that, accepting the version of Judge Evans as correct, it did not make out a case of former conviction. The rule on this subject is clearly stated by Chief Justice COCKRILL in the case of *State* v. *Blahut,* 48 Ark. 34, as follows:

"Each sale of liquor by the defendant to the minor was a separate offense, and there could be as many convictions as there were sales made. (*Emerson* v. *State,* 43 Ark. 372.) It is true the State may preclude the possibility of more than one conviction, even where there have been many sales, by taking a wide range in the proof, putting all the guilty sales in evidence, and relying upon the whole proof for a single conviction. In that case the defendant can be convicted upon the proof of any one of the sales made within a year of the finding of the indictment, and it is the established rule that the former conviction is a bar to a subsequent indictment for any offense of which the defendant might have been convicted upon the testimony under the indictment in the first case."

This rule was followed in more recent cases. *Briant* v. *State,* 72 Ark. 419; *Sanders* v. *State,* 115 Ark. 376.

The burden was on appellant to show that the sale which forms the basis of the present charge was made an issue in the former trial. We do not think that the testimony shows that such an issue was made. There was no testimony at all as to that sale in the former trial. The witness, Powell, was merely interrogated on cross-examination as to what he had testified in the mayor's

court about the sale for the purpose of contradiction, and a verdict of conviction for that sale would have been without evidence to sustain it. It is only where, in such cases, there is evidence introduced for the purpose of sustaining the charge that the judgment either for conviction or acquittal operates as a bar to further prosecution. *Turner* v. *State,* 130 Ark. 48; *Larkin* v. *State,* 131 Ark. 445.

Conceding that Judge Evans was correct in his statement concerning the remarks of the prosecuting attorney, they were not sufficient to introduce the sale now in question as an issue in the former trial, and, at most, the remarks of the attorney merely constituted error which should have been corrected in that case, and cannot be taken advantage of in the present case as a former adjudication of the issues now presented in this case.

Objection was made to an instruction given on this subject, but since we hold that there was not sufficient evidence to warrant a submission of the question of former conviction, no prejudice resulted from the instruction alleged to be erroneous.

The same may be said with reference to the introduction of some of the jurors in the former trial to prove that they had not considered in that case the sale made at the Central Drug Store. This testimony was not competent for the reason that it was unimportant what the jury actually considered in the case, but the testimony could not have been prejudicial inasmuch as it only related to the plea of former conviction.

Error of the court is assigned in the giving of instruction No. 3 by the court, which reads as follows:

"If you should find beyond a reasonable doubt from the evidence that the witness, Ernest Powell, went into the Central Drug Store and laid down five dollars on the counter, followed the defendant into a back room, and there Beck raised up the lid of a barrel or box, and witness Powell got out of the barrel or box a pint of alcoholic liquor, and went back through the drug store and found a dollar and a half on the counter and picked it up

and went out carrying the liquor with him, the court tells you that would be a sale of liquor by Beck."

Counsel have not shown in the argument in what respect the recital of facts in this instruction falls short of constituting a sale of whiskey by appellant, and we are unable to discover in what respect the elements of participation in a sale are lacking.

Counsel for appellant requested the following instruction, which the court refused to give:

"If witness Williams gave witness Powell five dollars with which to procure intoxicating liquors and witness Powell took the money and procured the liquor and returned it to Williams, he himself was guilty of the sale, unless Powell acted only as the agent of the buyer. If the witness Powell was interested in the alleged sale which is made the foundation of this prosecution, other than as agent of the buyer, he is an accomplice, and defendant cannot be convicted unless his testimony is corroborated by other testimony and the corroboration is not sufficient to convict if it only shows the commission of the offense and the circumstances thereof."

No other instruction submitting the question of Powell being an accomplice was given. It is the conclusion of the majority of the court that this instruction should have been given, and that it was error to refuse it. The first sentence in the instruction was undoubtedly correct; that is conceded by the Attorney General. The last sentence was also correct, and should have been given, for the circumstances proved in the case were sufficient to warrant the inference by the jury that Powell was a mere runner for appellant, and was in that way interested in the sale. It is unnecessary that it should have been a pecuniary interest, but if he was directly interested in helping appellant make the sale he was an accomplice, and there can be no conviction on his uncorroborated testimony. *Ellis* v. *State,* 133 Ark. 540. There was a sharp conflict between the testimony of Powell and Williams as to the former returning the whiskey and the balance of the money to Williams, and the jury might have rejected

the testimony of Powell as to his statement that he was not interested in the sale, and have drawn the inference from all the circumstances that he was soliciting for appellant. Appellant was entitled to an instruction on this subject; and, since no other instruction on the subject was given, the refusal of this one constituted prejudicial error which calls for a reversal of the judgment.

In view of another trial of the case, we mention another assignment of error which relates to the ruling of the court in permitting the State to introduce witnesses who testified to sales of whiskey made by appellant many years ago. The sales to which this testimony related were so remote in point of time that the testimony was incompetent, but it was invited by appellant himself, who, in response to direct questions propounded by his own counsel, stated that he had never at any time sold whiskey. It, therefore, presents a case of invited error.

The judgment is reversed for the error indicated, and the case remanded for a new trial.

HUMPHREYS, J., dissents.

REED v. FIRST NATIONAL BANK OF CORNING.

Opinion delivered December 8, 1919.

JUDGMENT—CONFORMITY TO PLEADING.—In an action to enforce a vendor's lien upon land, a complaint in which the only reference to a certain defendant was an allegation that such defendant claims an interest in the land was insufficient to sustain a decree by default against such defendant for recovery of the purchase money.

Appeal from Clay Chancery Court, Western District; *Archer Wheatley,* Chancellor; reversed.

C. T. Bloodworth, for appellant.

It was error to render a personal judgment against appellant, as no liability is shown by the evidence or alleged in the complaint that he owed any part of the consideration for the property. 73 Ark. 221. The complaint

states no cause of action against Reed, the appellant. 8 Ark. 456; *Ib.* 484; 25 *Id.* 570; 66 *Id.* 113; 74 *Id.* 468; 89 *Id.* 117; 107 *Id.* 353.

McCULLOCH, C. J. Appellee instituted this action in the chancery court of Clay County (Western District) against appellant and one Brown to foreclose a lien on certain real estate for the purchase price. It was alleged in the complaint that J. E. Matthews sold the real estate in question to Brown and that Brown executed to Matthews the promissory notes in suit, which were assigned to appellee by Matthews. The only reference in the complaint to appellant was as follows:

"That plaintiff understands that the defendant, Ernest Reed, is claiming some interest or claim on said lot."

The notes were exhibited with the complaint. Appellant and Brown were both served with summons to appear in the action, but neither appeared, and there was a default decree against both of them, which was for the recovery of the amount of the notes ($740.80) and for foreclosure of the vendor's lien on the real estate conveyed by Matthews to Brown. Appellant has prosecuted an appeal from the personal decree against him for recovery of the amount of the notes.

The decree was obviously wrong to the extent that it was for the recovery of the amount of the notes from appellant personally. The complaint contained no allegation which would be sufficient to warrant such a decree. The only allegation was that he was claiming some interest in the lot sold by Matthews to Brown. This feature of the decree may have been an inadvertence or misprision of the clerk in entering the decree, but as the decree stands upon the record it is erroneous and appellant is entitled to a reversal to that extent.

FLURRY v. THOMAS.

Opinion delivered December 8, 1919.

PARTITION—ALLOTMENT—EXCEPTIONS.—The fact that two sets of commissioners in a partition suit made practically the same allotments did not justify the chancellor in refusing to hear appellants' exceptions thereto, and to determine whether the allotment constituted a fair and just division of the lands according to value and quality.

Appeal from Logan Chancery Court, Northern District; *J. V. Bourland,* Chancellor; reversed.

John M. Parker, for appellant.

The partition was not fair and equitable. The report was not sworn to and the allotment to appellant was inferior in value and quantity and it was error to refuse to hear testimony as to the quality and value of the land and the fairness and equality of the allotment. Authorities are not necessary to be cited.

McCULLOCH, C. J. Appellants and appellees are owners as tenants in common of forty acres of land in Logan County, and this action was instituted for the purpose of having a partition of said lands. The chancery court rendered a decree for partition, there being no controversy as to the several interests of the respective parties, and appointed commissioners, who made a report allotting 13 1/3 acres on the north side of the forty-acre tract to appellants, on condition that appellants pay to appellees the sum of $200 for the purpose of equalizing the valuation of the several tracts allotted. Exceptions to the report were filed by appellants, which the court sustained, and the court appointed new commissioners, who made a report at the next term of court awarding to appellants 10 acres on the north side of said tract. Appellants filed exceptions to the last report and also filed in support of the exceptions the affidavits of numerous parties who resided in the neighborhood and were familiar with the condition and value of the lands. The testimony set forth in the affidavits tended to show that

the ten-acre tract allotted to appellants was, to a very considerable extent, inferior in quantity and value to the other portions of the land, and that the allotment to appellants was not fair and equal, either in value or quantity.

The court refused to hear testimony on the question of quality and value of the several tracts allotted to the parties on the ground stated in the decree that the last allotment made by the commissioners was practically the same as that made by the first commissioners. The court overruled appellants' exceptions and confirmed the report, from which appellants have prosecuted an appeal.

The chancery court erred in refusing to hear testimoney as to the quality and value of the land. The last allotment made by the commissioners was not practically the same as that made in the former report, but, even if that had been true, it does not preclude the court from determining whether or not the allotment constituted a fair and just division of the lands according to value and quality.

The decree is, therefore, reversed and the cause remanded with directions to the chancery court to hear testimony on the subject of the fairness and equality of the allotments made by the commissioners.

McCLENDON v. BOARD OF HEALTH.

Opinion delivered December 8, 1919.

1. MUNICIPAL CORPORATIONS—CITY MANAGER "AN OFFICER."—A city manager appointed under Acts 1917, page 568, to manage the affairs of the municipality; being required to take an official oath before assuming the office and his duties and functions being prescribed, is an officer and not an employee.
2. MUNICIPAL CORPORATIONS—QUALIFICATIONS OF MANAGER.—The provision of Acts 1917, page 568, for city manager of certain municipalities that the manager need not be a resident of the city is invalid under Constitution, article 9, section 3, providing that no person shall be elected or appointed to fill an office who does not possess the qualifications of an elector.

3. STATUTES—EFFECT OF PARTIAL INVALIDITY.—Though Acts 1917, page 568, providing for a city manager, is invalid in so far as section 33 provides that the manager need not be a resident of the city, such provision may be stricken out and the remainder of the act enforced.

4. HEALTH—POWER OF CITY MANAGER TO APPOINT BOARD OF HEALTH. —Under Acts 1917, page 568, section 34, authorizing the city manager "to organize, continue or discontinue such division or departments from time to time as to him may be deemed necessary and expedient, and to assist and remove all heads of departments, and all subordinate officers and employees of the city; all appointments to be upon merit and fitness alone," the city manager was authorized to appoint the board of health of the city; an earlier act giving the mayor such power being repealed.

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

O. H. Sumpter, for appellants.

1. The provisions of act 96, Acts 1913, govern the appointment of boards of health of cities of the first class and the provisions of act 114, Acts 1917, do not apply and said act does not expressly give the city manager the authority to appoint such board nor divest the city of such authority.

2. Said act 96 expressly constituted the mayor ex-officio a member of said board and by no rule of statutory construction can he be deprived of that right and the city manager be substituted under either of said acts and the court erred in its declarations of law.

R. G. Davies, for appellee.

The decision below was entirely correct and answers all the contentions of appellants and the judgment should be affirmed.

WOOD, J. The city of Hot Springs adopted the provision of act 114 of the Acts of 1917, providing for a Commission Manager of Municipal Governments for cities of the first class. The Board of Commissioners, consisting of the mayor and four commissioners duly elected under the act, appointed George R. Belding city manager

according to the provisions of the act providing for such appointment and prescribing the duties of city manager.

Act 96 of the Acts of 1913 provides for a Board of Health in cities of the first and second class and authorizes the mayor of such cities to appoint a City Board of Health consisting of five persons. J. W. McClendon was the duly elected mayor of the city of Hot Springs. On the first day of May, 1919, he appointed the members of the Board of Health of the city of Hot Springs. The persons so appointed were duly qualified to act, and under the appointment organized what they contend was the Board of Health for the city of Hot Springs.

On the 9th day of May, 1919, George R. Belding, the city manager, appointed five other persons as members of the Board of Health of the city of Hot Springs, who were also duly qualified to act as such and under such appointment organized what they contend was the Board of Health for the City of Hot Springs.

This action was instituted in the circuit court by George R. Belding and those appointed by him as the Board of Health against J. W. McClendon, the mayor, and those appointed by him as the Board of Health. The purpose of the action was to determine whether or not the mayor of the city of Hot Springs had authority under the law to appoint the City Board of Health or whether that authority was vested in the city manager.

The circuit court held that the city manager had the power of appointment and that the board appointed by him was the duly constituted Board of Health of the city of Hot Springs. From the judgment ousting the members of the purported Board of Health appointed by the mayor is this appeal.

Sections 33 and 34 of Act 114 of the Acts of 1917, are as follows: "Section 33. The mayor and city commission shall elect the city manager, who shall be the administrative head of the municipal government under the direction and supervision of the city commission, who shall hold office at the pleasure of the city commission. He shall be appointed without regard to his political be-

liefs and need not be a resident of the city at the time of his appointment, and shall be a person specially fitted by education, training and experience to perform the duties of said office. He shall be responsible for the efficient administration of all departments within the scope of his duties. He shall execute bond in favor of the city for the faithful performance of his duties in such sum and with such surety or sureties as may be fixed and approved by the city commission. During the absence or disability of the city manager, the city commission may designate some properly qualified person to execute the functions of the office."

"Section 34. The powers and duties of the city manager shall include the following:

"(a) To see that the laws and ordinances are enforced.

"(b) To organize, continue or discontinue such division or departments from time to time as to him may be deemed necessary and expedient, and to assist and remove all heads of departments, and all subordinate officers and employees of the city; all appointments to be upon merit and fitness alone. He shall fix salaries and wages of all subordinates and employees.

"(c) To exercise control over all such departments or divisions so created, or that may hereafter be created, which shall be made subject to the supervision of the city manager.

"(d) To see that all terms and conditions imposed on the city and its inhabitants, or any public utility franchise, are faithfully kept and performed, and upon knowledge of any violation thereof, to call the same to the attention of the city attorney, who is hereby required to take such steps as are necessary to enforce the same.

"(e) To attend all meetings of the commission, with the right to take part in the discussions, but having no vote.

"(f) To recommend to the commission for adoption such measures as he may deem necessary or expedient.

"(g) To act as budget commissioner and to keep the city commission fully advised as to the financial condition and needs of the city.

"(h) To keep full and complete records of the doings of his office, and to render as often as may be required by the city commission a full report of all operations during the period reported on, and annually, or oftener, if required by the city commissioners, to make a synopsis of all reports for publication.

"(i) To keep the city commissioners fully advised as to the needs of the city within the scope of his duty and to furnish the city commissioners on or before the 31st day of December of each year a careful estimate in writing of the appropriations required during the next ensuing fiscal year for the proper conducting of the departments of the city under his control.

"(j) To keep repaired all city buildings, and to purchase all supplies for every department of the city.

"(k) To perform such other duties as may be prescribed by this act or be required of him by ordinance or resolution now in effect, or which may hereafter be enacted."

Section 36 provides for the removal of the city manager by a majority vote of the city commission by presenting written statement setting forth the reason for his removal, a copy of which shall be delivered or mailed to him. The city manager is given five days within which he may request a hearing by the city commission and in that event his removal shall not take effect until a hearing is had and a written decision rendered by a majority of the city commission.

Among the provisions of the act is section 40, which in part is as follows: "(a) Whenever, in the laws of this State or in the ordinance of a city adopting the provisions of this act, reference is made to the 'council' or 'aldermen,' such reference shall be deemed made to the 'city commission' and 'commissioners' respectively created and elected under the new form of government hereby created.

"(b) When any officer or office is named in any law of the State or ordinance of such city, it shall, when applied to cities under this act, be construed to mean the officer or office having the same functions or duties under the provisions of this act or under the ordinances passed under authority thereof."

Another provision of the act (114 of the acts of 1917) is: "Section 15. The mayor and commissioners shall act, possess, and exercise all executive, legislative and judicial powers and duties now had, possessed and exercised by the mayor, city council, board of public affairs, and all other officers and offices in cities of the first class, except as otherwise expressly provided herein."

Act 114 concludes with this clause, "All laws and parts of laws in conflict herewith are hereby repealed."

In *Throope* v. *Langdon*, 40 Mich. 673-82, Judge Cooley says: "An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer. The officer is distinguished from the employee in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases other distinctions will appear which are not general."

In *Shelby* v. *Alcorn*, 36 Miss. 273, the court said: "It may be stated as universally true that where an employment or duty is a continuing one which is defined by rules prescribed by law and not by contract such charge or employment is an office and the person who performs it an officer."

In *Lucas* v. *Futrall*, 84 Ark. 540, we quoted the above from the Supreme Court of Mississippi and to the same effect from other adjudicated cases.

"While no hard and fast rule upon the subject" can be announced that will be applicable to all cases, yet when the rules generally adopted by the text writers and the authorities as cited and quoted by us in *Vincenheller* v. *Reagan,* 69 Ark. 460, and *Lucas* v. *Futrall, supra,* for distinguishing between an office and employment, are kept in mind, there can be no doubt that, measured by these usual tests, the position of city manager under Act 114 of the Acts of 1917 is an office and his duties are those of a public officer.

A glance at the provisions of the act prescribing the powers and duties of the city manager under the commission and city manager plan of government, and also the powers and duties prescribed for the mayor under the old or aldermanic plan for cities of the first class as contained in sections 5611-5617 inclusive, of Kirby's Digest, shows that it was the intention of the Legislature by Act 114 of the Acts of 1917, to transfer many of the powers and duties of the mayor under the aldermanic plan to the city manager under the commission and city manager plan.

A comparison of the statutes will show that under the commission and city manager plan as set forth in act 114, the city manager is clothed with those executive and administrative functions and duties which under the old or aldermanic plan were conferred upon and discharged by the mayor. The city manager is the head of the executive and administrative departments of the government, but he had no legislative functions such as the mayor had under the old form and such as he has now under the commission form.

Under a purely commission form administrative authority and responsibility is usually divided among the commissioners but under the present commission and city manager form all strictly executive and administrative authority, which under the old form was vested in the mayor, and which under the purely commission form was vested in the commission, is now, under the commission and city manager form (under act 114), vested in

the city manager. So that under the latter form there is no division of administrative and executive functions among several persons, but these are concentrated in the one person, the city manager.

Without entering into a minute analysis of the provisions prescribing his functions and duties, it suffices to say that the various provisions of the act creating the position of city manager and prescribing his functions and duties show that it was the intention of the Legislature to make such position an office and not an employment. His duties are such as are prescribed by the Legislature or by ordinance or resolution passed by the Board of Commission. They are public in character. They are also of great dignity and responsibility and in no sense contractual.

We conclude, therefore, that the position of city manager is an office and that the person appointed by the commission to exercise its functions and duties is an officer.

Being an officer, the provision that he need not be a resident of the city at the time of his appointment as contained in section 33 is contrary to article 9, section 3 of the Constitution providing that no person shall be elected or appointed to fill an office who does not possess the qualifications of an elector. But a careful review of the various provisions of the act convinces us that the Legislature would have passed the law with this provision eliminated, and that it can be stricken out and leave the act as a whole a complete law capable of enforcement.

It will be observed that section 34 of the act provides among other things as follows: (b) "To organize, continue or discontinue such division or departments from time to time as to him may be deemed necessary and expedient, and to assist and remove all heads of departments, and all subordinate officers and employees of the city; all appointments to be upon merit and fitness alone. He shall fix salaries and wages of all subordinates and employees."

The provision of act 96 of the Acts of 1913 creating a City Board of Health necessarily constitutes such board a department of the city government and the section above quoted conferring upon the city manager the power to organize, continue and remove all heads of departments and prscribing that all appointments shall be upon merit and fitness alone clearly vested the city manager with the power to appoint the City Board of Health.

Section 14 of the act 96 of the Acts of 1913, conferring upon the mayor the power to appoint members constituting the said Board of Health is necessarily repealed by section 34 (b), act 114, Acts 1917, above quoted. The two provisions are in direct conflict, and the last must prevail.

The judgment of the circuit court denying the petition of appellants is, therefore, correct and must be affirmed.

McCULLOCH, C. J., (concurring). My conclusion is that the position of city manager and also membership on the board of health are each, under the statute, an employment and not an office (*Middleton* v. *Miller County*, 134 Ark. 514) and that the statute in its entirety is valid. I concur in the judgment solely on that ground.

I am authorized to say that Mr. Justice SMITH also concurs on this ground.

COLLISON v. CURTNER.

Opinion delivered December 8, 1919.

1. MASTER AND SERVANT—INJURIES TO THIRD PERSON—INDEPENDENT CONTRACTOR.—Where a lease of a cotton gin bound the lessee to to pay rent and keep the gin running and to be responsible for damages, but required the lessor to "furnish all repairs necessary for the successful operation of the plant," the lessor is bound not only to furnish material for repairs but also to make them, and he can not escape liability for injury to third persons resulting from an explosion caused by the defective condition of a boiler.

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.—In an action for injury by the explosion of the boiler of a cotton gin, evidence of a custom to enter the boiler room to obtain information was competent on the issue as to whether plaintiff was a trespasser or was guilty of contributory negligence.

3. NEGLIGENCE—EVIDENCE.—In an action for injuries from the blowing out of a plug in a boiler, testimony that, on the next morning after the injuries were received, the threads in the boiler where the plug was set in were badly worn was competent to show the real condition at the time of the accident.

4. NEGLIGENCE—EVIDENCE.—So likewise the condition of the boiler fifteen days after the accident was competent where it does not appear that it was in a different condition from what it was in immediately after the injury.

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

Brundidge & Neelly and *Cul L. Pearce* for appellant.

1. Appellant's request for a peremptory instructtion should have been given, as the undisputed testimony shows that at the time of the accident appellant had leased the gin to Ledgerwood, who was operating the same as an independent contractor, and appellant had no control or management of same, nor did he hire or discharge the hands or give them any directions. 77 Ark. 553; 54 *Id.* 424; 55 *Id.* 510; Elliott on Railroads, art. 1063, p. 1586; Ann. Cases, 1916 D, 220; Ann. Cases, 1918 C, 624; 14 R. C. L. 473.

2. The relation between Collison and Ledgerwood is wholly in writing and the construction of same was for the court and not for the jury.

3. The court erred in giving instruction No. 1 for plaintiff. It was abstract and the testimony showed that defendant had leased the property and had no control or management of the same and it left out the question altogether whether or not under the contract Ledgerwood was an independent contractor. *Supra.*

4. Instruction No. 5 is open to the same objection.

5. No. 6 is erroneous because the jury are permitted to leave out of consideration the question whether plaintiff, David Curtner, who had control and charge of

the son and whose negligence would be imputed to plaintiff, was guilty of contributory negligence.

6. No. 7 is clearly erroneous, as it leaves out altogether the question of Ledgerwood being an independent contractor. Next it tells the jury that under the lease defendant agreed to furnish all repairs on the gin, when the testimony shows that he was to furnish such repairs as Ledgerwood might find necessary and make demand for suitable material to repair same, and that defendant had nothing to do with putting the machinery in condition and repairs prior to the commencement of operations of same for the season of 1918.

7. Instruction No. 9 is abstract, as there is no proof of the value of the child's services during minority.

8. No. 10 was specifically objected to because it told the jury that if they found for plaintiff under the second count they were to assess such damages as would compensate for the pain and suffering endured by the son, but there were no instructions given as to what fact they should find under the law before they could return a verdict for plaintiff under the second count.

9. The court erred in refusing No. 11 for defendant. It was a proper declaration of law on the question of independent contractor. For the same reason No. 12 should have been given.

10. No. 13 should have been given for defendant to cover the theory of defendant, as No. 7 for plaintiff had been given.

11. The court erred in permitting the witnesses, H. C. Pearrow and B. F. Mitchell, to testify as to the custom of people being around the engine and boiler room of the gin in 1916 and 1917, as well as 1918, as different parties were then operating the gin.

12. It was error to admit the testimony of J. W. Graham as to the condition of the plug and the conversation with defendant Collison after the accident and after the repairs of the boiler.

13. The court erred in permitting plaintiff to prove by P. J. Donohue the condition of the boiler after the

accident some fifteen days. 108 Ark. 489; 105 *Id.* 205; 151 S. W. 259; 70 Ark. 179; 78 *Id.* 148; 79 *Id.* 393; 89 *Id.* 556; 82 *Id.* 561; 48 *Id.* 460; 78 *Id.* 147. It was also error to admit the testimony of N. Miller, Ben Harrison and H. C. Pearrow as to the custom of customers going into the engine room for a drink of water. 108 Ark. 440; 48 *Id.* 177; 77 *Id.* 495.

Pace, Seawel & Davis and *G. G. McKay,* for appellee.

1. The request for a peremptory instruction was properly refused. A landlord in the absence of an express agreement is not required to repair the premises and is not responsible for its defective condition. 24 Cyc. 1128; 29 *Id.* 477; 18 A. & E. Enc. L. (2 Ed.), 241-2. See also 121 Ark. 253; 110 *Id.* 49. If the premises are dangerous at the time of the execution of the lease, the landlord is liable. 18 A. & E. Enc. L. (2 Ed.), 242.

2. All the testimony shows that it was the duty of appellant to repair the machinery and so does the lease. The boiler was defective and unsafe when the lease was made for 1918. Defendant and his child were lawfully on the premises and not trespassers but they were there by, at least, implied invitation. 29 Cyc. 455.

3. Instruction No. 1 for appellee was more favorable to appellant than the law warranted. There was ample testimony that the boiler threads were defective. The question as to an independent contractor could not be presented in this instruction and was foreign to the issues. Either appellant was the operator of the gin at the time of the accident or he was responsible under its terms, as the boiler was defective and dangerous when the lease was executed.

4. The objections against No. 5 can not be considered, as they are practically the same as those to No. 1, and the evidence fails to establish negligence at law or in fact on the part of appellee. If the boiler was defective at the time of the lease appellant was liable and no

contributory negligence is shown. This disposes of the objections to No. 6.

5. Instruction No. 7 for appellee is also too favorable to appellant. He was liable without regard to his agreement to furnish repairs. He was required to keep his machinery in a reasonably safe condition during the season of 1918.

6. Objections to Nos. 9 and 10 are without merit. The son was bright and healthy and did chores around the premises and elsewhere. The evidence justified them. Instruction No. 5 covers the question beyond controversy.

7. Nos. 11 and 13 for appellant were properly refused; they ignore the provisions of the lease requiring appellant to repair the machinery and omits the evidence that the boiler was dangerous and defective at the time of the alleged lease.

8. The evidence as to the custom of persons on the premises was competent. Appellee was there on business connected with the ginning of his cotton. The custom was well known and notorious and there was no error in admitting the evidence of Graham as to the condition of the boiler.

9. The jury found the issues for appellee under the law, and the testimony sustains it and the verdict is very small.

WOOD, J. On the 3rd of October, 1918, David Curtner, accompanied by his son, Woodrow Curtner, five years of age, drove a load of cotton to the gin of J. Collison at Bald Knob, Arkansas. While waiting to have the cotton ginned, Curtner and his son went into the boiler room of the gin, and while there a plug at the bottom of the boiler was blown out and Curtner and his son were scalded. The son died from the injuries received and David Curtner, in a separate action, in his own right, and as administrator of the estate of his son, instituted another action against the appellant to recover damages for the injury and death of the son.

The grounds of negligence set forth in the complaints are that Collison negligently and carelessly permitted the boiler to become and remain insecure and unsafe, in that the plug used by him to stop the blowpipe at the bottom of the boiler was too large for the opening, and when screwed into the opening only a few threads would catch; that the threads in the opening of the boiler were worn, some of them being entirely gone, making the plug insecure in the opening; that the plug blew out and permitted the steam and hot water to escape and burn the plaintiff below, appellee here, rendering him a cripple for life; that Collison at the time of and before the happening of the accident knew of, or in the exercise of ordinary care could have known of, the defective condition of the boiler and that such condition was wholly unknown to the appellee. The appellee then set forth minutely the nature of the injuries received.

The appellee alleged that he had suffered and that he will continue to suffer for the remainder of his life great pain of body and anguish of mind as a result of the injuries. That on account of his own personal injuries he had been damaged in the sum of $30,000, for which he asked judgment.

In the case of the appellee as administrator of the estate of his son he alleged the same grounds of negligence and set up that his son was injured by reason thereof and suffered great agony and finally died as the result of the negligence alleged.

He averred that the services of his minor son were worth to him the sum of $5,000 and that he should recover for the benefit of the estate in the sum of $15,000. He, therefore, prayed for judgment in the sum of $20,000.

In his answer the defendant, appellant here, denied all the material allegations of the complaint and set up as an affirmative defense that the gin where the accident happened had been rented by the appellant to one N. B. Ledgerwood, who at the time was in the exclusive possession, control, management, and operation of the same; that if the appellee and his son were injured their injuries were

caused by the appellee's going into the boiler room and taking his son without the invitation or permission of the appellant; that appellee knew or should have known that it was a dangerous place and was a trespasser, and was therefore guilty of contributory negligence.

The allegations of the answer in the case of the appellee as administrator of the estate of his son were substantially the same. In that case the appellant charged that the appellee was guilty of contributory negligence in taking his son into a dangerous place and allowing him to remain there.

The causes were consolidated for the trial.

Appellant first contends that at the time of the accident the gin was being operated by one N. B. Ledgerwood under a lease from appellant which exempted him from liability in damages for the injuries of which the appellee complains. The lease was dated August 1, 1918, and was between J. Collison, the lessor, and N. B. Ledgerwood, the lessee, and recites in part as follows: "For and in consideration of the payment of rentals hereinafter reserved, and the covenants herein, the lessor hereby grants, lets and leases unto the lessee, his executor, administrator and assigns, for a period of one (1) year from the date hereof, the following property:

"All the property—personal and real—now used and known as the 'Collison Gin Plant,' including the realty upon which it is located, in the town of Bald Knob, Arkansas, and the use and the employment of all machinery, fixtures, implements, utensils, supplies on hand, and all other things which now constitute or is a part of the said gin plant, or located upon the premises and which are considered a part of the said gin plant. * * *

"It being agreed, that the lessor shall furnish all wood, coal and other fuel, oil, belting, and other supplies, all repairs and new parts of machinery, and other similar things necessary for the successful operation of the said plant, and shall receive from the lessee the sum of four dollars and twenty-five cents for each and every bale of cotton ginned and turned out at the said plant and shall,

also, receive all profits and gain from the handling and sale of cotton seed coming from said gin. And the lessee shall pay said amount per bale, and concede all profits and gain from the handling and sale of cotton seed from said plant, and assumes and agrees to be responble for and assumes all liabilities for wages, debts, damages and otherwise, arising from or growing out of the operation of the said gin plant. And the lessor shall, during the period of said lease be in no wise connected with the operation or management of the said gin plant, and assumes no liability therefor. But the lessor shall assist the lessee in keeping books, accounts and do other records of the business when requested so to do."

The contention of the appellant is that under the above lease Ledgerwood at the time of the accident was an independent contractor and if the explosion was caused through any acts of negligence such acts were those of Ledgerwood.

The court at the instance of the appellee over the objection of the appellant gave instructions to the effect that under the terms of the lease appellant agreed to furnish all the repairs on the cotton gin; that if the jury found that at the time the alleged lease was executed the boiler plug near the back end was insecurely fastened and that the threads of the boiler would not catch and hold the plug in position, and that by reason thereof the boiler at said place was unsafe and dangerous, and that appellant knew this or could have known it by the use of ordinary care and reasonable inspection; and that if they found that there was this unsafe and dangerous condition, and that it continued to exist from the date of the alleged lease until the injury, and that appellant negligently failed to repair it, the alleged lease would not constitute a defense, provided that the appellee and his child were lawfully upon the premises at the time and place of the alleged injury and that the negligence, if any, of the appellant was the direct and proximate result of the injury as defined in other instructions.

The specific grounds of objection to the above instructions were that they told the jury that the appellant agreed to furnish all the repairs on the cotton gin when under the undisputed evidence the appellant was only to furnish the material for making such repairs as his lessee might find necessary and such as he might make demand for; and, further, because the undisputed evidence showed that appellant had nothing to do with putting the machinery in condition and repair prior to the operation of the same for the season of 1918.

The instructions and the objections raised to them call for a construction of the alleged lease.

A majority of the court have reached the conclusion that the trial court was correct in construing the alleged lease as one which bound the appellant not only to furnish the material for making the repairs, but also to actually make all the repairs that were "necessary for the successful operation of the plant." It occurs to us that this is the correct construction of the contract when the words "furnish all repairs" are given their ordinary and obvious meaning.

The word "repair" as used in the instrument is a noun. It means "act of repair; restoration; or state of being restored to a sound or good state after decay, waste, loss, reparation; mending; also an instance or result of such restoration; often in the plural, as the repairs to the house are extensive." Webster's New International Dictionary; Funk & Wagnall's New Standard Dictionary, "Repairs."

One of the definitions of the word "repairs" given by the latter author is "condition after use, specially good condition; condition after repairing." The definition of the verb "furnish" as given by Funk & Wagnall's is "to equip or fit out; supply what is necessary or fitting." As given by Webster is, "to accomplish; insure; to provide for; to provide what is necessary for."

If the appellant had intended that the words should have the meaning which he now insists they have, it would have been easy for the attorney who prepared the

instrument under his direction to have so worded it as to convey that meaning by simply using the exact words to express his meaning which he now contends the words used do express, towit: "to furnish all materials for making repairs," instead of the words "furnish all repairs"—the words actually used.

The appellant having prepared the instrument is responsible for the language employed, and, as he relies upon the instrument for his protection, he is not in a position to insist upon a different interpretation of the words than that of their plain and ordinary meaning.

Other portions of the instrument strengthen this construction and show that the party named as the lessor in the instrument was to have nothing whatever to do except to pay the rent and keep the gin running or in operation after all machinery, wood, coal, supplies, repairs, etc., necessary for its successful operation were furnished or made by the appellant. Such being the meaning of the alleged lease, the issue as to whether or not the negligence averred was that of an independent contractor and the doctrine applicable thereto have no place in this case. The court, therefore, ruled correctly in refusing prayers by the appellant for instructions seeking to have that issue submitted to the jury.

The issues of negligence and contributory negligence under the evidence were issues of fact for the jury. They were submitted under familiar and correct declarations of law.

Appellant complains here of the ruling of the court in admitting the testimony of certain witnesses tending to show what the custom was with reference to parties being permitted to enter the boiler room where the appellee and his son were injured. The abstract of the appellant does not show that any objection was made at the time to the testimony of these witnesses. Furthermore, if such testimony had been objected to there was no error prejudicial to appellant in admitting it, for appellee testified without objection, and there was no testimony to the contrary, that he went into the engine

or boiler room for the purpose of inquiring when his cotton would be ginned. Those in charge knew that he and his son were in the boiler room, and no objectins were made to their presence there. The testimony as abstracted was competent on the issue as to whether or not the appellee was a trespasser and guilty of contributory negligence in going in and taking his son into a dangerous place. The testimony tends to prove that persons going to the gin on business were permitted to go into the boiler or engine room; that no steps were taken in any manner to prevent those having business at the gin from going into the engine or boiler room.

The appellant complains of the ruling of the court in permitting the witness Graham to testify that "he went down to the gin the next morning after the explosion and that he found where the boiler had a plug in it and that it had been blown out; that the threads were mighty bad on the boiler where the plug is supposed to set in; it was eaten out considerable; that the threads on the boiler had an appearance of being freshly done but were worn slick; that Mr. Collison spoke to him about the matter," etc.

The abstract of appellant does not show that any objection was made to the introduction of this testimony; and, even if it had been objected to, the testimony was competent for the reason that it tended to show the real condition that the boiler was in at the time the accident occurred.

The appellant also urges here that the court erred in permitting witness P. J. Donahue to testify as to the condition that the boiler was in some fifteen days after the accident, but the appellant neither in his brief nor in his abstract set out any testimony of the witness which shows that the boiler was in any different condition at the time witness saw the same than it was at the time the injury occurred. The testimony of this witness as abstracted shows that he testified as an expert, and in answer to hypothetical questions propounded to him he gave his opinion concerning the causes that must have brought about the worn condition of the threads in the

hole of the boiler from which the plug was blown as assumed in the question propounded to the witness.

In the testimony as abstracted it does not appear that any objection was urged at the trial either to the question or to the answer. But again we say that, even if objection had been offered to the testimony in the form in which it appears in appellant's abstract, we would have to hold that the testimony was competent, and that it did not in any manner contravene the doctrine announced by us in *Prescott & N. Ry. Co.* v. *Smith,* 70 Ark. 179; *St. L. S. W. Ry. Co.* v. *Plumlee,* 78 Ark. 148, and other cases more recent of the same purport, to the effect that testimony is incompetent after an accident occurred tending to show that the defect causing the accident and injury was removed, altered, or changed by the master for the purpose of showing negligence.

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

OIL TROUGH GIN COMPANY *v.* HINES.

Opinion delivered December 8, 1919.

1. TRIAL—REQUEST BY BOTH PARTIES FOR PEREMPTORY INSTRUCTION.—Where both parties request a peremptory instruction, and do nothing more, they assume the facts to be undisputed and submit to the judge the determination of the inferences to be drawn therefrom.
2. CARRIERS—LOSS OF SHIPMENT—EVIDENCE.—Where there was a conflict in the evidence as to whether there was a loss in shipment of cotton seed, a directed verdict for defendant will be sustained where both parties requested a peremptory instruction.

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

STATEMENT OF FACTS.

Appellants brought this suit against appellee to recover damages in the sum of $701.83 for loss sustained by them in the transportation of a car of cotton seed alleged to have occurred on account of the negligence of appellee.

On the part of the appellants it was shown that the Oil Trough Gin Company is a partnership composed of J. M. Stephens and L. L. Ellison. According to the testimony of J. D. Ford, he was the bookkeeper of the firm during the ginning season in the fall of 1917. The firm operated its gin at a place five or six miles distant from Newark, Arkansas. The firm sold a car load of cotton seed to the Forrest City Cotton Oil Company at Forrest City, Arkansas. The usual custom of the firm in cases of this sort was to weigh the cotton seed in wagons at the gin and then haul it to Newark, where it was placed in a car on the railroad to be carried to the point of destination. Ford weighed the wagons which started from the gin to Newark with the cotton seed in question. The amount so weighed by him amounted to 60,050 pounds. The drivers of the last two wagons testified that they unloaded their seed from their wagons and placed it in a car. This filled the car up to the roof except a place right at the door where a man would stand who was shoveling the seed back. None of the drivers of the other wagons were placed on the stand.

J. A. Rouse helped to load the car of cotton seed in question and testified that the last two loads filled the car up to the roof. He further stated that he was paid by the ton for loading seed and had often loaded cars of the size of the one in question in the present case; that the returns from the point of destination governed as to his payment for loading the cars, and based on his past experience, he said that he was sure that the car in question contained 60,000 pounds of seed. The car was sealed up when it was loaded. A bill of lading was issued and the bill of lading placed the weight at 80,000 pounds with this notation, "weight subject to correction."

Appellants also introduced in evidence the freight bill which was issued at Forrest City, Arkansas, the point of destination. The freight bill showed the weight of the cotton seed to be 40,100 pounds. Here the appellants rested and appellee moved the court for an instructed verdict. Thereupon appellants also asked the court for

an instructed verdict. Neither party asked for any further instructions.

The court directed a verdict for appellee, and the case is here on appeal.

John B. & J. J. McCaleb, for appellant.

1. Both parties having requested a peremptory instruction, it was the duty of the court to dispose of all issues in the case of law and fact, but it was error to instruct for defendant, as the evidence was not undisputed and this court should reverse because there is no evidence to uphold a directed verdict. 193 S. W. 197; 10 R. C. L. 194; 96 Ark. 504; 101 *Id.* 532; 96 *Id.* 37; 100 *Id.* 71.

2. Appellants supported every material allegation in their complaint by competent evidence and appellee has not attempted to controvert this testimony in a single particular, and, both parties having requested a peremptory instruction and done nothing more, it was the duty of the court to direct a verdict for plaintiffs, and it was error to fail to do so. Cases *supra.*

Troy Pace, for appelleee.

It was the duty of the court to direct a verdict for appellee. 100 Ark. 71; 114 *Id.* 376; 32 *Id.* 337; 76 *Id.* 137; 89 *Id.* 273, 278. See also 103 *Id.* 64; 114 *Id.* 112, 119; 93 *Id.* 227.

HART, J., (after stating the facts). The effect of our decisions is that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed, and submit to the judge the determination of the inferences proper to be drawn from them. *St. L. S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71, and *St. Louis, I. M. & S. Ry. Co.* v. *Ingram,* 118 Ark. 377.

Counsel for appellants concede this to be the effect of our decisions; but they contend that under the undisputed evidence the court should have directed a verdict for appellants. We do not agree with counsel in this contention. It is true that, under the evidence adduced by appellants, they made out a case against appellee, but

it can not be said that the evidence in their favor is undisputed. The bookkeeper for appellants weighed out 60,000 pounds of cotton seed for the purpose of having the same shipped to Forrest City, Arkansas. These wagons started towards Newark, but the witness did not know whether all or only part of the seed reached their destination. Only two of the haulers testified. They said they hauled the two last loads and that when they placed the seed in the car the car was full up to the roof. A witness who helped load the car said that he was paid by the ton for loading cars of seed and that he was paid by the amount shown in the freight bill or returns to have been received by the consignee at the point of destination. He felt sure, judging from his past experience, that the car in question contained 60,000 pounds of seed. The weight of seed was placed in the bill of lading at 80,000 pounds with this notation, "Weight subject to correction." This evidence was sufficient to have warranted a verdict for appellants, but it is not undisputed. The car was sealed up after it was loaded and carried to its destination at Forrest City, where it was weighed by the railroad company before it was unloaded. Its weight there was shown to be 40,000 pounds. This was the weight placed in the freight bill which was introduced by appellants without objection. This testimony tended to contradict the other testimony introduced by appellants. The jury might have found from it that, the car having been weighed at point of destination before it was delivered to consignee and the weight being only 40,000 pounds, the other witnesses for the plaintiff were mistaken in placing or estimating the weight of the seed at 60,000 pounds.

Therefore, it can not be said that the testimony in favor of appellants is undisputed, and the judgment must be affirmed.

DYER & COMPANY v. DELIGHT LUMBER COMPANY.

Opinion delivered December 8, 1919.

1. APPEAL AND ERROR—NECESSITY OF BILL OF EXCEPTIONS.—The correctness of the court's ruling directing a verdict for defendant depends on the testimony introduced, and where there is no bill of exceptions a judgment rendered on a verdict for defendant must be affirmed.
2. APPEAL AND ERROR — BILL OF EXCEPTIONS — VERIFICATION.—The facts which occur in the trial of a case can only be brought to the Supreme Court for review by bill of exceptions certified by the trial judge or signed by the parties in the manner provided by the statute.
3. APPEAL AND ERROR—STENOGRAPHER'S CERTIFICATE.—A stenographer's certificate as to the correctness of the record of the testimony taken down by him, unless approved by the presiding judge, can not have the effect of making such evidence a part of the bill of exceptions, although such certficate may be found in the transcript of the record.

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

STATEMENT OF FACTS.

Dyer & Company commenced this suit before a justice of the peace against Delight Lumber Company to recover $53.84 alleged to be the balance due it for hay sold to the defendant.

There was a judgment by default against the defendant in the justice court. The defendant duly appealed to the circuit court and the case was tried *de novo.* At the conclusion of the testimony the court directed a verdict for the defendant. Judgment was rendered upon the verdict and the plaintiff has appealed.

O. A. Featherston, for appellant.

1. It was error to direct a verdict for defendant, but the case should have been submitted to a jury, as there was some evidence to support a verdict for plaintiff. 71 Ark. 445; 98 *Id.* 334; 105 *Id.* 526.

2. While the stenographer did not get the court's reason for directing a verdict, it was understood by both parties that the reason was that plaintiff, having made

defendant's letters a part of his deposition, could not call their statements into question. 101 S. W. 390. If there was any evidence to support appellant's theory, he was entitled to an instruction on that theory. 14 R. C. L. 793. Cases *supra.*

Laughlin & Johnson, for appellee.

There is no bill of exceptions in the case certified by the judge, or agreed to by attorneys and filed in time. 36 Ark. 262; 38 *Id.* 102; 42 *Id.* 30; 74 *Id.* 551; 145 S. W. 888; 171 *Id.* 1194.

HART, J., (after stating the facts). The correctness of the ruling of the circuit court depends upon the testimony introduced before it. The facts which occur in the trial of a case can only be brought to this court for review by a bill of exceptions certified by the trial judge, or signed by the parties in the manner provided by statute. *Moore* v. *Cairo & Fulton Rd. Co.,* 36 Ark. 262, and *Wright* v. *Midland Valley Rd. Co.,* 111 Ark. 196.

It is insisted by counsel for the defendant that the judgment must be affirmed because there is no bill of exceptions in the present case, and in this contention we think counsel are correct. There is in the transcript what purports to be the deposition of the secretary and treasurer of the plaintiff with eleven letters attached to it as exhibits, which are accompanied by the certificate of the court stenographer that they are a true and correct transcript of his notes taken at the trial of this cause in the circuit court and that the notes are a true and correct report of all the proceedings had at the trial of the case. A stenographer's certificate as to the correctness of the record of the testimony taken down by him unless approved by the presiding judge could not have the effect of making such evidence a part of a bill of exceptions, although such certificate may be found in the transcript of the record. *Abbott* v. *Kennedy,* 133 Ark. 105; *Mullett* v. *Morris,* 117 Ark. 377, and *Dozier* v. *Grayson-McLeod Lumber Co.,* 110 Ark. 244.

In the last mentioned case the court said: "In the case of *Moore* v. *State*, 65 Ark. 330, it was held that the stenographer's report provided for by this statute could be made available on appeal only by being made a part of the bill of exceptions. The stenographic report of the proceedings of a court is only a modern, progressive mode of securing that which was formerly made by writing same in longhand. The statute did not dispense with the duty imposed upon the judge to examine such report and his discretion to correct the same. Before the testimony thus taken by the official stenographer can properly be made a part of the bill of exceptions, it should be examined by the judge, and he must determine whether or not it is correct. In any event it is imperative that it must be in existence and a part of the bill sufficiently identified at the time the bill is allowed and signed by the judge. The stenographer is but a means of taking and transcribing the oral proceedings; but he has no authority or discretion to determine whether the report so made by him is a true and correct report of such proceedings. It is the duty of the judge, and solely within his judicial discretion, to pass upon its correctness and allow same before it can become a part of the bill of exceptions."

There is nothing but the stenographer's certified transcript of his notes in the present case. It was not signed by the judge, and there is nothing to show that it was examined or approved by him. Consequently, there is no bill of exceptions, and we can not know whether the testimony introduced warranted the circuit court in directing a verdict for the defendant.

Therefore, the judgment must be affirmed.

BOOE v. ROAD IMPROVEMENT DISTRICT NO. 4 OF PRAIRIE COUNTY.

Opinion delivered December 8, 1919.

1. COURTS—CONSTRUCTION OF OPINIONS.—The language of an opinion, like that of any other writing, must be given its plain and natural meaning except when used in a technical sense.
2. CONSTITUTIONAL LAW—NOTICE OF SPECIAL BILLS.—Constitution, article 5, section 25, requiring at least thirty days' notice to be given of intention to apply for a special bill, is mandatory.
3. STATUTES—PRESUMPTION.—The presumption is always in favor of the legality of legislative proceedings, and where the record, of which the court can take judicial notice, does not show to the contrary, the proceedings are conclusively presumed to have been in accordance with the constitutional requirement as to notice.
4. CONSTITUTIONAL LAW—AUTHORITY OF LEGISLATURE—PLEADINGS.—The authority of the Legislature to pass special bills can not be ascertained from admissions of the parties in pleadings, from their agreements, or from proof introduced of facts not required to be made a matter of record by the Constitution.
5. STATUTES — LEGISLATIVE AUTHORITY — EVIDENCE.—In determining whether passage of special act of September 30, 1919, was in compliance with the constitutional requirement as to notice, testimony of the Governor can not be considered, as it is not part of the record required or provided by the Constitution.
6. EVIDENCE—JUDICIAL NOTICE.—The proclamation of the Governor calling an extraordinary session of the General Assembly is a record of which the courts take judicial notice.
7. EVIDENCE—JUDICIAL NOTICE.—The courts take judicial notice of the date of passage and approval of a bill.
8. STATUTES—SPECIAL BILL—NOTICE.—Where less than thirty days intervened between the Governor's proclamation calling an extraordinary session of the General Assembly and the passage and approval of a special bill, the record conclusively shows that the constitutional requirement as to notice was not complied with.

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

STATEMENT OF FACTS.

W. I. Booe, a citizen and property owner within the limits of a road improvement district duly organized in Prairie County, Arkansas, under the Alexander Road Law, brought this suit in equity against the commission-

ers of said road improvement district to enjoin them from the issuing of $65,000 in bonds authorized by a special act of the General Assembly passed at the special session held in September, 1919.

On the 15th day of September, 1919, the Governor issued a public proclamation calling the General Assembly to meet in extraordinary session on the 22d day of September, 1919. The record of the General Assembly shows that it convened on that day and adjourned on the 1st day of October, 1919. Its records also show that the special act in question was passed at the special session and it was approved by the Governor on the 30th day of September, 1919.

The deposition of the Governor was taken by the defendant, and according to his testimony he wrote letters, more than thirty days before the special session convened, to nearly every member of the Legislature, telling him that it would be necessary to call the Legislature in extraordinary session to pass special road bills, and on the 18th of August, 1919, the Governor agreed with several persons interested that he would call a special session of the Legislature for the purpose of considering local improvement bills. In public speeches he made known that he intended to call the Legislature together again in special session, but no day was mentioned by him. His formal proclamation calling the Legislature together in extraordinary session under article 6, section 19, of the Constitution of 1874, was not issued until the 15th day of September, 1919.

At the hearing of the case the chancellor was of the opinion that the bill was a valid law, and it was decreed that the complaint be dismissed for want of equity. The plaintiff has appealed.

W. H. Gregory, for appellant.

The special act is unconstitutional, inoperative and void, because the call for the special session by proclamation of the Governor was less than thirty days prior to the convening of the Legislature, and thirty days' notice could not have been given. Const. 1874, art. 5, § 26.

Ib., art. 6, § 19. This court takes judicial knowledge of the issuance of the call and the convening of the Legislature, and it is unquestionable that no opportunity could have been given to publish the notice required.

R. W. Robins, amicus curiae.

The courts of this State have no power to investigate or determine whether notice of the introduction of a special or local bill has been given as required by the Constitution. 48 Ark. 370; 75 *Id.* 120; 87 *Id.* 8; 97 *Id.* 473; 44 L. R. A. (N. S.) 468; 130 Pac. 1114.

Evans & Evans, amici curiae.

1. This court judicially knows that the act is within the terms of the call of the Governor and that it was passed and approved in violation of the Constitution requiring thirty days' notice. 48 Ark. 370 should be overruled.

2. See in point cases in 5 Wheaton 1; 28 Ark. 378; 14 L. R. A. 459; Black, Const. Law, 319-20; 83 Ark. 448; 75 *Id.* 124.

Mehaffy, Donham & Mehaffy, amici curiae.

1. The act is unconstitutional and void because the constitutional provisions as to notice were not given. Kirby's Digest, § § 3718-19-20; 76 So. 33; 36 *Id.* 1024; 27 *Id.* 321; 38 *Id.* 647, 807-1031; 39 *Id.* 240-242, 357, 717; 46 *Id.* 251; 93 Ark. 336; 48 *Id.* 82; 93 *Id.* 336; 47 S. W. 798; 60 *Id.* 1085; 156 Pac. 1121; 22 L. R. A. (N. S.) 1089; 117 Ark. 252.

2. The passage of the act violates art. 5, § 25, of the Constitution also. The act shows on its face that it is an amendment to the Alexander Road Law.

3. It violates Amendment No. 10. 109 Ark. 479 has not been overlooked. See 25 L. R. A. (N. S.) 60. The people should be protected by the constitutional provisions as to notice and publication. 6 R. C. L., § § 69, 70-76, 114.

4. The act violates the United States Constitution and Amendment No. 14 thereto. Kirby's Digest, § § 3718-19-20.

J. I. Trawick, amicus curiae.

The act is invalid and violative of the Constitution. The cases in 40 Ark. 370, 75 Ark. 120, 86 S. W. 844, should not be followed. 137 Cal. 28; 27 Atl. Rep. 356, and others.

Emmet Vaughan, Coleman, Robinson & House, Clyde Going, Huddleston, Fuhr & Futrell, S. W. Adams, E. E. Hopson, J. R. Wilson, Rowell & Alexander, McMillan & McMillan, Harry P. Dailey, Holland & Holland, V. M. Miles, Roy D. Campbell, Harry Woods, J. G. Sain, U. J. Cone, S. S. Hargraves, Grover T. Owens and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

1. The question raised here has been often decided adversely to appellant's contention. 48 Ark. 370; 75 *Id.* 120; 87 *Id.* 8; 97 *Id.* 478; 120 *Id.* 406; 11 Cyc. 755; 55 Ark. 198. The Governor, Attorney General and members of the Legislature had a right to rely on these decisions.

2. The required notice could have been given. The testimony shows it. It was not impossible to give it as required by the Constitution and § § 4101-3, Kirby & Castle's Digest.

HART, J., (after stating the facts). The General Assembly convened in special or extraordinary session on September 22, 1919, pursuant to a proclamation of the Governor issued on the 15th day of September, 1919. The special session lasted nine days, adjourning on the 1st day of October, 1919. The act in question in the case at bar contained the emergency clause, and was approved on the 30th day of September, 1919. The act is a special one, and was held valid by the chancery court. Its constitutionality is attacked on the ground that the notice required by article 5, section 26, of the Constitution of 1874 was not given; and the correctness of the decision of the chancellor depends upon the construction to be placed upon that provision of the Constitution and the decisions of this court relating to the subject. The provision of the Constitution is as follows:

"No local or special bill shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall be at least thirty days prior to the introduction into the General Assembly of such bill, and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed."

Two theories exist in the United States with regard to provisions of the Constitution similar to the one under consideration in this case.

On the one hand, it is held that the behest of the Constitution is addressed to the Legislature itself and should be obeyed by that body; but that the matter ends with that department, and courts are not allowed to annul acts of the Legislature in any case because of its failure to follow the requirement. In short, in some jurisdictions such provisions of the Constitution are held to be directory merely.

On the other hand, in other States similar provisions of the Constitution have been held to be mandatory and subject to judicial review where the record, which can be judicially noticed, shows that the Legislature failed to follow the requirement or disregarded it.

The first case construing the clause under consideration in this State is *Davis* v. *Gaines,* 48 Ark. 370, and this has since been called the leading case on the subject. In that case the court first had under consideration article 5, section 25, of the Constitution, which provides that in all cases where a general law can be made applicable, no special law shall be enacted. The court said the act in that case was a special one, and that a general law could have been framed to apply to all portions of the State in like situation was demonstrated by the fact that there was such a law on the statute books at the time of the passage of the special act. The court further said that the Legislature was the sole judge whether provision by general law was possible except in certain cases enumerated in

the Constitution; and that the provision was merely cautionary to the Legislature.

After concluding the discussion upon this branch of the case, the court said:

"The same remarks apply to the passage of the bill without the previous publication of notice of the intention to introduce it. Section 26 of article 5, Constitution of 1874, requires evidence of such publication to be exhibited in the General Assembly before the bill becomes a law. But if the General Assembly chose to disregard this requirement, and to enact a local or special law without notice, no issue upon the subject of notice can be raised in the courts."

It is insisted by those seeking to uphold the act that the effect of the language just quoted is to hold that the provision of the Constitution is directory merely, and is not subject to review by the courts in any case. Of course, the language of any opinion like that of any other writing must be given its plain and natural meaning except when used in a technical sense. The dictionary meaning of 'disregard' is 'to pay no heed to;' 'to fail to notice or observe.' The word 'choose' implies election or choice. The words 'no issue upon the subject of notice can be raised in the courts' mean that the action of the Legislature could not be reviewed by the courts. Therefore, the plain and natural meaning of the words, 'But if the General Assembly choose to disregard this requirement, and to enact a local or special law, without notice, no issue upon the subject of notice can be raised in the courts,' mean that if the Legislature should pay no attention to the requirement and pass a special law without notice, its action is not subject to review in the courts. The court went further than it was necessary to do under the facts of that case. It was admitted in that case that no notice was given and the special act was passed at a regular session of the Legislature. The language of the provision is mandatory. It provides that no special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality

where the matter affected may be situated. The length of time the notice is to be published is provided for. It further provides that evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed.

One object of the requirement was to prevent hasty and improvident legislation. Another purpose was to give the people of the locality to be affected an opportunity to be heard upon the proposed legislation affecting their interest. This is especially important in cases of special improvement districts where the assessment of benefits is often made by the Legislature itself. It is important to the property owner that he be notified of the proposed legislation in order that he may have an opportunity to be heard upon a matter which so vitally affects his interest. The right to petition and protest has ever been recognized as the right and privilege of every free people, and the framers of the Constitution intended that this right should be made available to them in a useful and practical manner. Of course, the presumption is always in favor of the legality of the legislative proceedings, and where the record of which the court can take judicial knowledge does not show to the contrary, the proceedings are conclusively presumed to have been in accordance with the constitutional requirement as to notice. It is provided that evidence of the publication of the notice shall be exhibited to the Legislature so that it can know that every one affected has had an opportunity to be heard before the bill is passed. The Constitution does not require that evidence of the notice shall be spread upon the journals or otherwise preserved as evidence. Hence we hold that the passage of the act is conclusive of the fact that due notice was given unless the record of which the courts may judicially take notice shows otherwise.

As we have already seen in the case of *Davis* v. *Gaines, supra,* it was alleged in the complaint that the notice required by the Constitution was not given. A demurrer was interposed to the complaint, which had the

effect to admit its allegations to be true. It would not do to relegate to the courts the ascertainment of a jurisdictional fact for the Legislature upon admissions in pleadings by agreement of the parties or by proof introduced of facts not required to be made a matter of record by the Constitution. To hold otherwise would make the validity of special laws depend upon the action of the parties, and might make it valid as to one person and invalid as to another in the locality affected by it. Such a course would not only be ruinous to the people in such localities but might unsettle every special act passed since the adoption of the Constitution.

Hence in the case of *Davis* v. *Gaines, supra,* the fact that it was shown by the pleadings that no notice was given amounted to nothing. The act was passed at a regular session of the Legislature. The time and place when the Legislature should convene in regular session is fixed by the Constitution. So far as the record of which the court could take notice was concerned, the notice might have been given for the time and in the manner prescribed by the Constitution and evidence of the publication of the notice might have been exhibited to the Legislature before the act was passed. Hence the court should have held in that case that there was a conclusive presumption that the Legislature had found that the requirement of the Constitution had been complied with, there being nothing in the record of which the courts could take judicial notice of to the contrary. It was not necessary, therefore, for the court to decide that the subject of notice could not be reviewed by the courts or what amounts to the same thing, saying that no issue upon the subject of notice can be raised in the courts. To the extent that the opinion in that case conflicts with the views herein expressed, it is overruled.

In the case of *Stevenson* v. *Colgan,* 14 L. R. A. 459, the Supreme Court of California, in discussing the right of judicial review of legislative proceedings in enacting laws said:

"The authority and duty to ascertain the facts which ought to control legislative action are, from the necessity of the case, devolved by the Constitution upon those to whom it has given the power to legislate, and their decision that the facts exist is conclusive upon the courts, in the absence of an explicit provision in the Constitution giving the judiciary the right to review such action. We therefore hold that, in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it will take judicial notice. If the law, when thus considered, does not appear to be unconstitutional, the court will not go behind it, and by a resort to evidence undertake to ascertain whether the Legislature in its enactment observed the restrictions which the Constitution imposed upon it as a duty to do, and to the performance of which its members were bound by their oaths of office."

In *Green* v. *Weller,* 32 Miss. 690, the court said:

"It has been urged that it is the duty of the judiciary, in passing upon the constitutionality of acts of the Legislature, to preserve with strictness the limitations and safeguards provided in the Constitution against the undue exercise of power by the stronger department of the government. But the duty of strict confinement within its constitutional powers is equally incumbent on each department of the government. It may be that legislative acts may be passed without a compliance with the reqirements of the Constitution. If such defect or violation appear on the face of the act, or by that which constitutes the record, which can be judicially noticed, the power of the court to determine the question is indisputable. But if the proper record shows that the act has received the sanction required by the Constitution, as evidence of its having been passed agreeably to the Constitution and its provisions be not repugnant to the Constitution, the regularity and stability of government and the peace of society require that it should have the force of a valid law. For otherwise every act of the

Legislature would be open to be impeached, upon an inquiry into the facts which took place at its passage; all confidence in legislative acts would be destroyed; these acts, instead of receiving the sanction of the community, would open the door to litigation, and confusion and anarchy would take the place of law and order. Hence the wise maxim of the law, that such are presumed to be duly and solemnly done until the contrary be shown in proper form; and it is this presumption which protects the judgments of courts from impeachment collaterally."

The result of our present views is that the provision of the Constitution is mandatory and should be obeyed by the General Assembly, but there is always a presumption in favor of the legality of the legislative proceedings and that such proceedings are conclusively presumed to have been in accordance with the constitutional requirements unless the record of which the courts can take judicial notice show to the contrary.

The question does not appear to have come up again before the same members who participated in that decision. It must be admitted that the later decisions of the court do not clear up the question. Some of them, as in the cases of *Caton* v. *Western Clay Drainage District,* 87 Ark. 8, and *State ex rel.* v. *Woodruff,* 120 Ark. 406, seem to have followed closely the language of *Davis* v. *Gaines, supra.* Others like *Waterman* v. *Hawkins,* 75 Ark. 120, and *St. Louis Southwestern Railway Company* v. *State,* 97 Ark. 473, seem to have the view of the present opinion. All of the cases on the subject up to the present time arose from acts passed at regular sessions of the Legislature and were properly held valid for the reasons stated above.

This brings us to a consideration of the peculiar facts of the case at bar. For the reason already given, the testimony of the Governor can not be considered. It is no part of the record required or provided in the Constitution and can not be considered. The confusion that would result and the evils that might result from such a course are obvious. The uncertainty of memory and of

life itself, and the frailties of human nature, make it impracticable for laws to rest upon such a foundation. Such a course would be fraught with evils too numerous and varied to be classified.

Article 6, section 19, of the Constitution of 1874, reads as follows:

"The Governor may, by proclamation, on extraordinary occasions convene the General Assembly at the seat of government, or at a different place, if that shall have become since their last adjournment dangerous from any enemy or contagious disease; and he shall specify in his proclamation the purpose for which they are convened, and no other business than that set forth therein shall be transacted until the same shall have been disposed of, after which they may, by a vote of two-thirds of all members elected to both houses, entered upon their journals, remain in session not exceeding fifteen days."

The proclamation of the Governor under this clause of the Constitution was issued on the 15th day of September, 1919, calling an extraordinary session of the General Assembly to convene at the seat of government on September 22, 1919, and the act in question was approved September 30, 1919.

The General Assembly could not be called into extraordinary session except by proclamation issued by the Governor under article 6, section 19, of the Constitution. When the proclamation was issued, it became a record of which the courts could take judicial cognizance. The courts will, also, take judicial notice that the bill was passed and approved September 30, 1919. Article 5, section 26, provides that the notice of the intention to apply to the General Assembly for the passage of a special law shall be given at least thirty days prior to the introduction into the General Assembly of such a bill. This notice was not required to be given until after the proclamation of the Governor calling the Legislature to meet in extraordinary session was issued. Until that was done, no one could know that it would be called, and no notice under the Constitution could be given. The Con-

stitution provides the time and place for regular sessions of the General Assembly. Article 5, section 5, of the Constitution of 1874. The time and place for the extraordinary session are fixed by the proclamation of the Governor. Article 6, section 19, Constitution of 1874. Therefore, until the Governor's proclamation is issued, there is nothing upon which to predicate action in giving notice of an intention to apply for the passage of a special act. Less than thirty days elapsed from the date of the issuance of the Governor's proclamation until the date the bill under consideration was approved by him. Hence it was impossible that the requirement of the Constitution with regard to giving notice could have been complied with.

Therefore, this is a case where the record of which the court may judicially take notice shows conclusively that the requirement of article 5, section 26, of the Contitution of 1874 could not have been complied with by the Legislature, and under the views above expressed it is the duty of the court to declare the special act under consideration unconstitutional and void.

It follows that the decree must be reversed and the cause will be remanded with directions to grant the prayer of the complaint.

McCULLOCH, C. J., (concurring). I concur in the judgment declaring the special statute under consideration to be void, for the reason that the constitutional provision requiring notice of the introduction of the bill for such a statute is mandatory and, after giving conclusive effect to the implied finding by the Legislature that such notice as could have been given was in fact given, we find from the consideration of public records of which we take judicial cognizance that the executive proclamation calling the Legislature in extraordinary session did not give sufficient time for the required notice and that a notice given before the calling of the session was not valid.

But I am unwilling to treat the case of *Davis* v. *Gaines* as being overruled by this decision. The lan-

guage of the opinion in the case referred to is a little ambiguous and is open to either interpretation that the constitutional provision in question is merely directory or that the legislative determination as to the giving of notice is conclusive. I think, however, that the learned justice who wrote the opinion in that case had in mind that the legislative determination was conclusive as to the required notice having been given and that he meant, by the language used, to express that view, rather than the view that the provision is directory. When he stated that "if the General Assembly choose to disregard this requirement, and to enact a local or special law without notice, no issue upon the subject of notice can be raised in the courts," he meant that, notwithstanding the Constitution required notice, yet the Legislature had the power to disregard it by a false or erroneous finding that the notice had been given, and that in such event the finding is conclusive and an issue thereon can not be raised in the courts for the purpose of defeating the statute. He did not say that the constitutional provision on that subject was directory, but, on the contrary he referred to it as a "requirement," which means, of course, that it is mandatory. A requirement is not a direction. It is a mandate, an execution. The language of that opinion, in so far as it might appear to hold that the constitutional provision is directory, may well be disapproved for the sake of making the position of the court clear on this question, but I object to treating the case as being overruled.

The next case in which this court dealt with the subject after *Davis* v. *Gaines,* was *Waterman* v. *Hawkins,* 75 Ark. 120, and we put the decision squarely on the ground that the Constitution required the giving of notice but that the legislative finding as to the giving of notice was conclusive—that courts should "indulge the conclusive presumption that evidence of such publication was properly exhibited before the passage of the act,"—and *Davis* v. *Gaines* was cited as supporting that view.

The case of *Waterman* v. *Hawkins* has generally been cited in subsequent opinions with *Davis* v. *Gaines* as stating the position of the court with regard to this question.

Mr. Justice SMITH shares the views here expressed.

STOCK *v.* HAZEN STREET AND SIDEWALK IMPROVEMENT DISTRICT.

Opinion delivered December 8, 1919.

MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—VARIANCE.—Where the first petition for a street improvement district designated it for the purpose of improving the streets in the town, and the second petition, signed by a majority in value of the property owners, designated a less number of streets than those in the whole of the town, the variance is fatal to the validity of the district.

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

STATEMENT OF FACTS.

Clea Stock brought this suit in equity against the commissioners of Hazen Street and Sidewalk Improvement District to enjoin them from proceeding further in making the improvement on the ground that the district was not organized in the manner provided by statute and on that account is invalid.

The plaintiff alleges that he is a citizen and resident property owner of the town of Hazen. The complaint further alleges that the first petition of ten property owners prays that the whole of the town of Hazen be laid off into an improvement district "for the purpose of improving and constructing sidewalks and improving the streets in the town of Hazen, Arkansas."

That the ordinance passed by the town council of Hazen pursuant to said petition in laying off the district uses the same language as the petition in describing the improvement. That the second petition signed by a majority of the land owners of the proposed district specifies the sidewalks, crossings and streets that were to be improved, and that such description showed them to be

less than all the sidewalks and streets in the proposed district.

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.

Melbourne M. Martin, for appellant.

1. The first petition and the ordinance creating the district are void for lack of certainty in describing the improvements. K. & C. Digest, § 6824; 130 Ark. 44; 115 *Id.* 594; 103 *Id.* 272. See also, 105 *Id.* 65; 59 *Id.* 344; 90 *Id.* 29; 67 *Id.* 30.

2. The second petition is void because it varies from the first petition and ordinance in the description of the improvement and because no valid district was in existence at the time. 67 Ark. 30; 115 *Id.* 594; 116 *Id.* 178. The court erred in sustaining the demurrer. *Supra.*

3. Act No. 51, October 10, 1919, was not constitutionally passed and was void as a curative act. *Booe* v. *Road Dist., ante* p. 140.

C. B. Thweatt and *J. F. Holtzendorff,* for appellees.

1. The reason of the cases cited for appellant does not apply; the first petition sufficiently describes the proposed improvement, and the second petition supplies any defects. Such acts where the roads to be improved are left to the commissioners have often been sustained by this court. 213 S. W. 763; *Ib.* 768; 214 *Id.* 23; 90 Ark. 29; 115 *Id.* 600.

2. The Legislature can by curative act cure all defects and irregularities, or omissions which could have been dispensed with originally. Dillon on Mun. Corp. (5 Ed.), p. 126; 110 Ark. 548; 116 Ark. 177.

3. If the curative act is valid, it is retroactive and makes the ordinance valid at the time the second petition was signed. 36 Cyc. 1221. All defects are cured by the curative act.

HART, J., (after stating the facts). The first petition, the foundation for the organization of the improve-

ment district designated it "for the purpose of improving and constructing sidewalks and improving the streets in the town of Hazen, Arkansas."

The second petition which was signed by the majority in value of the property owners of the proposed district described the improvements by naming the streets and sidewalks specifically and a less number than those in the whole of the city was described. Indeed there was a substantial variance between the improvement as described in the two petitions; and this was fatal to the validity of the district. *Meehan* v. *Maxwell,* 115 Ark. 594, and *Less* v. *Improvement District No.* 1 *of Hoxie,* 130 Ark. 44.

The decree is sought to be upheld by a special act of the Legislature enacted for the purpose of curing this defect. The special act was passed at the extraordinary session of the Legislature in September, 1919, and was void for the reason given in *Booe* v. *Road Imp. Dist. No.* 4 *of Prairie County, Arkansas, ante* p. 140.

It follows that the decree must be reversed and the cause remanded with directions to grant the prayer of the complaint.

HAYES v. BISHOP.

Opinion delivered December 8, 1919.

1. TRIAL—RIGHT TO TRANSFER TO LAW—WAIVER.—The right to have a suit in equity transferred to the circuit court is waived by failure to make request therefor.
2. JUDGMENT—CONCLUSIVENESS.—A decree in partition which did not purport to adjudicate finally the rights of the parties, but merely furnished the basis of settlement, did not bar a subsequent action to recover payments made in excess of those required under the decree by reason of accident, oversight or mistake.

Appeal from Washington Chancery Court; *Ben F. McMahan,* Chancellor; affirmed.

Walker & Walker and *W. N. Ivie,* for appellant.

1. This is a suit for money had and received and cognizable only in a court of law, and the chancery court had no jurisdiction. 89 Ark. 385; 85 *Id.* 439.

2. There is not sufficient evidence or facts in the record for this court to go behind the settlement made. 15 Ark. 51; 101 *Id.* 335; 75 *Id.* 266. No offer to refund was made. 62 *Id.* 274; 74 *Id.* 270. There was no clear and satisfactory evidence of fraud or mistake. 88 *Id.* 363.

O. P. McDonald, for appellee.

1. The court had jurisdiction. The demurrer did not raise a jurisdictional question that is prohibited by law. It was waived by failure to move to transfer. 28 Ark. 458; 32 *Id.* 562; 31 *Id.* 411; 102 *Id.* 326-7.

2. The first decree is not *res judicata* and does not bar the present suit. 117 Ark. 360; 1 *Id.* 391; 10 *Id.* 339; 34 *Id.* 128; 25 *Id.* 429. The order made by the court was not final but interlocutory. 83 Ark. 189.

3. Equity had jurisdiction to correct or relieve against mistake or accident. 40 Ark. 393; 45 *Id.* 505; 38 *Id.* 283; 40 *Id.* 602. Or where complicated accounts are involved. 102 *Id.* 326; 48 *Id.* 426-433-4-5.

We do not attempt to reopen or modify the interlocutory decree but desire it carried out. The decree is right and should be upheld.

SMITH, J. Appellant is the sole heir at law of W. W. Bishop, who died intestate in Washington County, August 13, 1916, leaving the appellee surviving him as his widow and the stepmother of appellant. Bishop owned at the time of his death real estate of the value of fifteen thousand dollars and personal property worth between two and three thousand dollars, and owed between four and seven hundred dollars in unsecured debts. The widow was appointed administratrix and took charge of all the property and was administering the estate when suit was filed by appellant in the chancery court, praying a partition and division of said estate. An answer and

cross-appeal was filed by the widow in which she alleged that the estate was largely indebted to her for advances made to said estate. This litigation was settled by a stipulation in writing which was incorporated into and made a part of the decree entered in that cause. It was there recited that the parties were each to quitclaim to the other certain lands owned by Bishop at the time of his death.

In regard to the personal property the stipulation was as follows: "Mrs. Annie Bishop is to have one-third of all the personal property belonging to the estate of W. W. Bishop after the payment of all debts of the estate of W. W. Bishop, among which are the following: One hundred dollars borrowed of the First National Bank by Mrs. Bishop, and paid by her; fifty-five dollars paid by her for burial lot; twenty-five dollars and twenty-five cents paid by her for repairs on Ladd building; feed bill paid by her, sixteen dollars and forty cents; one hundred ninety-four dollars and fifty cents paid by her to J. F. Moore for funeral expenses; one hundred dollars, attorney's fee, to be paid O. P. McDonald, attorney for administratrix; and not to exceed one hundred fifty dollars to be paid to Mrs. Annie Bishop for all fees and allowances as administratrix of W. W. Bishop.

"It is understood that all rents due, whether paid or unpaid, up to and including December 12, 1916, are to be treated and considered as part of the personal property of said W. W. Bishop; it is understood and agreed that Mrs. Rebecca Cloer is to have as her absolute property her father's desk and that Mrs. Annie Bishop is to have the little cot, both of which are in the office of the deceased. It is also understood that Rebecca Cloer is to pay to the estate of W. W. Bishop all rent due for the house in which she is now living, amounting to about $100.

"It is also understood that all personal property, including bank stock, except such household goods as Mrs. Annie Bishop desires to retain at the invoice or at an agreed price, agreed upon between the parties, is to be

reduced to cash, and that the estate shall be settled up and proceeds divided within thirty days from this date."

It will be observed that this decree, instead of finally settling the respective rights of the litigants in this estate, merely furnished the basis for such settlement, and pursuant to its provisions the parties—accompanied by their respective attorneys—met to make a settlement on the basis recited in the decree.

Thereafter the present suit was filed, in which the matters above stated were recited, and it was there alleged that on casting up the accounts appellee was charged as administratrix with the sum of $2,655.82 and was given credits aggregating $1,308.52. It was there further alleged that "appellee was entitled to $150 inheritance tax, and $100 due from appellant as rent, and $102.50 paid out by appellee for nurse help and other expenses as additional credits, thereby making a total credit of $1,661.02; but that said appellee should be charged with $50 which she had received credit for to be paid Rice & Dickson, as attorney's fee, which she did not have to pay, but alleged that by oversight and mistake these additional credits and charges were not made in said settlement, and that by such mistake and oversight she had overpaid the appellant herein in the sum of $138.55; that she had paid her $841.75 when there was only due her, if the same had been correctly figured, the sum of $703.20." Judgment for this overpayment was prayed.

Appellant demurred to this complaint on the grounds that it did not state facts sufficient to constitute a cause of action, and because the court had no jurisdiction of the subject-matter. This demurrer was overruled, whereupon an answer was filed alleging that the matters set up in the complaint had been adjudicated and settled by the former decree, and further alleging that in the final settlement appellee had failed to pay her the full amount coming to her under the settlement and that there was a balance of $83.33 due her, for which she prayed judgment.

The cause was submitted on the pleadings and the depositions of the parties. Appellee identified Exhibit "B" to her complaint as the settlement between the parties made pursuant to the first decree and testified that prior to the signing of said Exhibit "B" there was another agreement, which is designated Exhibit "D," with reference to the inheritance tax and which contained a recital of the demands against the estate together with the bank deposits which had been made to its credit.

There was also offered in evidence a writing designated as Exhibit "C," which had been signed by the parties and reading as follows: "It is stipulated and agreed that, out of the personal estate going to Mrs. Cloer under settlement this day made, Mrs. Annie Bishop, administratrix, is to retain in her possession the sum of $150 to be applied on that part of inheritance tax due from Rebecca Cloer on the estate of her deceased father, W. W. Bishop; in the event that this amount is not sufficient to cover that portion of inheritance tax due from Mrs. Cloer, Mrs. Cloer is to pay any excess over and above said amount; and in the event that it does not require all of said amount to pay Mrs. Cloer's part of said inheritance tax, Mrs. Bishop is to refund to her the excess remaining in her hands.

"It is further stipulated that should any debts be probated against the estate of W. W. Bishop, deceased, other than those agreed upon and allowed and set forth in the partial stipulation agreed upon this date, that the same are to be paid by Annie Bishop and Rebecca Cloer, Mrs. Bishop to pay one-third and Mrs. Cloer to pay two-thirds.

"Dated this 19th day of December, 1916."

Appellee further testified that on the 19th of December, 1916, pursuant to the settlement made that day, she paid the appellant the sum of $841.75, and that said payment was excessive in the sum sued for and that this excess was paid as the result of a mistake made by appellee's attorney in incorrectly figuring the accounts between the parties.

Appellant testified that the balance represented by the check given her was arrived at after an extended conference and the check was received as payment in full of her part of the personal estate after all the claims had been settled.

The court found the fact to be that in making the settlement pursuant to the decree on the stipulation, "by accident, oversight and mistake, the said Annie Bishop paid to the said Rebecca Cloer the sum of $104.23 more than the amount which was due her," and that she should recover the sum so overpaid.

It is first insisted as ground for the reversal of the decree that this is a suit for money had and received and, therefore, cognizable only in a court of law. But no request to have the cause transferred was made, and, in the absence of that request, appellant will be held to have waived the right to ask for a trial at law of the issues raised. *Goodrum* v. *Merchants & Planters Bank,* 102 Ark. 326.

We think the first decree is no bar to the present suit, for the reason that it did not purport to adjudicate finally the rights of the parties, but contemplated the settlement subsequently made pursuant to its terms.

It is said appellee should not be permitted to recover here because she does not offer to return the benefit she obtained in this settlement, and that this is not a suit to set aside the settlement on the ground of fraud, accident or mistake, but simply a suit for money had and received. As has been said, this is not a suit to set aside a former decree, but is one to recover a sum alleged to be due upon a correct settlement under its terms. The court found that in making the settlement "by accident, oversight or mistake" an excessive payment was made; and we think appellee had the right to sue to recover this excess, and as the correctness of the amount of the alleged excess as found by the court is not disputed the decree will be affirmed.

SOUTHERN EXPRESS COMPANY *v.* FREEZE.

Opinion delivered December 8, 1919.

1. CARRIERS—TITLE TO GOODS DELIVERED TO CARRIER.—Title to goods delivered to a carrier remained in the consignor where there had been no sale.
2. CARRIERS—DELIVERY TO WRONG PERSON.—A carrier is guilty of negligence in delivering a shipment to a person other than the consignee where there was nothing about the shipment to indicate that the person receiving it had any right thereto.
3. CARRIERS—INSUFFICIENCY OF EVIDENCE TO SHOW AGENCY.—In an action against an express company for wrongful delivery, evidence *held* insufficient to constitute the person to whom the shipment was delivered an agent for the consignee to receive shipment.

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

E. L. Westbrook, for appellant.

Freeze had no authority to sue; delivery to the carrier was delivery to the consignee, and Freeze was not the consignee nor owner. 105 Ark. 53-57; 111 *Id.* 521; 118 *Id.* 17; 127 *Id.* 607; 115 *Id.* 221. Freeze was not the party in interest, and was not entitled to recover because of his carelessness in taking the word of a man in whose integrity he stated he had no confidence, and he was negligent in making the shipment.

Basil Baker and *Horace Sloan,* for appellee.

1. The appeal was not taken within six months after judgment. Kirby & Castle's Dig., § 1314.

2. The rule that delivery to the carrier is delivery to the consignee does not apply when no contract of sale existed under which title could pass. 10 C. J., p. 228, § 17; 63 Md. 179; 8 Cranch, 253; *Ib.* 354; 9 *Id.* 183.

3. The so-called negligence of Freeze in not calling up Gregory personally before shipment does not affect the liability of appellant. 134 N. Y. 62; 47 Ark. 335-9.

SMITH, J. Appellee, who is in the meat business in Jonesboro, shipped by the appellant express company a consignment of meat to John Gregory at Truman, Ark-

ansas, which was delivered to one V. E. Safley, who upon its receipt signed the name of Gregory by himself. It was shown at the trial from which this appeal was prosecuted that Gregory knew nothing of the shipment and gave Safley no authority either to receive it or to sign his name upon its receipt.

Judgment was rendered against the express company for the value of the meat, and a reversal of that judgment is asked here on two grounds: First, that appellee has no right to sue; and, second, the express company is absolved from liability for the misdelivery of the shipment because of appellee's negligence in making the shipment.

In opposition to appellee's right to maintain this suit cases are cited to the effect that the delivery of goods to a carrier for the purpose of shipment is a delivery to the consignee, and, on the authority of these cases, it is said that the title to this shipment passed out of the shipper upon its delivery to the express company. The cases cited are not in point here for the reason that the consignee disclaims any interest in or title to the shipment. If there was no sale, the title remained in the consignor.

The negligence of appellee is said to consist in shipping the goods without verifying Safley's authority to place the order for them. It appears that appellee had been making C. O. D. shipments of meat to Safley, who was not regarded by appellee as being entitled to credit. Safley called appellee over the 'phone and advised that he and Gregory had formed a copartnership and asked appellee if he would ship meats to this copartnership. Appellee advised that he would extend credit to Gregory and would ship meats to his order. Thereupon Safley ordered that the shipment in question be made to Gregory, and that was done. Gregory and Safley had not formed a copartnership, and had no business connections whatever except that Safley rented from Gregory the building in which he operated a butcher shop.

It is said that appellee was negligent in failing to secure a confirmation of this order from Gregory before

making the shipment. We do not think, however, that appellee was guilty of any conduct which deprived him of his right to expect that the shipment would be delivered to the consignee and to no other person. There was nothing about the shipment to indicate that Safley had any right to receive it, and delivery should have been made, therefore, only to the consignee. *C., R. I. & P. Ry. Co.* v. *Pfeifer,* 90 Ark. 524.

On his cross-examination Gregory testified as follows:

"Q. Didn't you receive a shipment of eggs there from the Graves Commission Company, at Cabool, Missouri, that had been ordered by Mr. Safley?

"A. No, sir; I ordered the eggs myself.

"Q. Do you remember when this case was tried in the justice of the peace court?

"A. Yes, sir.

"Q. Didn't you state there that these eggs were ordered from the Graves Commission Company, and that Mr. Safley got them out of the express office and signed your name for it, by himself as agent?

"A. I don't remember. He didn't unless I gave him authority to."

We think this testimony insufficient to constitute Safley an agent for Gregory to receive shipments consigned to Gregory without the knowledge or consent of Gregory.

The cause was submitted to the court sitting as a jury, and judgment was rendered against the express company for the value of the meats.

No error appearing, that judgment is affirmed.

WILKINSON v. ST. FRANCIS COUNTY ROAD IMPROVEMENT DISTRICT NO. 1.

Opinion delivered December 8, 1919.

1. HIGHWAYS—ASSESSMENTS.—In assessing benefits from a road improvement, the question is, to what extent will the proposed improvement enhance the value of the property against which the assessment is to be levied?
2. HIGHWAYS — REVIEW OF ASSESSMENTS.—The judgment of the judges who review assessments for road improvements should not be substituted for that of the assessors, unless the evidence clearly shows that the assessment is erroneous.
3. HIGHWAYS—ASSESSMENTS OF TOWN AND COUNTRY LAND.—Where town and country lands are assessed for the cost of a road improvement, the owner of country land can not complain of inequalities in the assessment of the town lots if the municipal assessments as a whole are not too low.
4. HIGHWAYS—ZONAL ASSESSMENTS.—Assessments of lands in a road district on a zone system at so much an acre depending upon their proximity to the road are not subject to judicial review because such assessments are not based upon the relative valuations of the lands assessed.

Appeal from St. Francis Chancery Court; *A. L. Hutchins,* Chancellor; affirmed.

W. J. Lanier, for appellant.

1. While the act No. 157, Acts 1917, page 814, was legally passed and valid (133 Ark. 64), the assessment of benefits against appellant's property are unjust, unequal, unequitable and disproportionate and not in accordance with the provisions of the act, and under section 12 of said act the chancery court should be required to equalize the assessments of the entire district, and erred in refusing to set aside the unjust and arbitrary assessments on appellant's property. 86 Ark. 14; 32 *Id.* 31; 49 *Id.* 202; 68 *Id.* 377; 69 *Id.* 68; 99 *Id.* 508.

2. Section 11 of the act is mandatory that the whole board shall act in a body, and here it is shown that three of the commissioners took no part, but only made a superficial examination of the assessment after its completion. Cooley on Taxation (2 Ed.) 257; 127 Ark. 315; 86 *Id.* 1.

3. Benefits can not be remote, contingent or speculative. 2 Page & Jones on Tax. by Assessment, § 652. Property can not be assessed for general benefits. 2 Page on Tax., etc., § 654. Special use of property as bank buildings, etc., can not be considered. *Ib.*, § 655. Special assessments can be supported only on the theory that the property assessed will be specially benefited by the assessment, and the assessment must not exceed the benefits, and must be proportionate to the benefits. 48 Ark. 370; 69 *Id.* 68; 71 *Id.* 4; Cooley on Tax (2 Ed.) 639-659, 661; 81 Ark. 162. The finding of the commissioners is not conclusive. 71 Ark. 556.

4. The constitutional requirements of uniformity and equality apply to local assessments, both in and out of cities and towns. 48 Ark. 370. And the requirement is satisfied only when assessments are imposed equally upon all standing in like relations. 64 Ark. 555; 70 *Id.* 549; 83 *Id.* 344.

5. Commissioners' acts in making assessments only *prima facie* and can be overcome by evidence and their acts are subject to review by the courts. 81 Ark. 80; 68 *Id.* 380; 80 *Id.* 462; *Ib.* 316; 80 *Id.* 97; 2 Page & Jones on Tax., etc., § 672. If district embraces both city and urban property, all must be fair, equitable and just in the assessment. 99 Ark. 100. Assessments may be reduced. 2 Page & Jones, Tax., etc., pp. 34-86, 698. They must be according to benefits. 81 Ark. 208; 98 *Id.* 100; 118 *Id.* 119; 103 *Id.* 452; Cooley on Tax. (2 Ed.) 638, 262, 559-61. See also 127 Ark. 315.

6. Act 157 requires the whole board to act. 119 Ark. 188; 98 *Id.* 113 and *supra.*

S. S. Hargraves and *Rose, Hemingway, Cantrell & Loughborough,* for appellees.

The only question is whether an assessment by zones is proper. The commissioners held it was and so acted. This method is almost universal and is upheld by the courts. 240 U. S. 242; 134 Ark. 299; 213 S. W. 775; 133 Ark. 121-123-5. See also 134 Ark. 14; 213 S. W. 749-775.

SMITH, J. Appellant is a large land owner in Road Improvement District No. 1 of St. Francis County, which was created by Act No. 157 of the Acts of 1917 (Acts 1917, page 814), and he seeks by this appeal to have the assessments against his lands vacated and set aside upon the ground that they are excessive, confiscatory and disproportionate to other assessments. This is a direct proceeding to review by appeal the refusal of the chancery court to revise and reduce appellant's assessments. He insists that the assessments were made by zones, the assessments against each tract being determined solely by a consideration of the zone within which the lands are located and without reference to the benefits to be derived from the proposed improvement.

It is undisputed that the assessment was made by zones, under which all lands lying within one mile of the proposed road were placed in the first zone and a betterment of seven dollars per acre assessed; and that lands lying more than one mile but within two miles of the road were placed in the second zone and a betterment of six dollars per acre assessed, and so on with other zones, the theory being that betterment from the improvement was in proportion to proximity to it. As a result of this theory and method of assessment, it is undisputed that lands lying in the same zone will have the same acreage assessment and that lands shown to be worth more than one hundred dollars per acre will pay no more tax than lands shown to be now worth less than five dollars per acre.

But the assessment is not necessarily to be condemned on that account. In the case of *Board of Improvement* v. *Southwestern Gas & Electric Co.*, 121 Ark. 105, the board of assessors made a horizontal assessment of twenty per centum of the value of the real property in the district as assessed for State and county purposes. The purpose for which that district was organized was to acquire, construct and equip a water plant and system. In that case the court below had held the assessment illegal and erroneous; but in reversing that finding we said:

"If the chancellor meant to hold that the assessors could not, even after giving due consideration to all the elements which go to make up the benefits to be derived from the stated improvements, make an assessment which resulted practically in a percentage of the value according to the assessment of taxes for State and county purposes, he was in error, for there is no sound reason why that method may not be adopted if that basis of assessment results in arriving at the real benefits from the improvement. If, however, a basis of that kind is adopted arbitrarily and without any relation to the real benefits to be derived, it is invalid and should be set aside. We have decided in numerous cases that a legislative ascertainment that benefits from a local improvement accrue in proportion to the value of the property affected will be respected unless it be demonstrated to a certainty that a mistake has been made."

Upon a review of the testimony in that case we reached the conclusion that the testimony did not warrant the conclusion that the board of assessors had acted arbitrarily in reaching the conclusion that the benefits to all property in the district would accrue in proportion to values. The assessors in that case were men familiar with the real property in the district, and in their meetings they had reached the conclusion that all the property in the district would be relatively benefited in proportion to the value thereof—the assumption being that the assessment of value by the county assessor was correct—and that a percentage assessment based on that valuation would represent the true benefits to be derived from the improvement. In that case it was shown that some of the property in the district was so situated that it did not then need the supply of water which was to be afforded by the construction of the improvement; yet we held that that fact was not necessarily conclusive that the benefits to all the property in the city might not accrue alike in proportion to the value of each piece of property.

In the case of *Alcorn* v. *Bliss-Cook Oak Co.,* 133 Ark. 118, the directors of the levee district sitting as a board of assessors imposed a tax of ten cents per acre upon each acre of land in the district. This assessment was resisted by the oak company on the ground that it was not proportionate to benefit. We approved the assessment, however, and in doing so said that "if the construction of the levee increases the values of the different classes of land within the district proportionately, there is no injustice. In this way the burden will be distributed in proportion to the benefits."

In the case of *Rogers* v. *Arkansas & Louisiana Highway Improvement District,* 139 Ark. 322, we said:

"The question is not what the usable value of the road is to a particular tract of land, but to what extent has the improvement enhanced the value of the land? It is against this enhanced value or betterment that the tax is levied to pay for the construction of the improvement, which is to bring about the enhanced value."

In making the assessments to pay for any proposed improvement the question is to what extent will the proposed improvement enhance the value of the property against which the assessment is to be levied, for it is this enhanced value which is taxed. The method of arriving at that enhanced value is to be determined by the men charged with that duty, and, as we have frequently said, the judgment of the judges reviewing the assessments should not be substituted for that of the assessors who made the assessments unless the evidence clearly shows that the assessment is erroneous.

Applying that test, what disposition shall be made of the assessment in the present case? The board here consists of seven members, who were named in the act and who appear to be successful men of affairs who have a general knowledge of the lands in the district. It must be confessed that portions of the testimony of some of these commissioners would appear to indicate that distance from the road was the only thing taken into account in assessing the betterments. But we think this a mere infelicity of speech, and while, as we have stated,

lands in the same zone, differing widely in market value and in usable value, received the same assessment per acre, this result was achieved because the commissioners had determined that each piece of land in the first and other zones received benefits equal to those of other lands in the same zones. Of course, mathematical accuracy in this respect is not required, because values and benefits are at last mere matters of opinion, and we can expect nothing more than an intelligent judgment honestly and fairly exercised. The commissioners all testified that it was their purpose to make a fair, just, equal and proportionate assessment of the benefits and that the assessment by zones met that requirement. It is true one or more of the assessors thought the assessment should be made *ad valorem,* but they yielded to the majority, and it is not shown that a substantially different result would have been reached had that method been employed.

There is testimony that much of the land owned by appellant received an assessment greater than its present market value. These were lands shown to be of small value chiefly because of the recurring overflows from the L'Anguille river, which winds it tortuous course through them. It is not shown or contended that these lands are beyond reclamation by drainage or by levees, and it is a matter of such common knowledge that courts may know it that levees and drains have passed beyond the experimental stage.

Considerable testimony was offered for the purpose of proving inequalities in the assessments of lots in the city of Forrest City and in the town of Palestine; but the owners of these lots against which these inequalities are said to exist do not appear to have complained, and, as appellant owns none of those lots, his only right to complain would be that the municipal assessments are too low as a whole, and as that complaint is not made this testimony appears to be immaterial in this litigation.

Upon a consideration of all the testimony in this case we do not feel warranted in revising appellant's assessments, and the decree of the court below approving them is, therefore, affirmed.

DAVIS v. STATE.

Opinion delivered December 8, 1919.

1. CRIMINAL LAW—STATEMENT MADE IN ACCUSED'S PRESENCE.—A statement by one jointly charged with the accused, made in the latter's presence and calling for a denial if untrue, is admissible in evidence, although it is not shown that accused actually heard it, where the natural thing would have been for him to hear it.
2. CRIMINAL LAW—STATEMENT CALLING FOR DENIAL.—In a murder case a statement in accused's presence by his brother, jointly indicted with him, that they were sawing wood and saw a team coming down the road, and that he jumped over a fence and stopped the team and saw deceased lying dead in the wagon bed, was a statement which called for a denial if untrue, as the statement tended to establish accused's presence at time of the killing.
3. CRIMINAL LAW—SUBSEQUENT STATEMENT OF CONSPIRATOR.—Where several persons were charged with murder, a statement made by one of them some time after the killing in the other's absence is not admissible against the other conspirators.
4. CRIMINAL LAW—RES GESTAE.—A statement by a codefendant in accused's absence, made an hour after the killing, is inadmissible as part of *res gestae.*
5. CRIMINAL LAW — ADMISSION OF TESTIMONY — HARMLESS ERROR.—Admission of evidence of a statement by a codefendant to the effect that accused was near the place of killing at the time deceased was killed, made in accused's absence, was not rendered harmless because there was other evidence that the same statement was made by codefendant in accused's presence and was not denied, nor because accused offered no testimony in denial, as his denial of guilt challenged the truth of the State's evidence.

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

Ponder & Gibson, for appellant; *L. B. Poindexter,* of counsel.

1. The testimony of Kell and others as to statements made by Homer Davis when he was arrested, etc., were not admissible against appellant. 75 Ark. 297-8; 91 *Id.* 490; 88 *Id.* 451; 64 *Id.* 121; 45 *Id.* 171; 42 *Id.* 380; 34 *Id.* 654.

2. Homer Davis was, according to the theory of the State, an accomplice, and a conviction can not be had

upon his testimony alone. 63 Ark. 461. The question is one of mixed law and fact. 51 *Id.* 115; 43 *Id.* 367; 63 *Id.* 462. An accomplice must be corroborated. 96 *Id.* 58; 59 *Id.* 430; 73 *Id.* 410.

3. The evidence is not sufficient to sustain the verdict. 46 Ark. 149; 97 *Id.* 159. There must be substantial proof. 67 *Id.* 417.

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

The testimony of Kell and others as to the statements made by Homer Davis when he was arrested and in the presence of appellant, was admissible and was not such as to call for a reply from him. Defendant's objections were general and could raise only the competence of the evidence. 69 Ark. 313. This evidence was secondary and proper when the necessary foundation was laid, which was that he heard the remark. 76 Ark. 400. The evidence fully sustains the verdict.

HUMPHREYS, J. Appellant was jointly indicted with his brother, Homer Davis, and separately tried and convicted for the murder of Charles Whittaker, in the Western District of Lawrence County, and adjudged and sentenced to life imprisonment in the penitentiary as a punishment therefor. From the judgment of conviction, an appeal has been duly prosecuted to this court. Appellant introduced no evidence. The history of the crime, according to the State's evidence, is, in substance, as follows: Charles Whittaker borrowed a wagon from R. G. Ritchie, residing west of Homer Davis' home, on the morning of December 13, 1917, to move Jim Phillips and wife, who resided east of the Homer Davis home. At the time he borrowed the wagon, Ernie Davis, a younger brother of Homer and appellant, was at Ritchie's and left before Whittaker. Whittaker left about fifteen minutes thereafter, going east. He stopped awhile and talked to J. M. Headrick, who resided about two hundred yards west of the Homer Davis home. From the Headrick home, he proceeded on his way, standing in his wagon and smoking a pipe, and, in this position, passed out of

Mr. Headrick's sight, on account of a hill situated between the two houses, which served as an obstruction to the view. Time enough had elapsed for Whittaker to reach Homer's home when a shot was heard by Mr. Headrick in that direction. Shortly after the shot, the dead body of Whittaker was found lying diagonally across the bed of the wagon dead, with a gunshot wound in the right-hand side of the skull, behind the ear. The shot entered from behind. There were no powder burns. Snow was upon the ground, and there was a pool of blood in about fifteen feet from the gate, in front of Homer's house, which had the appearance of being covered up with a corn scoop. There were tracks between the house and pool of blood. A scoop which fit in the marks made near the blood was on Homer's porch. Blood was found on the porch and doorknob. Some gun wadding was found on a direct line between the pool of blood and a little house that stood in the yard. Blood appeared at intervals between the house and where the dead body was found, but none was found west of the house in the direction from which Whittaker came. In an hour or so after Whittaker was killed, John Selsor, who had met him going in the direction and about twenty rods west of Homer's house, in passing back that way, saw Homer and his wife in their buggy fixing to leave, and observed Oliver Davis and his mother on Homer's porch. Oliver Davis resided with his father about 200 yards from Homer's dwelling. Bad feeling existed between Whittaker and the Davis family. That night, Homer and Oliver were arrested and placed under guard at their father's home.

Over the objection and exception of appellant, three witnesses, L. W. Kell, John Jean and J. M. Headrick, were permitted to testify as to a statement made by Homer in the presence of Oliver during the time they were being guarded. The statement, according to witness Kell, the deputy sheriff, was as follows: "Homer made this statement, I think that night, that he and Oliver were sawing wood, just across the fence there and seen a team coming down the road, and thought it was Tom Hall's

team, and he ran out and caught the team and seen it was Charley Whittaker and hung up the lines on the wagon bed and let them go on."

According to witness, J. M. Headrick, as follows: "Well, Mr. Homer Davis said that he was not uneasy, that they had not done anything to be uneasy for; that him and Ol. was there sawing wood and he looked up the road and saw the team coming and thought it was Tom Hall's team running away, and he just jumped over the wire fence, he says, and caught them; and about that time he looked back, he said, into the wagon, and saw it was Charley Whittaker, and that he was shot or dead—I don't remember exactly which word he used—but anyhow saw it was Charley Whittaker in the wagon, and he just hung his lines up on the corner of the wagon bed and let them go on."

According to witness John Jean, as follows: "And they (Homer and Oliver) were sawing wood and they seen a team coming along without any driver and coming in a pretty pert gait and Homer said he run out to head the team and stopped them and kinder peeped up and seen who was in the wagon; seen who it was and said it was just such a shock to him and unnerved him so he just had to sit down, and did. And he throwed the lines up on the wagon bed and turned the team loose and it went on."

Over the objection and exception of appellant, R. G. Ritchie was permitted to testify that, in appellant's absence, about one hour after the tragedy occurred, he passed Homer's home and hollowed to Homer and asked, "What on earth is the matter with Charley down there?" And Homer said, "God, I don't know. I seen the wagon come running down the hill there and I thought it was Tom Hall's team and I jumped over the fence and stopped them and went back to where the wagon was and it was Charley Whittaker and I turned them loose and let them go on down the road."

Appellant insists that the statement made by Homer Davis to D. W. Kell, John Jean and J. M. Head-

rick was not competent, because, first, it was not shown that appellant heard the statement; and, second, because the statement contained nothing which called for an explanation or denial on his part.

(1) The witnesses all said the statement was made at the time Homer and Oliver were arrested and placed under guard at their father's home, and in the presence of Oliver. It is hard to realize how a statement made under these circumstances could have escaped the attention of appellant. The natural thing would have been for him to hear it, and the jury were warranted in so finding.

(2) The statement tended to establish appellant's presence at the time the tragedy occurred, and, in the opinion of a majority of the court, if believed by the jury, when taken in connection with all the other facts and circumstances in the case, tended to connect him with the crime. Therefore, the jury were warranted in finding that the statement called for a denial on his part, if not present.

It is also insisted that the court committed reversible error in admitting the statement made by Homer Davis to R. G. Ritchie in the absence of appellant. This statement was admitted as substantive evidence against appellant, on the theory that it was the statement of a co-conspirator in the crime. Its admission cannot be justified on that ground, because it was made in the absence of appellant and after the conspiracy, if one existed, had been completed. Its introduction cannot be justified on the ground that it was a part of the *res gestae* because more than an hour intervened between the commission of the crime and the time the statement was made. The evidence was clearly incompetent, but, conceding it to be so, the learned Attorney General insists that it was not prejudicial for the reason that a statement of like nature was established by the undisputed evidence of other witnesses made by Homer in the presence of appellant while under guard at their father's home.

In felony cases, when the defendant pleads not guilty and introduces no evidence, juries are not required to accept as conclusive evidence of the State, though uncontradicted. Under such circumstances, the denial of guilt challenges the truth of the State's evidence, and it cannot be said that the State's testimony is undisputed though uncontradicted by testimony on the part of defendant. Had appellant introduced testimony on the point, which coincided with that of the State, then it might be said with reason that there was no dispute in the evidence. This court, in the case of *Parker* v. *State,* 130 Ark. 234, quoted with approval from the case of *United States* v. *Taylor,* 11 Fed. 470, as follows:

"'By his plea of not guilty, the defendant must be understood as denying the truth of the information or indictment, and as not conceding the truth of what the witnesses for the government have sworn to. This is so notwithstanding the fact that no witness for the defendant contradicted the statements of the witnesses for the prosecution. In this condition of the testimony it was the right of the jury to pass upon the credibility of the witnesses, even if unimpeached as to character, and to consider whether, upon applying all the tests of manner, clear or confused statement, prejudice and accuracy of memory, they were to be believed. It was within the province of the jury to disbelieve the witnesses for the government.' See also *Territory* v. *Kee* (N. M.), 25 Pac. 924; *State* v. *Wilson,* 62 Kan. 621, 52 L. R. A. 679; *State* v. *Godman,* 145 N. C. 461, 123 A. S. R. 467; *Huffman* v. *State,* 29 Ala. 40; Thompson on Trials (2 Ed.), vol. 2, sec. 2149."

It may be that the jury accepted the testimony of L. W. Kell, John Jean and J. M. Headrick because in part corroborated by this testimony of R. G. Ritchie. It was within the province of the jury to treat this testimony as corroborative of the statement made in the presence of Kell and others, and, if they did so, it necessarily played a part in bringing about the conviction

of appellant. It was, therefore, material and not merely cumulative.

The question of whether the verdict and judgment are supported by sufficient legal evidence is eliminated by our conclusion that the court admitted incompetent evidence to the prejudice of appellant's right.

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

McCULLOCH, C. J., (dissenting). The statement of Homer Davis to R. G. Ritchie was purely self-serving and did not tend to connect appellant with the commission of the crime, as did the testimony of the other three witnesses who gave testimony concerning statements of Homer Davis, and the testimony of Ritchie could not have had any effect prejudicial to appellant. Besides, the substance of the statement to Ritchie was embraced in the statement to the other three witnesses, Kell, Jean and Headrick, and the testimony of those three witnesses was undisputed.

The rule has frequently been laid down by this court that in a criminal case as well as in a civil case the admission of incompetent evidence should be treated as harmless, and not to cause a reversal of the judgment, where the fact sought to be proved was established by other undisputed evidence. *Lee* v. *State,* 78 Ark. 77; *Renfroe* v. *State,* 84 Ark. 16; *Farrell* v. *State,* 111 Ark. 180; *Taylor* v. *State,* 113 Ark. 520; *Kelley* v. *State,* 133 Ark. 261.

In the case of *Farrell* v. *State, supra,* we said: "It is well settled in this State that there is no prejudicial error in admitting incompetent testimony of a fact that has been proved by the undisputed evidence."

It is not discoverable in any of the opinions in the cases cited above that the testimony can only be treated as undisputed where the accused has introduced testimony on the point "which coincided with that of the State." In fact, a perusal of the cases cited above will show that in most of them, if not all, the undisputed evidence was adduced by the State. However, it is unim-

portant, I think, the source from which the undisputed evidence emanates, for if it is undisputed and uncontradicted, so that the jury has no right to arbitrarily reject it, then there can be no harmful result flowing from the introduction of incompetent evidence tending to establish the same fact.

Appellant adduced no testimony in the trial of this case, and the statements of his brother, Homer Davis, were proved by the undisputed testimony of three unimpeached witnesses. One of them was the deputy sheriff who made the arrest, and there was not the slightest hint in the argument of counsel of the existence of any ground for questioning the testimony of those witnesses.

I think the judgment should not be reversed for an error which obviously could not have had any harmful effect.

DEAN v. COLE.

Opinion delivered December 8, 1919.

1. HOMESTEAD—ABANDONMENT.—In order to constitute an abandonment of a homestead, there must be a removal with intention not to return.
2. HOMESTEAD — WHO MAY CLAIM.—Since the homestead claimant may sell the homestead free from judgment or execution, except for claims enforceable against it, the plea of homestead is available to his grantee.
3. HOMESTEAD—TIME OF ASSERTING CLAIM.—The failure of a homestead claimant to assert his claim of exemption before it was sold under execution or to file a schedule thereof does not work a forfeiture of the homestead right, which may be asserted when suit for possession is brought.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; affirmed.

J. E. London, for appellant.

When J. T. and Russie Cole moved off the land to Van Buren they lost their homestead right by abandonment, and the plea of homestead is only available to the homestead claimant and not to his grantee, and (3) T. A.

Cole can not avail himself of homestead as a defense, because J. T. and Russie Cole forfeited their right to homestead by failing to claim it before the execution sale or by filing a schedule. 55 Ark. 139-142. Jesse Cole did not claim the property as a homestead, nor did his wife, and the sale is not questioned so far as the title of appellant is concerned, and it is good as to all. Appellee has no title and the judgment should be reversed.

Starbird & Starbird for appellee.

J. T. Cole had no greater interest in the land than an estate by entirety in one-third thereof. When the land was conveyed to J. T. and Russie jointly, instead of to Russie alone, it only made J. T. a trustee for his wife and he had no interest subject to execution or other process. When J. T. and Russie moved to Van Buren they did not lose their homestead right, as they announced their intention to return and occupy the land as a homestead. There was no abandonment. The chancellor so held, and his finding is sustained by the evidence. Under our laws *now* a grantee or the holder of a homestead claim can make defense of homestead in a suit by a purchaser at execution sale. 66 Ark. 382; 75 *Id.* 591; Kirby's Digest, § 3902. This case is identical with 75 Ark. 591.

HUMPHREYS, J. This suit was begun in the circuit court of Crawford County by appellant against appellee, J. T. Cole, to recover possession of 120 acres of land in said county. Appellant alleged ownership and the right to possession of said lands by purchase at an execution sale under a judgment obtained by him against J. T. Cole on the 3rd day of July, 1916, and that appellee, J. T. Cole, through his tenant, Joe Mullen, was in the wrongful possession thereof.

Appellee, T. A. Cole, filed an intervention, alleging that he was the owner of said lands by purchase from appellees J. T. Cole and Russie Cole on the 9th day of March, 1917; that, at the time he so purchased them and at the time appellants obtained judgment and sold the lands under execution and obtained a sheriff's deed

thereto, said lands were the homestead of J. T. and Russie Cole; and that he, by tenant, and not J. T. Cole, was in the actual and rightful possession of said real estate. Intervener prayed that his title be quieted against the claim of appellant and moved and obtained a transfer of the cause to the chancery court of said county.

In that court, appellant filed an answer denying the material allegations set forth in the intervention.

We have refrained from setting out the other issues joined in the pleadings, because the determination of the issue stated is decisive of the case.

The cause was submitted to the court upon the pleadings and evidence, from which it was found that at the time appellant obtained judgment against appellee, J. T. Cole, sold the land in controversy under execution, became the purchaser thereof and obtained his deed thereto, said lands were the homestead of appellees Jesse Cole and Russie Cole; that T. A. Cole purchased said lands from J. T. and Russie Cole, free from any judgment or execution lien in favor of appellant. A decree was rendered in accordance with the findings of the court dismissing appellant's original complaint and quieting the title to said lands in T. A. Cole, from which findings and decree, an appeal has been prosecuted to this court.

The facts relating to the main issue in the case are, in substance, as follows: On the 3rd day of July, 1916, appellant recovered judgment against J. T. Cole in the circuit court of Crawford County for $59.10, including costs. On the 5th day of February, 1917, execution was issued, and on the 8th day of the same month levied upon the lands in controversy. Said lands were sold under the execution and purchased by appellant for the amount of his judgment and costs. After the expiration of redemption, to-wit, on the 27th day of April, 1918, the sheriff executed appellant a deed for said lands. Russie Cole inherited an undivided one-third interest in said lands from her father, Samuel Smith, who died

intestate in the year 1913. Gussie Meadors, another daughter, also inherited an undivided one-third interest therein. On the 8th day of September, 1915, Gussie Meadors sold the land to either J. T. Cole or Russie Cole, or to both, and she and her husband conveyed it to J. T. Cole and Russie Cole, who were, and are, man and wife. In order to pay the purchase money for the undivided one-third interest sold by Gussie Meadors and conveyed to the Coles, J. T. Cole and Russie Cole executed a mortgage upon an undivided two-thirds interest in said land for $500 to J. H. Cole. Immediately after the purchase of the Gussie Meadors interest in said land, J. T. Cole and Russie Cole moved upon and occupied it as their homestead. In April, 1916, they, with their children, moved to Van Buren and lived in a rented house. They both testified it was their intention to return to the lands, but, in the meantime, were compelled to sell it in order to pay the mortgage. On the 9th day of March, 1917, they sold the land to T. A. Cole, the intervener, who, as a part of the consideration therefor, paid the mortgage. J. T. Cole was a married man, the head of a family, and a resident of the State of Arkansas at the time the lands were purchased and thereafter. The lands were situated in the county and an undivided one-third interest therein was of the value of about $1,000. Neither J. T. Cole nor Russie Cole owned any other lands.

Appellant contends that, when J. T. and Russie Cole moved off the land to Van Buren, they lost their homestead right therein by abandonment. In order to constitute abandonment of a homestead, the homestead claimant must remove therefrom with an intention not to return. No such intention appears from the facts and circumstances in the case. Their avowed intention was otherwise. They did not purchase another home, but lived temporarily in a rented house after they moved to Van Buren. When the lands were about to be sold under execution, J. T. Cole protested and notified the prospective bidders that, if they bought, it would be

subject to his homestead right. Their avowed intention to return to the land was thwarted by necessity. The mortgage given to obtain the money to purchase a part of the lands practically absorbed it. The chancellor is, therefore, sustained in the finding that it was the homestead of J. T. and Russie Cole, when appellant obtained his judgment and sold the land under execution.

Again, it is insisted by appellant that the plea of homestead as a defense to judgment or execution liens is available only to the homestead claimant and not to his grantee. Under article 9, section 3, of the Constitution of 1874, and the Homestead Act of the General Assembly of 1887 (Kirby's Digest, section 3898), homesteads are not subject to judgment or execution liens on ordinary claims, but only such claims as are specified in the Constitution and act. The claim in the instant case is not one of the specified claims that may be enforced against a homestead. A homestead claimant may, therefore, sell his homestead free from any judgment rendered against him or execution issued thereon, unless for claims which may be enforced against a homestead under the Constitution and act. *Isbell* v. *Jones,* 75 Ark. 591.

Lastly, it is insisted that T. A. Cole cannot avail himself of the plea of homestead as a defense against the execution sale, because J. T. and Russie Cole forfeited their homestead right before they sold the lands to him, by failing to claim it as exempt before the execution sale, or by failing to file a description or schedule of same in the recorder's or clerk's office. Such a failure on the part of a homestead claimant does not work a forfeiture of the homestead right. The right may be asserted when suit is brought for possession of the lands constituting the homestead. Section 3902, Kirby's Digest. *Isbell* v. *Jones, supra.*

No error appearing, the decree is affirmed.

TEAGUE v. STATE.

Opinion delivered December 15, 1919.

1. ANIMALS—TICK ERADICATION LAW.—Under the tick eradication law, and the rules prescribed by the Board of Control of the Agricultural Experiment Station, it is the duty of owners of cattle to provide the means for dipping them, and it is no defense that the proper facilities have not been furnished.
2. ANIMALS—TICK ERADICATION LAW.—It is no excuse for failure to dip cattle that it is dangerous to do so and that injuries frequently result.

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

W. H. Mizell and *D. D. Glover,* for appellant.

1. Defendant's refusal to dip his cattle was not wilful; the county agent, though requested, failed to visit the vats nearest his home or give instructions as to preparing the dipping mixture; the vats in the neighborhood had been blown up and in some instances the mixture was poisonous and cattle injured and he was afraid to dip without some protection of the county agent, who refused to visit the vats and furnish protection; the court also refused the instructions asked by defendant. Our Constitution does not permit the Legislature to pass a void law, giving the Board of Control power to make rules requiring private property under a criminal penalty, to be dipped in poisonous vats and die without any recourse for damages. Const. 1874, art. 2, § 13 and art. 21, § 22; 130 Ark. 453.

2. The demurrer to the indictment should have been sustained for indirectness and uncertainty. Kirby's Digest, § § 2227-8. All the acts except No. 200, Acts 1915, p. 804, have been held void, and there is now no law as to dipping in Clark County. 208 S. W. 437; 126 Ark. 260, dissenting opinion. Act 59, Acts of 1909, does not apply. There was also error in the court's instructions. 126 Ark. 501, 260.

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

1. Clark County has been placed above the quarantine line by proclamation of the Governor and the dip-

ping laws and rules of the board apply to it. 208 S. W. 437.

2. There was no error in the instructions and the verdict is sustained by the evidence as no valid excuse or defense was shown for failure to dip.

McCULLOCH, C. J. The charge against appellant is the failure to dip his cattle in accordance with the rules and regulations prescribed by the Board of Control of the Agricultural Experiment Station for the eradication of ticks. It was proved at the trial below that appellant failed to dip his cattle, and he admitted it, but contended that his refusal to do so was not wilful and that he was justified in failing to dip on the ground that the agent of tick eradication inspector of the county failed on request to come to the dipping vat nearest appellant's home for the purpose of giving instructions about preparing the dipping mixture. Another excuse given by appellant was that the vats in that locality had been blown up, and in some instances the mixture had been poisoned so that cattle were injured from contact with it, and that he was afraid to dip his cattle without some protection from the county agent, who declined to furnish him protection from that danger.

According to the undisputed testimony a dipping vat had been built in the immediate neighborhood of appellant's home, but that it had not been used on account of it not being supplied with the dipping liquid. Appellant was a member of the partnership or association which constructed this vat. It is also shown that there are two other vats in that locality, but several miles distant from appellant's home.

It is not incumbent on the county inspector or other public authorities to furnish facilities for dipping cattle. The law requires it to be done and the Board of Control has prescribed rules and a formula for the dipping mixture, and it is the duty of persons owning cattle to provide the means for dipping their cattle. It is, therefore, no excuse to say that the proper facilities had not been

furnished, as it is the duty of the cattle owners themselves to furnish those facilities and use them. *Ashcraft* v. *State,* 140 Ark. 505.

Appellant offered to show that it was dangerous to dip cattle and that injuries frequently resulted, but the court excluded the testimony. This was correct, as it is not a question for the jury to determine whether or not it was proper to dip cattle, for the language of the law compels obedience to the requirements of the Board of Control. *Boyer* v. *State, ante* p. 84.

Appellant also asked the court to give instructions telling the jury in effect that the owner was not required to dip his cattle if damage to them would result from such dipping, but the court's ruling in refusing to give the instructions was correct.

Judgment affirmed.

WATSON v. BOYDSTUN.

Opinion delivered December 15, 1919.

HIGHWAYS — LIMITATION ON CONSTRUCTION — "LAST COUNTY ASSESSMENT."—Road Acts 1919, volume 1, page 105, creating the "Monette Road Improvement District," in limiting (in section 14) the cost of the construction to 30 per cent. of the "last county assessment," meant, not the last assessment preceding the construction of the improvement, but the last assessment preceding the enactment of the statute.

Appeal from Craighead Chancery Court, Eastern District; *Archer Wheatley,* Chancellor; reversed.

Huddleston, Fuhr & Futrell, for appellant.

The demurrer of plaintiff should have been sustained. The "Monette" Act No. 68, Acts 1919, if constitutional, allows the commissioners to let a contract for an illegal and excessive assessment and the plans and specifications are illegal, unauthorized and void. Section 14 of said Act 68 uses the words "last county assessment" and means for the year 1919, not 1918, and the assessment is excessive and void.

S. P. Patton, for appellee.

The estimated cost of the improvement is less than 30 per cent. of the last county assessment preceding the assessment. 84 Ark. 257; 97 *Id.* 334; 96 N. W. 450.

McCULLOCH, C. J. The General Assembly of 1919 (regular session) enacted a statute creating a road improvement district designated as "Monette Road Improvement District," composed of lands in Craighead County. Acts 1919, vol. 1, p. 105. The statute contains a description of the boundaries of the district, the route of the road to be improved, the names of the commissioners and the authority to construct the improvement, borrow money and levy and collect assessments on the benefits accruing to the lands in the district. The statute provides for a board of assessors to value the anticipated benefits. Section 14 of the statute, to the interpretation of which the present controversy relates, reads as follows:

"The State Highway Department shall at all times render any assistance within its power, and, if called upon by the district, shall have general supervision of the work of the engineer employed by the district. The construction cost of the improvements of the road herein called for, not including interest on borrowed money, shall not exceed in cost thirty per cent. of the values of all lands and real estate and real property in the district, as shown by the last county assessment; and in arriving at the proportion of the assessed value of any railroad, part of whose line or property is used for railroad purposes, within the district, the rate of value per mile of said railroad fixed by the State Tax Commissioner shall be used for each mile or fraction of a mile, or railroad or sidetracks within the district."

Appellant is the owner of real property in the district, and instituted this action in the chancery court of Craighead County to restrain proceedings under the statute on the ground that appellees, who are the commissioners of the district, have made plans and are about to con-

struct the improvement at a cost largely beyond the limits prescribed in that section of the statute.

The facts bearing on the point in controversy are set forth in the complaint and answer and must be taken as true, the court having overruled appellant's demurrer to the answer.

The commissioners have adopted plans and reported same to the county court for the construction of the improvement at a cost of $452,650, and the assessments on real property in the district for the year 1918 for State and county taxation, including tramways and railroads, amounts to the sum of $939,795, and thirty per centum thereof is $281,938.50. The cost of the improvement is, therefore, largely in excess of thirty per centum "of the value of all lands and real estate and real property in the district as shown by the last county assessment," if the assessments for the year 1918 are to be considered as the basis. It is, however, alleged in the answer that the assessment for the year 1919, which was then in progress at the time this suit was pending in the court below (June, 1919,) would amount to the sum of $1,539,545, and that the cost of the construction of the improvement would not, according to the plans adopted, amount to more than thirty per centum of that sum.

The question in the case then is whether the words "the last county assessment" in section 14 of the statute relates to the last assessment preceding the enactment of the statute, or whether it means the last assessment preceding the construction of the improvement.

We are of the opinion that the special statute in question relates to an assessment already in existence, and that it fixes the completed assessment for State and county taxation for the year 1918 as the basis for limiting the total cost of the improvement authorized by the statute. This is a special statute, it will be noticed, and contemplates immediate initiation and progress in making the improvement prescribed and it is evident that the lawmakers intended to fix a definite basis for the limitation of the cost of the construction. It is left to the commis-

sioners to form the plans for the improvement and to carry them out to completion, but this limitation was set by the lawmakers in the very beginning for guidance of the commissioners in determining whether or not the work could be done.

Counsel for appellees rely on the case of *Improvement District* v. *Offenhauser*, 84 Ark. 257, where we construed a section of the general statute relating to improvement districts in cities and towns, which reads as follows:

"It shall be provided by ordinance that the local assessment of benefits shall be paid in successive annual installments, so that no local assessment shall in any one year exceed twenty-five per centum of the assessed benefits accruing to said real property. The ordinance shall fix the day in each year when the local assessments for the year shall be paid, and the day fixed for the payment of the first installment shall not be later than sixty days from the date of the ordinance making the local assessment; provided, no single improvement shall be undertaken which alone will exceed in cost twenty per centum of the value of the real property in such district as shown by the last county assessment." Kirby's Digest, section 5683.

We decided in that case that the words "last county assessment" meant the last completed assessment in force, with additions made by the board of equalization, at the time of the passage of the ordinance levying the assessments of benefits. The statute there construed was a general and continuing one for the organization of improvement districts in cities and towns, while the statute now under consideration is a special one directly conferring authority to immediately proceed with the construction of the authorized improvement. It is clear that the general statute dealt with in the case cited above fixed a future date for the test in limiting the assessments on benefits according to the facts in each particular case at the time of the enactment of the ordinance levying the assessments, and it is equally clear that the present stat-

ute looks backward and refers to the last assessment already in existence at the time of the passage of the statute in creating a test for the limitation upon the authority of the commissioners with respect to the amount of the cost of improvement.

Counsel also rely on expressions in the case of *McDonnell* v. *Improvement District No.* 145, *Little Rock*, 97 Ark. 334, but in that case we were dealing with another subject, and nothing akin to the point involved in the present case was involved in that case.

According to the admissions in the answer, the commissioners are exceeding the limitation in the statute with respect to the cost of the improvement, and the court should have sustained the demurrer. The decree is therefore reversed, and the cause remanded with directions to the chancery court to sustain the demurrer to the answer, and for further proceedings not inconsistent with this opinion.

MARION HOTEL COMPANY *v.* DICKINSON.

Opinion delivered December 15, 1919.

1. CONTRACTS—MUTUALITY.—A written contract for the removal and use of trash and garbage accumulating at a hotel so long as the contracting firm "handle it satisfactorily to the" hotel company is lacking in mutuality, in that no time for performance is specified, and therefore may be terminated at the will of either party.
2. CONTRACTS—AGREEMENT NOT TO REVOKE.—Where such contract was verbally amended subsequently by a stipulation for a year's notice by the hotel company before revoking it, this implied a reciprocal obligation of the firm to continue the services at least the full period of the notice, so that the contract as amended was not lacking in mutuality.
3. DAMAGES—BREACH OF CONTRACT.—In an action for the breach of a contract for the removal and use of the trash and garbage of a hotel, where plaintiff had a large number of hogs on hand, for which he was unable to procure feed to fit them for the market, he was entitled to recover for all loss on that account.
4. DAMAGES—ESTIMATED PROFITS.—Where defendant broke its contract to furnish trash and garbage to plaintiff, the latter was

entitled to recover the estimated profits which he would have realized if the contract had not been broken.

5. CONTRACTS—ACCEPTANCE OF PERFORMANCE.—Slips signed by the steward of defendant's hotel, reciting that garbage had been removed "to my entire satisfaction" preclude defendant from showing that it had a right to cancel the contract because the service was unsatisfactory.

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

Cohn, Clayton & Cohn, for appellant.

1. The contract lacked mutuality and definiteness and was terminable at the will of either party. 64 Ark. 398; 110 *Id.* 444; 212 S. W. 313; 96 Ark. 184; 68 *Id.* 276, 526; 35 *Id.* 156; 100 *Id.* 510; 124 *Id.* 355; 212 S. W. 330; 1 Elliott on Cont., p. 393; 38 A. & E. R. Cases 16; 6 R. C. L., p. 691, § 96; 155 N. W. 319; 42 N. E. 386; 59 Pac. 146; 28 S. E. 998; 47 L. R. A. 343; 237 Fed. 860; 194 *Id.* 324; 212 S. W. 313, 330. In view of these authorities a peremptory instruction should have been given for defendant.

2. The court improperly instructed the jury as to the measure of damages. 79 Ark. 338; 55 *Id.* 376; 55 *Id.* 409; 70 *Id.* 42; 2 *Id.* 397. Future profits are not recoverable. 103 Ark. 584-8; 111 *Id.* 474-483-4.

3. It was error to exclude the testimony of H. A. Scott. 39 Ark. 580-3; 33 *Id.* 276, 284; 66 *Id.* 37.

Lewis Rhoton and *Carmichael & Brooks,* for appellee.

1. The cases cited for appellant are not in point. Here there was a contract as the jury found, and it did not lack mutuality and appellee was entitled to a year's notice. 104 Ark. 466, 474; 94 *Id.* 9; 64 *Id.* 398; 84 Am. St. 52; 51 *Id.* 301-303; 104 Ark. 466; 35 L. R. A. 512.

2. The court properly instructed the jury. 69 Ark. 219, 223; 78 *Id.* 336; 80 *Id.* 228; 91 *Id.* 427; 95 *Id.* 363; 97 *Id.* 522; 103 *Id.* 584; 78 *Id.* 345; 103 *Id.* 548; 8 L. R. A. (N. S.) 257 and notes.

3. Scott's testimony was properly excluded.

McCULLOCH, C. J. Marion Hotel Company, a domestic corporation engaged in operating a hotel in the city of Little Rock, entered into a written contract with appellee for the removal and use by the latter of all of the trash and garbage accumulating at said hotel. The contract recited a cash consideration of one dollar, and mutual obligations of the respective parties, one to permit the other to remove the trash and garbage, and the other to remove it twice per day from the hotel and "to return all silver, towels and other material belonging to the hotel company." The contract also specified that the lids of the garbage cans were not to be removed while being hauled, and that the requirements of the government with respect to sanitary rules were to be observed The contract was dated December 24, 1917, and did not specify any period of duration, but concluded with the following paragraph:

"This agreement is to begin on the first day of January, 1918, and continue in force as long as Dickinson & Wilbourn handle it satisfactorily to the Marion Hotel Company."

The contract was executed by Mr. Everett, the manager for the Marion Hotel Company, and the firm of Dickinson & Wilbourn, but later Wilbourn retired from the firm, and appellee Dickinson alone undertook to perform the contract, and he continued in the performance of the contract until July 17, 1918, when appellant gave notice of a discontinuance of the permission extended to Dickinson to take the trash and garbage.

Preparatory to performance of the contract appellee established a pasture and pens at a place a few miles out from the city limits of Little Rock for the purpose of keeping and fattening hogs and began the purchase and raising of hogs to be fattened for the market, expecting to use the garbage as feed. He procured wagons and other equipment to handle the garbage and kept two men in his employment engaged in doing the hauling. Appellee testified on the trial of the cause that shortly after the contract was entered into he called the attention of appellant's manager to the fact that the contract

specified no particular term or duration, and that he expected to equip himself to handle about 300 hogs at a time, and that he could not afford to thus equip himself for handling the business unless he was assured that the contract would not be rescinded short of a year's notice, and that the manager then agreed that the contract should not be revoked without such notice.

This is an action instituted by appellee for breach of the contract. Appellant in its answer admitted the execution of the writing set forth in the complaint, but denied that there was any oral contract subsequent thereto. Appellant admits that it rescinded the contract, which it contends it had a right to do under the written contract. The answer also contains appropriate denials concerning the extent and amount of damages alleged to have been sustained by appellee by reason of the alleged breach of the contract. There was a trial before a jury which resulted in an award of damages in favor of appellee in the sum of $2,500.

Appellant contends for reversal on three grounds set forth in the brief as follows:

"*First.* That the contract upon which appellee (plaintiff below) based his cause of action lacked mutuality and definiteness and was terminable at the will of either party.

"*Second.* That the lower court improperly instructed the jury as to the measure of damages.

"*Third.* That the testimony of H. A. Scott, set forth in paragraph 3 of the motion for a new trial, was improperly excluded."

The argument of appellant in support of its first ground for reversal is, we think, sound so far as it applies to the written contract. The obligations expressed in the contract lack mutuality in that no time for performance was specified, and it was therefore terminable at the will of either party. *St. L., I. M. & S. Ry. Co.* v. *Matthews,* 64 Ark. 398. The writing specified that it was to remain in force "as long as Dickinson & Wilbourn handle satisfactorily to the Marion Hotel Company," but there was

no expressed obligation on the part of Dickinson & Wilbourn to continue for any specified length of time, and no obligation could be implied on their part to continue as long as the service remained satisfactory to the Marion Hotel Company. It is not one of those kind of contracts where a reciprocal obligation is implied, as has been held in numerous decisions of this court. *Thomas-Huycke-Martin Co.* v. *Gray,* 94 Ark. 9; *Keopple* v. *National Wagonstock Co.,* 104 Ark. 466.

The same contention is made by learned counsel for appellant with respect to the alleged oral addition to the contract. In other words, the contention is that the subsequent verbal agreement that the contract should not be rescinded without giving a year's notice is open to the same objection that it lacks mutuality in that one of the obligors was not bound to continue the service or to give notice of a rescission of the contract.

We are of the opinion that the contract for the giving of a year's notice by one of the parties necessarily implied a reciprocal obligation on the part of the other party to continue the service for at least the full period of the notice, that is to say, for one year, and that it amounted to a mutual agreement for at least one year. The exaction by appellee of a promise on the part of the hotel company not to rescind the contract without giving a year's notice necessarily implied that he would carry on that service at least a year from that time. It is unnecessary to determine whether or not there was sufficient mutuality in the contract to extend it longer than one year.

Our conclusion, therefore, is that there was a binding contract between the parties which was enforceable and that appellant was liable for damages for the breach.

The jury found upon legally sufficient evidence that the contract was performed "satisfactorily to the Marion Hotel Company" and that appellant broke the contract without sufficient cause.

The court gave two instructions on the measure of damages, as follows:

"No. 2. If you find from the evidence that the defendant breached the contract on some ground other than the work was not carried out to its satisfaction, then you will find for the plaintiff such damages as you may find he sustained by breach of the contract, and in ascertaining the proper amount you may take into consideration whatever profits you may find from the evidence to a reasonable certainty he would have made if the contract had not been breached. And if you find from the evidence that the plaintiff was to have a year's notice before the contract should be terminated and the garbage and trash given him as long as he did the work to the satisfaction of the defendant, and if you further find that a year's notice was not given and the plaintiff did the work to the satisfaction of the defendant, then you will find for the plaintiff in such amount as you may find his entire profits would have amounted to if the contract had been carried out."

"No. 5. If you find from the evidence that the plaintiff notified the defendant that he had 275 Duroc-Jersey hogs, and he would suffer damages if the contract was breached by the defendant, then you will find for the plaintiff in such sum as will compensate him for any and all loss which you may find he sustained by being unable to prepare said 275 Duroc-Jersey hogs for market. And in arriving at such amount of damages you may take into account what it would have cost the plaintiff to feed the hogs until they were ready for market under the contract with the defendant and what it has actually cost him by reason of not being able to get the garbage, and the difference would be the amount of the verdict which you should render in favor of the plaintiff, if you find for the plaintiff."

The evidence tends to show that the appellee prepared to take care of, and fatten for market, 300 hogs at a time and that at the time of the breach of the contract he had on hand 275 Duroc-Jersey hogs which he was fattening for market, and that he sustained loss by reason of inability to procure swill to feed to the hogs. Appel-

lee in his testimony went into detail as to his method of feeding the hogs after putting them up to be fattened for market, and also testified as to the increased weight of the hogs thus handled, and the cost of feeding and the profits to be derived from the business. Instruction No. 5 relates specifically to the 275 hogs on hand, and the measure of damages declared by the court as to that lot of hogs was correct, and the testimony brought the case within the operation of the instruction. The evidence tends to show that it was impossible for appellee to get sufficient swill from the hotels and restaurants, and other sources, and that he had to buy feed at almost prohibitive prices.

The other instruction relates to the profits that would have been realized on the contract outside of the particular lot of hogs mentioned in instruction No. 5. If there was a breach of the contract, appellee was entitled to recover compensation for his losses on the 275 hogs on hand at the time of the breach, but this was not the full measure of his damages, as he was entitled to losses sustained for the remainder of the period of the contract. He was not compelled to continue to purchase or raise hogs for the purpose of carrying out the contract which appellant had broken, but was entitled to recover the estimated profits which he would have realized if the contract had been carried through. We think that the instructions can be harmonized, and that they were understood by the jury in the light of the testimony on the subject of damages.

Now as to the last assignment. Soon after appellee began the performance of the contract, he adopted a method of having the steward of the hotel to sign printed slips for the driver of each garbage wagon reciting that the "garbage and trash at the Hotel Marion had been cleaned up to my entire satisfaction." A great many of these slips were produced at the trial of the cause. Appellant offered to establish by the testimony of Scott, the steward of the hotel, facts and circumstances which tended to show that appellee had not been removing the

garbage in proper manner and to the satisfaction of the management of the hotel, but the court excluded the testimony. It is argued that these slips acknowledging the service in removing the garbage should be likened to mere receipts for the payment of money, and that the execution by the employees of the hotel company from day to day did not preclude appellant from showing as a matter of fact that the garbage had not been properly handled, or handled "satisfactorily to the Marion Hotel Company."

The weakness of appellant's contention is in treating these signed slips merely as receipts, for they amounted to more than that. The execution of those receipts constitutes acceptances of the performance of the contract from day to day, and they cannot be repudiated by appellant by showing that the contract had not in fact been performed in a satisfactory manner. Under the method of operating the business of removing the garbage, appellee saw fit to exact an approval from day to day, and appellant's authorized employee acquiesced in this method of doing business. If appellant had refused to sign the wrtten acknowledgment day by day, it would have constituted notice to appellee that the service was not satisfactory, or, at least, that the service had not been accepted as satisfactory, but the execution of these acknowledgments, in the absence of fraud or collusion, constituted a binding acceptance on the part of appellant of the past service in the removal of the garbage and prevented the reopening of that question. After having once accepted the service as satisfactory, appellant cannot be permitted to show that it had a right to cancel the contract because the service was unsatisfactory.

This disposes of the several grounds of attack made upon the rulings of the court, and results in an affirmance of the judgment. It is so ordered.

WHITE RIVER LUMBER COMPANY v. WHITE RIVER DRAINAGE DISTRICTS OF PHILLIPS AND DESHA COUNTIES.

Opinion delivered December 15, 1919.

1. STATUTES—EXTENSION OF LAW BY REFERENCE TO TITLE.—Article 5, section 23, Constitution of 1874, does not prohibit the repeal of a statute or a part thereof by reference to title. Act 1913, page 751, section 20, repealing Act 1911, page 200, section 7, does not violate the Constitution, article 5, section 23.
2. STATUTES—REPEAL OF REPEALING LAW.—At common law the original law was revived by the repeal of a repealing law.
3. LEVEES AND LEVEE DISTRICTS—ORGANIZATION OF DISTRICT TO CONSTRUCT DRAINS AND LEVEES.—Acts 1913, page 745, section 5, amending Acts 1909, page 852, section 32, expressly confers authority for the organization of a drainage district, the main object of which is the construction of levees.
4. STATUTES — AMENDMENT TO CHANGE PURPOSE — AMENDMENT OF FORMER STATUTE.—Constitution, article 5, section 21, provides that no bill shall be so altered or amended on its passage through either house, as to change its original purpose, *held* to apply only to amendments to a bill during its progress through the legislative houses, and not to an amendment of a former statute.

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

Fink & Dinning and *Buzbee, Pugh & Harrison*, for appellants.

1. The circuit court was without jurisdiction to make the order to establish a drainage district. The act (No. 279, Acts 1909) gives exclusive jurisdiction to the county courts. The amending act, No. 221, Acts 1911, extending the act by reference to its title, etc., is void under article 5, section 22, Constitution 1874. 132 Ark. 27.

2. The act of 1909 does not authorize the creation of a district to construct levees as proposed by this district. 114 Ark. 526; 106 *Id.* 517; 109 *Id.* 556; 91 *Id.* 5; 121 *Id.* 13; 93 *Id.* 490-5; 127 *Id.* 165.

3. The evidence is not sufficient to give the court jurisdiction. 86 Ark. 346; 127 *Id.* 165. It fails to show that as many as three of the petitioners were owners of

real property in the district, and this is fatal to the jurisdiction.

Moore & Vineyard and *J. G. Burke,* for appellees.

1. The circuit court has jurisdiction to make the order. Phillips County was properly placed back within the terms of the drainage laws by section 20 of act 277 of 1913, which repealed section 7 of act No. 221 of 1911. The Constitution does not apply to *repeals* of an act by reference to its title. 47 Ark. 476. *Rider* v. *State,* 132 Ark. 27, is not in point, as there are many distinctions.

2. Act 279 and amendments thereto authorized the creation of this drainage district. 64 Ark. 467; 47 *Id.* 476; 61 *Id.* 622-5. Repeals by implication are not within the meaning of our constitutional provisions. 69 Ark. 548; 131 *Id.* 291-297; 114 *Id.* 526-530; 213 S. W. 1; 178 *Id.* 893.

3. The petition for a drainage district was in accordance with the statute. The petition was signed by *five* or more real estate owners in the district, and appellants did not raise the question of jurisdiction below and can not now for the first time, as they are precluded. 89 Ark. 610; 119 *Id.* 20; 132 *Id.* 328; 213 S. W. 7.

MCCULLOCH, C. J. This cause originated in the circuit court of Phillips County to create a drainage district embracing 170,000 acres of land in Phillips and Desha counties, according to plans which provided also for the construction of certain levees in connection with the drainage plans. The petition for formation of the district was signed by numerous owners of land in the proposed district, and appellants, also owners of land in the district, appeared in court and were made parties for the purpose of opposing the formation of the district. The matter was heard by the court on the petition and the remonstrance of appellants, on the plans and estimates of the engineer, and on oral testimony. The plans provide for the construction of drains and levees at the estimated cost of $2,056,285, the greater portion of which is the cost of constructing the levees. The testimony shows, however,

that the whole is a related project essential to the proper reclamation of the lands in the proposed district.

The circuit court granted the prayer of the petition for the formation of the district.

The contention of appellants is (1) that the circuit court of Phillips County has no jurisdiction under the statutes of the State to grant such a petition; and (2) that there is no authority to organize a district, the main purpose of which is to construct levees.

The laws authorizing the formation of such districts are found in act No. 279 of the legislative session of 1909, as amended by act No. 221 of the session of the year 1911, and by act No. 177 of session of 1913.

The act of 1909, *supra,* is general in its application, and confers exclusive jurisdiction in the county court, with a further provision that after a district embracing lands in more than one county has been created by a county court, the subsequent proceedings shall be in the circuit court of one of the counties.

The act of 1911 provides that when a district is to be formed embracing lands in more than one county, the original proceedings for such formation shall be in the circuit court of one of the counties. Section 7 of the act of 1911 reads as follows:

"That this act does not apply to Phillips and Crittenden counties, and this act being for the immediate preservation of public peace, health and safety, shall take effect and be in force from and after its passage."

The act of 1913 amended, in certain respects not material to this controversy, both the acts of 1909 and 1911, and section 20 of that act contained an express repeal of section 7 of the act of 1911. Said section 20 reads as follows:

"That section 7 of the act of April 28, 1911, entitled 'An act to provide for the creation of drainage districts in this State, approved May 27, 1909, and to cure defects in the organization of districts thereunder' be repealed, and said act shall apply also to Crittenden and Phillips counties."

Section 32 of the act of 1909 reads as follows:

"The word 'ditch' as used in this act shall be held to include branch or lateral ditches, tile drains, levees, sluiceways, floodgates, and any other construction work found necessary for the reclamation of wet and overflowed land."

That section was amended by the act of 1913 so as to read as follows:

"The word 'ditch' as used in this act shall be held to include branch or lateral ditches, tile drains, levees, sluiceways, floodgates, and any other construction work found necessary for the reclamation of wet and overflowed land. And this act shall apply to the organization of districts the main object of which is the construction of levees."

Learned counsel contend that section 20 of the act of 1913 repealing section 7 of the act of 1911 was an attempt to extend a law by reference to title only, in contravention of article 5, section 22, of the Constitution, which provides 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."

It is argued that, although the express provision of the last statute is to repeal a section of the prior statute which exempted the counties named, its necessary effect is to extend operation of the prior statute to those counties by repealing the exemption, and that it amounts to the extension of a law by mere reference to the title. This argument is unsound. The thing prohibited by the Constitution is the extension of a law by reference to title only, and this was not an attempt to do that. The Constitution does not prohibit the repeal of a statute or part thereof by reference to title only. *Vance* v. *Austell,* 45 Ark. 400.

The act of 1911 expressly exempted Phillips and Crittenden counties from its operation and, this exemp-

tion being found in a separate section, it left the original act of 1909 in full and unamended force as to those counties. *Rennau* v. *State,* 72 Ark. 445.

The extension of the act of 1911, so as to operate in Phillips and Crittenden counties resulted under the act of 1913, not from extension by mere reference to the title of the act of 1911, but from the express repeal of the exemption, which had the effect of making the statute altogether general in its application. This is not forbidden. Under the common-law rule the repeal of a repealing law revived the original law repealed, and our statute on that subject (Kirby's Digest, section 7796) does not affect the subject in this case, for section 20 of the act of 1913 expressly provided that the act of 1911 shall apply to the counties originally exempted. *Faucette* v. *Patterson,* 140 Ark. 628.

The case of *Rider* v. *State,* 132 Ark. 27, relied on by counsel for appellants, is not applicable.

The act of 1913, amending section 32 of the act of 1909, expressly confers authority "for the organization of districts, the main object of which is the construction of levees." This language is too plain to leave any doubt as to its meaning. The original act of 1909 did not confer such authority, but the manifest purpose of the amendment was to confer that authority.

The amendment does not, as contended by counsel, offend against the provision of the Constitution (article 5, section 20), that "no bill shall be so altered or amended on its passage through either house, as to change its original purpose." That provision of the Constitution applies only to amendments to a bill during its progress through the houses of the Legislature, and does not apply to the amendment of a former statute.

The judgment of the circuit court is sustained by the testimony. Affirmed.

REED v. BRADFORD.

Opinion delivered December 15, 1919.

1. JUDGES—SPECIAL COUNTY JUDGE.—Where a county judge did not certify his disqualification to the Governor, as required by Constitution, article 7, section 36, a commission issued by the Governor, based upon affidavits of citizens, was not properly issued.
2. JUDGES—EFFECT OF COMMISSION TO SPECIAL JUDGE.—The Governor's commission issued to a special county judge on account of the alleged disqualification of the regular judge is not conclusive evidence of the appointee's legal authority where the regular judge refused to disqualify himself and continued to hold court.
3. JUDGES—SPECIAL JUDGE AS DE FACTO OFFICER.—Where the regular judge of the county court is present assuming to act in a particular case, there can be no *de facto* special county judge presiding at the same time.
4. CERTIORARI—VOID JUDGMENT.—A judgment rendered by a special county judge which is void upon its face because the special judge was commissioned by the Governor without the regular judge certifying his disqualification, as required by Constitution, article 7, section 36, is subject to attack on *certiorari*, although a remedy by appeal is also available.

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

D. B. Sain and T. D. Crawford, for appellants.

1. It was improper to join *certiorari* and prohibition, two different causes of action. Kirby's Digest, § 6079. *Certiorari* does not lie, because the record shows no error on its face.

2. Prohibition does not lie to try title to an office. Kirby's Digest, § 5157; 33 Ark. 191. Judge Butt was acting as special judge under a commission from the Governor, and he was at least *de facto* judge, and his acts can not be collaterally questioned. 55 Ark. 81; 43 *Id.* 243; 24 *Id.* 476; 52 *Id.* 356. See also 38 *Id.* 150, 158; 50 Miss. 607; 43 N. W. 572; High, Ext. Rem. § 767 b; 57 N. W. 1105; 15 So. Rep. 434.

3. Prohibition does not lie where there is an adequate remedy at law. 96 Ark. 332; 66 Ark. 211. The remedy was by appeal. 77 *Id.* 148.

W. P. Feazel, for appellee.

1. Appellant's contention as to misjoinder was waived when he answered without moving to strike, or to require appellee to elect. 112 Ark. 20; Kirby's Digest, secs. 6081, 6082; 86 Ark. 130; 87 *Id.* 307. It was too late to raise the question of misjoinder here.

2. This is not a suit to try title to office, and prohibition lies. Judge Butt was not legally appointed until Judge Dillard had certified his disqualification to the Governor. There can be no *de facto* officer so long as there is a *de jure* officer present and performing the functions of the office. 112 Ark. 293; 29 Cyc. 1391. *Quo warranto* was not the proper remedy here. 27 Ark. 13; Kirby's Digest, § 7981.

3. Butt was neither an officer *de facto* nor *de jure,* and his order was without jurisdiction. No appeal would lie. 87 Ark. 313; 77 *Id.* 334.

4. Appellees did plead to the jurisdiction as a defense, and only Judge Dillard was authorized to try the case, and he was not disqualified. 61 Ark. 88. The findings in the record proper will prevail over the recitals of a bill of exceptions. 72 Ark. 320; 39 *Id.* 254. The findings here are not sustained by the evidence, and not conclusive on this court. 42 Ark. 126; 39 *Id.* 254. A special judge must be elected as provided by the Constitution or his orders are *coram non judice* and void. Courts have power to inquire whether even the Governor has or has not acted in violation of the Constitution. 24 Ark. 168; 46 *Id.* 324; 132 *Id.* 391.

D. B. Sain and *T. D. Crawford,* for appellants, in reply.

1. The judgment entered by Judge Butt was not void on its face. There was nothing on its face to show its invalidity. Judge Butt's commission shows that the disqualification of Judge Dillard was "duly certified" to the Governor. Nothing in the record would have shown that the appointment was irregular. The record of the court is conclusive. Kirby's Digest, § 1316. See *Countz* v. *Markling,* 30 Ark. 17; *Hickey* v. *Matthews,* 43 Ark. 344.

2. Judge Butt was a *de facto* judge, since he was acting under a commission regular on its face. The trial judge held that the regular county judge was disqualified, and yet that he was *de jure* entitled to sit in cause. The two propositions are not reconcilable.

3. While the circuit court directed the clerk to issue a writ of *certiorari* to the clerk of the county court, no response was ever filed and no order was ever made quashing the judgment of the county court. On that branch of the case there is nothing before this court for adjudication. *Derton* v. *Boyd,* 21 Ark. 264; *Dicus* v. *Bright,* 23 Ark. 107. See 30 Ark. 148; 30 *Id.* 532; 58 Ark. 250; 33 Ark. 17. Since no judgment of the circuit court was entered, this court has no jurisdiction to affirm such a judgment.

McCULLOCH, C. J. Appellees filed in the cirucit court of Howard County their petition for writ of *certiorari* to bring up and quash a judgment of the county court, rendered by J. S. Butt, as special judge, opening a public road from Mineral Springs to the intersection of another road between Mineral Springs and Nashville; and they also prayed for a writ of prohibition to restrain said special judge from proceeding further in the enforcement of said judgment. On the hearing of the matter in the circuit court the relief prayed for was granted, and an appeal has been prosecuted to this court.

Appellants and certain other citizens and property owners filed in the county court their petition in due form praying for the opening of a public road along the route indicated. Appellees appeared in the county court, and were made parties to the proceedings. The county court, on June 2, 1919, S. F. Dillard, the regular judge of the court presiding, made an order appointing viewers and directed notice to be given to owners of land to appear in court on June 9th, for the hearing on the petition and report of the viewers. The court was, however, adjourned for the term, and the matter came on for hearing

on the first day of the regular July term. In the meantime, certain interested property owners presented to the Governor their affidavit stating that Judge Dillard was disqualified by reason of being interested in the proceedings for the opening of the road, and the Governor issued a commission to J. S. Butt as special judge of the county court to preside in that court on the trial of the matter. The commission recites that it had been duly certified to the Governor, in accordance with law, "that S. F. Dillard, judge of the county court in and for the county of Howard, is disqualified to preside at the trial," etc. In the trial of the present cause it is shown that Judge Dillard had not certified to the Governor his disqualification.

On the first Monday in July appellants and the other petitioners for the road appeared in the county court before Judge Dillard, the regular judge presiding, and announced that they would not enter into a trial of the cause before Judge Dillard for the reason that he was disqualified. Judge Dillard decided that he was not disqualified, and, the petitioners still refusing to proceed further, the court dismissed the petition for want of prosecution. This occurred during the forenoon, and at noon Judge Dillard announced a recess of the court and left the bench. During the noon recess J. S. Butt, assuming to act as such special judge of the court, took the bench and, without counsel on either side being present, pronounced an order reinstating the cause which had been dismissed by the court during the forenoon. He also ordered an adjournment of the court to the next day (July 8) for the purpose of hearing the cause. After the noon recess Judge Dillard reappeared and ordered an adjournment of the court to July 14. Judge Butt appeared in the court room on July 8th, and proceeded to hear the cause, and made the order in controversy in favor of the petitioners for the opening of the road.

Prior to this time the Governor had issued a commission to J. S. Butt as such special judge in this cause, but inasmuch as Judge Butt did not act under that commis-

sion, and decided himself that that commission had been prematurely issued and was void, it is not material in the consideration of the present controversy.

The contention of appellants is, in the first place, that the commission issued to Judge Butt by the Governor constituted him judge *de jure,* that it is conclusive evidence of his authority to act as such, and that his title can not be questioned except by the State in *quo warranto* proceedings. It is not true that J. S. Butt was a judge *de jure,* for his commission was issued without the necessary prerequisite of a certificate of disqualification by the regular judge. The Constitution (article 7, section 36) provides as follows:

"Whenever a judge of the county or probate court may be disqualified from presiding in any cause or causes pending in his court, he shall certify the facts to the Governor of the State, who shall thereupon commission a special judge to preside in such cause or causes during the time said disqualification may continue, or until such cause or causes may be finally disposed of."

Judge Dillard did not certify his disqualification, and the commission was not properly issued.

Nor is it correct to say that the commission is, under the circumstances of this case, conclusive evidence of legal authority. Judge Dillard was present holding the court, refusing to concede any disqualification on his part, and he not only assumed to preside in the cause, but actually rendered a final judgment dismissing the cause before Judge Butt attempted to act as special judge. A regular judge of the county court has control of his court and cannot, without his consent, be ousted from the bench, even by an individual armed with a commission from the Governor as special judge; nor can his authority be surreptitiously circumvented, as was attempted to be done in this instance by the special judge who took the bench during the noon recess of the court. *Cruson* v. *Whitley,* 19 Ark. 99. The Constitution provides how a special judge may be authorized to preside in a given case in which the regular judge of the court is disqualified. It

is an orderly method based on the consent of the regular judge and cannot be pursued without his consent. If he withholds his consent, in the event of disqualification, other remedies are available under the law.

Next, it is contended that Judge Butt was *de facto* judge, and that his judgments as such cannot be questioned collaterally. The answer to this is that the regular judge of the court was present on that day assuming to act in this particular cause and there could be no other *de facto* presiding judge. The regular judge was presiding in fact as well as in law. There can be no such thing as a *de facto* officer when the *de jure* officer is also present and acting. *Keith* v. *State*, 49 Ark. 439; *Jewett* v. *McConnell*, 112 Ark. 291.

An unseemly conflict, such as appears in this case, between the regular judge of a court and one attempting to act as special judge is not to be tolerated.

Again, it is urged that this is a collateral attack on the judgment pronounced by the special judge, and that it cannot be sustained. The judgment is void on its face for the reasons hereinbefore stated, and *certiorari* in the circuit court which has supervisory jurisdiction over inferior courts is the proper remedy, even though a remedy by appeal is also available.

The judgment of the circuit court in quashing the judgment afforded appellees a complete remedy, and it is unnecessary to consider the question of prohibition to prevent further proceedings. Nor is it important to consider appellants' objections to the joinder of the prayer for writ of prohibition with the prayer for *certiorari*.

Affirmed.

ALLEN v. SELLERS.

Opinion delivered December 15, 1919.

1. OFFICERS—JURISDICTION OF EQUITY.—While equity has no jurisdiction to determine title to a public office, or to aid proceedings in the county court, or in the circuit court on appeal, with respect to the removal of road commissioners, it has jurisdiction to prevent the unlawful interference with the occupancy of such office.

2. PROHIBITION—WHO MAY MAINTAIN.—Prohibition will not lie to prevent enforcement of a decree against persons who are not applying for the writ, though the decree is void as to them because they were not parties to the proceeding.

Prohibition to Perry Chancery Court; *Jordan Sellers,* Chancellor; petition denied.

Owens & Ehrman, for petitioners; *Pace, Campbell & Davis,* of counsel.

Prohibition lies, and the writ should issue to the chancery court. It is the only remedy where courts are proceeding without jurisdiction. 26 Ark. 51; 27 *Id.* 675; 33 *Id.* 191; 39 *Id.* 211. The chancery court is without jurisdiction, and plaintiffs in the court below have an adequate remedy at law. Article 7, section 33, Constitution; Kirby's Digest, § 1487; 75 Ark. 512; 73 *Id.* 70; 43 *Id.* 63; 75 *Id.* 511; 96 *Id.* 468; 93 *Id.* 269; 81 *Id.* 51; 48 *Id.* 331, 510; 88 *Id.* 160.

W. B. Rutherford, for petitioners.

No action is pending in the circuit court for which to invoke the aid of a chancery court. The commissioners removed were appointed by the county court for a definite term and held at the pleasure of the county court. 39 Ark. 211; 244 Fed. 382; 13 Peters 153. See also 73 Ark. 66. Chancery courts will not aid where no property rights are involved or jeopardized. 25 Ark. 301. Respondents were not in possession. The orders of the county court removing respondents and appointing petitioners are a part of the record. 84 Ark. 540; 69 *Id.* 606. The petition of respondents was not verified as required by law. When the demurrer was overruled, the chancery court was without jurisdiction or authority to grant a restraining order. The petition here is verified, and the answer is not.

Chas. C. Reid, John L. Hill, J. H. Bowen and *G. B. Colvin,* for respondent.

Chancery courts have the jurisdiction and authority invoked here. 69 Ark. 606; 177 S. W. 920; 84 Ark. 540.

Plaintiffs here have no other remedy and the order should be made. 61 Ark. 341; 61 *Id.* 354.

Here the statute gives the county court no right to remove the commissioners, and no such right exists nor can be implied. 86 Ark. 555; 94 *Id.* 49; 71 *Id.* 4.

Prohibition is never granted unless the inferior tribunal has clearly exceeded its jurisdiction and the party has no other protection. 96 Ark. 332. The chancellor was right in issuing the injunction and his action should not be interfered with by prohibition and the writ should be denied. Cases *supra.*

McCULLOCH, C. J. This proceeding arises on a petition for writ of prohibition to the chancellor of the Ninth District of Arkansas, presiding over the chancery court of Perry County. It is sought to prohibit the chancellor from proceeding further in a cause pending in the chancery court of Perry County wherein the petitioners are defendants and in which a temporary restraining order has been issued by the chancellor against them.

The following are the material facts of the case as they appear from the petition and response: A road improvement district designated as Road Improvement District No. 1 of Perry County, was duly organized by order of the county court of that county pursuant to the general statutes of the State with respect to the organization of such districts, and D. M. Wallace, J. T. Chafin and A. F. Leigh were the commissioners of the district. The county court of Perry County in November, 1919, at a regular term of the court, made an order removing the said commissioners from office and appointing in their stead the present petitioners, J. T. Shelton, J. J. Rankin and J. F. Hutchingson. The order of removal was made after a hearing instituted by a petition of certain owners of property in the improvement district. The original commissioners (Wallace, Chafin and Leigh) then instituted an action in the chancery court of Perry County against the petitioners to restrain the latter from interfering with the plaintiffs in the performance of the duties

of commissioners of the district and also to restrain the petitioners from attempting to exercise the duties of the office. The chancellor, over the objection of the petitioners, granted a temporary restraining order, which is still in force, and that cause is still pending in the chancery court. It appears also that when the order of removal was entered by the county court the original commissioners prayed an appeal to the circuit court of Perry County, but the county court refused to grant the appeal, whereupon an affidavit for appeal was filed with the clerk of the circuit court, and that officer granted the appeal, which is still pending in the circuit court of Perry County.

The case is controlled, we think, by the decision of this court in *Rhodes* v. *Driver,* 69 Ark. 606. The chancery court can not exercise supervisory control of the county court, nor can it exercise jurisdiction in aid of the proceedings pending in the county court, or in the circuit court on appeal, with respect to the removal of road commissioners. The chancery court can, however, exercise its jurisdiction for the purpose of preventing unlawful interference with the occupancy of a public office. The incumbent of an office is entitled to protection from such unlawful interference. That is the doctrine of *Rhodes* v. *Driver, supra.* There may be a *de facto* incumbency of membership of the board of commissioners of an improvement district. *Inland Construction Co.* v. *Rector,* 133 Ark. 277. The chancery court can not determine the title to the office or the right to possession, but it merely has the power to prevent unlawful interference with the actual possession and the discharge of the duties of the office. If the original commissioners, who were plaintiffs in the action instituted in the chancery court, are, in fact, in possession of the office with its records and paraphernalia, and are in the discharge of the duties of the office, they are entitled to the protection afforded by the chancery court. That court must, of course, determine upon the allegations of the complaint below whether or not it is true that the plaintiffs

in the case are occupying the office of road commissioner. If they have, in fact, been actually removed from the office and are no longer in actual possession, or if their removal is sought by the aid of process issued from the county court, then they can not invoke the aid of chancery to restore that possession, or to stay the process so issued from the county court, for, as before stated, it is within the jurisdiction of the chancery court only to protect a possession shown to exist, and not to determine the title or the rightfulness of the possession to the office.

The complaint in the case below has not been brought up for our consideration, but the recitals of the petition and the response show that the allegations of the complaint were sufficient to give the chancery court jurisdiction for the purposes here announced.

The writ will, therefore, be denied.

HART, J., not participating.

McCULLOCH, C. J., (on rehearing). Petitioners ask for a rehearing for the purpose of obtaining a modification of the judgment of this court to the extent of prohibiting the chancery court from proceeding with that part of its order requiring the depositories of the funds of the road district to honor the warrants drawn by the original commissioners. The two banking institutions which held the funds of the district on deposit are not parties to the case in the chancery court, and the mandate of the court against them is, for that reason, if no other, void and ineffectual. But the petitioners are not interested in prohibiting the attempt to proceed with the void order against third parties not privy to the record below.

Rehearing denied.

MINERS' BANK OF JOPLIN v. CHURCHILL.

Opinion delivered December 15, 1919.

1. APPEAL AND ERROR—FINAL ORDER.—An order of the chancery court confirming the report of a commissioner in foreclosure proceedings, directing him to pay all costs and taxes out of the purchase money, is not final and appealable, as there is no final order fixing the amount of the taxes, if any, to be paid.
2. APPEAL AND ERROR—MOTION TO CORRECT ERROR.—Where, in foreclosure proceedings, the commissioner is ordered to pay costs and taxes out of the purchase money, such order will not be reversed in the absence of a motion to correct it, in view of Kirby's Digest, section 1233, providing that "a judgment or final order shall not be reversed for an error which can be corrected on motion in the inferior courts until such motion has been made there and overruled."

Appeal from Van Buren Chancery Court; *Ben F. McMahan,* Chancellor; appeal dismissed.

Brundidge & Neelly, for appellant.

The court had no right to direct that the taxes due upon the land at the date of the confirmation of the sale be paid out of the proceeds of the sale. This was a judicial sale, the rule of *caveat emptor* will apply and the purchaser bought subject to all liens and encumbrances. 32 Ark. 112; 74 *Id.* 596; 18 A. & E. Ann. Cases, 500; 41 S. E. 247; 117 Am. St. Rep. 425.

M. P. Hatchett, for appellee.

1. No motion was made in the lower court to correct the error, if any. Kirby's Digest, § 1233; 68 Ark. 71; 93 Ark. 290; 56 S. W. 532; 124 *Id.* 263. The order of sale was made November 11, 1918, and the taxes as between vendor and vendee had not then become a lien on the lands. 53 Ark. 110; 77 *Id.* 216.

2. In the absence of a bill of exceptions the court's conclusions of law can not be reviewed here. 60 Ark. 250; 30 S. W. 212.

3. The court being the vendor and the commissioner its representative, it was the duty of the court, through its commissioner, to pay the taxes which were a lien upon

the lands in the custody of the court at the time of sale and confirmation, January 11 and May, 1919. 105 Ark. 261; 97 *Id.* 397; Rorer on Jud. Sales, sec. 1; 25 Ark. 52; Act No. 125, Acts 1911; 248 Fed. 46; 103 *Id.* 190; 34 Cyc. 346; 16 R. C. L., sec. 113.

4. There being no motion to correct, the sale was made, it must be presumed, as ordered by the order of confirmation and therefore relieved from the tax lien. Freeman on Void Jud. Sales, sec. 44; 16 R. C. L., sec. 61; 53 Ark. 110; 93 *Id.* 290; 248 Fed. 46; 103 *Id.* 190.

5. The rule, in judicial sales, of *caveat emptor* has been relaxed and the purchaser is entitled to a good, marketable title, free from encumbrances. 16 R. C. L., sec. 86. No injury was shown by motion to correct and it is too late after confirmation. 16 R. C. L., sec. 62; 53 Ark. 110.

WOOD, J. This appeal was from an order of the chancery court approving and confirming a report of its commissioner whom it appointed to make the sale upon decree of foreclosure.

The court directed that the commissioner make a deed to the purchaser named in said report upon his complying with the terms of his purchase, and present it to the court for its action thereon, and concludes as follows: "And it is further ordered by the court that the commissioner pay all costs and taxes now due on said land out of the purchase money."

The order here appealed from is not final, because it does not adjudicate that any taxes at that time were due and fix the amount thereof and render judgment for the same. The appeal therefore is premature, as there was no final judgment or order fixing the amount of the taxes, if any, to be paid. See *Davis* v. *Hale,* 114 Ark. 426, and other cases in First Crawford's Digest, p. 130, Appeal and Error, sec. 22.

Furthermore, the order as to the payment of the taxes stands on the same basis as an order for the payment of costs.

A party who conceived himself aggrieved by such order must move the court to correct the same before he has any standing in this court.

Section 1233 of Kirby's Digest provides: "A judgment of final order shall not be reversed for an error which can be corrected on motion in inferior courts until such motion has been made there and overruled. See *Boone County Bank* v. *Byrum,* 68 Ark. 71; *Shinn* v. *State,* 93 Ark. 290.

The appeal is, therefore, dismissed.

EX PARTE KING.

Opinion delivered December 15, 1919.

1. COURTS—ACT CREATING JUVENILE COURTS.—Acts 1911, page 166, establishing a juvenile court, did not create a separate court, but placed it within the jurisdiction of the county court.

2. INFANTS—JURISDICTION OVER JUVENILE DELINQUENTS.—The judicial and administrative functions with reference to delinquent infants, conferred upon the county courts by Acts 1911, page 166, do not interfere wth the constitutional jurisdiction of the probate courts over the estates of infants.

3. CONSTITUTIONAL LAW — PERSONAL LIBERTY AND RIGHT TO JURY TRIAL.—Acts 1911, page 166, can not be construed as depriving minors of the personal liberty and trial by jury guaranteed by the Constitution, as the intention of this act was not to confer on the county court power to institute criminal proceedings, but the purpose is to supply those who are destitute, homeless, abandoned, wayward or incorrigible with such environments as will conduce to their physical, moral and intellectual well being.

4. INFANTS—JURISDICTION OF PROBATE COURTS.—Constitution 1874, article 7, section 34, vesting in the probate court exclusive jurisdiction in matters relative to guardians, refers solely to the private guardianship as it affects the person and estate of the individual minor, and not to the interests of the public.

5. CONSTITUTIONAL LAW—CONSTRUCTION—RULE OF EJUSDEM GENERIS. —The doctrine that general words following an enumeration of particular things must be held to include only such things or objects as are of the same kind as those specifically enumerated applies in the construction of a constitution.

6. CONSTITUTIONAL LAW—CONSTRUCTION.—It is the duty of courts to construe the various sections of the Constitution so as to make the instrument as a whole harmonious.

Certiorari to Saline Circuit Court; *W. H. Evans*, Judge; affirmed.

W. K. Ruddell, for petitioner.

1. The "juvenile act" is unconstitutional, and hence appellant's conviction of delinquency by the Independence Court was void. Kirby & Castle's Digest, § 1561, being section 2 of the juvenile act of 1911. It creates a court unknown to and not mentioned in our Constitution. Art. 7, sec. 1, Const. 1874; 7 R. C. L. 981; 102 Ill. 218; 81 S. W. 435; 108 *Id.* 563; 60 S. E. 78; 1 Pin. (Wis.) 449; 45 Ala. 103; 36 Atl. 662.

2. The county court could not have jurisdiction. 115 Ark. 130; 90 *Id.* 195; 95 *Id.* 194; 3 L. R. A. (N. S.) 564, 575; 2 R. C. L. 343; 18 Am. St. 569; 90 Ark. 198.

3. The statute expressly gives the right of supersedeas. K. & C. Dig., § § 1533, 1590; L. R. A. 1915 E, 340, 343; 37 Wash. 258; 79 Pac. 786.

4. *Habeas corpus* can not take the place of appeal. 55 Ark. 275; 51 *Id.* 215; 49 *Id.* 143; 48 *Id.* 283.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, and *R. E. Wiley,* special counsel, for respondent.

1. Juvenile acts like ours (Acts 1917, page 288) have been sustained in practically all the States. 257 Ill. 328; 100 N. E. 892; Ann. Cases 1914 A, 1223-1227 and note; 213 Pa. St. 48; 5 Ann. Cas. 92; 14 *Id.* 816; 88 Pac. 609; 120 Am. St. 935; 18 L. R. A. (N. S.) 886; 120 Am. St. 952 and note. The general purpose of such acts is stated in 196 Fed. 123. They are not penal or criminal, but the purpose is to protect minors from prosecution and conviction and confer a benefit both upon the child and

the community. See also 51 Conn. 472; 103 Wis. 651; 79 N. W. 422.

2. The act is not unconstitutional. 26 Ala. 156; 209 Mo. 708; 108 S. W. 563.

3. The act does not create a new court, nor a separate one, but vests properly jurisdiction in the county courts which have jurisdiction "in all matters" relating to "paupers," "vagrants," "minors" and the local concern of counties, etc., and *ejusdem generis*. 213 Pa. St. 48; 5 A. & E. Ann. Cases 92; 144 N. W. 804; 38 Ark. 406.

4. The commitment by the juvenile court can not be superseded. 75 N. E. 655; 2 L. R. A. (N. S.) 244; 170 Pac. 130; L. R. A. 1918 C, 921; 87 Pac. 1069; L. R. A. 1918 C, 923 and notes.

WOOD, J. Miss Blanche Martin is superintendent of the Girls' Industrial School of Arkansas. This school was established by act of the General Assembly, approved February 9, 1917. Section 14 of the act in part is as follows: "That the present land, buildings and equipment now occupied by the Boys' Reform School is hereby converted into an institution to be known as the Girls' Industrial School of the State of Arkansas, and the same is hereby turned over to the board of managers of the Girls' Industrial School of the State of Arkansas, to be used by them for the care and custody of delinquent and dependent girls under the age of eighteen years. That the said board of managers shall, immediately after the passage of this act, proceed to erect at least two cottages, and equip the same for the care of such delinquent and dependent girls as may be committed to said school by the juvenile courts of this State."

Pearlie King was adjudged a delinquent by the juvenile court of Independence County on the 5th of May, 1919, and committed to the Industrial School. On the 9th of September, 1919, a writ of *habeas corpus* was issued by Circuit Judge W. H. Evans of Saline County, directed to Miss Blanche Martin, ordering her to produce the body of said Pearlie King and to show the cause of

her imprisonment. Miss Martin responded, bringing Pearlie King before the circuit judge, and alleged that she held the custody of Pearlie King under the authority of an order of the juvenile court of Independence County. This order adjudged in part as follows: "That the said Pearlie King, being the age of fifteen years, be taken to the Girls' Industrial School at Little Rock and turned over to them to be handled by them as they deemed best for the interest of said child."

The circuit judge thereupon denied the petition and remanded Pearlie King to the custody of Miss Blanche Martin.

These proceedings are brought to us for review by certiorari.

It appears from the record that Pearlie King is held in custody under an order of the juvenile court of Independence County.

The first question for our consideration therefore is whether or not the act 215 of the Acts of 1911, page 166, creating juvenile courts is constitutional. The title of the act is, "An act creating and establishing a juvenile court in the several counties of this State, defining the jurisdiction and powers thereof, providing for the support of the same, and for other purposes." The first section of the act declares: "That all persons under the age of twenty-one years shall, for the purpose of this act only, be considered wards of this State and their person shall be subject to the care, guardianship and control of the court, as hereinafter provided.

"A court, to be known as 'The Juvenile Court,' is hereby created and established in the several counties of this State. The court shall be held by the county judge of the county at the place where the county court is, by law, required to be held, and may be opened and adjourned from time to time, as the judge thereof may deem proper. The clerk of the county court shall be the clerk of the juvenile court, and any officer or person, who, under the law, is authorized to serve process issued from

any of the courts of this State, may serve the process issuing out of the juvenile court."

Then follows the definition of the words "dependent child," "neglected child" and "delinquent child." Also a provision that the disposition of any child under the act and evidence given in the cause shall not be used for any purpose whatever except in subsequent cases against the same child under the act, and a provision prohibiting the newspapers from publishing the name of the child proceeded against without a written order of the court. There is also a definition of the words "child and children" and "parent and parents," and of the word "association."

The second section of the act provides: "The county courts of the several counties of the State shall have original jurisdiction in all cases coming within the terms of this act. All trials under this act shall be by the court without a jury."

Section 3 of the act provides as follows: "The findings of the court shall be entered in a book or books to be kept for that purpose, and known as the 'Juvenile Record' and the court may, for convenience, be called 'The Juvenile Court.'"

Succeeding sections provide for the method of procedure, petition, process, notice, trial, final disposition of the cause, and an appeal to the circuit court.

We need not analyze the various provisions of the act. Suffice it to say when they are all considered, as they must be, and given their proper construction in relation to each other, it was not the intention of the Legislature to create a separate and independent tribunal and vest it with certain functions and powers, but rather to place within the jurisdiction and power of the county court, in the manner provided in the act, the subject-matter of the disposition of minors, who, for purposes of the act, are considered wards of the State.

The act prescribes certain functions and confers certain powers, some of which are clearly judicial and others clearly administrative. Some of the sections of the act

fail to discriminate between the functions which are judicial and those which are administrative. For instance, in the sixth section the county court is given authority to appoint any number of discreet persons of good moral character to serve as probation officers. Also in the fourteenth section the judge of the juvenile court is given the power to appoint a board composed of six reputable men and women to constitute a board of visitation, etc. The above functions are clearly administrative.

Other sections prescribe duties and functions which are clearly judicial. For instance, in the first section a court is designated as a juvenile court to be held by a county judge at the place where the county court is required to be held with the same procedure and the same machinery for the discharge of the functions and duties prescribed as are designated for the county court. In this and other sections court proceedings are provided for and issues are to be determined by the court which are judicial in character. While the first section of the act designates the court, when performing the duties and functions prescribed by the act as the "Juvenile Court," nevertheless the act requires that these duties and functions shall be performed by the the county judge and the other officers who constitute the necessary machinery for holding the county court. The clerk of the county court is the clerk of the juvenile court, and the sheriff and other officers, who under the law are authorized to serve process from the county court, serve the process issuing from the juvenile court.

The key note for the construction of this act to determine whether or not it was the purpose of the Legislature to create an independent tribunal with separate powers is found in the second and third sections. The second section confers upon the "county courts original jurisdiction in all cases coming within the terms of this act." The third section, while designating the court as the "Juvenile Court" and its record as the "Juvenile Record," expressly declares that this is done "for convenience."

Construing the act as a whole, we have reached the conclusion that it was not the purpose of the Legislature to create an independent tribunal and to confer upon it judicial powers. The act, therefore, does not offend against article 7, section 1, of our Constitution, which provides that, "The judicial power of the State shall be vested in one Supreme Court; in the circuit courts; in county and probate courts, and in justices of the peace."

In 7 R. C. L., p. 981, sec. 9, it is said: "In most of the jurisdictions in which juvenile court legislation has been enacted, separate and distinct courts have not, however been provided for, but the jurisdiction of the regular courts has been enlarged to cover the matters embraced in the legislation." The judicial power conferred by this act, as we construe it, is vested in the county courts. See also *Lindsay* v. *Lindsay,* 257 Ill. 328; Ann. Cas. 1914 A, 1223, and note at page 1227.

The next question is, Was it within the power of the Legislature to confer upon the county court jurisdiction of the subject-matter contained in this act?

The act defines at length the words, "dependent," "neglected" and "delinquent child," and declares that all such children under the age of twenty-one shall, for the purposes of this act only, be considered wards of this State and their person shall be subject to the "care, guardianship, and control of the court," meaning the county court.

The act is an exceedingly long one, and it is therefore impractical, without unduly extending this opinion, to set forth in detail and discuss all its provisions. The seventeenth section provides: "This act should be liberally construed to the end that its purposes may be carried out, towit, that the care, custody and discipline of the child shall approximate as nearly as may be that which should be given it by its parents, and in all cases of dependency, where it can properly be done, that the child shall be placed in approved family home, and become a member of a home and family by legal adoption or

otherwise, and, in cases of delinquency, that as far as practicable any delinquent child shall be treated, not as a criminal, but as misdirected and misguided and needing aid, encouragement and assistance, and if such child can not be properly cared for and corrected in its own home or with the assistance and help of the probation officers, then that it may be placed in a suitable institution where it may be helped and educated and equipped for industrial efficiency and useful citizenship."

Section 20 provides: "Nothing in this act shall be construed to give the guardian appointed under this act the guardianship of the estate of the child or to change the age of minority for any other purpose except the custody of the child."

The judicial and administrative functions conferred by the act upon the county court and the judge of that court in no manner interfere with the jurisdiction conferred by the Constitution upon probate courts over the estate of infants, for the act in express terms declares that its purpose was not to interfere with the guardianship of the estate of the child. The intention of the lawmakers was not to confer upon the county court the power to institute proceedings against minors by way of criminal prosecution or punishment for alleged violations of law. The act, therefore, could not be construed as depriving minors of that personal liberty guaranteed by the Constitution and trial by jury before they can be deprived of that liberty. On the contrary, the sole purpose of this act seems to be to supply those who are "destitute, homeless, abandoned," wayward, or incorrigible, who have not yet arrived at the age where they are entitled by the law of nature or of the State to absolute freedom, with such environments as will conduce to their physical, moral and intellectual well-being. This law undertakes to reclaim and reform, rather than to condemn and punish. For these unfortunate minors who come within the terms of the act it opens the doors of an asylum, but not a jail. For orphan children who are "destitute, homeless, abandoned or dependent upon the

public for support," this law seeks to provide as near as may be the home life. Those children who have become or are likely to become idle, vicious and depraved by reason of the neglect of parents, guardians or others having control over their persons, this law undertakes to rescue from their vile and dangerous surroundings, and to place them where they may be supported, educated, reformed, and thus made useful members of society. In other words, the State, as *parens patriae,* by virtue of this law, assumes the guardianship of those of her minor children who come within the terms of the act and hence need her protection. She has imposed upon her subordinate governmental agency, the county, the burden of costs incident to the proceedings set forth in the act and has designated the county court and the judge thereof, the functionary having in charge the administrative affairs of the county, as the most suitable instrumentality to execute the beneficent purposes of the act.

The only provision of the Constitution referring in specific terms to guardians is found in article 7, section 34, which is as follows: "The judge of the county court shall be the judge of the court of probate, and have such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates as is now vested in the circuit court, or may be hereafter prescribed by law."

At that time circuit courts were vested with exclusive jurisdiction, under certain conditions, to appoint guardians of minors, and such guardians "were entitled to the charge, custody and control of the person of their ward and the care of his education, support and maintenance, etc." See act of April 22, Acts of 1873; Kirby's Digest, § § 3776-77.

By the above provision of the Constitution all of that jurisdiction was taken away from the circuit courts and vested exclusively in the probate courts, the intention being "to restore the probate system as it existed under

the Constitution of 1836." *Hall et al.* v. *Brewer et al.*, 40 Ark. 433; *Watson* v. *Henderson*, 98 Ark. 63.

A careful consideration of the act of April 16 of the Acts of 1873, and of the act of April 22 of the Acts of 1873 (pages 120, 187), and of the constitutional provision above vesting in probate courts original exclusive jurisdiction in matters relative to guardians, convinces us that the above provision refers solely to the private guardianship of the persons and estates of minors, that is to the guardianship as it affected the person and the estate of the individual minor, and not the interests of the public. The jurisdiction over infants and their guardianship, so far as their conduct and condition might affect, not only themselves but also the welfare of the communities in which they resided or might be found, was vested by the framers of the Constitution in some other tribunal.

It was the intention of the framers of the Constitution of 1874 to cover by general outline every possible subject, public and private, that might come within the sphere of judicial or *quasi*-judicial action and to specifically parcel out and vest the jurisdiction over such subject among the various courts created by that Constitution. After so doing, the makers of the Constitution, in a sort of a "lest we forget" clause, provided that "the circuit court shall have jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which may not be vested in some other court provided for by this Constitution." Art. 7, § 11.

This has been held to give the circuit courts the great residuum of jurisdiction over all matters which had not been confided by the Constitution exclusively to the jurisdiction of other tribunals. *State* v. *Devers*, 34 Ark. 188. So that it is certain that if the guardianship of infants as defined in the act under review is not vested by the framers of the Constitution in some other specific tribunal it is vested by the above provision of the Constitution in the circuit courts. But it is not probable that the wise men who framed the Constitution of 1874, when they came to allot jurisdiction of the various courts

which they had created, did not specifically have in mind a subject-matter so vital to the interests of every community as the public guardianship of the destitute, homeless, abandoned and wayward infants.

The majority of us have reached the conclusion that the Constitution vested the jurisdiction of the subject-matter contained in this act in the county courts, as the tribunal best suited to exercise jurisdiction of this kind, and that the particular clause conferring such jurisdiction is found in article 7, section 28, as follows: "The county court shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes and in every other case that may be necessary to the internal improvement and local concerns of the respective counties." The specific authority for this act is found in the all-embracing clause "in every other case that may be necessary * * * to the local concerns of the respective counties."

It will be observed that certain subjects are enumerated in the last provision quoted that relate peculiarly to the financial affairs of the county, such as county taxes and the disbursement of money for county purposes. Another class embraces matters that pertain especially to internal improvements, such as roads, bridges and ferries.

Of both of these classes it might appropriately be said that they have reference particularly to the material and financial interests of the counties. But there is still another class, while indirectly affecting the financial affairs of the county, nevertheless relates to the conditions of good citizenship and affects the moral welfare of the communities. Such, for instance, is the jurisdiction over paupers, bastardy, vagrants and the apprenticeship of minors. After enumerating the particular subjects in these classes, by the sweeping clause "in every case that may be necessary to the internal improvement and local concerns of the respective counties," it was manifestly

intended to include not only the particular subjects designated but all those not named which might reasonably come within the same generic class.

The doctrine of *ejusdem generis* may apply as well in the construction of a constitution as in the construction of a statute. That doctrine is that when general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated. See *Lee* v. *Huff*, 61 Ark. 494-502; *Hempstead County* v. *Harkness*, 73 Ark. 600-2; *State* v. *C., R. I. & P. R. Co.*, 95 Ark. 114-16; *State* v. *Gallagher*, 101 Ark. 593-7; *Jones* v. *State*, 104 Ark. 263.

This court has in effect applied the doctrine in numerous cases wherein it has been held that county courts have jurisdiction over the subject-matter of levees and ditches. These, although not expressly mentioned, it is held, belong to the same general class of internal improvement as roads, bridges, ferries, etc. *Cribb* v. *Benedict*, 64 Ark. 555; *Board of Directors St. Francis Levee Dist.* v. *Redditt*, 79 Ark. 154-8.

The constitutionality of acts vesting jurisdiction in county courts to construct levees, drains and ditches is bottomed upon the theory that these are subjects of internal improvement and local concern of a public nature and for a public purpose over which the county courts have exclusive original jurisdiction under article 7, section 28, *supra*. See "Construction of Drains and Ditches," chap. 46, secs. 1414-50 inclusive, and "Levees and Cut-Offs," chap. 100 of Kirby's Digest; *Lee Wilson & Co.* v. *Wm. R. Compton Bond & Mtg. Co.*, 103 Ark. 452.

In matters of local concern as affecting the moral status of the community, this court has sustained acts conferring upon county courts jurisdiction in the matter of passing upon petitions for putting in force local option laws and in granting and withholding licenses for the sale of intoxicating liquors. In *Ex parte Leon Levy*, 43 Ark. 42-9, this court held that the county courts "may exercise a discretion in determining whether any licenses

should be granted in the township or ward, and who may be fit subjects of the grant. In determining these questions or similar ones, the court acts as a court, discharging the proper functions of a court, invested with police powers, and making orders affecting the general good of the citizens, with regard to their local concerns. This is within the ambit of their constitutional purpose."

In *Trammell* v. *Bradley, County Judge,* 37 Ark. 374-81, this court says: "The counties are governmental agencies—the Briarean arms of the sovereign power; and, through the county courts, the operations of general police regulations may be best adapted to circumstances. The Constitution has invested them, under legislative direction, with the exclusive original jurisdiction of all matters connected with the internal improvement and local concerns of their respective counties. It seems to harmonize with that, to make them the proper tribunals, under fixed laws, to ascertain and declare the facts and circumstances under which certain police laws are to operate, as depending upon the knowledge, by the inhabitants of special localities, of their best interests, and the expression of their desires. What may, in some localities, be a great evil, may, in others, be a convenience or a necessity."

In the minds of the framers of our Constitution, the subjects of "paupers, bastardy, vagrants and the apprenticeship of minors" were considered matters of such local concern affecting the welfare of the immediate communities or counties, respectively, where these classes of persons might be found, that it was deemed wise to vest in the county courts, as subordinate governmental agencies in control of the affairs of the county, the jurisdiction over these subjects.

It occurs to a majority of us that governmental control over the subject-matter of infants, wards of the State, who are dependent, neglected and delinquent, as these terms are defined in the act under review, are in the same general class and are of the same character as the subjects above enumerated and were intended, in the gen-

eral clause covering "every other case necessary to the local concerns of the respective counties," to come under the jurisdiction of the county courts vested by that clause.

If infants are dependent, neglected and in indigent circumstances, they are paupers; if they are born out of wedlock they are bastards; if they are idle and homeless they are vagrants; and if they have no trade or vocation they are subject to apprenticeship. If infants belong to some one or all of these classes, they come within the jurisdiction conferred upon the county courts by the above provision of the Constitution. If within any of these classes, the fact that they are infants should not render them any the less amenable to such jurisdiction. Certainly no higher duty could devolve upon the government than to throw proper safeguards around that helpless class who have become dependent, neglected, abandoned and wayward, and who have thus become a charge upon the public, or wards of the State.

These, of course, are functions of government in which the whole State in a broad sense is interested, but which in a peculiar and local sense affect the immediate communities where the unfortunate classes, defined in the act, are located. Hence, we conclude that the Legislature made no mistake in vesting the jurisdiction conferred under the designation "juvenile courts" in county courts. That is where it belongs under our Constitution.

In reaching this conclusion, we are not unmindful of the jurisdiction conferred by the Constitution upon courts of chancery, which is the same jurisdiction that courts of equity exercised at the time of the adoption of the Constitution. Art 7, § 15, Const. Courts of equity at the time of the adoption of our Constitution had general jurisdiction over the persons and property of minors. *Bowles* v. *Dixon,* 32 Ark. 92; *Myrick* v. *Jacks,* 33 Ark. 425; *State* v. *Grisby and Wife,* 38 Ark. 406; *Watson* v. *Henderson,* 98 Ark. 63.

In the last case we said: "But it was not intended by the Constitution to take away from the chancery

courts their ancient original jurisdiction over the persons and estates of minors so far as such jurisdiction may be necessary for the protection of the infant or to protect his property from waste or spoliation through the carelessness, fraud, mistake or imposition of his parents, guardians, or others. These are distinct grounds of equitable jurisdiction which have existed since the establishment of courts of chancery, and have been recognized in the jurisprudence of our English-speaking people for centuries."

This jurisdiction of chancery courts is not a supervisory jurisdiction over the courts of law, for that is vested by the Constitution in the circuit courts. Art. 7, § 14. While this ancient jurisdiction of courts of chancery over the person and estates of infants under our Constitution is original, it does not arise and can not be invoked except upon some purely independent equitable grounds. This jurisdiction of chancery courts, as the jurisdiction of probate courts in matters relating to guardians, deals solely with the person and the estate of the individual infant and has reference to the interests of the particular individual rather than to a class. It deals with matters of private guardianship and not with that public guardianship over infants as a class, such as was contemplated by the framers of the Constitution by the jurisdiction conferred upon county courts, as *parens patriae,* to assume custody and control over infants as wards of the State whenever their condition, or their conduct, makes it necessary that this should be done for the public welfare.

This jurisdiction of chancery courts can never be invoked so long as the county courts properly discharge the high and sacred duties committed to them. It is the duty of this court to construe the various sections of our Constitution so as to make the instrument as a whole harmonious. The construction which we have given article 7, section 28, and the act under consideration, preserves that harmony.

Through the diligence of counsel we have been favored with citation to several cases which show that acts similar to this have generally been upheld by the courts. The leading case is *Commonwealth* v. *Fisher,* 213 Pa. St. 48, 5 Ann. Cas. 92. Other cases are *Lindsay* v. *Lindsay, supra,* and see case note to above case 1914 A, 1223-1227; *Pugh* v. *Bowden,* 54 Fla. 302, 14 Ann. Cas. 816; *Mill* v. *Brown,* 31 Utah, 473, 88 Pac. 609, 120 Am. St. Rep. 935, and note at page 952; *In re Sharp,* 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. (N. S.), 886. We have examined these and found them helpful. They prepare a friendly approach for the construction of the act, but they are not controlling for the reason that none of them is based upon provisions like ours.

The progressive and enlightened policy of such legislation is everywhere recognized and commended. Happily for the unfortunate class benefited and for the public weal, we find no barrier in our organic law to the act in its present form.

The judgment of the circuit court, awarding the custody of Pearlie King to the Girls' Industrial School, is correct and is affirmed.

McCULLOCH, C. J., (dissenting). The constitutional parceling out of the jurisdiction of the various courts is complete. Jurisdiction is specifically assigned as to almost every conceivable subject, but out of superabundant caution, the framers of the Constitution made the circuit court the residuum of all unassigned jurisdiction. It is only where a subject is not found within the list of those specifically assigned to other courts that it falls within the residuum clause of the jurisdiction of the circuit court.

The statute now under consideration with reference to the consignment of children to the place of refuge provided for in that statute is not one for the punishment of crime, and, of course, does not fall within the criminal jurisdiction vested in the circuit court or of the justices of the peace. It comes within the range of that subject

which embraces the care and custody and protection of infants. The jurisdiction of that subject-matter is expressly vested by the Constitution in the probate court. Section 34, article 7, provides that a court of probate shall have "such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates as is now vested in the circuit court, or may be hereafter prescribed by law." At the time of the adoption of the Constitution of 1874, circuit courts had exclusive jurisdiction over the persons and property of infants. The act of April 22, 1873, conferred that jurisdiction on the circuit court, and provided for the appointment of guardians, both of the person and of the estate of minors, and also provided that guardians of the person of a minor should be entitled to the "charge, custody and control of the person of his ward, and the care of his education, support and maintenance." Kirby's Digest, secs. 3776, 3777. All of that jurisdiction passed to the probate court under the provision of the Constitution quoted above. That jurisdiction is exclusive, but it does not supplant or interfere with the jurisdiction of chancery courts over that subject exercised on independent equitable grounds. *State* v. *Grisby,* 38 Ark. 406; *Watson* v. *Henderson,* 98 Ark. 63.

The matter of adjudicating the question of propriety of sending a child to the refuge provided by the statute could, therefore, be vested in the probate court as a part of its jurisdiction over the persons of infants without impairing the jurisdiction of chancery courts on independent equitable grounds according to the doctrine of the two cases cited above and without encroaching on the criminal jurisdiction of the circuit court. *Ex parte Baker,* 121 Ark. 537. In the Baker case, *supra,* we held (quoting from the syllabus) that "giving circuit judges jurisdiction over an insane person acquitted of a crime on the grounds of insanity" is "not an invasion of the exclusive jurisdiction of the probate court."

In *Watson* v. *Henderson, supra,* Judge WOOD, speaking for the court, quoted with approval from another case, as follows:

"Equity sits silent in the courts as long as the law is able to meet the demands of justice; it aids the law, but is not officious in its services. Equity distinguishes between the shield and the sword. To protect the estate from a danger which the infant, because of his tender years, is unable to defend against is one thing; to commission some one to go into the field of trade, selling and buying on account of the infant is another thing. Courts of equity have original jurisdiction over the estates of minors, but conceding that jurisdiction for certain equitable purposes does not concede jurisdiction to do any and everything whatsoever with the estate of a minor, *quia* minor. The act to be valid must be based on some equitable principle."

Further on in the opinion it was said: "The same principles that govern courts of chancery in interfering with the proceedings and adjudications of courts of probate in the administration of estates of deceased persons should control them in interfering with the administration of the estates of minors in the hands of their guardians, because the original jurisdiction of probate courts in each case is exclusive."

I confess my utter inability to comprehend the use of the term "private guardianship of infants" as distinguishing a class over which the general jurisdiction of the probate court does not extend. As I have already remarked, in the allotment of jurisdiction of the courts the framers of the Constitution vested in the probate court *all* of the jurisdiction over the persons and estates of minors as such. This does not take away any of the jurisdiction allotted to other courts on independent grounds, even though its exercise may relate to the interests of minors. It does not take away the criminal jurisdiction of the circuit courts or of justices of the peace, even though the exercise of that jurisdiction may be and often is exercised in the rendition of judgments

against minors. It does not take away from those courts the civil jurisdiction over litigation concerning the property rights of minors. But, so far as the courts may deal with infants as such, the exclusive jurisdiction is given to the probate courts.

The control of infants and any other class of dependent or helpless persons is not a matter of "local concern," within the meaning of that term as used in prescribing the jurisdiction of county courts. Such an application of it would convert it into a "general welfare clause," under which authority might be conferred on the county courts in all of the varied and intricate matters affecting society in the county—health, morals or prosperity, or anything else. Such was not, in my judgment, the intention of the framers of the Constitution in the use of the term "local concern." I think it related solely to the antecedent term "internal improvement." *Little Rock* v. *North Little Rock*, 72 Ark. 195.

The construction of jails and the maintenance of prisoners incarcerated therein are matters of local concern within the exclusive jurisdiction of the county court, but the control over prisoners charged with crimes are not within such jurisdiction, for it belongs to those courts which exercise criminal jurisdiction. Counties may, as matters of local concern, be authorized to build infirmaries for the care of insane persons and jurisdiction over it would be vested in the county court; but this would not carry with it jurisdiction over insane persons, which is, by the Constitution, vested in probate courts. So the counties could, by the Legislature, be authorized to build refuges for the care of dependent or incorrigible children, and that would constitute a matter of local concern, but it would not carry with it jurisdiction to determine when a child should be consigned to that refuge, for to do so is an invasion of the jurisdiction of the probate court.

The majority rely, in support of their views, on certain decisions of this court upholding statutes giving ju-

risdiction to county courts in the matter of regulation of the liquor traffic. Language is quoted from the opinion in one of those cases which seems to sustain the views of the majority that all matters affecting the interests of society in a county are matters of "local concern" over which the county court has exclusive jurisdiction; but when the whole opinion in that case is examined, and the opinions of other cases of like nature, it will be seen that the real basis of the county court's jurisdiction over the regulation of the liquor traffic is the taxation power in the granting of license and over elections held for the purpose of determining whether or not license shall be granted. The case of *Freeman* v. *Lazarus,* 61 Ark. 247, is instructive on this subject.

I dissent, therefore, from the holding that jurisdiction was properly conferred in the county court.

SMITH, J. (dissenting). I think it sufficiently appears from the analysis of the act under review contained in the majority opinion that a court, and not a mere administrative agency, has been created. It is so expressly stated in the act, and the jurisdiction of this court is defined and the practice and procedure therein are prescribed. It is true that certain functions of an administrative character are imposed on this court, but it remains a court notwithstanding that fact.

In my opinion, the difficult question in the case is, has the jurisdiction here defined been conferred upon the proper court? And the very difficulty we have experienced, in arriving at a correct answer to that question confirms me in my view that the jurisdiction here conferred upon the county court properly belongs to the circuit court, and that the act is void because it was not lodged there.

The majority opinion reflects the fact that it has been seriously considered whether or not, under the authority of the cases there cited, the jurisdiction defined in the act under review did not inhere in the chancery court. But, after a careful consideration of all our cases

throwing light upon the subject, we have all concluded that the chancery court does not have the jurisdiction here conferred upon the county court.

I agree fully with the majority that this jurisdiction does not belong to the probate court. There is nothing in the act which would interfere with any guardian in the discharge of his duties as such. Children with guardians who are dependent, neglected or delinquent are made subject to the act just as are dependent, neglected or delinquent children having parents.

A minor with a guardian might be convicted of some misdemeanor, under the judgment of a justice of the peace, or of some felony in the circuit court without infringing upon the jurisdiction of the probate court. So, here, the necessity for the restraining and corrective influence of the industrial school might be as great in the case of a minor having a guardian as in that of a minor who did not have one. So I fully concur with the majority that the constitutional provision vesting in probate courts jurisdiction in matters relative to guardianship refers solely to the private guardianship of the person and estates of minors, that is, to the guardianship as it affects the person and the estate of the individual minor, but not the interests of the public, and that the jurisdiction over infants so far as their conduct and condition might affect, not only themselves, but also the welfare of the communities in which they reside, was vested in some tribunal other than the probate court.

If it were conceded that the custody and control of delinquent, dependent or neglected children was a matter of *local concern,* as that term is used in the Constitution, then the majority have reached the correct conclusion; but I submit that the framers of the Constitution had no such definition in mind when they employed that term in defining the jurisdiction of county courts.

The "local concern" must not be interpreted as meaning those things which the people of a particular community are locally concerned, for such a definition would include the suppression of crimes generally and

many other matters over which no one would contend the county court had jurisdiction.

In the case of *Little Rock* v. *North Little Rock,* 72 Ark. 195, it was insisted that the attempt of the Legislature to confer authority upon the town council to order an election upon the question of a change of municipal boundaries was a violation of the provision of the Constitution giving the county courts "exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, and in every other case that they may be necessary to the internal improvment and local concerns of the respective counties." Article 7, section 28, Constitution 1874. Answering that insistence, the court there defined "local concern" in the following language, which is appropriate here:

"But the argument that the change of boundaries between two incorporated towns is a 'local concern,' within the meaning of this provision of the Constitution, seems to prove too much; for, if that be true, why are not the improvements of city streets and the other local improvements of the city local concerns, within the meaning of the Constitution, and why does not the county court have exclusive jurisdiction in such matters also? * * * It thus appears that the local concerns over which the county court is given exclusive jurisdiction are those which relate specially to county affairs, such as public roads, bridges, ferries, and other matters of the kind mentioned in the section referred to, and we do not think that the formation of towns and cities, or the change of their boundaries, is a local concern, of which the county court has exclusive jurisdiction. This conclusion is, we think, sustained by the former decisions of this court."

The majority say that, if this jurisdiction is not vested in the county courts, it must be vested in the circuit courts; and that, in my opinion, is where it is vested. The jurisdiction of the circuit courts is not of a "lest we forget" character. These courts have the great re-

siduum of jurisdiction over all matters which have not been confided by the Constitution to the jurisdiction of other tribunals. The jurisdiction of these other tribunals is defined, and the jurisdiction not assigned to some other tribunal is vested in the circuit courts. It must be true, therefore, that if the chancery courts, the county courts or the probate courts do not possess this jurisdiction, the circuit courts must do so.

The desire to uphold this legislation is common to us all, and is fully shared by me, but, as the jurisdiction was taken from the only court which, in my opinion, could properly exercise it, and was conferred upon a court which, under the Constitution, could not exercise it, I must express my view that the legislation is unconstitutional, and I, therefore, dissent from the order and judgment of the majority.

ENGLAND v. HUGHES.

Opinion delivered December 15, 1919.

1. BANKS AND BANKING—BANK AS DEBTOR OF DEPOSITOR.—By a general deposit a bank becomes the debtor of the depositor, and bound by an implied contract to pay the sum upon his demand or order.
2. BANKS AND BANKING—RIGHT OF DEPOSITOR TO SUE.—Where a national bank has failed and gone into hands of a receiver who has published a notice for presentation of claims under Revised Statutes, section 5235, a general depositor need not make a demand on the bank in order to become entited to sue for or claim his money.
3. LIMITATION OF ACTIONS—SUSPENSION BY APPOINTMENT OF RECEIVER.—The appointment of a receiver for an insolvent national bank will not stop the running of the statute of limitations against the claims of a creditor.
4. LIMITATION OF ACTIONS—BANK DEPOSITS.—Passbooks or deposit slips of a general bank depositor, being mere receipts, are not within Kirby's Digest, section 5081, excepting bills, notes and evidences of debt of banks from the statute of limitations; the statute referring to instruments issued by a bank passing current as money.

5. LIMITATIONS OF ACTIONS—BANK DEPOSITS.—An action against a bank by a general depositor to recover the amount of his deposit is barred by the three-years statute (Kirby's Digest, section 5064) relating to contracts or liabilities, express or implied, not in writing.

6. BANKS AND BANKING—CONSTRUCTION OF STATE ACT.—The Arkansas banking act, section 58, providing that dividends and unclaimed deposits, remaining unpaid in the commissioner's hands for six months after the order for final distribution, shall be by him deposited in trust for the depositors, refers exclusively to the procedure of winding up State banks, and not to national banks.

7. BANKS AND BANKING—DEPOSITOR TO FILE CLAIM.—Under Arkansas banking act, section 54, requiring that claims should be presented to the commissioner at a time and place fixed by him, and that actions upon rejected claims must be brought within six months after service of notice of rejection, *held* a depositor who has failed to present his claim is not entitled to participate in the funds required by section 58 to be deposited by the commissioner.

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

STATEMENT OF FACTS.

On May 26, 1919, W. B. Hughes, as trustee, and others brought this suit against Lloyd England, as receiver of the State National Bank of Little Rock, Arkansas, for the sums respectively set opposite their names.

The plaintiffs allege in their complaint that the State National Bank of Little Rock, Arkansas, was a corporation organized under the laws of the United States and engaged in the banking business. It suspended business on the 19th day of June, 1914, and was declared insolvent by the Comptroller of the United States Treasury, and placed in the hands of a receiver in February, 1915.

In the answer it is alleged that the State National Bank of Little Rock, Arkansas, closed its doors and ceased to do business on June 19, 1914; that at the time the bank closed its doors it began liquidation as an insolvent bank in the manner required by the national bank act, and that notice of such fact was published in the public press; that a receiver was duly appointed for the bank

on the 17th day of February, 1915; that immediately following the date of his appointment the receiver, under order of the Comptroller of the Currency, published a notice requiring all depositors and other creditors of the bank to file their claims with him as receiver within ninety days and stating that any claim not filed within the period designated would be disallowed and barred; that the plaintiffs had on general deposit in the bank at the time it ceased to do business the amounts sued for in this case; that they never presented their claims to the receiver for allowance. Therefore, it is claimed that the plaintiffs are barred of relief by the statute of limitations, and defendant especially pleads in bar of plaintiffs' action the three years' statute of limitation.

A demurrer to the answer was sustained, and, the defendant having refused to plead further, judgment was rendered in favor of each of the plaintiffs for the amount respectively sued for by him. The defendant has appealed.

Charles T. Coleman, for appellant.

1. By a general deposit with a bank the relation of debtor and creditor is established. The title to the money passes to the bank, and it agrees to pay it on demand during banking hours, etc. 111 U. S. 127; 161 *Id.* 288; 192 *Id.* 145; 130 Fed. 780; 15 *Id.* 675; 92 Cal. 14; 16 L. R. A. (N. S.) 593; 100 N. Y. 50; 196 U. S. 301; 98 Ark. 294; 46 *Id.* 537; 48 *Id.* 267; 69 *Id.* 43; 104 *Id.* 294; 126 *Id.* 266; 124 *Id.* 531.

2. The action is barred by the three-year statute of limitation. Kirby & Castle's Digest, § 5992. The contract was not in writing; the law implies a promise to pay on demand, and the statute does not begin to run until demand and refusal to pay. A suspension of payment by a bank or discontinuance of business dispenses with necessity of demand. 25 Cyc. 1098; Morse on Banks (3 Ed.) 548; 130 Fed. 780. To the same effect are 10 Gill. & J. 422; 9 *Id.* 439; 8 *Id.* 449; 12 Blatchf. 480; 65 N. H. 670; 23 Atl. 529; 152 Penn. 65; 3 Elliott on Cont.,

sec. 2660; Michie on Banks, etc., pp. 1321-23. The demurrer admits that plaintiffs knew of the suspension of the bank, the appointment of receiver, the order of the comptroller requiring all creditors to file their claims, etc., but they did not file their claims but stood supinely by with full knowledge of all the facts until the period of limitation expired, and they are barred.

3. The action is not within the provision in section 6009, Kirby & Castle's Digest. It is not based on the pass book but is founded on the implied promise to pay between the bank and depositor. 46 Ark. 537; 69 *Id.* 43; 104 *Id.* 550; 124 *Id.* 531; 126 *Id.* 266; 98 *Id.* 294; 53 Mich. 163; 36 Pac. 1066; 3 R. C. L. 531, par. 160. The pass book is not a written contract, but *prima facie* evidence only that the bank has received on deposit the amount stated and the date, etc. 53 Kan. 480; 133 Mass. 16; 53 Mich. 163; 36 Minn.193. It is not even an account stated. 126 Ark. 266. Its real status is a receipt. Our statute excepts "evidences of debt issued by a bank," and pass books are not issued as evidences of debt. What is meant by "evidences of debt issued by the bank" is shown by the history of our law. Rev. Stat. 1838, chap. 91, and sec. 18; 4 Ark. 175; 13 *Id.* 563; Rev. Stat., chap. 109. The rule *ejusdem generis* requires that the general words only include the kind or class as those specifically enumerated. 104 Ark. 263; 95 *Id.* 114; 73 *Id.* 602; 101 *Id.* 593; 61 *Id.* 494. The use of the deposit slip is well understood as a mere receipt and is not assignable. 134 N. Y. 368, 32 N. E. 38. As to meaning of "issue or put in circulation," see 17 Barb. 309-341. Provisos are construed strictly and take no case out of the enacting clause not falling clearly within its terms. 15 Pet. 165; 46 Ark. 306-310; Black on Int. of Laws, p. 275.

Wallace Townsend, for appellees.

1. Deposits are included in the term "evidences of debt" as used in Kirby & Castle's Digest, section 6009. 36 Mich. 494; 24 Am. Rep. 610. Pass books are evidence of debt. 16 N. E. 904-6; 24 L. R. A. 737; 117 U. S. 96-106; 126 Ark. 266-277.

2. The rule *ejusdem generis* does not operate against appellees. 2 Ark. 250; 102 *Id.* 218-19; Endlich, Int. Stat., § 409, cited in 70 Ark. 458.

3. The *lex fori* prevails. 155 U. S. 610-618; 27 Fed. 503-6. The suit is not barred by our statute. *Supra.* See also 27 Fed. 503; 44 *Id.* 586; 97 *Id.* 309-318; 98 *Id.* 375; 106 *Id.* 791. Under the provisions of our banking act and laws, the appellees are not barred. Act No. 113, Acts 1913. The statute does not run against trusts. 46 Ark. 25; 52 *Id.* 168; 132 *Id.* 402-410; 58 *Id.* 84-90. The Legislature can not deprive parties of an existing right by cutting off the remedy. 13 Ark. 262; 78 *Id.* 392-7; 65 Cal. 71; 2 Pac. 887. The appointment of a receiver does not work a dissolution of a bank, but it remains liable to creditors and suits. 14 Wall. 383. The receiver can have no defense the bank did not have. 34 Cyc. 191, 193; 98 Ark. 280-294. The barring of claims for non-presentation follows only where there is a final distribution of funds. 34 Cyc. 342. The act of 1838 deprives appellant of the defense of limitation, as does the act of 1913.

HART, J., (after stating the facts.) The circuit court sustained a demurrer to the answer of the defendant, and so the allegations of the answer must be taken as true. The answer alleges that each of the plaintiffs had on general deposit in the bank at the time it failed the sum respectively set opposite his name; that the bank was adjudged insolvent and a receiver appointed; that under an order of the Comptroller of the Currency notice was duly given requiring all depositors and other creditors of the bank to file their claims with the receiver within ninety days, and that the plaintiffs failed to do this.

By a general deposit, a bank becomes the debtor of the depositor, and bound by an implied contract to pay the same upon his demand or order. *Steelman* v. *Atchley,* 98 Ark. 294; *Himstedt* v. *German Bank,* 46 Ark. 537; *Henry* v. *Conley,* 48 Ark. 267; *Carroll County*

Bank v. *Rhodes,* 69 Ark. 43; *Covey* v. *Cannon,* 104 Ark. 294; *Citizens Bank & Trust Co.* v. *Hinkle,* 126 Ark. 266, and *State National Bank* v. *First National Bank,* 124 Ark. 531, and *Burton* v. *United States,* 196 U. S. 301.

When the bank failed and went into the hands of the comptroller, its business was at an end, and when the comptroller, under section 5235 of the Revised Statutes of the United States, directed the receiver to publish a notice for three consecutive months calling on all persons who might have claims against the bank to present the same and make legal proof thereof, this amounted to a waiver of the necessity for a demand by the depositor before he became entitled to sue for or claim his money. By closing its doors and ceasing to do business, the bank said in effect that it would not pay the depositors, and the law does not require a vain or fruitless thing to be done. Michie on Banks and Banking, vol. 2, p. 1323. *Planters Bank* v. *Farmers Bank* (Md.), 8 Gill & J. 449; *Union Bank* v. *Planters* (Md.), 9 Gill & J. 439, 31 Am. Dec. 113, and *Watson* v. *Phoenix Bank* (Mass.), 8 Metc. 217, 41 Am. Dec. 500.

It may be also stated in this connection that the appointment of a receiver will not stop the running of the statute of limitations against the claim of a creditor of an insolvent bank. *Davis* v. *Scott, Recvr.,* 129 Ark. 226. More than three years elapsed from the time the notice to creditors was published by the receiver under orders from the Comptroller of the Currency until this suit was brought. Hence counsel for the defendant claims that the plaintiffs are barred under the first subdivision of section 5064 of Kirby's Digest which provides that all actions founded upon any contract or liability express or implied not in writing shall be commenced within three years.

On the other hand, counsel for the plaintiffs claim that section 5074 of Kirby's Digest, which provides that all actions not included in the foregoing provisions shall be commenced within five years after the cause of action shall have accrued, governs the case at bar. They base

their contention on section 5081 of Kirby's Digest, which provides that none of the provisions of this act shall apply to suits brought to enforce payment on bills, notes, or evidences of debt issued by any bank or moneyed corporation. They claim that amounts due by the bank on general deposits are "evidences of debt" issued by the bank. Hence they say that it is not an action specifically provided for in the statute of limitations and is included within the provisions of section 5074 of Kirby's Digest. We can not agree with counsel for the plaintiffs in their contention. When the statute of limitations in section 5081 of Kirby's Digest speaks of bills, notes or evidence of debt issued by any bank it refers to instruments of writing issued by the bank which shall circulate as currency or as a medium of exchange in this State and does not refer to general deposits. Deposit slips and deposit entries in pass books are not contracts in writing, but are mere memoranda or receipts. The use of deposit slips or pass books is well understood. It merely constitutes an acknowledgment that the amount of money named therein has been received by the bank, and it is not expected that the deposit slip will ever be presented to the bank again unless a dispute should arise as to the amount of the deposit, in which event it would become important as evidence. It is a receipt, merely, and will not support an action against the bank. The suit should be brought on the debt, and the deposit slip or pass book would be evidence as to the time and amount of the deposit showed thereon. 3 R. C. L., p. 531, par. 160; 7 C. J., pp. 637 and 638; *Talcott* v. *First Nat. Bank of Larned,* 53 Kan. 480; *Com.* v. *Reading Saving Bank,* 133 Mass. 16; *Davis* v. *Lenawee Bank,* 53 Mich. 163; *Branch* v. *Dawson,* 36 Minn. 193, and case note to L. R. A. 1918 B at 298. See also *Citizens Bank & Trust Co.* v. *Hinkle, Admr.,* 126 Ark. 266. Of course, a certificate of deposit might be written by the bank in such language as to constitute it both a contract and a receipt. Such is not the case here however.

According to the allegations of the answer the plaintiffs deposited their money in the usual way on general deposit and the bank owed them the amounts which they deposited. If the deposit slips or pass books are nothing more than receipts, they could not form the basis of an action against the bank as above stated, and could only be used as evidence against the bank. It follows that the words, "evidence of debt," as used in the statute refer to instruments issued by the bank and signed by it of the same class as bills and notes and which should pass current as money.

Counsel for the plaintiffs have cited two cases contrary to the views herein expressed, but we do not deem it necessary to review them. In the first place, it may be said that the decisions are based upon the peculiar language of the statutes of the States wherein they were decided. In the second place, if such were not the case, we think they are opposed to the great weight of authority, which hold that deposit slips and pass books are not written contracts but are receipts and nothing more.

It follows that the court erred in sustaining a demurrer to the answer, and for that error the judgment will be reversed, and judgment rendered here in favor of the defendant.

HART, J., (on rehearing). Counsel in his brief on his motion for a rehearing relies upon section 58 of the Banking Act to show error in the opinion of the court. Acts of 1913, p. 462.

Section 58 provides that dividends and unclaimed deposits remaining unpaid in the hands of the commissioner for six months after the order for final distribution, shall be by him deposited in one or more State banks in trust for the several depositors.

In the first place it may be said that this section refers exclusively to the procedure of winding up insolvent State banks. It is claimed by counsel that the section also applies to insolvency proceedings under the National Bank Act because of the absence of any provision

on the subject in that act. Even if counsel should be correct in that contention, section 58 would have no application here. Section 54 of our banking act provides that all persons who have claims against the insolvent bank shall present the same to the commissioner at a time and place to be fixed by him. It further provides that actions upon rejected claims must be brought within six months after service of notice of such rejection upon the claimant.

In the case at bar no presentation of claims by the plaintiffs as depositors was made, and it is evident that it is only in such cases that section 58 applies.

It follows that the motion for a rehearing must be denied.

BAUM v. INGRAHAM.

Opinion delivered December 15, 1919.

PARTITION—SALE SUBJECT TO UNASSIGNED DOWER.—Where a widow had conveyed her unassigned dower, it was error in partition suit to decree a sale of the land subject to unassigned dower, since such sale, without first assigning dower, might have prevented other persons than the assignee from bidding.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. H. Vaughan,* Special Chancellor; reversed.

T. P. Winchester, for appellants.

1. The court erred in not taking into account the unassigned dower of the widow. Ingraham was the real purchaser of the land at the sale.

2. The filing of the mandate of this court was in effect the beginning of a new suit and notice was necessary and was not given. The sale of the lots subject to the dower interest was erroneous. Kirby's Digest, § § 5776-5785.

The appellee, *pro se.*

1. The law was followed as to filing the mandate, notice, etc. Kirby's Digest, § 6174, as modified by subse-

quent statute. The mandate was not a reversal but an affirmance, but appellants had ample and due notice. Section 1236 does not sustain appellants' contention as to notice.

2. There was no error in the sale or report of the commissioners and none in the decree as to partition. The fee was decreed to be partitioned subject to the dower estate, and that decree was affirmed by this court.

3. The commissioner's sale was properly subject to dower, as held by this court on former appeal.

4. As to the reason of the commissioners, the case in 90 Ark. 500 is not applicable. 49 Ark. 104; 76 *Id.* 146.

5. Equity will not disturb a decree upon technicalities where substantial justice has been done as here and the matter is *res judicata.* 72 Ala. 190; 30 Cyc. Pl. & Pr. 178; 26 Ill. 504; 32 Iowa 399; 75 Me. 418; 112 Mass. 753; 3 Sandf. (Va.) 264. The rule is different where dower has been assigned. 41 N. C. 392; 30 Cyc. P. & L., p. 180. Justice has been done.

HART, J. This is the second appeal in this case. The opinion on the former appeal was delivered on October 21, 1918, and is reported in 136 Ark. 101, under the style of *Ingraham* v. *Baum.* This suit was originally brought in equity by William and Marguerite Baum against Lee H. Ingraham to set aside a probate sale to certain lots at which Ingraham became the purchaser at private sale and which the plaintiffs allege they had inherited from their father. The father of the plaintiffs died owning three lots in the city of Fort Smith, Arkansas, being the property in controversy. His widow removed to the State of Oklahoma with her children and married again. Their stepfather was appointed guardian for the children and procured an order of the probate court for the sale of the minor's interest in the land at a private sale. Lee H. Ingraham became the purchaser at the sale, and the sale was approved by the probate court, although it was made privately and no appraisement as required by the statute had been made. The

dower of the widow was not assigned to her, and she conveyed it to Lee H. Ingraham. Mary Baum, the oldest child, conveyed her interest to Ingraham when she became of age. A mistake was made in the deed as to the description of her interest, and reformation of the deed was sought.

The chancellor held that the sale of the minors' interest in the land was void because it was made at a private sale. The chancellor also reformed the deed from Mary Baum so as to recite that she had conveyed all her interest in the land to Ingraham. The decree of the chancellor in both of these respects was affirmed in the Supreme Court. The chancellor also made a finding in regard to betterments, and the only objection made to the finding in this respect by either party on appeal was that the chancellor had made a mistake in his finding as to values, and this court held that the finding of the chancellor in this respect was not against the preponderance of the evidence and was therefore affirmed. The opinion also recited that the complaint contained a prayer for the partition of the land and that this was ordered subject to the widow's claim of dower and the lien for betterments. This court said that this was the proper order to make, inasmuch as the chancery court had power to grant full relief.

Upon remand of the case commissioners were appointed to make partition according to the respective interests of the parties and subject to the defendant's lien for betterments.

It will be remembered that the father of the minor plaintiffs died leaving a widow and three children, all of whom were minors. The widow conveyed her unassigned dower to the defendant, Ingraham, and the oldest child conveyed her interest to him as soon as she became of age. Upon the remand of the case the chancery court first appointed commissioners to partition the land according to the respective interests of the parties. The commissioners reported that the land could not be divided without injustice to the parties and recommended a sale

of it. The commissioners were discharged, and their report approved and confirmed. A commissioner was then appointed to sell the land subject to the dower interest which was owned by the defendant, Lee H. Ingraham. L. H. Taylor bid off the property at the sale for the sum of $4,000. He assigned his bid to Mrs. Lucie Ingraham, the wife of the defendant, Lee H. Ingraham. The court directed that a deed be executed to her subject to the dower interest of the widow, which was owned by Lee H. Ingraham as a separate estate. The court then proceeded to make a division of the proceeds between the parties according to their respective interests, taking into consideration the lien of the defendant Ingraham against the land for betterments or improvements

The decision of the chancellor was wrong. This court in its former opinion said that the court had the power to grant full relief in making a division of the estate. The widow had conveyed her unassigned dower in the land to the defendant, Ingraham. It has been held that a conveyance by a widow of her dower in land before it has been assigned to her will be upheld in a court of equity, and her dower interest may be recovered by her alienee. *Weaver* v. *Rush,* 62 Ark. 51; *Griffin* v. *Dunn,* 79 Ark. 408; *Flowers* v. *Flowers,* 84 Ark. 557, and *Arbaugh* v. *West,* 127 Ark. 98.

The error of the court below consisted in not taking into account the unassigned dower of the widow which had been conveyed to the defendant, Ingraham. The sale was ordered made subject to her unassigned dower. This might have resulted in great prejudice to the plaintiffs, and might have prevented other parties than Ingraham from bidding at the sale. The court should have taken that into account in decreeing the partition of the land and erred in decreeing the sale without assigning dower. It is true the land was struck off at the sale to a third party, but without paying any part of the purchase money he assigned his bid to the wife of L. H. Ingraham, and under the circumstances, as disclosed by the record, we think it may be taken as showing that L. H. Ingraham

was the purchaser, and that the bid was made by a third party and assigned to his wife for him. In other words, we think the records show that he was the real purchaser, and that the bid of the third person and transfer to the wife of Ingraham was colorable merely.

It follows that the decree must be reversed and the cause will be remanded for further proceedings in accordance with the principles of equity and not inconsistent with the opinions in this case.

BUSH v. DELTA ROAD IMPROVEMENT DISTRICT OF LEE COUNTY.

Opinion delivered December 15, 1919.

1. HIGHWAYS—JURISDICTION OF COUNTY COURT.—1 Road Acts 1919, page 706, creating a road district, and providing that the improvement shall be laid out on the road as now laid out or which may be laid out by the county court, and any change in the line to be approved by the county court, and also that any bridges built shall be built as approved by the county court, *held* not an infringement of the constitutional jurisdiction of the county court over county roads.
2. CONSTITUTIONAL LAW—LEGISLATIVE POWER.—The inclusion of lands within the boundaries of a road district created by the Legislature is an exercise of legislative power which the courts can not set aside.
3. HIGHWAYS—ASSESSMENT OF BENEFITS.—A bill to enjoin the commissioners of a road district from proceeding to build the road upon the ground that the assessment upon plaintiffs' lands would be burdensome and in excess of benefits was prematurely brought prior to the assessments, since the tax payers would have notice of the assessments with opportunity to complain if found to be excessive.
4. HIGHWAYS—ROAD DISTRICT—LEGISLATIVE POWER.—The Legislature has power to create and to abolish local improvement districts, and the subsequent creation of a road district embracing the territory of a prior district held to abolish it.
5. HIGHWAYS—ROAD DISTRICT—DESCRIPTION OF BOUNDARIES.—1 Road Acts 1919, page 706, in including "that part of sections 21 and 22 on the left or east bank of the St. Francis River," when read in connection with other parts of the description, means the east side of the river, and is therefore not indefinite or uncertain.

Appeal from Lee Chancery Court; *A. L. Hutchins,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellants, who are property owners within the proposed road improvement district, brought this suit in equity against appellees, who are commissioners of said proposed district, to enjoin them from proceeding to construct the road provided for.

Appellants set out in their complaint the several grounds which they claim render the district invalid and there is an agreed statement of facts filed by the parties to the effect that the allegations are true. The several grounds of objections to the validity of the district will be stated separately and discussed in the opinion.

The chancellor was of the opinion that the district was valid, and it was decreed that the complaint should be dismissed for want of equity. The case is here on appeal.

Roleson, Gatling & Norton and *Daggett & Daggett,* for appellants.

1. The act is unconstitutional and void, because it gives the commissioners power to lay out and establish new public roads. 120 Ark. 277.

2. A large portion of the lands are inaccessible to the road and no benefits accrued, though they were assessed. 120 Ark. 286.

3. The act does not limit the amount of money to be expended in the construction of the road, nor does it provide the kind nor character of the road.

4. The commissioners have the power to determine the amount of assessment absolutely.

5. The description of district is uncertain and indefinite, and the district embraces other districts.

House, Rector & House, for appellees.

1. None of appellants' contentions that the act is invalid are tenable nor are they they sustained by any authorities. The recent cases of *Sallee* v. *Dalton, Cum-*

nock v. *Alexander, Reitzammer* v, *District* and *Booe* v. *Sims* settle all their contentions.

2. As to benefits, see 98 Ark. 113 and the recent decisions in cases *supra,* mss. op.; 96 Ark. 410; 120 *Id.* 286; 100 *Id.* 366; 108 *Id.* 366; 108 *Id.* 419; 83 *Id.* 344; 133 *Id.* 118.

3. The limitations as to the amount to be expended are fixed by law that it shall not exceed the benefits. Cases *supra;* 134 Ark. 30; 110 *Id.* 99; 113 *Id.* 193; 106 *Id.* 39; 120 *Id.* 377.

4. The Legislature has full authority to empower the commissioners to assess for benefits. 98 Ark. 549. If the assessments were excessive, the remedy was by appeal. 127 Ark. 318.

5. The same land can be included in two districts, but the act of 1911 creating District No. 1 is invalid under 118 Ark. 294. See also 109 Ark. 90-97; 113 *Id.* 363; 119 *Id.* 188; 103 *Id.* 452-463. *Van Dyke* v. *Mack,* 139 Ark. 524, is squarely in point. See also 123 S. W. 827; 100 Ind. 380.

A subsequent act repeals a former one to the extent of its repugnancy. 72 Ark. 8; 65 *Id.* 508; 92 *Id.* 79; 76 *Id.* 34; 82 *Id.* 305. The act creating the Delta district is a valid expression of the lawmaking power. Cases *supra.*

HART, J., (after stating the facts). The district in question was created by an act of the Legislature passed at its regular session in 1919 and approved March 8, 1919. Special Road Acts of the Session of 1919, vol. 1, p. 706.

It is first earnestly insisted that the act is unconstitutional because it gives the commissioners power to lay out and establish new public roads and takes away from the county court the jurisdiction over public roads vested in it by article 7, section 28, of the Constitution of 1874.

The section complained of is section 2, and it reads as follows:

"Said district is hereby organized for the purpose of improving that part of the public roads in Lee County, Arkansas (here follows detailed description of the roads). The improvements to be made by said district are to be made on the road as now laid out, or which may be laid out by the county court of Lee County, or substantially on this line, the nature of the improvements and any change in the line of said road to be approved by the county court of Lee County, Arkansas. The county court of Lee County shall lay out public roads along the lines selected by the board of commissioners in the manner provided by Act 422 of the Acts of 1911 of the State of Arkansas, being "An Act to amend section 7328 of Kirby's Digest of the Statutes of Arkansas. Said highway is to be constructed of macadam or such other material as the commissioners may deem best, and they are authorized to build such bridges and culverts as they may find desirable. Any bridges built shall be built as approved by said county court. In building said highway, the commissioners may proceed by letting the work as a whole or in sections, or they may build the same, or any part thereof, with day labor and the use of such county and State convicts as may be conceded them by the State, or Lee County. In case bids are advertised for, the commissioners shall have the right to accept or reject any bid."

The proposed road which is to be constructed and improved is to be something over twelve miles in length and provision is made for the laying out of a new road to the extent of four miles on each end thereof.

It is earnestly insisted by counsel for appellants that the act provides that the commissioners shall lay out the new road and make it mandatory upon the county court to establish the roads as laid out by the commissioners and thus destroys the freedom of judgment of the county court in the matter.

In *Sallee* v. *Dalton,* 138 Ark. 549, this court held that a special act of the regular session of the Legislature of 1919, creating a road improvement district in

Randolph County, Arkansas, which provided for the construction of new roads to be established as well as the improvement of old roads already established, did not violate article 7, section 28, of the Constitution of 1874, giving the county courts exclusive jurisdiction over roads.

Section 3 of that act provides that if any part of the proposed road has not been laid out as a public road, it is hereby made the duty of the county court of Randolph County to lay the same out in accordance with Act 422 of the acts of the General Assembly of the State of Arkansas for the year 1911.

It is contended by counsel for appellants that if this section had stood alone in that act, the court would have held it to be mandatory. We can not agree with counsel in this contention. The court held that this section of the statute was merely a method of procedure for the guidance of the county court in laying out the new roads, and was not mandatory so as to deprive the county court of its freedom of judgment in laying out new roads. This is shown both by the majority opinion and the dissenting opinion in that case.

Section 5 of the act provides that if the commissioners deem it to the best interest of the district to vary the line of road, they may report that fact to the county court, and in that event, if the county court approves the report, it may make an order changing the route of the road, and, if necessary, it shall, in that event, lay out the new road in the manner hereinbefore provided. That is to say, that it should lay out the new road in the manner provided in section 3. The majority of the court held in that case that section 5 and section 3, when construed together, did not deprive the county court of the judgment and discretion in the establishment of new roads vested in it by the Constitution, and Judge WOOD and the writer maintained the contrary view in a dissenting opinion. The court deliberately construed the statute, and no useful purpose could be served by going into the matter again. A careful reading of section 2 of the act

in the case at bar will show that it is in no essential respect different from sections 3 and 5, construed in the case just referred to.

Here the section provides that the county court of Lee County shall lay out public roads along the lines to be selected by the board of commissioners in the manner provided by act 422 of the Acts of 1911. It also provides that any change of line of the road is to be approved by the county court of Lee County. It provides that the bridges shall be built as approved by the county court. Therefore, we are of the opinion that the present statute in the respect complained of is substantially like that construed in *Sallee* v. *Dalton, supra,* and that the decision in this case on this point is ruled by the decision in that case. Other recent cases sustaining *Sallee* v. *Dalton, supra,* are *Cummock* v. *Alexander,* 139 Ark. 153; *Reitzammer* v. *Desha Road Imp. Dist. No.* 2, 139 Ark. 168; and *Hamby* v. *Pittman,* 139 Ark. 341.

The agreed statement of facts shows the following:

"That the construction of the proposed road is impracticable and not feasible; that large portions thereof run through low and swampy lands and that roads thereon can not be constructed without building such levees, embankments, bridges and culverts to such a cost as would be far in excess of any possible benefit that might accrue to adjoining lands.

"That the whole of the roads to be constructed under said act lies within the eastern part of the boundaries of the district; that practically all of the lands within the western half of the district are inaccessible to the proposed roads on account of natural obstacles lying between such lands and the proposed route of the roads, and that by reason thereof such lands can not be benefited in any manner by the construction of the roads. It is claimed, therefore, that the assessment against lands in the eastern half of the district will be burdensome and amount to confiscation."

It is earnestly insisted by counsel for appellants that, under the agreed statement of facts just quoted, the

court should have held the district unconstitutional. The act in the case at bar provides for the assessment of benefits by the board of assessors and for an equalization of these assessments upon a hearing given to all the property owners after due notice. The Legislature defined the boundaries of the district in the present case, and the inclusion of the property within the boundaries of the district was an exercise of legislative power which the court can not set aside.

In the case of *Coffman* v. *St. Francis Drainage District,* 83 Ark. 54, the Legislature created the district, fixed the boundaries thereof, and made the assessment. It was there claimed that the act of the Legislature was such an arbitrary abuse of the taxing power as would amount to a confiscation of the plaintiff's property without any benefit whatsoever to him. The court held that, while the Legislature, in creating a drainage district, may provide what lands shall be assessed for the improvement, and the extent of such assessment, the court will interfere where the act of the Legislature is such an arbitrary abuse of the taxing power as would amount to a confiscation of property without benefits. In that case as we have already seen, the assessment of benefits was made by the Legislature, and it was held that the courts could review the action of the Legislature upon proper allegations and proof showing that the proposed district amounted to a confiscation of the plaintiff's land.

In *Myles Salt Company, Limited,* v. *Board of Commissioners of Iberia and St. Mary Drainage District,* 239 U. S. 478, the court held that the Legislature of a State may constitute drainage districts and define their boundaries, or may delegate such authority to local administrative bodies; and that such action, unless palpably arbitrary and a plain abuse, does not violate the due process provision of the Fourteenth Amendment.

The court further held that the action of the local administrative body in including land within a drainage district which is palpably arbitrary, such inclusion not being for the purpose of benefiting such land but for the

purpose of obtaining revenue therefrom, amounts to a deprivation of property without due process of law under the Fourteenth Amendment. Mr. Justice McKenna, who delivered the opinion of the court, said:

"It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not and can not be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation. *Wagner* v. *Baltimore, ante,* p. 207. We are not dealing with motives alone but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind."

The effect of these and other decisions of the Supreme Court of the United States and of this court show that the property owner would be entitled to relief at some stage of the proceedings upon proper allegations and proof that his lands were not benefited, or that the proposed improvements taxed his lands so high as to amount to a confiscation of them. As we have already seen, under the provisions of the present act, it is provided that the commissioners shall make the assessment of benefits and damages, and that due notice thereof shall be given to the property owner in order that he may be heard. This is the time and place for the property owner to show that his property is not benefited at all or that it is taxed so high as to amount to a confiscation of it. Taxation by special assessment is defensible only upon the theory of corresponding special benefits to the property assessed. The question of benefits is a question of fact. The location and surface conditions of the lands are matters to be considered by the commissioners in assessing the lands. The present action is premature on

this question. A full opportunity will be given to the land owner to make his complaint in this respect before the board of commissioners when his lands are assessed and the action of the board is subject to judicial review within the limits above announced upon proper allegations and proof. Such is the effect of the holding of this court in *Harrison* v. *Abington,* 140 Ark. 115.

It is next insisted that the present district is invalid because the lands of appellants are situated in another improvement district which had for its object and purpose the improvement of the proposed road in the present district as well as other roads in Lee County. The record does not show that the board of commissioners of that district have entered upon the work of constructing and improving the proposed road. Under the decisions cited in this opinion as well as many other decisions of this court, it is firmly established that the Legislature has full power to establish local improvement districts and to abolish those already created. If it be assumed that the prior district was a valid one, it may be said that the creation of the present district impliedly repealed it so far as the construction of the present proposed road is concerned. The two statutes in this regard would be repugnant to each other, and the later act will repeal by implication the prior one.

Finally it is insisted that the boundaries of the district are not definitely described in the act, and for that reason the act is void. For instance, it is insisted that the act defining the boundaries of the district is made indefinite by the use of the following language: "and that part of section 21 and 22 on the left or east bank of the St. Francis River." The map shows that a part of section 21 is on the east side of the St. Francis River and part of it on the left side of the river. All of section 22 is on the east side of the river, a corner of the section only touching the river. When this part of the description is read in connection with the other parts, it is evident that the words, "east bank of the river," were used in the sense of east side of the river. The same reason-

ing applies to the description of the lands bordering on "Old River."

We have examined the description and are satisfied that it is definite and certain.

It follows that the decree must be affirmed.

SCONYERS v. SCONYERS.

Opinion delivered December 15, 1919.

1. GUARDIAN AND WARD — TRANSACTIONS BETWEEN. — Purchase of land by a guardian from his minor ward is a transaction which the law subjects to the closest scrutiny, and will be upheld only in case the guardian has exercised the utmost good faith.
2. GUARDIAN AND WARD—GOOD FAITH IN IN PURCHASE OF GUARDIAN FROM WARD.—Evidence that land purchased by a guardian from his minor ward was worth at least the purchase price and perhaps very much more, that the sale was made by the ward to procure an education, and that the guardian did not disclose to the ward that he owed him money, *held* not to show the necessary good faith required to uphold the transaction.
3. GUARDIAN AND WARD—SALE TO GUARDIAN—RATIFICATION.—A ward did not ratify a sale of real estate to his guardian by demanding payment of a purchase money note after the guardianship expired where he demanded payment without knowing his right to rescind and while the guardian's influence over him still continued.
4. GUARDIAN AND WARD — CONTINUANCE OF RELATION OF TRUST.— There is no presumption of law that the relation of trust and confidence between a guardian and ward terminates instanter when the ward comes of age or the guardianship closes, as when the ward's disabilities are removed.

Appeal from Jackson Chancery Court; *Lyman F. Reeder,* Chancellor; reversed.

John W. Stayton and *Samuel M. Casey,* for appellants.

A guardian can not buy his ward's land, and this case falls squarely within 54 Ark. 640; 96 *Id.* 573; 129 *Id.* 149. No case is cited by appellee to the contrary. 112 Ark. 141 is not in point. Pom. Eq. Jur. (3 Ed.), §

961. *Uberrima fides* is required, and the benefit to the guardian invalidates the deed or sale.

Boyce & Mack, for appellee.

1. The sale here was open, fair and honest, and the consideration was full, and *uberrima fides* was exercised, and there was no advantage taken in any way, and the sale was not even voidable. Black on Rescission and Cancellation, sec. 40; Pom. Eq. Jur. (4 Ed.), sec. 956; 39 Cyc. 371; 112 Ark. 141. See also 84 *Id.* 557; 78 *Id.* 111; 96 *Id.* 251.

2. The evidence shows conclusively that every act of appellee and every duty he owed his brother and ward will bear the most careful analysis and stand every test of the law as to good faith, fairness and honesty, and the chancellor so found. The price was adequate, and the judgment should be affirmed. *Supra.*

SMITH, J. Appellant and appellee are the sons of T. J. Sconyers, who died in the year 1905, owning at the time of his death a tract of land in Independence County, which was his homestead. In addition, he owned a tract of land containing two hundred acres in Jackson County. He was survived by six children and a widow, who was the stepmother of the children. In a manner not necessary to state here the Wolff-Goldman Realty Company of Newport acquired three of these shares in the year 1915. The other shares were owned by appellant, appellee and another brother named Oscar. Appellee had acquired the interest of the widow. Shortly before the transactions occurred out of which this litigation arose appellee bought the share of the Wolff-Goldman Realty Company and of his brother, Oscar, who had just come of age, thereby becoming the owner of the whole title to all the land except the undivided one-sixth interest owned by appellant. Appellant was born January 16, 1898, and was the youngest of the children.

On April 9, 1912, appellee was appointed guardian for appellant, and took charge of his interest in the above lands as well as the personal property in which he had

an interest. About May, 1916, appellant entered into a contract with appellee for the purchase of the undivided one-sixth interest which appellee did not then own, and as appellant was not of age an order was procured from the Independence Chancery Court on June 5, 1916, removing appellant's disability of nonage. It is shown that appellant employed the attorney who had charge of that proceeding; but it is reasonably certain that this action was taken at the suggestion of appellee. Appellee was finally discharged as guardian on October 18, 1916, one day after the execution and delivery of the deeds. On October 17, 1916, appellant executed to appellee two deeds, one of which conveyed the lands in Independence County for the recited consideration of $250, and the other conveyed the lands in Jackson County, the same being the lands in controversy, for the recited consideration of $1,250; and this suit was brought to set aside the conveyance of the Jackson County lands.

The complaint contains many allegations of fraud, among others one to the effect that appellant was told and believed that the two instruments which he executed were mortgages, and that the purpose of their execution was to enable him to procure money to pay his expenses at school. But, without setting out the testimony, it may be said that the testimony does not support that allegation, and the relief prayed can not be awarded on that account.

It is insisted, however, that the law denied appellee the right to purchase appellant's interest under any circumstances whatever; but that if such right did exist the testimony does not show that *uberrima fides* which must exist before the guardian can purchase the land of his ward. We think appellant is not correct in his first contention, but is correct in his second. The court below held with appellee on both contentions, and in support of the decree there pronounced it is here insisted that the court below correctly found the facts on the issue of undue influence; but that if that finding is not supported

by the testimony a subsequent ratification of the sale has been shown.

In support of the contention that appellee could not purchase appellant's interest in the land the cases of *Hindman* v. *O'Connor,* 54 Ark. 633, and *Haynes* v. *Montgomery,* 96 Ark. 573, and *Sorrels* v. *Childers,* 129 Ark. 149, and other cases are cited, in which the trustee had bought at a sale the title of the *cestui que trust,* all of which cases held that as a matter of public policy this could not be done. Those cases are not applicable here for the reason that the guardian has not acquired at some sale the title of the ward, but has acquired title from the ward. This last is a transaction which the law subjects to the closest scrutiny, and, having done so, permits to stand in the event only that the negotiation and consummation of the deal has been characterized by the utmost good faith on the part of the guardian. The test in such cases is stated in the case of *Waldstein* v. *Barnett,* 112 Ark. 141, in a quotation there copied from the case of *Reeder* v. *Meredith,* 78 Ark. 111, which had been taken from section 195 of Perry on Trusts, and which need not be restated here.

We think, however, that the testimony in this case does not meet that test. The testimony is conflicting as to the value of the land, but all the witnesses agree that it was worth at least as much as appellee paid for it at the time of the purchase, and a number of witnesses placed the value much higher. Several of the witnesses who testified that a fair price had been paid for the land also stated that their estimate of the value of the interest sold was based upon the rent derived from it. It was shown that appellee, in his settlement with appellant, charged himself with rent at $5.50 per acre, when he was in fact working the land on shares and receiving the equivalent of ten to twenty dollars per acre. Appellant was not advised of that fact, and appellee excuses his failure so to do by saying that he regarded himself as the tenant, and that he was charging himself with what he regarded as reasonable rent for the land.

Appellant desired to go to school, and sold the land to raise money for that purpose. Appellee had failed for nearly four years to file a settlement of his guardianship, and appellant did not know that any sum was due him by his guardian; and it is now insisted that no sum was due him; but, as we understand the testimony, there was in fact $147.85 due appellant at the time of the sale. This sum might not have been sufficient to defray appellant's expenses at school, but he was entitled to know that this sum was due him in reaching a decision as to whether or not he should sell his land.

Appellant had gone to school near Fort Smith, and was at school when this sale was made, and he accompanied his brother to Fort Smith for the purpose of acknowledging the deeds. At the time the deeds were delivered no money was paid and no notes for purchase money were given. A straight warranty deed was made, reciting the receipt in full of the consideration, and no lien was reserved in the deed or other security given. At the end of about a year a settlement between the brothers was had, in which no calculation of interest was made. Notes for the purchase money were not given until the fall of 1917, and these were not paid when due. An attorney was employed by appellant to collect the first of these notes to fall due; and it is said that this constituted a ratification of the sale. Another note has not yet been paid, although a tender of payment was made by appellee and refused by appellant. It is now said that when appellant demanded payment of the first note he did not know that he had any rights in the matter except to require payment of the notes, but that when he was advised that he could rescind he elected so to do and refused to receive payment of the unpaid note.

We think there has been no ratification, for appellant was not advised as to his rights when he demanded payment of the first note.

There is no presumption of law that the relation of trust and confidence terminates *instanter* when the ward comes of age or the guardianship closes. The contrary is

shown to be the law in the case of *Haynes* v. *Montgomery*, 96 Ark. 573, where this court quoted with approval from 1 Story on Equity (13 Ed.), sec. 317, the following statement of the law:

"* * * It is obvious that during the existence of the guardianship the transactions of the guardian can not be binding on the ward if they are of any disadvantage to him; and indeed the relative situation of the parties imposes a general inability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate in the highest sense of the term the fullest deliberation on the part of the ward and the most abundant good faith (*uberrima fides*) on the part of the guardian. For in all such cases the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased; and if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian." There was no ratification here for the additional reason that the influence of the guardian had not ceased, when the settlement was made; as is evidenced by appellant's failure to charge the interest then due. He was still under twenty-one years of age, although his disability of nonage had been removed, and the guardianship had closed.

The decree of the court below will, therefore, be reversed and the cause remanded with directions to set aside the deed to the Jackson County lands.

BARTON v. MATTHEWS.

Opinion delivered December 15, 1919.

SUBROGATION—PAYMENT OF DEBT.—Before the right of subrogation can be claimed, the party seeking to be subrogated to securities in the hands of another must have paid the entire debt of the third person, payment of a portion only of the debt not giving rise to the right.

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

R. S. Hudson, for appellant Barton.

1. Barton was clearly subrogated to the rights of T. M. Neal. 54 Ark. 273; 86 Ga. 198; 124 Ind. 254; 123 Ala. 325; 71 Iowa 106.

2. The deed of Mary J. Matthews to her mother was void because she was one of the parties to receive the benefit of the foreclosure sale to Barton and because made for the benefit of a debtor when insolvent. 10 Ala. 231; 3 Md. 11; 47 W. Va. 156; 69 N. Y. 187.

3. As to Barton's right to subrogation, see also 56 Ark. 73, 85 Ala. 233. Payment of the entire debt was not a condition precedent; part payment was sufficient. 147 Ind. 406; 96 *Id.* 21.

R. W. Holland, for appellee.

1. The purchaser of land at judicial sale buys at his risk so far as title is concerned, and is charged with all the equities against it. *Caveat emptor* applies. 22 Ark. 92; 32 *Id.* 321. Barton paid his money and got what he purchased, 80 acres of land belonging to the estate of A. J. Matthews, deceased. The court was the vendor, and when the sale was confirmed it was a completed transaction. 53 Ark. 413.

2. Subrogation need not be argued; but, if so, Barton did not pay the whole debt but only a *part*. 90 Ark. 51; 96 *Id.* 594; 76 *Id.* 245. The decree is right, equitable and just, and there is no equity in appellant's claim.

SMITH, J. A. J. Matthews in his lifetime owned the south half northeast quarter section 34, township 8

north, range 20 west, and executed a mortgage thereon, in which his wife Lavissa joined, to one T. M. Neal, to secure a debt of $1,650. Matthews died, and a suit was brought against his widow and heirs to foreclose this mortgage. In the decree rendered in that cause it is recited that L. E. Barton tendered into court the sum of three thousand dollars as his bid for the land, and that bid was accepted and a commissioner appointed to execute a deed to Barton. The mortgage debt, which appears to have been reduced to the sum of $744.50, was ordered to be first paid, and the sum of $1,600 was ordered appropriated and applied to the payment of the purchase price of the south half southwest quarter section 26, township 8 north, range 20 west, which the widow had bought as a homestead for herself and her children, and the remainder was ordered to be paid to certain of the children. This decree was rendered December 11, 1916.

There were ten of these children, one of whom was named Mary J. Matthews, and against whom a judgment for $720 was rendered in the chancery court on September 16, 1916, in favor of one J. W. Turnbow. On November 1, 1916, Mary J. Matthews executed to her mother a deed to her interest in the land in section 34, and about that time the other adult children did likewise.

On September 13, 1917, an execution issued on the Turnbow judgment, which was levied on the undivided interest of Mary J. Matthews in the lands in section 34, whereupon Barton brought suit to restrain the sheriff from selling that interest. A decree was entered in that cause on October 19, 1917, in which the court found that the interest of Mary J. Matthews in the land in section 34, after discharging the mortgage indebtedness, was $200, and that Turnbow was entitled to receive, by virtue of his judgment and execution thereunder, the sum of $200 from the sale of said land. The court thereupon ordered that Barton pay to Turnbow the sum of $200, whereupon he "should be subrogated to all the rights of said J. W. Turnbow under said judgment to the extent of the present interest of the said Mary J. Matthews as

heir at law of the said A. J. Matthews." No question is raised as to the validity of either of these decrees.

Thereafter Lavissa Matthews, the widow of A. J. Matthews, brought this suit against Barton and Mary J. Matthews to quiet her title to the land in section 26; and an answer and cross-complaint was filed by Barton, in which he prayed that he be subrogated to all the rights of J. W. Turnbow against the said Mary J. Matthews in and to her one-tenth interest in the estate of A. J. Matthews, deceased. The relief prayed by the widow was granted, and that prayed by Barton was denied, and this appeal has been prosecuted from that decree.

The court properly denied Barton's prayer for subrogation, for the reason that he had paid a portion only of the debt due Turnbow. In *Richeson* v. *National Bank of Mena*, 96 Ark. 601, we quoted from *Bank of Fayetteville* v. *Lorwein*, 76 Ark. 245, the following statement of the law:

"Before the surety can claim the right to the benefit of any of the securities, he must first pay the entire debt of the principal for the payment of which the securities were given. As is said in the case of *Bank of Fayetteville* v. *Lorwein*, 76 Ark. 245: 'The right of subrogation can not be enforced until the whole debt is paid, and until the creditor be wholly satisfied, there ought to and can be no interference with his rights or his securities which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim.' Sheldon on Subrogation, sec. 127; 4 Pom. Eq. Jur, sec. 1419, 27 Am. & Eng. Ency. Law 210; *McConnell* v. *Beattie*, 34 Ark. 113, and cases cited in *Bank of Fayetteville* v. *Lorwein*, *supra*."

See also Sheldon on Subrogation (2 Ed.), secs. 14, 70; *Jones* v. *Harris*, 90 Ark. 51, 55; *Plunkett* v. *State Nat. Bank*, 90 Ark. 86, 88, *State ex rel. Luck* v. *Atkins*, 53 Ark. 303; *McConnell, Admr.*, v. *Beattie, Admr.*, 34 Ark. 113; *Schoonover* v. *Allen*, 40 Ark. 132, 137, 138; *Receivers of N. J. Midland Ry. Co.* v. *Wortendyke*, 27 N. J. Eq. 658; *Morrow* v. *U. S. Mortgage Co.*, 96 Ind. 21; *Lumberman's*

Ins. Co. v. *Sprague,* 59 Minn. 208, 60 N. W. 1101; *Muller* v. *Flavin,* 13 S. D. 595, 610; *Featherstone* v. *Emerson,* 14 Utah 12; *Kyner* v. *Kyner,* 6 Watts (Pa.) 221.

Decree affirmed.

PEAY v. SOUTHERN SURETY COMPANY.

Opinion delivered December 15, 1919.

1. ESTOPPEL—RATIFICATION.—Where a principal received the benefit of a payment by the surety on his bond in a judgment obtained against the obligee of the bond, the principal will be estopped to deny the authority of the surety to make such payment.
2. PRINCIPAL AND SURETY—LIABILITY OF SURETY.—Generally the liability of the principal is the measure of the surety's liability, and if a surety pay where no liability exists the payment will be treated as voluntary and not recoverable.
3. PRINCIPAL AND SURETY—PAYMENTS BY SURETY.—Where a contractor's application for an indemnity bond provided that, in any accounting between the contractor and the surety, the surety should be entitled to credit for any and all disbursements made in good faith under the belief that it was liable, or that it was necessary to make the same, a surety is entitled to recover payments made and expenses incurred in good faith in investigating claims against the contractor for nonperformance of his contract.
4. MORTGAGE—ABANDONMENT.—A surety which takes a mortgage from its principal to indemnify itself from liability as surety will not be held to have abandoned its mortgage by endeavoring to reimburse itself for expenses incurred out of a judgment recovered by the principal.
5. PRINCIPAL AND SURETY — RECOVERY OF EXPENSES BY SURETY.—Where, under the terms of an agreement of indemnity, the surety was entitled to recover disbursements made in good faith, the surety was entitled to recover the amount expended on attorney's fees and traveling expenses incurred in defending suits, etc.
6. PRINCIPAL AND SURETY—RECOVERY OF PREMIUMS.—Where a contractor paid a single year's premium to a surety company, and defaults of which the company was liable occurred within that year, the company is not entitled to premiums for subsequent years because the liabilities growing out of the defaults were not adjusted for several years.

Appeal from Pulaski Chancery Court; *John E. Martineau,* Chancellor; reversed in part.

J. A. Comer and *Mehaffy, Reid, Donham & Mehaffy,* for appellants.

Before appellee can recover, it must show that the sums alleged to have been paid out were paid, and that it was legally liable for the sums paid under the bond, and that Peay was legally liable for said sums. The liability of a surety is identical with that of the principal. If Peay was not liable for the sums alleged to have been paid, then appellee was not liable and it can not recover from Peay. The liability of a surety is measured by the strict terms of its contract, and can not be extended by construction or implication. Before the surety can be liable the principal must be, and a surety is discharged when liability of the principal is discharged or extinguished. 119 Ark. 102. A surety who voluntarily pays a debt on which a principal is not liable can not recover; he is a volunteer. 52 N. E. 245; 14 Ky. Law Rep. 267; 85 Mass. 524. A surety is discharged by payment of the debt. 96 Ark. 268. A release of the principal releases the surety and the property mortgaged as security. 32 Cyc. 155. All the payments made by appellee for which it now sues were made prior to the decree in the city of Eufaula case in the United States District Court. Appellee was a party to that suit but consented to being made a codefendant, and all these sums were concluded by the judgment in that case. Peay was not a party to that suit, and neither Peay nor appellee were liable for the claims in this suit. All these matters have been adjudicated in another suit between the same parties, and appellant Peay, the principal, recovered judgment against the city of Eufaula. If appellee had not *voluntarily* paid the $2,500, it would be released by reason of the judgment recovered by Peay. 32 Cyc. 152; 40 N. E. 169.

A release of the principal releases the surety and property mortgaged. 32 Cyc. 155.

Buzbee, Pugh & Harrison, for appellee.

1. It was not necessary for Peay to be joined as defendant in any of the suits brought against appellee un-

der the laws of Oklahoma. Okla. Rev. Laws 1910, § § 969 and 4694; 161 Pac. 793. Nor was it necessary for appellee to notify Peay of the making of claims or bringing of suits against appellee as surety on Peay's bond; but Peay was notified continuously until all these claims were closed up. Peay had ample time to arrange all these matters before the suits were brought and settled by appellee. Peay was duly notified of the Rogers Lumber Company claim, and had a year to adjust same before suit. He paid no attention to it. The Hutchings attorney's fee and the items of costs and fees to witnesses should have been allowed by the court. 93 Ark. 530. Franklin earned his fee, and traveling expenses were incurred in the service of Peay and on his behalf. All these, as well as the amounts paid by Franklin in settlement of Rogers Lumber Company, Eckelcamp and Baker suits, were paid in good faith, and proper charges against Peay under his indemnity agreement with appellee and should be allowed. All these claims were settled with the consent and on the advice of Peay's attorney, Tisdale. Such costs, expenses and attorneys' fees were paid in defending those suits by appellee and it is entitled to recover for all of them. 124 Mass. 67; 127 N. W. 848; 17 Mass. 169. The agreement of Peay was to save it harmless from all liability, damages, loss, costs, charges and expenses, including attorneys' fees, and all should be now allowed on the cross-appeal here. 96 N. W. 782; 134 Ark. 499; 202 Fed. 483; 30 So. Rep. 758; 136 Ark. 227; 175 Pac. 701.

2. The $2,500 paid in compromise settlement of the city of Eufaula suit was only considered and adjudged in the judgment recovered by Peay, and the decree of the lower court against Peay should be affirmed, and appellee should be given judgment on the cross-appeal for the items claimed, $766.79.

3. As to marshaling assets, see 3 Pom. Eq. Jur. (2 Ed.), sec. 1414.

HUMPHREYS, J. This suit was instituted in the Pulaski County Chancery Court by appellee against appellants to recover $6,393.26 from Nick Peay, and to foreclose a mortgage given by Nick Peay and R. B. Malone, on the 30th day of January, 1913, to secure said indebtedness. Prior to the institution of the suit, R. B. Malone had died, and the administrator of his estate and his minor heirs, through their guardian, were made parties defendant to the suit, and are a part of the appellants herein. The other appellants, in addition to Nick Peay, were made parties defendant in the suit on account of alleged mortgage and judgment liens held by them upon the same property. There is no controversy in this court concerning the respective priorities of the lien claimants. The only issues involved on the appeal grow out of the judgment rendered against Nick Peay and the lien declared upon the land to secure same. It was alleged in the complaint that appellee had expended the amount aforesaid in liquidation of claims against Nick Peay, growing out of an attempted performance of a contract made by him to construct a water and sewer system for the city of Eufaula, Oklahoma; that said amounts were paid pursuant to and within the terms of an application for and an indemnity bond executed by appellee to said city of Eufaula to guarantee the proper construction of said water and sewer system, in accordance with the contract between said city and Nick Peay. The written application for and the indemnity bonds given by appellee to the city of Eufaula and the State of Oklahoma were made parts of the complaint. That portion of the application fixing the liability between appellant, Nick Peay, and appellee, Southern Surety Company, in case of default in the construction of the water and sewer systems, or in case of failure to pay for labor and material used in the construction thereof, reads as follows: "* * * will at all times indemnify and keep indemnified the company and hold and save it harmless from and against any and all liability, damages, loss, costs, charges and expenses of whatsoever kind or nature

including counsel and attorney's fee, which the company shall or may at any time sustain or incur by reason or in consequence of having executed the bond herein applied for, or by reason or in consequence of the execution by the company of any and all other bonds executed for us at our instance and request, and that we will pay over, reimburse and make good to the company, its successors and assigns, all sums and amounts of money which the company or its representative shall pay, or cause to be paid, or become liable to pay, on account of the execution of any such instrument, and on account of any liability, damage, costs, charges and expenses of whatsoever kind or nature, including counsel and attorney's fees, which the company may pay, or become liable to pay, by reason of the execution of any such instrument, or in connection with any litigation, investigation, or other matters connected therewith, such payment to be made to the company as soon as it shall have become liable therefor, whether the company shall have paid out said sum or any part thereof or not. That in any accounting which may be had between us and the company, the company shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it in good faith under the belief that it is or was liable for the sums and amounts so disbursed, or it was necessary or expedient to make such disbursements, whether such liability, necessity or expediency existed or not."

The items alleged to have been paid, pursuant to the contract and under the terms of the bond, consisted of $2,500 paid to compromise a $40,000 suit, which had been brought by the city of Eufaula against Nick Peay, alleging improper construction of the systems and a failure to clean them out, with the costs accruing in the case; a number of payments for labor and materials, alleged to have been used in the construction of the systems; telegraph, railroad fares, special fees for investigating the claims and lawyers' fees in defending suits and adjusting claims.

Appellant Nick Peay filed an answer, denying that he had made default in any particular in the performance of his contract with the city of Eufaula, or that he had failed to pay for any material or labor used in the construction of water and sewer systems for said city.

The cause was submitted to the court, upon the pleadings, exhibits thereto, the evidence of the witnesses and documents adduced and identified by them, from which the court found that appellant Nick Peay was indebted to appellee in the sum of $4,626.83, on account of amounts paid for him under the terms of the application and bonds it had executed for him to the city of Eufala and the State of Oklahoma; that, to secure due payment of said sum, the mortgage, sought to be foreclosed, was executed by Nick Peay and R. B. Malone in his lifetime; that appellee was entitled to a lien upon the land for that amount and a decree of foreclosure. The decree was rendered in accordance with the findings of the chancellor, from which findings and decree an appeal has been prosecuted to this court by appellants. The court found that appellee was not entitled to recover on account of the following claims paid by it: $150 lawyer's fees to W. T. Hutchings; $9.44 for his traveling expenses; $7.35 for the traveling expenses of J. H. Wall, an attorney to assist Hutchings; and $600 additional claims by appellee for premiums on the indemnity bonds, alleged not to have been paid by appellant Peay. From the dismissal of appellee's bill claiming these amounts, the cross-appeal has been prosecuted to this court. The whole case is therefore before us for trial *de novo*.

The evidence on behalf of appellee tends to show that it received notice from the mayor of Eufaula about March 9, 1914, to the effect that appellant, Peay, had violated his contract with the city; that, in April following, it received notice from attorneys claiming the nonpayment by Peay of labor and material claims; that it immediately gave Peay notice of these claims, but that he paid little or no attention to them; that it then employed E. J. Franklin to go upon the ground and make

a thorough investigation of the claims; that, on July 14, 1914, the city brought a suit against it for $40,000, on account of Peay's failure to construct the sewer and water systems in accordance with his contract; that soon thereafter a number of other suits were brought against it for claims on account of labor, materials, moneys advanced and rents due on machinery used in the construction of the systems; that, immediately upon the institution of these suits, it gave appellant, Peay, notice to adjust or defend them; that he employed C. J. Tisdale, who rendered advice and assistance in most of the adjustments and settlements; that the claim of Eckelcamp Hardware Company, for $386.54, was investigated and settled for $228.85, on the advice of Tisdale and Hutchings; that the claim of C. K. Baker for a pay roll, representing $655.05, which had been O. K'd as correct by W. A. Wood, appellant Peay's superintendent, was settled for $200; that the claim of the Rogers Lumber Co., for $73.85, was O. K'd by Mr. Wood, but was settled, after judgment was rendered thereon and after it was ascertained that the material sued for was delivered on the job, for $90.26; that the Eufaula National Bank suit, for $3,233.33, and the suit of the Municipal Excavator Company, for $1,500, on account of rents for the use of machinery used in the construction of the work, brought against appellee under the bond, were defeated through the efforts of an attorney who was paid $150 fee, or $75 in each case, and additional smaller items for expenses for himself and assistant attorney; that appellant's attorney, Tisdale, was present and assisted in the defense of these cases; that the suit for $40,000, brought by the city of Eufaula against Nick Peay, was settled on a basis of $2,500, after an inspection by D. D. Smith, an engineer sent by appellee to inspect the systems and after a thorough investigation by Franklin and upon the advice of both Tisdale and Hutchings that a large judgment would be more than likely rendered against appellee on its indemnity bond; that it paid E. J. Franklin a fee of $500 for his investigations and assistance in compro-

mising and settling the claims, including the $40,000 suit by the city of Eufaula against appellee, which investigations and services covered a period of about two years; that the other items it expended were for telegraph and traveling expenses of its engineers and lawyers, and costs incident to the litigation growing out of the adjustments of the claims; that the item of $2,500 paid out by it in settlement of the $40,000 suit brought by the city of Eufaula against it on the indemnity bond was afterwards utilized by appellant Peay in the adjustment and settlement of a suit which he had brought in the United States District Court for the Eastern District of Oklahoma against the city of Eufaula, for the balance due him upon his contract for constructing the water and sewer systems, and that, by the use of the item, he secured a compromise judgment for $2,500 more than he would have otherwise obtained.

The following clause appeared in the judgment rendered in favor of Nick Peay against the city of Eufaula in the United States Court for the Eastern District of Oklahoma: "It is especially agreed that this settlement includes the payment in full of all right of action or claim against the city of Eufaula on the part of the Southern Surety Company for the sum of $2,500, under a judgment formerly rendered in favor of the city of Eufaula and against the Southern Surety Company as surety of said Nick Peay; and thereupon the parties have further stipulated and agreed in open court that judgment might be rendered herein against the city of Eufaula in the sum of $6,000."

The testimony of appellant, Nick Peay, tended to show that he constructed the water and sewer systems in accordance with his contract and that the city was indebted to him for a large sum at the time it brought suit against his bondsmen, the appellee herein; that he so informed appellee and advised it not to pay anything for an acquittance; that he employed an attorney to defend the suit; that he owed no balance for labor and material that entered into the construction of the systems, and so

advised appellee; that he rendered every assistance to defeat the claims; that the employment of parties to investigate the claims and of attorneys to defend against them was without his consent.

The record in the case is voluminous, and for that reason we have not attempted to set the evidence of each witness out in detail.

It is insisted by appellant, Peay, appellee failed to establish by the weight of evidence that he owed the amounts it expended for him, and that the evidence conclusively shows said appellant was not indebted to the city of Eufaula when the appellee paid the $2,500 item in settlement of the $40,000 suit brought on the bond by said city against appellee. The basis of the latter contention rests on the fact that, after the payment, appellant, Peay, recovered a judgment of $6,000 against said city in the United States Court for the Eastern District of Oklahoma for a balance of $6,000 due him for constructing the water and sewer systems. We think Peay is clearly estopped from raising any question as to his liability on the $2,500 payment. It is apparent from the face of the judgment in the United States court that he received the benefit of the payment in the compromise settlement, thereby increasing his judgment to that amount. The acceptance of a benefit under, necessarily amounted to the ratification of, the payment. The liability for the other payments must be determined on the interpretation of the contract and an analysis of the evidence. Generally, the liability of the principal is the measure of the liability of the surety; so, if the surety should pay where no liability existed against the principal, it would be treated as a voluntary, nonrecoverable payment. This rule, however, may be modified by contract. For example: In the case of *United States Fidelity & Guaranty Co.* v. *Baker,* 136 Ark. 237, a provision in an indemnity bond was held to be legal which provided that a voucher showing payment by the guarantor to the guarantee should be conclusive evidence (except for fraud) as to the fact and the amount of the liability of

the principal to said guarantor. A very similar provision was incorporated in the contract between Peay and appellee. It is as follows: "In an accounting which may be had between us and the company, the company shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it in good faith under the belief that it is, or was, liable for the sums and amounts so disbursed, or it was necessary or expedient to make such disbursements, whether such liability, necessity or expediency existed or not."

This language is quite broad, and our interpretation of it is that Nick Peay is responsible to appellee for all good faith payments it made in absolving itself from the claims made against it on account of the guaranty bonds it executed to the city of Eufaula and the State of Oklahoma, guaranteeing the proper construction of the sewer and water systems in said city, and the payment of all labor and material that entered into the construction thereof. We have carefully read and analyzed the evidence, and our conclusion is that, when measured by the contract fixing the liability of Peay, as interpreted above, it can not be said that the finding of the chancellor against Peay is contrary to the weight of the evidence. On the contrary, we are convinced that appellee paid only such amounts to claimants under the bonds as it believed in good faith Peay owed, after making a very careful investigation and after making every effort to settle the claims for as little as possible. Insistence is also made that the court erred in allowing the items of attorneys' fees, costs, charges for inspection, investigation and traveling expenses. Again appellant is met with the terms of his contract by which he must abide. The contract provides that appellee may recover from Peay any "damage, costs, charges and expenses of whatsoever kind or nature, including counsel and attorney's fees which the company may pay * * * in connection with any litigation or other matters connected therewith." It is suggested, however, that appellee has abandoned its right to a lien under its mortgage in this State

by filing an intervention, seeking satisfaction out of the fund deposited in the United States District Court for the Eastern District of Oklahoma to pay the $6,000 judgment recovered by Nick Peay against the city of Eufaula. The issues involved in the instant case have not been adjudicated in that court, so appellee is not precluded from prosecuting this suit under the doctrine of *res adjudicata,* and we do not think it can be said with reason that a creditor abandons his security by attempting to collect his claim from another source or out of different property from that on which his lien exists.

Under the cross-appeal, it is insisted that the court erred in refusing a judgment for $150, attorney's fees to W. T. Hutchings, traveling expenses of $9.44 paid to him, and $7.35 to his assistant, J. H. Wall. These expenditures were made in defending suits which were brought against appellee on the bonds, and were within the terms of the contract between appellee and Peay. Judgment should have been rendered for them.

It is also insisted on the cross-appeal that the court erred in refusing a judgment for additional premiums. Appellant Peay paid the premium for one year. The record shows that the defaults of Peay under his contract with said city, for which appellee became responsible, occurred within the year, and that appellee received notice of said defaults and failure to pay claims for material and labor within that time. After notice to appellee of Peay's defaults, it could not charge and collect second, third and fourth year premiums just because the liabilities growing out of the defaults were not adjusted for several years. The liabilities accrued during the first year, and appellee had notice of them during that time. *Southern Surety Co.* v. *Perdue,* 134 Ark. 458.

The decree on the direct appeal is affirmed; and, on the cross-appeal, is reversed and remanded with directions to enter a judgment in accordance with this opinion.

SHUFFIELD v. STATE.

Opinion delivered December 15, 1919.

1. JURY—SELECTION OF TALESMEN BY SHERIFF.—Kirby's Digest, section 793, as amended by Acts 1917, page 1121, providing for the disqualification of sheriffs to serve process by an affidavit of prejudice, etc., filed by the accused, refers to the issuance of process in vacation, and has no reference to the conduct of a trial in the presence of the court, or to the selection of talesmen under the orders of the court.
2. JURY—DISQUALIFICATION OF SHERIFF—DISCRETION OF COURT.—After a criminal trial has begun, the disqualification of the sheriff to select talesmen by reason of bias or prejudice is a matter addressed to the discretion of the court.
3. JURY—DISQUALIFICATION OF SHERIFF TO SELECT TALESMEN.—Where accused's affidavit charged the sheriff with prejudice and bias, but no proof to support the charge was offered, the court did not abuse its discretion in refusing to disqualify the sheriff from selecting talesmen, although the sheriff was a witness at the trial and had watched accused's premises and arrested him for making intoxicating liquors.
4. INTOXICATING LIQUORS—EVIDENCE.—Evidence *held* to sustain conviction of manufacturing intoxicating liquors.
5. INTOXICATING LIQUORS—MANUFACTURE FOR USE AS BEVERAGE.—In a prosecution for unlawfully manufacturing intoxicating liquors, it is unnecessary to prove that the liquor was manufactured to be drunk as a beverage.
6. INTOXICATING LIQUORS—UNLAWFUL MANUFACTURE—INSTRUCTION.—An instruction that accused must be acquitted unless the evidence showed beyond a reasonable doubt that he had manufactured intoxicating liquors sufficiently advised the jury that the mere preparation for the manufacture of liquors would not sustain a conviction.

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

H. B. Means and T. N. Wilson, for appellant; *Chas. Jacobson,* of counsel.

1. The sheriff was disqualified, and the coroner should have selected the talesmen, and the verdict is not supported by the evidence, as the liquors found were not spirituous or fermented within our statute. 203 S. W. 838.

2. The court erred in its instructions. 152 U. S. 570; 149 *Id.* 586; 74 S. E. 500.

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

1. There was no error in overruling the motion to disqualify the sheriff. Kirby's Digest, section 793, as amended by 206, Acts 1917, is not mandatory, and under the law it was a matter for the clerk and not the court, and as the matter was presented to the court instead of the clerk he can not complain. But no prejudice resulted, as it is not shown that his challenges to jurors were exhausted.

2. The evidence is sufficient to support and sustain the verdict. The defendant's confession, coupled with the introduction of the whiskey itself to the jury, together with the testimony of officers that it smelled and tasted like whiskey, was enough.

3. The instructions cover the law of the case fully and fairly.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Clark Circuit Court for manufacturing spirituous or fermented liquors, and, as a punishment therefor, was adjudged and sentenced to serve one year in the State Penitentiary. From the judgment and sentence an appeal has been duly prosecuted to this court.

Appellant insists that reversible error was committed by the court in overruling his motion to disqualify the sheriff. During the empaneling of the jury, appellant filed a motion, in accordance with section 793 of Kirby's Digest, as amended by Act No. 206, Acts of 1917, to disqualify the sheriff from selecting talesmen from the bystanders, in accordance with an order of the court, and, because of such alleged disqualification, to permit the coroner to select said talesmen. The amended act referred to reads as follows:

"In all cases upon affidavit filed with the clerk of the circuit court, or any other court of record, of the partial-

ity, prejudice, or relationship of the sheriff or deputy sheriff of any county where suit is brought or to be brought, or shall have been commenced, or where such affidavit is filed by the defendant in any criminal prosecution, the clerk shall issue and direct all process to the coroner, who shall execute the same and discharge all duties in such criminal or civil prosecution or suit in the same manner that the sheriff could have done in like cases." This act clearly refers to the issuing of process in vacation, and has no reference whatever to the conduct of a trial in the presence of the court. After the beginning of a trial, the disqualification of the sheriff would be a matter addressed to the discretion of the court. The affidavit charges prejudice, partiality and bias as a ground to disqualify the sheriff. No proof was offered to support this charge. It is true the sheriff became a witness and testified that he watched appellant's premises and finally arrested him at the still, where appellant made certain damaging statements to him and the constable of the township; but this evidence was far from showing any prejudice, partiality or bias on the part of the sheriff toward appellant. Therefore, there was no abuse of discretion by the court in overruling the motion to disqualify the sheriff.

Appellant next contends that the evidence is not legally sufficient to support the verdict. The sheriff discovered a crude still about three hundred yards north of appellant's residence. There were two barrels near it that contained mash, which consisted of corn meal, or chops, and water mixed. There were a box and keg on the ground. After the discovery, he visited the still day and night for several days and found two-thirds of the mash had been used from Friday night to the following Sunday morning. On Saturday afternoon, the still was hot. On Sunday morning, appellant appeared on the scene and moved the keg and box. He then started to leave the still, and the sheriff arrested him. The sheriff testified that appellant admitted that he had made a little run, about a half gallon to three quarts, and that the

product was at his house in a tin bucket; that it was not very good, because it was not made at the right time; that it was sour, on account of his mash not being what it should be. The sheriff then sent appellant away with Mr. Dooley, the constable, and remained at the still. In about fifteen minutes, appellant's daughters came to the still, carrying split pine wood, and threw it down near the still. When they started to leave, the sheriff arrested them and took them to the place where Mr. Dooley was guarding appellant. The sheriff started to go back, at which time, he testified, he was told by appellant that no one else would come to the still, unless it was some of his own folks, in order to carry out his directions. The sheriff and Mr. Dooley then took appellant and his daughters to the residence and left them in the yard in charge of Mr. Dooley. The sheriff searched the house and found four or five gallons of the manufactured article in tin buckets, and carried it out in the yard, where a bucket containing a gallon and a half was intentionally kicked over by appellant. The sheriff then went to the still and got all the manufactured product he could find there, and poured all that he had procured at both places in a keg and brought it to Arkadelphia. According to the sheriff's and Mr. Dooley's evidence, the product smelled and looked like whiskey. A glass of it was exhibited to the jury at the trial.

Appellant's explanation, when on the witness stand, was that the still was the property of George Chaney; that George Chaney had made the stuff, and, upon finding that it was of no value, had brought it down and left it near his fence, and had given him the mash to feed his hogs. He denied that he had made any admissions in the presence of the sheriff and Mr. Dooley to the effect that he had made the stuff himself. Other evidence was adduced, tending to corroborate that part of appellant's testimony, to the effect that the still belonged to George Chaney, and that he had given the output to appellant because a poor product. We think there was sufficient legal evidence to sustain the verdict that the appellant,

at the time and place charged in the indictment, manufactured spirituous or fermented liquors.

Lastly, it is insisted that the court erred in refusing to instruct the jury that appellant could not be convicted unless the evidence showed that he had made liquor to be drunk as a beverage, and that it contained some per cent. of alcohol. We have examined the act under which appellant was indicted, and find no requirement therein to the effect that the liquor must have been manufactured to be drunk as a beverage before appellant could be convicted for manufacturing spirituous or fermented liquors. Therefore, instructions Nos. 3, 4 and 5, requested by appellant and refused by the court, embracing that idea, were properly refused. The jury were instructed, at the request of appellant and on the court's own motion, to the effect that, unless the evidence showed beyond a reasonable doubt that appellant manufactured the alcoholic, vinous, malt, spirituous and fermented liquors, they should acquit him. The jury must have understood from these instructions that it was necessary for appellant to actually manufacture such liquor before he would be amenable, and that a showing that he had merely made preparation for the manufacture thereof would not be a sufficient showing upon which to base a conviction.

No error appearing, the judgment is affirmed.

BOURLAND v. BAKER.

Opinion delivered December 15, 1919.

1. HUSBAND AND WIFE—WIFE'S TORTS—HUSBAND'S LIABILITY.—The common law rule that the husband is liable for the wife's torts has been abrogated by the married woman's act (Acts 1915, page 684).
2. APPEAL AND ERROR — NEGLIGENCE — INSTRUCTION.—Where there was no evidence to support some of the allegations of negligence in a personal injury action, an instruction to find for plaintiff if you find from the evidence that plaintiff was injured as a result of defendant's negligence as charged in the complaint, was not objectionable as authorizing the jury to find negligence as charged though not established by the evidence.

3. APPEAL AND ERROR—INVITED ERROR.—One who requests and obtains instructions submitting separately each allegation of negligence is in no position to complain of an instruction that submitted all of the allegations of negligence, whether supported by evidence or not.

4. TRIAL—CONSTRUCTION OF INSTRUCTIONS AS A WHOLE.—An instructstruction on the negligence of an automobile driver *held* not to impose an extraordinary degree of care on such driver, when considered in connection with other instructions.

5. MUNICIPAL CORPORATIONS—COLLISION WITH PEDESTRIAN—INSTRUCTION.—An instruction exempting an automobile driver from liability for injuries to a pedestrian if she temporarily took her eyes off the street in front to give attention to her children in the automobile was properly refused since such act might or might not have been negligent.

MUNICIPAL CORPORATIONS—DRIVING ON WRONG SIDE OF STREET—INSTRUCTION.—An instruction to the effect that if the jury found from the evidence that defendant operated her automobile in a negligent manner upon the street as charged in the complaint, and plaintiff's injuries were the result of such negligence, they should find for plaintiff, was not objectionable as submitting the issue as to liability of defendant if she was driving on the wrong side of the street where there was no evidence that she was driving on the wrong side.

Appeal from Sebastian Circuit Court, Fort Smith District; *Paul Little,* Judge; reversed in part.

James B. McDonough, for appellants; *J. Sam Wood,* of counsel.

James Bourland, the husband, is not liable for the torts of his wife committed in his absence. Since the married woman's act of 1915, the husband is no longer liable. 102 Ark. 351; 64 *Id.* 381; 44 *Id.* 401. All these cases are based on the law prior to 1912. The act of 1915 strikes down every reason for the ruling that the husband was liable. 124 Ark. 167; 145 N. Y. S. 708; 65 Ill. 129. See also 94 Pac. 36; 37 S. W. 138; 99 N. W. 818; 44 Pac. 833; 21 Cyc. 1352, note 86; 65 N. E. 770; 140 Pac. 1022; 49 Atl. 889. The reason of the rule having ceased, the liability also ceased. 104 La. 496; 118 Miss. 58; 120 Mass. 89; 41 Mich. 214.

2. The court erred in its instructions, as there is no evidence to support them. 69 Ark. 130; 87 *Id.* 243; 89 *Id.* 147; 82 *Id.* 243; 82 *Id.* 547; 41 *Id.* 382; 63 *Id.* 177; 4 Crawford's Digest, 4997-9; 168 S. W. 129.

3. It was especially error to give No. 7, as it does not clearly point out the obligations and duties of pedestrians and drivers of motor cars on the streets. 143 Pac. 743, par. 10; 183 *Id.* 358; 152 *Id.* 319.

4. It was error to admit the evidence of Dr. Rose, detailing the statements of James Bourland.

5. It was error to refuse No. 12 for defendants. 104 Atl. 749.

Edwin Hiner, for appellee.

1. The husband is still liable, as he is not released by the act of 1915. 64 Ark. 381; 92 *Id.* 486; 102 *Id.* 351 If the act had been intended to relieve the husband of liability, it would have said so, but it did not, and the husband is still liable.

2. There is no error in the instructions given r refused; they correctly state the law.

HUMPHREYS, J. Appellee instituted suit against appellants in the Sebastian Circuit Court, Fort Smith District, to recover $11,000, on account of an injury received by him through the alleged negligent operation of an automobile by appellant, Queen Bourland, wife of appellant, James Bourland. The allegations of negligence in the complaint consisted, first, in driving the car at a high and dangerous rate of speed; second, in driving it on the left, instead of the right-hand, side of the street, in violation of a city ordinance; third, in driving it without giving the proper warning or keeping the proper lookout when approaching appellant.

Appellants filed answer, denying the material allegations in the complaint, and pleading the negligence of appellee as the proximate cause of the injury.

The cause was submitted to a jury, upon the pleadings and evidence, and a verdict and judgment rendered

in favor of appellee for $2,000, from which an appeal has been duly prosecuted to this court.

Appellee was injured by an automobile driven by appellant, Queen Bourland. When the injury occurred, he was walking south on the east side of North 13th street, about midway between the suburban railway and North O street. Queen Bourland was on the front, and her little boy and infant on the back seat of the chummy roadster she was driving. She was on the same side of the street and going the same direction appellee was walking. The street is straight, between the suburban railway and O street, and the distance between the two points about 200 yards. Appellee was near the curbing on the east side of the street. When struck, his legs were thrown under the car and his body on the outside, with his head lying very near the curbing. The car stopped just as the hind wheel reached him. He was severely injured, and, as no question is made in regard to the amount of damages recovered, it is unnecessary to set out the nature of the injury.

The evidence on behalf of appellee tended to show that the car was being rapidly driven and approached and struck him suddenly, without signal or warning, about two o'clock in the afternoon of September 17, 1918; that he heard the car, stepped to the east, giving almost the entire street, and did not look back because he expected it to pass around and not strike him; that the place where there should have been a sidewalk was rough and grown up in weeds; that the street was paved and that he had chosen the east side of the street near the curbing upon which to travel, because automobiles usually traveled on the right-hand or west side of the street.

The evidence of appellants tended to show that, at the time of the injury, appellant, Queen Bourland, was driving her car at a slow rate of speed; that when she reached and crossed the suburban, she looked in front and saw nothing; that she then looked back at the baby and told her boy to sit down; that she again glanced to the front and observed appellee immediately in front of her; that

he had stepped in front of the car suddenly; that she did not see him at all until he stepped in front of the car; that she instantly shut off the engine, put on the brakes with both feet and stopped the car; that the front wheel ran over appellee, but that the hind wheel stopped just as it reached him.

It is first insisted by appellants that there is no foundation in the allegations and evidence justifying the rendition of a judgment against appellant, James Bourland, the husband of Queen Bourland. The verdict was returned and judgment rendered against James Bourland on the sole ground that a husband in this State is responsible for his wife's torts. At the common law, a husband was liable for the torts of his wife committed in his absence. That rule of liability is still in force in Arkansas, unless abrogated by Act 159, Acts of the Legslature of 1915, known as the Married Woman's Act. The reason existing for the rule at common law was the legal unity incident to the marriage relationship. It was reasoned that, on account of the unity, the husband could absolutely control his wife in and out of his presence. It followed that, because of this control, he could prevent his wife from committing a tort on another, even in his absence. The Married Woman's Act of 1915, as construed in the case of *Fitzpatrick* v. *Owens,* 124 Ark. 167, had the effect of absolutely and completely destroying the legal unity founded upon the nuptial contract. The act has effectually severed the legal unity between husband and wife in this State. In holding that the emancipation of the wife was so complete that the wife might sue the husband for a tort committed by him on her person, this court said, in the case of *Fitzpatrick* v. *Owens, supra,* that: "These enactments (referring to the Married Woman's Act antedating the Act of 1915) left but little in the way of restrictions upon the rights of married women, but the Legislature deemed it proper to provide further legislation to completely emancipate her, and they did so by this statute (referring to the Married Woman's Act of 1915) which declares its purpose in the broadest terms

to 'remove the disabilities of married women.' An analysis of the language of the statute shows that the Legislature meant to complete the work of emancipation and to give married women all the rights and remedies possessed by unmarried women. The words 'to sue and be sued', when considered by themselves, merely enlarge the remedies of a married woman and do not enlarge her rights, but in considering the significance of those words we must do so in connection with the words which precede and which follow, and undoubtedly the use of those words serves to give a remedy for all the rights found to have been enlarged by the preceding words and those which follow. Now, the preceding words confer, in unqualified terms, the right of the married woman 'to contract and be contracted with,' and the words which follow declare in the very broadest terms her right 'in law and equity' to 'enjoy all rights and be subjected to all the laws of the State as though she were a *feme sole.*' If this language be given any effect at all in the light of preceding statutes enlarging the rights of the married woman, it necessarily means that a married woman is to enjoy in law and equity all the rights which she would enjoy if she still remained a single woman, and that with respect to those rights she may sue and be sued. * * * It was evidently meant to confer upon her the enjoyment of those rights and remedies, even against her husband, the same as if she were unmarried."

The legal unity, which was the reason of the rule fixing liability on the husband for his wife's torts, having been swept away by the act, the liability is swept away. The reason being dissolved, the rule can not exist. It was therefore error to refuse to instruct the jury peremptorily to return a verdict for appellant James Bourland.

It is insisted that the court erred in giving instruction No. 4. The instruction is as follows: "Therefore, if you find from the evidence that the defendant, Queen Bourland, operated her car in a negligent manner at the time the plaintiff was injured, as charged in plaintiff's

complaint, and that his injuries were the result of said negligence, you must find for the plaintiff, unless it affirmatively appears from the evidence that the plaintiff was at the time of his injury himself guilty of negligence contributing to the injury."

The instruction is assailed because, according to appellant's interpretation thereof, it submitted all the allegations of negligence set up in the complaint to the jury for consideration, whether supported by evidence or not. It is true evidence was not introduced in support of every allegation of negligence in the complaint. The trend of the evidence, however, limited the issues to whether the injury resulted from fast driving, failure to give a signal of warning, failure to keep a proper lookout, or whether due to appellee's own negligence; and, in the absence of specific objections to the general terms in which the allegations of negligence were submitted, it will be presumed that the jury considered only such grounds of negligence as were supported by the evidence. No specific objections were made to the instructions. Again, appellant, Queen Bourland, requested and obtained instructions submitting separately each allegation of negligence contained in the complaint, so said appellant is in no position to complain.

The instruction is also assailed on the ground that it imposed an extraordinary degree of care upon said appellant to prevent the injury. It is contended the instruction must be read in connection with the allegation of the complaint to the effect that appellant, Queen Bourland, injured appellee "by her failure to keep a vigilant and constant lookout for persons lawfully upon the streets." This is only an allegation in an exaggerated form of a lack of ordinary care, and can not be treated as an instruction imposing an extraordinary degree of care upon said appellant. No such inference could have been indulged by the jury in the face of positive instructions to the contrary. Instructions Nos. 2 and 7 necessarily enlightened the jury in this regard. The instructions referred to were as follows:

"Negligence, as defined and used in these instructions, is a failure to exercise ordinary care. Ordinary care is such care as a reasonably prudent and careful person would be expected to exercise under the same or like circumstances."

"The rights of pedestrians and drivers of motor cars and other vehicles have equal rights to the use of the streets of the city. It is the duty of the one to use ordinary care and caution to prevent injury to another. It is likewise the duty of the other to use ordinary care and caution to avoid being injured."

It is also contended by appellant, Queen Bourland, that the court erred in refusing to give instruction No. 11, requested by her. That instruction exempted Queen Bourland from liability if she temporarily took her eyes off the street in front to give attention to her children while driving along. Such an act on her part might, or might not, have been negligent, dependent upon all the circumstances in the case. The instruction was properly refused.

It is also contended that the case was erroneously submitted upon the theory that appellant, Queen Bourland, was liable for the injury if driving on the left-hand side of the street. It was alleged in the complaint that she was driving on the left-hand side of the street, contrary to an ordinance of the city. No such proof was made, and, under our interpretation of instruction No. 4, no such issue was submitted to the jury.

The judgment is affirmed as to Queen Bourland, but is reversed and the cause dismissed as to James Bourland.

PAYNE v. ROAD IMPROVEMENT DISTRICT NO. 1 OF MARION COUNTY.

Opinion delivered December 22, 1919.

1. HIGHWAYS—STREETS AND ALLEYS.—The term "public highway" in its generic sense includes streets and alleys as well as rural roads, though it is not always so understood in the popular sense, and there is usually enough ambiguity in the use of the term to warrant examination of the context, wherever used, for the purpose of determining the precise meaning.
2. HIGHWAYS—SINGLE IMPROVEMENT.—2 Road Laws 1919, page 1631, creating Road Improvement District No. 1 of Marion County, intended to include the streets and alleys in three incorporated towns in the district, and is void for attempting to join together as a single improvement projects necessarily separate and distinct.
3. HIGHWAYS—IMPROVEMENT DISTRICT INCLUDING STREETS.—A road improvement district may properly include portions of the streets of towns which form a part of the general highway.
4. STATUTES—LOCAL STATUTES—NOTICE.—An express amendment to a local statute falls within the requirements of the Constitution with reference to notice of the introduction of bills for local statutes.

Appeal from Marion Chancery Court; *Ben F. McMahan,* Chancellor; reversed.

Elmer O. Owens, for appellant.

1. The act is unconstitutional, invalid and void, because it gives a roving commission to improve, build or repair any highway or any portion of a highway or road in the district, including the streets and alleys of three incorporated towns. There must be no uncertainty as to the highways to be improved. 115 Ark. 88; 86 *Id.* 21; 97 *Id.* 341; 116 *Id.* 167; 90 *Id.* 29; 118 *Id.* 123. The act attempts to join together as a single improvement projects which are necessarily separate and distinct.

2. It attempts to usurp the jurisdiction of the county court and invest it in a board created by the Legislature. Const., art. 7, sec. 28. It creates a perpetual commission to take over the entire roads and highways of the district, thereby taking away the jurisdiction of

the county court and municipal corporations. Const., art. 19, sec. 27.

Williams & Seawel, for appellees.

1. The act does not clothe the board with a "roving commission." The term "public highways" only refers to county roads and not to streets in incorporated towns but only to country roads. The act authorizes the improvement of all the public highways in the district legally established. None are omitted, and there is no uncertainty or indefiniteness. The commissioners are clothed with discretionary powers to select such public highways as they deem necessary and proper, but the Legislature had the plenary power to confer such authority. 125 Ark. 325-9; 120 *Id.* 277, 284. Section 11 prevents any inequality or injustice as to lands not to be benefited. 89 Ark. 513, 516.

2. The act does not deprive the county court of any jurisdiction over the roads in the district, nor is it contrary to or violation of article 7, section 28, of our Constitution. 120 Ark. 277; 89 *Id.* 513; 92 *Id.* 93; 130 *Id.* 507, 513.

3. Article 19, section 27, Constitution, is not violated nor is the jurisdiction of any municipal corporation over its streets and alleys in anywise violated. The facts that the three towns are included within the limits does not invalidate the act. 118 Ark. 119, 127; 99 *Id.* 100; 120 *Id.* 277. By the act there is a conclusive legislative determination that the improvement contemplated is single, and there is no showing that such determination is obviously and demonstrably erroneous. 130 Ark. 507; 125 *Id.* 325; 133 *Id.* 64; 209 S. W. 81; *Sallee* v. *Dalton,* 138 Ark. 549. The State in its sovereignty has full power over the streets of a town as well as public roads, and may confer the supervision and control on such agency as it deems best for supervision and control. 103 Ark. 529; 76 *Id.* 22. See also 92 *Id.* 93, 99; 97 *Id.* 318; 120 *Id.* 277.

Primarily, a statute should be construed according to the ordinary meaning of its words and their usual accepted meaning in common language. 102 Ark. 205; 97

Id. 38; 47 *Id.* 404. While true that the terms "road" and "highway" in a broad generic sense may include streets and alleys, there is no presumption that the Legislature so intended their use. Elliott on Roads and Streets, p. 16; 86 Mo. App. 572, 578.

The word "road" is now commonly used to denote a public way in the country rather than a street of a town. Elliott on Roads and Streets (2 Ed.), sec. 7; 155 N. Y. 23; 49 N. E. 246-7; 95 N. Y. 135.

A "street" is a highway, but a highway is not necessarily a street. 103 Ind. 349; 2 N. E. 803; 91 *Id.* 242, 247.

Streets of towns were not intended to be included in the act.. The rule of "*ejusdem generis*" should be applied here. 36 Cyc. 1119 (11); 104 Ark. 261; 101 *Id.* 593; 95 *Id.* 114. A reasonable construction should be placed on the act in order to uphold it. 66 Ark. 466; 56 *Id.* 485.

McCULLOCH, C. J. Appellee is a road improvement district created by a special statute enacted by the General Assembly of 1919, embracing certain territory in Marion County and for the purpose of improving the public highways in that district. Acts 1919, vol. 2, p. 1631. In the first section of the statute the boundaries of the district are designated by the description of the lands to be embraced therein, and the second paragraph of section 1 describes the roads to be improved as follows:

"That said road improvement district is hereby created and organized for the purpose of making improvements on the public highway leading from a point on Searcy County line where Road District Number One (1) of Searcy County intersects the Marion County line near Salgado, thence to Rush, thence to Yellville, and Summit, and thence following Ridge road by way of Lee's mountain to the Boone County line west of Dodd City, Arkansas, to build, improve, widen, straighten and repair all public highways within the boundaries of said district which have heretofore been dedicated as a public high-

way, by the county court of Marion County, or by the town council of the incorporated towns of Rush, Yellville, and Summit, and for that purpose shall have the right by its board of commissioners hereafter provided for to condemn right-of-ways for the purposes herein mentioned, to sue and be sued, to plead and be impleaded and to constitute a body politic, for the purposes of carrying out the intention of this act."

Section 4 of the statute reads as follows:

"The said board of commissioners shall have, and they are vested with, power and authority, and it is hereby made their duty, to build, construct, maintain and repair said roads within said district, and all public highways therein as they deem necessary and proper, as herein contemplated, and in doing so shall expend all necessary sums of money authorized to be levied and collected under authority of this act, and as herein provided."

The remainder of the statute, which contains 24 sections, outlines a comprehensive scheme for the construction of the improvements and for the levying of assessments on the benefits to real property in the district and the enforcement of such assessments, and also for the borrowing of money in advance to pay for the improvement. Authority is conferred for the appointment of assessors to "make an assessment of all benefits to be received by the lands in said district."

Appellant is the owner of real property in the district, and instituted this action attacking the validity of the statute on the ground, among others, that in providing for the improvement of all the highways in the district, including the streets in the three incorporated towns, the Legislature had attempted to join together as a single improvement, projects which are necessarily separate and distinct.

The argument of counsel for appellee in seeking to sustain the validity of the statute is that the term "public highways" in the statute was not intended to refer to streets in incorporated towns, but referred only to country roads. It therefore becomes necessary in the first

place to construe the statute to determine what it meant by its language describing the improvements to be made.

It is clear that the first part of the paragraph describing the improvement refers to an established public highway beginning at a point on the line between Searcy and Marion counties, near Salgado, and running north to Yellville, the county site, and thence northwesterly to a point on the boundary line between Marion and Boone counties. This much of the description is clear and definite, and if there was nothing more in the statute there would be no grounds for attack upon it. But the descriptive words used with reference to the contemplated im- would form a part of the general highway to be improved, widen, straighten and repair all public highways within the boundaries of said district which have heretofore been dedicated as a public highway by the county court of Marion County, or by the town council of the incorporated towns of Rush, Yellville, and Summit."

Section 4 makes it the duty of the board of commissioners "to build, construct, maintain and repair said roads within said district, and all public highways therein as they deem necessary and proper, as herein contemplated." The term "public highway" in its generic sense includes streets and alleys as well as rural roads (Webster definition, "highway"), though it is not always so understood in the popular sense. *Texarkana* v. *Edwards*, 76 Ark. 22. There is usually enough ambiguity in the use of the term to warrant the examination of the context, wherever used, for the purpose of determining the precise meaning, and when that is done in the present case we think that it is clear that the framers of the statute meant to include the public streets of the three incorporated towns mentioned. If that was not the intention of the lawmakers, no reference would have been made to the dedication of public highways "by the town councils of the incorporated towns of Rush, Yellville and Summit." The word "dedicated" was not correctly used, but it is clear that the framers of the statute meant by the language used to refer to streets opened by authority of

the respective town councils of the incorporated towns mentioned as well as the country roads established as public highways by the county court. If streets and alleys had not been intended to be embraced there was no occasion whatever for making reference to highways "dedicated" by the town councils. It may be argued that the framers of the statute had in mind main thoroughfares through each of the incorporated towns which would form a part of the general highway to be improved, and that it was not necessary to designate this part of the highway which ran through the incorporated towns. There is much reason to believe this to be so. But, when it is conceded that any of the streets through any of these incorporated towns formed, under the language used, a part of the general public highway to be improved, then it necessarily follows from the other language of the statute that the improvement was not to be limited to those streets, but that all of the public highways, including streets and alleys, were to be improved. In other words, the same description which would embrace the particular streets forming a part of the general highway designated necessarily embraces all other streets and alleys in the towns.

We see no escape from the interpretation of the language used that it embraces all of the streets and alleys of the incorporated towns mentioned. This may have come about by inadvertence, but such is the only reasonable interpretation which can be given to the language used. Such being the proper interpretation of the statute, our conclusion is that it is invalid because it joins together as a single improvement the improvement of all of the streets and alleys of three different incorporated towns in the same county, but widely separated from each other.

We do not mean to hold that the inclusion of that portion of the streets of the towns which formed a part of the general highway to be improved would be invalid. Our previous decisions on that subject lead to the contrary. *Nall* v. *Kelley,* 120 Ark. 277; *Conway* v. *Miller*

County Highway & Bridge District, 125 Ark. 325; *Bennett* v. *Johnson,* 130 Ark. 507. But it is different where all of the streets and alleys of different municipalities are attempted to be grouped together as a single improvement. They are necessarily separate, and the improvement of the streets and alleys of one municipality as a whole cannot possibly inure to the benefit as a local improvement to the real property in another municipality distantly removed. It is an obviously demonstrable error to join them together as a single improvement to be constructed by a single assessment on all the property in the district. This statute only provides for one assessment of the benefits and that of the benefits arising from all of the designated improvements considered as a whole. Under the terms of the statute it is the duty of the board of assessors to assess the benefits of the whole improvement on the different pieces of real property in the district, and the assessments to pay for the improvements are to be levied on the benefits thus appraised. It necessarily follows that under this scheme the improvement in a given municipality would have to be paid for by contributions from assessments levied on property in the other municipalities as well as on the rural property. If we had a case where each of the improvements in the district were treated as separate ones, and authority was conferred to assess separately the benefits arising from each improvement, then it would be different, but here the necessary result from the proposed scheme is to levy assessments on all the property in the district to pay for improvements which are obviously distinct and separate.

We are of the opinion that this feature of the statute renders it invalid, and it is unnecessary to discuss the other grounds for attack on the validity of the statute.

At the recent special session of the General Assembly another statute was enacted correcting the defects in this one which we have discussed by omitting the general authority to improve all the highways in the district, but that statute was also invalid for the reasons stated in the case of *Booe* v. *Road Improvement District No. 4 of Prairie County, ante* p. 140.

An express amendment to a local statute falls within the requirements of the Constitution with reference to notice of the introduction of bills for local statutes.

Reversed and remanded with directions to enter a decree granting the prayer of the complaint.

MUSE v. EASTHAM.

Opinion delivered December 22, 1919.

1. APPEAL AND ERROR—CONTRACT NOT SET OUT IN RECORD.—Where a written contract, whereby defendant furnished logs to plaintiff who sold the lumber output to defendant, is not in the record, the court on appeal must assume that the contract fixed the rights of the parties with respect to inspections at the place of delivery and as to the price and terms of sales.
2. CUSTOMS AND USAGES—VARYING CONTRACT.—Where a written contract fixes the rights of parties, the contract can not be varied by proof of a custom of the trade.

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

Beloate & Anderson, for appellant.

The consideration of a contract is always open to explanation by parol evidence. **26 Ark. 451.**

The contract provided for inspection at Sedgwick, but where had at destination the *custom* of the trade was admissible in evidence, and the court erred in ruling out the proof of the custom of the trade. 89 Ark. 591; 106 *Id.* 410; 85 *Id.* 568; 81 *Id.* 560; 69 *Id.* 318.

Smith & Gibson, for appellee.

1. The abstract of appellant is insufficient, and the appeal should be dismissed.

2. Appellant asked no instructions, and his objections to those given for appellee were general, and he requested no change in any of them. 136 Ark. 175; 102 *Id.* 460; 82 *Id.* 603. The verdict is responsive to the issue and is conclusive.

McCULLOCH, C. J. Appellee sued appellant on account for the sum of $297. The account grew out of a contract between the parties whereby appellant furnished logs to appellee at the latter's saw mill for a certain stipulated price, and appellee sold and delivered the lumber output of the mill to appellant at a stipulated price.

According to the testimony adduced by appellee, the lumber was delivered on board of cars at the mill, consigned by bill of lading to appellant, according to appellant's orders, to its designated consignee. Of this disputed account the sum of $197 was for deductions made for culls at the point of destination of the first cars shipped. The remainder of the account was for deduction of 2 per centum on all the bills claimed by appellant in accordance with an alleged custom of the lumber trade. Appellee testified that when he was ready to ship the first cars appellant instructed him to inspect the lumber himself and that appellant would accept his grading. Appellant denied that he agreed to accept appellee's inspection and offered to prove that it was customary in the lumber trade to charge back for culls rejected at the destination of the shipment. The court excluded the testimony as to custom of the trade. There was no proof adduced by appellant showing that the culls were rightfully rejected, but he contented himself with proof that his vendee had made a return of the rejections.

Appellant also offered to prove a custom of the trade to deduct 2 per centum on payment of bills within ten days. The court excluded the testimony.

There was a contract between the parties, but it is not in the record as abstracted, and we must assume that the contract fixed the rights of the parties with respect to inspections at the place of delivery, and as to the price and terms of the sales of lumber. If so, those features of the contract could not be varied by proof of trade customs. *Cook* v. *Hawkins,* 54 Ark. 423; *Paepcke-Leicht Lumber Co.* v. *Talley,* 106 Ark. 400.

If there was any ambiguity in the written contract, it does not appear in the abstracts of the record.

Judgment affirmed.

FEIBELMAN *v.* HILL.

Opinion delivered December 22, 1919.

1. SPECIFIC PERFORMANCE—MUTUAL RESCISSION—SUFFICIENCY OF EVIDENCE.—In a purchaser's action for specific performance, a finding of the court that there had been no rescission by mutual consent *held* not against the preponderance of the evidence.
2. VENDOR AND PURCHASER—TIME AS OF ESSENCE OF CONTRACT.—Time is not of the essence of a contract for the sale of land where the contract did not expressly so stipulate, and such condition did not necessarily result from the nature and circumstances of the contract.
3. VENDOR AND PURCHASER—TENDER OF PAYMENT.—Where time was not of the essence of a contract for the purchase of land, tender of payment by the purchaser before the vendor had made an attempt to declare a forfeiture entitled the purchaser to a conveyance of the land.
4. APPEAL AND ERROR—HARMLESS ERROR.—In an action by a purchaser of land for specific performance, an excessive allowance by the court by way of abatement to extent of the dower interest in the vendor's wife, in the event of her refusal to join in the conveyance was harmless where the vendor declared that she was ready to join in the deed if the court decreed specific performance.

Appeal from Chicot Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

Streett & Burnside, for appellant.

1. The court erred in decreeing performance of acts not provided for by the instrument sought to be enforced.

2. The finding as to the inchoate dower right of the wife is without evidence to support it and arbitrary and unjust.

3. The facts do not justify the decree in enforcing specific performance, as nothing had been paid on the contract, and the evidence clearly establishes a rescission of the contract. Appellant under the proof has the greater equities, while appellee has enjoyed the benefits while appellant has sustained the losses. Courts of equity always reserve the right of exercising a sound discretion in suits for specific performance. and generally

refuse relief where the case is not clear or where the complainant is in the wrong, and refuse to interfere. 34 Ark. 663.

J. R. Parker, for appellee.

Reviews the evidence and pleadings and contends that the decree is supported by the evidence and is right and just. It was charged in the complaint that the inchoate right of dower was one-third the purchase price of the land, and this was not denied in the answer and cross-complaint, and hence must be taken as true. 91 Ark. 30. But appellant guaranteed that he and his wife would make a good deed, and the decree is supported by the great preponderance of the evidence.

McCULLOCH, C. J. This is an action instituted by appellee in the chancery court of Chicot County against appellant to compel specific performance of a contract entered into by these parties for the sale by appellant to appellee of a tract of land in that county containing eighty acres. There was a written contract dated July 21, 1913, whereby appellant agreed to sell the land in controversy to appellee for the price of $1,000, payable in five equal annual installments, due December 1. 1914. and thereafter, with interest at the rate of ten per centum per annum from date until paid, and agreed to execute to appellee a deed on payment of said notes at maturity. The clause in the contract with respect to appellant's obligation to convey the land reads as follows:

"Now, if the said promissory notes are paid at maturity, then and in that event I bind myself or heirs to make said M. H. Hill a quitclaim deed to the above described lands; and when said notes are paid according to the tenor of this instrument, then this instrument is to be null and of no effect."

Appellee alleged in his complaint the execution of the contract, his occupancy of the land thereunder, and the payment of some of the interest on the notes, and also alleged that he had on the 27th of November, 1918, made a tender to appellant of the full amount of the notes, to-

gether with the balance of the unpaid interest, but that appellant had refused to execute a deed in compliance with the contract. Appellant filed his answer and cross-complaint admitting the execution of the contract, but denying that appellee had paid anything on the notes, and alleging that in the year 1918 the contract had been rescinded by mutual agreement, and that appellee had agreed to pay rent for the year 1918. The prayer of the cross-complaint was that appellant recover the amount of rents, and also recover possession of the land in controversy. The cause was heard on oral testimony, and the chancellor found in favor of appellee and decreed specific performance.

There is a sharp conflict in the testimony as to whether appellee paid any of the interest on the notes, and also as to the issue concerning the alleged rescission of the contract by mutual agreement. Appellee testified that he paid the interest on the notes due in 1915 and 1916, respectively, but had never paid any of the principal of the notes. He testified that in January, 1917, he went to see appellant and offered to pay all of the notes and interest, but that appellant declined to accept it or to make a deed, and that he also made a tender on November 27, 1918, and demanded a deed, which appellant refused to execute.

Appellant was a merchant, and, according to the testimony, appellee traded with him from year to year for supplies. Appellee testified that he spent a considerable sum of money in improvements, especially in building a house, and in rebuilding it after it was practically blown away by a storm in the fall of 1916. Appellant admitted that appellee offered in January, 1917, to borrow the money and pay off the purchase money notes, but that he declined to accept payment on the ground that there had been a forfeiture, and that appellee agreed to pay rent. He testified that appellee remained in possession of the land during the year 1917 pursuant to his agreement to pay rent, but failed to pay the rent as promised, and in the early part of 1918 entered into another agreement to

rescind the contract and to buy the place under a new contract for the price of $3,000. This was all denied by appellee in his testimony, and there was no other testimony in the case corroborative of either of the parties, except that of Doctor Easterling, who testified that he accompanied appellee when he made the last tender to appellant, and that appellant did not make any claim concerning the alleged rescission of the contract, but refused to make the deed or accept the money on the ground that there had been a forfeiture.

We cannot say that the chancellor's findings on the issues of fact were against the preponderance of the evidence, and we must, therefore, accept as correct the findings that there had been no rescission of the contract by mutual consent. Time was not of the essence of the contract since the parties did not so expressly stipulate, nor does it necessarily result from the nature and circumstances of the contract. *Atkins* v. *Rison,* 25 Ark. 138; *Butler* v. *Colson,* 99 Ark. 340.

Appellee continued in possession under the contract and made a tender of payment before there was any attempt to declare a forfeiture. The chancellor was, therefore, correct in refusing to uphold appellant's attempt to enforce a forfeiture and in decreeing specific performance. *Turpin* v. *Beach,* 88 Ark. 604.

Appellee in his complaint alleged that appellant had a wife, and he asked the court to abate the purchase price to the extent of the value of the inchoate dower interest in the event appellant's wife refused to join in the conveyance, and the court made such finding and ordered the abatement in accordance with the prayer of the complaint in the event appellant's wife refuses to join in the conveyance. It is argued that there is no testimony in the record to support the finding of the chancellor as to the value of the inchoate dower right of appellant's wife, but it is unnecessary to go into this question, inasmuch as appellant declared before the court that he was ready to make the deed if the court so decreed, and that his wife would join in the conveyance. It became unneces-

sary, therefore, to take proof as to the value of the inchoate dower interest of the wife, and the excessive allowance made by the court by way of abatement is not material for the reason that it will not become effective, for the reason that appellant declared his purpose of delivering a deed in which his wife would join in accordance with the decree of the court.

The decree is, therefore, affirmed.

SEBASTIAN COUNTY ROAD IMPROVEMENT DISTRICT v. HOCOTT.

Opinion delivered December 22, 1919.

1. HIGHWAYS—REDUCTION OF ASSESSMENT FOR PRIOR IMPROVEMENT.—Acts 1919, page 539, volume 1, of Road Acts, creating the Sebastian County Road Improvement District, is not void as to section 35, providing in effect that where an improvement already made is found to be available as part of the contemplated improvement, the benefits to be derived therefrom are to be deducted from the assessment of the lands which paid for the prior improvements.
2. APPEAL AND ERROR—MOOT QUESTION.—Whether the decree appealed from erred in restraining the sale of bonds, borrowing of money and construction of improvements within thirty days need not be decided where the thirty days have already expired.
3. EVIDENCE—JUDICIAL NOTICE.—The courts take judicial notice of the location of sections of land in their relation to each other.
4. CONSTITUTIONAL LAW — DEMONSTRABLE MISTAKE IN STATUTE.—Where the Legislature undertakes to determine what lands will be benefited by a road improvement, the Supreme Court will declare the statute void only in case of a demonstrable mistake.
5. HIGHWAYS—CLOSENESS OF LAND TO ROAD.—The fact that certain lands omitted from the legislative assessment of benefits are as close as lands included does not on its face show discrimination.
6. HIGHWAYS—JURISDICTION OVER ROADS IN ADJOINING STATE.—Road Acts 1919, volume 1, page 539, creating Sebastian County Road Improvement District, is not subject to the objection that it attempts to confer extraterritorial jurisdiction on the commissioners to construct a road running through the State of Oklahoma.
7. HIGHWAYS—ALLEGATIONS OF FRAUD—SUFFICIENCY.—A complaint against the county judge and the commissioners of a road improvement district which alleges that the county judge prepared

the statute which created the district and seeks his private profit in carrying out the project, and that he recommended a certain engineer for the district at a fixed salary, when the service could have been secured for a less sum, on the assurance that the engineer could by influence secure a larger sum from the highway department for the construction of the road, is not a sufficient allegation of fraud or collusion.

8. PLEADING—ALLEGATION ON BELIEF.—A charge can be made upon information and belief if the facts are alleged in the complaint to be true; but a mere statement in the complaint that information has been received concerning matters set forth is not sufficient to constitute a charge that the facts themselves exist.

Appeal from Sebastian Chancery Court, Greenwood District; *J. V. Bourland,* Chancellor; reversed in part.

Daily & Woods and *Holland & Holland,* for appellants.

1. The court erred in sustaining the demurrer to the amended complaint and dismissing the complaint and afterwards enjoining defendants from borrowing money or selling bonds. No allegation of the complaint warranted this. The court was only called on to determine the validity of the act. 106 Ark. 39.

2. The act here in question is almost a literal copy of Act 265, Acts 1917, construed in 130 Ark. 507.

3. The decree provides for the appointment by the chancellor in vacation of a visitorial committee with power to inspect, examine and report on the acts of the commissioners and other officers. The Legislature has not authorized such a committee, and the court had no power to appoint such a committee or authorize it to sell bonds or borrow money.

4. The district was created by the Legislature, and the lands included and excluded were determined by it, and it is admitted by plaintiffs that the lands were benefited. 81 Ark. 208; 125 *Id.* 330; 213 S. W. 755. This last case is decisive of this. 213 S. W. 768.

5. The allegation that eleven sections of land are excluded from the district was not arbitrary nor unjust, and hence not void. The allegation is a mere bold assertion by counsel and is not sustained by any proof.

6. All the points named in the act are within the district and will be benefited. No part of Oklahoma is traversed by the road and the order is not void. 126 Ark. 322; 213 S. W. 768; *Ib.* 762; 133 Ark. 389.

7. Section 31 does not render the act void. Const., art. 22, § 2; 213 S. W. 755.

R. W. McFarlane and *George W. Johnson,* for Solesbee *et al.; T. A. Pettigrew* and *G. W. Johnson,* for Hocott *et al.*

The allegations of the complaint are admitted by the demurrer. 70 Ark. 568. No motion to make more definite and certain was made. 49 Ark. 277; 52 *Id.* 378; 75 *Id.* 64; 94 *Id.* 433.

Under these decisions the complaint stated a cause of action. Extravagance in expenditures were charged and proven. 54 Ark. 650; 128 *Id.* 122; 114 *Id.* 290; 101 U. S. 601. The allegations of fraud and collusion are clear and specific. 128 Ark. 122; 49 *Id.* 277.

Courts of equity have power to appoint a visitorial committee. The order here was made on the court's own motion and we need not defend it, but it was proper. 7 A. & E. Enc. Law 857.

It is the duty of the court to declare an act void which is arbitrary and burdensome on its face. The act violates the rule as to uniformity and equality. 130 Ark. 70; 83 *Id.* 74; 48 *Id.* 370; 34 *Id.* 224-7. See also as to sufficiency of the allegations of the complaint, 83 Ark. 54; 96 *Id.* 163. The decision in 89 Ark. 513 should be reconsidered, and the court return to its previous decisions. 213 S. W. 768. The two roads are independent, and the district should not be extended to include territory in no wise affected by *all the improvements.* 89 Ark. 513; 118 *Id.* 294. Section 31 of the act authorizes contributions by the county court from the general revenue of the county, which violates section 11, article 16, Constitution, as Sebastian County is divided into two districts which are really

two counties, separate and distinct. This section is void on cross-appeal.

McCULLOCH, C. J. This appeal involves the decisions of the chancery court of Sebastian County, Greenwood District, in two separate cases instituted by owners of real property against the Sebastian County Road Improvement District and the directors thereof, which cases were consolidated by the chancery court and tried together.

In the case in which Hocott and others were plaintiffs, the attack is on the validity of the statute which created the improvement district, and in the other case the attack is on the proceedings by the commissioners pursuant to the statute. In the first case the chancery court overruled a demurrer to one of the paragraphs of the complaint concerning the validity of a certain section of the statute, and held that the section in question was void and unenforceable, but that it did not affect the validity of the statute as a whole. The court also restrained the commissioners of the district from proceeding, for a period of thirty days after approval of the assessments of benefits, to sell bonds or to borrow money and from proceeding with the construction of said improvement within said period. From this feature of the decree the improvement district prosecuted an appeal to this court, and the plaintiffs in the action prosecuted an appeal from the other rulings of the court in sustaining the demurrer to certain paragraphs of the complaint.

The questions involved will be discussed in the order in which they are presented in the briefs of counsel.

Sebastian County Road Improvement District was created by a special statute enacted by the General Assembly of 1919 (Act 193, session of 1919), which described the boundaries of the district and authorized the improvement of the following public road: "Beginning on Jenny Lind road where same intersects Dodson avenue in the city of Fort Smith, Arkansas, thence running in a southernly direction through South Fort Smith;

thence in an easterly direction through old Jenny Lind and Greenwood; thence in a southernly direction through Huntington and Mansfield; thence in a northernly direction through Midland, Hackett, Bonanza and into the city of Fort Smith, terminating at the juncture of Towson and Dodson avenues."

The statute provides for assessments of benefits to be made by a board of assessors appointed by the commissioners, and on the filing of the assessment lists with the board of commissioners notice is to be given and an opportunity afforded property owners to be heard. The statute further provides that any property owner may, within thirty days after the hearing before the commissioners, file his complaint in the chancery court for relief against the assessments.

Section 35 of the statute reads as follows: "If any part of the roads herein authorized and directed to be improved in said district, are [is] improved either by the county, or by any other agency, before the commissioners of this district find it necessary to proceed with the work of improvement, and such improvements are sufficient or available under the plan of improvement in this district as approved by the county court, it shall be the duty of the commissioners to credit the assessment of benefits against any of said land with such amounts as represent the amount that said benefits are reduced because of said improvements in any part of the said road made by other agencies than the district and accepted by the district as complying with their plans."

The first question argued in the briefs is that relating to the decision of the court in holding that section 35 is void. We think the chancellor erred in so holding. A similar provision in another road law was upheld by this court in the case of *Bennett* v. *Johnson,* 130 Ark. 507. The effect of this provision in the statute is that where a portion of the contemplated improvement has been constructed through another agency and an improvement already made is found to be available as a part of the contemplated improvement as a whole, then the assessments

of benefits accruing from the prior separate improvement incorporated into the present improvement is to be deducted from the assessments of benefits accruing from the whole improvement, treating the existing improvement as a part of the whole. This does not operate as an exemption of any part of the property in the district from taxation. It merely presupposes that a prior separate improvement which is available to incorporate into the new improvement will necessarily augment the anticipated benefits to accrue from the whole improvement, and provides that, in assessing the benefits from the new improvement as a whole, the original benefits accruing from the prior improvement shall be deducted. It will be observed that it is not the cost of the original improvement which is to be deducted, but that the benefits which have accrued to the property from such prior improvement are to be deducted. The provision is one to prevent double taxation, rather than to exempt from taxation. It only relieves property from contribution to the new improvement as a whole, to the extent of benefits which accrued from the original improvement. It treats the old improvement, which had been a separate one, as a part of the new improvement, but allows credits on the new appraisal of benefits under the new scheme to the extent of the original benefits which accrued from the separate improvement. Under the scheme thus provided, the board of assessors appraise the benefits accruing to each tract, lot or parcel of land in the district from the contemplated improvement as a whole and then deduct from that appraisal of benefits on each tract, lot or parcel, the benefits which accrued from the separate original improvement, and this leaves as the new assessment the additional benefits which accrue from the new improvement into which the old improvement has been incorporated as a part.

It is not essential to the justice and equality of this scheme that the prior improvement should have been made by an agency which specially taxed the property owners for a local improvement. The result is the same,

even if the county or city had made the original improvement out of the general taxes for road purposes. It is not, in other words, the prior payment of special taxes which calls for the reduction of benefits, but it is the fact that another existing improvement augments the benefits of the new improvement into which it is incorporated and that, therefore, benefits to that extent should be reduced so as to obtain the net result of the actual benefits to accrue by reason of the new improvement. This provision applies, of course, only to property affected by the original improvement. Viewing the statute in that light, we reiterate our conclusion reached in the case of *Bennett* v. *Johnson, supra,* that it is valid.

As to the question of correctness of the decree in restraining the selling of bonds, borrowing money and construction of the improvement within thirty days after approval of assessments of benefits, it may be said that this question has become a moot one by reason of the expiration of that time, and it is unnecessary to consider it.

The decree will be reversed so far as it holds that section 35 of the statute is invalid.

The first point raised on the appeal of the plaintiffs is that the lands of appellant Hocott and certain others were not specially benefited, though in close proximity to the contemplated improvement, and that other lands of equal distance from the road were not included in the boundaries of the district. The allegations of the complaint are in this respect too vague and indefinite to constitute a charge of obvious discrimination. *Bush* v. *Delta Road Imp. Dist. of Lee County, ante,* p. 247. It is true the lands of the plaintiffs are described in the complaint, and other lands alleged to be equally distant from the road are also described, and decisions of this court are relied on in which we held that it was an obviously arbitrary and discriminatory statute which included lands distant from a road improvement and omitted intervening lands. *Heinemann* v. *Sweatt,* 130 Ark. 70; *Milwee* v. *Tribble,* 139 Ark. 574.

We take cognizance judicially of the location of the sections of land in their relation to each other, the boundaries of the district, and the road to be improved are specified in the statute, but this is not a case where outlying lands are included and where intervening lands are omitted, such as was the fact in the cases cited above. The Legislature, in defining the boundaries of the district, has necessarily made a determination as to what lands will and what will not be benefited, and it is only in case of demonstrable mistake that the court will declare a statute void. It does not necessarily follow that all lands equally distant from the road to be improved will be benefited, and the fact that some of the omitted lands are as close to the road as other lands which are included does not on the face of it show that there is discrimination. We are not at liberty to disregard a determination of the Legislature unless facts are shown which establish an obvious and demonstrable mistake in the findings of the lawmakers.

It was charged in the complaint, as one of the grounds for declaring the statute to be void, that a portion of the described public road runs through the State of Oklahoma and that the order of the county court changing the road is void. Proper authority is given to the county court to lay out the roads, and there is nothing in the argument that the statute attempts to confer extraterritorial jurisdiction on the commissioners to construct a road running through the State of Oklahoma. The road to be improved in this instance is what is called a loop, starting at Fort Smith, running through Jenny Lind and Greenwood, and thence back to Fort Smith through Huntington, Mansfield, Midland, Hackett and Bonanza. We think this attack on the statute is unfounded.

In the other case, Solesbee and other property owners make an attack on the proceedings of the commissioners of the district. There is an attempt on the part of the plaintiffs in that case to charge fraud and collusion between the commissioners and the county judge, and be-

tween the commissioners and the engineer elected by the commissioners. The language of the complaint is not, however, sufficient to constitute a cause of action, and the court properly sustained a demurrer.

In one of the paragraphs of the amended complaint it is charged that the couunty judge prepared the statute which was passed creating the district and "seeks his private profit" in the carrying out of the project, and that he "recommended the election of Hugh L. Carter as engineer for the road district at a salary of 5 per cent. of the construction cost of the road, when the service could have been secured at a cost not exceeding $250 per month, on the assurance that the said Hugh L. Carter could by 'influence' secure a larger sum from the State Highway Department for the construction of the road." This, of course, is not sufficient to constitute a charge of collusion and fraud on the part of the commissioners of the district, it not being alleged that the commissioners entered into such agreement.

The original complaint contains the following paragraph: "That as these complainants are informed and believe that at said meeting held at the city of Fort Smith, Arkansas, on the 14th day of March, 1919, among other proceedings, Hugh L. Carter was elected as engineer for said road at a salary of five per centum of the cost of the construction of said improvement; that at said meeting it was proposed by members of said board to sell approximately $1,000,000 of bonds bearing six per cent. interest, to provide for the construction of said road at private sale; said sale to be made at once, without having been previously advertised and with but one bidder present. That said proposition, as these complainants are informed and believe, was favored by a majority of said board, but that, on objection being made, said sale was deferred. That, as the complainants are informed and believe, a meeting of said board has been called in the city of Fort Smith, Arkansas, for the 25th day of March, 1919, for the purpose of passing on said proposition to sell said bonds."

This paragraph is urged here as sufficient to charge a premature contract with an engineer for excessive commissions. We do not think that the charge is sufficient either to show a premature election or a contract on its face for an excessive compensation. The facts are not alleged to exist, but it is merely a statement that the plaintiffs have received information to that effect. A charge can be made upon information and belief if the facts are asserted to be true in the complaint, but a mere statement in the complaint that information has been received concerning matters set forth is not sufficient to constitute a charge that the facts themselves exist. 12 Standard Enc. of Proc., p. 899.

The decree in this case is, therefore, affirmed.

On the appeal of the Sebastian County Road Improvement District in the Hocott case, the decree of the chancery court is, for the error indicated above, reversed and the cause remanded with directions to sustain the demurrer to the paragraph of the complaint concerning the validity of section 35 of the statute.

It is so ordered.

WOFFORD v. DEQUEEN REAL ESTATE COMPANY.

Opinion delivered December 22, 1919.

1. APPEAL AND ERROR—WHO MAY NOT COMPLAIN.—In a suit by real estate brokers to recover a fee of $1,500 for procuring a purchaser of land where the jury found in favor of the plaintiffs, defendant can not complain on appeal because the jury gave plaintiffs only $400, when they were entitled to the amount sued for.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict of the jury rendered under correct instructions and upon conflicting evidence is conclusive on appeal.
3. TRIAL—FORM OF VERDICT.—An instruction that if the jury find for plaintiffs their verdict shall be, "We, the jury, find for the plaintiffs (and write therein any sum which you may so find)," was in usual form and good against general objection.

4. APPEAL AND ERROR—HARMLESS ERROR.—An instruction on the form of verdict, erroneous as permitting the jury, if they returned verdict in favor of plaintiffs, to find for them in a less sum than they were entitled to was harmless to defendant.

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

J. S. Lake and *B. E. Isbell,* for appellant.

1. The evidence is insufficient to support the verdict. If plaintiffs were entitled to anything the jury should have found for the full sum of $1,500, or nothing. The jury could not legally disregard the undisputed evidence. 96 Ark. 42; *Ib.* 500; 101 *Id.* 536; 116 *Id.* 82. The verdict rests purely on speculation or conjecture and should not stand. 114 Ark. 112; 116 *Id.* 82; 117 *Id.* 638; 174 S. W. 547.

2. There is no evidence that the contract was changed or modified.

3. The court erred in its instructions given and refused. They were misleading, prejudicial and erroneous.

4. There was no consideration for the change in contract, and really none was made. 34 Ark. 44; 122 *Id.* 169; 112 *Id.* 226; 111 *Id.* 223. A verdict should have been directed for defendant.

Abe Collins, for appellee.

1. The only issue is whether or not appellee entered into the contract with Pemelton. The evidence is sufficient to sustain the verdict, and appellant can not complain because the jury were too lenient. 78 Ark. 275; 122 *Id.* 530.

2. The instructions are correct and there was no error in admitting evidence. Only general objections were made to any of the instructions. 66 Ark. 264; 70 *Id.* 558. Specific exceptions should be made. 89 *Id.* 24.

3. One can not complain of errors to his benefit. 5 Ark. 408; 26 *Id.* 142; 89 *Id.* 195; 78 *Id.* 275; 122 *Id.* 530.

4. Parties to a contract may, by new agreement, change the terms thereof and the new undertakings will support it. 112 Ark. 223.

WOOD, J. This suit was instituted by J. S. Whitten, W. M. Gilstrap and H. K. Ford, partners doing business under the firm name of DeQueen Real Estate Company, against **J. A. Wofford.**

It was alleged in the complaint that Wofford was indebted to the plaintiffs in the sum of $1,500 for commission earned by the plaintiffs in selling a farm for the defendant, Wofford. It is alleged that under the contract the farm was listed by the defendant with the plaintiffs to be sold at the net price of $11,000 and that if plaintiffs should succeed in selling the place for an amount greater than $11,000 they were to receive all in excess of that sum as a commission. They further allege that they had found a purchaser who was ready, willing and able to purchase the place for the sum of $12,500 and that the defendant refused to carry out his contract and to accept the purchaser to whom the plaintiffs had contracted to sell the farm, all to plaintiffs' damage in the sum of $1,500, for which they asked judgment.

The defendant in his answer admitted that he had listed the farm with the plaintiffs for sale but alleged that under the agreement he specifically stipulated he must have as much as $3,000 of the purchase money in cash. He denied that this sum or any other sum in cash was ever offered to him by the plaintiffs or anyone else for them and he offered to deed the farm to the purchaser named by the plaintiffs if the sum of $3,000 was paid to him and reasonable arrangements made for the deferred payments.

Upon the above issue evidence was heard and the cause was submitted to a jury, under instructions, which returned a verdict in favor of the appellees in the sum of $400, for which sum judgment was entered in their favor. From that judgment is this appeal.

The appellant contends that under the undisputed evidence if the farm was sold at all by the appellees it was sold for the sum of $12,500 and that the verdict, therefore, should have been for the full sum of $1,500 or

nothing; that there is no evidence to sustain a verdict for the sum of $400.

The appellees introduced a contract executed by the DeQueen Real Estate Company and one G. H. Pemelton, by which the company sold to Pemelton the Wofford farm. The contract recites a consideration of $12,500, of which $1,500 was cash in hand and the balance to be paid on receipt of the abstract of title and upon the execution of a warranty deed to anyone whom Pemelton might name. The contract specified the amount of the deferred payments and when they were to be made. The contract among other things recited, "Cash payment, above referred to, to be held by the party of the first part until the abstract of title is inspected by the party of the second part," and, should it be impossible for the party of the first part to make a good title, the cash payment was to be refunded. This contract was executed on September 2, 1918. On the same day Pemelton executed to the DeQueen Real Estate Company a bill of sale to an automobile, a pair of mules, a set of harness, bonds and stamps, all for the aggregate sum of $1,350, cash in hand paid.

The testimony of the appellees was to the effect that they executed the contract as above set forth; that Wofford said for appellees to go ahead and sell the farm on those terms; that after making the contract Pemelton turned over his car and gave the bill of sale to the other personal property. Appellees were going to send for the mules and he was to mail the stamps. After the contract was executed with Pemelton appellees presented it to Wofford and he said it was all right except he wanted another $1,000 in cash. Wofford told appellees that he was to be paid $2,000 in cash and stamps and bonds $150, but that he couldn't take the other stuff and appellees told him they would take it and he said it was all right.

The testimony for the appellant tended to show that he made a verbal contract with the appellees to sell his farm; they were to have all they could sell it for over $11,000. The appellant was to have one-third of the sale

price of $11,000 in cash and balance upon such terms as might be agreed upon. The appellees never offered appellant any cash. Appellant denied that he approved the contract entered into between the appellees and Pemelton. Appellant's testimony was to the effect that he looked over it and told Gilstrap, who brought the contract to him, that he would not accept it at all; that he told Gilstrap that he would have to get the money or he would call the deal off; that they paid him nothing, but that if they would get him the money he would close up the deal.

Appellees claim that appellant had authorized them to sell the place on a credit.

It is true that under the undisputed evidence if appellees had procured a purchaser for appellant's farm who was ready, willing and able to buy upon the terms agreed upon between the appellees and appellant, appellees were entitled to the full sum of $1,500, instead of $400 awarded them by the verdict of the jury. But the fact that the jury returned a verdict in favor of the appellees shows that the jury believed and accepted the testimony of the appellees rather than the testimony of appellant on the disputed issue as to whether or not appellees had procured a purchaser who was ready, willing and able to buy upon the terms agreed upon between appellant and appellees. Since the jury found for the appellees on this issue, appellant is in no attitude to complain because the jury by their verdict gave the appellees only $400 when they were entitled to $1,500. As is said in *Stiewel* v. *Lally,* 89 Ark. 195-209, "Appellant cannot complain of this leniency shown him by the jury." See also *Arnold* v. *McBride,* 78 Ark. 275-8; *Shapard* v. *Mixon,* 122 Ark. 530-42.

The appellant further complains that there was no evidence to warrant the jury in finding that the appellant agreed to sell the place according to the terms of the contract which the appellees entered into with Pemelton. But an examination of the testimony set forth in the record, which it could serve no useful purpose to discuss in de-

tail, convinces us that this was purely an issue of fact which was sent to the jury under instructions of the trial court which correctly declared the law.

The principal issue in the case under the evidence is whether or not the appellant authorized the appellees to sell his farm to Pemelton upon the terms set forth in the contract between the real estate company and Pemelton, which the appellees introduced in evidence.

The testimony, as we have shown, was in sharp conflict upon this issue, but as it was submitted under correct instructions, and the verdict of the jury is conclusive here, we find no error in the rulings of the court in the admission of testimony or in the granting and refusing prayers for instructions.

Appellant contends that the court erred in instructing the jury as to the form of the verdict, which instruction is as follows:

"If you find for the plaintiffs, your verdict will be: We, the jury, find for the plaintiffs (and write therein any sum which you may so find)."

Only a general objection was made to the instruction; it is in the usual form.

Appellant urges here for the first time that the instruction was erroneous for the reason that it permitted the jury if they returned a verdict in favor of the appellees to find for them in a sum less than they were entitled to under the undisputed evidence. But, as we have already shown, this instruction in this form could not have been prejudicial to appellant, because it authorized the jury, if they found in favor of the appellees, to return a verdict in a much less sum than the appellees were entitled to recover if they were entitled to recover at all.

If the appellant conceived that he was prejudiced by the instruction, he should have made his objection specific by requesting the court to tell the jury that if they found in favor of the appellees they should return a verdict in the sum of $1,500.

Appellees under the undisputed evidence are the only parties who were entitled to complain of the instruction as to the form of the verdict, and they are not appealing.

We find no errors in the record prejudicial to appellant, and the judgment is, therefore, affirmed.

BLISS v. MANILLA SPECIAL SCHOOL DISTRICT.

Opinion delivered December 22, 1919.

1. SCHOOLS AND SCHOOL DISTRICTS—BUILDING CONTRACT.—A written contract between plaintiff architect and defendant school district, employing plaintiff to prepare plans for a school building, with a provision that the contract was void if the district was unable to secure money on its bond issue and another instrument executed by the same parties on the same day under which plaintiff agreed to buy the bonds for a specified sum *held* to constitute one contract, so that the two instruments should be construed together.
2. SAME — BUILDING CONTRACT — ARCHITECT'S FEE.—In an action against a school district by an architect to recover his fee, an instruction that if plaintiff duly made the plans and was prepared to buy the district's bond issue as he had agreed, and the district failed to carry out its obligations, the plaintiff could recover, but that if plaintiff failed to purchase the bond issue without the district's fault the jury should find for defendant, *held* proper.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. H. Dudley,* Judge; affirmed.

Ben F. Reimberger, for appellant.

1. The school board sold the bonds to Speer & Dow, and under the contract and the law and evidence the judgment should have been for plaintiff for $352.70 as architect and $221 as superintendent.

2. There was no breach of the contract by appellant, and there is error in the instructions. The two contracts were separate and distinct, neither resting on the other.

Buck & Lasley, for appellee.

1. The two instruments should be construed as one contract. 127 Ark. 535; 108 *Id.* 69.

2. The court did not err in its instructions. Appellant did not take and pay for the bonds. The jury has settled all questions of fact against appellant and there are no errors of law.

WOOD, J. This action was instituted by the appellant against the appellee to recover damages on account of an alleged breach of contract.

The appellant alleged that he entered into a contract with the appellee whereby he was employed by the latter as architect and as superintendent for a school building; that he was to receive for his services as architect the sum of 3 per cent. on the contract price when the plans and specifications were completed and the contract awarded; that if the contract was not awarded 3 per cent. of the estimated cost; that he was to superintend the erection of the building and receive for his services as superintendent the sum of 2 per cent. of the cost of the building; that he performed his part of the contract in preparing the plans and specifications; that the contract was awarded and the building was to cost $11,090; that the appellee refused to accept his services as superintendent, which he was ready to perform, for the erection of the building and failed to pay him his fee as architect and as superintendent, to his damage in the sum of $554.50.

The appellee answered, admitting that it entered into the written contract as alleged, and alleged that the contract provided that the same was to be null and void if the school board was unable to get money on the bonds of the district which it proposed to issue and sell for the purpose of raising funds to erect the building. The answer denied that the appellant performed his part of the contract and denied that he was ready to perform the same.

The appellee further alleged that on the day of the execution of the contract set up in the complaint the appellee entered into a written contract with appellant whereby appellant agreed to purchase bonds of the dis-

trict in the sum of $12,000; that appellant was to receive the sum of $400 and was to deliver the balance of the $12,000 to the appellee on or before the date on which appellee would receive bids and let the contract for the erection of the school building; that at the instance of appellant the appellee issued the bonds and delivered the same to W. B. Worthen & Company, trustees; that on the 10th of October, 1917, at the instance of appellant appellee entered into a written contract with one Thompson for the erection of the school building, the contract price being $11,090. The contract provided that the building was to be completed within ninety days from the date of the contract; that Thompson, the contractor, was ready to comply with his contract, but was unable to do so because of the failure of appellant to accept and pay for the bonds according to his contract; that on account of such failure and neglect appellee was unable to dispose of the bonds until the latter part of February, 1918, when it did so realizing thereon $60 less than the price which appellant agreed to pay; that the contractor, on account of the delay in securing the funds realized from the sale of the bonds, canceled his contract and required appellee to pay him the sum of $16 as damages for its breach of contract; that on account of the breach of contract by the appellant the appellee, in order to secure a school building with the amount of money that it had available, was compelled to have new plans and specifications drawn for a much smaller and cheaper building; that, during the delay caused by failure of appellant to carry out his contract for the purchase of the bonds there was an advance in the price of labor and building material which made it impossible for appellee to construct the building according to the original plans and specifications supplied by the appellant and rendered such plans and specifications worthless to the appellee; that the contract for the sale of bonds and the services of appellant as an architect grew out of the same negotiations and were so related that they should be treated as one contract.

Appellee made its answer a cross-complaint, and alleged that it was damaged by reason of appellant's breach of contract in the particulars set forth $2,576, for which it prayed judgment.

The appellant testified that he was an architect and specialized in school buildings in Arkansas. He introduced in evidence the written contract between himself and the school board of date August 13, 1917.

The contract was as set forth in appellant's complaint and admitted by the appellee. It is unnecessary to set it out. It contained a provision as follows: "This contract is void if the board is unable to get money on bonds."

The appellant testified that he made the plans and specifications and placed them in the hands of the contractors and advertised for bids. The lowest bid was $11,090. The contract was let on condition that money was obtained on the bonds. The bonds were sold and the school board received about the sum of $12,000. Appellant was not paid for his services.

The president of the appellee, school board, testified to the execution of the contract between the school board and the appellant for his services as architect and superintendent of the building. The blanks in the contract were filled out by the appellant. On the same day that the contract was entered into with the appellant for his services as architect and superintendent, the appellant submitted to the board of directors the following offer in writing: "Gentlemen: For the sum of four hundred dollars ($400) we will undertake to prepare the proper resolutions, deed of trust, form of bond, twelve thousand dollars ($12,000) amount, and furnish the lithographed blank bonds ready for signature, together with the opinion of our special bond attorneys, Messrs. Read & McDonough, of Fort Smith, Arkansas, for your proposed school loan. In connection with this proposal we will also pay you par for your bonds at the time of sale of said bonds when properly advertised according to the laws of the State of Arkansas now in force. In this way

you will not be delayed indefinitely in getting your proceedings prepared and ready for the market but will have salable bonds when time comes to ask for bids, bonds to be six per cent. and mature in the year 1932."

Witness further testified after the execution of the contract with appellant that he said he would prepare all papers and mail to the board and requested it to execute them and return to him promptly; that in the purchase of the bonds the board did not know that appellant was not working for himself; it relied upon his contract; that after the execution of the above contract relative to the bond issue papers began to come to the board, which papers it promptly executed and returned, and thus carried out instructions from appellant. The board had executed all the papers by September 22, and sent the same with the bonds to W. B. Worthen & Company, trustees. The board advertised the bonds for sale on the 26th of September. On October 10, 1917, Bliss had the board enter into a contract with one Thompson for erection of the school building which was to be completed within ninety working days from that date. The board at that time had received no money from the bonds. The contractor would not begin working, and the board did not wish him to until it had received money for the bonds. Witness, as president of the board, communicated with Bliss, who finally told witness that war conditions were such that he was unable to get the money on the bonds. The bonds remained with W. B. Worthen & Company, as trustees, until some time in December, 1917, when witness recalled them and canceled Thompson's contract for the erection of the building and wrote appellant that they considered the contract of the board with him null and void. The board paid Thompson sixteen dollars. After the bonds were returned, the board began to receive letters from Speer & Dow in regard to the bonds. The board finally sold them the bonds at par and accrued interest less $460, which was the best price it could get after it had endeavored to sell them to other people. The board paid sixty dollars more than it would have had to

pay appellant if he had taken the bonds. Witness had considerable correspondence, at the request of appellant, with Speer & Dow. Witness did not know whom they represented or what arrangements had been made for the handling of the bond issue. Witness did not know at the time that appellant had attempted to assign his contract with Speer & Dow. The board looked to appellant for securing the funds. It understood that the reason that it corresponded with Speer & Dow was they were handling the matter for appellant. That is before Speer & Dow made the board the last offer which was accepted. The board received the money for the bonds from W. B. Worthen & Company, trustees, on December 23, 1917.

It appears that the written contract which was signed by appellant to take the bonds was assigned to Speer & Dow August 15, 1917.

Appellant in rebuttal testified that he notified the board at his first meeting with them that Speer & Dow were to handle the bonds and buy them. The board afterwards wrote appellant and also Speer & Dow, saying that it considered the contract canceled. In the meantime the liberty loans had come out, the bonds were not worth the money, and Speer & Dow sent the school board a telegram offering par and accrued interest less $600 for the bonds. Witness told Speer & Dow that they must carry out the original contract for the sale of bonds and protect witness. Witness induced Speer & Dow to renew the first proposition, because witness knew that he was still responsible to the board on the first contract. It was witness' obligation over his own name.

There was correspondence between the school board and Speer & Dow tending to show that the board had accepted Speer and Dow as the assignees of the contract between it and appellant for the purchase of the bonds.

The testimony on behalf of the appellee, however, as above stated, tends to show that the appellee in this correspondence was treating Speer & Dow as represent-

ing appellant until it notified appellant and Speer & Dow that the contract with appellant was at an end.

The testimony of the president of the board of directors of the appellee district was to the effect that the contract made by the appellee with the appellant for services as architect and superintendent and the written proposal of the appellant to the appellee to buy the bonds of the district were executed on the same day, and that they were parts of the same contract, both papers being the result of the same negotiations.

There is no testimony abstracted in the record which disputes the above.

The contract for services as architect and superintendent recites: "This contract is void if the board is unable to get money on the bonds." The contract proposing to take the bonds recited among other things, "We will also pay you par for your bonds. * * * In this way you will not be delayed indefinitely in getting your proceedings prepared and ready for the market but will have salable bonds when the time comes to ask for bids."

The court did not err, in view of the above testimony, in instructing the jury that the two separate papers offered in evidence were to be construed together, and that they constituted one contract; that it was the duty of appellant to make a complete set of working plans and specifications, and that it was also the duty of the appellant to take the bond issue and furnish the money for the erection of the building in the sum of $12,000.

The court correctly construed the two instruments as one contract. *Belding* v. *Vaughan,* 108 Ark. 69; *Grady* v. *Weimer,* 127 Ark. 535. The court also correctly interpreted the mutual obligations of the parties to the contract.

In another instruction the court told the jury that if the appellant furnished the plans and specifications and was ready and willing to perform his contract and take the bonds and furnish the money to the appellee, and the appellee for any reason failed to carry out the contract with respect to its obligations in the sale and

disposition of the bonds, they should find for the appellant the 3 per cent. due upon the contract for the preparation of the plans; that, on the other hand, if the jury found from the evidence that the appellant breached his contract with reference to the purchase of the bonds and furnishing the money, and that this was in no way due to the fault of the appellee, they should find for the appellee.

The above instruction, as we understand the evidence, correctly submitted the issuable facts as to whether or not there was a breach of the contract and who breached the same.

We find no error in the instruction, and there was evidence to sustain the verdict that the appellant breached the contract, and that he was not, therefore, entitled to recover any sum under it.

Conceding, without deciding, that the contract is valid, and treating it as the parties have treated it, *i. e.*, as a valid and binding contract, there was evidence to sustain the verdict in favor of appellees. The judgment is therefore correct, and it is affirmed.

PINKERTON v. STATE.

Opinion delivered December 22, 1919.

1. INTOXICATING LIQUORS—UNLAWFUL MANUFACTURE—EVIDENCE.—In prosecution for manfacturing spirituous liquors, contrary to Acts 1915, page 98, evidence *held* to sustain conviction.
2. CRIMINAL LAW—SUFFICIENCY OF VERDICT.—A verdict: "We, the jury, find the defendant guilty and assess his punishment at one year's imprisonment," was sufficient to sustain a sentence for one year's imprisonment in the penitentiary.

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

Pinnix & Pinnix, for appellant.

The evidence is not sufficient to sustain the verdict. Appellant was indicted as a principal, but on the trial the State adopted the theory that he was present aiding and

abetting the crime. Kirby & Castle's Digest, section 1646, does not relieve the State of the burden of proving at least some agency employed by defendant in the alleged commission of the crime. The State wholly failed to do this. No proof of his guilt was made, and the substantial rights of defendant were prejudiced by the informality of the verdict, and the court under it could not enter a sentence for felony. The court also erred in refusing the instruction asked by defendant. Where the jury are required to fix the punishment, they must do so in their verdict with certainty or the verdict will be bad. 5 Gratt. (Va.) 697; 43 Ala. 319; 52 Ga. 122; 1 Blackf. (Ind.) 28; 7 Leigh (Va.) 751; 12 La. Ann. 382; 5 Cal. 355; 35 N. E. 469; 24 S. W. 895; 8 *Id.* 892.

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

1. The evidence sustained the verdict, even if defendant had not taken the stand; it was a question for the jury whether his explanation of his presence was true or not, and they have found him guilty, which settles the matter, as there was no error in the instructions or their modification.

2. The verdict is good under our law, and he did not specifically except to it and can not now complain. 45 Ark. 524; 90 *Id.* 482.

HART, J. John Pinkerton prosecutes this appeal to reverse a judgment of conviction against him for the crime of manufacturing spirituous liquors.

The sheriff of Pike County received information that a wildcat still was located near the home of S. A. Morphew in Pike County, Arkansas, and with two deputies went there to investigate the matter. They located the still, which was of 150 gallons capacity, in a pasture about one-eighth of a mile from the residence of S. A. Morphew. They found a still full of mash and barrels and other things necessary to the operation of the still. The sheriff went off to get some breakfast for himself and deputies, and left his two deputies to watch the still.

According to their testimony S. A. Morphew came early in the morning and built a fire under the furnace. He then took the lid off of the still and began to stir the beer in it. After he had stirred the beer or mash for a while, the deputies arrested him and carried him off a short distance from the still, and one of them was left to guard him. Morphew had put the cap back on the still and laid the paddle down. After taking Morphew away, one of the deputies went back to watch the still. After he had stayed there some time, John Pinkerton, the defendant, approached the still and took off the cap which Morphew had placed on it before he left. Pinkerton then picked up the paddle which Morphew had left on the platform and went to stirring the mash or beer in the still, just as Morphew had done. After he had stirred it for about five minutes, the deputy sheriff arrested him.

The sheriff testified that he was familiar with the operation of a wildcat still, and that he found about a half of a quart of wildcat liquor at the still.

Morphew was the father-in-law of the defendant, and the defendant lived at his house. Morphew was a witness for the defendant and testified that the defendant had been sent to the penitentiary for manufacturing whiskey and had just come back from there the Christmas before the trial; that the defendant had lived at his house since he had been discharged from the penitentiary and was making a crop with him; that the defendant had nothing whatever to do with setting up the still, and so far as he knew the defendant did not know it was there; that he, Morphew, had set up the still by himself and had carried the mash from his dwelling house to the still; that both he and the defendant knew how to run a still and to manufacture spirituous liquors; that it is necessary in making liquor to keep the mash or beer stirred; that there was a dim path leading from his house to the place where the still was found in operation.

The defendant was a witness for himself, and admitted that he had been convicted of the crime of manufacturing intoxicating liquors and had been confined in

the penitentiary for that offense. He also admitted that he knew how to make spirituous liquors and to operate a still, but he said that he had determined to quit the business after he was discharged from the penitentiary. He testified that on the morning in question he went down into the pasture to look for a mule, and incidentally ran across the still; that the paddle was already in the mash and that he picked it up and stirred it around in there for a moment out of curiosity; that he did not stir the beer or mash, and had no intention of helping to manufacture spirituous liquors. The defendant was found at the still early one morning in June, and it was a rainy, misty morning.

The principal assignment of error relied upon by the defendant for a reversal of the judgment is, that the testimony is not sufficient to warrant the verdict. Our statute makes it a felony to manufacture or to be interested directly or indirectly in the manufacture of alcoholic, spirituous or fermented liquors. Acts of 1915, page 98.

In *Lowery* v. *State,* 135 Ark. 159, the court held that it was a violation of the statute to run the beer or mash through the process of distillation one time. It is true that in the case at bar the mash or beer had not been run through the still one time, but there was a bottle of wildcat whiskey found at the still. It was shown that the still had been set up there for three weeks, and that there was plenty of wood with which to run the furnace and of mash at the residence of Morphew with which to manufacture intoxicating liquors. Both Morphew and the defendant who lived with him knew how to operate a still. The still was situated in Morphew's pasture about one-eighth of a mile from his residence. These facts and circumstances were sufficient, if believed by the jury, to show that some one had manufactured spirituous liquors at the still, although both Morphew and the defendant denied that they had made or manufactured any spirituous liquors. Indeed, Morphew said that he had found the liquor in question at the still when he first procured

the still some several weeks before that time. His testimony and that of the defendant, however, only went to contradict the other testimony, and did not have the effect to wholly disprove it.

This brings us to the question of whether the proof was sufficient to show that the defendant was directly or indirectly interested in the manufacture of the liquor. It is true both he and Morphew testified that he was not interested in making the liquor and that he did not know anything about the still being there until the morning in question when he was arrested, but they are contradicted by the other facts and circumstances in the case. The still had been set up only an eighth of a mile distance from the residence of Morphew, where the defendant also lived. It is hardly probable that any one living there and working in the fields on the place could do so without seeing the smoke or other indications which would point to the operation of a still to one who like the defendant knew how to run the still himself and make intoxicating liquors. The mash was kept in an outhouse in the yard. There was a path leading from the house to the still. The deputy sheriff testified that the defendant walked up to the still, took the cap off of it and picked up a paddle lying there and began to stir the beer or mash just like Morphew had done earlier in the morning. The defendant knew how to make whiskey. Morphew said that he was stirring the mash for the purpose of making whiskey, and that this was necessary to be done. Therefore, the jury were warranted in believing that the defendant was assisting in the manufacture of the whiskey on the morning in question and had assisted in making the wildcat whiskey which was found at the still. See *Pinkerton* v. *State,* 126 Ark. 201.

The jury returned the following verdict: "We, the jury, find the defendant guilty and assess his punishment at one year's imprisonment."

Judgment was pronounced upon the verdict, and the defendant was sentenced to one year's imprisonment in the State penitentiary.

Counsel for the defendant urges that the verdict is not sufficient to support the judgment of the court. We can not agree with counsel in this contention. The statute provides but one punishment for the crime, and that is imprisonment in the State penitentiary for a period of one year. Hence there was no inconsistency between the verdict of the jury and the judgment and sentence of the court.

It follows that the judgment must be affirmed.

FIRST NATIONAL BANK OF MENA v. ALLEN.

Opinion delivered December 22, 1919.

1. COMPROMISE AND SETTLEMENT—CONSIDERATION.—The compromise of a disputed claim furnishes sufficient consideration to uphold the terms of a compromise, even though the asserted claim is without merit, and could not have been sustained in the courts.
2. BILLS AND NOTES — LIABILITY OF ACCOMMODATION MAKER OF CHECK.—Where a dispute between a bank and an indorser upon a check was compromised by the bank returning the check in consideration of a third party delivering a check, the latter was liable on his check under Negotiable Instrument Law, section 29, though he signed it merely as accommodation.

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

STATEMENT OF FACTS.

The First National Bank of Mena commenced this suit against T. A. Allen and C. E. Sutton before a justice of the peace to recover the sum of $50. From a judgment rendered against them the defendants duly appealed to the circuit court, where the case was tried *de novo*.

The facts are as follows: C. E. Sutton and his daughter, Eva Sutton, were conducting a restaurant in the city of Mena, and the daughter received a check from Fred Fonsworth, a customer, drawn in favor of her father on the First National Bank of Mena. She supposed the check was for fifty cents, and received it for that sum. She had authority to endorse checks payable

to her father and endorsed the one in question to another customer in making change for $5. She still supposed the check was for fifty cents. Some unknown person carried the check to the First National Bank of Mena and presented it without endorsing it, and it was cashed by that bank. It turned out that the check was for $50, instead of fifty cents. At the close of the day's business the First National Bank found out that Fonsworth was not a customer of it and called up the Planters' State Bank, and was told by the officers of that bank that Fonsworth was its customer, but that he did not have enough funds in the bank to pay the check.

The president of the First National Bank of Mena found out from the Suttons that the check was intended to be for fifty cents instead of $50. The bank insisted that Sutton was liable to it on his endorsement because the check was intended to be drawn on the Planters' State Bank and was drawn on the First National Bank by mistake.

On the other hand, Sutton claimed that the check being drawn on the First National Bank and cashed by it, that he was only liable to the bank for the sum of fifty cents for which sum the check was intended to be drawn. In settlement of their dispute T. A. Allen, as an accommodation to C. E. Sutton, gave the bank his check on the Planters' State Bank of Mena for $50, and the bank turned over the check of Fonsworth to Sutton. Before the check was presented to the bank for payment Allen notified it not to pay the check. Hence this lawsuit.

The case was tried before a jury, which returned a verdict for the defendants, and from the judgment rendered the plaintiff has appealed.

Norwood & Alley, for appellant.

The check was a written instrument for a certain amount, and Sutton received the check and endorsed it and was liable, and plaintiff was entitled to a directed verdict. It was an obligation in writing and for a valuable consideration and is binding. Act 81, Acts 1913, § 61.

It was given to settle a dispute between Sutton and the bank and for a good and sufficient consideration. 131 N. Y. 149; 52 *Id.* 422; Crawford's Ann. Neg. Inst. Law, p. 71; 213 Mass. 336.

Prickett & Pipkin, for appellees.

Under the undisputed facts appellees should have had a directed verdict, but the result is the same, and there is no error, as justice has been done. 13 C. J. 321, § 156. Allen had the right to stop payment of his check, and there was no liability of Sutton, as he never agreed to pay it; he simply thought he was liable on his endorsement and he was not. The original promise was without consideration, and the secondary promise was likewise so and not binding. 13 C. J. 321, § 156. See also 2 Michie on Banks, etc., 908, § 124. Sutton was never liable to the First National Bank for the check, as the bank accepted and paid it and could not recover back the amount from the payee, because the maker had no funds in such bank. 2 Michie on Banks, etc., 908, § 124, and cases cited.

HART, J., (after stating the facts). The court instructed the jury that if Mr. Sutton received the check as fifty cents and disposed of it as fifty cents neither he nor Allen was liable to the plaintiff. This was wrong. The check drawn by Fonsworth on the First National Bank in favor of Sutton was plainly written for fifty dollars, although Sutton received it for fifty cents. He endorsed the check. Inasmuch as he was not a customer of the First National Bank and was a customer of the Planters' State Bank, it was supposed that he had made a mistake and used one of the blank checks of the former bank, when he in fact intended to draw the check on the latter. The Planters' State Bank, however, refused to pay the check because Fonsworth did not have sufficient funds to meet it. Under this state of facts, the plaintiff bank approached Sutton and claimed that he was liable for the whole of the $50. Sutton claimed that, inasmuch as the check was drawn on the First National Bank and it had cashed it, he was only liable on his endorsement for

the sum of fifty cents, that being the amount for which he had received the check. The parties settled their dispute by the bank surrendering to Sutton the check which Fonsworth had drawn in favor of Sutton and Sutton gave to the bank the check of Allen for $50, Allen being an accommodation drawer for him. This was the settlement or compromise of a disputed claim between Sutton and the First National Bank of Mena, and it is well settled in this State that the compromise of a disputed claim furnishes sufficient consideration to uphold the terms of a compromise even though the asserted claim is without merit and could not have been sustained in the courts. *Willingham* v. *Jordan,* 75 Ark. 266; *Fender* v. *Helterbrandt,* 101 Ark. 335, and *Simonson* v. *Patterson,* 137 Ark. 106, and cases cited.

It follows that the compromise between the bank and Sutton furnished a sufficient consideration to make Sutton liable to the bank for the $50 when Allen stopped payment on his check which had been given in satisfaction of the claim of the bank. The surrender by the bank of the original check drawn in favor of Sutton by Fonsworth was a sufficient consideration moving from it. Allen was also liable as an accommodation party under our Negotiable Instruments Act. Acts of 1913, page 260. Section 29 reads as follows: "An accommodation party is one who has signed the instrument as a maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

In construing a precisely similar section of the Negotiable Instruments Act of the State of Massachusetts, the Supreme Court of that State said that where a defendant for the accommodation of a debtor and without consideration gives his note or check to a creditor of the debtor in payment of, or as security for, the debt due from the debtor to the creditor, he is liable to the creditor on

the note or check. *Neal* v. *Wilson,* 213 Mass. 336. In that case the court further said that the fact that the creditor knew the check was given for the accommodation of the debtor was not a defense, for that was the purpose of the transaction. Under this decision and under the plain language of the statute just quoted, Allen was liable to the plaintiff bank.

It follows that the judgment must be reversed and the cause remanded for a new trial.

DES ARC OIL MILL, INC., *v.* MCLEOD.

Opinion delivered December 22, 1919.

1. ABATEMENT AND REVIVAL—DISSOLUTION OF CORPORATION.—Under Kirby's Digest, sections 935, 954, dissolution of a corporation did not abate a pending suit against it based upon a claim for unascertained and unliquidated damages; the claimant being a "creditor" within the statute, and the claim of damages constituting a "debt."
2. CORPORATIONS—DISSOLUTION—PENDING ACTIONS.—Kirby's Digest, section 954, providing that equity courts should dissolve and wind up insolvent corporations, did not contemplate that actions properly pending at law should be transferred to equity; but when such actions are reduced to judgment in the law court, enforcement should be had in equity.

Appeal from Prairie Circuit Court, Northern District; *George W. Clark,* Judge; affirmed.

John F. Clifford, Price Shofner, F. E. Brown and *Richard M. Mann,* for appellants.

1. The dissolution of the corporation abated all actions against it. Kirby's Digest, §§ 957-8; Thompson on Corp. (1910 Ed.), par. 6562-4-5-9; 116 Ark. 74; 21 Wall. 609; 3 Story 658; 69 S. E. 822. The motion to abate should have been granted, as the corporation had been duly dissolved. 116 Ark. 74; 144 U. S. 640; 8 Pet. 281; Cook on Corp. (1908 Ed.), § 642; 10 Cyc. 1316-17; 68 Ill. 348; 111 Pac. 1073; 120 Fed. 165; 74 *Id.* 425; 7 R. C. L., pp. 735 to 740.

2. It was error to refuse to transfer the case to the Pulaski Chancery Court, as it had jurisdiction, as the circuit court no longer had jurisdiction. Kirby's Digest, § 958.

3. A peremptory instruction for defendant should have been given, as plaintiff showed by his own testimony that he had full knowledge and appreciation of the danger and assumed the risk. 206 S. W. 655; 96 Ark. 500; 73 *Id.* 49; 82 *Id.* 534; 97 *Id.* 486; 107 *Id.* 341-528; 121 *Id.* 556; 163 Mass. 391.

4. The court erred in reading to the jury plaintiff's instruction No. 3. It gave undue emphasis to the particular features of the case embodied therein to the exclusion of defendant's theory and other issues. 79 Ark. 53; 89 Mich. 476; 50 N. W. 991. It was also error to fail to give defendant's instruction No. 9. It was incumbent on the master to instruct the servant against danger not reasonably anticipated. See cases *supra;* 26 Cyc. 1116; 76 N. W. 362; 44 S. E. 707.

Brundidge & Neelly and *Emmet Vaughan*, for appellee.

1. The cause did not abate on account of the dissolution of the corporation. The Legislature never intended giving the right to surrender a charter to defeat a pending cause of action in the courts. 116 Ark. 80. The parties, appellants, voluntarily came into court and made themselves parties to the action and can not avoid liability by setting up the dissolution of the corporation.

2. The peremptory instruction was properly refused as heretofore decided on former appeals to this court, as was also the refusal to give No. 9. This court has practically passed on all the instructions given and refused and there was no error.

SMITH, J. This is the third appeal in this cause and the facts out of which the litigation arises need not be restated here. *McLeod* v. *Des Arc Oil Mill Co.*, 131 Ark. 594, 199 S. W. 932; *Des Arc Oil Mill, Inc.*, v. *McLeod,* 137 Ark. 615, 206 S. W. 655.

At the trial from which this appeal was prosecuted instructions were given conforming to the law as announced in the former opinions, and no useful purpose would be served by reviewing them.

It is earnestly insisted, however, that a verdict should have been directed in favor of appellants. But there appears to be no substantial difference between the testimony on this appeal and that on the former appeals, and we have already twice held that the testimony made a case for the jury.

It appears that, after the second judgment had been rendered in the court below, and prior to the reversal of that judgment here, the corporation assigned its assets to one of its stockholders, and, by unanimous vote of the stockholders, a resolution was adopted dissolving the corporation. Before the trial from which this appeal was prosecuted a receiver was appointed on the prayer of one of the stockholders and officers, who was also a creditor, and a motion was made in the court below to transfer this cause to the Pulaski Chancery Court, where the receivership was pending. That motion was denied, and the cause proceeded to trial and judgment.

A claimant for damages is a creditor (*Papan* v. *Nahay,* 106 Ark. 230; *Horstmann* v. *LaFargue,* 140 Ark. 558), and the damages claimed constitute a debt within the protection of the law; and we do not think the dissolution of the corporation abated appellee's suit for damages.

It is pointed out that at the common law, and in the absence of any saving statute, the dissolution of a corporation effectually abates all actions pending against it at the time of such dissolution, and it is asserted upon the authority of the opinion in the case of *State ex rel. Attorney General* v. *Arkansas Cotton Oil Co.,* 116 Ark. 74, that we have no saving statute which prevents the abatement of suits for debt. That case, however, was a suit for a penalty, and, recognizing the rule of the common law stated above, we there held that our statute on the subject of the dissolution of corporations did not contain a saving clause making the corporation liable for

penalties claimed against the corporation at the time of the dissolution. The statute on the subject is as follows:

"Sec. 953. If any corporation shall expire or cease to exist, either by its own limitation, judicial judgment or forfeiture of charter, or by legislative act, the common law in relation to corporations shall not be in force in relation thereto, but the goods and chattels, lands, tenements and hereditaments, and every right or profit issuing out of or appertaining thereto, moneys, credits and effects of such corporation, shall immediately vest in the State in trust for the uses and purposes by said charter contemplated; and each, every and all right, upon the expiration or dissolution of said corporation, shall be and is in abeyance until the action of the Legislature shall be had thereon, unless provisions shall be made by law for the management of said corporation fund in contemplation of such dissolution.

"Sec. 954. Hereafter courts having equitable jurisdiction may make decrees upon the application of the stockholders or creditors of any corporation, to dissolve and wind up such corporation and to pay its debts and distribute its assets among the holders of the shares of stock thereof, in all cases where it shall be made to appear that such corporation is insolvent, and therefore unable to continue its business, and in all cases where it shall be made to appear that the corporation has ceased to transact business." Kirby's Digest.

It will be observed that in express terms the common law rule is abrogated and courts having equitable jurisdiction are authorized to wind up such corporations and "to pay its debts and distribute its assets," and in the case of *State ex rel. Attorney General, supra,* we said of the statute quoted that it "does, as before stated, contain a provision for the payment of debts and the distribution of assets, but this does not, for obvious reasons, apply to the recovery of a penalty." And in the same case it was also said:

"Since there is no provision in the statute for the payment of this kind of a claim against a dissolved

corporation, it is plain that there can be neither a continuation of the action nor a revival thereof. Whether there would be an abatement of an action which does in effect survive under the statute, we need not stop to inquire, for the reason that that question is not raised here. We have before us the question of enforcement of a strictly penal statute, which does not survive under this or any other statute, no provision is made for the enforcement of such claim against a dissolved corporation, and it necessarily follows that the action does not survive, even where the dissolution takes place after the commencement of the action."

Although appellee's demand was a debt, it was based upon a claim for unascertained and unliquidated damages, which must first be ascertained, and the suit for that purpose pending at the time of the dissolution did not abate. It was not necessary to revive it against any one because it had not abated, and the court properly refused to transfer it to the chancery court where the receivership was pending, because the statute quoted manifests no purpose to lift out of the law courts the jurisdiction of pending causes which were otherwise properly triable at law.

Of course, when such demands have been reduced to judgment payment must be enforced in the manner pointed out by the statute—that is, through the aid of courts having equitable jurisdiction.

It is pointed out in the opinion in the case of *State ex rel. Attorney General, supra,* that business corporations were unknown at the common law, and the only municipal, ecclesiastical and eleemosynary corporations then existed; and we think the purpose and effect of our statute changing the common-law rule in regard to dissolved corporations was to prevent corporations generally from freeing themselves from liability for their debts by dissolving.

The statute makes no attempt to prevent corporations from dissolving; indeed, it provides the method by which they may do so, but its purpose would be largely

defeated if it were given a construction which rendered it impotent to prevent a corporation ridding itself of a debt in the manner here attempted.

Judgment affirmed.

COAL DISTRICT POWER COMPANY v. KATY COAL COMPANY.

Opinion delivered December 22, 1919.

1. ELECTRICITY—CONTRACT TO SUPPLY POWER—IMPOSSIBILITY OF PERFORMANCE.—Where a power company agreed to provide such electric power as might be required for a certain purpose, it was no defense to a failure to furnish such service that certain supplies could not be procured by reason of war.
2. ELECTRICITY—CONTRACT TO FURNISH—DAMAGES.—Where a power company agreed to furnish current to operate a coal mine, and by reason of its failure to do so the mine was closed, the power company was liable for the net profits that would have been made if the mine had not been closed.
3. ELECTRICITY — CONTRACT TO FURNISH — ELEMENTS OF DAMAGES.—Where plaintiff was compelled to close his mine and to operate under difficulties by defendant's failure to furnish current at all times as agreed, he was not entitled to damages for loss of profits and also to money paid for excessive cost of operation, as operating costs should be taken into account in ascertaining loss of profits upon the production of coal.
4. APPEAL AND ERROR—MATTER NOT CONSIDERED BELOW.—The Supreme Court will not render judgment for an item of damages not submitted to the jury.
5. ELECTRICITY—DAMAGES—LOSS OF PROFITS.—In an action by a mine owner against a power company for damages caused by closing the mine by reason of defendant's failure to furnish constant power, as agreed, testimony showing the profit of the mine when operatives were not interfered with, and the time during which there was a suspension of operations due to absence of current, is sufficiently definite to support a recovery.

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

Hill, Fitzhugh & Brizzolara, for appellant.

1. The contract was in general terms, there being no agreement for the supply of any definite amount of current nor any guaranty that there would be no inter-

ruptions, nor promise to take any definite amount, nor any special object for which current was taken. The contract was in general terms for the sale of current of electricity without any special provisions whatever. The proof shows defendant exercised the highest degree of care at all times. Any interruptions of service were solely on account of matters entirely beyond the control of defendant and in spite of all efforts to furnish current; no negligence was shown but the interruptions were caused by failure in the insulators, which it was impossible to obtain on account of the war and a strike. 112 Ark. 425 is different from this case, nor does 64 N. J. Law 240 apply. Wigmore on Publ. Serv. Corp., § § 657-9; 38 Mass. 417; 13 C. J. 640; 149 U. S. 1. See also 3 Page on Contracts, pp. 2113-2140.

2. Loss of anticipated profits were not recoverable. 91 Ark. 192; 49 C. C. A. 244; 91 Ark. 180; 1 Sedgwick on Dam., § § 184-6-7-8; 34 Ark. 184; 44 Penn. St. 156, 169; 91 Ark. 433; 113 *Id.* 588; 75 *Id.* 469; 77 *Id.* 150. The leading case in this State is 72 Ark. 275. See also 104 *Id.* 215; 139 U. S. 199; 1 Sedg. on Dam. (8 Ed.), § 159; 190 U. S. 540; 31 Okla. 292.

3. The instructions were erroneous, and the case tried entirely upon an erroneous theory as to the liability of appellant and the measure of damages. Cases *supra.*

4. If plaintiff was entitled to recover, the measure of damages was not the loss of profits but the rental value of the property or interest on the investment during the time of the interruptions of the business. 35 Atl. 1127; 3 Suth. on Dam., p. 2127; 77 Ark. 150; 134 *Id.* 345.

5. The evidence as to losses is not sufficient to support the judgment on the cross-appeal. See 77 Ark. 150.

Warner, Hardin & Warner, for appellee.

1. Defendant is liable for the breach of the contract. There was no ambiguity, and its construction was for the court and not the jury. 126 Ark. 19. The con-

tract was prepared by defendant alone and all doubts resolved against it. 112 *Id.* 6.

2. Even if the contract was impossible of performance, defendant had agreed in absolute terms to perform it and after breach non-performance from impossibility was no defense. 112 Ark. 425; 52 L. R. A. (N. S.) 502; 126 Ark. 46, 50; 93 *Id.* 447-952; 234 Fed. 817; 105 Ark. 419; 91 *Id.* 180; 61 *Id.* 312; 181 S. W. 640; 13 C. J. 635-706; note to L. R. A. 1916 F, 31-37 *et seq.;* 107 Me. 279; 78 Atl. 288; 91 N. Y. Supp. 544; 74 Pac. 52; 60 U. S. (L. Ed.), 576; 34 So. 744; 183 S. W. 431; 164 Fed. 980.

112 Ark. 425-435 definitely settles the liability of defendant for all damages caused by the breach. See also 72 Fed. 227; L. R. A. 1916 F, 37 and note; 78 Atl. 288; 136 Ark. 231; 13 C. J. 637.

3. The question of ordinary care does not enter into this case. The action is *ex contractu,* not *ex delicto.* 105 Ark. 419; 52 S. E. 677.

The defense of act of God was a conclusion and not a statement of fact, and since the order to suspend was of a temporary nature, it was available as a defense. L. R. A. 1916 F, 67, also *Ib.* 12 and note 8.

The court below properly declared the effect of a violation of the contract. 45 Atl. 692; 112 Ark. 425; 89 *Id.* 24; 64 Ind. 125; 22 Atl. 633.

4. Plaintiff was entitled to recover for loss of profits and the instructions properly submitted the question to a jury. *U. S. Auto Co.* v. *Arkadelphia Mill Co.,* ms. op., October 6, 1919; 136 Ark. 231; 111 *Id.* 474; 91 *Id.* 192.

Profits were reasonable in the contemplation of the parties at the time the contract was made. 53 Ark. 434-443; 69 *Id.* 219; 104 *Id.* 215; 74 *Id.* 358; 72 *Id.* 275; 71 Atl. 759; 4 R. C. L. 461, § 28; 6 L. R. A. (N. S.) 1058; 136 Ark. 231.

Defendant actually possessed sufficient knowledge and notice of the special circumstances which might cause special damages to follow the breach of contract. 8 R. C. L. 461, § 28.

5. The damages from loss of profits were *certain* in their nature and as respect to cause. Cases *supra;* 91 Ark. 433; 105 *Id.* 433; 63 Tex. 381; 38 So. 64; 17 C. J. 756, § 90; 111 Ark. 190.

6. There was no error in the instructions. The facts are undisputed and a directed verdict was proper. 104 Ark. 267; 57 *Id.* 461.

7. Plaintiff was entitled to recover damages for expenses incurred. 28 U. S. (L. Ed.), 168; 17 C. J. 798, note 18; 85 Ark. 605; 134 *Id.* 345. See also 134 Ark. 430; 1 Suth. on Dam., pp. 257-8; 17 C. J. 800, § 126 (b).

SMITH, J. The parties to this litigation entered into the following contract:

"The following contract entered into and made this 24th day of May, 1917, by and between the Katy Coal Company, a corporation duly organized and existing under and by virtue of the laws of the State of Arkansas, to be hereinafter referred to as the consumer, and the Coal District Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of Arkansas, to be hereinafter referred to as the company. Witnesseth:

"For the sum of one dollar and other good and valuable considerations, each paid to the other, receipt of which is hereby acknowledged; the company agrees to deliver to the premises of the consumer at a central transformer station located at what is known as 'Midland Six Mine,' about one and one-half miles north of Midland, Arkansas, and the consumer agrees to accept, use and pay for upon the terms and conditions as herein provided, what is commercially styled Three Phase Sixty Cycle Alternating Current at a potential of approximately two hundred and twenty volts.

"The company agrees to build at its expense and provide sufficient transformer capacity, a transmission line to the location of a transformer station, said location to be decided upon by both parties to this contract. The consumer agrees to construct at its expense all pole lines,

wires, etc., etc., necessary for the conduction, or transmission of such electrical energy as it may use, from the transformer station to the location of the pumps, fans, hoists, or other power using appliances.

"The consumer agrees to and does hereby grant to the company permission to construct upon the land now owned or leased by the consumer, the transmission line necessary to serve the consumer, and to allow said company to extend said transmission line for the service of other consumers.

"The consumer agrees to pay the company all bills for electric power not later than the tenth of each month upon the following basis:

"First—A demand charge of one dollar per month per killowatt of maximum demand as indicated by the name plate ratings on the transformers installed, plus an energy charge of:

"First 1,000 K. W. H. per month	$0.04	k. w. h.
"Next 2,000 K. W. H. per month	.03	k. w. h.
"Next 3,000 K. W. H. per month	.025	k. w. h.
"Next 4,000 K. W. H. per month	.0225	k. w. h.
"All in excess of 10,000 K. W. H. per month	.02	k. w.h.

"The consumer agrees that at no time during the life of this contract that a demand charge of less than forty killowatts shall be used.

"The company agrees to provide such additional capacity as the consumer may require for its purpose, however such additions in capacity shall establish the basis of the demand charge for the remainder of the life of this contract.

"This contract shall be in full force and effective force for a period of five (5) years from and after the date power is turned on the line, which shall not be later than sixty days from the date of the signing and acceptance of this contract, unless the company shall be prevented in the construction of said line by causes reasonably beyond its control."

The circumstances under which the contract was executed are as follows: G. W. Skow was the superintendent of the power company, which is in the business of dealing commercially in electric power in the coal mining district, and he appears to have been conversant with the methods of mining coal generally and to have been familiar with conditions in appellee's mine. The negotiations leading up to the contract were had between Skow and H. F. Rogers, the president and manager of the coal company. The mine passed into the control of the coal company on April 15, 1917—it having been operated prior to that time under a different management—and was being operated at the time of the execution of the contract. Skow and Rogers consulted, both at the company office and at the mine, and a blue print was prepared showing the details of the mine. The blue print gave the dimensions of the slope and showed the number, position and dimensions of the entries connected with it and of a concrete dam which had been constructed to prevent the flow of water down a depression or swag in the mine from an adjacent creek.

Water accumulated at this depression and required pumping to prevent it flooding the mine. A steam pump had been employed for this purpose with unsatisfactory results, owing to the distance from the steam power, and Skow was advised that steam power was being used for that purpose, and that electric power was desired for the purpose of operating the pump and supplanting steam as the power to be used in the general operation of the mine. Skow prepared the specifications for the pump and the accessories necessary to handle the water situation, and he advised Rogers the machinery necessary to install to use the electric current. After these details had been discussion and agreed upon, Skow prepared the contract set out above, and it was executed without any change being made.

The coal company at its own expense erected the necessary poles and strung the wires for the transmission of the current and made all other essential preparations to

operate its plant with the current contracted for, at a very considerable expense to itself. No attempt was made to show any failure to perform on the part of the coal company nor that performance was prevented by an act of God or the public enemy, the defense made and relied upon being that performance was prevented by circumstances and conditions not under appellant's control and the details of which will be more fully stated.

The parties proceeded to operate under the contract and the coal company operated the mine with the current furnished by the power company and the current was sufficient for the coal company's purpose, except that frequent interruptions in the transmission of the current occurred. These interruptions varied in duration, and during their continuance the operation of portions of the mine was interfered with, as a result of which it is said the damages sued for were sustained.

The power company admits it did not furnish the service called for by the contract, but contends that it used the utmost diligence in the effort to do so and seeks to exonerate itself from liability for the damages sustained on that account.

The interruption in the service commenced about November 22, 1917, and continued until February 13, 1918. The trouble appears to have been caused by the breaking down of a number of insulators, and the testimony showed that it was impracticable, if not impossible, to get the style of insulators then in use on the lines connecting with the power company's plant for the reason that some of the ingredients in the compound used in the old style of insulators were made in Germany, and on account of the World War could not be secured. After discovering the cause of the trouble the power company made diligent effort to procure a different kind of insulator and did procure them as soon as it was able to do so.

Under the facts stated the court construed the contract as imposing an absolute duty on the power company to furnish current, and in one of the instructions given told the jury the power company was liable for the dam-

age resulting from its breach of the contract if default had been made in failing to furnish current, and only this question and the question of damages were submitted to the jury. The damages claimed were loss of profits upon the production of coal and money paid out for excessive labor and power in the operation of the mine without the electric current. The instructions given submitted the question of loss of profits on the production of coal, but refused to submit the question of increased cost of operation as a separate ground of recovery. There was a judgment for the coal company for $3,500, and both sides have appealed.

We think the court correctly interpreted the contract set out above. A demand charge of one dollar per month per kilowatt was provided for and also that "the consumer agrees that at no time during the life of this contract that a demand charge of less than forty kilowatts shall be used," so that a minimum consumption of current amounting to $40 per month was provided for. It was also provided that "the company agrees to provide such additional capacity as the consumer may require for its purpose, however such additions in capacity shall establish the basis of the demand charge for the remainder of the life of the contract."

Anticipating that the current contracted for would be furnished, the coal company removed the concrete dam and proceeded to operate the mine. The removal of this dam increased the necessity for this current to operate the pumps to prevent the flooding of the mine.

This case is not distinguishable in principle from the case of *Harrington* v. *Blohm,* 136 Ark. 231. There Harrington had contracted to equip a pumping plant ready for operation by June 1, and through his failure to do so there was an insufficient supply of water to cultivate and mature Blohm's rice crop. Harrington sought to excuse this failure and the consequent liability for damages by showing that he had "used his best endeavors to get said well and machinery installed before June 1 and that the

failure to do so was no fault of defendant's (Harrington)."

We said however that Harrington could not be excused by that showing, that the obligations of the contract were reciprocal, and that it must have been in the contemplation of the parties that damage to the rice crop would result if water were not furnished. So here it must have been in the contemplation of the parties that damage would result if the required electric current was not furnished, and this current was as essential here as was water in the case of *Harrington* v. *Blohm, supra.*

The circumstances of the case show that the parties to the contract must have contemplated the uses to which the current would be put and the consequences of the failure to furnish it, and that the coal company would begin the operation of the mines in reliance upon the performance of the contract. Measured by this test, we think it must be said here, as was said in the case of *Midland Valley Rd. Co.* v. *Hoffman Coal Co.,* 91 Ark. 194, that "the net profits of operating the mine as damages for a breach of the contract may fairly be said to have been in contemplation of the parties when the contract for furnishing cars (electric current) for the shipment (mining) of appellee's coal was entered into."

There is a cross-appeal here upon which we are asked to render judgment for the excessive cost of operation due to the failure to furnish the current. This we can not do, as that issue was not separately submitted to the jury, and a reversal of the judgment wuld be required if it appeared that error had been committed in this respect. We think error was not committed in that respect, as a consideration of all operating costs should have been taken into account in ascertaining profits.

One of the chief reasons urged for the reversal of the judgment is that the testimony is not sufficiently definite and certain to support the recovery. But the testimony did show the output of the mine when operations were not interfered with and that under those circumstances a profit of fifty cents per ton was made, and a

record was kept of the time during which there was a suspension of operation due to the absence of the current, so that we conclude the damages assessed were not speculative or conjectural.

We do not set out or discuss the instructions, as no specific objection is pointed out to any particular instruction, the insistence being that the court should have submitted to the jury the sufficiency of appellant's excuse for nonperformance, and that the testimony was not sufficiently definite to support a recovery of profits.

We do not agree with appellant upon either contention, and no other error appearing the judgment is affirmed.

NORTH AMERICAN UNION v. OLIPHINT.

Opinion delivered December 22, 1919.

1. INSURANCE — FOREIGN FRATERNAL BENEFIT SOCIETY — SERVICE OF PROCESS.—A foreign fraternal benefit society doing business in the State in violation of Acts 1917, page 2087, is estopped to deny that it had a license or that the Insurance Commissioner was its agent for the service of process.
2. INSURANCE—FOREIGN SOCIETY DOING BUSINESS IN STATE.—A foreign fraternal benefit society which took over the membership of another society doing business in the State, adopted the local organizations of the latter society, attached riders to the policies of members, assuming liabilities thereunder, levied and collected premiums and dues on such policies, paid losses, and directed representatives of the merged society to solicit insurance, was "doing business" in the State, within the meaning of Acts 1917, page 2087, relating to service of process on foreign benefit societies.
3. CONTINUANCE—SURPRISE.—In an action on contract it was not error to refuse a continuance asked by defendant on the ground the plaintiff changed the theory of his case at the trial, in that the complaint alleged a direct contract while the proof tended to show subsequent ratification of an unauthorized contract, since the alleged contract rested in correspondence which defendant's counsel obtained in advance of the trial.
4. INSURANCE—AGREEMENT TO PAY AGENT.—Letters *held* to indicate an intention to remunerate an agent for services rendered and to be rendered.

5. INSURANCE—RATIFICATION OF CONTRACT OF EMPLOYMENT.—Letters written by a fraternal benefit association *held* sufficient to support a finding that such association ratified a contract of an association of members of such association undertaking to bind such association to pay plaintiff for services rendered and to be rendered.

6. TRIAL—INSTRUCTION.—An instruction, "If you further find, from a fair preponderance of the evidence and under all the circumstances of the case as reflected by the evidence, that the services, if any, were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that a pecuniary compensation should be made for them, then you would be warranted, under the law, in finding there was an implied promise on the part of the defendant to pay the plaintiff in money for any such services," *held* not erroneous, as in effect instructing the jury to determine whether there was an implied contract from the character of the services rendered, and not from the whole evidence in the case.

7. TRIAL—REQUESTS ALREADY COVERED.—It was not error to refuse a requested instruction fully covered by given instructions.

8. TRIAL—AMBIGUITY IN INSTRUCTION.—Any mere ambiguity in an instruction should be specifically pointed out to the court or met by a correct request eliminating the ambiguity.

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

Sherrill, Buchanan & Mallory, for appellant.

1. Proper service was not had on appellant. Sec. 17, act 462, Acts 1917; 69 Ark. 429-396. The summons was served upon the State Insurance Commissioner and J. L. Hawkins, an alleged collector for defendant, but not an agent for service. 69 Ark. 429, 396; 251 Fed. 171; 251 *Id.* 71. The doctrine of estoppel does not apply here. 1 Herman on Estoppel, p. 14; 218 U. S. 573. Defendant was not doing business in Arkansas nor engaged in business in the State. 177 U. S. 28-45; 204 *Id.* 21-22; 218 *Id.* 573.

2. The court erred in refusing to permit defendant to introduce evidence on motion to quash service. 218 U. S. 573; 134 Am. St. 879; 197 N. Y. 279.

3 A continuance should have been granted, and it was error to refuse it. Defendant was a foreign corpo-

ration and had no witnesses present and was taken by surprise.

4. Plaintiff failed to make out a case of ratification. 166 Fed. 944; 78 N. J. L. 637; 76 Atl. 1024; 121 Cal. 55-63-4; 108 Me. 83-4; 66 Mo. App. 643-6; 32 Pa. 340, 347-8; 3 Daly (N. Y.) 98-100; 16 Cal. 591.

5. No agreement was made with plaintiff by any one to pay him a monetary commission or consideration, as the evidence shows.

6. The court erred in giving instruction No. 3 for plaintiff but should have given a directed verdict for defendant. It erred also in giving Nos. 8 and 9 and 10. The instructions are confusing and ambiguous.

Moore, Smith, Moore & Trieber and *Gardner K. Oliphint,* for appellee.

1. The court had jurisdiction over defendant. The motion to quash the service only stated conclusions without setting up facts to sustain it; it attacked the jurisdiction over the person of defendant and not the subject-matter and the proof showed that defendant was doing business within this State, both generally and specially, and is estopped. 219 Fed. 96; 104 N. W. 1054; 1 Fed. 471; 140 *Id.* 921; 95 Ark. 302, 307; 19 Okla. 115; 39 *Id.* 629; 60 Ark. 578; 56 *Id.* 539-541. Here service was had under act 462, Acts 1917.

2. The court properly refused to hear evidence on motion to quash, as the motion was not proper, and did not state facts.

3. No error in refusing a continuance. 214 S. W. 1.

4. The implied agreement to pay plaintiff for his services was ratified as soon as the parties who made the agreement obtained control of the defendant.

5. There was an implied agreement to pay plaintiff in money and there is no error in the instructions. 6 R. C. L. 587; 56 Ark. 382; 82 *Id.* 136.

HUMPHREYS, J. Appellee instituted suit against appellant in the Third Division of the Pulaski Circuit Court to recover $800 on account of alleged services ren-

dered by him to appellant from September 1, 1917, to May 1, 1918, for the stipulated amount of $100 per month, and on a second count in the complaint claimed the same amount upon a *quantum meruit* for services rendered during said period.

Appellant, specially appearing, filed a motion to quash the service upon the ground, among others, that it was a foreign corporation, incorporated under the laws of Illinois, to do a fraternal insurance business, and that neither at the time service was had upon the Arkansas State Insurance Commissioner nor at any time prior thereto had it taken out a license to do business in Arkansas, nor had it done an insurance business in the State in violation of the law, by failing to appoint the Insurance Commissioner as its agent upon whom service might be had. This motion was overruled by the court, over the objection of appellant; whereupon appellant, reserving its rights raised by the motion to quash, filed an answer, denying its liability on account of service rendered, as alleged.

The cause was submitted to a jury upon the pleadings, exhibits, the evidence and depositions of witnesses and exhibits introduced and attached, and the instructions of the court, upon which a verdict was returned in favor of appellee for $500. A judgment was rendered in accordance with the verdict, from which an appeal has been duly prosecuted to this court.

The evidence revealed that appellant was a fraternal benefit society, organized under the laws of Illinois, and doing a fraternal insurance business in Illinois and other States, with headquarters at Chicago. The Knights and Ladies of Honor was an Indiana corporation of the same character, licensed to do business in Arkansas, and which maintained local organizations in the latter State. On or about August 1, 1916, the Knights and Ladies of Honor became insolvent, and its organizations and business were taken over by appellant. Appellant assumed the liabilities of the policies of the Knights and Ladies of Honor in Arkansas and issued riders to the members in Arkansas to be attached to their policies in the Knights and Ladies of

Honor. The premiums and dues of the Knights and Ladies of Honor were thereupon forwarded to the North American Union. In the month of December, following, appellant and the Fraternal Aid Union, another organization of the same character, entered into a merger which also included the organization and business of the Knights and Ladies of Honor. At the time of the first merger, appellee was working for the Knights and Ladies of Honor at a salary of $100 per month, but, after the merger, was retained in the same capacity by appellant at the same salary until its union with the Fraternal Aid Union, and, after the second union, or merger, appellee was retained by the Fraternal Aid Union until the first of September, 1917, in the same capacity and at the same salary. Under the last merger, the business of the three organizations was conducted as one business under the name of the "Fraternal Aid Union." During the month of June, 1917, members, who had formerly had control of the business of the North American Union, organized themselves into the "Policy Holders' Protective Association" of the North American Union, and procured the institution of a suit in Chicago for the purpose of dissolving the merger between appellant and the Fraternal Aid Union, and reclaiming the organization known as the North American Union, together with its fund which had passed into the hands of the Fraternal Aid Union. The issues, as finally joined in the suit attacking the validity of the merger between the North American Union and the Fraternal Aid Union, also involved the validity of the merger between the Knights and Ladies of Honor and the North American Union. During the time the Policy Holders' Protective Association was aiding in the prosecution of the suit, the members which organized it secured a meeting of the Supreme Council of the North American Union, and elected Henry J. Beecher, president, C. A. Gillespie, secretary, Daniel S. Wentworth, general counsel, H. A. Correa, superintendent, and C. C. Nunemaker, committeeman of the State of Order. They began to operate the business of the North American Union

under their official titles, but were restrained from conducting any business during the pendency of the suit. The same parties then opened an office in Chicago and conducted the business of the North American Union under the name of Policy Holders' Protective Association. The chief business conducted by them during that period consisted in writing letters and sending out literature concerning the great merit of and benefit to be derived from remaining with the North American Union, and advising all members and local organizations to withdraw their influence and contributions from the Fraternal Aid Union and to render both to the North American Union. The method advised and most generally adopted was to secure resolutions from local lodges, expressing allegiance to the North American Union and to send all monthly dues to it in Chicago, as well as to make voluntary donations for temporarily maintaining the organization and carrying on the litigation. On August 29, 1917, either before or just about the time the injunction against appellant, as reorganized, became effective, a letter was written to appellee by Henry J. Beecher, supreme president, on a letter-head carrying the names of the respective officers and the following inscription:

"North American Union,
"A Northwestern Reserve Fund Insurance Association."

In part the letter read: "We can assure you that, as soon as the organization is restored to its membership and is allowed to use the general funds of the order, we will not forget those who have been loyal to us, and we sincerely believe that time is not far off." After the injunction became effective and until dissolved, the letter-heads were as follows:

"Policy Holders' Protective Association
North American Union
"A Northwestern Reserve Fund Insurance Association."

The general trend of the letters written to appellee by the Policy Holders' Protective Association was in the nature of approvals of work appellee had done toward holding the local organizations in Arkansas in the North

American Union, and requests for continued diligence, and directions as to methods of procedure, etc. The following excerpts are taken from letters written by D. S. Wentworth, C. G. Nunemaker, H. A. Correa and Henry J. Beecher, prior to the dissolution of the injunction.

September 18, 1917. "I am sorry to say that just at the present time we could not guarantee anything, but we have constantly before us the intelligent and loyal work you are doing for the N. A. U., and when the proper time comes you need not worry about being compensated for time and trouble so nobly rendered in this cause. Keep up the good work, and, as previously stated, we will take care of you. It is impossible, with our limited help, to write each and every individual council or member, but are trying to keep you posted through bulletins and circulars."

September 27, 1917. "At once get in touch with all of your friends and have them hold the K. & L. of H. members in your State for the N. A. U. We are going to rely upon you to do this for us in your State, and we will see that you are taken care of. Get right down to brass tacks now, circulate this good news," etc.

September 29, 1917. "I am enclosing herewith copies of part of the proceedings of the demurrer recently heard before Judge Pinkney. Kindly call on your different papers and see if you can get them to print as much of the article as possible in your daily papers, as it will undoubtedly help our cause."

October 9, 1917. "All the former K. & L. of H. councils have to do to remain with the North American Union is to send their remittances to this office and ignore the F. A. U. You do not have to do another thing, we will take care of the balance of matters for you and your council, so get busy at once and see that your assessments are sent to Mr. Chas. P. Crance, supreme treasurer, at the above address. Your work now lies in having the councils who desire to remain North American Union write here and the best way we will have of judg-

ing your work will be by the number of remittances we receive from Arkansas."

October 11, 1917. "I am very pleased to hear that Mimosa Council will stand back of their promises, and will prove their loyalty by remitting to this office."

October 15, 1917. "I also have your letter of October 13, enclosing the strong resolutions of Mimosa Council No. 203, for which kindly accept thanks. I am having the resolutions of Mimosa Council copied and will enclose them in a letter to each and every council in the State of Arkansas, and hope you will be able to follow them up and get results."

October 19, 1917. "Practically every council, whether K. & L. of H. or otherwise, that we have gone after, we have landed back into the fold, and by placing the true facts before the members there is no reason why you can not do the same. Give me a history of the various councils you are working on, so that I may keep informed as to their standing and condition. If possible, get me a list of their membership as to amount of insurance carried and dues paid."

October 29, 1917. "It gives me great pleasure to be able to say that we are today in receipt of a telegram from the Fraternal Aid Union stating that they have agreed to accept our terms of compromise. All it will be necessary for any council to do to remain with the N. A. U. is to make their monthly remittances to this office the same as your council has been doing."

October 31, 1917. "All that is necessary for any council to do to remain with this order is to make their monthly remittances to us, regardless of whether or not they have signed riders."

The suit involving the validity of the merger was compromised and the injunction dissolved on November 7, 1917. The decree restored the North American Union to its original status, recognized as legal the board of officers elected at the preceding August meeting, returned its assets and permitted it to obtain such of the membership of the Knights and Ladies of Honor as chose

to affiliate with it. Thenceforth, the business was conducted by the recognized officers in the name of the North American Union. In the conduct of the business, it continued to levy and collect dues from the membership of the Knights and Ladies of Honor in the State, organized under the name of Mimosa Lodge, and also from the local lodge at Conway, until the summer of 1918. The letters written by appellant to appellee, after the dissolution of the injunction, were in commendation for loyal services rendered the appellant during the litigation and in requests for a continuation of his services in the future. In a letter of date November 9, appellant said: "Am advised that you were informed of the good news that our grand old order has been restored, and pleased that Mimosa council has cast her lot with such a worthy order as the N. A. U. has been, and still remains a great deal better through our reprehensible officers being removed. Spread the good news broadcast among all of your members and satisfy them that the N. A. U. has come to stay."

Of date November 12, said: "The K. & L. of H. members are to be allowed to decide for themselves where they want to go, and the F. A. U. have a right to present their side, and it will be up to you, if you desire the members to stay in N. A. U. to present the N. A. U. side of the case. As soon as proofs of death are received, we will see that they are given prompt consideration so as to give you advertising. Kindly see that the papers are correct and will not have to be returned for corrections."

Of date November 22, said: "We are sending, under separate cover, marked copy of the January, 1916, issue of the Western Review. The article referred to is in the form of editorial comment on the subject of merger, and gives court opinions, a study of which may give you some talking points to be used in making your council visitations."

Of date of November 27, said: "Shortly after the first of the month you will receive our December issue of the North American Union News, which will set forth our financial standing, also rates, etc., for new members. You

will be sent sufficient supply for distribution among all your friends. If you can use to good advantage any more copies of the decree, kindly let me know, and we will forward same."

Of date December 12, said: "Glad you are going to see that only loyal members are elected to official positions through the ensuing year. Without good loyal officers we cannot expect to obtain any degree of success. *In re* the claim of the late Richard T. Johnson, will say that this is now in the hands of our investigating department, and, as quickly as they pass upon same, it will be paid."

And of date December 22, said: "I have asked another organization, of which I am the legal adviser, to-wit, the Degree of Honor, to write to you so that you might investigate and see whether or not you could get more advantages out of that society than you could out of the N. A. U. for the reason that the Degree of Honor has some thirty councils in your State. If upon investigation you find that they can, then they are to make a proposition worth your while. You have been faithful and true to the N. A. U. and we intend to stand by you, but our membership in Arkansas will be so small that we will not be able to give it the attention you desire, and there will probably be delays in the payments of claims, as in the Johnson case, and therefore there would be no advantage to your membership to belong to an organization that is not fully organized in your State. If, when you have looked into it and find you cannot make arrangements, the N. A. U. will stand behind you as you did for it."

And of date December 22, said: "According to your records, I find your lodge, with 120 members, and Conway with 10, making a total of 130 members, are the only ones that voluntarily elected to remit to this office and remain with the N. A. U. If I were you, I would write to Mrs. Olson and find out all about her State organization in Arkansas, what she can offer you personally for such services as you might render, and then think the matter over.

carefully. I would not be in any hurry, because you are protected in the N. A. U. and will be protected. We do not want you to think we are trying to cast you adrift, now that we have come out of the litigation successfully, but we want you to consider that we are not going to be selfish in the matter, and are going to allow you to enjoy the fruits of victory as well as ourselves, and to have the option of placing your organization where it will have not only adequate insurance protection, but also will get the best benefits from a social point of view."

And on December 28, said: "I am enclosing to you under separate cover a few advance copies of our January issue and refer you to page 8, wherein you will find the financial statement. I hope that you will get these advanced copies where they will do the most good, especially among the desirable K. & L. of H. members who desire information as to the true facts."

And on January 4, 1918, said: "We have, however, conceived of this plan—that we send you, under separate cover, some fifty application blanks, and if you can secure any business, you have the applicant write to this office, enclosing his application, and we will register him in our Union Council No. 17. When everything has been adjusted in Arkansas, we will transfer the members to your council. We hope that you will be able to do some business for us along this line, for no insurance company can live without new business, and if we have 130 members in Arkansas, we should try and have at least fifty new applications written, in order to make up for the thirteen months that no new business has been written. In writing this business, under present conditions, we prefer you to get as young people as you can. We are accepting business from sixteen years up. The younger business we get, the better it will be for us as to our average age, and under the war conditions, women are a better risk than men between 21 and 31, unless they have been exempted from the draft."

We have selected from the correspondence such extracts as most strongly tend to establish an implied con-

tract for services entered into between the Policy Holders' Protective Association and appellee, because it is contended by appellant that, after resolving every favorable inference deducible from the evidence in favor of appellee, there is not sufficient upon which to sustain the finding of an implied contract between the Policy Holders' Protective Association and appellee, and a subsequent ratification thereof by appellant.

It is first insisted by appellant that the court erred in refusing to quash the service of summons upon it. The summons was served upon the State Insurance Commissioner, under act 462, Acts of the General Assembly of 1917. That act requires fraternal benefit societies, as a prerequisite to obtaining a license to do business in the State, to appoint the Superintendent of Insurance its agent upon whom legal process might be served. No such appointment was made; hence appellant had no license to do business in the State. It follows that the Superintendent of Insurance was not appellant's agent, upon whom service might be had, and the service was invalid, unless appellant is estopped to deny service by having done business in the State in violation of the statute. If appellant was doing business in the State, it was violating the statute, and is estopped to deny that it had a license or that the Superintendent of Insurance was its agent for purposes of service. *Masons' Fraternal Accident Assn.* v. *Riley,* 60 Ark. 578; *Vulcan Construction Co.* v. *Harrison,* 95 Ark. 588; *Ehrman* v. *Teutonia Insurance Co.,* 1 Fed. 471; *Mutual Reserve Fund Life Assn.* v. *Phelps,* 190 U. S. 147; *Old Wayne Mutual Life Assn. of Indianapolis* v. *McDonough,* 204 U. S. 8. We think taking over the membership of the Knights and Ladies of Honor, adopting the local organizations of this order as its local organizations, attaching riders to the policies of the members of the Knights and Ladies of Honor, thereby assuming liabilities under the policies, levying and collecting premiums and dues on the policies, paying losses, and directing its representative to solicit insurance, constitute a doing of business in the State under the statute. The court did not err in overruling the motion to quash the service.

It is next insisted that the court erred in refusing to grant appellant a continuance in the cause. The ground upon which the insistence is based is that appellee changed the theory of his case at the commencement of the trial, to the surprise and prejudice of appellant. The suggested change in theory is that the complaint alleged a direct contract, whereas the proof tended to show the subsequent ratification of an unauthorized contract and that it was prejudiced because it had only taken proof to meet the issue tendered in the complaint. It is true the complaint alleged an agreement between appellant and appellee, but the validity of the contract rested entirely upon correspondence which counsel for appellant obtained in advance of the trial. It is also true some of the letters were written by appellant on stationery bearing appellant's letterhead, but many of them were written by the Policy Holders' Protective Association, which assumed to act for appellant, as indicated both by the letterhead and contents of the letters. With this information in hand, appellant was not warranted in assuming that only such letters as were written by appellant itself would be relied upon to establish the contract. The whole correspondence was submitted by appellant as establishing the contract pleaded and relied upon for recovery. With this information in advance, neither surprise nor prejudice resulted to appellant in denying its request for a continuance.

It is next insisted that the letters written by the Policy Holders' Protective Association do not show an undertaking to pay a monetary consideration for the services of appellant. We think the language heretofore quoted from the letters of date August 29 and September 15, indicate a monetary consideration for services being, and to be, rendered, by appellee, as soon as appellant could regain its funds. The language employed, as well as the connection in which it was used, indicates an intention to reward loyal service by remuneration out of the general fund when recovered. It is also clearly inferable from the letters that, in response to a request and direc-

tion of the Policy Holders' Protective Association, appellee rendered loyal and valuable services to appellant in restoring its independence and regaining its fund. It is contended, however, that, if the language of the letters sustain an implication to pay appellee for services in money, the letters written after the dissolution of merger and the restoration of appellant to an independent state are insufficient to establish a ratification of the contract. The extracts quoted in the statement of the case from the letters written by appellant after the dissolution of the injunction otherwise impress us. We think the contents of the subsequent letters justify and support a finding that appellant subsequently ratified such contract as was made and entered into between the Policy Holders' Protective Association and appellee.

Instructions Nos. 1, 3, 8 and 9, requested by appellant and refused by the court, were predicated upon the theory that there was no evidence in the record tending to show an implied contract for services to be paid in money which was subsequently ratified by the North American Union. In the discussion of whether there was sufficient legal evidence to support the verdict and judgment, this court ruled that it was inferable from the letters written by the Policy Holders' Protective Association to appellee that, for the loyal services being rendered and to be thereafter rendered to it and the North American Union, appellee should be remunerated whenever the fund of the North American Union was recovered by, or restored to, it. The ruling on that point concludes the contention of appellant that the court committed error in refusing to give its requests, 1, 3, 8 and 9, aforesaid.

It is also insisted that the court erred in giving instruction No. 3, requested by appellee, which is as follows: "With reference to the contention that plaintiff was to be paid, if at all, in new employment, and not in money, you are instructed that, if you find from a fair preponderance of the evidence that the plaintiff performed the services set forth in his complaint, that such services were rendered for and received and accepted by

the defendant, and if you further find from a fair preponderance of the evidence and under all the circumstances of the case as reflected by the evidence that the services, if any, were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that a pecuniary compensation should be made for them, then you would be warranted, under the law, in finding there was an implied promise upon the part of the defendant to pay the plaintiff in money for any such services; but otherwise if you should find that there was an express contract to the contrary, or if you should find that the services were not of a nature leading to such a reasonable belief." The interpretation placed upon this instruction by appellant is that it in effect instructed the jury to determine whether there was an implied contract to pay for services in money from the character of the services rendered and not from the whole evidence in the case. We do not so interpret it. The very converse is true. Under a proper construction of the instruction, the jury was told that it was incumbent upon appellee, in order to recover, to show by a preponderance of all the evidence that it was impliedly understood by the parties that the services were to be remunerated in money and not in new employment; and that, before such an inference could be drawn, the nature of the services must be consistent with the inference. This was certainly the general intendment of the instruction, and, even if ambiguous in meaning, it cannot be said to be inherently erroneous. Any mere ambiguity carried in the instruction should have been specifically pointed out to the court or met by a correct request eliminating the ambiguity.

It is also insisted that the court erred in refusing to give appellant's requested instruction No. 10. We think it was fully covered by instructions Nos. 1 and 2, given by the court at the request of appellee, as well as by instruction No. 7, given by the court at the request of appellant. Being fully covered by other instructions, it was not error to refuse it, though a correct declaration of the law, as applicable to the facts.

Lastly, it is contended that the court erred in modifying appellant's eleventh request, by adding the following clause to it: "Or that the defendant duly ratified the same by knowingly accepting and retaining the benefits of such implied contract." It is conceded that the court intended, by inserting the word "knowingly" to convey the idea that appellant could not have ratified the contract without knowing the terms thereof, but that the clause in which the word "knowingly" was inserted is ambiguous and susceptible to a different meaning than that intended by the court. Reading the modified instruction as a whole, we do not think it ambiguous, but, if appellant is correct, it should have been met by a specific objection or a request for a correct instruction, which was not done.

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

ASHCRAFT v. STATE.

Opinion delivered December 22, 1919.

PROSECUTING ATTORNEY—FEE ON AFFIRMANCE.—Where thirty defendants were separately indicted for the same offense, and by consent were tried together, and one judgment of conviction entered, and an appeal prosecuted to the Supreme Court and affirmed, the prosecuting attorney is entitled to a single fee of twenty dollars only on such affirmance, and not to a separate fee for each of the convictions.

Appeal from Perry Circuit Court; *Guy Fulk,* Judge; *Geo. W. Emerson,* prosecuting attorney, for the motion; *C. C. Reid, contra;* motion denied.

PER CURIAM. There were thirty defendants indicted separately for the same offense, but by consent they were tried together, and there was one judgment of conviction against all of the defendants. An appeal was prosecuted to this court and the judgment against all of the defendants was affirmed. The statute reads as follows:

"Upon the affirmance of a judgment on the appeal of the defendants, an attorney's fee of twenty dollars, to be paid to the prosecuting attorney, shall be taxed as part of the costs of the appeal, and upon the reversal of a judgment upon an appeal by the plaintiff, a fee of five dollars." Kirby's Digest, section 2620.

The clerk of this court taxed as cost one fee of twenty dollars, and the prosecuting attorney moves the court for a retaxation of cost so as to allow a separate fee of twenty dollars on each of the convictions.

The reliance of the prosecuting officer in his contention for a separate fee for each conviction is on the decision of this court in the case of *Hempstead County* v. *McCollum,* 58 Ark. 159, where the court construed the statute (Kirby's Digest, section 3488) allowing prosecuting attorneys a fee "for each conviction on indictment for felony," and holding that on joint indictments against several defendants tried together, and on an indictment against a single defendant charging more than one offense, the prosecuting attorney is entitled to a separate fee on each conviction.

The two statutes relate to different subjects, and are open to different interpretations.

Section 3488 relates to fee of a prosecuting attorney on each conviction in criminal prosecutions.

Section 2620 relates to fees taxed upon affirmance of judgments in misdemeanor cases in the Supreme Court. One is allowed as compensation for service in procuring each conviction in a criminal case, and the other is allowed as a docket fee on each judgment. The gist of the decision in the McCollum cases, *supra,* was that, while there was but one judgment, there was more than one conviction within the meaning of the statute, and that the prosecuting officer was allowed, under the statute, a fee on each of the convictions, regardless of the fact that there was only one judgment in the case. In the opinion the court quoted Prof. Wharton as follows:

"In an indictment against two or more the charge is several as well as joint, and the conviction is several." Wharton Cr. Pl. & Pr., sec. 314.

The case and the applicable statute is entirely different where there is only one judgment of affirmance, though it embraces several convictions. The prosecuting attorney is not required to follow up appeals in criminal cases and services performed in that regard are voluntary. The Attorney General alone is required to represent the State in causes pending in the Supreme Court. Kirby's Digest, sections 3462, 3463. But the statute allows the prosecuting attorneys a docket fee on each judgment of affirmance in misdemeanor cases in the Supreme Court. This is not for services performed, for, as before stated, none are required of that officer.

It is not material that in the present case the indictments against the defendants were separate. The cases were tried together by consent, and only one judgment was rendered, and there was only one judgment of affirmance. The taxation of a single fee for the judgment of affirmance is against all of the defendants jointly and severally. Only one fee can be imposed, but it may be collected from either of the defendants at the election of the State, or it may be apportioned against all of them, as the State may elect. The fact that each conviction is separate does not affect the question of allowance of a single fee for the affirmance.

Motion overruled.

CANNON v. FOSTER.

Opinion delivered December 22, 1919.

1. CANCELLATION OF INSTRUMENTS—FRAUD—INTERVENING RIGHTS.—A deed given in exchange of property will not be canceled on the ground of fraudulent misrepresentation as to the quantity and condition of the land where the rights of innocent purchasers have intervened.
2. COVENANTS—MEASURE OF LIABILITY.—The measure of liability of a covenantor for breach of warranty as to part of the land exchanged is the proportionate value of such part.

3. VENDOR AND PURCHASER—FRAUD—MEASURE OF DAMAGES.—Where, in a suit to cancel a deed given in exchange of lands on ground of fraud, defendant has falsely represented that certain land would be embraced in the description contained in the deed, he would be liable to plaintiffs for the difference in value between the land which he represented would be conveyed and that which was in fact conveyed as of the date of the conveyance.

Appeal from Lee Chancery Court; *A. L. Hutchins,* Chancellor; affirmed.

C. W. Norton, for appellants.

1. In view of the circumstances supporting Cannon's testimony and discrediting Foster's, the court erred in its findings as to fraud and mistake. The evidence shows both.

2. Mistake upon part of plaintiffs as to the location of the land called for by the deed is shown conclusively, and the deed should have been canceled.

3. There was a material failure of consideration. On the question of fraud, and failure of title, see 22 Ark. 205; 40 *Id.* 420; 123 *Id.* 175; 185 S. W. 277; 46 Ark. 337-354; 11 *Id.* 58. On the doctrine of rescission for mistake, see 19 Cyc. 1252; 4 R. C. L. 506; Black on Resc. & Can., § § 140, 436; 103 N. E. 296-7. See also 30 Ark. 687.

W. S. Ward and *Daggett & Daggett,* for appellees.

1. The evidence fails to show either fraud or mistake. The two causes of action, one based on fraud and the other on mistake, are inconsistent, and the court correctly required an election. As to the liability of Miss Pearce, the law is correctly stated in 12 R. C. L., p. 339, § 477.

2. Conceding that Foster was guilty of fraud, such fraud can not be imputed to defendant Pearce without showing (1) that Foster acted as her agent and perpetrated the fraud with her knowledge and consent, and (2) that she benefited from Foster's fraudulent practices. Fraud is never presumed and the burden was on him who alleged it to prove it by clear and satisfactory evidence. 92 Ark. 509. Appellants have failed to do this by competent testimony.

A vendee who discovers fraud or misrepresentations of the vendee before the contract of sale is consummated can not afterwards complain. 99 Ark. 458. Cannon knew before he paid the draft attached to the deed (1) that Yancey owned the timber on the land Foster showed him, and (2) that the greater portion of the land, if not all, lay on the east side of the lake, and appellants can not recover. 99 Ark. 458; 40 *Id.* 420; 123 *Id.* 257. These two latter cases are cited by appellant, and they have no application here, as Miss Pearce neither participated in the fraud or derived any benefit from it, nor was Foster her agent. Miss Pearce has no place in this suit. Cannon's remedy, if any, was against Foster alone.

SMITH, J. Appellants, Sam and Caledonia Cannon, who are husband and wife, seek by this suit to cancel a deed executed by them conveying two lots in the city of Marianna and to recover the sum of $725, which sum of money, together with the lots, furnished the consideration paid by appellants for a certain tract of land described as north of river west half of the southwest quarter of section 17, township 2 north, range 4 east, containing sixty acres, according to the plat of the government survey.

Appellee Foster contracted to buy this land from his co-appellee, Miss Pearce, for the sum of $750, and he contracted to convey it to appellants for the sum of $725 and their two lots, and these negotiations were consummated by a deed from Miss Pearce to appellants for the land and a deed from appellants to Foster for the lots together with the payment of $725, the net result being that Foster acquired the two lots in Marianna as the result of the two deeds by the payment of $25.

Appellants filed an amended complaint and several amendments to their complaint, and in these pleadings there were allegations of fraud and of mistake, and the court required an election upon the ground that these allegations were repugnant and inconsistent and required appellants to elect upon which of said pleas they would

rely. Having saved exceptions to this ruling, appellants elected to proceed upon the allegations of fraud. This appeal, however, brings the entire record before us for review, and the briefs discuss all the questions raised by the pleadings or the testimony, and we proceed to a consideration of the entire cause *de novo*.

Appellants discuss the pleadings and the testimony under three heads and say they are entitled to the relief prayed under either. It is first said there was fraud upon the part of the appellee, Foster, by showing to appellant Cannon a different piece of land from that he proposed to sell him; second, mistake upon the part of appellants as to the location of the land called for by the deed made to them, whether such mistake was or was not induced by fraudulent representations; third, a material failure of consideration or impossibility of performance by appellees in that they can not deliver title to at least a third of the land contracted to be conveyed.

The case presents a pure question of fact. The land in question is described as that part of west half of southwest quarter of section 17, north of the river; but a lake flows through this land and empties into the river on this land, and there is testimony showing that the land lying west of the lake is higher and better, and, consequently, more valuable than that east of the lake. The land in question adjoins the east half of the southeast quarter of section 18, the west line of which eighty-acre tract of land had been surveyed out and painted and is referred to by the witnesses as the blue painted line. Appellant Sam Cannon testified that appellee Foster showed him this blue line and told him it was the west line of the land he was buying, and he testified that he showed this line to his wife and one James Turner as the line to the land which he was buying a week before the delivery of the deeds. Caledonia Cannon corroborated her husband by testifying that he showed her the blue line as the west line of the land he was about to buy; and Turner gave testimony to the same effect. This blue line was not the west line of the land described in the deed. Had it been

the line to the land which it was intended to be conveyed, it would have embraced all of the east half of the southeast quarter of section 18 north of the river.

Appellant Sam Cannon testified that he thought all the land he was buying was west of the lake, and that he would not have bought but for this representation. On the other hand, Foster denied that he had made any such representation, and a disinterested witness testified that Foster told Cannon in his presence that there were only fifteen acres west of the lake. It is said, however, that there is not even that quantity of land west of the lake; but no survey of this land has been made, and the witnesses vary in their estimates on that subject.

In the original opinion* in this case the decree of the court below was affirmed upon the ground that the testimony did not show what quantity of land was in fact west of the lake, and we said the appellant must, therefore, fail for the lack of this proof, for we said we could not otherwise know to what extent, if at all, they had failed to receive the land called for in their deed.

In the petition for rehearing it is now pointed out that in a prior deed executed by Miss Pearce to another party she had conveyed all the land lying west of the lake north of river, west half southwest quarter, section 17, township 2 north, range 4 east, and could not, therefore, have conveyed any land west of the lake to the Cannons, even though her deed may have described land which in fact was west of the lake. A closer examination of the description contained in this prior deed confirms the truth of the statement just made, so that we now conclude that the representation that there was any land west of the lake could not have been true.

We think the testimony shows a representation by Foster that as much as fifteen acres of this land was west of the lake, and in our original opinion we did not reverse the decree because, as we then thought, the testimony did not definitely show that representation was false.

*The original opinion was withdrawn, and this opinion substituted. (Rep.).

With the facts before us as we now understand them, appellants make a case for rescission, and would be granted that relief but for the further fact, which also appears, that the rights of innocent purchasers have intervened and that relief could not be granted without injustice to these purchasers, with whom the greater equity lies.

There is no showing that Miss Pearce made any representations to the Cannons, nor did Foster represent himself to be, nor was he believed to be, her agent; so that no liability attaches to Miss Pearce as Foster's principal in his dealing with the Cannons. Her liability, if any exists, will arise out of the breach of her warranty, and that liability depends on the question whether in fact any of the land described in her deed to the Cannons had been previously conveyed by her. If so, the measure of her liability will be the proportionate value of the proportion of the land, if any, which was twice conveyed at the time of the conveyance, because, to that extent, in that event, her deed will fail to convey the land which it describes.

Foster's liability, however, is not thus limited. He may have been honestly mistaken about the land which would be conveyed under the description of north of river west half southwest section 17, township 2 north, range 4 east, and it may be found that Miss Pearce has not in fact twice conveyed the same land, yet this would not necessarily excuse Foster from liability. If, as the testimony establishes, Foster falsely represented that fifteen acres west of the lake would be embraced in the description employed in the deed, then he is liable to the Cannons for the difference in the value between the land which he represented would be conveyed and that which was in fact conveyed as of the date of the conveyance.

As the testimony has not sufficiently developed the facts essential to be known to decide the questions stated, we reverse the decree with directions to the court below to make this finding and to hear such additional testimony as may be necessary for that purpose.

SIZER v. MIDLAND VALLEY RAILROAD COMPANY.

Opinion delivered December 22, 1919.

1. APPEAL AND ERROR—REVIEW—ABSENCE OF BILL OF EXCEPTIONS.—In the absence of a bill of exceptions, the Supreme Court can review the judgment only for errors appearing on the face of the record, in which case the pleadings are part of the record.
2. APPEAL AND ERROR—RECORD—WHAT CONSTITUTES.—The intervening petition of an attorney to enforce his lien on the proceeds of a compromise, together with a copy of the attorney's contract with the plaintiff in the action, filed as an exhibit to such petition, constitute parts of the record proper.
3. APPEAL AND ERROR—WHEN BILL OF EXCEPTIONS UNNECESSARY.—A bill of exceptions is unnecessary where the judgment of the trial court, reciting the facts, shows error on its face.
4. ATTORNEY AND CLIENT—LIEN.—An attorney's lien on his client's cause of action can not be defeated by a voluntary payment to the client without the attorney's consent.
5. ATTORNEY AND CLIENT—STIPULATION AGAINST COMPROMISE.—Where a contract between attorney and client stipulated that neither would settle the cause of action without the other's consent, such stipulation, though illegal, is severable from the remainder of the contract, which may be enforced.
6. ATTORNEY AND CLIENT—CONTRACT—LAW OF CONTRACT.—Where a contract of employment of an attorney to prosecute a cause of action contemplated that it should be performed in Arkansas, and suit was accordingly brought in this State, the contract is to be construed with reference to the laws of this State.

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

STATEMENT OF FACTS.

This is a proceeding by an attorney against a railroad company to enforce his claim and lien for attorney's fees under the statute in a personal injury action.

In his petition F. P. Sizer, in effect, alleges that he is an attorney at law and entered into a written contract with H. C. Ellis to bring a suit against the Midland Valley Railroad Company for personal injuries received by said Ellis on account of the alleged negligence of the railroad company. The petition also alleges that suit was brought under the contract and that while it was pending Ellis compromised and settled the case with the claim

agent of the railroad company for the sum of $10,000 without paying the fee of said attorney. The suit was brought in the circuit court of the Fort Smith District of Sebastian County, Arkansas, and the attorney's petition was filed in that court. The contract between H. C. Ellis and F. P. Sizer was filed as an exhibit to the complaint and is as follows:

"This agreement made and entered into this the 23rd day of April, 1917, by and between H. C. Ellis of Muskogee, Oklahoma, party of the first part and F. P. Sizer, attorney and counselor at law, of Monette, Missouri, party of the second part, witnesseth:

"First party has this day employed second party as his attorney to represent him in the presentation and prosecution of a certain cause of action he has against Midland Valley Railroad Company for personal injuries sustained by him at Tulsa, Oklahoma, on the 30th day of March, 1917, caused by head-on collision extra engine No. 12 east bound and switch engine No. 60.

"Second party hereby accepts said employment and agrees to investigate said cause of action at his expense, and, if necessary, will prosecute said cause of action through all the courts, to the end that substantial remuneration be had for said injuries; and for his attorney fees and expenses second party shall have thirty-three and one-third (33 1/3) per cent. of all sums collected, either by suit or compromise, and a proportionate part of said cause of action is hereby assigned to the second party to secure same, and in case nothing is recovered then party of the second part shall have nothing for his fees or expenses.

"It is further agreed that neither party hereto will settle or adjust this cause of action without the consent of the other, and first party agrees to attend the trial of the cause and will aid in the procurement of testimony for trial of same.

"Witness the signatures of the parties hereto, in duplicate hereof, the day and year first above written.

"H. C. Ellis,
"F. P. Sizer."

The judgment of the circuit court is as follows:

"On this April 15, 1919, the petition of intervener having been duly presented, he appearing in person and by his attorney, Jo Johnson, the defendant appearing by its attorneys, O. E. Swan, T. B. Pryor and J. B. McDonough, and, the plaintiff appearing in person in open court but filing no pleadings, the court, being well and sufficiently advised, doth state in writing as required by law, file and adjudge, the conclusions of fact found separately from the conclusions of law, as follows, to-wit:

"Conclusions of fact: The material allegations of the intervener's petition are sustained by the evidence. The intervener is entitled to recover, under the evidence, on his petition, of and from the defendant, for principal and the interest thereon from May 12, 1917, to this date, the total sum of $3,718.33, besides 6 per cent. per annum interest thereon from this date until paid, with statutory lien for same on defendant's property as for personal injury.

"Conclusions of law: This provision contained in the contract of employment between plaintiff and intervener, to-wit: 'It is further agreed that neither party hereto will settle or adjust this cause of action without the consent of the other,' a full copy of said contract being attached to intervener's petition as part thereof, is against public policy and therefore makes said contract void under the law of this State as declared by our Supreme Court. For that reason, and for that reason alone, the law is concluded to be in favor of the defendant on the intervener's petition, precluding intervener from recovery, regardless of the evidence, and intervener duly excepts. This April 15, 1919.

"Paul Little, Judge.

"Therefore, for the single reason aforesaid, and for no other reason, it is considered, ordered and adjudged by the court, that said intervener, F. P. Sizer, take and have nothing under his said intervening petition, and that the defendant, Midland Valley Railroad Company, do have and recover of and from said intervener, F. P. Sizer,

all its legal costs laid out, and [plaintiff] excepted and excepts to the conclusions of law aforesaid and to this consequent judgment in favor of defendant, and prays an appeal to Supreme Court, which is granted; and to the finding of fact, defendant also saved its exceptions."

The case is here on appeal.

Jo Johnson, for appellant.

1. The contract in this case is not against public policy. Our statute, section 463, was passed long after the decision in *Davis* v. *Webber,* 66 Ark. 190. The clause is severable and should be eliminated and the contract allowed to stand. 175 U. S. 79; 20 Sup. Ct. Rep. 39; 26 Iowa 196-202; 91 S. W. 1046; 110 Am. St. 500; 193 Mo. 1; Kirby's Digest, § 4457; 98 Ark. 527; 136 S. W. 658. The rule in *Davis* v. *Webber* has been changed by statute. 120 Ark. 389; 128 *Id.* 471. See also 115 S. W. 1047.

2. If the clause is objectionable, it is severable and the balance of the contract stands. 115 S. W. 1047; 139 N. W. 711; 149 *Id.* 865; 144 *Id.* 760; 123 *Id.* 277; 61 So. 694; 13 Ann. Case 441; 132 Am. St. 142-153; 138 Iowa 688; 116 N. W. 813; 134 *Id.* 575; 115 S. W. 1042; 126 *Id.* 517; 152 *Id.* 487; 13 A. & E. Cases 444; 22 Cyc. 498; 208 S. W. 786.

3. If void between the original parties, the rule can not be applied by a third party. 51 Ark. 294; 102 U. S. 148-161; 6 Wis. 645; 8 Kan. 122; 59 Ark. 1; 90 *Id.* 351; 152 S. W. 490.

4. The defense that the clause is against public policy is not available to appellee and the judgment must be reversed. *Supra.*

5. The conclusions of fact found and adjudged that the material allegations of intervener's petition are sustained by the evidence, and this court should prevent the consummation of defendant's fraudulent intent to cheat the attorney out of his fee. 66 N. E. 395; 93 Am. St. Rep. 173, note and cases cited; 82 N. E. 117; 128 Ark. 478; 9 How. Pr. 460.

Allyn Smith, also for appellant.

1. The intervener's petition is founded on a writing as evidence of indebtedness, and a copy is filed as part of the pleadings, and the contract is part of the record in this case. 37 Ark. 542; 34 *Id.* 434; 53 *Id.* 476. Where an exhibit is the foundation of the action, it is a part of the record and controls the averments of the complaint. 53 Ark. 476; 14 S. W. 670-1.

2. The conclusions of fact and of law are also part of the record in this case. 59 Ark. 178; 65 *Id.* 14; 45 S. W. 473, col. 1.

3. The *lex loci contractus* governs as to the law of the contract, Oklahoma, but the place of performance, Arkansas, and its laws should govern as to performance, *lex fori.*

4. The facts are stated in the judgment and no bill of exceptions was necessary. 111 Ark. 353; 163 S. W. 1140; 77 Ark. 89.

T. B. Pryor and *James B. McDonough,* for appellee.

1. The conclusions of fact and of law are not a part of the record. There was no motion for new trial and no bill of exceptions. 59 Ark. 178; 26 *Id.* 479; 2 *Id.* 14; 33 *Id.* 830; 22 *Id.* 224; 33 *Id.* 830; 21 *Id.* 454; 46 *Id.* 17; 214 S. W. 67; 109 Ark. 543. See also 84 Ark. 342; 38 *Id.* 568; 9 *Id.* 67; 11 *Id.* 627; 81 *Id.* 332; 64 *Id.* 483.

2. The contract is not before this court. *Supra.* The original contract is not in the record at all.

3. The contract is void as against public policy and the rule in *Davis* v. *Webber* has not been changed. Acts 1909, p. 892; Kirby & Castle's Digest, § 463. There is nothing here to show when the action was commenced, there being no bill of exceptions.

4. The contract is not separable, but if so the whole contract is void under *Davis* v. *Webber.*

5. The validity of the contract is determined by the circumstances in each case.

6. On the allegations of the intervening petition they are not supported by the evidence and the judgment should be affirmed.

HART, J., (after stating the facts). There is no bill of exceptions, and this court can only review the judgment of the court below for errors appearing on the face of the record. The pleadings are a part of the record and need not be set forth in a bill of exceptions. *London* v. *Hutchens,* 80 Ark. 410; *Jones* v. *Jackson,* 86 Ark. 191, and *Morrison* v. *St. Louis & San Francisco Rd. Co.,* 87 Ark. 424. The petition of the attorney is one of the pleadings in the case and is a part of the record proper. The contract between the attorney and the plaintiff in the personal injury action, and which is filed as an exhibit to the petition, is the foundation of the action and is therefore also a part of the record proper. *Sorrells* v. *McHenry,* 38 Ark. 127; *Newton as Collector* v. *Askew,* 53 Ark. 476; *Hudson* v. *Newton,* 83 Ark. 223, and *North State Fire Ins. Co.* v. *Dillard,* 88 Ark. 473.

The judgment of the court below recited that the court found that the material allegations of the intervener's petition were sustained by the evidence and that under the contract, if valid, he was entitled to recover his attorney's fees in the sum of $3,718.33 with the statutory lien for same on the railroad's property. He was denied relief, however, solely on the ground that his contract was void.

It is well settled in this State that no bill of exceptions is necessary where the judgment of the lower court reciting the facts shows error on its face. *Shattuck* v. *Lyons,* 62 Ark. 338; *Shane* v. *Dickson,* 111 Ark. 353; *Baucum* v. *Waters,* 125 Ark. 305; *Davis, Admr.,* v. *McCandless,* 130 Ark. 538, and *First National Bank of Fort Smith* v. *Thompson,* 124 Ark. 161. In the last mentioned case the court held that a cause will be reversed where the court's rulings of law are inconsistent with his findings of fact.

In the case at bar the court found the facts in favor of the attorney but denied him relief on the ground that his contract was void and that he could not recover thereunder. It results from the views we have expressed that, in determining whether the conclusions of law of the court are inconsistent with its findings of fact, we may

consider the record proper, and that includes the petition of the attorney, the contract between the attorney and client, which was made an exhibit to the petition and is the foundation of the action and the judgment itself.

Counsel for the railroad company seek to uphold the judgment upon the authority of *Davis* v. *Webber,* 66 Ark. 190. In that case the court held that a stipulation in a contract for an attorney's fee for prosecuting a suit that the client shall not settle the suit without the attorney's consent was void as against public policy; and that if such stipulation was not severable from the rest of the contract, but was an inducement for entering it, the entire contract was void. In that case the attorney sued his client to recover for services as attorney under a certain contract and to enforce his statutory lien for the amount due him upon certain property recovered. The contract in that case, as in the case at bar, contained a clause that the client should make no settlement or compromise of the case without the consent of his attorney. The court said that this clause was fatal to the entire contract and was not severable from it because it seemed to have been the inducement for entering upon the contract. The reason given was that, under our statute as it then existed, when any judgment was recovered in a court of record in favor of any party, his attorney in the action had a lien upon an interest in the judgment for the amount of his fee which could be enforced in a proceeding in the court in which the judgment was rendered. The court said after judgment was rendered the parties to the suit might settle if they wished, but, before there could be any satisfaction of the judgment, the attorney's fee should be paid. Before judgment, however, the attorney could only trust the integrity and judgment of his client not to compromise without advising him and making arrangements about his fee. In short, under the statute as it then existed the parties to the suit could settle the case before judgment and thus deprive the attorney of his lien upon the property for any claim upon the adversary party. Thus it was of distinct advantage to the

attorney to have a clause in the contract providing that the case should not be settled without his consent. Such a clause, if enforceable, would also be of disadvantage to the adversary party, for it would prevent him from compromising or settling the case. For this reason the clause was held not to be severable and to avoid the entire contract. Our present statute is essentially different. Under it the lien which the statute gives the attorney follows the cause of action throughout without interruption and attaches to that in which the right of action is merged. If judgment is obtained, the lien attaches to that; if compromise or settlement is made either before or after judgment, the lien attaches to that, and in each case the attorney's interest is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent. *St. L., I. M. & So. Ry. Co.* v. *Hays & Ward,* 128 Ark. 471. In that case the court held that, while the parties to the suit have the right to settle it, the attorney's lien act requires that they shall take into consideration the fact that the attorney has a lien upon the cause of action and provides for its enforcement in the action, to the end that the parties may not ignore his lien and deprive him of his rights under his contract with his client.

Thus it will be seen that under the present attorney's lien statute no advantage could accrue to the attorney by inserting a clause providing that the client should not settle the case without his consent and the adversary party could not be hurt by the insertion of such a clause; for, as we have already seen, this clause could not prevent the parties from settling, and in the event that they did settle the attorney had a lien for his fee which the adversary party could not ignore. In other words, the railroad company was under no obligation to observe such an agreement, and it could not deprive it of its right to compromise the action, but under the statute it could not ignore the attorney nor deprive him of his fee, whether the compromise was made before or after judgment.

In *Newport Rolling Mill Co.* v. *Hall,* 144 S. W. 760, the Court of Appeals of Kentucky in discussing a similar question said:

"It is maintained by counsel for appellant, and there is authority to support it, that this stipulation vitiated the entire contract, while it is insisted for appellee that the contract is divisible, and that the obnoxious clause can be stricken out and the remainder of the contract sustained. It is often quite difficult to determine whether a contract is severable or entire, and this question frequently arises in the construction of contracts, parts of which are valid and parts invalid. The general rule is that, if the obnoxious feature of a contract can be eliminated without impairing its symmetry as a whole, the courts will be inclined to adopt this view as the one most likely to express the intention of the parties; but, if the good and bad are so interwoven that they cannot be separated without altering or destroying the general meaning and purpose of the contract, the good must go with the bad, and the whole contract be set aside."

In the application of this rule we think the contract in the case at bar is a severable one and that the clause against a compromise without the consent of the attorney may be eliminated without affecting the validity of the remainder of the contract. The principal consideration of the contract was the obligation upon the part of the attorney to give his legal services to the client in the action and the agreement upon the part of the client to pay the attorney a stipulated sum for his services. The payment of the services of the attorney could not be defeated by any settlement of the case and could in no way injure the client or his adversary. Therefore we are of the opinion that the contract in question was a valid and binding one.

The case of *McClain* v. *McFarlane,* 135 Ark. 602, relied upon by counsel for the railroad company, does not in anywise conflict with the views we have herein expressed. The court in that case said that the contract under consideration did not contain a clause which pre-

vented the client from settling his claim without the consent of his attorney, but that it only provided that the lawyer could not make a settlement without the consent of his client. Hence the question involved in the case at bar was not in issue in that case and was not decided.

Finally, it is insisted that the contract was made without the State and for that reason is not enforceable. But little need be said with regard to this phase of the case. The contract contemplated that it was to be performed in Arkansas, and the suit was in fact brought here. Therefore the law of this contract was in Arkansas. *Midland Valley Rd. Co.* v. *Moran Bolt & Nut Manufacturing Co.*, 80 Ark. 399. In that case the court held that a contract is to be construed with reference to the law of the place of performance and not of the law of the place where it was originated.

It follows that the judgment must be reversed, and the cause will be remanded for a new trial.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *v.* HILL.

Opinion delivered December 22, 1919.

1. CARRIERS—SAFE INGRESS AND EGRESS.—It is the duty of a railroad company to use ordinary care to provide passengers with a safe and convenient method of ingress and egress to and from its cars, and the company is liable for damages by reason of neglect of such duty.
2. CARRIERS—EVIDENCE OF CUSTOM—NEGLIGENCE.—While evidence of the custom of other railroad companies under like conditions was evidence tending to show that defendant was not negligent in providing a place for the transfer of its passengers from its coaches to a transfer boat, it was not conclusive evidence of that fact.
3. CARRIERS—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.—In an action by plaintiff to recover damages for the death of her husband sustained in attempting to jump from a stage plank furnished by defendant for the transfer of its passengers to a ferry boat, where there was evidence tending to prove that the entrance to the stage plank was in a slippery and unsafe condition,

and the evidence as to whether deceased was drunk was conflicting, *held* the questions of negligence and of contributory negligence were for the jury.

4. APPEAL AND ERROR—CREDIBILITY OF WITNESSES.—The jury, and not the appellate court, were the judges of the credibility of the witnesses.

5. CARRIERS—CONTRIBUTORY NEGLIGENCE—IMMINENCE OF DANGER.—Where a passenger is suddenly confronted by imminent danger, he can not be expected to calculate chances or to deliberate upon the means of escape; and if he acts as a man of ordinary prudence placed in similar circumstances, and in doing so makes an effort to escape injury and is injured, the carrier is responsible for damages.

6. TRIAL—REPETITION OF INSTRUCTIONS.—It was not error to refuse an instruction fully covered by instructions given.

7. TRIAL—REFUSAL OF ARGUMENTATIVE INSTRUCTION.—Requested instruction "that the law does not impose on the railroad company the duty of so providing for the safety of persons going from the train to the boat in this case that they will encounter no possible danger and meet with no casualties in the use of the appliances provided" *held* to be argumentative, and therefore properly refused.

8. DEATH—DAMAGES.—In an action by a wife for death of her husband, 61 years old, testimony tending to prove that he had been furnishing her from $150 to $175 per month for the support of the family *held* to warrant a verdict for $12,000.

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

STATEMENT OF FACTS.

Mattie Lee Hill, administratrix of the estate of W. L. Hill, deceased, brought this action against the Yazoo & Mississippi Valley Railroad Company to recover damages for the death of her husband and intestate, W. L. Hill, which was caused by his attempt to jump from the stage plank of the transfer boat of the defendant at Trotter's Point, Mississippi, his body striking the guard of the boat whereby he received injuries from which he died.

The defendant was a common carrier operating a railroad from Memphis, Tennessee, to Helena, Arkansas. The coaches of the train were usually carried down an incline at Trotter's Point, Mississippi, and run on a track

which was laid on the transfer boat and was thus carried across the Mississippi River to Helena where the coaches were pulled by an engine from the boat up the incline on that side of the river.

W. L. Hill was a resident of Memphis, Tennessee, and on the 24th day of May, 1917, bought a ticket from Memphis to Helena, Arkansas. He took passage on one of the defendant's trains, and when the train arrived at Trotter's Point, Mississippi, it was ascertained that the incline was out of repair and that the passengers would have to leave the coaches and walk down the river bank to the transfer boat, and thus be carried across the river. For this purpose the railroad company had prepared a passageway to the boat by making an excavation in the sand at the top of the bank of the river about eight feet in length and six feet deep. This incline was gradual and was followed by ten steps which had been cut in the sand. Each step was about twelve inches wide and was variously estimated to be from six inches high up to the height of a regular house step. From the bottom of the steps cut in the sand, a gang or stage plank about 24 feet in length and 3½ feet wide, extended to the boat. The gang plank was without guard rails.

One of the witnesses for the plaintiff said that the end of the gang plank resting on the bank of the river was much higher than the end which rested on the boat.

The witnesses for the defendant said that the gang plank was about five feet higher on the bank than it was at the boat. Some of the passengers had gone on down the bank ahead of W. L. Hill after they had left the train. A woman with her little child and its nurse were walking along the stage plank next to the boat. Another woman and her companion were on the stage plank next to the bank. Hill started down the bank and while going down the steps his foot slipped, and in attempting to recover his balance he first walked fast and then began to run as he approached the stage plank and hallooed to the passengers next to him to look out, and brushed by the woman and her companion. Before he reached the boat he

leaped from the stage plank towards the boat and struck the edge of the boat with great violence, falling on the pit of his stomach. He was rendered unconscious, and was given first aid by a physician present who was, also, a passenger. The physician gave him an injection of morphine to ease his pain and said that as soon as he examined Hill he knew that his injuries were fatal. When the transfer boat had crossed the river to Helena, Hill was placed in charge of the conductor of the train. In a short time a surgeon of the railroad company came down to the station and ordered Hill removed to the hospital of the railroad company. After remaining at the station for awhile he was carried to the hospital and died four or five days later. In the meantime, he suffered great agony.

The physician who rendered first aid to him testified that when he first examined Hill he did not appear to have been drinking. He also said that Hill talked in a rational manner after he became conscious. He admitted, however, that he had given a statement to the claim agent of the railroad company in which he stated that he had smelt whiskey on Hill's breath. He asserted, however, that he was testifying as to the truth of the matter as he recollected it and did not know how this came to be in the statement he made to the claim agent. When Hill was received at the hospital he had two one-half pint bottles of whiskey in his pockets and about one-half of one of them had been drunk. His wife was summoned to his bedside and remained there until he died. She testified that he left home with two one-half pint bottles of whiskey and that neither of them had been opened when he left home. She said that he drank whiskey, but was not addicted to getting drunk and that he was perfectly sober on the day he left home on the journey which proved fatal to him.

Other witnesses for the plaintiff also testified that he appeared to be sober on the occasion in question. They were passengers on the train and witnesses to the accident, and stated that Hill's foot slipped, and that he be-

gan to walk fast and then run in an effort to regain his balance. It was also shown that the sand of the river bank was soft and yielding and wet and slippery. One of the witnesses for the defendant, who was a much younger man than Hill, testified that his foot slipped in going down the steps, and that he nearly fell. He characterized the condition of the steps as dangerous. Hill was sixty-one years old at the time of his death. He was accustomed to traveling and was a stout, active man for his age.

On the part of the defendant, it was shown that a sudden rise in the Mississippi River had caused some of the pilings of the incline to become loose, and that for this reason it was necessary for the passengers to leave the coach on top of the river bank and walk down the bank to the transfer boat for a few days until the incline could be repaired. Passengers were transported several times a day in this manner. The section crew of the railroad made the pathway as has been described above, and it was shown by the railway company that there was no obstruction in the way which could have caused Hill to stumble. The section crew were witnesses for the defendant and testified that the sand was soft and yielding, and that, when each train load went either down or up the incline, they smoothed off the steps which they had cut in the sand, and made them entirely safe for the next trip.

The transfer boat had a night and day captain, who were also the pilots of the boat. Each of them had had much experience in navigating the Mississippi River, and testified that the method adopted for transferring the passengers from the coaches to the transfer boat and from the transfer boat back to the coaches was the best method of doing so under the circumstances, and that it was the method usually adopted by boats plying the Mississippi River. They said that it was not customary and that it was impractical to have guard rails on the stage plank. It was also shown that between the boat and the river and under and on the sides of the gang plank, there was soft sand and no rocks, sticks, or other obstructions.

Several witnesses for the defendant testified that Hill was drunk on the train from Memphis to Trotter's Point, and that he was drunk as he walked down the river bank. Some of them said he gave a yell as he started to run and another one as he jumped from the stage plank towards the boat. The conductor of the train said that, after they arrived at Helena, Hill admitted to him that he was drunk. The driver of the ambulance also stated that Hill admitted to him on the way to the hospital that he was drunk. The head nurse at the hospital, also the one who attended him, both say that he was very drunk when he was received at the hospital. Other facts will be stated or referred to in the opinion under appropriate headings.

The jury returned a verdict for the plaintiff, and the defendant has appealed.

F. A. Montgomery and *Fink & Dinning,* for appellant.

1. The peremptory instruction asked should have been given, as there was no proof of negligence on the part of appellant. 40 A. & E. R. R. Cases (N. S.) 226; 51 S. E. 443 and note 240; 95 U. S. 439; 15 Fed. 880; 55 Cal. 593; 66 Barb. (N. Y.) 43; Wharton on Negl., § 1 and notes.

2. It was error to refuse the four instructions asked by defendant, as they are the law and are supported by the evidence. 10 C. J. 911 and notes; 126 La. 502; 52 So. Rep. 678; 139 Am. St. 542; 115 Ark. 262.

3. The verdict is contrary to the overwhelming preponderance of the evidence, as no negligence was shown on the part of the appellant or its employees.

4. The verdict is excessive. 99 Miss 697; 103 *Id.* 830; 106 *Id.* 615; 108 *Id.* 421; 109 *Id.* 536; 74 So. 835. The verdict should be diminished in proportion to the negligence of the intestate.

Pace, Seawel & Davis, for appellee.

1. Appellant was a carrier for hire and had ample knowledge of its duty to provide a safe approach down

the embankment to the steamer operated by appellant. There was no error in refusing a directed verdict for defendant. The approach was dangerous, and appellant knew it or should have known it. The evidence does not show intoxication of deceased or other contributory negligence. The approach was unsafe and dangerous. The verdict settles the question of the negligence of defendant.

2. Deceased was not guilty of contributory negligence and the verdict of the jury settles the question as to the negligence of defendant, as does the testimony.

3. There was no error in refusing appellants requested instructions.

4. The verdict is not excessive. Deceased had an expectancy of life of thirteen years and at $1,800 he would have earned over $24,300 which, reduced to its present value, would amount to $15,091.20, a sum in excess of the verdict. The case was fairly tried by an impartial jury and is free from prejudicial error and should be affirmed.

HART, J., (after stating the facts). The court submitted to the jury the question of the negligence of the defendant and the contributory negligence of W. L. Hill. The court instructed the jury that the burden of proof was upon the plaintiff to establish the negligence of the defendant, and upon the defendant to show contributory negligence on the part of W. L. Hill.

In the first place, it is strongly insisted by counsel for the defendant that the evidence fails to show any negligence on the part of the defendant and that for this reason the court erred in submitting the question to the jury. In determining this question it becomes necessary to consider the duty of the defendant toward W. L. Hill. The relation of the carrier and passenger still existed when Hill was injured. It is the duty of a railroad company to use ordinary care to provide passengers with a safe and convenient method of ingress and egress from its cars, and the company is liable for damages by reason

of the neglect of such duty to its passengers in descending from a car at a station or from the cars down the river bank to the transfer boat in the present case. *K. C. Sou. Ry. Co.* v. *Watson,* 102 Ark. 499; *St. L., I. M. & S. Ry. Co.* v. *Woods,* 96 Ark. 311; *St. L. & S. F. Rd. Co.* v. *Caldwell.* 93 Ark 286, and *Little Rock & Ft. Smith Ry. Co.* v. *Caveness,* 48 Ark. 106.

The defendant admits that it was bound to use ordinary care to provide safe and suitable accommodations to enable its passengers to leave its coaches on top of the river bank and to embark on the transfer boat, but they insist that the undisputed evidence shows that they did provide such accommodations, and that the happening of the accident in question was such an accident as could not reasonably have been anticipated by the defendant, and the omission to provide against it could not constitute actionable negligence. They point to the fact that they first made an incline at the top of the bank and followed this with steps down to the gang plank and that the gang plank itself was three and one-half feet wide with cleats on it for the purpose of preventing the passengers from slipping while walking on it. They kept a crew there for the purpose of smoothing out the steps after each train load of passengers passed down them. All the members of this section crew testified that they did smooth out the steps after each trip and that there were no obstructions there. It was also proved by the two captains that they were experienced river men, and that the method used there was the best method in use on the Mississippi River, and that it was the one usually adopted by all the boats on the river. This testimony was not sufficient to take the case from the jury upon the question of the negligence of the defendant. The river bank at the point in question was sand, and the witnesses for the plaintiff testified that the sand was soft and yielding and wet and slippery. One of the witnesses for the defendant testified that the steps were dangerous on this account. There were no posts driven up and down the bank and ropes or guard rails attached to them.

This might have been done in a very short time and at a very little expense. Moreover, there were only ten steps and the carrier might have built wooden steps of rough lumber and temporarily anchored them in the sand.

The jury as men of experience in the ordinary affairs of life might have found that this could have been done at little cost and was necessary for the safety of the passengers in ascending and descending the river bank. It is true the captains of the transfer boat testified that the method used was the best method, but the jury might not have believed their testimony in this regard. Moreover, if the method adopted by the railroad company was wrong, the use of the same method by others could not right the wrong. What was the custom of others under like conditions was evidence tending to show that the railroad company was not negligent in providing a safe and suitable place for the passage of its passengers from its coaches to the transfer boat, but it was not conclusive evidence of that fact. The jury might find from other evidence that the way provided was dangerous and defective in spite of this evidence. The conduct of others is received as evidence of the nature of the thing in question because it indicates what is the influence of the thing on the ordinary person, in that situation; but it is not to be taken as fixing a legal standard for the conduct required by law. Wigmore on Evidence, § 461, and *Oak Leaf Mill Co.* v. *Littleton,* 105 Ark. 392, and cases cited. In the case last cited the court was dealing with the test of a master's duties in furnishing a safe place for his servant to work, but the principle is the same, and what was said in that case applies with equal force here. The jury might have found that the method used by the railroad company was not a safe method for the discharge of its passengers, and it is not a sufficient answer to say that it was the same kind of way that is usually used by boats plying the Mississippi River. The court submitted the question of the negligence of the defendant to the jury under the principles of law above announced, and we do not think it erred in doing so.

It is next earnestly insisted by counsel for the defendant that the court erred in not telling the jury, as a matter of law, that the defendant was guilty of contributory negligence. In the first place they contend that practically the undisputed evidence shows that W. L. Hill was drunk at the time the accident occurred, and that this caused him to stumble and that the consequences which followed were due to his being drunk.

We can not agree with counsel in this contention. Hill's wife testified that he left home sober and only had two one-half pint bottles of whiskey when he left home. She said that he placed them in his pocket because his grip was full of other things. The witnesses for the plaintiff, who were passengers on the train and saw the accident, said that Hill did not appear to be drunk, and that he walked down the river bank much in the same way the others did until he stumbled and endeavored to recover himself by walking faster. The physician who administered first aid to him and gave him an injection of morphine said that he did not appear to be drunk, and that after he regained consciousness Hill talked to him intelligently.

It is true the conductor testified that Hill was very drunk while they were waiting at the station for an ambulance to take him to the hospital, but the jury might have found that Hill drank some of the whiskey after he was injured to ease his pain and that the whiskey and morphine together made him very drunk. The ambulance driver says that he admitted to him that he was drunk and the head nurse at the hospital said that he was very drunk when he reached there, but as above stated, this might have been accounted for by the jury on the theory that he drank some whiskey after he was injured.

It will be remembered that his wife testified that there was no whiskey used out of the two one-half pint bottles at the time he left home. The jury were the judges of the credibility of the witnesses, and it can not be said that there is no evidence of a substantial char-

acter to support their finding that Hill was not guilty of contributory negligence in this respect.

Again, it is contended that the court should have told the jury as a matter of law that Hill was guilty of contributory negligence because he jumped from the stage plank towards the boat when all around the stage plank there was soft sand upon which he might have jumped, and thus prevented the injury We can not agree with counsel in this contention. This court has uniformly held that on occasions where a passenger is suddenly confronted by imminent danger, he can not reasonably be expected to calculate chances, or to deliberate upon the means of escape, but that he must of necessity judge of the danger by the circumstances as they at the instant appear to him and not by the result. Immediate action and decision are required of him, and if he acts as a man of ordinary prudence placed in similar circumstances, and in doing so makes an effort to escape injury and is injured, the railroad company is responsible to him for his damages. *Railway Co.* v. *Murray,* 55 Ark. 248; *Jacks* v. *Reeves,* 78 Ark. 426; *St. L., I. M. & S. R. Co.* v. *Stamps,* 55 Ark. 248; *K. C. Sou. Ry. Co.* v. *Watson,* 102 Ark. 499.

Under the evidence adduced by the plaintiff the jury might have found that Hill did not have time to look at the ground under the gang plank and see whether it was safe to jump there or not; but that, realizing that a woman and child and its nurse were in front of him on the stage plank, with whom he must come in contact unless he jumped, he leaped from the gang plank to avoid injuring them and himself, thinking that he could safely land on the boat. Therefore, we do not think the court erred in submitting the contributory negligence of Hill in this regard to the jury.

It is next insisted that the court erred in refusing to give instruction No. 4, asked by the defendant. The instruction reads as follows: "You are further instructed that the duty of the carrier as to its premises is not to furnish absolutely safe premises, or premises

as safe as possible; if it adopt a method of construction of a standard character such as is generally adopted by other well-regulated carriers, and exercises reasonable care to keep the premises in repair, its duty is sufficiently performed."

If it be assumed that the instruction was correct, it is fully covered by instruction No. 3, which was given to the jury at the request of the defendant. This will be readily apparent from reading and considering the two instructions together. Instruction No. 3 is as follows: "You are instructed that if you believe from the evidence that the incline of the defendant at Trotter's Point, Mississippi, connecting its railroad track with its transfer boat, was out of repair without the fault of the defendant but owing to the changes of the water of the river, and that the defendant was for that reason obliged to transfer its passengers from the train on the Mississippi side onto a train on the boat, and that the defendant provided such a reasonably safe way to approach the boat as was in general use and such as a reasonably prudent person would provide, then the jury will find for the defendant, even though they believe that he was sober and in the exercise of reasonable care for himself, and did slip on the sand steps that had been provided on account of the condition of the ground, and this was the cause of his injuries."

It is next insisted that the court erred in refusing to give instruction No. 5, at the request of the defendant. The instruction is as follows: "You are further instructed that the law does not impose on the railroad company the duty of so providing for the safety of persons going from the train to the boat in this case that they will encounter no possible danger, and meet with no casualties in the use of the appliances provided." This instruction was also covered by the matters embraced in instruction No. 3. Besides the instruction as asked is argumentative in form, and for that reason need not have been given by the court.

It is next insisted that the court erred in not giving instructions Nos. 6 and 8, asked by the defendant. These instructions will be considered together. They are as follows: No. 6. "You are further instructed that if you believe from the evidence that the death of the plaintiff's intestate was caused by his attempting to jump from off the gang plank of the defendant's landing from the river to its transfer boat, when there were other means by which he could have reached the boat in safety to himself and others, that the law is that the plaintiff's intestate assumed the risk of jumping into the boat, and the defendant is not liable, and the jury will so find." No. 8. "You are instructed that if you believe from the evidence that the cause of the death of the plaintiff's intestate was that he unnecessarily jumped or attempted to jump from the gang plank to the boat, then you are instructed that the casualty has no connection with the fact that he lost his balance in coming down the bank, if you believe he lost his balance in that way and the injury to him, but that his injuries were solely caused by the jump, and the jury will find for the defendant."

As we have already seen, the fact that the result showed that there was a way for Hill to have escaped mortal injury by jumping on the sand, and that in the emergency he chose the one which proved fatal to him, would not characterize his act as one of negligence as a matter of law. Therefore the court did not err in refusing to give either of these instructions.

Finally, it is insisted that the verdict is excessive. The complaint is in two counts. In the first count the plaintiff sued for the use of herself and her minor child for their financial loss in the death of the husband and father. In the second count the plaintiff sued for the use and benefit of the estate of W. L. Hill, on account of the mental and physical pain and suffering resulting from the injury. There was a verdict and judgment for the plaintiff on the first count in the sum of $12,000 and on the second count in the sum of $500, making a total of $12,500.

It is the contention of counsel that the verdict on the first count is excessive. No point in this respect is made on the second count, for it is conceded that W. L. Hill suffered great agony for the four or five days which he lived after receiving his injuries. At the time of his death, W. L. Hill resided in Memphis, and, besides his adult children, left his widow and a daughter seventeen years of age, who were dependent upon him for support. His wife testified that he was a very affectionate husband and father, and that he took great pride and interest in helping to raise their daughter. She said that her husband was sixty-one years old at the time of his death; that he weighed 160 pounds and was about five feet six inches tall; that he was very strong and also very industrious; that he was a piano salesman and solicitor; that he would get pianos by buying them and then sell them to other people; that he had a tuner with him who assisted him in his work, and that he made outside money enough in this way to pay his traveling expenses; that his earnings were from $150 to $175 per month; that he paid all of this to her alone, and that she disbursed it for the support of herself and family; that Mr. Hill's business called him away from home a good deal, and that she stayed at home with their daughter; that they had lived in Memphis about twenty-six years before his death, during which period he had followed the business of selling pianos either on salary or on commission; that sometimes he bought pianos and sold them again; that they were not in debt at the time of his death and that she usually paid cash for their living expenses. She denied that her husband got on frequent and protracted sprees. She testified that she had known him to go five years without drinking any at all. She testified that he was not addicted to excessive drinking; that he drank moderately; and that it never interfered with his business.

On the other hand, it was shown by the defendant that Hill was addicted to the excessive use of intoxicating liquors, and for this reason could not hold a position

long at a time, and that he did not make more than $50 per month above his traveling expenses. These facts were proved by the men for whom Hill had worked for several years prior to his death. It was shown that Hill's wife was having trouble with one of these firms with regard to a settlement of the amount alleged to be due her husband, but the witnesses said that this did not influence their testimony. They all claimed they were testifying to matters shown by their books. The life expectancy of Hill was thirteen and one-half years.

It is claimed by counsel for the defendant that the verdict is excessive, and that the evidence of Mrs. Hill has been completely overcome by the evidence adduced by the defendant. We can not agree with counsel in this respect. It is true that the defendant offered evidence as to what Hill was making, and the witnesses were men for whom Hill had worked and that they testified that they had taken the items from their books which showed the state of his account. This evidence, however, was not conclusive, because it was not admitted to be true, and Mrs. Hill testified that her husband gave her from $150 to $175 per month to be used in the support of herself and family. Her testimony in this respect was as to a matter which might or might not be true. It was as to a matter of which she had personal knowledge, and therefore her testimony was positive evidence. The testimony of the witnesses for the defendant of course was in direct conflict with her testimony, but the jury were the judges of the credibility of the witnesses, and it can not be said that the evidence adduced for the defendant conclusively disproved the testimony of Mrs. Hill. This is true because she testified as to matters of which she had personal knowledge and her testimony was therefore evidence of a substantive character. It was not opposed to any law of nature or to any well known scientific fact. It was relevant to the point at issue, and, if true, warranted the jury in returning a verdict for $12,000. Being evidence of a substantive character and of matters of which Mrs. Hill had personal knowledge, it

could not be overcome by the testimony of the defendant as a matter of law, no matter how strong it might be. It is our duty to uphold a verdict when there is any evidence of a substantial character to support it. Therefore, it would be useless for us to enter into a discussion of the truth or falsity of her testimony. It is sufficient to say that it was believed by the jury, and warranted the verdict.

It follows that the judgment must be affirmed.

GENERAL COOPERAGE & TIMBER COMPANY *v.* HEDGES.

Opinion delivered December 22, 1919.

1. SALES—EXECUTORY CONTRACT—RIGHT OF INSPECTION.—Where a contract for the sale of staves was an executory one, the defendants had the right to inspect them in order to ascertain whether they conformed to the agreement.
2. SALES—PLACE OF INSPECTION.—In an action for breach of a contract of sale of staves in which the purchasers had a right of inspection, preponderance of evidence *held* to support finding of chancellor that the agreement was that the staves should be inspected at the place of manufacture, and not at the place of delivery.
3. RECEIVERS — DAMAGES BY APPOINTMENT.—Where the evidence shows that the receiver never actually took the property out of the owner's possession, but permitted him to continue to operate it just as he had done before, the owner suffered no loss by the appointment, and the chancellor was correct in not allowing damages on account thereof.

Appeal from Ashley Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

STATEMENT OF FACTS.

The General Cooperage & Timber Company and H B. Carter brought this suit in equity against Z. T. Hedges and G. W. Moore to recover an amount alleged to be due them under a contract for the sale of certain staves. They alleged in their complaint that the defendants were insolvent, and asked for the appointment of a receiver to take charge of the defendants' stave mill and a large

quantity of staves on hand in it which are alleged to belong to the appellants. A receiver was duly appointed and took charge of the property. The appellees denied that they were indebted to the appellants, and by way of a cross-complaint allege that the appellants were indebted to them, and they also ask for damages which accrued by reason of the appointment of a receiver.

The original contract between the parties was duly signed by them and reads as follows: "This memorandum of agreement made and entered into this.....day of October, 1913, by and between Z. T. Hedges and George W. Moore of Pulaski County, Arkansas, parties of the first part, and the General Cooperage & Timber Company of New Orleans, La., party of the second part.

"Witnesseth: That for and in consideration of the sum of one dollar in hand, paid by the party of the second part to the parties of the first part, the receipt of which is hereby acknowledged, the parties of the first part do hereby sell to the party of the second part and the party of the second part hereby buys from the parties of the first part, the following staves, towit: 200,000 34 in. x ¾ in. air dried and listed white oak whiskey staves at the price of $42 per 1,000 on basis of 4½ in. average, f. o. b. cars Wilmot, Arkansas.

"100,000 34 in. x ¾ in. air dried and listed white oak barrel staves at the price of $20 per 1,000 on basis of 4½ in. average, f. o. b. cars Wilmot, Arkansas.

"100,000 staves, width may be either 34 in. x ¾ in. air dried and listed red oak at $19 per 1,000 on basis of 4½ in. average, f. o. b. cars Wilmot, Arkansas, or 30 in. x ⅝ in. ash pork staves, air dried and listed at $14 per 1,000 on basis of 4¼ in. average, f. o. b. cars Wilmot, Arkansas, or parties of the first part may deliver part red oak and part ash so that the total number of such staves delivered will not exceed 100,000.

"Inspectors shall be governed by the standard rules agreed to by the Tight Barrel Stave Manufacturers' Association and the National Coopers' Association.

"Party of the second part agrees to advance the parties of the first part the sum of $1,000 cash. Said $1,000 to be used in the purchase and installation of a country stave mill, and, upon the purchase of said plant, the said first parties hereby agree to give to the said second party a mortgage covering the said stave mill outfit as a further protection of their note for $1,000 payable at four months from date and bearing interest at the rate of 6 per cent. per annum, which first parties agree to furnish upon the signing of this contract and before said sum of $1,000 is advanced to said first parties.

"The second party also agrees to advance to the first parties the sum of $17.50 per 1,000 on the white oak staves above purchased, $15 per 1,000 on the red oak and $11 per 1,000 on ash, as they may be delivered to the railroad at Wilmot, Ashley County, Arkansas, when due as many as 50,000 have been so delivered. The object being that the second party shall make advances only upon lots of 50,000 or more.

"Second parties agree that upon the signing of this contract by the parties of the first part to furnish the sum of $1,000 by their check mailed from their office in New Orleans promptly upon receipt by them of this contract properly executed.

"It is understood that the difference between the amount advanced as the staves are delivered to the railroad and the contract prices shall be credited upon the note of $1,000, which second party agrees to cash under the terms of this contract.

"It is understood and agreed by the parties hereto that the manufacture of staves herein contracted will begin as soon as possible and full delivery made not later than June 1, 1914.

"It is also agreed between both parties that no other staves shall be sold to or manufactured for any party by said first parties until this contract is completed and all obligation hereunder canceled.

"This contract is executed in triplicate.

"Witness the signatures and seals of the parties hereto this 15th day of October, 1913."

The General Cooperage & Timber Company advanced $1,000 to G. W. Moore on the 15th day of October, 1913, and G. W. Moore and Z. T. Hedges gave their written obligation in payment therefor and agreed to give the General Cooperage & Timber Company a mortgage on the mill plant as security for the note. On the 15th day of October, 1913, G. W. Moore and Z. T. Hedges entered into a lease contract with H. B. Carter, which is as follows:

"Memorandum of agreement to the lease between Hedges & Moore, of Wilmot, Arkansas, as lessors, and H. B. Carter of New Orleans, La., as lessee, entered into this 25th day of May, 1914.

"The said lessors hereby lease and demise to said lessee the following described premises for and in consideration of the sum of $1 cash in hand paid to the lessors by the lessee, the receipt of which is hereby acknowledged.

"Five acres, more or less, located in the tract of land belonging to A. M. Kellar, west of railroad in the town of Wilmot, Arkansas, the said five acres being located on the west end of said tract on lake bank and west of small ravine running to lake.

"Tract above described is more specifically set forth in lease from Maingault & Gorham to G. W. Moore, dated November 5, 1913, to which reference is here made.

"It is agreed between the lessors and the lessee that this lease shall remain in effect and full force as long as any staves are piled on the herein described land on which moneys are advanced, under terms of a certain contract, entered into between Hedges & Moore and the General Cooperage Company under date of October 15, 1913."

H. B. Carter by assignment succeeded to the rights of the General Cooperage & Timber Company in the original contract. The court found that all the staves involved in the controversy between the parties were, by the terms of sale, to be delivered, inspected and accepted

by appellants on the railroad at Wilmot, Ashley County, Arkansas, and that the items recharged to the defendants on account of the inspection and rejection of the staves at New Orleans, their point of destination, were not legitimate charges, and the defendants' exceptions thereto should be sustained.

The court found that the total charges against the appellees should aggregate $10,763.70, and that the total credits to which appellees are entitled aggregate $12,-446.55, leaving appellants indebted to appellees in the sum of $1,682.85. The court further found that the receivership and injunction obtained by the appellants at the beginning of this suit were wrongfully obtained, but that appellees had not been damaged thereby. It was therefore decreed that appellee G. W. Moore should recover of the appellants the sum of $1,682.85 with interest at the rate of 6 per cent. per annum from August 11, 1915, until paid.

To reverse the decree, appellants have prosecuted this appeal, and appellees have taken a cross-appeal.

G. P. George and *Geo. W. Hays,* for appellant; *Gardner K. Oliphint,* on the brief.

1. The decree is clearly against the preponderance of the evidence; it is shocking to the sense of justice. The contract is incomplete as to the exact place of inspection of the staves, and hence the parties resorted to parol evidence to prove the real intention of the parties where inspection was to be made. The testimony shows that the inspection was to be made on arrival at point of destination, New Orleans, and the law so fixes the destination as the point of inspection. The evidence on that point is definite and competent. 135 Ark. 31. The balance due on the staves was to be paid after inspection, whether at Wilmot or New Orleans, according to the rules of the Tight Barrel Stave Manufacturers' Association, etc. The chancellor erred in finding that the inspection was to be made on the railroad at Wilmot and the staves accepted there.

"F. O. B." means "free on board;" used in the sale of goods, it only denotes the duty of the seller to deliver the goods free from all charges on board the carrier. This is all it denotes. 81 N. E. 1017; 23 R. C. L., sec 159, p. 1337.

2. There was no actual inspection at Wilmot, as the testimony shows at most a count of the number. Mr. Moore's visits strongly indicate that the inspection was to be at New Orleans. 46 Ark. 131.

3. The chancellor should have debited appellee's account with $4,125.16 for staves rejected because not up to contract, and the testimony for appellant and of H. B. Carter is sufficient to base judgment for the rejected staves. The law applicable can be found in 101 Pac. 233; 136 Ark. 342; 76 *Id.* 177-179; 35 Cyc., pp. 384-386, 391-7, 403. See also 81 Ark. 549. The contract was not an entire contract, and appellants are entitled to the charges for failure of the staves to come up to standards and specifications as to quality and character. The contract entitled appellant to inspect separately each and every car load shipped as to character and quality to determine the amount of credit appellees were entitled to on each car. 81 Ark. 559-560.

4. The contract was not entire, but, if so, under the evidence and law (*supra*), appellant is entitled to charge appellees for the deficiency in character and quality of the staves. 93 Ark. 454; 125 S. W. 122; 27 L. R. A. (N. S.) 914-919.

5. The contract was an executory one, and appellant had the right to inspect after arrival at New Orleans and to charge appellees back with the amount of all staves found to fail to come up to specifications and standards. 93 Ark. 454. There was no completed sale merely upon delivery to the carrier. L. R. 7 C. P. 438. Though title may have passed to the purchaser if he has had no opportunity of inspection he has the right to inspect within reasonable time and may reject the articles if they do not comply with the warranty of quality or other terms of the contract, as the sale or contract is ex-

ecutory only. 106 N. W. 891; 58 *Id.* 373; 29 Pac. 6. No inspection was made or contemplated to be made at Wilmot, but it was to be at destination, New Orleans. On question of delivery, see 209 S. W. 65; 100 Ark. 17; 23 R. C. L. 1426, secs. 250 and 256, p. 1432; 115 U. S. 363; 2 Mechem on Sales, § 1377; Williston on Sales, § 473; 12 Am. St. 831; 22 N. E. 349.

6. As to the miscellaneous items, McQuay's expenses to Wilmot, etc., they should have been allowed. The decree should be reversed and judgment entered here for $2,980.97.

Compere & Compere, for appellee Moore.

1. Under the contract the place of inspection was Wilmot, and inspections at another place did not bind Moore. The parol agreement establishes this fact and the evidence was competent.

2. As to miscellaneous items, the lower court properly refused to charge appellees with them.

Williamson & Williamson, for appellee Hedges.

1. There was no partnership between Moore and Hedges. The evidence and documents show this conclusively.

2. The court properly found that the place of inspection was Wilmot, and the evidence sustains the finding.

3. The book accounts and exhibits and cash payments show an acceptance of the staves at Wilmot.

The law cited by appellant is undoubted, but no law is involved in this case, only a question of fact. The evidence proves conclusively an acceptance at Wilmot many months before any question was raised. 76 Ark. 177-9.

4. Appellants not only had full opportunity of inspection, but did actually inspect and did not undertake to repudiate within a reasonable time. 62 L. R. A. 795.

5. There was no error as to the miscellaneous items, but the court erred in not allowing damages from the wrongful issuance of the injunction and the receivership;

$1,000 at least was proved, which should have been allowed on cross-complaint.

HART, J., (after stating the facts). The parties to this lawsuit entered into a written contract whereby appellees agreed to sell the white oak, red oak and ash staves which they should manufacture at their stave mill at Wilmot, Ark., to appellants for a stipulated price per thousand f. o. b. cars, Wilmot, Ark.

The contract provides that the inspectors shall be governed by certain designated standard rules, but the contract is silent as to the place of inspection. Appellants agreed to advance appellees $1,000 for the purpose of purchasing a stave mill and appellees agreed to give appellants a mortgage on the mill. The contract further provides that appellants shall advance appellees a stipulated sum per thousand on the staves as they may be delivered to the railroad at Wilmot, Ark., when as many as 50,000 have been delivered; but that no advances shall be made on lots less than 50,000. The difference between the amounts advanced and the contract price was to be credited on the $1,000 note. The manufacture was to begin at once and full delivery made before June 1, 1914. The date of the contract was October 15, 1913. Under this contract appellants claim that the sum of $14,484.40 was advanced to appellees, and that appellees delivered staves of the contract value of $11,503.43, leaving a balance due to appellants of $2,980.97. On the other hand, appellees claim that appellants advanced to them only the sum of $10,246.36, and that they delivered to appellants staves of the contract value of $12,446.55, leaving a balance due appellees by appellants $2,200.20; for which judgment is prayed in the cross-complaint.

The chancellor found that the amount advanced to appellees was $10,763.70; and that the value of the staves shipped under the contract was $12,446.55, leaving a balance due appellees of $1,682.85; and a decree was entered accordingly. The finding of the chancellor was based on a holding that there was an understanding between the

parties that all the staves were to be delivered, inspected and accepted by appellants on the railroad at Wilmot, Ark.

There are some miscellaneous items to be taken into consideration in stating an account between the parties, but it is admitted by counsel on both sides that the correctness of the chancellor's finding in the main depends upon whether or not the inspection should have been made at the point of shipment, or at the place of destination. If the inspection ought to have been made at Wilmot, Ark., the appellants accepted the staves there and could not afterwards make any charges against appellees on account of defects in the staves, which were discovered by a subsequent inspection made after the staves reached the point of destination. On the other hand, if the staves were not to be inspected until they arrived at New Orleans, the point of destination, the evidence of appellants shows that when inspected there they were found to be defective, and that, after throwing out the culls, appellants were only liable to appellees in the amount stated above, which was less than the amount advanced to appellees by appellants.

It is conceded by counsel on both sides that, the contract for the sale of the staves being an executory one, appellants had the right to inspect the staves in order to ascertain whether they were such as the appellees had agreed to ship them, and such is the law. *Deutsch* v *Dunham,* 72 Ark. 141, and *Ward Furniture Man. Co.* v. *Isbell,* 81 Ark. 549.

The written contract contains a provision that the inspector shall be governed by certain designated standard rules; but is silent as to the place where the inspection is to be made. In the case at bar, however, both parties testify that a separate oral agreement was made as to the place where the inspection was to be made; but their testimony is in irreconcilable conflict as to the terms of that agreement. Thomas Sanders represented appellants in the matter, and was asked if anything was said by appellees about inspecting the staves at Wilmot, Ark.

He answered: "No; on the contrary, it was distinctly understood that the staves were not to be inspected and graded at Wilmot, Arkansas, but were to be inspected and graded at points of destination, that is, at points where the staves were to be shipped. That is why Hedges & Moore provided for advances to be made by Mr. Carter on the staves. It was understood that the staves were to be examined as to quantity or number at Wilmot, Arkansas; that advances of part of the purchase price were then to be made as soon as the staves were delivered to the railroad, and the balance of the purchase price was to be paid after the staves had arrived at destination and had been inspected and graded. If it had been agreed upon or understood that the staves were to be inspected and graded at Wilmot, Arkansas, then there would have been no provision or agreement about advances when delivered to the railroad at Wilmot, Arkansas; for, if the staves were to be inspected and graded at Wilmot, Arkansas, before delivery to the railroad, then the purchase price of the staves would have been due and payable and the question of advances would not have arisen."

In addition it was shown by appellants that they had sold the staves to the Brooklyn Cooperage Company at New Orleans, and had directed appellees to ship the staves to the company; that on on one occasion appellee G. W. Moore had been summoned to New Orleans on account of the inspector of the consignee finding so many defective staves; that the staves were then reinspected in the presence of both H. B. Carter and G. W. Moore, and that Moore had expressed himself as satisfied with the inspection.

On the other hand, G. W. Moore denies this. He admitted that he went to New Orleans, but his version of what occurred between him and Carter after arriving there is that he never expressed himself as being satisfied with any inspections there. He said he went to the factory where Carter said the staves were, and that Carter tried to show him the culls; that he asked Carter where the good staves were and that Carter answered that they

were in the dry kiln; that he turned to Carter and asked him how he figured on him, Moore, inspecting staves in the dry kiln; that he then told Carter that he had not sold him finished staves, but rough ones; that there was no use to look any further; and that he looked to Carter to pay for all the staves that had been shipped under the contract; that the representative of the consignee asked him why he did not sell direct to a factory like itself, instead of selling to a middle man like Carter; that he could make more money by doing so. Moore further testified that the agreement was that the inspection was to be made at Wilmot, Ark., and that appellants sent a man there every time he, Moore, drew a draft on them, and that the representative of appellants came and inspected and counted the staves at Wilmot, Ark.; that Mr. McQuay, Mr. Carter's son and Mr. Baxter, who stayed at Wilmot about three months, were the representatives of appellants sent to Wilmot from time to time to inspect the staves; that Baxter made a report to appellants on every car and did his own inspecting and culling; that Baxter accepted the staves shipped and so reported to appellants.

Mr. McQuay testified for appellants that he was sent there once or twice to count the staves ready for shipment; but said that he had no directions with regard to inspecting them for quality and did not do so. Neither Carter's son nor Baxter were called as witnesses nor was any attempt made to explain their not being called to testify.

Z. T. Hedges also testified in positive terms that the contract was that the inspection was to be made at Wilmot, Ark. He said that he owned the timber out of which the staves were to be manufactured and expected to get his pay therefor out of the staves which Moore would ship to appellants; that for this reason he was interested in the inspection being made at Wilmot and was not willing to wait until the staves arrived at New Orleans.

It was shown that twenty-three car loads were shipped, and that the staves run all the way from 15,000

to 19,000 staves to the car load. The staves were hauled to Wilmot and deposited on the five-acre lease preparatory to inspection and shipment according to the testimony of appellees. They also stated that many culls were there after the shipment of staves was stopped.

The record shows that from time to time a bill of sale to the staves then deposited on the five-acre lease at Wilmot was made by appellees to appellants. Under this state of the record, it can not be said that the finding of the chancellor that the parties agreed that the inspection should be made at Wilmot is against the preponderance of the evidence. The testimony of the parties to the agreement on this point is in direct conflict.

Moore and Hedges testify that the agreement was that the inspection should be made at Wilmot, and that pursuant to the agreement appellants sent Mr. McQuay, Mr. Baxter and H. B. Carter's son to Wilmot, and that they inspected the staves, took out the culls and accepted the staves for appellants every time Moore drew on them for the purchase price of the staves.

Counsel for appellants point to the fact that McQuay testified that he was only sent there to inspect for quantity and that he did not inspect for quality. Of course, this tended to contradict the testimony of Moore, but, on the other hand, neither Carter's son nor Baxter who did the greater part of the inspecting testified in the case, and no explanation is made as to why they were not called as witnesses relative to so vital a matter.

Again it is said that Moore is contradicted by Carter and the representative of the factory to whom Carter had sold the staves in New Orleans. They both testified that Moore expressed himself as satisfied with the inspection made there. Moore denied this, and said he told Carter that he expected to hold him to the inspection made at Wilmot. The fact that a lot of culls were left on the five-acre tract of ground which appellants had leased at Wilmot for the purpose of having the staves deposited preparatory to shipment tended to corroborate Moore. The parties knew approximately how many staves a car would

hold, and if quantity was all the inspection at Wilmot was to be made for, it seems that it was a vain and useless thing to do; for the bill of lading would show approximately the number of staves and this could accompany the draft drawn by Moore on appellants for the purchase price of the staves. Then, too, several bills of sale were executed by appellees to appellants from time to time to staves piled on the five-acre lease. This indicated that these staves had been accepted by appellants. After a careful consideration of the testimony from its different angles, we can not say that the finding of the chancellor with regard to the point of inspection is against the preponderance of the evidence.

There were four items which are referred to as miscellaneous items, and one of these is for $400. Moore testified positively that he did not get this money. Appellants undertook to set out all the checks and drafts that they had paid in favor of Moore for staves. This one was not among them, and the chancellor was right in not allowing it. The other three items are small ones, and we do not think it can be said that the finding of the chancellor with regard to them is against the preponderance of the evidence. We do not regard them of sufficient importance to merit a separate and detailed discussion.

Upon the cross-complaint but little need be said. It is true Moore testified that he was solvent at the time the receiver was appointed, and has continued solvent since that time. But the evidence also shows that the receiver never actually took the property out of Moore's possession, and permitted him to continue to manage and operate it just as he had done before. Hence the appellees have not suffered any loss by the appointment of the receiver, and the chancellor was right in not allowing them any damages on account thereof.

Therefore the decree will in all things be affirmed.

WEAVER v. McLEAN.

Opinion delivered December 22, 1919.

ARBITRATION AND AWARD—CONCURRENCE OF ARBITRATORS.—Where the parties to a boundary dispute agreed to submit the controversy to three surveyors, a party thereto will not be bound by a majority report, in the absence of express agreement thereto, notwithstanding Kirby's Digest, section 7821, authorizes a majority of three or more persons to do any act directed to be performed by them, as such statute applies only to statutory boards.

Appeal from Sharp Chancery Court, Northern District; *Lyman F. Reeder,* Chancellor; affirmed.

C. E. Elmore, for appellants.

1. The court erred in refusing to confirm the reports of Williams and that of McCaleb, the board of surveyors. Kirby's Digest, ch. 5; 36 Ark. 446-9; 44 *Id.* 166; 68 *Id.* 580; 76 *Id.* 153. This was an arbitration and settled the question. The boundary line as actually run and established by the surveyor general governs. 128 U. S. 691-7; 158 *Id.* 253; 197 *Id.* 510; 88 Ark. 48.

2. All the proof shows that all the fence belongs to Weaver. The court disregarded the field notes and based its decision on the survey of McCaleb, and there is no testimony corroborating McCaleb. Rev. St. U. S., § 2396, should be upheld, as the lines and corners were duly established. 88 Ark. 48; 128 U. S. 691-7.

Arthur Sullivan, for appellee.

1. The appeal should be dismissed, as the abstract does not comply with Rule 9.

2. No award was ever made that would bind the court. 2 R. C. L. 396; 5 C. J. 188; 20 N. E. 713. Kirby's Digest, section 7821, does not apply. The court properly set aside the award. 15 A. & E. Ann. Cas. 508-9. Only two of the arbitrators or surveyors ever participated and it was not concurred in by the absent member. 3 C. J., p. 96, note 53; 5 Enc. L. & Proc., p. 147, N. 3 and 148-9 and notes; 18 Fed. Cas. No. 10, p. 276; 44 Watts (Pa.) 75; 15 A. & E. Cas. 508-9; 97 Am. St. 310; 97 Ark. 193.

The decree shows that the chancellor adopted the testimony of Frye and McCaleb as establishing the true facts and the findings are clearly supported by a great preponderance of the evidence and should not be disturbed.

HUMPHREYS, J. Appellants instituted suit against appellee in the Northern District of the chancery court of Sharp County, to enjoin appellee from joining his fence to their fence. It was alleged in the complaint that appellants owned the east half of the southeast quarter of said section 2, and the appellee the northwest quarter of the southwest quarter of section 1, all in township 19 north, range 5 west; that the lands of the respective parties adjoined, and that appellee had wrongfully and unlawfully joined his fence to the fence of appellants, near their east line.

Appellee filed an answer, denying that the fence to which he had joined was on appellants's land; but alleged that it was on his own land, near the west line thereof.

The issue thus joined involved the location of the true line between the lands of said parties. By consent of the parties, the court appointed a board of surveyors, consisting of W. D. Williams, John H. Davis and T. H. McCaleb, to locate the section line between sections 1 and 2, in township 19 north, range 5 west, which constituted the division line between appellants' lands lying in said section 1 and appellee's lands lying in section 2.

The board of surveyors attempted to locate the true line between the lands of said parties, but were unable to agree. John H. Davis and W. D. Williams located and reported the true line as being a straight line between the southwest corner of section 1, township 19 north, range 5 west, and a point on township 19-20 north line 82.22 chains west of the northeast corner of said section 1. T. H. McCaleb located and reported the true line as being a straight line between the southwest corner of section 1, township 19 north, range 5 west, and a point on the township 19-20 north line 83.32 chains west of the northeast corner of said section 1.

The cause was submitted to the court, upon the pleadings, conflicting reports of the surveyors and the evidence adduced in support of each survey, or location of the disputed line, from which it was found and decreed that the true line was a straight line between the southwest corner of said section 1 and a point on said township line 83.32 chains from the northeast corner of said section 1, which line intersects the division fence between the lands of said parties twenty-four rods south of appellee's northwest corner, leaving the north twenty-four rods of the fence on appellants' land, and the south fifty-six rods of said fence on appellee's land. From the decree, an appeal has been duly prosecuted to this court, and the cause is before us for trial *de novo*.

It is first insisted for reversal that appellee was bound by a majority report of the board of surveyors, appointed by consent, for the purpose of locating the true line between the lands of appellant and appellee. In support of this contention, appellants cite section 7821 of Kirby's Digest, which is as follows: "An authority conferred upon three or more persons may be exercised by a majority of them; and a majority of three or more persons may do any act directed to be performed by them." This section is not controlling, for the reason that it only applies to boards provided by the statutes of the State. It has no reference to boards appointed by the court with the consent of the parties to adjust matters of private nature between individuals. Nothing short of a unanimous report of the board, free from fraud, would be binding upon the parties. 5 C. J., p. 96, note 53; 5 Enc. of Law & Proc., p. 147, and note 3, and p. 449, and notes.

A majority report of such a board could only bind in case the contract or agreement had so provided. Nothing in this record indicates that such an agreement was made.

It is also insisted that the court erred in establishing the line between said sections 1 and 2, in accordance with the survey of T. H. McCaleb. We have read the testi-

mony with great care tending to support each survey, but, in stating our conclusions, deem it unnecessary to set the evidence out in detail. Suffice it to say that the surveyors who testified in the case agree upon the location of all the corners of said section 1 except the northwest corner thereof; that said northwest corner is 1.45 chains west of the southwest corner of section 36, township 20 north, range 5 west. The correct location of the southwest corner of said section 36 will therefore determine the correct location of the northwest corner of said section 1. The southwest corner of said section 36 was established by Williams and McCaleb at different points on said township line. Neither located said corner in accordance with the measurements from the northeast corner of said section as shown by the Government field notes, but the corner of said section 36, as located by McCaleb, is in line with the south ⅛ corner and ¼ corner of sections 35 and 36, township 20 north, range 5 west, as discovered by a north line run from it, which necessarily proves that the southwest corner of said section 36, established by McCaleb, is correct. That being so, it follows that the correct location of the northwest corner of said section 1 is 1.45 chains west of the southwest corner of said section 36, as established by McCaleb. Williams did not run a tie line from the southwest corner of said section 36, as located by him, north to any present monument to prove its correctness. Therefore, the corners in dispute, established by him, are not correct.

No error appearing, the decree of the chancellor is affirmed.

SMITH v. MURPHY.

Opinion delivered December 22, 1919.

1. RECEIVERS—AUTHORITY TO MAKE CONTRACTS.—Where a receiver of partnership land made a contract for rent of the land after a petition for sale of land had been filed, and subsequently, and before any arrangements had been made by the lessees, the court ordered the receiver not to rent the lands, the lessees contracted at their peril, and are bound to take notice of the receiver's incapacity to conclude a binding contract without the court's sanction, since they became parties to the litigation with respect to the property.
2. JUDICIAL SALES—PURCHASER'S RIGHT OF POSSESSION.—Since the purchaser at a judicial sale has a clear right to possession as against all parties to the proceedings, in which the sale is made, which right the court will summarily enforce by writ of assistance, except where the parties in possession are not parties to the suit and claim by legal right, or are entitled to hold on account of superior equity.
3. APPEAL AND ERROR—REVERSAL.—Though the chancellor erred in denying a writ of assistance to a purchaser at receiver's sale on account of a lease which the receiver had improperly executed, yet where such error can not be remedied by restoration of the land to the purchaser because the period of lease had already expired, a reversal of the judgment will carry a judgment in favor of the purchaser for rent and costs.

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

E. B. Stokes and *Crawford & Hooker,* for appellant.

1. The court erred in refusing to put appellant in possession of the lands purchased by him. All parties dealing with the receiver must and did know that whatever he took was subject to the approval of the court, and that if they did make the contract with the receiver in October or November, 1918, for the year 1919, they knew that the contract would not be effective if the land was sold and certainly unless the rent contract was approved by the court, and

2. The rent the receiver agreed to accept was not a fair and adequate rental and should not have been approved by the court, even if there had been no sale.

3. When the sale was confirmed and deed approved the title and right to possession passed to the purchaser. High on Receivers (2 Ed.), sec. 186; 23 A. & E. Enc. L. (2 Ed.), 1066. The testimony shows that no definite contract for rent was ever agreed to by the receiver and Bridge & Company, but if it had it should have been set aside by the court. 5 Pom. Eq. Jur., sec. 208; 51 C. C. A. 640. See also 77 Ark. 216-220; Kirby's Digest, § 6321; 17 A. & E. Enc. L. (2 Ed.), 1013-14. The rights of the purchaser were superior to those of Bridge & Company, renters from year to year, and who knew of the efforts to sell, and the chancellor erred in in refusing a writ of assistance.

Taylor, Jones & Taylor, for appellees.

A writ of assistance does not go as a matter of right but is in the sound discretion of the court. 2 R. C. L. 728; 65 Am. St. 353. Nor will it go where there is an adverse holding by a *bona fide* claimant to the possession. 82 Am. St. 124; 5 *Id.* 245; 44 *Id.* 449. The purchaser knew the receiver was likely to rent the lands as usual and it was unfair for appellant to wait until December 5, 1918, when the rent contract was already made for the year 1919, and the court exercised its sound discretion in refusing the writ of assistance and the decree is correct.

HUMPHREYS, J. Appellant and William E. Murphy formed a partnership in 1905 to buy, cultivate and sell lands, and to raise, buy and sell live stock. They continued the partnership business until November 30, 1910, when a bill was filed in the Jefferson Chancery Court to dissolve the partnership, sell the personal property and place the real estate in the hands of a receiver for the purpose of rental, during the pendency of the proceeding. By consent of the parties, Dr. Arthur Fowler was appointed receiver. He accepted the trust and qualified by taking the oath and giving bond, after which he took charge of all the assets, sold the personal property and applied the proceeds on the debts of the firm.

He rented the lands from year to year up to, and including, the year 1919. His custom was to rent the lands in the fall for the succeeding year. On June 5, 1918, appellant applied for a sale of the lands in order to liquidate the unpaid indebtedness of the firm and wind up its affairs. Pending this application, either in the latter part of October or the first part of November, 1918, the receiver rented the lands, known as the Murphy and Gross places, to William E. Murphy and F. P. Bridge & Company for the year 1919, at a rental of $1,000 and necessary repairs. On the 5th day of December, 1918, the court made an order, directing the receiver not to rent the lands for the year 1919. On January 4, 1919, by consent of parties, all the partnership lands were ordered sold. The lands sold at public auction to appellant, on January 29, 1919, for $32,250. He executed a note with approved security for the purchase money, and the commissioner reported the sale to the court and asked a confirmation thereof. On February 11, thereafter, appellees interposed, by petition, objections to the issuance of a writ of possession for the Murphy and Gross places, on the ground that they had rented the lands for the year 1919, from the receiver, and had made arrangements for the cultivation of same. Appellant filed a reply to the petition, setting up his purchase, the execution of an approved note for the purchase money, and asserting his right to a writ of possession. On February 14, 1919, the receiver filed a report, setting up the rental contract for the Murphy and Gross places to F. P. Bridge & Company for 1919, for $1,000, and asking that the contract and his tenants' possession be approved. The report of sale by the commissioner and of rental by the receiver, the petition and response thereto, requesting a refusal of the writ of possession, together with the evidence introduced for and against the issuance of the writ, were submitted to the court, upon which the confirmation of the sale of the lands was decreed, the rental contract approved and a writ for the possession of the Murphy and Gross places denied From the decree approving the

rental contract and denying the writ of possession, an appeal has been duly prosecuted to this court.

Evidence was adduced in support of the rental contract, tending to show that the tenants had rented and occupied the Murphy and Gross places for a number of years; that it was the custom of the receiver to rent them in the fall for the following year; that the present contract was made in October or November, 1918, for 1919, in keeping with the custom, before the court made an order not to rent the lands for the year 1919; that the tenants had made sundry arrangements to cultivate, and they and their subtenants and share-croppers were in possession of the lands, ready to cultivate them; that no other lands for miles around could be rented, and that the rental contract of $1,000 and necessary repairs was a fair rental for the lands.

Evidence was adduced in support of the issuance of the writ, showing the sale, pursuant to a consent order, the purchase and execution of a secured and approved note for the purchase money, and tending to show that a thousand dollars and necessary repairs was not a reasonable rental value of the place for the year 1919.

The sole issue presented by this appeal is whether the court erred in refusing the writ of possession for the Murphy and Gross places. This contract of rental was made with the receiver after a petition for the sale of the lands had been filed. On December 5, 1918, before any arrangements had been made by the tenants, their subtenants or share-croppers to cultivate the lands, the court had ordered the receiver not to rent the lands for the year 1919. This order was clearly a disapproval of the rental contract made in the latter part of October or the first part of November. The general rule of law is that "all persons dealing with receivers * * * do so at their peril, and are bound to take notice of their incapacity to conclude a binding contract without the sanction of the court." High on Receivers (2 Ed.), § 186; American & English Enc. of Law, vol. 23, p. 1066. Not only the receiver, but also all parties who contract with him

in relation to the property in controversy held by him, become parties in litigation in respect to the property, and must be governed by the orders concerning it. It is a well recognized principle of law that: "The purchaser at a judicial sale has a clear right to the possession of the property sold as against all parties to the proceeding in which the sale is made, and this right the court will summarily enforce by writ of assistance, or in some other appropriate manner." Am. & Eng. Enc. of Law (2 Ed.), vol. 17, p. 1014. It is true that a writ of assistance does not go as a matter of course, but it is also true that it is never withheld unless the exigencies of the particular case require it. The only exigencies which will warrant a denial of the writ are where the parties in possession are not parties to the suit and claim by legal right, or where they are entitled to hold on account of paramount equities to the rights of the purchaser at the sale.

We think the finding of the chancellor, to the effect that $1,000 and repairs was a reasonable rental for the places for the year 1919 is supported by a preponderance of the evidence. The year has about closed, so the error of the chancellor in refusing the writ can not be remedied by restoration of the lands to appellant. At this late date, a technical reversal of the decree can result only in a judgment in favor of appellant for rents and costs.

For the error indicated, the decree is reversed and judgment is directed here for $1,000, the rental value of the places, together with his costs.

ROBINSON v. SECURITY BANK & TRUST COMPANY.

Opinion delivered December 22, 1919.

1. BANKS AND BANKING—PAYMENT OF FORGED CHECK.—A bank is liable to its depositor where it paid out his money on forged checks.

2. BANKS AND BANKING—PAYMENT OF FORGED CHECK—RATIFICATION. —Where plaintiff instructed his partner to deposit money to plaintiff's credit in defendant bank which he did, but subse-

quently the partner without authority drew out the money on forged checks, and plaintiff, after discovering it, waited eight or nine months before demanding payment of the bank, *held* not sufficient to show ratification of the partner's unlawful act as matter of law.

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

Sam Latkin, for appellant.

1. The court erred in directing a verdict for defendant. It was a case for a jury under the evidence and the law. 89 Ark. 368; 96 *Id.* 451; 107 *Id.* 158; 7 C. J. 639.

2. The law presumes that a deposit belongs to him who deposits it with the bank and in whose name it is entered. 177 Fed. 164; 120 *Id.* 526; 69 N. E. 215. A forged check does not protect the bank from a suit by the true owner and depositor. 57 N. Y. S. 525; 208 N. Y. 218.

P. R. Andrews and *J. G. Burke,* for appellee.

1. The court properly instructed the jury to find for defendant. There was no conflict in the testimony and nothing for a jury to pass on. 104 Ark. 267.

2. Plaintiff could not recover under the facts. Silence for a long time will be deemed ratification of the wrongful acts of an agent of the principal. 50 Ark. 466; 83 *Id.* 444; 96 *Id.* 505-511. The court probably directed a verdict, as the money was deposited and withdrawn by the same person and Boldin told plaintiff he had deposited and withdrawn the money. The presumption is that the money was the depositor's. 2 Michie on Banks, etc., 924-7, 975; 22 Ore. 202; 29 Pac. 435; 45 Fed. 163; 4 N. E. 619. Under the facts there was no error in directing a verdict for defendant.

HUMPHREYS, J. Appellant instituted suit against appellee in the common pleas court of Phillips County, to recover $300, alleged to be due him for money deposited in appellee's bank to his credit. A pass book showing a deposit of $200 in his name on December 17, 1913, and a

certificate of deposit for $100, deposited in his name on the 16th day of January, 1914, were made the basis of the suit.

Appellee filed answer, denying any liability on account of the alleged deposits. Upon hearing, a judgment was rendered dismissing appellant's complaint, from from which an appeal was prosecuted to the Phillips Circuit Court, where a trial was had at the April, 1919, term thereof. At the conclusion of the evidence, the jury were peremptorily instructed to return a verdict for appellee, which was done; whereupon a judgment was rendered in favor of appellee, from which an appeal has been duly prosecuted to this court.

The evidence shows that two negroes, appellant and Will Boldin, raised a partnership cotton crop in 1913, on a farm belonging to Mr. Burke. Will Boldin took the cotton to Helena and sold it to Lee Pendergrass. Appellant instructed Will Boldin to deposit one-half of the proceeds to his (appellant's) credit in appellee's bank. On the first sale of cotton $200 was appellant's share, and Will Boldin deposited that amount to the credit of appellant, Gilbert Robinson, in the bank, and took a pass book showing the deposit, which he delivered to appellant. Out of the second sale of cotton, appellant's share amounted to $100, which was deposited by Will Boldin in the name of appellant, Gilbert Robinson, for which he took a certificate of deposit that was subsequently delivered to appellant. The first deposit was made on December 17, 1913, and the second on January 16, 1914. Thereafter, Will Boldin drew the money so deposited out of the bank on checks to which he had signed appellant's name without his authority or consent.

Appellant testified that, in the spring of 1914, he discovered that Will Boldin had drawn the money, and he made no mention to, or demand on, the bank for payment until 1915, some eight or nine months after he made the discovery; that Will Boldin told him he would replace the money, and requested him not to mention the matter to the bank, because it would ruin him; that he

made no promise to withhold information nor any contract with Will Boldin to look to the crop of that year for the payment of the money; that he did not testify to that fact in the common pleas court.

Louis Solomon testified on behalf of appellee that appellant gave testimony in the common pleas court to the effect that when he made the discovery he (appellant) agreed to look to Will Boldin for the amounts the following fall when he gathered his growing crop. Louis Solomon also offered to testify that the cashier of appellee had told him, when Will Boldin made the deposit, he represented himself to be Gilbert Robinson, and that both Will Boldin and Gilbert Robinson were strangers to the cashier at that time. This testimony was objected to by appellant and excluded by the court, upon the ground that it was hearsay.

Appellant insists that the court erred in peremptorily instructing the jury, for the reason that the evidence tended to establish material issues in his favor. As the record now stands, after excluding the irrelevant testimony to the effect that Will Boldin represented himself to be Gilbert Robinson at the time he made the deposit, the undisputed evidence established the relationship of debtor and creditor between appellant and appellee. In other words, the evidence indicates that Will Boldin deposited the money with appellee in the name of Gilbert Robinson, according to Gilbert Robinson's instruction; that the bank issued a pass book and certificate of deposit to Gilbert Robinson for the amount of the deposits; that, afterwards, without any authority or right delegated by Gilbert Robinson, Will Boldin forged checks and drew the money out. It was said by this court in the case of *Carroll County Bank* v. *Rhodes,* 69 Ark. 43, and reiterated in *Bank of Hartford* v. *McDonald,* 107 Ark. 232, that: "When money is placed as a general deposit in a bank, it is no longer the property of the depositor, but immediately becomes the money of the bank. The depositor becomes the creditor of the bank, and the bank his debtor; and the bank is bound by an implied contract

to honor the checks of the depositor to the extent of his deposit. When his checks are drawn in proper form, the bank is bound to honor them." Therefore, under the undisputed facts in this case, the relationship of creditor and debtor was established between appellant and appellee, and that the money was not paid out by the bank upon checks properly drawn, but was paid out by it on forged checks. Had this been the only issue, a peremptory instruction should have been given for appellant, but there was an issue of whether or not appellant ratified the unlawful and wrongful withdrawal of the fund by Will Boldin. We presume the court concluded that the undisputed evidence showed a ratification by appellant of the unlawful act by Boldin in withdrawing the fund. We cannot agree with the court in this regard. It is true appellant did not demand the money as soon as he discovered Will Boldin had drawn it out on forged checks and that he waited eight or nine months thereafter before demanding same. His explanation for this is that, at the time he made the discovery, the money had been drawn out of the bank, and that he desisted for a time because Boldin claimed a disclosure of the facts would ruin him, and because of his promise to return the money to the bank. Appellant denied that he stated in the common pleas court that he told Will Boldin it was all right, after he discovered he had drawn out $50, and that he agreed to look to Boldin's crop in the year 1914 for the money. Had the record disclosed that appellee was prejudiced by appellant's failure to make the disclosure promptly upon receiving the information, it might be said, as a matter of law, that appellant ratified the unlawful act of Boldin in withdrawing the fund, but, no prejudice being shown and no conduct disclosed indicating an approval and acquiescence by appellant in the unlawful act of Boldin in withdrawing the money, it can not be said, as a matter of law, that appellant ratified the unlawful act. With reference to the ratification by a principal of the unauthorized acts of an agent, it was said in the case of *Lyon* v. *Tams & Co.*, 11 Ark. 189, that: "The safer gen-

eral rule, however, would seem to be that which Judge Story enunciates, and which is well sustained by almost all the authorities, that is, that the dissent must be expressed in a reasonable time after the information has been received, and thus the circumstances of each particular case will be regarded in determining the degree of promptitude incumbent upon the principal. As, if the danger of loss by delay be imminent, anything short of an instantaneous disavowal would be unreasonable, and if not so great, then a corresponding abatement of the rigor of the rule graduated upon principles of justice and fair dealing." So we think the question of ratification in the case at bar was a question upon which the jury was entitled to pass, under proper instructions.

In dealing with the first issue, the suggestion made by this court that it would have been proper to give a peremptory instruction in behalf of appellant was based upon the facts before us, and can have no bearing upon a rehearing, if the record should disclose by competent evidence that Boldin represented to the cashier of the bank, at the time he made the deposit, that his name was Gilbert Robinson.

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

HAGER v. STATE.

Opinion delivered January 12, 1920.

1. INTOXICATING LIQUORS—PARTICIPATION IN TRANSPORTATION.—One who went with another employed to transport liquor, knowing the purpose of the trip, was a participant in the unlawful enterprise, even though he had no interest in the result.
2. CRIMINAL LAW—PARTICIPANTS IN MISDEMEANORS AS PRINCIPALS.—Those who procure or participate in the commission of a misdemeanor, or who assent thereto, are indictable as principals.

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

Smith & Gibson, for appellant.

There was no competent evidence to convict appellant, even treating the information as amended by the evidence introduced. *Whitley* v. *State,* 140 Ark. 425. He was not an aider and abetter in transporting the liquor from one place to another in this State. Mere silence in the presence of crime is not sufficient to convict. 81 Ark. 173. No active part by word or act was taken by defendant to constitute him an aider or abetter in the crime. 88 *Id.* 240; 45 *Id.* 361; 60 *Id.* 312.

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

The evidence is clear and convincing that defendant was present aiding and abetting the crime. He consented to it, and hence was guilty as a principal. 47 Ark. 188; 51 *Id.* 552; 49 *Id.* 60; 45 *Id.* 361; 55 *Id.* 188. The trial court was correct in directing a verdict of guilty. *Ashcraft* v. *State,* 140 Ark. 505.

McCULLOCH, C. J. Appellant was convicted of the offense of transporting liquor in Lawrence County, in this State, in violation of the act of February 17, 1919 (Acts of 1919, p. 75), making it unlawful "for any person, firm, corporation or association in any manner to transport * * * from one place to another in this State * * * by any means whatsoever, any alcoholic, vinous, malt, spirituous or fermented liquors," etc.

The only ground urged for reversal of the judgment is that the evidence does not sustain the conviction. There is little, if any, dispute about the facts. A young man named Judd had a quantity of whiskey in suitcases at or near the station of Murta, on the railroad a few miles north of Walnut Ridge. It does not appear in the evidence where Judd had brought the liquor from, but his purpose was to transport it from Murta to Walnut Ridge. Judd went to Walnut Ridge and arranged with Lloyd Barton to obtain a conveyance and drive over with him to Murta to get the whis-

key. Barton agreed to do so and hired the conveyance at a livery stable, and he asked appellant to go with him on the trip. Appellant, according to the testimony, at first declined, but after a little urging agreed to accompany Barton and Judd and a man by the name of Wallace, who was also interested in the transportation of the liquor on the trip to Murta to bring the whiskey to Walnut Ridge. The four men got into the conveyance hired by Barton and drove to Murta, obtained the whiskey and returned to Walnut Ridge. This occurred during a certain night.

Just before leaving Walnut Ridge, Barton informed the sheriff of the enterprise, and the sheriff was on the lookout for the party on its return and attempted to arrest the men in the conveyance. As the party drove by in the hack along a street in Walnut Ridge the sheriff called out to them to halt, but they whipped up the team and made their escape, the sheriff firing several shots at them. It is undisputed that appellant was with the party, and that he knew before he started on the trip the purpose of Barton and the other men in going to Murta.

It is contended that appellant was a mere silent spectator without any interest in the transportation of the liquor, and that he was not such a participant in the offense as to make him guilty with the other offenders. This view of the matter is not a correct interpretation of the law. Mere presence at the commission of an offense does not constitute guilty participation. But there is something more involved when there is an affirmative act which constitutes encourgement to commit the offense. In the present case the transportation of the liquor constituted the offense, and the fact that appellant accompanied the principal offender on the trip operates as affirmative acquiescence and encouragement, even though appellant was not interested in the result of the enterprise. *Miller* v. *State,* 55 Ark. 188. Appellant was not accidentally present at the commission of the offense, but he consciously went along with the principal offender

when the offense was committed, and this made him a participant. Those who procure or participate in the commission of a misdemeanor, or who assent thereto, are indictable as principals. *Fortenbury* v. *State,* 47 Ark. 188.

Appellant is guilty of an offense according to his own statement of the facts, and the judgment of conviction was correct.

Affirmed.

PATTERSON v. STATE.

Opinion delivered January 12, 1920.

1. OBSTRUCTING JUSTICE—RESISTING ARREST.—Testimony tending to prove that an officer went to accused's home to arrest him, that accused refused to submit to arrest, and said that he would appear before the justice on the following morning, and turned to walk back toward the house, whereupon the officer fired to frighten him; that he continued into the house and returned with a shotgun for the purpose of intimidating the officer and preventing him from making an arrest, was sufficient to sustain a conviction of resisting an officer.
2. OBSTRUCTING OFFICER—RESISTING ARREST.—Where an officer with a warrant of arrest made an unlawful assault on accused and he secured his gun for the sole purpose of defending himself, he was not guilty of resisting the execution of criminal process by the drawing of a gun on an officer under Kirby's Digest, section 1962.

Appeal from Lincoln Circuit Court; *W. B. Sorrels,* Judge; affirmed.

Brattom & Bratton, for appellant.

There is no legal evidence on which the verdict could be legally based and if instruction No. 1 asked by defendant and given by the court is a correct theory of the law, and it is, had been followed by the jury, defendant was entitled to an acquittal. The verdict is contrary to the evidence. 55 Ark. 502.

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

The evidence is ample to convict of the crime charged, resisting the execution of legal process. Kirby & Castle's Digest, § 2110. His claim that the officers made an unwarranted attack upon him and that he merely acted in self-defense, is not sustained by the law or evidence. It was purely a jury question and the verdict is conclusive, and the verdict and punishment are not too severe.

McCULLOCH, C. J. Appellant was convicted under an indictment charging a violation of the following statute:

"Every person who shall resist the execution of any civil or criminal process, by threatening or by actually drawing a pistol, gun or other deadly weapon upon the sheriff or other officer authorized to execute such process, shall, upon conviction thereof, be imprisoned in the penitentiary for a term not less than one nor more than five years." Kirby's Digest, section 1962.

The sole ground urged for reversal is that the evidence was not sufficient to sustain the verdict. The charge is that appellant obstructed the service of criminal process in the hands of Porter Pounders, a deputy sheriff of Lincoln County. It is undisputed that a criminal charge against appellant was lodged before a justice of the peace of Lincoln County and that a warrant of arrest was issued and placed in the hands of Pounders, a deputy sheriff. He went to appellant's house for the purpose of serving the warrant.

Pounders testified that he drove up in front of appellant's house and called appellant out and informed him that he had a warrant for his arrest, and that appellant expressly refused to submit to arrest and turned and walked back toward his house, when Pounders fired two shots into the ground, as he stated, to scare appellant, but appellant ran into the house and returned with a gun which he leveled at Pounders and declared that

he would "die and go to hell" before he would submit to arrest by Pounders. Pounders testified further that he got behind the car to prevent appellant from shooting him and that he engaged appellant in conversation for about ten minutes trying to persuade him to submit to arrest, but that appellant refused and kept his gun in position all the while to prevent the officer from forcibly arresting him. Pounders also testified that as appellant rushed into the house to get the gun he fired a shot at him, but missed him.

According to appellant's own testimony, he did not refuse to submit to arrest but merely stated that he would appear before the officer the next day, that particular day being Sunday, and that Pounders thereupon began to fire on him and that he ran into the house and got his gun for the purpose of protecting himself from Pounder's assault. There is, however, a sharp conflict in the testimony, and the issue has been settled against appellant by the verdict of the jury.

We think the testimony was sufficient to sustain the verdict. The evidence tends to show that appellant refused to submit to arrest and that he procured a gun and drew it on the officer, not for the purpose of protecting himself from assault, but to intimidate the officer and to prevent him from enforcing submission. *Williams* v. *State,* 70 Ark. 393.

Conceding that the act of Pounders in firing at appellant as he went into the house constituted the use of excessive force and was wrongful, yet this did not lessen the effect of appellant's own criminal act in securing his gun and drawing it on the officer for the purpose of preventing him from making the arrest. Of course, if Pounders made an unlawful assault on appellant, and appellant secured the gun for the sole purpose of defending himself, he would not be guilty, but the testimony adduced in the case warrants the finding that appellant did not get the gun for the purpose of defending himself, but that he ran into the house and secured

the gun and leveled it at the officer for the purpose of preventing the execution of the warrant.

Judgment affirmed.

TAYLOR v. GEORGIA STATE SAVINGS ASSOCIATION.

Opinion delivered January 12, 1920.

1. TAXATION — SETTLEMENT OF COLLECTOR — LIEN.—Kirby's Digest, section 7172, providing for a lien on the property of a tax collector for all amounts found on settlement to be due from that officer, applies both to the original account of the officer and to the readjusted account under section 7174; both sections being embraced in the same statute.
2. TAXATION—LIEN ON PROPERTY OF COLLECTOR—LIMITATION.—Kirby's Digest, sections 4438, 4439, regulating the period of limitation of judgment liens to three years, has no application to section 7172, providing that balances found due from a collector shall be a lien from the date of the settlement of his account, inasmuch as the former statutes have no application to liens of judgments of the county court.
3. TAXATION—LIEN ON COLLECTOR'S PROPERTY—EXTENT.—The lien of Clay County on the property of the tax collector for balance found due from him is co-extensive with the limits of the county, regardless of which district of the county the collector lives in or in which the settlement was filed or readjusted.
4. EXECUTION—PLACE OF SALE.—Under Kirby's Digest, section 3275, and Acts 1911, page 161, section 7, providing two judicial districts in Clay County, and directing all sales of real estate made by the sheriff under the laws regulating judicial sales to be made at the courthouse door in the Western District, all sales under execution of land lying in either district are to be made in the Western District.
5. TAXATION—LIEN ON COLLECTOR'S LAND—SUPERSEDEAS.—A lien created by section 7172, Kirby's Digest, in favor of a county on the land of a tax collector was not extinguished by the supersedeas bond executed by the tax collector on appeal to the Supreme Court from an adjustment of his account; the bond merely suspending the enforcement during the pendency of the appeal.
6. TAXATION—LIEN ON COLLECTOR'S LAND—ENFORCEMENT.—Where a county obtained a lien on a tax collector's land under Kirby's Digest, section 7172, and the collector appealed to the Supreme Court and executed a supersedeas bond, the county could prop-

erly enforce the county's lien against the land without first exhausting its remedy against the sureties on the bond.

7. MARSHALING ASSETS—ENFORCEMENT.—Where a county acquired a lien against the land of a tax collector under Kirby's Digest, section 7172, and the collector's land sold under execution and purchased by a surety on the collector's supersedeas bond, a junior lien-holder can not subsequently ask that the surety be compelled to secure reimbursement for losses out of property other than that mortgaged, where the surety stands upon his legal right as purchaser at execution sale, and does not ask to be subrogated to the rights of the county.

8. JUDGMENT—CONSTRUCTIVE NOTICE.—A judgment of the county court purporting to be rendered on a particular day was notice of its existence, though the record of the last preceding day did not show an adjournment to that day, where such adjournment was actually made and the record was subsequently corrected to speak the truth.

9. EVIDENCE—PRESUMPTION OF REGULARITY OF COURT PROCEEDINGS.—Where a court of record, assembled at the place authorized by law, assumes to function as a court, it is presumed, until the contrary appears, that the proceedings are regular and proper; but this presumption may be overcome by other portions of the record showing that the court was not legally in session at the time of the attempted rendition of the judgment in controversy.

Appeal from Clay Chancery Court, Western District; *Archer Wheatley,* Chancellor; reversed.

J. S. Taylor and *Oliver & Oliver,* for appellants.

1. Kirby's Digest, section 7172, applies to the facts of this case, which are undisputed, and appellees are not *bona fide* purchasers for valuable consideration and without notice. Appellees' contention that this statute has no application to balances found due from a collecting officer on the readjustment of his accounts but only to balances on original settlements is unfounded and erroneous. Kirby's Digest, sections 7165 to 7175, are a part of the act of March 31, 1883, pages 286-8. Sections 7163 to 7173, are part of the Revised Statutes, and in 1867 act No. 56, Acts 1867, was passed and is exactly the same as sections 7164-5 of Kirby's Digest, except it provides that the proceedings may be begun within *one* year instead of two years, as in the act of 1883. Properly sections 5280-1

should have preceded section 5279, but the fact that they are so digested in no way affects their construction. The primary object of the law was to provide a lien for the county. Courts should put themselves in the place of the Legislature at the time of the enactment and investigate the state of the law on the subject, the contemporaneous circumstances and facts and make such application as will best promote the objects of the legislation. 20 A. & E. Enc. Law, 632 (b); 76 Ark. 443.

Statutes relating to the same subject-matter must be considered as a whole and construed in the light of other provisions relating to the same thing. 125 Ark. 459; 122 *Id.* 111. The intention of the Legislature must be ascertained and given effect. 36 Cyc. 1106 (2) *et seq.* Construing the act of 1867 in the light of these rules, there is no doubt that the Legislature intended that a lien should attach to the real and personal property of the officer when the balance was found after the settlement had been approved. Clearly, the court did not err in holding that Clay County had a lien under section 7172, Kirby's Digest, but did err in holding the lien of appellees superior to that of the county to which appellees succeeded. The county court is a superior court of record. 53 Ark. 476; 38 *Id.* 150. Probate courts are also. 11 Ark. 551-2; 18 *Id.* 449; 44 *Id.* 270; 47 *Id.* 419.

The presumption is that the acts of courts of record are regular and proper. Black on Judg., § 270, and this presumption is indulged, even though the record is silent or incomplete. *Ib.*, § 271; Freeman on Judg., § 132; 19 Ark. 96; 23 Pac. 453; 16 Cyc. 1075 (b); 3 Ark. 532; 24 *Id.* 151, 143.

2. Everything is to be presumed in favor of the regularity of the proceedings of courts of record. 20 Cent. Dig. Ev., § 104; 24 Ill 210; 12 Kan. 282; 15 N. W. 562; 25 S. W. 372; 95 N. Y. S. 93.

3. Kirby's Digest, section 4478, provides that decrees conveying land or vesting title thereto shall be recorded within one year, or be void as to innocent purchasers, etc. The decree to be constructive notice must

contain the opening order of the court, and the opening and adjourning order on the last succeeding day thereafter. The contention of appellees and the holding of the court are contrary to all authorities and to reason.

Actual and constructive notice are equally binding. 2 Pom. Eq. Jur., § 690, 592, p. 17.

Huddleston, Fuhr & Futrell, House, Rector & House and *C. T. Bloodworth,* for appellees.

1. Section 7172 of Kirby's Digest, creating a statutory lien, has no application, but if it does, then the record of the court at Piggott, showing that there was no court on March 4, 1915, was not sufficient to charge plaintiff with constructive notice. The revenue law deals with two classes of collectors, *delinquent* and *non-delinquent* collectors. Sections 7175-6. Matthews was not a *delinquent* in any sense.

2. Even if Clay County had a lien under section 7172, the decree is correct, as plaintiff had no actual knowledge of the proceedings to restate the settlement filed by Matthews in July, 1913, and the records of the county court of Piggott did not constitute constructive notice to plaintiff. The case must be tried on the original record before this court, which shows affirmatively that there was no county court in session on March 4, 1915. On May 21, 1915, when Matthews gave the Georgia Savings Association its mortgage, the judgment of the county court showed on its face to be absolutely void. If the court had convened at any time after February 26 and prior to March 4, 1915, its acts would have been void under the law. 48 Ark. 227; 58 *Id.* 181; 89 *Id.* 160; 101 *Id.* 390-5; 203 S. W. 704; 61 A. L. R. 456; 211 S. W. 369. The record fails to show a session of court on March 4, 1915, and any session thereafter was void.

There is nothing in the record which shows a *nunc pro tunc* entry correcting the record, but if there was it was made in 1918, too late to affect appellees' rights. 99 Ark. 435; 127 *Id.* 337; Freeman on Judgm., §§ 67-8; 4 Am. St. 883, notes; 23 *Id.* 431; 69 *Id.* 764; 126 *Id.* 738;

15 L. R. A. (N. S.) 683, notes; 18 N. W. 889; 23 Cyc. 46. Presumptions are never indulged where the record is silent. No duty rested on appellees to investigate facts of which it had no knowledge. The decree is right.

McCULLOCH, C. J. J. E. Matthews was sheriff and ex-officio tax collector of Clay County, and at the July term, 1913, of the county court of that county he filed his settlement of tax collections showing, among other credits, a certain payment of $8,000 to the county treasurer. The settlement was approved. A petition was filed in the county court on February 5, 1915, against Matthews by the treasurer alleging that the item of credit for said payment of $8,000 to the treasurer was erroneous, in that no such payment was in fact made and the petition contained a prayer for readjustment of said settlement account. The proceedings were based on the statute which provides that "whenever any error shall be discovered in the settlement of any county officer made with the county court, it shall be the duty of the court, at any time within two years from the date of such settlement, to reconsider and adjust the same." Kirby's Digest, section 7174.

The county court proceeded to readjust the said account of Matthews on March 5, 1915, and entered a judgment against Matthews readjusting his said account and finding him in debt to the county in the sum of said item for which he had erroneously taken credit.

These proceedings were had at the regular January term, 1915, of the county court at Piggott, the county seat, where the original settlement account had been filed and approved. Clay County has two separate court districts, the courts for the Eastern District being held at Piggott, and those for the Western District being held at Corning. Acts 1881, p. 21; Acts 1911, p. 162.

Citation against Matthews was duly issued and served, returnable on February 25, 1915, and on that day the hearing was continued over to March 4, 1915, to which date an order of adjournment of the court

was entered. The judgment readjusting the account was, as before stated, rendered and entered of record on March 5, 1915, but at that time the record failed to show an opening and adjournment of the court on March 4th, the date to which the court had previously adjourned. However, this omission was subsequently corrected by a *nunc pro tunc* entry showing that the court convened on March 4th, according to adjournment, and that, after certain proceedings were had, there was adjournment to March 5th, the date on which the judgment in controversy was rendered. This was not done, however, until after the rights asserted by appellees in this action were acquired.

Matthews mortgaged the lands now in controversy situated in the Western District of Clay County to appellees Georgia State Savings Association and American Building & Loan Association in April and May, 1915, respectively, and appellees now seek to foreclose said mortgages.

Execution was issued against Matthews on the aforesaid judgment in favor of Clay County on June 12, 1917, and the same was levied on the lands in controversy. The land was advertised and sold under the execution at Corning, and appellant Taylor, who was one of the sureties on the bond of Matthews as tax collector, purchased the lands for himself and his co-sureties. In the foreclosure suit instituted by appellees, Taylor was joined as defendant, and relief against him was sought in the cancellation of his deed under the said execution sale. The chancellor granted that relief against appellant and decreed a foreclosure of the mortgages free from any claims of appellant.

Appellant asserts the superiority of his claim as purchaser of the land upon the force of a lien created in favor of Clay County by the following statute:

"The amount or balance of every account so settled and due to the county shall be a lien from the date of the settlement of such account on the real estate and personal property of the delinquent situated in the

county wherein each delinquent lives." Kirby's Digest, section 7172.

Appellees contend that the statute has no application to balances found to be due from a collecting officer on the readjustment of his accounts, and that it applies only to delinquencies on balances on original settlements made by such officers.

Sections 7155 to 7176, inclusive, of Kirby's Digest, which relate to the settlements of collecting officers with the county court and the enforcement of the claims of counties against delinquent officers, were enacted in the order they now appear in the Digest by the act of March 31, 1883, which was a general revenue statute. Acts 1883, p. 199. The last two sections mentioned relate to readjustment of accounts for errors within two years after date of settlements.

Learned counsel for appellees disclaim any contention that the position of section 7172 of the digest with relation to the later sections (7174 and 7175) authorizing the readjustment of accounts has, of itself, an important bearing on the interpretation of this part of the statute, but their argument is, as we understand it, that, under the law as declared in previous statutes prior to the passage of the revenue act of 1883, *supra,* section 7172 did not apply to balances due on readjusted accounts under the other sections, and that when the framers of the act of 1883 re-enacted those parts of the old statutes in the regular order in which they appeared in Gantt's Digest, it was meant to adopt the same entirely with the restricted application of each section. This does not follow, even if it be conceded that section 7172 as found in the old statute did not apply to balances due on readjustment accounts. The sections on this subject in Kirby's Digest down to and including section 7173 were in the Revised Statutes of 1838, and in the year 1867 the General Assembly enacted the statute (Kirby's Digest, secs. 7174 and 7175) authorizing the county court to readjust the accounts of such officers within one year from date of settlement. All of these

sections of the old statute, as digested in Gantt's Digest of 1874, were incorporated in regular order and substantially in the same language, except that section 7174 was changed so as to authorize the readjustment within two years, instead of one year, as theretofore authorized.

There is little reason for assuming that the lawmakers meant to make a distinction between balances due between original settlement accounts of collecting officers and those accounts which the county court might readjust upon authority of the statute. This distinction might have resulted under the old statutes by reason of the fact that the various provisions of the law were in different statutes, separately enacted, without reference to each other, but when the framers of the general revenue and taxation law of 1883 gathered together the various sections of the former statutes and enacted them into a composite whole, their separate relationship to each other was changed and the distinctions which thus existed with respect to the effect of the lien section (7172) on the other sections authorizing readjustment of accounts entirely disappeared.

What the framers of the statute meant to do was to give the county a lien on the property of a collecting officer for all amounts found on settlement to be due from that officer, whether the balance appeared from an original account of the officer or from a readjusted account. The lien is conferred for the balance due whenever ascertained and declared by judgment of the county court. The balance found due is the same debt, though unascertained until the account is readjusted, and the lien attaches under the statute whenever the balance is ascertained and declared.

There is no significance in the use of the words "account so settled" in section 7172 as showing that the provisions of that section applied only to balances found due under sections of the statute which precede this one in order. The sections are all embraced in a single statute, and the words "so settled" relate to balances found

due on settlements and readjustments thereof as authorized by that statute.

Our conclusion, therefore, is that the statute in question applied to the balance found due on the readjustment of the accounts of Matthews.

It is next contended that the lien expired in three years under a general statute of the State regulating the period of limitations of judgment liens, which prescribed that such liens shall continue in force three years from date of judgment. Kirby's Digest, secs. 4438, 4439.

We do not quite understand the application of this contention to the facts of the present case for the reason that the execution was issued and sale made thereunder within three years after the rendition of the judgment of the county court readjusting the account of Matthews. Be that as it may, however, it is clear that the period of limitation fixed by the general statute has no application to the statute now under consideration with respect to liens in favor of a county against delinquent collecting officers. The general statute applies only to judgments "in the supreme, chancery or circuit courts of this State, or in district or circuit court of the United States within this State." Kirby's Digest, section 4438. The lien involved in the present case is one conferred in favor of the county under the special circumstances mentioned in the statute, that is to say against the property of a delinquent officer for the balance found due to the county on his settlement for funds collected. There are no prescribed limitations upon the continuation of this lien. Whether the general statutes of limitation of ten years for suits on judgments apply, we need not decide in this case.

The next contention is that, inasmuch as Clay County has been divided into two districts, the effect of which is to make the separate districts the same as distinct counties, the lien under this statute only applies to property within the Eastern District, where the judgment of the county court readjusting the account of Matthews was rendered. That is not the language or the effect of

the statute, which in express words declares the lien in favor of the county "on the real estate and personal property of the delinquent situated in the county." The lien is, therefore, co-extensive with the limits of the whole county, regardless of which district the delinquent lives in or in which the settlement was filed or readjusted.

Again, it is insisted that the execution sale was void because it was held at the courthouse door at Corning, in the Western District, whereas it should have been held at the courthouse door at Piggott, the county seat. The lands sold are, as before stated, situated in the Western District. The statute regulating sales of real estate under execution provides that the sale of real estate "shall be made at the courthouse door, unless at the request of the defendant who owns the land, the officer shall appoint the sale upon the premises." Kirby's Digest, section 3275. This means, of course, the courthouse door of the county where the lands are situated. In the statute dividing Clay County into two districts there is a section relating to the enforcement of judgments and decrees (section 7) which reads as follows:

"That all judgments and decrees rendered in the circuit courts of the respective districts shall be liens upon real estate only in the district where such judgments and decrees are rendered; but executions in the hands of the sheriff shall have the same lien and force throughout the entire county, as though but one court was held in said county; and all sales of real estate and other property made by the sheriff, in accordance with the laws of this State, regulating judicial sales at the courthouse door in the Western District, shall be as lawful as if made at the courthouse door of the county seat. Provided, that all sales upon executions, decrees and orders of the courts of the Eastern District shall be made at the courthouse door of the county seat in the Eastern District."

It must be confessed that the language of this section is to some extent vague and uncertain, but we think

the proper interpretation of the language is that all public sales of lands situated in the Western District of Clay County are to be made at the courthouse door in that district. The proviso in the section is the part which renders it uncertain, but it was intended, we think, to declare that all sales on execution, that is all such sales as regulated by general statute with respect to the place of sale, should be at the courthouse door in the Eastern District, and that all sales under decrees and judgments of the courts of the Eastern District should be made at the courthouse door in that district. This interpretation gives full effect to the manifest purpose of the lawmakers to treat the Western District of Clay County as a separate county so far as concerned the regulation of sales under execution. The use of the words "judicial sales" was obviously intended to embrace execution sales, though it is not a correct use of the term.

It is further contended that the lien created by statute in favor of Clay County was extinguished by the supersedeas bond executed by Matthews on his appeal to the Supreme Court. The law has been settled against this contention by the decision of this court in the case of *Love* v. *Cahn,* 93 Ark. 215, where it was held that the execution of a supersedeas bond does not operate as annulling or vacating the judgment appealed from, but merely suspends the enforcement during the time that the appeal was pending. Nor is it correct to say that the county or the sureties on the bond of Matthews ought to have first exhausted the remedy against the sureties on the supersedeas bond.

This is also true as to the contention that all of the property of Matthews should be marshaled and that appellant and the other sureties on the bond of Matthews should be compelled to secure reimbursement for losses out of property other than that mortgaged to appellees. That question might properly have arisen if appellees had sought to compel marshaling of assets before the sale under execution and the acquisition of the rights

of appellant as purchaser of the particular lands sold at the execution sale. Appellant, though originally liable to Clay County for the amount, has acquired specific rights under his purchase at the execution sale, as evidenced by the sheriff's deed pursuant to the sale, and it is too late now for appellees to ask a court of equity to compel him to release the rights thus acquired and seek reimbursement out of other property of the delinquent collector. He is not asking to be subrogated to the rights of the county, as a judgment creditor of Matthews, but he stands upon his legal right as purchaser at the execution sale. Appellees are now in no position to insist upon that relief, which a court of equity, under other circumstances, might have afforded.

This brings us to a consideration of the last contention of counsel for appellees in support of the correctness of the decree, and the one upon which it seems the chancellor based the decree, that is to say the contention that the judgment of the county court entered on March 5, 1915, readjusting the account of Matthews was void on its face at the time appellees acquired rights in the property in controversy under the mortgages for the reason that the record showed an adjournment from February 25, 1915, to March 4, 1915, without showing that the court convened on the last named date and adjourned over to the 5th.

The record of the county court, which was before the chancellor at the time of his decree, including the *nunc pro tunc* entry showing that the county court was in fact convened on March 4th, and adjourned over until the next day, made a complete record of a valid session of the county court on March 5th, the date of the rendition of this judgment. But it is conceded that appellees at the time of the execution of the mortgages had no actual notice of the rendition of this judgment, but the contention is that the condition of the record at that time was defective in failing to show a session of the court on March 4th, to which it had been adjourned, that the judgment entry of March 5th did not constitute con-

structive notice to appellees in dealing with Matthews concerning the property on which the county asserted a lien. The contention is, in other words, that, since appellees had no actual notice of the rendition of the judgment, the record as it then stood did not give constructive notice because it was a record which appeared on its face to show that the judgment was unauthorized. If the *nunc pro tunc* order correcting the defects in the record was not before us, the decision of the case might be different, but we have a record now which shows that the judgment was valid, and this narrows the question for decision to that of whether or not those dealing with Matthews were bound to take constructive notice of a judgment appearing on the record of the county court, even though there was a defect in the chain of records from day to day so as to show an authorized session on the date of the rendition of the judgment.

The judgment entered on March 5th was regular so far as it showed that the court purported to be in session that day and was attempting to exercise the functions of a court. This, we think, was sufficient to put every person on notice, constructively or otherwise, that the court was then in session. The fact that, according to the record of the proceedings that day, the court was assuming to function as a court was sufficient to put the public upon notice that the court was in fact in session. If it turned out that there was no validity to the session, of course, the judgment of the court would be void, but the judgment, if in fact valid, though defective according to the omissions in the record of sessions of previous days, was sufficient to charge the public with notice of its legal existence. Where a court of record, assembled at the place authorized by law, assumes to function as a court, it is presumed until the contrary appears that the proceedings are regular and proper. *Sweeptzer* v. *Gaines,* 19 Ark. 96; 1 Black on Judgments, section 270; 1 Freeman on Judgments, section 132.

This presumption may be overcome by other portions of the record showing that the court was not legally

in session at the time of the attempted rendition of the judgment in controversy, but the fact that it appeared regularly upon the record of the court was sufficient to constitute notice to all persons that there was a judgment legally rendered by the court, and if it turns out by a correction of the record, or otherwise, that the judgment was in fact valid, all persons are bound by it.

We are of the opinion, therefore, that the chancellor erred in holding that appellees were innocent mortgagees, and that the rights under those mortgages are superior to appellant's rights as purchaser of the land under execution. The decree is reversed and the cause remanded with directions to enter decree in favor of appellant in accordance with this opinion.

MAMA COAL COMPANY v. DODSON.

Opinion delivered January 12, 1920.

1. MASTER AND SERVANT—ASSUMED RISK.—A servant assumes the risk of dangers created by the negligent act of the master where he is aware of the negligence and appreciates the danger.
2. MASTER AND SERVANT—ASSUMED RISK—PROMISE TO REPAIR.—Where a servant complains to the master of a dangerous condition and receives a promise that necessary repairs will be made, the obligation to bear the risk shifts to the master during the period of the promise unless the danger is so open and obvious that a person of ordinary prudence would not proceed in the face of it.
3. MASTER AND SERVANT—ASSUMED RISK—APPREHENSION OF DANGER.—The mere apprehension of danger on the part of the servant does not create an assumption of risk as a matter of law where there is reliance on the express assurance of the master that the place is safe.
4. TRIAL — INSTRUCTION — SPECIFIC OBJECTION.—In an action by a servant for personal injuries, where there was no question that the servant was aware of a dangerous condition, an instruction which included the idea of the duty of the master to warn the servant of dangers which he had reason to believe the servant was unaware, given in connection with the feature of the case which involved the effect of the master giving an assurance of safety, was an inaccuracy which should have been specifically called to to the attention of the court.

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

A. A. McDonald and Holland & Holland, for appellant.

There are two questions only for this court to decide: (1) The question of assumed risk and (2) whether the verdict is clearly against the instructions of the court and in the face of the evidence.

The tramway was dangerous, and plaintiff knew it and assumed the risk. The court erred in giving the second instruction for plaintiff. 56 Ark. 206; 77 *Id.* 376; 81 *Id.* 343-6; 96 *Id.* 391; 1 Roberts' Fed. Liability of Carriers, p. 992, par. 559-560. For the same reasons the court erred in instructions 3, 4, 5 and 6 for plaintiff. The verdict is absolutely in the face of the law.

W. L. Curtis, for appellee.

1. The facts were ample to take the case to the jury as to whether plaintiff assumed the risk or not; the instructions covered the respective theories of plaintiff and defendant and there were no errors. 56 Ark. 192; 26 Cyc. 1097, par. B, and pp. 1185, 1221, L. R. A. (N. S.) 453; 48 L. R. A. 542; 4 L. R. A. (N. S.) 990, par. 4; 18 R. C. L., par. 149, p. 655 and par. 150; *Ib.,* pp. 694-701, par. 185.

2. The testimony is undisputed that the unsafe condition of the switch to the tipple had been called to the master's attention and he had repeatedly assured its safety and plaintiff did not comprehend or appreciate the dangers incident to its use. See authorities *supra.* There were no errors prejudicial to appellant.

McCULLOCH, C. J. The plaintiff, Jennings Dodson, was employed in a coal mine being operated by the defendant, and while so employed received personal injuries, and this action was instituted by him to recover compensation for the injuries. He was engaged, when injured, in operating a car for the purpose of hauling loads of rock which had been dislodged and broken up in the process of mining coal. A car loaded with rock

weighed, usually, about five thousand pounds, and was operated along a track called a tipple track. The track was elevated in places a considerable distance above the surface of the slope and was supported by wooden props spiked together, which formed a frame for the car track to rest on. As plaintiff was operating a car along the track the supports gave way and the car fell, precipitating the plaintiff amongst the falling rock to the ground, a distance of twelve or fifteen feet, and he received painful and serious injuries which incapacitated him for work for a considerable length of time. The trial jury awarded damages in the sum of $400, and there is no question raised on this appeal about the assessment of damages being excessive.

Negligence of the defendant is alleged in allowing the car track to become insecure. There is a denial of the charge of negligence, and also a plea that the plaintiff was aware of the alleged defects in the track, and, therefore, assumed the risk of the danger.

The principal contention here is that the undisputed evidence shows that the plaintiff was fully aware of the danger and must be deemed to have assumed the risk. The plaintiff, and other witnesses introduced by him, testified that repeated complaints were made to McDonald, the boss, about the dangerous condition of the track, and that McDonald declined to make any repairs, but on the contrary directed the men to go ahead with the work, otherwise he would discharge them and employ others in their stead. Some of the witnesses testified that McDonald assured them that the track was in good condition and "would stand a thousand years." Plaintiff so testified himself.

The rule of law is well settled that a servant, even as to dangers created by a negligent act of the master, assumes the risk of such danger when he is aware of such act of negligence and appreciates the danger. There are, however, certain well defined exceptions to this general rule. One of the exceptions is that where

the servant makes complaint to the master and receives a promise that necessary repairs will be made to obviate the danger, the obligation to bear the risk shifts to the master and the servant is absolved from the assumption of risk during the period of promise unless the danger is so open and obvious that a person of ordinary prudence would not proceed in the face of it. Another exception is that, even though the master declines to remove the danger, if there is an express assurance on the part of the master to the servant that the place is safe, the servant may to some extent rely on that assurance of safety and does not necessarily assume the risk unless the danger is so open and obvious that a person of ordinary prudence would not proceed to work. *C. O. & G. Rd. Co.* v. *Jones,* 77 Ark. 367. In other words, if the servant relies on the assurance of the master as to the safety of the working place, the mere fact that he is aware of the danger does not place on him the obligation of assuming the risk. It then becomes a question for the trial jury to determine whether or not there was was in fact an assumption of risk. The mere apprehension of danger on the part of the servant does not create an assumption of risk as a matter of law where there is reliance on an express assurance of the master that the place is safe. See note to *Brown* v. *Lennane,* 155 Mich. 686, 30 L. R. A. (N. S.) 453; *McKee* v. *Tourtellotte,* 167 Mass. 69, 48 L. R. A. 542; *Bush* v. *West Yellow Pine Co.,* 2 Ga. App. 295; *Burkard* v. *A. Leschen & Sons Rope Co.,* 217 Mo. 466.

In the case note cited above the result of the authorities is summed up in the statement that "the general effect both of a direct command and an assurance of safety is to modify the rule of assumption of risk and contributory negligence."

The evidence in the present case was, we think, sufficient to sustain the verdict in plaintiff's favor. The proof shows that he was, with other employees, apprehensive of the danger created by the apparently insecure condition of the track, but the danger was not so

obvious or glaring as to necessarily make him guilty of contributory negligence or to impose upon him the assumption of risk by proceeding after he was assured by his superior that the working place was safe. The jury might have found that while the place was dangerous, and that the defendant was negligent in allowing it to become so, yet the danger was not so obvious that a prudent person would not have proceeded, especially where the master gave assurances of safety. This issue was submitted to the jury, and the verdict is conclusive.

Objection is made to an instruction which included the idea of the duty of the master to warn the servant of dangers of which he had reason to believe that the servant was unaware. This feature of the instruction had no appropriate place in the case, for the evidence shows that the plaintiff was aware of the danger, or, at least, was apprehensive of it, and needed no warning. There is a difference between the duty to warn and the effect of an assurance of safety, and this instruction concerning the duty to warn was given in connection with that feature of the case which involved the act of the master in giving the assurance of safety. The reference to the duty to warn was inaccurate, but this inaccuracy should have been called to the attention of the court by a specific instruction.

We are of the opinion, therefore, that no grounds for reversal of the judgment are shown.

Affirmed.

DORAN v. STATE.

Opinion delivered January 12, 1920.

1. WITNESSES — IMPEACHMENT OF OWN WITNESS BY INCONSISTENT STATEMENTS.—Where a witness for the State did not testify to any fact prejudicial to the State nor surprise the State by his testimony, but merely denied that a fact existed which the State undertook to prove by him, the State had no right, under Kirby's Digest, section 3137, to introduce other witnesses to testify to statements by the witness inconsistent with his testimony.

2. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY.—In a prosecution for seduction, statements of the prosecuting attorney in argument that the law in Mississippi permitted relatives of a seduced woman to kill the seducer, that such law is good law, and that "if you do not enforce the statutes and convict the men charged with seduction, the time will come here in Arkansas when the men will take the law in their own hands and go out and kill the seducers," etc., constituted prejudicial error.

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

Evans & Evans, for appellant; *John P. Roberts* and *W. A. Ratteree,* of counsel.

1. There was no corroboration of the female witness. Kirby's Digest, § 2043; 40 Ark. 482; 77 *Id.* 16, 468; 73 *Id.* 265; 86 *Id.* 30; 92 *Id.* 421; 84 *Id.* 67; 102 *Id.* 263; 77 *Id.* 23; 135 *Id.* 173.

2. A verdict of not guilty should have been instructed, as there was no legal corroboration of the prosecutrix's testimony.

3. The court erred in permitting the State to contradict Dr. Armstrong. 101 Ark. 45; 112 *Id.* 481.

4. The verdict was the result of passion and prejudice, and the impassioned remarks of the State's attorney were highly prejudicial. 58 Ark. 368; 48 *Id.* 106; 212 S. W. 319.

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

1. There was sufficient corroboration of the female's testimony. 40 Ark. 482; 77 *Id.* 468; 92 *Id.* 421; 86 *Id.* 30; 67 *Id.* 416; 73 *Id.* 291.

2. The intercourse was established by both corroborating testimony and the circumstances, and the promise of marriage was sufficiently corroborated.

3. There was no reversible error in reading to the jury a part of a Supreme Court decision and no error in refusing to give instruction No. 11 for appellant.

4. No error in permitting the State to contradict its own witness, Dr. Armstrong. Wigmore on Ev., 896, 904; Greenleaf on Ev. (2 Ed.), 444; 114 Ark. 398.

5. There was no prejudicial error in the argument of the prosecuting attorney. 23 Ark. 32; 193 S. W. 89. They were mere expressions of opinion. 112 *Id.* 452; 115 *Id.* 101.

WOOD, J. The appellant was convicted of the crime of seduction and duly prosecutes this appeal.

First. The State called a witness, Dr. Armstrong, and asked him if the defendant had not come to him and asked him for medicine to make a woman come around. This the doctor denied, and he was then asked if he had not told the father of the prosecuting witness, and also a Mr. Westmoreland, that the defendant had made such a request. This the doctor denied also. The father of the prosecuting witness and Mr. Westmoreland were called, and testified over the objection of the defendant that the doctor had made these statements. Appellant urges that this was reversible error.

The State was apprised before calling Dr. Armstrong that he would not testify that "defendant had come to him and asked him for medicine to make a woman come around."

Dr. Armstrong testified that he had told the deputy prosecuting attorney and also the prosecuting attorney that he would not so testify. Therefore, it affirmatively appears that the State was not surprised by his testimony.

In *Jonesboro, L. C. & E. Rd. Co.* v. *Gainer,* 112 Ark. 477-481, we said: "Where a party is taken by surprise at the testimony of his own witness, such testimony being entirely different from what the witness had given the party calling him to understand that his testimony would be, the party taken by surprise, and who is prejudiced by the testimony of his own witness, may contradict him with other evidence, and by showing that he had made statements different from his present testimony, provided the proper foundation is laid for contradiction of the witness by calling his attention to the circumstances of the time and place." See also *Derrick* v.

State, 92 Ark. 237; *Roy* v. *State,* 102 Ark. 588; *Carlton* v. *State,* 109 Ark. 516; *Williams v. Cantwell,* 114 Ark. 542; *Shands* v. *State,* 118 Ark. 460.

Section 3137 of Kirby's Digest provides that the party producing a witness is not allowed to impeach his credit by evidence of bad character unless it is in a case in which it was indispensable that the party should produce him, but he may contradict him with other evidence, and by showing that he made statements different from his present testimony.

The above is one of the provisions of our civil code taken verbatim from the civil code of practice of Kentucky. In *Champ* v. *Commonwealth,* 2 Metc. (Ky.), 17-24, the Court of Appeals of Kentucky construing this provision said: "The obvious meaning of the rule is, that where a witness states a fact prejudicial to the party calling him, the latter may be allowed to show that such fact does not exist, by proving that the witness had made statements to others inconsistent with his present testimony. But a case like the present, where the witness does not state any fact prejudicial to the party calling him, but only fails to prove facts supposed to be beneficial to the party, is not within the reason or policy of the rule, and the witness cannot be contradicted in such case by evidence that he had previously stated the same facts to others. Such a practice would be a perversion and abuse of a rule which was intended to protect a litigant against the fraud or treachery of a witness whom he may have been induced to confide in, and would lead to consequences more injurious than the evils the rule was intended to remedy."

In *Hull* v. *State ex rel. Dickey,* 93 Ind. 128-134, the Supreme Court of Indiana after quoting the above, among other things, adds, "Surely it was not intended that a party may impeach his own witnesses, where they testify favorably or fail to thus testify. This would, indeed, be an idle and useless ceremony. It could accomplish no good, and might work great harm. No fact having been stated, none could be disproved, and, as the

jury might regard these statements as substantial proof of the fact sought to be established, great harm might result, as they are clearly inadmissible for any such purpose." See also *Conway* v. *State,* 118 Ind. 482; *Miller* v. *Cook,* 124 Ind. 102-4; 1 Greenleaf on Ev., p. 589, section 444.

In the instant case the witness Dr. Armstrong did not testify to any fact prejudicial to the State nor did he surprise the State by his testimony. Indeed, he did not testify as to any substantial affirmative fact. His testimony was simply a denial that the fact existed which the State undertook to prove by him, towit: that the appellant had asked witness for a medicine to cause a woman to come around or to procure an abortion. The rule was not intended to allow a party who produced a witness to enter upon the collateral issue of impeaching his own witness merely for the purpose of showing that such witness was unworthy of belief.

The time necessary for the trial of causes in the administration of justice is too precious to be frittered away with such useless procedure. Such indirect methods for establishing substantive facts were not contemplated by the above provision of our Code and are contrary to all rules for the production of evidence. See also *Thomas* v. *State,* 72 Ark. 582-84.

Second. In the concluding portion of his closing address to the jury in this case, Honorable C. M. Wofford, the prosecuting attorney of the district, said: "The law in Mississippi on this subject is that the relatives of the young woman who is seduced take shotguns and go out and kill the seducer. Personally, I think that is a good law. I would not blame the young men in this country when their sisters are seduced if they were to take pistols and go out and kill the seducer. If you do not enforce the statutes and convict the men charged with seduction the time will come here in Arkansas when the men will take the law in their own hands and go out and kill the seducers of their mothers, their sisters, their wives and their daughters."

The defendant, while the prosecuting attorney was making this statement, objected to the same and asked the court to exclude it from the consideration of the jury. The court overruled the objection of the defendant and permitted the prosecuting attorney to conclude the statement and declined to exclude the same from the consideration of the jury. The defendant duly saved his exceptions.

The above is a copy of the statement contained in the bill of exceptions. The appellant urges that the above remarks of the prosecuting attorney constitute error for which the judgment should be reversed. The appellant is correct in his contention. These remarks are characterized in the bill of exceptions as "impassioned." They are all this, and more; they were inflammatory. They purported to state as a fact that the law in Mississippi permitted relatives of young women who had been seduced to take shot guns and go out and kill the seducer. Such is not the law in Mississippi nor in any other State of the Union, nor in any civilized country. It will be observed that the prosecuting attorney not only made an incorrect statement as to the facts but, after improperly assuming that the law of Mississippi was as stated by him, went further and added his personal commendation of such a law.

The remarks of the prosecuting attorney as a whole must be construed as an appeal to the passions and prejudices of the jury. It was an endeavor to inflame their minds against the crime of seduction in general to such an extent as to persuade them to convict the accused simply because he stood "charged with that crime." For he said, "If you do not enforce the statute and convict the men charged with seduction," etc. He did not even qualify his language by saying that "men charged and proved to be guilty should be convicted," but he called upon them to enforce the statute against men who "were charged with seduction."

This court speaking through the late Mr. Justice BATTLE in *Holder* v. *State*, 58 Ark. 481, aptly character-

ized the functions of a prosecuting attorney as follows: "A prosecuting attorney is a public officer 'acting in a quasi-judicial capacity.' It is his duty to use all fair, honorable, reasonable and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case and the conclusions legitimately deducible from the law applicable to the same. To convict and punish a person through the influence of prejudice and caprice is as pernicious in its consequences as the escape of a guilty man. The forms of law should never be prostituted for such a purpose." See also *Vaughan* v. *State,* 58 Ark. 368; *Walker* v. *State,* 138 Ark. 517.

Under our Constitution and laws every person accused of crime is guaranteed an impartial trial. Article 2, section 10, Constitution 1874; *Polk* v. *State,* 45 Ark. 165-69. This is one of the purposes for which courts are created. To this end all their functionaries are pledged by solemn oath. A fair trial cannot be had where the prosecuting attorney, one of the chief ministers of justice, is permitted to profane the very altar, where, as an official, he is expected to worship, by invoking a spirit of lawlessness to preside over the deliberations of the jury. Such was the effect of the remarks above quoted. The court, although requested so to do, "declined to exclude the same from the consideration of the jury." Thus the jury were given to understand by the judge himself, the ruling genius at the trial, that the argument was not improper. It would be a mockery of justice and a travesty upon legal and orderly procedure to hold that a prisoner under such circumstances was accorded fair treatment by those alone to whom is com-

mitted the duty of seeing that his legal rights are protected. The court erred in permitting the remarks of the prosecuting attorney over the objection of the appellant, and in not excluding at his request such remarks from the jury.

Inasmuch as the cause must be remanded for a new trial, we refrain from commenting upon the sufficiency of the evidence on the questions of the corroboration of the prosecutrix as to the promise of marriage and the act of sexual intercourse.

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

McCULLOCH, C. C., (concurring). I concur in the judgment of reversal on the ground that the testimony of witness Westmoreland was incompetent, and that the court erred in admitting it over appellant's objection, but I can not agree with the other judges in the conclusion that the remarks of the prosecuting attorney constituted prejudicial error which also calls for a reversal.

The very intemperate remarks of the prosecuting attorney were, of course, highly improper and can not be accounted for on any ground other than the excitement of the occasion, but they constituted, after all a mere expression of the opinion of that officer, and I can not conceive of any impression being made on the minds of an intelligent jury calculated to result in prejudice to the rights of appellant. We should not reverse judgments for mere irregularities in the proceedings, nor even for errors, however gross, unless it is probable that some prejudicial effect resulted.

I think the court is now taking a backward step in the trend of its decisions in declaring that the remark of the prosecuting attorney, which merely expressed his opinion as to the duty of the jurors in this class of cases, calls for a reversal of the judgment.

I concur, as before stated, in the judgment of reversal, but wish to express my disapproval of the ruling of the court in declaring the argument of counsel to be a reversible error.

McCULLY v. STATE.

Opinion delivered January 12, 1920.

1. CRIMINAL LAW—INSANITY—EVIDENCE.—Upon the issue as to accused's sanity at the time of the alleged commission of an offense, testimony tending to show his mental condition both before and after commission of the act was competent.
2. INSANE PERSONS — INQUISITION OF LUNACY — ADMISSIBILITY.—In criminal cases the record of inquisitions of lunacy or insanity is competent to go to the jury as evidence on that issue, but the weight of such evidence is for the jury.
3. CRIMINAL LAW—REQUESTED INSTRUCTIONS ALREADY COVERED.—It was not error to refuse prayers for instructions fully covered by those given.

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

W. S. Coblentz, for appellant.

1. The court should have admitted the records of the probate court showing defendant's lunacy. 8 R. C. L. 189; 31 Cal. 576; 63 N. Y. 409; 12 Pa. St. 159; 34 Ohio St. 394; 61 Kan. 87; 1 McClain, Cr. Law, 136; 14 R. C. L. 620.

2. The court erred in refusing to give instruction No. 3 for defendant on reasonable doubt. Brickwood-Sackett on Instructions, § 2649, p. 1701; 71 Ark. 291.

3. It was error to refuse No. 4. 32 Ark. 539; 53 *Id.* 180; 51 *Id.* 115; 3 Enc. of Ev., 743.

4. There was prejudicial error in the remarks of the prosecuting attorney. 99 Ark. 558; 107 *Id.* 469.

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

1. It was not error to refuse to admit the county court records as to insanity at some time prior to the trial. 50 Ark. 511. The finding of the county judge was not a judicial proceeding in a court of record and not competent. 42 N. E. 609; 55 N. W. 276; 49 So. Rep. 40; 111 Mass. 308-310.

2. There was no reversible error in refusing the instructions asked, as no exceptions were saved to the court's ruling.

3. No error in closing argument of the prosecuting attorney. Any impropriety was cured by the court's corrections.

WOOD, J. The appellant was convicted of the crime of incest. In the course of the trial the appellant offered to introduce the record of the probate court showing that he had been committed to an insane asylum in July, 1918. The court would not permit such testimony, holding that the "best evidence is to bring in witnesses before the jury and let them testify as to his sanity or insanity."

The appellant duly excepted and objected to the ruling and made this one of the grounds for his motion for a new trial.

To determine the issue as to whether the appellant was insane at the time of the alleged commission of the offense, testimony tending to show the mental condition of the accused both before and after the commission of the act was competent. 1st McClain on Criminal Law, p. 136.

The following from 8 R. C. L., p. 189, section 182, is a correct statement of the law: "When insanity is relied on as a defense to a crime, great latitude is allowed in admitting evidence having any tendency to throw light on the mental condition of the defendant at the time of the commission of the crime. * * * It is competent to go into the mental condition of the prisoner both before and after the commission of the act, for, while insanity is no defense unless it existed at the same time the act was done, still evidence to prove insanity either before or after the act is proper to be weighed by the jury in coming to a conclusion whether insanity existed at the time the act was done." See also 14 R. C. L., p. 620, section 71.

In *Eagle* v. *Peterson,* 136 Ark. 72-8, we said: "We think the true rule to be that an adjudication of lunacy is not conclusive, but only *prima facie* evidence." This was held as the rule in a civil case.

In criminal cases the record of inquisitions of lunacy or insanity is competent to go to the jury as evidence on that issue, but the weight of such evidence is for the jury.

In *Wheeler* v. *State,* 34 Ohio St. 394, the defendant offered a record from the probate court showing that four years previous to the commission of the alleged crime an inquest had been held in that court, and that he had been adjudged insane and confined in an asylum. See also *State v. Murrey,* 61 Kan. 87, 8 R. C. L., p. 189, section 182, *supra.*

In 3 Taylor on Evidence, section 1674, says: "In general, a judgment *in rem* furnishes conclusive proof of the facts adjudicated as well against strangers as against parties; but this rule does not extend either to criminal convictions, which are subject to the same rules of evidence as ordinary judgments *inter partes,* or to inquisitions in lunacy, inquisitions *post mortem,* or other inquisitions, which though regarded as judgments *in rem,* so far as to be admissible in evidence of the facts determined against all mankind, are not considered as conclusive evidence. An inquisition in lunacy, for instance, though admissible against strangers, is not conclusive proof of what was the state of mind of the supposed lunatic at the time of the inquiry."

Such inquisitions, it thus appears, are simply received as a part of the evidence for the consideration of the jury, they are not conclusive of the fact adjudged, and the matter is still left open for the jury to determine from all the facts adduced as to whether the prisoner was insane at the time of the alleged offense.

The appellant complains of the ruling of the court in refusing certain of his prayers for instructions, but other instructions given by the court fully covered the propositions of law contained in these prayers.

We find no other reversible error in the record, but for the error indicated the judgment is reversed and the cause remanded for a new trial.

McDANIEL v. RICHARDS.

Opinion delivered January 12, 1920.

1. JUDGMENT—RES JUDICATA.—Where a complaint on its face shows that a cause of action stated therein was between the same parties and involving the same subject-matter as that determined in a former suit between them, a demurrer in such case will be treated as a plea of *res judicata,* and the case disposed of as if a formal plea to that effect had been filed.
2. JUDGMENT—RES JUDICATA.—All the issues that are determined, or that could be determined, in a suit are *res judicatae* in a subsequent suit between the same parties.

Appeal from Lee Chancery Court; *A. L. Hutchins,* Chancellor; affirmed.

W. J. Lanier and *R. J. Williams,* for appellant.

1. Mrs. McDaniel having paid the indebtedness secured by the trust deed is entitled to be subrogated to all the rights of Goodman Brothers, J. M. Baker, Julius Goodman and Effie N. Richards. 134 Ark. 526. Jas. G. Conlan was primarily liable, and his surety paid the notes and is entitled to subrogation to all rights of the original payee. 2 Daniel Neg. Ist. (5 Ed.), § 1343; 32 Cyc. 254-5, 261; 28 L. R. A. 528; 13 *Id.* 619 and note; 67 Ark. 200; 4 *Id.* 506; 23 *Id.* 530; 57 *Id.* 544; 96 *Id.* 268.

2. The statute of limitations begins to run against surety's right of action from time of payment of debt of principal. 21 R. C. L. 121; 27 A. & E. Enc. Law, 272; 32 Cyc. 264-5-9; 25 *Id.* 1113-14; 18 L. R. A. (N. S.) 585; 61 Am. Dec. 503 and note; 9 Yerger, 521; 1 Wood on Lim. (2 Ed.), § 145; 9 L. R. A. 411; 7 Baxter, 119; 14 Am. St. 559; 11 S. W. 92; 87 Am. St. 115.

3. Mrs. Effie N. Conlan having joined in the trust deed to secure indebtedness, takes subject thereto. 55

Ark. 234; 121 *Id.* 70; 132 *Id.* 71; 31 *Id.* 596; 64 *Id.* 518; 25 *Id.* 58; 9 R. C. L. 588; 5 L. R. A. 519; 14 Cyc. 914-18; 131 Ark. 232. The wife has no vested interest in her husband's lands, she having joined in deed or trust deed not to alienate any estate but to release a future contingent interest. 53 Ark. 279; 55 *Id.* 230.

4. If no express contract is made, the law implies a promise by the principal to make good any loss incurred by his surety. It is equivalent to an express request of the principal that the surety pay his debt. 5 How. 96; 23 Ark. 530; 16 *Id.* 72; 24 N. E. 1051; 47 Iowa 469; 29 Gratl. 280. No obligation becomes absolute when the debt has been paid. 56 Md. 567; 44 Mo. 336; 109 U. S. 665. Subrogation should have been allowed and decreed. 74 Ill. App. 524.

See also as to right to subrogation. 54 L. R. A. 614; 22 Gratl. 748; 23 N. W. 119; 23 N. J. Eq. 329.

Subrogation is a doctrine of chancery and can not be enforced in law. 33 Ala. 706; 9 Watts 451; 8 Mo. 408; 93 Am. Dec. 783; 34 Ark. 569.

5. A surety is entitled to every means the creditor had to enforce payment. 20 W. Va. 614; 22 Mo. App. 328; 17 N. J. Eq. 189; 48 Ohio St. 75; 10 Yerger 310; 5 Wendell 85.

6. Upon general demurrer the test is, can the pleading be cured by amendment? 91 Ark. 404; 70 *Id.* 161; 71 *Id.* 562; 77 *Id.* 351; 31 Cyc. 287-290. Payment by a surety does not discharge the right of subrogation. 73 Ark. 174; 127 *Id.* 462; 34 *Id.* 569; 123 *Id.* 81; 68 *Id.* 449; 96 *Id.* 268; 8 *Id.* 494; 16 *Id.* 84; 75 Va. 407; 19 Am. Dec. 629 and note; 4 Watts 451, etc.

Daggett & Daggett, for appellee.

The facts of this case are identical with those in 134 Ark. 519, and that case is conclusive of this and a final determination of this.

WOOD, J. J. C. Conlan died in 1885, leaving Mrs. O. V. Conlan, his widow, and James G. Conlan and Mrs.

Clyde McDaniel, his only children. He owned in fee certain land in Crittenden and Lee counties. His widow on January 31, 1908, by quitclaim deed conveyed her dower and homestead interests in the Lee County lands to James G. Conlan and Mrs. Clyde McDaniel. On the same day for valuable consideration by quitclaim deed James G. Conlan and his wife, Mrs. Effie N. Conlan, and his sister, Mrs. McDaniel, conveyed all their interests in the Crittenden County lands to Mrs. O. V. Conlan. Mrs. Effie N. Conlan joined in the deed relinquishing her dower and homestead rights. On the same day Mrs. McDaniel for a valuable consideration conveyed her one-half interest in the Lee County lands to F. D. Granger, who in turn conveyed to J. M. Baker. James G. Conlan was indebted to Goodman Brothers in the sum of $3,575 for which he, his mother and sister on March 25, 1907, executed and delivered their joint and several promissory notes amounting in the aggregate to $3,582, due in one, two, three, four and five years respectively, bearing interest from maturity until paid at 10 per cent. per annum. To secure the payment of these notes James G. Conlan and Mrs. O. V. Conlan, Mrs. McDaniel and her husband, executed their deed of trust on all the lands they owned in Crittenden and Lee counties. Mrs. Effie Conlan joined in the trust deed relinquishing all her dower and homestead interests. The debt was the separate debt of James G. Conlan. His mother and sister signed the notes and deed of trust solely for the accommodation of James G. Conlan.

James G. Conlan paid the first note, due March 25, 1908, of $825 before his death, which occurred on June 27, 1908. He died without issue and left surviving him his mother, his sister and his widow.

Mrs. O. V. Conlan died intestate December 15, 1910, leaving her only heir Mrs. McDaniel. Mrs. Effie Conlan, after the death of her husband, took possession of the undivided one-half interest in the Lee County lands of which her husband died seized and with rents arising from these lands and partly from her own means paid the

remaining four notes secured by the deed of trust on the land to Goodman Brothers and J. M. Baker.

A suit was instituted by Mrs. McDaniel against Mrs. Effie N. Conlan *et al.* in the Lee Chancery Court to quiet title to land in Lee County and for the rents and profits against Mrs. Effie N. Conlan. In that suit Mrs. Conlan made her answer a cross-complaint in which she set up that she had paid the notes of her husband, James G. Conlan, and asked that her homestead and dower interests in the lands be set apart to her and that she be subrogated to the rights of Goodman Brothers and J. M. Baker, the holders of the notes, and that a lien be declared in her favor on the husband's undivided interest in the lands and that unless the same be paid that the lands be sold, etc. As a result of that suit the court dismissed Mrs. McDaniel's complaint for want of equity and entered a decree in favor of Mrs. Conlan subrogating her to the rights of Goodman Brothers in the deed of trust of $3,655.50 with interest at the rate of 10 per cent. per annum and decreed that the same was a lien on the lands to which Mrs. McDaniel was seeking to have the title quieted in Lee County and directed that unless the same were paid that the lands be sold to satisfy the same and appointed a commissioner to execute the decree. That case was appealed to this court. See *McDaniel* v. *Conlan,* 134 Ark. 519. The court concluded its opinion in the following language: "The decree of the court is affirmed except as to the amount of interest allowed Mrs. Conlan, as to this the decree is reversed and the cause is remanded with directions to enter a decree in accordance with this opinion and for such other and further proceedings as is necessary to execute its decree."

On the remand of that cause to the lower court, the chancery court heard the same upon the mandate and the record as set out in the original decree. The court found the facts substantially as above set forth and entered a decree awarding to Mrs. Effie Conlan homestead and dower rights in an undivided one-half interest in certain lands in Lee County which were described in the decree,

which were owned by her husband at the time of his death and further decreed that she have and recover from Mrs. Clyde McDaniel the sum of $3,827.01, with interest to be satisfied wholly against the lands which were described in the decree, being the undivided interest of her husband in those lands subject to Mrs. Conlan's homestead and dower rights, and appointed a commissioner to make sale of the lands if the amount of the decree were not paid. The court also decreed that if the undivided one-half interest of James G. Conlan in the lands in Lee County were not sufficient to satisfy the debt, the commissioner should then proceed to sell his interest in the Crittenden County lands.

The above decree was entered on January 7, 1919. On the 15th of February, 1919, this present suit was instituted in the Lee Chancery Court by Mrs. McDaniel against Mrs. Effie N. Richards, formerly Conlan, J. M. Baker, Goodman Brothers and Julius Goodman, trustee. In her complaint she set up the facts substantially as above set forth and alleged that she had paid the sum of $3,791 to the commissioner who under the last decree of the Lee Chancery Court was threatening to carry into effect the directions of that decree and to sell her lands for the purpose of satisfying same. She prayed judgment against the defendants for that sum and asked that she be subrogated to the rights of Goodman Brothers, J. M. Baker and Mrs. Effie N. Richards, under the deed of trust and that she have a decree for the sum she had paid and that the same be declared a lien on the lands described therein and that same be sold to satisfy the same.

Mrs. Effie N. Richards was the only party upon whom service was had and she alone appeared in the action. She demurred to the complaint, which demurrer the court sustained. The plaintiff declined to plead further and a decree was entered dismissing the complaint for want of equity, from which is this appeal.

The decree of the chancery court was correct. The facts set forth in the complaint show clearly that the

rights of all the parties in the present litigation were in issue and fully determined by the decree of the chancery court entered January 7, 1919. Instead of paying the sum awarded to the appellee, Mrs. Effie (Conlan) Richards by that decree, appellant, if she conceived that she was aggrieved thereby, should have appealed therefrom.

When a complaint on its face shows that a cause of action stated therein was between the same parties and involving the same subject-matter as that determined or which could have been determined in a former suit between them, the complaint fails to state a cause of action which the plaintiff can maintain against the defendant and is demurrable. The demurrer in such case will be treated as a plea of *res judicata,* and the case disposed of the same as if such formal plea had been filed. The name of a pleading is immaterial.

Here the complaint shows that the parties to the present action were the same as in the former suit; that that suit involved the same subject-matter and that all the issues that could be determined here could have been determined in the former suit.

The decree in that case must, therefore, be considered as a final determination.

Affirmed.

STANFORD v. SAGER.

Opinion delivered January 12, 1920.

1. SPECIFIC PERFORMANCE—DESCRIPTION OF LAND.—A contract for the sale of land witnessed merely by letters which fail to describe the premises to be conveyed can not be enforced specifically.
2. FRAUDS, STATUTE OF—NECESSITY OF PLEA.—Where a complaint seeking specific performance of a contract for sale of land fails to allege that the contract was in writing, it was unnecessary for the defendant who denied specifically all the allegations of the complaint to plead the statute of frauds specifically, since it devolved upon plaintiffs to show a valid and enforceable contract.

3. FRAUDS, STATUTE OF—DEMURRER RAISING DEFENSE.—The defense of the statute of frauds may be raised by demurrer to a complaint whose allegations disclose a contract falling within the terms of the statute.

4. FRAUDS, STATUTE OF—PART PERFORMANCE.—Evidence *held* not to show part performance sufficient to take the case out of the statute of frauds.

5. FRAUDS, STATUTE OF—PART PERFORMANCE.—Delivery of possession of land before offer had been accepted by owner and acts merely preparatory or ancillary to the agreement did not constitute part performance.

Appeal from Drew Chancery Court; *J. S. Harris,* Special Chancellor; affirmed.

John Baxter and *J. T. Bullock,* for appellants.

1. The check for $500 from Stanford to Ross and the written correspondence constitute the written contract and the court erred in not decreeing specific performance, as there was part performance of the contract which took the case out of the statute of frauds. It is undisputed that Sager placed the lands in the hands of Ross authorizing him to sell for $40 an acre net; that the authority of Ross as Sager's agent was valid and binding, and Sager was notified that $500 cash, earnest money, had been paid and $2,000 was placed in the hands of his attorney to be paid when a proper deed was delivered. Stanford was bound and Lephiew was also bound and should be held to specific performance. 1 Ark. 416.

2. Only Ross and Stanford have the right to plead the statute of frauds and their conduct and correspondence took this case out of the statute. They had the right to waive the formality of writing out their contracts in full. The part performance took the case out of the statute of frauds. 40 Ark. 390; 36 Cyc. 642, par. 2, and 644-5. Rightful possession as here in the vendee takes the case out of the statute. 30 Ark. 250; 15 *Id.* 312; 26 *Id.* 344; 115 *Id.* 154.

3. Lephiew can not be considered an innocent purchaser. His corrupt conduct in offering to pay Ross an extra commission and other acts stamp him as acting in

bad faith. On the doctrine of innocent purchaser we cite 80 Ark. 86; 75 *Id.* 228; 105 *Id.* 429; 108 *Id.* 490. The chancellor did not find him to be an innocent purchaser but based his decree on the statute of frauds erroneously.

4. Ross and Stanford waived the statute of frauds, if they could have pleaded it. The statute can be waived. 71 Ark. 302; 96 *Id.* 184; 96 *Id.* 505; 105 *Id.* 638; 32 *Id.* 97; 92 *Id.* 392; 194 S. W. 1032. Appellants are entitled to specific performance and the title divested out of Lephiew and vested in Stanford.

D. Dudley Crenshaw, for appellees.

1. The contract was entirely in parol and there was no such part performance as to take it out of the statute of frauds. The contract in the correspondence, etc., is not enforceable, as no adequate description of the lands appears anywhere. 21 Ark. 543; 23 *Id.* 421; 206 S. W. 896.

2. There was no written agreement or memorandum of sale, nor are the terms of sale clear, definite or certain. Elliott on Contracts, § 2291. The terms are not definite nor the description adequate and certain. 70 Atl. 894; Elliott on Contracts, § § 2290, 2294; 85 Ark. 1; 102 *Id.* 697; 144 S. W. 528.

3. The finding of the chancellor that there was no written contract or memorandum of sale to bind the parties should govern this court unless clearly contrary to the weight of the evidence and it is certainly not. 84 Ark. 426; 106 S. W. 201; 129 Ark. 58; 195 S. W. 378.

4. The payment of part of the purchase money is not such part performance as to make an oral contract of land specifically enforceable. 1 Ark. 391; 21 *Id.* 553; 44 *Id.* 334; Elliott on Contracts, § 2301.

5. No bad faith on part of Lephiew is shown and he was an innocent purchaser *bona fide* for valuable consideration paid. The burden was on appellants to show that he purchased with notice. 103 S. W. 609. He was an innocent purchaser, without notice, and in good faith. 19 Ark. 51.

6. The principal as well as the agent was bound, and if void neither is bound. 88 S. W. 385.

7. Appellees rely on the statute of frauds and pleaded it, and did not waive it. 32 Ark. 97; 92 *Id.* 392; 96 *Id.* 104, 505. The statute of frauds is available. 19 Ark. 39; 194 S. W. 1032. On appeal the pleadings will be treated as amended by the proof. 98 Ark. 529; 104 *Id.* 215; 88 *Id.* 363; 76 *Id.* 551. The statute of frauds need not be specifically pleaded. 19 Ark. 23-39; 79 Atl. 86; 101 U. S. 231.

8. The parol contract was not enforceable, as the description was not adequate if it had been in writing. Elliott on Cont., § 2291 and cases cited *supra.* Specific performance is discretionary with the chancellor. 12 Ark. 421, 551; 34 *Id.* 663. A clear case must be made. 34 Ark. 663. The decree is just and equitable and should be upheld.

WOOD, J. George Sager, who resided in Illinois, owned a tract of land in Drew County, Arkansas, consisting of 164½ acres. Sager by letters duly authorized W. C. Ross, a real estate dealer, to sell this land at the net price of $40 per acre.

In one of the letters, of date February 10, 1918, to Ross he said in part: "I will make terms one-half cash, the balance one and two years and would make it three before missing a sale with 8 per cent. interest. I have a man on the place and I have promised him the place for this year not signed up yet. * * * For description and number of section, see E. G. Hammock, attorney. He has all my papers. I have 164½ acres in the place."

In another letter of February 19, 1918, he writes Ross as follows: "In reply to yours of the 15th, I want the renter protected, but if you should make a sale, the tools and one horse on the place are mine. I would not want to leave them to make this year's crop. W. E. Lephiew and I have been trying to trade for some time. I had priced the place to him some time ago for cash $6,000. He made me an offer of $30 an acre. I told him

we could not trade and now he has wrote me again if I will make the price some less we can trade. I will not make it less. When I sent him that price I had an eighty-acre farm contracted for here for that amount of money. It was sold last week. Also received a letter from J. B. Coleman, the man that bought the Wells place, wanting price and terms on my place. I will refer him to you. Do the best you can for me. I will be down in about two weeks."

After receiving the above letter Ross entered upon negotiations with Dr. J. M. Stanford of Hector, Arkansas, for the sale of the place. Stanford made an offer, the terms of which Ross immediately wired to Sager as follows: "This offer of terms $2,500 cash, balance to be arranged one, two and three years. If you can accept these terms the place is sold."

Sager wired in reply: "Will be in Dermott tomorrow." On the arrival of Sager he and Ross agreed orally upon the amount of cash that Sager was to receive for the place and the terms upon which the deferred payments should be made.

It was agreed between Ross and Sager that when the notes for the purchase money were due they were to be taken up at the bank without discount to Sager. After these terms had been arranged which were satisfactory to Sager, Ross informed him that his place was sold. Ross and Sager then went to Judge Hammock, Sager's attorney, whom Sager directed to bring down the abstract to date preparatory to closing the deal. Sager also instructed him to make the deed when the abstract was completed. Sager informed Ross that Judge Hammock handled the whole thing for him.

The terms of the sale agreed upon between Doctor Stanford and Ross were as set forth in the telegram above except that the notes were to draw 8 per cent. interest to be paid annually, and were to reserve a lien on the land. After Sager and Ross had agreed upon the terms for the payments Ross wired Judge Bullock, Stanford's agent, that the deal had been accepted by Mr.

Sager and to forward the money at once. In answer Ross received the following check:

"Russellville, Ark., March 16, 1918.

"Pay to the order of J. T. Bullock five hundred dollars ($500.00).

"J. T. Stanford, M. D.

"To People's Exchange Bank, Russellville, Arkansas.

"One-fifth of first payment, endorsed by J. T. Bullock and W. C. Ross."

Ross then notified Sager and Judge Hammock, his attorney, that he had received the check. Hammock and Crenshaw, attorneys and agents of Sager, informed Ross that the deed had been prepared and would be forwarded to Stanford. Ross wrote to Stanford that the deed had been prepared and forwarded. In the meantime Ross had sent the abstract of title to Doctor Stanford at Russellville to be approved by his attorney. On April 10, 1918, Ross received a letter from Sager in which he states that more than three weeks had elapsed since he was down there, and that he had not heard from any one. Ross replied April 12, explaining that the delay had been occasioned by the failure of the abstracter to complete the abstract, but that it had been completed and forwarded to the attorney of the purchasing party at Russellville, and further stating "if he handles the matter with any dispatch whatever I shall be able to report a close on this transaction within the next week or ten days."

Then follows some correspondence between Ross and Stanford showing that they considered the deal about ready to close, but that the papers had not as late as April 20, 1918, been passed upon by the attorney for Stanford. On that date Ross writes Sager saying: "I think from the appearance of matters in the premises now that I will be ready to close the deal between you and Doctor Stanford within the next few days. I have not heard from him since sending a correction on the title which was asked for by the attorney, but I expect

to receive the papers within the next few days, at which time the matter should be closed. I will notify you just as soon as I have everything in hand to close the deal."

On May 7, 1918, Ross learned that Sager had sold the land to W. E. Lephiew. On that day Ross wired Sager in part as follows: "My client put up $500 when I sold him your property as per your order. Money for balance has been ready pending abstract and deed."

Sager on the 7th of May, 1918, sold the tract of land of 164 acres to W. E. Lephiew.

Stanford and Ross instituted this action in the Drew Chancery Court against Sager and Lephiew for specific performance of an alleged contract between Sager and Stanford for the sale of 164 acres of land which are specifically described in the complaint and for cancellation of the deed from Sager to Lephiew of these lands, and for damages for breach of contract. Demurrers were filed and overruled.

Sager and Lephiew denied specifically all the allegations of the complaint and Lephiew adopted his answer and set up that he was an innocent purchaser for value.

The chancery court found that the contract which plaintiff sought to have specifically performed rested entirely in parol, and that there was no part performance thereof to take it out of the statute of frauds, and entered a decree dismissing the complaint in this respect for want of equity. From which is this appeal.

The facts as above set forth were developed by the testimony of Ross, and they are undisputed.

The chancellor found that Ross was duly authorized by Sager to make the sale of the lands in controversy, and that Ross entered into an oral contract with Stanford for a purchase of the lands. These findings are correct, but they are not sufficient to warrant a decree for a specific performance.

In the negotiations between Ross, as the agent of Sager, and Stanford, the proposed purchaser, it nowhere appears that there was any memorandum containing a description of the lands to warrant specific performance.

Treating all the letters in evidence as constituting the contract between the parties, yet in none of these letters is the land to be conveyed specifically described nor is there any description of the land in the check which Stanford sent Ross and which was cashed by Ross as earnest money.

The appellants contend that this check and the correspondence between Ross and Stanford constitutes the written contract. Conceding this, yet, since the land to be conveyed is nowhere accurately described, the court was clearly correct in holding that the contract could not be specifically performed.

In *Ashcraft* v. *Tucker,* 136 Ark. 447, we said: "Before a court of equity is justified in requiring the specific performance of a contract to convey land, the property must be accurately described. The contract must disclose a description which is in itself definite and certain or one which is capable of being made certain by other proof, the contract itself furnishing the key by which the property may be identified." *Fordyce Lumber Co.* v. *Wallace,* 85 Ark. 1.

Learned counsel for appellants contend that the appellees never pleaded the Statute of Frauds. The appellants declared on an alleged contract for the conveyance of land, setting out what they conceived to be the terms of the contract but without specifically alleging that the same was in writing.

The appellees demurred to the complaint, which demurrer was overruled. The court might very well have decided the cause as it did on demurrer as the allegations of the complaint disclose a contract falling within the Statute of Frauds. See *Izard* v. *Conn. Fire Ins. Co.,* 128 Ark. 433.

The court, however, ruled that the complaint was sufficient and disposed of the cause on evidence adduced on the issues raised by the complaint and answers thereto.

The appellants alleged that the appellee Sager entered into a contract to convey to appellants a certain

tract of land and set up what they conceived to be the facts constituting such contract.

The appellee Sager denied specifically all the allegations of the complaint. This was sufficient to put the burden upon the appellants of proving a contract which in equity entitled him to specific performance. The record shows that in the development of the testimony the Statute of Frauds was in issue. It was treated by the parties as in issue, and the court, it appears, determined the question of specific performance purely on that issue.

Where a defendant in his answer denies making the contract which plaintiff declares on and seeks to have specifically performed, it is not necessary in such case for the defendant to specifically plead the Statute of Frauds, for the reason that it devolved upon the plaintiff to show that he had a valid contract as alleged. See *Wynn* v. *Garland,* 19 Ark. 23; *Trapnall's Admr.* v. *Brown,* 19 Ark. 39.

But if the contract be considered as one resting entirely in parol as the court found, still there was no sufficient part performance thereof to take the case out of the Statute of Frauds. While appellant Stanford testified on his direct examination that he understood that Ross delivered the possession of the land to him, yet his testimony further shows how this was done. He had gone out with Ross to look at the land and while so doing he told Ross that the land suited him all right and made Ross an offer. Ross stated that he would wire Sager the terms and find out whether he would accept the offer or not. Stanford understood that the trade was closed and that all the papers would be executed as soon as they could hear from Sager, stating that he would accept the terms. He then went home and learned through Ross two or three days afterwards that Sager had accepted the terms, whereupon he sent a check for $500. On cross-examination he was asked what steps he took in regard to taking possession of the place and replied, "I wrote to Mr. Ross to know the name of the tenant on the place as I wanted to get him to do some work." He was then

asked, "Did you personally or through an agent go upon any part of this land or receive any rental from its occupation or in any way act as the landlord to the negro tenant?" He answered, "I had no correspondence with the negro." He further testified that he delayed having work done for the reason that he heard that Sager had refused to sign the deed. He said that he understood that the deal was not finished until Mr. Sager accepted the terms.

The above testimony, which is undisputed, clearly shows that no possession in fact was delivered to Stanford, but, even if possession was delivered by Ross to Stanford, such possession was before the terms of Stanford's offer had been accepted by Sager. The acts that were done by the parties as shown by this testimony were merely preparatory or ancillary to the agreement and were not done after the agreement had been entered into. Such acts do not constitute part performance. Pomeroy, Eq. Jur., § 1409.

The trial court, therefore, correctly concluded that there was no such part performance of the contract as would take the case out of the Statute of Frauds.

The decree is, therefore, affirmed.

J. R. BISSELL DRY GOODS COMPANY v. KATTER.

Opinion delivered January 12, 1920.

1. FRAUDS, STATUTE OF—SALE OF GOODS—PART PERFORMANCE.—In an action for the purchase price of goods in excess of $30, which were ordered orally, where the plaintiff claimed that defendant had accepted an installment of the goods and had paid therefor, the burden was on him to prove such acceptance and part payment.
2. TRIAL—ABSTRACT INSTRUCTIONS.—Requests not based upon evidence were properly refused.
3. SALES—COUNTERMAND OF ORDER.—A letter: "Please cancel my back orders. I am in a notion of quitting business and leave to Europe to see my people," sufficiently countermanded all orders for goods that had not been delivered at the time the letter was written.

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

Cunkle & Barry and *T. P. Winchester,* for appellant.

1. We concede that the order given the salesman, Weaver, for goods was under the statute of frauds, not binding, but if Katter actually accepted and received part of the goods and paid for same the sale was binding under the statute, and the court erred in giving instruction No. 1 for plaintiff.

2. It was also error to refuse instruction No. 3 for plaintiff. This instruction presents every phase of the case as made by the pleadings and evidence. Every phase of the statute of frauds has been settled by this court, and this instruction stated the law. 19 Ark. 473; 79 *Id.* 338-343; 20 Cyc. 245 B, *et seq.;* Browne on Stat. of Frauds (4 Ed.), § 354.

3. The order for the goods could not be countermanded after acceptance. 76 Ark. 237; 101 Ark. 68; 78 *Id.* 574; 79 *Id.* 172; 105 *Id.* 213; 89 *Id.* 239; 76 *Id.* 371; 136 U. S. 68.

4. The theory and argument of defendant that the contract of acceptance was severable; that goods of several varieties sold at different prices were included in the order and defendant could accept such as he chose and reject the others, based on 76 Ark. 74; 90 *Id.* 78, and others. But those cases have no application here, as he accepted the goods after ordering them shipped and paid for part of them and asks cancellation not on account of the quality of the goods or delay in shipping but because he wants to quit business. Nor did he plead this as a defense but only said he did not owe, the statute of frauds, etc. The instruction No. 2 given is confusing and misleading.

Ira D. Oglesby, for appellee.

The instructions given and refused state the law correctly, and the cases cited by appellee do not apply. The contract was severable and appellee could countermand

all or part of his order. 76 Ark. 75; 81 *Id.* 549. The jury found against plaintiff and any error in instruction No. 2 was harmless and there is no prejudicial error.

WOOD, J. Plaintiff below, appellant here, brought this action against the defendant below, appellee here, upon an alleged past due account for goods sold appellee in the aggregate sum of $2,548.87. The account was itemized and made an exhibit to the complaint.

The appellee answered, denying that he was indebted to the appellant. He alleged that on the 12th of September, 1918, he verbally ordered certain dry goods from the appellant of the aggregate amount of $2,300; that some of the goods were to be shipped by the appellant to the appellee immediately, other goods of the order were to be shipped January 1, 1919; that the appellant failed to ship the goods as ordered and that because of this fact the appellee in writing canceled all of said order, but that notwithstanding this fact the appellant afterwards shipped the goods. The appellant further alleged that prior to the above order he purchased from appellant 100 dozen oriental towels for the sum of $215; that at the time the towels were purchased and received by the appellee the appellant was indebted to the appellee in the sum of $307.36 for goods which the appellee had ordered from appellant and for which he had paid but which goods were never shipped to or delivered to the appellee by the appellant; that the appellant was, therefore, indebted to the appellee in the sum of $92.36, for which he prayed judgment.

The appellee further set up that appellant was barred from maintaining the action on the account set forth in the complaint because it was a contract for the sale of goods for more than $30 and that there was no note or memorandum signed by the appellee for the purchase of such goods and that none of the goods included in the account were accepted or received by the appellee and nothing was given by the appellee in earnest to bind the bargain or in part payment of the account. Appellee, therefore, pleaded the statute of frauds.

The appellee further set up that the order of September 12, 1918, for a total purchase of $2,300 was never accepted by the appellant and that the appellee countermanded the order before acceptance and before any shipment was made.

Appellant denied the allegations of the appellee's counterclaim. The issue raised by the counterclaim was settled by the jury on proper instructions in favor of the appellant, and there is no appeal by the appellee, so that issue is eliminated here. Appellee admitted that he owed appellant the sum of $215 for goods purchased prior to the order of September 12, 1918, and judgment was entered in appellant's favor for this amount.

The first question for our consideration is whether or not the court erred in presenting the issue of the statute of frauds, which the appellee set up to appellant's claim for $2,300 on the order of September 12, 1918. On this issue the appellant requested the court to instruct the jury as follows: "If you find from the evidence in this case that Katter gave the order of September 12, 1918, which has been put in evidence before you, and Bissell Dry Goods Company accepted the order and shipped a part of the goods so ordered, that Katter received these goods and paid for them, and that after these goods were received and paid for, other goods included in the same order were shipped to him, that he is liable for the goods so shipped whether he received them or not."

In another instruction the appellant asked the court to tell the jury in part as follows: "If you find from the evidence that defendant gave the order for these goods, and his name was not signed to it, either by himself or by any one else authorized by him to sign it, then defendant would not be bound by the order, unless he acknowledged it in writing, or unless he accepted some of the goods which were mentioned in said order. So if you find from the evidence that defendant acknowledged in writing that he did give the order, or if you find that he received any of the goods mentioned in said order, then

your verdict must be for the plaintiff for all the goods shipped by it to the defendant, which were mentioned in said order.

"The defendant pleads as further defense to this action that after said order was given, and before plaintiff shipped him any of the goods mentioned in said order, he in writing, on November 23, 1918, countermanded the order.

"On this defense you are instructed that if you find from the evidence that plaintiff accepted said order when it was received, that defendant could not, after plaintiff accepted it, countermand it, and you are further instructed that defendant's letter to plaintiff on November 23, 1918, which has been introduced in evidence is not a countermand of the order introduced in evidence, but is a request to plaintiff to cancel all his back orders; and that plaintiff's reply to said letter, of date November 25, 1918, is a refusal to grant said request."

Appellant concedes that the order of September 12, 1918, given by the appellee to the appellant's salesman, was a verbal order, and, being for merchandise of over the value of $30, was not binding upon the appellee under the statute of frauds, unless the appellee accepted a part of the goods included in the order and actually received the same. Appellant contends that the appellee actually received a part of the goods embraced in this order and paid for same.

Witness Bissell testified that he was the president of the appellant; that the order in controversy was sent to the appellant by its salesman, Weaver; that he acknowledged the receipt of it by writing appellee a letter. (The letter, however, was not adduced in evidence.) Witness further testified that the goods sold on the orders sent in by the salesman to the appellant were shipped from the mill. Witness was not present, and did not ship any of the goods, and did not know of his own personal knowledge that they were shipped. Witness failed to produce in evidence a bill of lading showing such shipment and admitted that he had none.

The appellee testified positively that he never received any of the goods contained in the order of September 12, 1918. The burden was upon the appellant to show that he had accepted appellee's order for goods and had shipped the same to him. The court, therefore, did not err in refusing appellant's prayer for instruction No. 1, as it does not appear that there was any competent evidence to show that appellant had accepted the order and had shipped the goods, and that appellee had received any of the goods. In this respect, therefore, the instruction was abstract.

Witness Bissell testified that he received a letter from the appellee dated November 23, 1918, canceling the order in controversy. That letter was as follows: "Please cancel my back orders. I am in a notion of quitting business and leave to Europe to see my people. J. S. Katter."

The appellee testified in regard to the cancellation of the order that he had been dealing with the appellant for two or three years; that it was the general custom in their dealings to allow him to cancel his orders. "All the time they had been canceling for us," witness states, and further, "I sent in orders to the plaintiff and canceled lots of times. * * * If I did not want them, I would turn them back."

The appellant complains at the ruling of the court in refusing one of its prayers for instruction telling the jury that the letter of November 23, 1918, was not a countermand of the order introduced in evidence but a request to cancel his back orders. The court did not err in refusing this prayer. It was calculated to confuse and mislead the jury. The letter speaks for itself, and shows that it was intended as a cancellation or countermand of all orders for goods that had not been delivered at the time the letter was written, and the testimony of the appellee tended to show that none of the goods in the order of September 12, 1918, had been delivered.

It would serve no useful purpose to set out and discuss other rulings of the court in the granting and re-

fusing prayers for instructions and in the admission of testimony of which appellant complains. What we have said shows the theory presented by appellant's prayers for instructions in the lower court, which, as we have seen, were erroneous. We find no reversible error in the record, and the judgment is therefore affirmed.

McCORMICK v. STATE.

Opinion delivered January 12, 1920.

1. PARENT AND CHILD—ABANDONMENT OF CHILD.—A father may be prosecuted for abandonment of an infant child, under Acts 1909, page 134, without showing that he had abandoned the child's mother.
2. PARENT AND CHILD—ABANDONMENT OF CHILD—EFFECT OF RETURN.—Where a father abandoned his infant child, it was no defense that after such abandonment he returned to his wife and child if his return was not in good faith and was merely to avoid prosecution with intent to leave after adjournment of court.
3. WITNESSES—CROSS-EXAMINATION.—Where, in a prosecution for child abandonment, defendant testified that he was not able to support the child, it was proper to permit the State on cross-examination to show his earnings for the purpose of contradicting his testimony in chief.

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

O. A. Featherston, for appellant.

The offenses charged were inseparable and two misdemeanors. There was no demurrer. 32 Ark. 204. Both wife and child abandonment were charged, and the burden was on the State to prove every constituent element of the offense charged. 70 S. W. 130. It was necessary to prove that the refusal or neglect was without "lawful cause." Chambelayne, Mod. Law of Ev., vol. 2, sec. 960; Enc. of Ev., p. 802 (d), 804 (2); Greenl. on Ev. (16 Ed.), § 80. There is no evidence to support the verdict and defendant was deprived of a fair trial by the testimony as to abandonment before he and his wife were reunited and the failure to show neglect or failure to provide *with-*

out cause. He had the right to show this, and that his acts were not without cause, especially after the condonation of the offense by the return of the wife.

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

1. It was not error to allow the prosecuting attorney to elect to sever and try defendant for child abandonment.

An affidavit or information before a justice may be amended in the circuit court to conform to the proof. 56 Ark. 444; 1 S. C. R. 365. Wife abandonment and child abandonment are separate crimes. Kirby's Digest, § 2230; *Chronister* v. *State.*

2. There was no error in permitting proof that defendant had not supported his child since prosecution was instituted. Such evidence was competent as showing his intentions and (1) he saved no exceptions nor (2) preserved exceptions in his motion for new trial and (3) the evidence was competent as showing defendant's motives and intentions at the time of abandonment and contradicting his statements that his failure was due to his inability.

HART, J. Oscar McCormick prosecutes this appeal to reverse a judgment of conviction against him for the crime of abandoning his infant child. On the 6th day of June, 1919, an affidavit was filed before a justice of the peace charging that Oscar McCormick, on or about the 5th day of May, 1919, committed the crime of wife and child abandonment. He was tried and convicted on the 28th day of June, 1919, and duly prosecuted an appeal to the circuit court. The prosecuting attorney elected to try the defendant on the charge of child abandonment and he was convicted before a jury of that offense.

The record shows that the child was only a few months old at the time the abandonment was charged. Hence it is insisted that the prosecuting attorney could not elect to try the defendant for child abandonment with-

out also trying him for abandoning his wife. The prosecuting attorney made his election in the circuit court to try the defendant on the charge of abandoning his child. The affidavit before the justice charged him with abandoning his wife and child.

The question of whether or not the defendant in the future could be tried on the charge of wife abandonment under this same affidavit does not arise on this appeal. We are only concerned with the question of whether or not he could be tried for abandoning the child without also showing that he had abandoned his wife. At common law that the husband neglects to support the wife in connection with his abandonment or desertion of her is not a criminal offense. *Ex parte Jackson,* 45 Ark. 158. Since then our Legislature has passed a statute making it a misdemeanor for a man, without good cause, to abandon or desert his wife or to abandon his child or children under the age of twelve years; or to fail, neglect or refuse to maintain or provide for such wife, child or children. Acts of 1909, page 134.

The general purpose of such a statute is to prevent the abandoned wife or child from becoming a public charge, and it has been upheld as a valid statute. *Green* v. *State,* 96 Ark. 175, and *Dempsey* v. *State,* 108 Ark. 76.

It will be noted that the statute provides for the punishment of the husband who, without good cause, abandons his wife or child and neglects and refuses to maintain and provide for them. It may be that the prosecuting attorney thought he could not maintain the charge against the defendant for abandoning his wife, but that he could maintain it for abandoning the child. The defendant might be convicted of abandoning or failing to support his child, and yet not be guilty of a like offense towards his wife. It is none the less his duty to support the child while being nurtured at its mother's breast, than it would be after it had grown large enough to be taken away from its mother. The State is interested in the marital relation and may enforce its obligation. It is essential to the welfare of society and the State that

the family should be supported and its members prevented from becoming a public charge. The law charges the expense of the family upon the husband, and makes it a misdemeanor for him to abandon or neglect to support his child, and he can not excuse himself from the performance of this duty in regard to the child by showing that he had good cause to abandon his wife.

The record shows that the husband first abandoned his wife and infant child and then went back to them and stayed with them for a month or two, but it is also shown that the defendant stated to a witness for the State that he was going back to his wife and stay with her until after court adjourned and then was going to quit her again.

It is claimed that because the husband returned to his wife that this constituted a condonation of the offense, and that his first abandonment of her and the child could not be proved in support of the charge against him. We can not agree with counsel in this contention. If the defendant did not intend in good faith to return to his wife and support her and the child, his return merely to avoid a prosecution during the term of the court was simulated and did not amount to an excuse for his past offense.

It has been held that where a husband's offer of a home is insincere and fraudulent with a view of evading the statute, the wife's refusal to accept the offer is no defense to a prosecution for abandonment and failure to support them. *People* v. *Harris,* 14 N. Y. Supp. 830; *People* v. *Frederick* (1894), 78 Hun 36, 28 N. Y. Supp. 1002 (affirmed on opinion below), 39 N. E. 21; *People* v. *Paaschen* (N. Y.), 174 N. Y. Supp. 406; *Baskins* v. *State,* (1914), (Court of Crim. App.), 171 S. W. 723.

In the case at bar the wife did not know that his return was merely for the purpose of preventing a prosecution under the statute, and his return under such circumstances could not have the effect of excusing his past conduct.

It is also contended that the court erred in admitting testimony of the defendant's acts of abandonment and

failure to support the child subsequent to the date of the trial in the justice of the peace court. As a part of his defense, the defendant testified that he was not able to support his wife and child. He testified on cross-examination that he made something over $3 per day after he was convicted in the justice court, and that he devoted a part of this to the payment of his attorney's fees. He had testified that he was unable to support his child, and this testimony was admissible for the purpose of contradicting his testimony in chief. See *Ketchum* v. *State,* 125 Ark. 275, where, on the charge of the illegal sale of whiskey, the State was permitted to show sales made after the finding of the indictment in the same house to show knowledge on the part of the defendant that the illegal sale of whiskey was being carried on there, although he had denied any knowledge of that fact.

It is next insisted that the evidence is not sufficient to support the verdict. The wife of the defendant testified that the defendant abandoned her and their infant child when it was only a few months old, and that he failed to support her and the child. It is true he was sick a part of the time, but after he got well he still abandoned his wife and child and neglected and refused to support them. This testimony was sufficient to warrant the verdict. *Dempsey* v. *State,* 108 Ark. 76.

It follows that the judgment must be affirmed.

HUCKABY v. WALKER.

Opinion delivered January 12, 1920.

1. LANDLORD AND TENANT—RIGHT TO WAY-GOING CROP.—Where a lease for one year contained no provision that the tenants could gather the cotton crop after expiration of the tenancy, and there was no proof of a local custom to that effect, it was error to instruct that tenants had a reasonable time after termination of their lease to enter the land and remove the crop.
2. LANDLORD AND TENANT—RIGHT TO WAY-GOING CROPS.—At common law, in the absence of any custom to the contrary, where a lease for a term certain is silent as to who shall be entitled to growing crops at the end of the term, the tenant is not entitled to such crops.

Appeal from Clay Circuit Court, Eastern District; *R. H. Dudley,* Judge; reversed.

STATEMENT OF FACTS.

A. B. and J. C. Walker brought separate suits against A. H. Huckaby before a justice of the peace to recover the value of certain lint cotton. A verdict was rendered in favor of the plaintiff in each case in the justice court, and the defendant appealed to the circuit court. There the cases were consolidated for the purpose of trial.

M. C. Doom owned a farm in the Eastern District of Clay County, Arkansas, and rented it under a written contract to A. B. Walker for the year 1917. The Walkers entered into possession of the farm and planted a part of it in cotton. In August, 1917, Doom sold the farm to the defendant, A. H. Huckaby.

According to the testimony of J. C. Walker, he cultivated twenty-five acres of cotton on the Doom farm in 1917. He picked over his cotton one time in the fall; then the weather became bad, and it kept snowing all the time. The snow did not go off of the ground in time for him to pick any cotton before the first of the year 1918. Huckaby purchased the land in August, 1917, and then made a contract to rent the place for the year 1918. Walker stayed on the place until some time in February, 1918, and then made an agreement with Huckaby to give up the place and move to another one which he had purchased. It was part of their agreement that Huckaby would give him further time within which to gather and haul away the cotton which remained in the field. J. C. Walker picked some of the cotton, and some time in March Huckaby and his children entered the field and picked the cotton for the value of which this suit was brought.

According to the testimony of A. B. Walker, he also rented a part of the Doom place for the year 1917, and planted a part of it in cotton. He picked the cotton over one time before the bad weather set in. It then began to snow and snowed at intervals until the last week in February, 1918. From the time it began to snow until the

first of March, 1918, there was snow on the ground continuously and the cotton could not be picked. In March, 1918, Huckaby and his children picked the cotton which remained in the field and refused to account to A. B. Walker for it.

According to the testimony of A. H. Huckaby, there was no understanding about the cotton in the field at the time the Walkers moved and gave up the land. Huckaby did not make any agreement with the Walkers that they might pick cotton after their tenancy had expired and they had left the place.

The jury returned a verdict for the plaintiffs and the defendant has appealed.

Huddleston, Fuhr & Futrell, for appellant.

The court erred in giving instruction No. 1 for plaintiffs, telling the jury that plaintiffs had a reasonable time after the termination of their lease to enter the land and remove the cotton. It is abstract; it is not the law and gives rights plaintiffs were not entitled to. Tiedeman on Real Prop., § 170, p. 225; 2 Blackstone, Com. 150; Tiedeman, Real Prop., § 69; 67 Iowa 829; Tiffany, Landl. & Ten., 156; 2 *Id.*, p. 1470; 17 Atl. 39; 50 Mo. 348; 71 *Id.* 597. Being tenants at sufferance and having vacated and abandoned the premises, plaintiffs had no right to return and gather the crop. *Supra.*

T. W. Davis and *S. C. Costen,* for appellee.

Plaintiffs were not tenants at sufferance after January 1, 1918. 24 Cyc. 1041. They were entitled to emblements. 24 Cyc. 1040; 71 Ark. 302-304. After the termination of the lease the tenant has a reasonable time to remove his crops. 35 L. R. A. (N. S.) 707 and note; 98 Miss. 636; 54 So. Rep. 77. There was no error in instruction No. 1 nor in refusing defendant's instructions. Cases *supra.*

HART, J., (after stating the facts.) It will be remembered that the plaintiffs rented the land from Doom for the year 1917, and that in August of that year Doom

sold the land to the defendant, Huckaby. The cotton, the value of which is sued for in this case, was raised in 1917. The tenancy of the Walkers expired on the first day of January, 1918, and their lease did not contain any provision with reference to their right to go on the land and gather their crop after the expiration of their tenancy. The court instructed the jury that, in the absence of a provision to the contrary, the law provides that the plaintiffs might have reasonable time after the expiration of their tenancy within which to go upon the land and finish gathering and removing their crop.

The plaintiffs seek to uphold the judgment upon the authority of *Opperman* v. *Littlejohn* (Miss.), 35 L. R. A. (N. S.) 707. In that case the court held that a tenant of land for a year may, after the termination of the year, take away within a reasonable time a crop which stood matured on the land at the expiration of the lease. The court, also, held that in this respect there was no difference between a crop which had been severed and not removed and a crop matured and ready for severance. We can not agree with this decision. At common law where land is leased for a term certain and the lease is silent as to who shall be entitled to the growing crops at the end of the term, the tenant is not entitled to such crops. It has been generally held, however, that the rule of the common law that a tenant for years, or from year to year, can not claim crops growing on the land at the end of the term is subject to an exception where there is a custom to the contrary. A custom of this kind has been generally held to be good and reasonable, particularly in the case of a tenancy from year to year of agricultural land. It has been said that this custom is based upon justice and equity and tends to the promotion and protection of agriculture which has always been generally favored by the courts. Underhill on Landlord and Tenant, volume 2, par. 769-770; Tiffany on Landlord and Tenant, volume 2, par. 251, p. 1637; Taylor on Landlord and Tenant (9 Ed.), volume 2, paragraphs 538-540, and 24 Cyc. 1069. Where the lease contract is silent in the

respect mentioned, the custom may be reasonably understood as forming part of the contract and does not alter or contradict it. The custom, to be admissible, must be proved to have been known to the parties or to be so general and well established in the particular locality that knowledge and adoption of it may be presumed. There was no proof in the present case that it was the custom of the locality in question that the off-going tenant should have the way-going crops.

Therefore, the court erred in telling the jury that the plaintiffs had a reasonable time after the termination of their lease to enter the land and gather and remove the cotton.

For this error the judgment must be reversed and the cause will be remanded for a new trial.

STATE v. BOWLIN'S ESTATE.

Opinion delivered January 12, 1920.

TAXATION—ASSESSMENT OF INHERITANCE TAX—REVIEW.—An appraisement of the value of an estate of inheritance made by an appraiser duly appointed by the probate court is not subject to review by the courts, in the absence of a charge of fraud or that any illegal principles of valuation were adopted.

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

STATEMENT OF FACTS.

William Bowlin died testate on the 31st day of December, 1915, in Crawford County, Arkansas, owning a valuable estate consisting of both real and personal property. John M. Weaver was duly appointed executor of his will, and upon application to the probate court was also appointed to appraise the value of the estate for the purpose of ascertaining the amount of inheritance taxes to be made thereon. Weaver made an appraisement of the estate and made his report in writing to the probate court.

The Attorney General filed exceptions to the report of the appraisement, alleging that the real estate had been valued too low. The exceptions of the State were overruled by the probate court, and the State appealed to the circuit court. There a motion was made to dismiss the exceptions of the State to the report of the appraiser. The motion was sustained by the circuit court, and judgment rendered accordingly. The State has appealed.

John D. Arbuckle, Attorney General, and *E. L. Matlock,* for appellant.

The court erred in holding as matter of law that the State is bound by the appraisement. Acts 1913, p. 824, par. 1 and § 13, etc. The report of appraisement was merely the basis upon which the probate court might fix the amount of tax to be paid, and the State had the right to object and except to the report. 132 Ark. 138. The appraisement is vital to the State, and the State had the right to question it.

L. H. Southmayd and *S. R. Chew,* for appellee.

1. The act of the probate court is not a judicial act, but merely ministerial and administrative and not subject to review. 120 Ark. 295, 297; 132 *Id.* 138-140; 37 Cyc. 1614 and note; 48 Ala. 386-9; 135 U. S. 473; 218 Fed. 380; 146 Pac. 912; 156 *Id.* 124; 148 U. S. 32-43; 46 Ark. 383-386.

2. Courts will not review decisions of boards of assessment for mere errors of valuation, and no right of appeal is given the State by the act, and the State is bound by the value of the estate as fixed by the probate court. 63 Ark. 576-8; 90 *Id.* 417; 94 *Id.* 217; 106 *Id.* 248.

HART, J., (after stating the facts). Bowlin died in 1915, and the inheritance tax law passed by the Legislature in 1913 governs. Acts of 1913, p. 824. Section 13 provides that when the value of the inheritance is uncertain, the probate court, on the application of any interested party, at the instance of the Attorney General, or upon its own motion, shall appoint some competent per-

son as appraiser, who shall be sworn officer of the court, and whose duty it shall be to appraise the property and make a report thereof in writing to the probate court in the manner provided by the act.

An appraisement of the property was duly made in accordance with the provisions of this section of the statute, and the State appealed to the circuit court from an order of the probate court refusing to set aside the appraisement on the ground that the property had been undervalued. No provision for an appeal is made in the statute, and the circuit court properly dismissed the State's appeal. Without the assessment of property there can be no taxation and the government would be without means of support. According to the uniform current of authority, it has been held that the assessment and valuation of property for the purpose of taxation are entirely statutory, and that the right to secure a review of its valuation is purely statutory. Hence it was within the power of the Legislature to provide what officer or board should be the final judge of the valuation to be placed upon property listed for taxation.

The record shows that the assessment in the case at bar was made by the proper officer and in conformity to the mode prescribed by statute. Hence the finding of the officer was not subject to review by the circuit court unless the right to an appeal had been conferred by the statute. Cooley on Taxation (3 Ed.), vol. 2, pp. 1379-1396; *Hughes* v. *Parker,* 148 Ind. 692; *Marion County Court* v. *Wilson* (Ky.), 49 S. W. 8; *Paducah St. R. Co.* v. *McCracken* (Ky.), 49 S. W. 178; *Hower's Appeal,* 127 Pa. St. 134; *Olympia Water Works* v. *Board of Equalization,* 14 Wash. 268.

It has been held by this court, under statutes with regard to assessment of property for general taxation that the courts are powerless to revise an assessment of property made by the proper authorities when the assessment has been honestly made upon property subject to taxation and upon a proper basis. *Wells Fargo & Co. Exp.* v. *Crawford County,* 63 Ark. 576, 588; *Clay*

County v. *Brown Lumber Co.*, 90 Ark. 417; *State* v. *Little*, 94 Ark. 217, and *State ex rel.* v. *K. C. & M. Ry. & Bridge Co.*, 106 Ark. 248.

In the present case no fraud is charged, and it is not alleged that any illegal principles of valuation were adopted. Hence the statutory remedy is exclusive, and, no right of appeal having been conferred by the statute, the court properly dismissed the State's appeal from the judgment of the probate court.

It follows that the judgment will be affirmed.

BELL *v.* GENTRY.

Opinion delivered January 12, 1920.

1. WILLS—CONSTRUCTION.—A will is to be construed as a whole for the purpose of ascertaining the disposition which the testator intended to make of his estate.
2. WILLS—CONSTRUCTION—FEE TAIL.—Under a devise to testator's widow "as long as she shall remain unmarried and my widow, with remainder thereof on her decease or marriage to my said children and their bodily heirs," the children at death of the widow who died without having remarried, took the fee as remaindermen, and not merely a life estate with remainder in fee to their children.
3. WILLS—VESTING OF ESTATES.—The law favors the vesting of estates as early as possible.

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

Langley & Johnson, for appellants.

1. Under the will of the father, Dennis McLendon and M. F. Smith took a fee simple title to their respective tracts. 58 Ark. 303; 3 *Id.* 147; 29 *Id.* 418; 13 *Id.* 88; 98 *Id.* 553; 116 *Id.* 565; 104 *Id.* 439; 105 *Id.* 458; 115 *Id.* 9; *Ib.* 184; 111 *Id.* 163; 22 *Id.* 567; 115 *Id.* 400. Under the will the widow took a life estate in all the lands, remainder to certain children. On the death of the widow the fee vested in Dennis McLendon and M. F. Smith to their respective lands. Cases *supra;* 23 Ark. 1. The language of the will does not create a fee tail but a fee simple

estate. 22 Hun. (N. Y.) 428; 1 N. Y. 491; Kirby's Digest, § 735; 52 Ill. 98; 3 Conn. 429; 4 W. Va. 320. This case falls squarely within 58 Ark. 303. See also 29 L. R. A. (N. S.) 935 and note.

Wills should be construed liberally and the intent of the testator carried out. 202 Mass. 512; 186 *Id.* 464; 122 N. W. 964; 195 N. Y. 486; 240 Ill. 492; Page on Wills, § 561; 1 Jones Real Prop., § 606; 2 Underhill on Wills, § 658.

2. If Dennis McClendon and M. F. Smith only took life estates, then the return of the purchase money with interest is the true rule. 181 S. W. 288; 66 Ark. 433; 43 *Id.* 450; 59 *Id.* 322; 54 *Id.* 195.

U. A. Gentry and *Jas. H. McCollum,* for appellee.

There is no question as to the estate granted under the will. 3 Ark. 147; 49 *Id.* 125; 75 *Id.* 19; 111 *Id.* 54. On the death of the widow, Dennis McLendon and M. F. Smith took a fee simple estate. 126 Ark. 53. See also 44 Ark. 458; 67 *Id.* 517; 94 *Id.* 615; 98 *Id.* 570; 115 *Id.* 400; 116 *Id.* 233; 128 *Id.* 149; 95 Ark. 21; 128 *Id.* 149; 98 Ark. 570; 111 *Id.* 54.

Appellee is entitled to recover for improvements. 2 Black on Rescission and Cancellation of Cont., p. 1465, § 635; 13 Ark. 291; 29 *Id.* 47; 50 *Id.* 447; 53 *Id.* 573; 61 *Id.* 363; 71 *Id.* 99.

W. C. Rodgers, amicus curiae.

The legal effect of the will was to vest in the children an estate in fee simple and comes clearly within the rule in Shelley's case. Tiedeman, Real Prop., § 433; 58 Ark. 307; 211 S. W. 183-4; Bingham on Descent, 233. Perpetuities are abhorred under our law and are void. 3 Ark. 147, 191. See also 213 S. W. 372; 116 Ark. 61-65.

SMITH, J. This appeal involves the construction of the will of James McClendon, who at his death was survived by his widow, who was also his executrix, and by seven children. After disposing of his personal property, the testator disposed of his lands as follows: "I devise

to my said executrix all the residue of my real estate as long as she shall remain unmarried and my widow with remainder thereof on her decease or marriage to my said children and their bodily heirs in the following manner:

"To my son Dennis (certain lands).

"To my daughter, M. F. Smith (certain lands)."

Other devises of land to the other five children in similar language were made.

The court below held that these children took only a life estate with remainder in fee to their children, and decreed accordingly, and this appeal questions the correctness of that holding.

It is a settled rule of construction that in arriving at the intent of a testator we read the will as a whole for the purpose of ascertaining the disposition which he intended to make of his estate, and when we have done so here we conclude that it was the intention of the testator to give his wife an estate for her life or for her widowhood with remainder cast upon the death or remarriage of the widow and that the remainder should vest upon the happening of the first of those events. This is the usual and ordinary meaning of the words "with remainder thereof *on* her decease or marriage to my said children and their bodily heirs." The will created a remainder and provided when it should vest, and that was on the decease or remarriage of the widow. In defining the heirs who should then take the testator employed words of procreation so that only those heirs special, rather than the heirs general, took under the will; but the rights of these heirs became fixed when the remainder was cast, which event proved to be the death of the widow, as she died without having remarried. *Harrington* v. *Cooper,* 126 Ark. 53.

At the death of the widow, when the remainder was cast, the son, Dennis, and the daughter, M. F. Smith, survived her and they, therefore, took the fee as remaindermen. Had they, or either of them, died in the lifetime of their mother, their bodily heirs would have taken the

fee; and these bodily heirs would have taken as devisees under the will (and not by descent from Dennis or M. F.), they being the heirs special, or bodily heirs, *in esse* when the event happened upon which the remainder was to vest, that is the death of the testator's widow.

We are led to the conclusion announced, not only by a consideration of the language set out above, but by the settled rule of construction that the law favors the vesting of estates as early as possible, and we think the construction given this will effectuates the intent of the testator.

The litigation arose over an attempt to compel a prospective purchaser to take the title in question, which he had declined to do because he was advised that only a life estate would be conveyed, and the court below so decreed. That decree will be reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

HOWELL v. STATE.

Opinion delivered January 12, 1920.

1. RAPE AND CARNAL ABUSE—EVIDENCE.—In a prosecution for carnally knowing a female under 16, defendant, testifying in his own behalf, may be compelled on cross-examination to answer what his relationship with the girl was after she reached that age.
2. WITNESSES—IMPEACHMENT AS TO COLLATERAL MATTER.—In a prosecution for carnally knowing a female under 16, testimony contradicting that of the girl on direct examination that no man except defendant ever had carnally known her was competent; when a party in examination in chief is allowed to inquire about collateral facts, such testimony may be contradicted.

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

W. S. Coblentz, for appellant.

1. The court erred in refusing to permit the witness, Harris, to testify that he saw the prosecuting witness having sexual intercourse with McKinnon. 22 R.

C. L. 1211; 10 R. C. L. 936; 33 L. R. A. (N. S.) 477; 54 Ark. 25.

2. Also in excluding the testimony of Nonus Harris. 42 Pac. Rep. 953.

3. It was error to allow the prosecuting attorney to ask defendant as to acts of intercourse with the prosecutrix after she was 16 years of age. 97 S. W. 566.

4. The comments of the prosecuting attorney in his argument were prejudicial. 2 R. C. L. 419. There was on evidence to base them upon and they were without foundation.

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

1. There was no error in excluding the evidence offered. Evidence of intimacy with other men is inadmissible. 125 Ark. 272; 90 *Id.* 435; 72 *Id.* 409; 84 *Id.* 16; 15 *Id.* 624; 92 *Id.* 71; 103 *Id.* 119.

2. A cross-examining party is concluded by the answer the witness gives to a collateral matter, and no other evidence is allowable to contradict the witness. 99 Ark. 604; 34 *Id.* 480; 16 *Id.* 568; 103 *Id.* 119.

Cross-examination is largely within the discretion of the trial court. 103 Ark. 70.

3. There was no error in the remarks of the prosecuting attorney. 126 Ark. 354; 113 *Id.* 598.

SMITH, J. Appellant was convicted of carnally knowing one Carrie Sherman, a girl under the age of sixteen years. At the trial in the court below the prosecutrix, upon her direct examination, was asked if any man other than appellant had ever had sexual intercourse with her, and she answered that she had never had sexual intercourse with any man except appellant. Upon her cross-examination she repeated the statement. Appellant denied that he had sexual intercourse with the prosecutrix at the times and places stated by her, and while he admitted, upon his cross-examination, that he had had sexual intercourse with the prosecutrix, he stated this did not occur until after she was seventeen years old. Testi-

mony was offered in his behalf that another boy had had sexual intercourse with the girl; but this testimony was excluded.

Exceptions were saved to the action of the court in requiring appellant to answer the question whether he had had intercourse with the prosecutrix after she was sixteen years old. We think no error was committed in compelling appellant to answer what his relationship with the girl was after she became sixteen, as such testimony tended to show what the relationship between them was before she became sixteen.

We think, however, that error was committed in excluding the testimony contradicting the testimony of the prosecuting witness that no man except appellant had carnally known her. The rule announced in the case of *King* v. *State,* 106 Ark. 160, is not applicable here. There the testimony in regard to acts of intercourse with other men than the accused was brought out on cross-examination, and we said that as the testimony was collateral the answer of the witness, whether true or false, concluded the inquiry. But here the testimony was brought out by the State on the direct examination of the witness, and while she was cross-examined on this point that fact did not deprive appellant of the right to impeach her statement.

The identical question under consideration was passed upon in the case of *McArthur* v. *State,* 59 Ark. 435, where the court said: "The general rule is that when a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question; but this limitation only applies to answers in the cross-examination. It does not affect the answers to the examination in chief. Wharton's Crim. Ev. (8 Ed.), sec. 484; *State* v. *Sargent,* 32 Me. 429. When a party, in his examination in chief, is allowed to inquire about collateral acts, the opposing side will usually be allowed to contradict the witness by evidence showing to the contrary. The prosecuting attorney, after having asked Pearl Jones whether she had had sexual in-

tercourse with either of the sons of defendant, elected to proceed further, and to ask her if she ever had sexual intercourse with any man. It was, therefore, proper to allow defendant to contradict her by evidence tending to show that she had been guilty of such acts of illicit intercourse, though such evidence could not go in justification of the crime, but at most only to contradict and impeach the witness."

It is insisted that other rulings of the court were erroneous; but we think no other substantial error was committed.

For the error indicated the judgment is reversed and the cause remanded.

LEE v. STATE.

PALMER v. STATE.

Opinion delivered January 12, 1920.

1. ANIMALS—FAILURE TO DIP CATTLE—INDICTMENT.—An indictment alleging that defendant "unlawfully failed to dip his cattle" *held* sufficient.
2. ANIMALS—FAILURE TO DIP CATTLE—VARIANCE AS TO OWNERSHIP.—In a prosecution for failure to dip cattle, proof that the cattle did not belong to defendant, but to his wife, was immaterial where he assessed and paid taxes on the cattle in his own name and otherwise controlled them and his duty to dip was that of an owner.
3. ANIMALS—FAILURE TO DIP—DEFENSE.—One ordered to dip his cattle on certain days is criminally liable for failure to do so unless it was impossible to comply, and it was not error to refuse to instruct the jury to acquit if reasonable effort had been made to dip them.
4. ANIMALS—FAILURE TO DIP—DEFENSE.—It is no excuse for failure to dip cattle that some of the cattle dipped were scalded and otherwise injured, provided the mixture conformed to the formula prescribed by the State Board of Control.
5. ANIMALS—DUTY TO DIP CATTLE.—Placing a particular county or portion thereof in free area does not mean that dipping may not thereafter be required in such area.

6. CRIMINAL LAW—JUDICIAL NOTICE.—Although the courts will take judicial notice of general rules for the conduct of business which have been duly made and published by the Board of Control in tick eradication work, it can not take judicial notice of all actions taken by the board in the execution of such rules.

7. ANIMALS—TICK ERADICATION—RULES OF BOARD.—When the Board of Control adopted a rule that where systematic tick eradication is to be conducted in any county due notice of same will appear in one or more newspapers published in such county, the regulation makes notice a condition precedent to its enforcement, and it was error to exclude testimony to the effect that no such publication had been made.

Appeal from Union Circuit Court; *Chas. W. Smith,* Judge; reversed.

Powell & Smead, for appellant.

1. The demurrer should have been sustained to the indictment. It charges no offense. The rules and regulations promulgated by the Board of Control were not disobeyed. The county was in the free area, and it was no violation of law to fail to dip cattle in Union County after March 1, 1919. 208 S. W. 436 has not been overlooked, but is should be overruled. No rule requiring the dipping appears in the rules of the Board of Control, nor was any notice given or published. *Ashcraft* v. *State,* 140 Ark. 505.

2. It was error to exclude evidence of damage to cattle by the formula. *Boyer* v. *State, ante,* p. 84.

3. The court erred in refusing defendant's instructions 3 and 7 and in giving No. 1 for the State, also in refusing 5 and 6.

4. There was error in permitting the evidence as to facts occurring after the indictment.

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

1. The indictment is sufficient. 126 Ark. 561; 208 S. W. 436; Kirby's Digest, § 2229.

2. Notice was given. Courts take judicial notice of the rules of the Board of Control. 130 Ark. 453-6.

3. No defense that Union County is in the free area. Act 86, Acts 1915.

4. No error in excluding evidence of damage to cattle or refusing the instruction thereon. The mixture as testified to conforms to the formula prescribed by the board. 114 Ark. 398.

5. No error in giving No. 1 for the State or refusing Nos. 5 and 6 for defendant. *Ashcraft* v. *State,* 140 Ark. 505.

6. Evidence that appellant had not dipped cattle since the indictment was admissible. It was competent to impeach his statement as to his failure to dip at all.

SMITH, J. There is no connection between the two appeals disposed of in this opinion except that it has been found that both appeals can be disposed of in a single opinion, as substantially the same questions are raised in each case.

The indictment in each case alleged that appellant had "unlawfully failed to dip his cattle," and the sufficiency of this allegation is raised by demurrer. We have heretofore held against appellants' contention in this respect in the cases of *Palmer* v. *State,* 137 Ark. 160, and *Rider* v. *State,* 126 Ark. 501.

In the instant case of L. Palmer, it is insisted that, even though the indictment is held sufficient, there is a variance between it and the proof, in that it is shown that the cattle which he failed to dip belonged to his wife. That fact is immaterial, however, under the testimony in this case, as it is shown that appellant Palmer assessed and paid the taxes on the cattle in his own name and otherwise controlled them; and his duty to dip was that of an owner. The case is analogous to that of an indictment for larceny where proof of special ownership is held sufficient to sustain a conviction under a general allegation of ownership.

Various excuses were offered by each of the appellants to justify their failure to dip, as, for instance, on one occasion one of the appellants had lost a valuable young mule the day before the dipping was to be done.

Other excuses were that the cattle had strayed from their customary range and that it had been impossible to herd them in time for the dipping; and instructions were asked which in effect told the jury to acquit if a reasonable effort had been made to dip on the regular dipping days. These instructions were properly refused, as the testimony did not show an impossibility to comply with the regulations. *Ashcraft* v. *State,* 140 Ark. 505.

There was testimony that when the dipping vats were properly prepared the chemical preparation did not injure the cattle, and an offer was made to show that cattle were scalded and otherwise injured, and upon this testimony instructions were asked to the effect that if cattle were injured as a result of being dipped failure to dip would not be unlawful. These instructions were properly refused. The dipping would be required, even though some cattle were injured, if the mixture conformed to the formula prescribed by the State Board of Control. *Boyer* v. *State, ante,* p. 84.

It is argued that the testimony shows that the formula prescribed by the Board of Control was not used. The record does have the inspector say that in charging his vat he used 24 barrels of sal soda, but it is apparent that the statement should have read 24 pounds, as in answer to the question, "How did you prepare the sal soda for the vat?" the inspector answered, "Mixed it in a can."

Other assignments of error are discussed in the brief, but without setting them out we think it suffices to say that in other cases involving the enforcement of the rules and regulations of the Board of Control in tick eradication work we have held adversely to appellants' contentions.

It does appear, however, that both cases under consideration originated in Union County, and that the failure to dip was committed subsequently to March 1, 1919, that being the day when Union County was placed in what is known as free area, that is, territory in which tick eradication work was supposed to be complete, where

cattle from such territory may lawfully be shipped to uninfected territory without complying with certain rules and regulations applying in shipments from infected territory to uninfected territory.

Placing a particular county or a portion thereof in free area does not mean, however, that dipping may not thereafter be required in such county or community. The rules of the Board of Control provide that it may be done. Systematic dipping may be required. Regulation No. 5 on the subject of "Systematic Work" is as follows: "When systematic tick eradication work is to be conducted in any county of this district, due notice of same will appear in one or more newspapers of general circulation published in said county. In counties or portions of counties where systematic tick eradication work is being conducted under the regulations of this board, it shall be the duty of all persons owning or having charge of any cattle to dip all their cattle every fourteen days under the supervision of a duly authorized inspector of this board unless they receive written notice that they are not required to dip their cattle."

An offer was made to show that the notice here provided for was not given; but this testimony was excluded, and that action of the court is defended in the brief on behalf of the State in the following argument there found: "Appellant complains of the action of the court in excluding testimony offered which would have shown that the Board of Control had passed no resolution requiring the dipping of cattle in Union County. We think we have covered this matter in our brief in the Lee case. That was a matter of which the trial court and this court on appeal take judicial notice. It is not a matter of proof and cannot be offered by the State or by the defendant in evidence. The court judicially knows whether this resolution was passed or this order promulgated or not. Proof that it was or that it was not is not only unnecessary but incompetent. The question cannot be submitted to the jury, but was wholly a question for the court to determine, and the court should determine it, not from the

evidence offered, but from the facts which come to the judicial knowledge of the court." We do not agree with this argument. It is true we have several times held, and in this opinion have reaffirmed the holding, that we take judicial knowledge of the rules and regulations promulgated by the State Board of Control, and that it is unnecessary, therefore, to set out these rules in an indictment charging their violation. Our more recent cases to that effect are bottomed upon the case of *K. C. So. Ry. Co.* v. *State*, 90 Ark. 343, where it was said: " 'When a statute authorizes executive officers to make general rules for the conduct of public business, and such rules are duly made and published, the courts will take judicial notice of them.' 7 Enc. of Evidence, 990; 16 Cyc. 903; *Caha* v. *United States*, 152 U. S. 211."

But it would be a very great extension of the doctrine of that case to hold that we not only take judicial notice of general rules for the conduct of public business which have been duly made and published by the Board of Control, but that we also take judicial notice of all actions taken by the board in the execution of these rules. The board, as well as the public, is bound by its own rules, and the public has a right to expect compliance therewith on the part of the board. The regulation set out above provides that where systematic tick eradication work is to be conducted in any county, due notice of same will appear in one or more newspapers of general circulation published in said county. The regulation itself makes this notice a condition precedent to the enforcement of regulations requiring dipping to be done, and the court should not, therefore, have excluded the testimony upon this subject, and for that error the judgment will be reversed, and the causes remanded for a new trial.

MALLORY v. STATE.

Opinion delivered January 12, 1920.

1. JURY—FIXED OPINION AS DISQUALIFICATION.—Veniremen who testified on their *voir dire* that they had each formed a fixed opinion as to defendant's guilt, based upon statements made by persons not witnesses who professed to relate the facts as they occcurred, and that it would require testimony to remove or change their respective opinions, but that they could and would disregard such opinions and try the case according to the law and evidence, were competent as jurors.
2. JURY—QUALIFICATION AS ELECTOR.—It was not error to accept a veniremen who testified on September 27, 1919, that he was 22 years old and had never paid a poll tax, where it does not appear when he became of age, as he may have just reached that age, in which case he was not delinquent in paying his poll tax.
3. CRIMINAL LAW—INSTRUCTION.—A verbal statement of a special judge that "The county has been put to an enormous cost in trying this case. * * * I expect to sit until you reach a verdict" —*held* not a threat but an admonition of the ills attendant upon disagreement, with assurance that ample time would be given for deliberation.
4. HOMICIDE—EVIDENCE OF MOTIVE.—In a prosecution for murder, where defendant was permitted to testify that he sought deceased for an explanation of a difficulty, he was not prejudiced by a refusal to allow him to go into further detail concerning his motive.
5. CRIMINAL LAW—RES GESTAE—SELF-SERVING DECLARATIONS.—Evidence that defendant told the officer immediately after he was arrested that he had a pistol at the time he stabbed deceased but did not use it was incompetent, being too remote to constitute part of *res gestae* and also being a self-serving declaration.
6. CRIMINAL LAW—INSTRUCTIONS CONSIDERED AS A WHOLE.—The objection that an instruction on self-defense omitted to tell the jury to consider the facts as they appeared to defendant was met where other instructions covered that point.
7. HOMICIDE—FAILURE TO CHARGE AS TO ASSAULT.—It was not error to refuse to charge upon the law of assault in a homicide case where defendant was guilty of manslaughter or nothing.

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

R. J. Williams and *M. B. Norfleet, Jr.*, for appellant.

1. It was error for the court to hold that Tom Hampton, Jesse Pharr and C. E. Phillips were compe-

tent jurors. They had expressed opinions on the case and were disqualified as jurors. 45 Ark. 170; Const., art. 2, § 10.

2. The court erred in giving the State's instructions and by the refusal of the one asked by defendant as to what constituted an assault.

3. Defendant was prejudiced by the charge of Special Judge J. Walker Morrow.

4. It was error to refuse appellant the right to show why he was seeking the deceased, Connerly. 43 S. E. 230.

5. It was error to refuse to permit defendant to tell what he said to Mr. Lacefield after he was placed in jail. It was part of the *res gestae.* 43 Ark. 99; *Ib.* 289; 1 Greenl. on Ev., § § 108, 111; Wharton, Cr. Ev., § § 262, 270; 43 Ark. 103.

6. The jurors rejected were duly qualified. Kirby & Castle's Digest, § § 5217-18; Const. Amend. No. 9, art. 28; 68 Ark. 464.

7. It was error to refuse instruction No. 1 for defendant. 11 Pickle (Tenn.), 137.

8. It was lawful for defendant to show his purpose in seeking deceased or in going to the scene of the homicide. 52 W. Va. 132; 43 S. E. 230; 22 Mont. 92; 55 Pac. 927; 26 Tex. 107. Defendant's purpose was lawful. *Supra.* Statements of deceased reflecting upon the character of defendant and his female relatives are admissible in his behalf as to his motive. 15 Ky. L. Rep. 562; 24 S. W. 611; 26 *Id.* 201.

9. It was error to give No. 3 for the State. It is misleading, argumentative and ambiguous. 6 Mo. App. 592; 8 Peters 399; 24 Cal. 14; 5 Nev. 337.

10. The verbal remarks of Special Judge Morrow were prejudicial. 117 Ark. 81.

11. Instructions as to the lower grade of homicide should have been given. 36 Kan. 187; 105 Mo. 38; 1 Tex. App. 225; 98 Mo. 150; 13 Ky. Law Rep. 313; 73 Mo. 592.

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

1. There was no proper bill of exceptions. 84 Ark. 241; 103 *Id.* 21; 47 *Id.* 180; 79 *Id.* 127.

2. It is not necessary to be an elector to be a qualified juryman in Arkansas, as the statute is silent as to qualifications of petit jurors.

3. No error in giving instruction No. 3. 74 Ark. 431; 62 *Id.* 286; 109 *Id.* 475; 93 *Id.* 409.

4. No error in instruction or statement of the special judge. 98 Ark. 83; 111 *Id.* 272; 134 *Id.* 528.

5. No error in refusing defendant the right to testify as to his purpose in seeking the deceased. It was immaterial.

6. No error in refusing to let defendant testify what he told the deputy sheriff after he was in jail. The statements were too remote to be *res gestae.*

HUMPHREYS, J. Appellant was indicted and tried in the St. Francis Circuit Court for murder in the first degree for killing James Connerly in the courthouse yard at Forrest City. The trial resulted in a conviction for manslaughter and a sentence, as punishment therefor, to the State penitentiary for seven years. From the judgment of conviction an appeal has been duly prosecuted to this court. In the formation of the jury to try appellant, Tom Hampton, Jesse Pharr and C. E. Phillips, on their *voir dire,* testified severally, in substance, that each had formed, expressed, and had a fixed opinion as to the appellant's guilt, which had been formed from statements made by parties who professed to relate the facts as they occurred, and that it would require testimony to remove or change their respective opinions. In response to the questions propounded by the court, each testified that he could and would disregard the opinion and try the case according to the law and evidence, or, at least, each thought he could. Wm. Billingsley, another venireman, testified, on September 27, 1919, that he was 22 years of age and had never paid a poll tax. The court held each

of the veniremen qualified, over the objection and exception of appellant, and he was compelled to exhaust his peremptory challenges in challenging them, and, on this account was prevented from peremptorily challenging Ed Clegg, who qualified as a juror.

On Sunday morning, May 25, 1919, between eight and nine o'clock, James Connerly had a difficulty with Emmett Mallory, appellant's uncle, at Crawford's restaurant in Forrest City. They both left the restaurant, Emmett Mallory leaving first. A short time thereafter, appellant and Reuben Mallory came to the restaurant and inquired for James Connerly. Not finding him, they went to the depot, from which place they were taken, by request, in Will Dooley's car, to Dr. Aldridge's residence where Connerly frequently visited. In the meantime, Connerly had been arrested and placed in the custody of George Dooley in the courthouse yard, while the officer who arrested him went to arrest Emmett Mallory.

According to the State's evidence, Connerly was sitting on an urn in the courthouse yard near his custodian, Dooley, when appellant, in company with Reuben Mallory, came hurriedly into the courtyard and approached Connerly. After they passed Dooley, he observed a knife in appellant's hand. Appellant said something to Connerly about abusing an old man and cursed him. Dooley hallooed to him to stop, but, notwithstanding, appellant stabbed Connerly twice while he was raising up and before he got perfectly straight. Dooley grabbed his hand before he struck the third blow, but appellant broke away from Dooley, and, in the renewal of the conflict, both fell to the ground. Others came and assisted in separating the men, and, after both were on their feet, appellant reached around Dooley and cut Connerly in the back. Four knife wounds were found upon Connerly's body—two in front and two behind. One had penetrated the heart. The two front wounds were over four inches in depth. After the antagonists were separated, Connerly walked out of the courtyard into the alley where he soon died.

The evidence on behalf of appellant showed that he, in company with Reuben Mallory, upon hearing of the difficulty between appellant's uncle and Connerly, sought and found him for the purpose of obtaining an explanation of the difficulty. The court ruled that appellant could not show that his purpose in seeking an explanation was to effect a reconciliation between his uncle and Connerly, to which ruling an objection was made and exception saved; that when they found Connerly in the courtyard appellant requested an explanation of the difficulty, whereupon Connerly sprang to his feet and remarked: "I beat him up and I will beat you up, you s— of a b—;" that Connerly attacked him and threw his hand toward his pocket as if to draw a weapon, and appellant cut him twice before Dooley grabbed his hand; that, in a renewal of the conflict, they fell to the ground, and the cuts in the back were made during the scuffle; that appellant had a pistol during the difficulty, which he did not attempt to use. Appellant offered to prove that he told the deputy sheriff, Lacefield, immediately after his arrest and incarceration in the jail, that he had a pistol and did not use it. The court excluded this evidence over the objection and exception of appellant.

After the submission of the case to the jury, it became necessary for the regular judge to leave, and the Honorable J. Walker Morrow was elected special judge to preside in the absence of the regular judge. After the special judge assumed the bench, he sent for the jury, and, being informed that they had not reached a verdict, he read the instructions to them, which had been given by the regular judge, and, in addition, instructed them orally as follows:

"This is an intelligent jury and the county will not get one more so. The county has been put to an enormous cost in trying this case. I was selected to fill the place of the regular judge and I am prepared to do so, and I expect to sit until you reach a verdict. Take the case, gentlemen of the jury." Proper objections and exceptions were saved to the verbal statement.

It is contended that the court committed reversible error in holding Tom Hampton, Jesse Pharr and C. E. Phillips as qualified jurors. The several opinions held by the jurors were not based upon statements made to them by witnesses, so were necessarily formed from rumor or hearsay. Each testified that he could, or thought he could, disregard the opinion and try appellant according to the law and evidence. The record fails to show that either had any bias or prejudice against appellant. These facts being true, it is immaterial whether the several opinions were fixed and that it would take evidence to remove them. It was said in the case of *Jackson* v. *State,* 103 Ark. 169 (syllabus 1): "A juror is not disqualified in a criminal case by reason of a 'fixed' opinion based upon hearsay testimony or mere rumor, which opinion it would take evidence to remove, where he states that he can go into the jury box and disregard such opinion, and that he had no bias or prejudice for or against the accused." It is urged that the court erred in qualifying Wm. Billingsly as a juror because he was not an elector. Under the statutes of this State, a petit juror must be an elector. Kirby's Digest, section 4508. Billingsly testified on September 27, 1919, that he was 22 years of age, and that he had never paid a poll tax. He may have attained to the age of 22 on the date he testified. The record does not disclose anything to the contrary. If this be the case, he attained to the age of 21 after assessing time in 1918, and was not subject to the payment of a poll tax until after assessing time in 1919, and could not have been delinquent until after the expiration of the time for payment of the poll tax assessed against him in 1919. Article 28, Amendment No. 9, of the Constitution of the State of Arkansas of 1874, is as follows: "Every male citizen of the United States, or male person who has declared his intention of becoming a citizen of the same, of the age of twenty-one years, who has resided in the State twelve months, in the county six months, and in the precinct, town or ward one month, next preceding any election at which he may propose to vote, except such persons as may for the commis-

sion of some felony be deprived of the right to vote by law passed by the General Assembly, and who shall exhibit a poll tax receipt or other evidence that he has paid his poll tax at the time of collecting taxes next preceding such election, shall be allowed to vote at any election in the State of Arkansas. Provided, that persons who make satisfactory proof that they have attained the age of twenty-one years since the time of assessing taxes next preceding said election and possess the other necessary qualifications shall be permitted to vote, and provided further, that the said tax receipt shall be so marked by dated stamp or written endorsement by the judges of election to whom it may be first presented as to prevent the holder thereof from voting more than once at any election."

Our interpretation of the exemption clause in said amendment is that a minor who becomes of age after assessing time does not have to present evidence or a poll tax receipt showing payment of the poll tax at the time of collecting taxes next preceding the election in order to entitle him to vote at said election. In other words, the exemption relates to the time of assessing and not to the time of payment of taxes, as there is no duty to assess at all until after one has attained to the age of 21, and only then at the regular assessing time. The phrase "time next preceding for assessing taxes" in the proviso relates to the time for assessing the tax which was payable next preceding the date when the right to the elective franchise is to be determined, and not literally to the preceding assessing period of a tax which has not become payable under the law. The manifest purpose was to favor those who have just emerged from the disability of minority by exempting them from this requirement as a condition precedent to the exercise of the elective franchise until there has been delinquency in payment of a poll tax which could have been legally assessed; and after a citizen minor comes of full age he is entitled to the franchise until he falls delinquent in the payment of the poll tax legally assessable against him. Billingsley, being

otherwise qualified for jury service, was properly qualified by the court as being an elector under said amendment to the Constitution.

It is insisted that the court committed reversible error in making the verbal statement to the jury concerning the expense resulting from a disagreement and the length of the time he was willing to accord to them for deliberation on the case. We have carefully examined the statement, and are unable to interpret it a threat or persuasion to coerce the jury into the rendition of an unwilling verdict. It was an admonition "of the ills attendant upon a disagreement," an explanation of their duty to agree upon a verdict, if possible, with the assurance that they would be given ample time to deliberate. We think the admonition within the rule announced in *St. L., I. M. & S. R. Co.* v. *Carter,* 111 Ark. 272, and reiterated in *Whitley* v. *State,* 114 Ark. 243, and *Reed* v. *Rogers,* 134 Ark. 528.

It is insisted that the court erred in refusing to permit appellant to testify that his motive in seeking an explanation from Connerly of the difficulty between him and his uncle was to effect a reconciliation between them. The only object appellant could have in testifying to the excluded evidence would be to show that he was bent on a mission of peace. This object was accomplished when he was permitted to testify that he sought out Connerly for an explanation of the difficulty. The purpose having been accomplished, appellant was not prejudiced by the refusal of the court to allow him to go into further detail concerning his motive.

It is insisted that the court erred in refusing to permit appellant to testify concerning statements made by him to the deputy sheriff, after arrest and incarceration, concerning his pistol. The statements were too remote in point of time to be a part of the *res gestae.* They were also incompetent because in the nature of self-serving declarations.

It is insisted that the court erred in giving instruction No. 3, which is as follows: "You are instructed that

the law has such a strong regard for the sanctity of human life that one person may not kill another, even in his necessary self-defense, except as a last resort, and when he had done all in his power consistent with his safety to avoid the danger and avert the necessity of the killing; so in this case if you find from the evidence and circumstances, beyond a reasonable doubt, that the defendant could have reasonably avoided the danger to himself, and averted the necessity of killing the deceased, it was his duty to have done so." The vice contended for in the instruction is that it does not tell the jury that they must view the facts as they appeared to appellant. This point was covered by other instructions in the case, and, when all the instructions are read together, the vice contended for in this instruction is eliminated.

Lastly, it is insisted that the court committed reversible error in refusing to give appellant's requested instruction upon the law of assault. It is contended that appellant was entitled to instructions on the lower grade of the offense upon which he was charged. Death ensued from this assault, and, consequently, appellant was guilty of manslaughter or nothing. He was therefore not prejudiced by the refusal to charge the jury as to the law of assault.

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

JORDAN v. STATE.

Opinion delivered January 12, 1920.

1. GRAND JURY—DISCRIMINATION AGAINST AFRICAN RACE.—Where the jury commissioners selected electors to serve on the grand jury panel who possessed the statutory qualifications without reference to race or color, it was not error to refuse to discharge the regular panel on the ground that the African race had been discriminated against.
2. CRIMINAL LAW—CHANGE OF VENUE—CREDIBLE WITNESSES.—It was not error to deny a petition for change of venue where the examination of the supporting witnesses disclosed that they had heard a few men in several places in the county express animosity toward accused.

3. HOMICIDE—MURDER IN SECOND DEGREE—EVIDENCE.—Evidence *held* to warrant verdict of murder in the second degree.

4. WITNESSES—CROSS-EXAMINATION OF ACCUSED.—In a prosecution for murder there was no error in permitting accused to be asked on cross-examination concerning his conviction by court-martial for desertion while in the service in the army, as a defendant who takes the witness stand is subject to the same rules of evidence and impeachment as any other witness, and may be impeached by drawing out that he has been guilty of acts of moral turpitude, and especially of crime which reflects upon his integrity or credibility as a witness.

5. CRIMINAL LAW—HARMLESS ERROR.—An instruction in a homicide case which was applicable only to murder in the first degree was without prejudice where the jury convicted of murder in the second degree.

6. CRIMINAL LAW — INSTRUCTION — CIRCUMSTANTIAL EVIDENCE. — Where the State's main dependence was upon direct, and not circumstantial, evidence, there was no error in not embodying in an instruction the usual cautionary rule that circumstances must be consistent with guilt and inconsistent with innocence, as that rule is applicable only where the State relies entirely upon circumstantial evidence.

7. CRIMINAL LAW—INSTRUCTION—NECESSITY OF OBJECTION.—Where appellant made no objection below that an instruction was erroneous in failing to caution the jury as to circumstantial evidence, and offered no request for instruction on that point, he can not complain of the omission.

8. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—It was not error to refuse a requested instruction that was covered by another instruction given by the court.

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

A. A. Poff, P. S. Seamans and *X. O. Pindall,* for appellant.

1. The verdict is not supported by the evidence. The evidence is overwhelming that the deceased was the aggressor and completely to blame for his death and that he made a murderous assault on defendant.

2. It was error to refuse a change of venue, and the court abused its discretion in refusing. The petition and supporting affidavits were made according to law and the supporting witnesses were credible.

3. The court erred in allowing the State to ask defendant and requiring him to answer that he had been convicted of desertion from the United States Army. 70 Ark. 610; Underhill on Ev., § 246.

4. It was reversible error to give instruction No. 29 for the State on the law of abandonment of a combat. 63 Ark. 286.

5. No. 27 for the State was also error, as it improperly declared the law of circumstantial evidence.

6. The instructions to which defendant was most entitled were refused and nowhere covered. 64 Ark. 147.

7. The motion to discharge the panel should have been sustained. 10 Otto 322.

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

1. The question of abandonment of the combat and defendant's theory was submitted to the jury on proper instructions, and the jury by their verdict have settled the matter and the evidence supports the verdict.

2. The change of venue was properly denied. No proper showing was made. The witnesses were not shown to be credible persons. Kirby's Digest, § 2318. An order overruling a motion for change of venue on appeal is conclusive unless it appears the court abused its discretion. 98 Ark. 139; 85 *Id.* 536; 121 *Id.* 87; 103 *Id.* 70; 80 *Id.* 360. See also 85 *Id.* 514; 100 *Id.* 218; 125 *Id.* 597.

2. There was no error in the cross-examination of defendant as to his desertion. 75 Ark. 548; 114 *Id.* 239; 74 *Id.* 397; 100 *Id.* 199; 103 *Id.* 87; 100 *Id.* 321; 106 *Id.* 362.

3. There were no errors in the instructions. 104 Ark. 397; *Bost* v. *State,* 140 Ark. 254; 114 Ark. 398; 100 Otto 322.

HUMPHREYS, J. Appellant was indicted in the Drew Circuit Court for murder in the first degree for killing Sandy Haskell.

When the Drew County Circuit Court convened on the second Monday in September, 1919, a motion was filed in behalf of appellant to discharge the regular panel of the grand jury upon the ground that the African race had been discriminated against by the jury commissioners in the selection of a grand jury, in that no negroes were selected to serve. In response to the ground set forth in the motion, the jury commissioners gave testimony to the effect that they selected the jury with a view to getting electors of approved integrity, sound judgment and reasonable information, without regard to race or color. Over the objection and exception of appellant, the motion was overruled by the court.

Appellant then filed a petition for a change of venue, upon notice and in form required by law. Peter Phillips, William Henderson and John C. Jackson were the affiants to the petition. Their credibility as supporting witnesses was tested by an examination before the court concerning their knowledge of the prejudice existing in the minds of the inhabitants of Drew County against appellant. The sum total of their evidence was that they had heard a few people in Baxter, Blissville, Cominto, Monticello, Collins, Selma and Tillar express the opinion that since appellant had returned from France he was an upstart, did not care what he did and should be sent to the pen. It was admitted that the qualified electors in Drew County numbered 4,114, and that five-sixths of the qualified electors live in territory not visited by said affiants. Over the objection and exception of appellant, the court declined to grant a change of venue, and the cause proceeded to a hearing, which resulted in a conviction for murder in the second degree and a sentence to the State penitentiary for twenty-one years. From the judgment of conviction and sentence, an appeal has been duly prosecuted to this court.

Appellant, a negro twenty-nine years of age, served in the army in 1917-18 and '19. In January, 1918, he was convicted by a court-martial for desertion. After appellant's return to Drew County, on the morning of July

21st, he went in company with Homer Lewis, a boy fourteen years of age, to the Dabney place to hunt his father's horses. While on the place, near Will Graham's home, Sandy Haskell, a younger and larger negro, appeared with a shotgun and began to berate and threaten to kill appellant and his father, charging appellant with having mistreated and drawn a gun on him a few days before. Appellant denied having abused or assaulted Sandy, assumed a conciliatory attitude toward him, and during the controversy succeeded in getting behind a nearby tree. Sandy continued to abuse and threaten appellant, going to the extent of challenging him to draw his gun and come from behind the tree. At this juncture there is a conflict in the testimony on the part of the witnesses for the State and those for appellant. Upon the part of the State, Jessie Graham testified that she heard a shot which was fired after Sandy Haskell had started away from appellant in the direction of his home; J. D. Whitacre that he heard the shot, immediately turned his head and observed appellant holding a pistol around the tree and Sandy running from him (appellant) toward the witness; Dr. A. S. J. Collins, a graduate physician, experienced in surgery, that he examined the dead body of Sandy Haskell and found that death resulted from a gunshot wound that severed a large artery in the leg; that the ball from the gun entered from the back part of the right leg and came out just to one side of the knee cap.

The witnesses upon the part of appellant testified that when appellant fired the fatal shot, Sandy Haskell was pointing his gun in the direction of appellant, abusing, threatening to kill and challenging him to draw his gun and come from behind that tree.

It is insisted that the court committed reversible error in overruling the motion to discharge the regular panel of the grand jury. The allegation of discrimination against the African race by the jury commissioners in the selection of the grand jury is unsupported by evidence. On the contrary, it is established by the undisputed

evidence that the jury commissioners selected electors to serve on the panel who possessed the statutory qualifications without reference to race or color. The court did not err in overruling the motion.

It is next insisted that the court committed reversible error in overruling the petition for change of venue. One of the statutory requirements of affiants to a petition for a change of venue is that they shall be credible persons. Kirby's Digest, section 2318. One test of credibility within the meaning of that word, as used in the statute, is the knowledge of the affiant concerning the subject of inquiry. If he lacks knowledge, or is wanting in information as to the state of mind of the inhabitants concerning an accused, then the court would be warranted in finding that he is not worthy of belief on the question of whether the minds of the inhabitants of a county are so prejudiced against the accused that he cannot obtain a fair and impartial trial in the county. *Dewein* v. *State,* 120 Ark. 302. The affiants in the instant case were examined by the court, touching their credibility as witnesses in reference to the state of mind of the inhabitants of the county toward appellant. They had heard only a few men in a limited number of places in the county express any animosity or ill will toward appellant. We think the examination revealed a lack of knowledge on the part of affiants of the state of mind toward appellant of the citizens of a considerable portion of the county, much less of all portions of the county. The examination revealed that affiants were without any information concerning the state of mind of the citizens toward appellant in almost the entire county. Their knowledge was meager indeed, being limited to only a few people in a few localities in the county. There was no abuse of discretion of the court in denying the petition for change of venue under the particular facts in this case.

A reversal is insisted upon because the verdict is not supported by the evidence. Appellant's theory is that the entire evidence disclosed that Sandy Haskell was the aggressor and that appellant fired the fatal shot in nec-

essary self-defense. While there was much evidence tending to establish this theory, there was substantial evidence tending to show that Sandy Haskell had abandoned the difficulty and started home when appellant shot him. Jessie Graham testified that he had started away from appellant in the direction of his home when the shot was fired. J. D. Whitacre testified that immediately upon hearing the shot, he turned his head and Sandy was running away from appellant. Dr. A. S. J. Collins testified that deceased was shot from behind. The evidence just related is wholly inconsistent with the theory of appellant and entirely consistent with the theory of the State. Had the deceased been walking around the tree, pointing his gun at appellant and threatening to kill him when the fatal shot was fired, it is next to impossible to see how the ball could have entered from the rear, instead of on the side or in the front. In walking around the tree with his gun pointed at appellant when the fatal shot was fired, the deceased must necessarily have presented his side or front toward appellant. The entry of the ball behind the knee cap and its exit to the side of the knee cap, necessarily placed deceased's back, and not his front or side, toward appellant when he fired the shot that resulted in the death of Sandy. The verdict is sustained by sufficient substantial evidence.

It is insisted that the court committed reversible error in permitting the State's attorney to ask, and appellant to answer, concerning his conviction by a court-martial for desertion while in service in the army. A defendant who takes the witness stand is subject to the same rules of evidence and impeachment as any other witness. A witness may be impeached by drawing out of him on cross-examination that he has been guilty of acts of moral turpitude, and especially of crime, which reflect upon his integrity or credibility as a witness. *Hollingsworth* v. *State,* 53 Ark. 387; *Vance* v. *State,* 70 Ark. 272; *Hunt* v. *State,* 114 Ark. 239; *King* v. *State,* 106 Ark. 160.

It is insisted that the court committed reversible error in giving instruction No. 29, because it improperly

declared the law of abandonment, as applied to a combat. It is unnecessary to set out this instruction or to comment upon it further than to say it had application only to murder in the first degree. Appellant was not convicted of murder in the first degree, and therefore suffered no prejudice by the instruction if it carried the error insisted upon.

It is insisted that the court committed reversible error in giving instruction No. 27, which is as follows: "You are instructed that evidence is of two kinds, namely, direct and circumstantial, or that any fact in the case, or any element of the crime charged, may be proven by either kind or by both kinds of evidence; and if any fact in this case or any element necessary to constitute the crime charged have been established to your satisfaction beyond a reasonable doubt by either direct or circumstatial evidence, or by both kinds, then such fact or element has been sufficiently proven, and if upon consideration of all the facts proved in the case you believe beyond a reasonable doubt that the defendant is guilty, it is your duty to so find."

The vice contended for in the instruction is that it did not contain the usual cautionary rule applicable to circumstantial evidence to the effect that the circumstances must be consistent with guilt and inconsistent with the innocence of an accused. The cautionary rule contended for is only applicable in cases where the State relies entirely upon circumstantial evidence for a conviction. In the instant case, the State's main dependence was upon direct, and not circumstantial, evidence. Appellant, however, is in no position to complain if the cautionary rule, as applied to circumstantial evidence, was omitted from the instruction, because he made no suggestion that the instruction was erroneous for this reason, nor did he request an instruction on the point. *Price* v. *State,* 114 Ark. 398.

Lastly, it is insisted that the court committed reversible error in refusing to give appellant's request No. 7, which is as follows: "The court instructs the jury

that if Haskell, deceased, came up near to where the defendant was and attempted to shoot the defendant or to do him greatly bodily harm, the law in that case does not require him to retreat or withdraw, and he may stand his own ground and defend himself, and, if need be, kill his assailant, and such would be justifiable homicide, and the defendant is entitled to acquittal at your hands."

No error was committed in refusing to give the above instruction, because the court had already given it in substance in other instructions, especially instruction No. 4, requested by appellant and given by the court, which is as follows: "If you find from the evidence that at the time of the shooting of the deceased, Haskell, he, the said Haskell, was in the act of committing a murderous assault upon the defendant, Jordan, you are instructed that the said Jordan was under no obligation of law to retreat, but was justified if he stood his ground, and, if, necessary to save his life or prevent the said Haskell from inflicting on him great bodily harm, kill the said Sandy Haskell."

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

BROWN v. CREEKMORE.

Opinion delivered January 19, 1920.

1. WITNESSES — SUITS AGAINST SPECIAL ADMINISTRATORS.—Kirby's Digest, section 3093, providing that in actions by or against administrators, in which judgment may be entered for or against them, neither party may testify against the other as to any transactions with or statements of the intestate, unless called to testify thereto by the opposite party, is not resricted to regular administrators, but applies with equal force in a cause wherein an estate is represented by a special administrator.
2. JUDGMENT—RES JUDICATA.—A decree in a former action by decedent against defendant wherein the defendant filed a counterclaim, reciting that such counterclaim was disallowed as to the items constituting it, was *res judicata* in a subsequent action between the same parties wherein the defendant filed a counterclaim as to the same items.

3. EVIDENCE—PAROL EVIDENCE TO CONTRADICT DECREE.—Parol testimony is not competent to contradict the affirmative and unambiguous recitals of a decree concerning the subject-matter of the court's ruling.

4. CONSTITUTIONAL LAW—VESTED RIGHT.—Acts 1917, page 1441, defining a counterclaim, applied to suits pending at the time of its passage, as there can be no vested right in a mere remedy.

5. JUDGMENT—FAILURE TO SET UP COUNTERCLAIM.—Kirby's Digest, section 6098, providing that "a defendant may set forth as many grounds of defense, counterclaim and set-off, whether legal or equitable, as he may have," does not debar a defendant from setting up a matter of counterclaim which might have been set up in a former action by plaintiff against him.

6. JUDGMENT—FAILURE TO SET UP COUNTERCLAIM.—Kirby's Digest, section 6104, providing that where defendant fails to plead as a set-off a claim against the plaintiff he shall be "forever barred from recovering costs in any suit which he may thereafter institute," does not bar the cause of action itself by reason of failure to assert it as a cross-action.

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

W. A. Falconer and *Joe R. Brown,* for appellant.

1. The court erred in permitting defendant to testify as to transactions between him and appellant's decedent. Kirby's Digest, § 3093; 48 Ark. 133; 46 *Id.* 306; 50 *Id.* 157; 82 *Id.* 136; 123 *Id.* 266; 132 *Id.* 441. The clause applies also to special administrators, as the word "administrator" as used applies to all, whether general or special.

2. It was error to allow the defendant to set up a defense which was *res judicata* the matters which had been pleaded in the chancery decree and there decided. 20 Ark. 91. The special administrator is a privy to the deceased Vincenheller in representation. 22 Cyc. 388; 52 Ark. 411; 5 *Id.* 303, 424; 119 *Id.* 413; 108 *Id.* 574; 41 *Id.* 75; 76 *Id.* 423.

A judgment of a court of competent jurisdiction operates as a bar to all defenses, legal or equitable, pleaded, or which could have been pleaded. 76 Ark. 423; 57 *Id.* 500; 23 Cyc. 1215. On *res judicata,* see also 135 Ark. 450;

Herman on Estoppel and Res Judicata (Ed. 1886), page 279, § 244.

E. L. Matlock, for appellee.

1. Appellee was competent to testify, as he was not prohibited by our statute. Kirby Digest, § § 3093, 6029, 6300. These statutes do not preclude a party from testifying as to transactions with deceased where there is a special administrator. 35 Ark. 247; 38 *Id.* 631; 63 *Id.* 556; 87 *Id.* 242.

Appellee's claim was established by other competent evidence and Vincenheller's letters. 56 Ark. 385; 82 *Id.* 136.

2. The trial court did not err in permitting appellee to plead the decree in chancery. Appellee was a competent witness as to what was done by the court and not written in the decree or to explain any ambiguous recitals in said decree and to testify that the items claimed by him were not in fact put in issue or decided against him in said decree. 11 Ark. 666; Kirby's Digest, § § 6090, 6104. This statute was upheld in 66 Ark. 529. As to *res judicata,* see 136 Ark. 115; 55 *Id.* 286; 94 U. S. 608; 62 Ark. 76; 66 *Id.* 336; 96 *Id.* 87; 116 *Id.* 501; 121 *Id.* 594.

The burden was on defendants to prove the former adjudication, and they failed. If appellee was incompetent, there was enough competent evidence to sustain the verdict and the judgment should be affirmed.

McCULLOCH, C. J. Appellant's intestate, G. A. Vincenheller, instituted this action against appellee before a justice of the peace in Crawford County to recover a balance of $100, alleged to be due and unpaid on a promissory note executed by appellee. Vincenheller died while the cause was pending in the circuit court on appeal, and there was a revivor in the name of appellant as special administrator.

The note sued on was executed by appellee to Vincenheller for the sum of $500, but, according to the testimony adduced in the cause, it had been paid down to a

balance of $100, and appellee pleaded a counterclaim based on items aggregating the sum of $105, alleged to be owing to him by Vincenheller.

In the trial of the cause appellee was allowed, over appellant's objection, to testify concerning alleged transactions between him and Vincenheller which formed the basis of the items of appellee's counterclaim. This is assigned as error. Appellant also introduced in evidence a decree of the chancery court of Crawford County in a cause between the same parties which appellant claims constituted an adjudication adverse to appellee of the cause of action against Vincenheller set forth in the counterclaim. The court ruled against the plea of former adjudication and submitted the issue to the jury as to the merits of the counterclaim. The verdict was in appellee's favor for the full amount of the counterclaim, upon which the court rendered a judgment over in appellee's favor for the recovery of the sum of $5 against the estate of said decedent.

The ruling of the court in admitting the testimony of appellee concerning transactions with the decedent is defended on the ground that the statute excluding such testimony has no application to suits by or against special administrators. Constitution of 1874, Schedule, sec. 2; Kirby's Digest, sec. 3093.

The statute provides that "in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party." The operation of the statute is not restricted to regular administrators, but applies with equal force to a cause of action in which the estate of a decedent is represented by a special administrator. The fact that one of the parties appears in the action as the legal representative of an estate calls the statute into operation so as to exclude the testimony of either party concerning "any transaction with or statements of the testator."

The court erred, therefore, in admitting the testimony of appellee concerning his transactions with appellant's intestate.

We are also of the opinion that the court erred in failing to give effect to the prior adjudication of the chancery court concerning the cause of action set forth in appellee's counterclaim. Appellee and Vincenheller were parties to that suit, the latter being the plaintiff and the former being a defendant, and appellee filed a counterclaim setting forth the same items embraced in the counterclaim in the present action, except one item of $25, which will be referred to later. That portion of the decree which records the action of the court concerning the counterclaim reads as follows:

"On this 17th day of September, 1917, the same being one of the days of an adjourned term of the above entitled court, comes on for hearing the above entitled cause, comes the plaintiff, by his attorney, J. R. Brown, and defendant, Lynch Creekmore, by his attorney, E. L. Matlock, the other defendants failing to appear, and the cause is submitted upon the complaint and exhibit thereto, and the answer and counterclaim of the defendant, Lynch Creekmore, the replication of the plaintiff and the oral testimony adduced at the time. And, it appearing that the said defendants were duly served with process, and the defendant, Lynch Creekmore, having duly entered his appearance in this cause by filing an answer and counterclaim herein, which counterclaim was disallowed (the same comprising a claim of $50 against the plaintiff for services in collecting rents, $10 for building a fence, $10 for a pump put in for plaintiff and $10 for two small outhouses)."

The contention is that the chancery court did not decide the merits of the counterclaim, but dismissed it on the ground that the items set forth could not be made the subject-matter of a counterclaim because they did not arise "out of the contract or transactions set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action." Kirby's Digest, § 6099.

We think that the language of the decree clearly expresses the intention of the court to adjudicate the merits of the counterclaim and not merely to strike it out. The record recites that the answer and counterclaim were filed and that the cause was submitted "upon the complaint and exhibits thereto and the answer and counterclaim of the defendant" and that the "counterclaim was disallowed," there following a recital of the items constituting the counterclaim.

It was not competent to contradict by parol testimony the affirmative and unambiguous recitals of the decree concerning the subject-matter of the court's ruling. *Quisenberry* v. *Davis,* 136 Ark. 115.

The General Assembly of 1917 (Acts 1917, p. 1441) amended section 6099 of Kirby's Digest so as to read as follows:

"The counterclaim mentioned in this chapter may be any cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them."

The decree of the chancery court was rendered on September 17, 1917, and that court may or may not, as suggested by counsel for appellee, have rendered the decree on the counterclaim without being advised concerning the change in the law brought about by the enactment of the new statute, which had not then been printed, but, be that as it may, the chancery court had jurisdiction of the counterclaim, and its adjudication is conclusive between the parties. The new statute applied in the trial of that cause, even though the action was instituted in the chancery court before the enactment of the statute. There can be no vested right in a mere remedy, and the statute applied to causes of action pending at the time as well as those which were instituted thereafter.

In the present action the counterclaim embraced an item of $25 for the "use of house on Austin land for 1913" which said item was not embraced in the counterclaim adjudicated in the chancery court, and therefore appellee is not barred from asserting that item as a counterclaim in the present action. The fact that the cause

of action on that item was then existent and might have been asserted along with the other items does not bar the assertion of that cause of action in the present litigation. The rule that the defendant must plead all of the defenses does not apply to causes of action asserted by a plaintiff or to a cross-action asserted by a defendant. The statute (Kirby's Digest, § 6104) provides that where a defendant fails to plead as a set-off a claim against the plaintiff he shall be "forever barred from recovering costs in any suit which he may thereafter institute," but the cause of action itself is not barred by failure to assert it as a cross-action. This item of $25 was proved beyond dispute by a letter written by Vincenheller, and the evidence must be treated as undisputed, establishing appellee's right to recover that sum, and to use it as a set-off against appellant's cause of action. The other items of the counterclaim are, according to the undisputed evidence, barred by the former adjudication.

The judgment is therefore reversed, and, instead of remanding the cause, judgment will be entered here in favor of appellant for recovery of the undisputed amount of unpaid balance on the note, after crediting the sum of $25 due appellee on his counterclaim.

GRAY v. BRITTAIN.

Opinion delivered January 19, 1920.

1. STATUTES—EXTENSION BY REFERENCE TO TITLE.—Acts 1917, page 1708, section 3, adding the territory embraced in a certain tick eradication district to another tick eradication district, does not violate Constitution, article 5, section 23, prohibiting the Legislature from extending the provisions of a statute by reference to its title only.
2. STATUTES—EXTENSION BY REFERENCE TO TITLE.—That a statute transferring the territory of one tick eradication district to another referred to a prior statute to identify the territory transferred does not constitute an extension by reference to the title of such statute.

Appeal from Lee Chancery Court; *A. L. Hutchins*, Chancellor; affirmed.

J. Walker Morrow and *Henry G. Gatling,* for appellants.

Section 1 of act 91, Acts 1915, is unconstitutional and void, as it violates section 23, article 5, of the Constitution. It is an attempt to extend the provisions of the act by referring to the numbers of the section and act without re-enacting them. 52 Ark. 290; 49 *Id.* 131; 29 *Id.* 252; 13 Mich. 481; 200 S. W. 275.

McCULLOCH, C. J. The sole question involved on this case relates to the validity of the act of the General Assembly of 1917 (Acts 1917, vol. 2, p. 1708), abolishing the Northeast Arkansas Cattle Tick Eradication District and attaching the territory in that district to the Northwest Arkansas Tick Eradication District. The Northeast Arkansas Cattle Tick Eradication District was created by an act of the General Assembly of 1911, approved May 30, 1911, Act No. 358, Session of 1911. The district, as originally created, did not include Lee County and certain other counties in that locality, but there was an amendment by act of March 3, 1915, enlarging the boundaries of the Northeast Arkansas Cattle Tick Eradication District so as to include other counties, Lee County being among the number. There is no assault on the validity of that statute, which it is conceded was repealed by the act of March 24, 1917, *supra.*

The Northwest Arkansas Tick Eradication District was created by the act approved March 1, 1915, and the boundaries are described in the statute. Acts 1915, p. 338. Sections 1 and 2 of the act of March 24, 1917, expressly repeal the act of 1911, *supra,* creating the Northeast Arkansas Cattle Tick Eradication District, and the act of 1915, *supra,* adding territory thereto. Section 3 reads as follows:

"That all territory now embraced in the Northeast Arkansas Cattle Tick Eradication District is hereby annexed to and made a part of the Northwest Arkansas Tick Eradication District."

The basis of the attack on the validity of the statute is that section 3 was an attempt to extend the provisions

of a former statute by reference to title only in contravention of section 23 of article 5 of the Constitution, which reads 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."

The contention is unsound for the reason that the statute adding the territory embraced in the abolished district to the other district mentioned does not constitute an extension of a law by reference to title only. New territory may be added to any kind of special district by appropriate description of the territory without re-enacting the provisions of the law applicable to the area thus added. Where the statute merely adds new territory, the addition in that form does not constitute an extension of the law merely by reference to title. *Hermitage Special School District* v. *Ingalls Special School District,* 133 Ark. 157. Nor does the reference to the old statute creating the Northeast Arkansas Cattle Tick Eradication District for the purpose of describing the territory to be added to the other district constitute an extension of a law by reference to the title of a statute. The boundaries of the Northeast Arkansas Cattle Tick Eradication District were set forth in the statute creating that district and the territory embraced therein could be appropriately and sufficiently described by reference to that statute, as well as by reference to any other known record for the purpose of identifying the territory in dealing with it in a new legislative enactment. The fact that the method of description adopted is a reference to another public statute does not constitute, as before stated, an extension of a law by reference to the title of the statute. The result is the same as if the area were described as a certain county, or counties or a certain school district. The fact that those areas are created by a statute does not lessen the complete identity for descriptive purposes under their designated names.

The chancery court was correct in refusing to sustain the attack on the validity of the statute, and the decree is affirmed.

DAVIES v. HOT SPRINGS.

Opinion delivered January 19, 1920.

1. TAXATION—RESTRICTIONS ON POWER.—Unlimited power of taxation is an essential attribute of sovereignty, and restrictions on the power to impose a particular kind of tax must be found in the Constitution.
2. TAXATION — UNIFORMITY — PRIVILEGE TAXES.—The constitutional provisions respecting uniformity in taxation apply only to property taxes, and not to taxation of privileges.
3. TAXATION—CLASSIFICATION OF PRIVILEGES.—The State may select the privileges to be taxed, and the omission from the list to be taxed of a number of occupations does not constitute an unlawful discrimination, so long as there is no discrimination between persons in like situations and pursuing the same class of occupation.
4. TAXATION—EXEMPTION IN OCCUPATION TAX.—The exemption by act of February 19, 1919, page 82, of persons paying a tax to the city or State on gross incomes from the occupation tax which municipalities are authorized to impose, is not an unlawful discrimination.
5. STATUTES—PARTIAL INVALIDITY.—If the exemption in act of February 19, 1919, page 82, authorizing cities to tax occupations of persons paying a tax on gross incomes to the city or State is void, it does not invalidate the statute, except as to those classes of privileges to which the exception applies.
6. MUNICIPAL CORPORATIONS — REFERENDUM OF ORDINANCES — VALIDITY OF STATUTE.—If act of February 19, 1919, page 82, section 6, authorizing a referendum of an ordinance imposing an occupation tax be held to disqualify voters who have recently come of age, and whose names are not on the poll tax list, to sign the referendum petition, the act is not void, as the Legislature may confer or withhold the referendum, and may prescribe the terms on which it may be exercised.
7. TAXATION—MUNICIPAL OCCUPATION TAX.—Act of February 19, 1919, page 82, authorizing cities to tax occupations, authorizes the imposition of a tax, and not merely a license fee for purposes of regulation.

8. TAXATION—OCCUPATIONS.—While the State can not impose a license fee for purposes of regulation on a lawful business which needs no regulation, the power to tax even lawful occupations has no such restrictions upon it.
9. TAXATION—ENFORCEMENT OF LICENSE TAX.—Where the Legislature authorizes the imposition of a license tax by municipalities as a condition for the exercise of an occupation, it may authorize the imposition of a fine as a method of enforcing payment.
10. TAXATION—LICENSE TAX—REGULATION.—An ordinance imposing occupation taxes for revenue purposes need not provide for any system of regulation or inspection of the occupations taxed.
11. TAXATION—OCCUPATION TAX—CLASSIFICATION OF MERCHANTS.—An ordinance classifying merchants according to the amount of goods and merchandise carried in stock is not unreasonable or arbitrary.
12. TAXATION—OCCUPATION TAX—CLASSIFICATION OF PHYSICIANS AND LAWYERS.—An ordinance under act February 19, 1919, page 82, classifying physicians and attorneys for taxation by imposing a greater tax on those who have practiced ten years or longer violates the provision of the statute that no classification shall be based upon earnings or income.
13. MUNICIPAL CORPORATIONS—PARTIAL INVALIDITY OF ORDINANCE.—The discriminatory effect of an ordinance imposing a greater tax on lawyers and physicians who have practiced ten years or longer can be eliminated by striking out the excessive amount of the tax, leaving the ordinance effective as imposing the smaller tax on all lawyers and physicians.

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

R. G. Davies, for appellants.

The act as well as the ordinance of the city itself is void and unconstitutional. The statute provides an unjust and discriminatory method of classification, which renders it void and exempts from tax persons, firms, etc., who pay a tax to the city or State on gross incomes. The ordinance was not passed according to law nor published as required by law. 56 Ark. 370; 100 *Id.* 406; 40 *Id.* 105; 98 Mass. 219; 36 Ind. 90; 23 Mich. 457; Dillon, Munic. Corp., § 291 (299). The council had no authority to pass the ordinance, and it is void. 31 Ark. 462; 34 *Id.* 105-8; 27 *Id.* 467; 64 *Id.* 363. It also violates section 4 of said act and conflicts with it. 75 Ark. 458. It also violates

article 2, section 18 of the Constitution. 61 Ark. 226; 61 *Id.* 622; 103 *Id.* 298; 17 R. C. L. 474; 175 Ill. 445-458; 58 Miss. 478, 559; 34 Am. Dec. 636; 90 Ark. 127. It is void as an occupation tax and is opposed to public policy. 17 R. C. L. 480; 177 U. S. 183; 33 Fla. 162; 31 Am. St. 770; 127 Ind. 109; 34 Am. Dec. 628; 23 How. 437; 17 R. C. L. 635.

The ordinance is void both as a tax and as a license. 85 Ark. 509. Taxes can not be imposed as a license. 17 R. C. L. 639. Lawyers can not be thus discriminated against or deprived of a living. 64 Mo. 639; Cooley, Const. Lim., § § 495-521; 23 Gratt. 564; 4 Wall. 333; 101 Ark. 238. See also 88 Ark. 263; 96 *Id.* 199; 52 *Id.* 301; 93 *Id.* 612.

J. C. Marshall, amicus curiae.

The act is void as well as the ordinance. It exempts certain classes from the tax or license and is contradictory and discriminatory and is indefinite and uncertain in meaning. 49 L. R. A. (N. S.) 955; 57 *Id.* 348; 43 So. 1015; 51 L. R. A. 896-7; 16 *Id.* 608; 53 S. W. 882; 31 L. R. A. 522; 61 Ill. App. 374; 73 S. W. 1097; 76 N. E. 1121, etc.

J. H. Carmichael and *John F. Clifford, amici curiae.*

1. 46 Ark. 471 settles all the qeustions raised in favor of the city, because the 5th clause of section 3, act 1915, and act 94, Acts 1919, are almost identical, and the ordinance is in substantial compliance with the act, and the city authorities are in better position to make fair and equitable classification than either the court or Legislature. This case has been cited and approved in 124 Ark. 349; 70 *Id.* 555; 90 *Id.* 130; 93 Ark. 612; 37 L. R. A. (N. S.) 777.

2. As to the objection of class legislation, see 80 Ark. 333; 112 *Id.* 14; 52 *Id.* 228; 117 *Id.* 54; 85 *Id.* 512.

3. As to the referendum contention, see 45 Ark. 400; 49 *Id.* 376; 110 *Id.* 529; 67 *Id.* 594.

4. The ordinance is in substantial compliance with the act and such occupation or privilege tax acts have

often been sustained. 31 Kan. 151; 47 Am. Rep. 486; 25 Pac. 232; 12 *Id.* 310; 86 *Id.* 162; 10 *Id.* 99; 7 *Id.* 625; 89 *Id.* 10; 53 *Id.* 985; 30 L. R. A. 422; 17 L. R. A. (N. S.) 898; 184 U. S. 329; 100 N. C. 525.

A. J. Murphy, for appellee.

Neither the act nor ordinance is void for any of the reasons stated by appellants. 46 Ark. 471; 49 L. R. A. (N. S.) 954; 18 L. R. A. 409; 56 Ark. 331; 37 *Id.* 356.

McCULLOCH, C. J. Appellants are citizens of the city of Hot Springs, severally pursuing various avocations of business, trade and profession, and they instituted this action in the chancery court attacking the validity of an ordinance of said city, imposing a tax on occupations. Section 1 of the act of February 19, 1919 (General Acts 1919, page 82), which is the source of the power of a municipality to impose an occupation tax, reads as follows:

"That hereafter any city council or board of commissioners of any city of the first and second class shall have the power to enact, by a two-thirds vote of all the members elected thereto, an ordinance or ordinances requiring any person, firm, individual or corporation who shall engage in, carry on, or follow any trade, business, profession, vocation or calling within the corporate limits of such city, except such persons, firms, individuals or corporations who pay a tax to the city or State on gross incomes, to take out and procure a license therefor and pay into the city treasury before receiving same, such a sum or amount of money as may be specified by such ordinance or ordinances for such license and privilege. The city council or board of commissioners shall have the right to classify and define any trade, business, profession, vocation or calling and to fix the sum or amount any person, firm, individual or corporation shall pay for such license required for the privilege of engaging in, carrying on, or following, any trade, business, vocation or calling, based on the amount of goods, wares or merchandise carried in stock in any business, or the

character and kind of trade, business, profession, vocation or calling, but no classification shall be based upon earnings or income; and shall have the full power to punish for violation of such ordinance or ordinances. *Provided,* no person, firm, individual or corporation shall pay a license fee or tax mentioned in this act in more than one city in this State, unless such person, firm, individual or corporation maintains a place of business in more than one city, and the license charged and collected shall be for the privilege of doing business or carrying on any trade, profession, vocation or calling in the city where such trade, business, profession, vocation or calling is situated. *Provided further,* that neither the above limitation as to the amount of license nor anything contained herein shall be construed as a limitation or restriction upon the power of such city to tax, license, regulate or suppress any trade, business, profession, vocation or calling in any case where power has been previously, or may hereafter be, conferred by any other laws or statutes."

The attack is on the validity of the statute itself as well as the ordinance in question passed by the municipality. It is conceded to be within the power of the legislative branch of our State Government to pass laws authorizing municipal corporations to provide by ordinances for the enforcement of a tax on occupations, including professional, trade and business avocations of all kinds. This court has expressly decided that under the Constitution now in force that power exists. *Little Rock* v. *Prather,* 46 Ark. 479; *Fort Smith* v. *Scruggs,* 70 Ark. 555; *Laprairie* v. *City of Hot Springs,* 124 Ark. 349; *Pine Bluff Transfer Co.* v. *Nichol,* 140 Ark. 320.

Section 5, article 16 of the Constitution expressly provides that the General Assembly shall have power to tax privileges, and in section 23 of article 2 it is provided that "the General Assembly may delegate the taxing power, with the necessary restriction, to the State's subordinate political and municipal corporations." Unlimited power of taxation is an essential attribute of sov-

ereignty and self-imposed restrictions must be found in the organic law of the sovereign State to find justification for declaring the imposition of a particular kind of tax to be unauthorized. This principle is so well settled that it needs no citation of authority to support it.

It is claimed, however, that the statute provides an unjust and discriminatory method of classification which renders it void. In consideration of that question it must be remembered that the provision of the Constitution with respect to uniformity in taxation applies only to a property tax, and has no reference to the taxation of privileges. *Fort Smith* v. *Scruggs, supra.* The State having the power to tax privileges, it necessarily follows that it may make its own selection of the privileges to be taxed, and the omission from the list to be taxed of any number of occupations does not constitute an unlawful discrimination. *Ex parte Byles,* 93 Ark. 612. The only restriction which the law imposes on the exercise of the power is that there shall not be a discrimination between persons in like situations and pursuing the same class of occupation. *Waters-Pierce Oil Co.* v. *Hot Springs,* 85 Ark. 509.

It is contended that the whole statute is rendered void by the exemption from the tax of "persons, firms, individuals or corporations who pay a tax to the city or State on gross incomes." The argument is that this is an unjust exemption which constitutes a discrimination against the same class of persons or corporations who are not compelled by statute to pay a tax to the city or State on gross incomes, and that this avoids the whole statute. It is not correct to say that the exemption in favor of those who pay a privilege tax on incomes to the city or State is an unjust exemption and amounts to an unlawful discrimination. This is not a property tax, but is a tax on privileges, and the exemption from its operation of one who pays for a privilege in another form, and on a different basis, does not necessarily constitute an unjust classification. It does not follow, however, that, even if the exemption were found to be void, it would affect the

validity of the statute in other respects, for, if the imposition of the tax on some classes of privileges fails, this does not affect the validity of the tax on other privileges. *Fort Smith* v. *Scruggs, supra.* The striking out of an exemption could not be made to operate so as to bring under the operation of the statute privileges which the statute had exempted. *Ex parte Deeds*, 75 Ark. 542. But the striking out of a whole class by reason of exemptions would not defeat the statute as a whole so far as it operated on other classes. In other words, because the legislative will is thwarted with respect to the tax on some of the classes or privileges affords no grounds for defeating the other classes which the lawmakers obviously intended to tax.

It is argued that there are certain kinds of insurance companies that are not required by statute to pay a tax on gross incomes, and that this operates as a discrimination against such companies as between that kind of insurance business and other kinds which are required to pay the tax to the State on gross incomes. It is sufficient answer to this argument to say that none of that class of tax payers are involved in the present litigation, and, therefore, it is unnecessary to discuss that feature of the statute, since, as before stated, a decision as to the validity of the statute in that respect would not affect the rights of other tax payers who are parties to this litigation.

Another attack on the validity of the statute relates to the provision contained in section 6 for a referendum of ordinances passed by municipalities for the imposition of the tax. That section provides that when "a petition signed by fifteen per cent. of the qualified electors of said city, as shown by the latest payment of poll tax," shall be filed with the city clerk within thirty days from the first date of publication of the ordinance, "an election shall be called by said city council or board of commissioners within ninety days from the date of the filing of said petition, and said ordinance shall be referred to the qualified electors of said city." The contention is that

the statute is void because this provision restricts the right to sign the referendum petition to electors of the city whose names appear on the list of tax payers of the city. It is unnecessary to decide whether or not the language of the statute means that electors such as those who have recently become of age shall not have the privilege of signing the petition, for the reason if such were the effect of the language it would not avoid that portion of it. There is no provision of our Constitution which either confers the right of referendum on municipal ordinances or that denies or restricts such referendum power. *Tomlinson Bros.* v. *Hodges,* 110 Ark. 528. The whole matter is within the power of the Legislature as the source of the authority for passage of municipal ordinances. The Legislature has the power either to confer or withhold the referendum and to prescribe the terms on which it may be exercised. The conditions expressed in this statute are not unreasonable, and do not, under any construction, conflict with any of the legal rights of voters. The right of referendum is expressed merely as a condition, and the privilege of signing such a petition exists only by virtue of the statute which confers it. The signing of the petition is not an election in any sense, but a mere condition upon which there may be a referendum of the measure to the people. Of course, the right to exercise the franchise at an election under the referendum is another thing, but there is nothing in this statute which restricts the privilege of any qualified elector to vote at such an election.

Again, it is contended that, the statute being one which provides for the imposition of a tax and not for a mere regulation of certain occupations, the provision for enforcement by fine is void. It is clear from the language of the whole statute that it is intended as the imposition of a tax. The words "license fee" is used generally, but when the whole language is considered together, it is manifest that the Legislature intended to authorize the imposition of a tax by municipalities on all occupations which a municipality may by ordinance select.

One of the strongest indications of this intention is that it makes no distinction between the different kinds of occupations with respect to the propriety or necessity for some kind of regulation. While the State has no right to impose a license fee for purposes of regulation on a lawful business which needs no regulation, the power to tax even lawful occupations has no such restrictions upon it. There are cases which seem to hold that where the power exercised is one to impose a tax and not to regulate a business or occupation which the public has a right to regulate, the tax cannot be imposed as a condition upon the right to pursue the occupation and a fine be imposed for pursuing it without paying the tax. This view of the matter is, we think, wholly erroneous, for the power to tax necessarily carries with it the efficient power to enforce the payment of the tax. The requirement of the payment of the tax for the exercise of the privilege of pursuing an occupation and the imposition of a fine or other punishment for pursuing the business without first having paid the tax is a mere method of enforcing payment, and it clearly falls within the power of the taxing authority. *Ex parte Byles, supra;* 2 R. C. L., p. 951; *Banta* v. *City of Chicago,* 172 Ill. 204, 40 L. R. A. 611; *Cousins* v. *State,* 50 Ala. 113; *Wilmington* v. *Macks,* 86 N. C. 88.

All of these attacks on the validity of the statute are, therefore, unfounded.

Now, the first attack on the validity of the ordinance is that it imposes a license fee without containing any provision for inspection or regulation, and the effort is to bring the case within the doctrine laid down by the decisions of this court where it is held that license fees under ordinances which were intended merely for purposes of regulation must limit the license fee to a charge for expenses of regulation. This ordinance, and the statute which authorizes it, is, as we have already seen, not one for the imposition of a license fee merely to provide for regulation of certain occupations, but it is an ordinance for the imposition of a tax. It is, therefore, un-

necessary for the ordinance to provide for any system of regulation or inspection. The ordinance is one purely for raising revenue, and it applies to all occupations selected and classified by the taxing power, regardless of the kind of business, and without any coincident effort to regulate.

The principal attack on the validity of the ordinance itself relates to the classification of occupations and the amount of the tax. The inquiry must, of course, be confined to the classifications which affect the parties to this litigation, as they are not interested in other classes of occupations. Most of the appellants are engaged in business as merchants, and the classification in the ordinance follows the authority conferred by the statute by basing the tax "on the amount of goods, wares and merchandise carried in stock."

We find no legal objection to this statutory basis, as the classification is not unreasonable and arbitrary. This subject was thoroughly and learnedly discussed by the late Justice Brewer in the opinion of the court in the case of *City of Newton* v. *Atchison,* 31 Kan. 151, and little can be said in addition to what is said in that opinion in support of this kind of a basis of taxation.

Appellant Davies is a lawyer, and several of the other appellants are practicing physicians in the city of Hot Springs, and they attack the ordinance on the classification of such professional men according to the number of years in practice. The ordinance provides that the tax shall be $25 on all who have been in practice less than ten years, and $50 on all who have been in practice ten years or longer. There is an express provision in the statute itself to the effect that "no classification shall be based upon earnings or income." If the length of service in the practice of law or medicine can be made the basis of classification, it is because length of service denotes probable earning capacity, as a seasoned lawyer or physician of longer experience can probably earn a greater annual income than one of less experience, but to permit a classification based on the distinction as to

length of service necessarily results in a basis of earnings or income which is expressly forbidden by the statute. It is difficult to see how men of the same learned profession can be put in different classes for purposes of taxation except upon the basis of difference in earning capacity or income and any other classification would be purely arbitrary.

We hold, therefore, that the ordinance is in conflict with the statute in so far as it imposes an additional amount of tax on lawyers and physicians who have been in practice ten years or longer. The discriminatory effect of the ordinance can, however, be eliminated by striking out the excessive amount of the tax without affecting the validity of the ordinance in any other respect. This would leave the ordinance effective as to an imposition of the tax on all lawyers and physicians in the lowest sum expressed in that classification, to-wit, the sum of $25. To this extent the decree of the chancellor is erroneous, for the ordinance shows on its face the defect indicated above.

The decree is, therefore, reversed and modified to the extent that it denies relief to the appellants mentioned with respect to the excessive amount of tax imposed. In all other respects the decree is affirmed.

PFEIFFER v. BERTIG.

Opinion delivered January 19, 1920.

1. DRAINS—INTEREST ON ASSESSMENTS.—Without some statute expressly or impliedly allowing it, interest can not be allowed on assessments or included therein.
2. DRAINS—INTEREST ON ASSESSMENTS.—Special and Private Acts 1911, No. 196, extending the limits to the St. Francis Drainage District, and referring to Acts 1909, No. 235, contemplated that where money is borrowed by that district or by a subsidiary district for making the improvements for which the district was created the assessment of benefits shall bear interest, so that the directors might issue bonds which with principal and interest would exceed the amount of assessed benefits, but which would not exceed the assessed benefits with interest.

3. CONSTITUTIONAL LAW—FREEDOM OF CONTRACT.—Special and Private Acts 1911, page 533, providing that "where the payment of the benefits assessed is deferred or made payable in installments" and bonds are issued, the benefits assessed shall bear interest at the rate fixed by the board, does not prohibit the landowner from paying his assessments, nor make the interest a penalty, and hence does not interfere with the right of contract.

4. DRAINS—INTEREST ON ASSESSMENTS—RIGHT TO COMPLAIN.—Where a landowner against whom benefits had been assessed sued to restrain the district from issuing bonds or incurring any indebtedness which could not be paid within the limits of the assessed benefits, but did not tender the amount of his assessment of benefits, he was in no position to complain that the assessment bore interest.

5. DRAINS—INTEREST ON ASSESSMENTS.—A provision expressly allowing present payment of the assessment of benefits is not essential to give validity to acts authorizing the collection of interest on such assessments.

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

Huddleston, Fuhr & Futrell, for appellant.

1. The court erred in overruling the demurrer to the answer. Act 196, Acts 1911, sections 7 and 8, only apply to the parent act and not to subsidiary districts. These sections only apply to the parent district, and subsidiary districts have no power to issue interest-bearing bonds when principal and interest greatly exceed the benefits assessed. Subsidiary district No. 11 is not entitled to claim the benefits of the provisions of the acts, but the interest must be considered a part of the construction, and the benefits draw no interest, and the cost of construction exceeds the benefits and the demurrer should be sustained.

2. The act is not a valid exercise of the legislative power. 16 Atl. 728; 40 *Id.* 288-290; 42 S. E. 468; 67 N. C. 264-5.

Rose, Hemingway, Cantrell & Loughborough, for appellees.

Subsidiary districts are controlled by the laws applicable to the drainage districts created under the general

act of 1909 and amendments thereto, and the case is controlled by the case in 122 Ark. 291.

WOOD, J. Appellant filed his complaint against the appellees in the Greene Chancery Court. The appellant alleged that he "is the owner of the lands situated within the limits of Grassy Slough Subsidiary Drainage District No. 11 of the St. Francis Drainage District which has been organized in pursuance of the statutes governing St. Francis Drainage District. The benefits within the said districts have been assessed at the sum of $146,590, and the defendants as commissioners of said district are about to make a contract for the issuing of $120,000 of the negotiable bonds of said district, payable serially in the course of the next twenty years. The principal and interest of said bonds will greatly exceed the amount of the benefits assessed, and therefore the defendants have no right to issue said bonds; but if said bonds are issued they will get into the hands of innocent purchasers, and the plaintiff will be harassed in the United States courts by vexatious suits. The plaintiff, therefore, prays that the defendants be restrained from issuing the bonds aforesaid or from incurring any indebtedness which cannot be paid within the limits of the assessed benefits and for such other relief as may be deemed equitable."

The appellees answered alleging: "It is true that the assessed benefits within said subsidiary drainage district amount to $146,590, and that the defendants contemplate the issuing of $120,000 in bonds, payable serially in the course of twenty years, and that the principal and interest of said bonds will exceed the amount of the assessed benefits; but they say that, by the terms of the act under which said district was organized, said assessment of benefits bears interest at the rate of six per cent. per annum, which is a rate in excess of that borne by the bonds, so that there is no possibility of the amount due upon the bonds exceeding the assessed benefits with interest."

The appellant filed a general demurrer to the answer which was overruled by the court.

The appellant stood on his demurrer, whereupon the court entered a judgment dismissing his complaint for want of equity and taxing him with the costs. From which judgment he appeals.

Act 196 of the acts of the Special and Private Acts of 1911 provides in part as follows:

"Section 7. That in no case shall the board of directors of the St. Francis Drainage District construct or make any improvements contemplated by the provisions of said act unless the benefits estimated by the assessors and approved by the county court shall equal or exceed the primary cost of the making of such improvements; but the cost of making the improvements shall not be held to include the interest accruing on any interest-bearing evidence of debt issued for the purpose of making and maintaining the improvements."

"Section 8. In all cases where the payment of the benefits assessed is deferred or made payable in installments and bonds are or shall be sold or money borrowed for the purpose of making or maintaining any such improvements, the benefits, whether already assessed or hereafter to be assessed on the several parcels of property, shall bear interest at a rate to be fixed by the board sufficiently high to meet or cover the interest on such bonds or indebtedness, and when so done, it shall be held that the same is done for the benefit of the persons who own the lands assessed for making the improvements in proportion to the benefits assessed, and any amount levied or assessed for the purpose of paying interest on bonds issued or money borrowed to make or maintain any such improvements shall be held and construed to be as interest on the benefits accruing from the construction of the improvements."

These sections clearly contemplate that where money is borrowed by the board of directors of the St. Francis Drainage District for the purpose of making the im-

provements for which the district was created the assessment of benefits shall bear interest.

Section 8 expressly provides that the benefits "shall bear interest" and declares that the purpose of making the assessment of benefits bear interest is "to meet or cover the interest on such bonds or indebtedness."

It is well established that the question as to whether the assessment of benefits shall bear interest is one controlled entirely by statute. "In the absence of some statute expressly or implicitly authorizing interest, interest cannot be allowed on assessments or included therein." 1st Page and Jones "Taxation by Assessment," p. 474, and cases cited in note.

Learned counsel for appellant contends that the above sections have reference solely to the original St. Francis Drainage District, but do not apply to subsidiary districts of the original or parent district. Counsel are mistaken in their contention. Sections 7 and 8 are part of an act entitled, "An act to extend the limits of the St. Francis Drainage District and for other purposes." Section 9 of the act provides in part as follows:

"The St. Francis Drainage District was organized for the purpose of establishing a main system of drains and levees for the protection of the lands in said district taken as a whole, and it is realized that in order to make said drainage and levee system effective it will be necessary to construct special systems of drainage and levees for various sections of the territory within said general drainage and levee district."

Provision is then made whereby the board of directors of the St. Francis Drainage District may establish upon the terms and conditions therein prescribed subsidiary drainage and levee districts. When the conditions prescribed are complied with, "if the board deems it to the best interest of owners of real property within said district that the same shall become a subsidiary drainage district, it shall make an order upon its records establishing the same as a drainage district, subject to all the terms and provisions of this act."

There is a further provision making the board of directors and the assessors of the St. Francis Drainage District the directors and assessors of the subsidiary districts and providing that the assessors in making the assessment of benefits of the subsidiary districts shall be governed by the act and the amendments thereto creating the St. Francis Drainage District approved May 12, 1909, being Act 235, Acts 1909.

The act further provides that the board of directors of the St. Francis Drainage District may borrow money in the name of the subsidiary district and issue bonds bearing the rate of interest not exceeding 6 per cent. and giving them power to levy taxes upon the assessed benefits within the district in a sufficient sum to pay the interest on the bonds and the principal as they mature.

The section contains this further provision, "except as herein provided, such subsidiary districts shall be governed by the 'act to provide for the creation of drainage districts in this State, approved May 27, 1909, and the amendments thereto.' "

While section 9, *supra,* providing for the creation of subsidiary districts, comes after sections 7 and 8 above, that is of no consequence in construing the statute. It is clear from the whole act that the original or parent St. Francis District and the subsidiary districts created under the act of 1911 were under the terms of that act to be considered as an entire project having for its purpose the establishment of a drainage district and levee system that would be effective to cover the entire territory included within the general drainage and levee districts.

Therefore, we conclude that sections 7 and 8 were intended to apply to the subsidiary districts as well as to the original or parent district. They were embraced in the same act with section 9 and must be considered in connection with that section. There is no language in sections 7 and 8 expressly limiting their application to the benefits assessed in the original or parent district. And, in the absence of such express restriction, they can

not be confined in their application solely to the parent district.

The language, "except as herein provided, such subsidiary district shall be governed by the 'act to provide for the creation of drainage districts in this State,' " expressly makes sections 7 and 8 applicable to subsidiary districts as well as the parent district. Certainly sections 7 and 8 are included in and are a part of the provisions of the act and come within the words, "as herein provided." We can not, therefore, agree with counsel for the appellant nor with counsel for the appellees, who seem to be in accord on the proposition, that in the matter of assessment of benefits bearing interest subsidiary districts are governed by the act approved May 27, 1909, and the amendments thereto. If this were the case, then there is no authority for making the assessments of benefits bear interest, for at the time of the passage of the Act 196 of the Acts of 1911, neither the original act approved May 27, 1909, nor the acts amendatory thereto so provided. See Acts 54, 136, 221 of the General Acts of 1911.

Such authority was not given by statute until the passage of Act 177 of the Acts of 1913, approved March 13, 1913. But this act was not in existence until something like two years after the passage of Act 196, approved April 20, 1911, under which the Grassy Slough Subsidiary Drainage District No. 11 of the St. Francis Drainage District was formed.

The language of the act under which the district in controversy was created (Act 196, Acts of 1911) expressly provides that, "except as herein provided, such subsidiary district shall be governed by the 'act to provide for the creation of drainage districts in this State, approved May 27, 1909, and the amendments thereto.' " The language last quoted, of course, has reference only to the act of May 27, 1909, and the amendments thereto that were then in existence. It had no reference whatever to future amendments of that act.

Learned counsel for the appellees are mistaken in assuming that the decision of this court in *Oliver* v. *Whittaker,* 122 Ark. 291, rules this case. In *Oliver* v. *Whittaker, supra,* we had under consideration an original or parent drainage district which was created under the general statute of May 27, 1909. The district in that case was organized and the assessment of benefits made after the passage of Act 177 of the Acts of 1913. We held that Act 177, approved March 13, 1913, amending the general statute of 1909 was applicable in that case and authorized the collection of interest on deferred payments of assessments. But here as we have seen the district was created under Act 196 of the Acts of 1911 providing for subsidiary districts, which act as we construe it made the general law of May 27, 1909, and the amendment thereto, which were then in existence, applicable to subsidiary districts created under it, except as therein provided. Sections 7 and 8, *supra,* were therein provided and applied to assessment of benefits.

Counsel for appellant contends that sections 7 and 8 are void for the reason that they make no provision for the landowner to pay the assessment of benefits against his land. They say that such in effect denies to the appellant the right of contract, and that the interest which he is, therefore, compelled to pay is in the nature of a penalty.

It will be noted that section 8 provides, "where payment of the benefits assessed is deferred or made payable in installments." This language seems to contemplate that the benefits might not be deferred. Certainly there is nothing in the act which expressly prohibits the landowner from paying his assessments when made.

In appellant's complaint he does not tender the amount of his assessment of benefits nor is there any allegation in the answer to the effect that there was a tender by appellant of the amount of the benefits assessed. So the appellant is really not in an attitude to complain that the assessment of benefits bears interest. See *Heath* v. *McCrae,* 55 Pac. 433, 20 Wash. 343; *Barber Asphalt*

Paving Co. v. *Gogreve,* 5 So. 849, 41 La. Ann. 252; *Newman* v. *City of Emporia,* 21 Pac. 593, 41 Kan. 560.

The allegations of the answer show that to make the improvements the directors of the district contemplated the issuance of bonds which were to be paid serially through a course of twenty years. As the appellant got the benefit of the money derived from these bonds in the present improvement of his property, and since the payment of his assessment was deferred, it was but just and right under such a state of case that he should be made to pay interest on the assessment of benefits. At least such was the judgment of the lawmakers, and the act does not interfere with the right to contract.

Our attention has not been directed to any cases where it is held that a provision expressly allowing present payment of the amount of benefits assessed is essential to give validity to acts authorizing the collection of interest on the assessment of benefits, and our own research has not discovered any cases so holding. On the contrary, the authorities seem to uphold statutes where no such provision is made. See *People* v. *Webber,* 45 N. E. 723, 164 Ill. 412; *Edwards & Walsh Const. Co.* v. *Jasper,* 90 N. W. 1006, 177 Iowa 366; *Langdon* v. *Bitzer,* 82 S. W. 280, 26 Ky. 579; *Germond* v. *City of Tacoma,* 33 Pac. 961; Page and Jones "Taxation by Assessment," *supra.*

In *Skillern* v. *White River Levee District,* 139 Ark. 4, the act provides that the amount of the assessment of benefits should be automatically increased 6 per cent. per annum. This was tantamount to making the benefits bear interest at the rate of 6 per cent. per annum. We held that the statute was valid. There was no provision in that statute for the present payment of benefits.

It follows that the judgment of the court overruling the demurrer to the answer and dismissing the appellant's complaint for want of equity is in all things correct.

Affirmed.

HART, J., dissents.

GREESON v. CANNON.

Opinion delivered January 19, 1920.

1. EQUITY—JURISDICTION.—Jurisdiction of equity to determine the title to land includes jurisdiction to give full relief by ousting the wrongful occupant.
2. APPEAL AND ERROR—HARMLESS ERRORS.—Where the law court erroneously held that the decree of the chancellor settling title to land was not conclusive, but gave judgment in favor of the same party, the judgment will be affirmed.

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

R. G. Davies, for appellant.

The land sued for was never the plaintiff's; it was in section 3; it was never described with accuracy; and no one can tell where it is from any evidence introduced. The statute of limitation must be based upon open, notorious, hostile possession and an *honest* claim of title against the world, and the court erred in not giving defendant's instructions. Blashfield Inst. to Juries, pp. 1328 and 1324. Plaintiffs were allowed to introduce the chancery decree, but defendant was not allowed to introduce the evidence of Baker, the surveyor, taken to maintain the decree, or any of the surveyors. Defendant nevertheless proved he did not trespass, and plaintiffs never claimed the land, and the judgment should be reversed.

A. Curl, for appellee.

The decree introduced in evidence sustains plaintiff's contention, and, not having been appealed from, is conclusive. But aside from this the evidence is conclusive that plaintiffs' ancestor and plaintiffs had maintained a fence at the place named in the complaint for thirty-five years and that those who preceded defendant in title to the adjoining land had all that time recognized the fence as the dividing line and acquiesced in the possession and occupation of the strip of land in question. The case was properly submitted to the jury on the statute of limitations, and the verdict is conclusive and should be affirmed. Kirby's Digest, § 5056.

WOOD, J. The appellees instituted this action against the appellant in the Garland Circuit Court. They alleged that for more than thirty years their ancestor, J. J. Teague, had had title to the NE. ¼ of section 10, township 3 south, range 20 west, and more than thirty years ago he constructed a fence along what was conceded by the owner of lands adjoining on the north to be the north line of said tract; that the fence was kept up and so recognized as the north boundary line of the land until the death of J. J. Teague about the year 1907; that after the death of J. J. Teague the fence remained in the same place and was recognized by the appellees and the owners of the land adjacent thereto on the north as the line between them until the month of February, 1918, when appellant who had come into the possession of the land adjoining on the north set up claim to certain lands south of the fence before mentioned and which land is described as follows: "Beginning at the east end of the aforesaid fence, run thence south 27 feet; thence west, bearing a little north 694 feet; to a point where the said fence intersected the said line of the aforesaid fence of the plaintiffs; thence east 694 feet, to the place of beginning."

They alleged that the appellant took possession of this land and that the appellees instituted a suit in the chancery court of Garland County against the appellant to restrain him from trespass upon the land; that upon the hearing of that suit the chancery court found as matters of fact "that the said fence so constructed by the said J. J. Teague, the plaintiffs' ancestor, from whom plaintiffs inherited, and so kept up and maintained by said J. J. Teague, in his lifetime, and by these plaintiffs after his decease, had been for more than thirty years recognized by the said J. J. Teague and those succeeding him in title, and those preceding in title in the land owned by the defendant, as the true line dividing the lands of the plaintiffs and the lands of the defendant; and that the said line so marked by said fence had, by the statutes of limitations, become the established line between the

said lands of the plaintiffs and the lands of the defendant."

The appellees further alleged that the said decree of said court was of record at page 438, Book Q, of the records of the proceedings and decrees of the said chancery court, and they asked same to be taken as a part of the amended complaint and alleged that said decree has not been appealed from, has not been set aside, or in any wise modified or altered, but remains in full force.

The appellant answered and admitted that the appellees owned the NE. ¼, NE. ¼, section 10, township 3 south, range 20 west, but denied specifically all other allegations of the complaint. The cause was heard on the issues thus raised.

Appellees, over the objection of appellant, introduced in evidence the decree of the chancery court referred to in the complaint which recites in part as follows: "The court, being now and sufficiently advised as to law and facts involved in this cause, doth find that the plaintiffs are the owners of the * * * (here follows a description of the land as alleged in the complaint to be owned by the appellee and also a description of the adjoining land alleged to be owned by the appellant) * * *. This action being based on a controversy as to the boundary line between the said two tracts of land, the court doth find that a fence built and erected by the ancestor of the plaintiffs, and maintained by him and those succeeding him in title and possession for more than thirty years, was, and has been for more than thirty years, recognized by him and those succeeding him in title and by those preceding the defendant in title and possession, marking the true boundary line between the said two tracts of land; and, as matter of law, the court doth find that the said line, so marked by the said fence, has, by virtue of the statute of limitations, become, and is the true boundary line between the said two tracts of land; and the court further finds as a matter of fact that recently, and a few days before the institution of this suit, the defendant proceeded to erect, and did erect, a fence on the land

south of this line, so as to encroach upon, and enclose about the twenty-seven feet of the land enclosed by said fence, and which was, and has been in the possession of the plaintiffs and those under whom they hold for more than thirty years, and now holds possession of the same. But, as matter of law, this court has no jurisdiction to oust, or to enter a judgment of ouster to dispossess the defendant of said land. But that the plaintiff will have to resort to a court of law for such judgment of ouster."

By consent, the pleadings in the chancery court were read in evidence upon which the recitals set forth above were based. The trial court construed the decree of the chancery court as not intending to settle the title to the land in controversy, but that it was only intended to preserve the rights of the parties *in statu quo* until there could be a final determination of the issue as to title in a court of law.

There was testimony introduced on behalf of the appellees tending to sustain the allegations of their complaint and also testimony introduced by the appellant tending to prove that a survey made by the county surveyor at appellant's instance showed that the land in controversy was land to which he had the record title.

In the view we have taken of the cause it is unnecessary to set forth and discuss this testimony, nor do we deem it necessary to set forth and discuss the instructions of the court. The jury returned a verdict for the appellees, and from the judgment in their favor is this appeal.

The judgment is correct and must be affirmed for the reason that the decree of the chancery court was *res judicata* of the issue in this cause. That decree was between the same parties and involved the same subject-matter. The trial court in this cause misconstrued the decree holding that it was not intended to settle the title to the land in controversy. Such finding and holding was, as we construe it, directly contrary to the findings and the decree of the chancery court. The recitals of that decree plainly show that the court found that the

appellees were the owners by virtue of the statute of limitations, and that they were entitled to the possession of the land in controversy, but the chancery court was of the further opinion that it had no jurisdiction to oust the appellant of the possession. In this conclusion the chancellor was plainly in error. Having acquired jurisdiction of the parties and of the subject-matter for the purposes of settling title and granting injunctive relief, the chancery court plainly had the further power to oust the appellant of the possession and to grant its writ of assistance if necessary for that purpose. Having acquired jurisdiction for one purpose, it should have retained it as to all and should have under its findings of fact and law granted the appellees the relief for which they prayed in their original complaint. *Merchants & Farmers Bank* v. *Harris,* 113 Ark. 100-11; *Dickinson* v. *Ark. City Imp. Dist.,* 77 Ark. 570-76, and other cases cited in 2 Crawford's Digest, 1865.

Although the circuit court erred in construing the decree of the chancery court, its judgment is, nevertheless, correct for the reason stated, and it is affirmed.

McCULLOCH, C. J., (concurring). The evidence in this case is abundant to sustain appellees' title by adverse possession, and, as that issue was properly submitted the jury, I think the judgment shold for that reason be affirmed. But I do not agree with the majority that the former decree of the chancery court was a bar to appellant's defense in this action. Appellees prayed for the same relief in the chancery court as in the present case, but the court denied the relief and remitted appellees to the law court to obtain that relief. The chancery court merely restrained appellant from trespassing on the land until the rights of the parties with respect to the land could be determined, and refused to grant other relief expressly deciding that that court had no jurisdiction to do so. Now the chancery court may have erred in refusing to fully adjudicate the rights of the parties, but its refusal to do so does not bar a subsequent

adjudication by a court of competent jurisdiction. The reasons given by the chancery court for the small measure of relief granted to appellees does not constitute an adjudication of the issues involved in this suit, for it is obvious that the chancery court meant to leave those issues undecided, holding that it was without jurisdiction to decide them.

TYSON v. HORSLEY.

Opinion delivered January 19, 1920.

1. COMPROMISE AND SETTLEMENT—CONSIDERATION.—A voluntary settlement or compromise of claims between parties with or without merit, if asserted in good faith, is sufficient consideration to support a new agreement or contract.
2. FRAUDS, STATUTE OF—ORIGINAL UNDERTAKING.—Where defendant had, or was asserting, a claim against E.'s land for E.'s debt, and plaintiff promised to pay E.'s account if defendant would release the land and let plaintiff sell it, and defendant on this undertaking released E.'s land, and let plaintiff sell it, and defendant released E. and charged the account to plaintiff, there was an original undertaking on a sufficient undertaking, and the statute did not apply.
3. FRAUDS, STATUTE OF—QUESTION FOR JURY.—Whether there was an original undertaking by plaintiff upon a sufficient consideration to pay the debt of a third person *held* a question for the jury under the evidence.

Appeal from St. Francis Circuit Court; *R. J. Williams,* Special Judge; reversed.

J. Walker Morrow and *Henry G. Gatling*, for appellant.

1. The court erred in its oral instructions. The undertaking to pay John Elby's debt was an original one and based upon a new and original consideration, taking it out of the statute of frauds. An agreement not to exercise a legal right is a valid consideration to support a contract. 110 Ark. 327; 45 *Id.* 67; 76 *Id.* 292; *Ib.* 1; 106 *Id.* 465; 96 *Id.* 46.

2. The court erred in giving plaintiff's instruction No. 1. Cases *supra.*

3. The court erred in refusing No. 2 for defendant, also No. 1 for defendant. There was no testimony to show that plaintiff released or waived any lien for rent, and the alleged promise to pay the rent account not being in writing was void under the statute of frauds. 12 Ark. 174; 81 *Id.* 127; 102 *Id.* 407; 31 *Id.* 643; 113 *Id.* 542; 125 *Id.* 240. Defendant's instruction No. 1 was the law and should have been given. *Supra.* It was error to refuse defendant's No. 3. Kirby's Digest, § 1654. The mere printed name of appellant in evidence was not signed by appellant, nor any one for him, and is not a compliance with the statute so as to bind appellant. 101 Ark. 68; 20 Cyc. 272.

4. Appellee waived the rent. Kirby's Digest, § 5034; 54 Ark. 346; 103 *Id.* 91. He may waive it orally. This was a question for the jury to have passed on and the judgment should be reversed for errors in the instructions.

Mann, Bussey & Mann, for appellee.

1. There was no error in the instructions. None of the errors alleged were prejudicial. 96 *Ark.* 156; 91 *Id.* 310.

2. The John Elby debt was transferred to the account of plaintiff in 1917, December 31, and was an afterthought.

WOOD, J. This action was brought by the appellee against the appellant on an account which was itemized, in which the appellee claimed that appellant was due him the sum of $968.45.

Appellant answered denying liability. He alleged that the appellee was indebted to him in the sum of $934 on an account which he had against one John Elby, which he alleged that the appellee, in writing, for valuable consideration, agreed to pay.

The appellee replied denying that he was liable to the appellant for the Elby account and denying that he had promised to pay the same in writing. He, there-

fore, expressly pleaded the statute of frauds as to such account. This was the principal issue involved.

The appellant testified in part concerning it as follows:

"As to the John Elby account, Mr. Horsley sold that land and received a check for $100 on it and told me he would take care of the John Elby account. While I had a claim on the land, I never said anything more to Elby at all after Mr. Horsley told me he would take care of the account. After I gave him this statement, it brought him out owing me about $315, including the John Elby account. I didn't know whether Mr. Horsley ever denied that John Elby item or not. I don't remember, to be honest, but I remember telling him if he would pay me the John Elby account as the statement calls for that I was perfectly willing to let the account go as it stood. I certainly had a claim on the land and expected him to take care of it; I released my claim on the land in consideration of his promise to pay the account. I never had any more to say to John or to do with him at all."

Appellant further testified: "I thought I had a letter from Mr. Horsley in which he agreed to pay the John Elby account; I may be mistaken. I had an assignment, held his lease contract. Mr. Horsley told me that if I would let him sell that land he would pay the account and I released my interest. I told him (Horsley) that if he would pay the Elby account I would pay the rent. He said he had sold the land when he told me to charge the John Elby account to him."

Horsley, the appellee, testified concerning this as follows: "At one time I told Mr. Tyson that there was a chance of my selling that land and if I did I would take care of his account, merely a good-natured offer; that is, that I thought I had a chance to sell it, and if I sold it I would notify Mr. Tyson and take care of this John Elby account, that he wouldn't lose it. It was a verbal statement. I didn't sell the Elby land; he is on the land now; he borrowed the money from the Federal Farm Loan

Bank and has the land and has a deed for it and everything else."

The court, among others, granted the following prayer of appellee for instruction:

"No. 1. You are instructed that under the law of this State the plaintiff could not be held to pay the account of John Elby unless the promise to pay the same was in writing; and not then unless the conditions under which the promise was made, if any, were carried out."

The court further instructed the jury at appellee's request as follows: "There is a difference between the parties as to whether or not that was an express promise or whether a conditional promise. If it was a conditional promise, then the conditions would have to be carried out before it would become binding, and whether it be expressed or conditional if it was not in writing the plaintiff would not be bound by it."

The appellant duly objected and excepted to the ruling of the court in granting these prayers.

The appellant among others requested the court to instruct the jury as follows: "No. 2. You are instructed that if the plaintiff, for a valuable consideration, assumed to pay the debt of John Elby, and the defendant released his debt against Elby, relying thereon, then the defendant can recover the same."

The court refused to grant this prayer of the appellant's, to which ruling he duly objected and excepted.

The appellant contends that the testimony tended to prove that the appellee upon a new and original consideration to him from appellant agreed to pay the latter a debt due him by one John Elby in the sum of $934.

The appellant is correct in his contention. The testimony of appellant as above set forth, tended to sustain his contention and made it an issue for the jury as to whether or not, for a new and original promise from the appellant to the appellee, the appellee agreed to pay the appellant the debt due him by John Elby.

In the recent case of *Simonson* v. *Patterson,* 137 Ark. 106, we said: "This court is committed to the doctrine

that a voluntary settlement or compromise of claims between parties with or without merit, if asserted in good faith, is sufficient consideration to support a new agreement of contract."

In *Jonesboro Hardware Co.* v. *Western Tie & Timber Co.*, 134 Ark. 543, we said: "We have several times held that a parol promise to pay the debt of another is not within the statute of frauds when it arises from some new and original consideration of benefit or harm moving between the newly contracting parties. We have also held that a waiver of legal right is a sufficient consideration to support a promise to pay the debt of another."

The testimony of appellant tended to prove that he had a claim on the land of John Elby for the payment of Elby's debt to him. At least he was asserting such claim and that the appellee promised appellant that if the latter would release such claim and allow appellee to sell John Elby's land appellee would pay to appellant Elby's account, and that acting upon this agreement the appellant released Elby and charged the account to the appellee.

Under the above authorities the testimony of the appellant made it an issue for the jury as to whether or not there was an original undertaking by the appellee upon a sufficient consideration to pay to appellant the debt due him by John Elby.

The rulings of the court in giving appellee's prayer for instructions and in refusing appellant's prayer as above set forth ignored this issue. These rulings were erroneous and prejudicial to appellant.

We find no other prejudicial error in the ruling of the court, but for the errors indicated the judgment must be reversed and the cause remanded for a new trial.

SEWERAGE DISTRICT NO. 1 OF SILOAM SPRINGS v. BLACK.

Opinion delivered January 19, 1920.

1. MUNICIPAL CORPORATIONS—SEWERS—CONSTRUCTION.—It is the duty of the commissioners of a sewerage district to construct the sewer so that it will not become a nuisance to any neighborhood or to any particular inhabitant thereof; and it is the duty of the city, after the sewer has been turned over to it, to prevent it from becoming a nuisance by properly maintaining and repairing it.
2. MUNICIPAL CORPORATIONS — SEWERS AS NUISANCE.—A complaint against a sewerage district and a city which alleges that defendants have constructed and maintained a general system of sewerage and a disposal plant which sprays noxious odors in the air and discharges the sewage into a stream of fresh water running through plaintiffs' farm; that by such acts the stream is polluted so as to make the water unfit for animal or human use and to be filled with noisome smells and nests or beds for the incubation of mosquitoes; that defendants spray the sewage in a liquid form in the air near plaintiffs' dwellings, causing corruption of the atmosphere, noisome smells, flies, and mosquitoes; that by these acts the homes of plaintiffs are rendered disagreeable, uncomfortable and uninhabitable; that defendants are maintaining a nuisance, which is continuous and recurring, *held* to state a cause of action.
3. EMINENT DOMAIN—TAKING OF PROPERTY—REMEDY OF OWNER.—Under Constitution, article 2, section 22, if private property is taken, appropriated or damaged, for use of the public for sewerage purposes under Kirby's Digest, section 5664, the remedy of the owners would be an action at law; but where the complaint alleges that a sewer system, as maintained by defendants, constitutes a nuisance, and the answer denies such allegation, the issue is properly triable in equity.
4. MUNICIPAL CORPORATIONS—SEWER SYSTEM AS NUISANCE—BURDEN OF PROOF.—In a suit against a sewerage district and city to restrain the maintenance of a nuisance, plaintiffs met the burden of proof by showing the existence of a nuisance and that the proximate cause thereof was the sewerage system which defendants had constructed and were maintaining, and plaintiffs were not required to prove that the sewerage system was improperly constructed or maintained.
5. MUNICIPAL CORPORATIONS—SEWERAGE SYSTEM AS NUISANCE—EVIDENCE.—Evidence *held* to sustain finding of chancellor that defendants' sewerage system, as constructed and maintained, constitues a nuisance.

6. MUNICIPAL CORPORATIONS — INJUNCTION — PARTIES.—In an action against a sewerage district and city to restrain maintenance of a nuisance, where the testimony shows that both city and district were maintaining the nuisance, the court properly granted an injunction against both district and city.

Appeal from Benton Chancery Court; *B. F. McMahan,* Chancellor; affirmed.

Tom Williams and *A. L. Smith,* for appellants.

1. The court erred in overruling the demurrer filed by the city of Siloam Springs to the complaint. There was a clear misjoinder of parties defendant and plaintiffs had an adequate remedy at law. 113 Ark. 239.

2. The court erred in overruling the motion of the city to make the complaint more definite and certain. Dillon on Mun. Corp., par. 1051-2 and 1051 A; 117 Am. St. 749; 188 Miss. 456; 42 So. Rep. 204.

3. The court erred in refusing to sustain a special answer and plea in abatement filed by defendants as plaintiffs had an adequate remedy at law. 22 Cyc. 771; 145 Pa. St. 324; 27 Am. St. 694; Dillon Mun. Corp., 1051-1051 A, 1052; 117 Am. St. 749; 188 Miss. 456; 42 So. 204; 93 Ark. 362; 87 *Id.* 213; 92 *Id.* 538; 91 *Id.* 58; 85 *Id.* 544; 2 Dillon, Mun. Corp. (2 Ed.), par. 1046 and notes; 27 Am. St. 694.

4. The court erred in not dismissing the petition for want of equity and in not finding for appellants upon the evidence in the case. It was not a nuisance to be enjoined even if private parties were injured in their private rights. 67 Am. Dec. 186; 22 Barb. (N. Y.) 297; 107 Am. St. 222; 53 N. Y. 55; Misc. Rep. 726; 5 Ohio N. P. 39; 107 Ark. 422. All parts of the city were drained into Salt Creek, a natural outlet; the sewer was properly erected and maintained, and every precaution taken to prevent noxious odors, pollution of water, air, etc. 153 Ind. 337. Equity will not restrain where the power is lawfully exercised and the greatest good to the greatest number of residents is attained and the work is skillfully done. 135 Ind. 547; 41 Am. St. .....; 110 Mass. 216; 14 Am. Rep. 592; 112 Ind. 542; 23 *Id.* 381. See also 79 Ind. 491; 41

Am. St. 618; 17 Ind. 267; 14 *Id.* 399; 75 *Id.* 241; 39 Am. Rep. 135; 19 *Id.* 326; 7 Cush. 53-85; 121 Ind. 331-337; 14 Utah 47; 2 Story Eq. Jur. 925-928; High on Inj., § § 459, 483; Eden on Injunc., 231. The question of reasonableness is one of fact. 44 N. H. 580; 84 Am. Dec. 105; 15 N. W. 167. Cities as riparian owners are entitled to the reasonable use of a stream as an outlet for sewers, and if pollution occurs no liability occurs. 58 N. E. 142; 302 Pa. 474.

The sewer was constructed and operated in the most skillful manner, and if injury resulted injured parties were remitted to their remedies at law. *Supra.* 2 Edwards 188; 9 Paige 233; 4 *Id.* 444; 65 Conn. 365; 56 Ark. 205.

The decree is indefinite and uncertain in its directions and contradictory in its findings.

R. F. Forrest, Verne McMillan and L. S. Forrest, for appellee.

1. There was no error in overruling the demurrer, because it did not raise the point of defect of parties and plaintiff had no adequate remedy at law.

2. Nor did it err in overruling the motion to make more definite and certain, because it was sufficiently definite and there is no record of such a motion.

3. No error in refusing to sustain the so-called answer and plea in abatement, because a plea in abatement is no method to attack the jurisdiction of the court, and plaintiffs had no adequate remedy at law.

4. No error in overruling the motion to quash depositions of plaintiffs. The motion was not verified. The certificate of the notary shows they were duly sworn to, and all the defendants were present at the examination and cross-examination.

5. The court did not err in not dismissing for want of equity nor in finding against appellants upon the whole evidence, because a dangerous nuisance was proven and appellees' evidence was conclusive. The law is well settled in Arkansas and all other States except

perhaps Indiana. On these ponts and the others made by appellant, see Kirby's Digest, § 6094; 33 Ark. 497; 2 Wood on Nuisances (3 Ed.), 1150-1174. The remedy at law was not adequate, and there was a nuisance. 2 Wood on Nuisances, 1174; 119 Cal. 387; 51 Pac. 557. It was injurious to health and to property of plaintiffs. 84 Hun 281; 32 N. Y. Supp. 442.

Equity will enjoin the pollution of stream by sewage. 150 Ill. 273; 37 N. E. 218; 42 N. E. 77; or where it is a nuisance. 46 Ark. L. R. 169; 119 Ark. 169; 2 Wood on Nuisances (3 Ed.), 801, 1177.

6. A demurrer properly raises the question of jurisdiction. Kirby's Digest, § 6093.

7. It is no defense that a nuisance is properly conducted or maintained carefully (102 Ark. 288), if it is so built and used as to destroy the comfort of the owners and occupants of adjoining property-holders. 85 Ark. 544-552. The law does not authorize the dumpage of sewage on appellee's premises. 103 Ark. 270.

8. Where a party appears, he can not object that no legal notice was given. 9 Ark. 518.

9. The statements of witnesses may be written by any one the officer calls to do the writing. Kirby & Castle's Digest, § 3407; 86 Ark. 259. The depositions were duly sworn to and certified.

10. The court properly refused to sustain the special plea in abatement.

11. The court did err in not dismissing the petition for want of equity, but did not err in finding for appellees on the whole case. A dangerous nuisance was proven. 102 Ark. 288; 85 *Id.* 553-4; 5 Pom. Eq. Jur., § § 539, etc.; 93 Ark. 53; 77 Am. St. Rep. 335; 92 S. W. 931-2; 42 Am. St. 367; 50 *Id.* 158; Spelling on Inj. (2 Ed), § 676; 15 Cyc. 728; 54 Ark. 144; Kirby's Dig., § 3965; 63 Pac. 557; 60 S. W. 593; 47 S. W. 70; High on Inj. (4 Ed.), § § 746, 773-4; 119 Ark. 169. The acquiring of the right-of-way by condemnation does not give the right to maintain a nuisance. 93 Ark. 53; 77 Am. St. 53; 92 S. W. 931; 119 Ark. 169. Nor does an ordinance authorize

appellants to empty their refuse on appellees' premises. 103 Ark. 270; 119 *Id.* 169.

12. The injunction should have been made permanent after a reasonable time to repair. *Supra.* The nuisance was continuing and grew more aggravated. 102 Ark. 288. This case is not different from 119 Ark. 169. The evidence established every fact proved in that case. Where a nuisance is proved, it is no defense that it was produced scientifically or carefully operated. 102 Ark. 288. The fact that sewers are necessary, and that the statute directs that they follow as far as possible the natural drainage, does not justify a city in discharging sewers into a stream to the damage of land owners. 155 Mo. 283; 119 Ark. 169; 113 *Id.* 442; 68 Conn. 263; 70 *Id.* 435; 39 Atl. 796; 9 Col. App. 828; 48 L. R. A. 691; 71 Hun. 232; 1 Wood on Nuisances (3 Ed.), § 434.

13. The decree here is not fatally defective; it is definite enough. 119 Ark. 169.

On the whole case no prejudicial errors appear.

WOOD, J. This action was instituted by the appellees against the appellants to restrain the latter from maintaining a nuisance.

The complaint in substance alleged that the city of Siloam Springs had been organized into one improvement district known as Sewerage District No. 1, for the purpose of constructing and maintaining a general sewer system therein; that a board of improvement was appointed, which board proceeded to construct and maintain a general sewerage system in Sewerage District No. 1; that it had extended the mains from the sewerage district to and adjoining the residences of the plaintiffs, who lived beyond the corporate limits of the city and beyond the sewerage district; that beyond the corporate limits of the city of Siloam Springs the defendants maintain a disposal plant which sprays noxious odors in the air and discharges the sewage from the sewerage district into a stream of fresh, pure water running through plaintiff's farms; that by such acts the stream is polluted so as to

make the water unfit for animal or human use, and is filled with noisome smells and nests or beds for the incubation of mosquitoes; that the defendants sprayed the sewage in a liquid form in the atmosphere near plaintiffs' dwelling, causing corruption of the atmosphere, noisome smells, flies, and mosquitoes; that by these acts the homes of plaintiffs are rendered disagreeable, uncomfortable and uninhabitable; that, by thus maintaining the sewerage disposal plant, the defendants have created a nuisance to the injury of plaintiffs which cannot be measured by monetary value; "that defendants by reason of their careless indifference, criminal, and reckless maintenance of the sewerage disposal plant have caused plaintiffs great physical annoyance and discomfort;" that such acts are continuous and recurring.

They further alleged that the defendants without exercising the law of eminent domain against the plaintiffs were appropriating without due process of law, the air and pure water of plaintiffs' farms and will continue to do so to the irreparable damage of plaintiffs unless restrained.

Plaintiffs alleged that they had no complete or adequate remedy at law and prayed that the defendants be perpetually enjoined from doing the acts and causing the conditions set forth in their complaint.

Demurrers to the complaint were filed and overruled, and the defendants answered denying specifically all its material allegations.

The defendants among other things set up in their answer that the sewerage system and disposal plant were constructed in accordance with the law, that the district was duly and legally formed, that the sewerage system and disposal plant were constructed by the most modern methods and by competent engineers and that same were being operated in a proper manner under the supervision of properly instructed employees and in accordance with the Board of Health, that the improvement was necessary for the public health of the general community.

The ruling of the court on the preliminary motions we deem it unnecessary to consider.

The material questions presented for our consideration are whether or not the court erred in its findings of facts and in the application of the law to those findings.

The court among other things found that the sewerage system and disposal plant were "managed, controlled, operated, and maintained jointly by the defendants," and that they were "so managed, maintained, and controlled as to constitute a nuisance."

The court further found that plaintiffs owned lands joining and in the vicinity of the disposal plant operated and maintained by the defendants; that flowing through the lands of L. W. Wallace and Anna Forrest is a stream of spring water with its source as the water supply of the city of Siloam Springs; that the defendants so operated and maintained its sewerage plant as to discharge the sewage into this stream, polluting its waters and making the stream unfit for animal or human use, thereby constituting a nuisance.

The court further found that the defendants by spraying the sewage in a liquid form in the atmosphere near plaintiffs' dwellings caused noisome smells, stenches, corruption of the atmosphere, flies, and mosquitoes; that the defendants by the above acts maintain a nuisance which rendered the enjoyment of the plaintiffs' farms, homes, and dwellings uncomfortable and uninhabitable to persons of ordinary sensibilities and depreciated their value as homes and places of abode.

The court further found that the operation and maintenance by the defendants of the disposal plant in the manner indicated had caused the plaintiffs great physical annoyance and discomfort and that the injury to the rights of the plaintiffs could not be measured by monetary value. That the operation and management by the defendants of its disposal plant was continuous and recurring, and that the plaintiffs had no complete and adequate remedy at law.

The court thereupon entered a decree perpetually enjoining the defendants "from so operating, managing, and controlling the disposal plant as to constitute a nuisance to the plaintiffs."

The testimony is exceedingly voluminous, and unless this opinion were extended to great length it would be impracticable to set it out and discuss it in detail. Indeed, such discussion would be of no use as a precedent.

Suffice it to say that the testimony on behalf of the appellees tended to prove that the sewerage system and disposal plant in connection therewith, situated outside of the corporate limits of the city of Siloam Springs, were constructed and maintained in such a manner as to discharge sewage of the city in a running stream which flowed through the farms of some of the appellees, thereby polluting the same and making it unfit for the use of human beings and domestic animals. That the stream was filled with noisome smells, that the sewage was so discharged as to cause nests or beds for the incubation of mosquitoes and flies, that the atmosphere was so polluted with noxious odors in such proximity to the appellees' homes as to make them uncomfortable and indeed uninhabitable to persons of ordinary sensibilities. Some of the witnesses described the odors as like rotten eggs or carcasses of decaying animals. One of the witnesses said "at times it was like a human body decaying;" others described the odor as "like a smell that comes from a toilet."

There was much testimony to the effect that the odors arising from the disposal plant and sewage discharge were so noisome as to render the condition of those who were subjected to them, exceedingly uncomfortable, indeed practically unbearable.

The testimony tended to show that the effect of the discharge from the disposal plant into the water of the running stream passing through the farms of some of the appellees was to cause slime all in the bottom at the disposal plant and to give the water a murky, milky appearance where it ran into the creek; that mosquitoes were

hatched there where the water ran out, and that wiggle-tails and mosquitoes were floating on the slime that was coming out of the sewerage plant.

Several witnesses stated that the water was discharged a few feet from the disposal plant into Sager Creek, the running stream which flowed through the farms of some of the appellees. That the water above where the discharge occurred was clear like any other running water, and that the water below contained "sludges of matter filthy looking like human sewage." The scum on some of the eddy places and on the rocks was an inch or two inches thick, which gave off a very offensive odor.

There was introduced on behalf of the appellees an analysis of samples of water taken from the stream above and below where the sewage from the disposal plant emptied into the same, made by the bacteriologist of the University of Arkansas. These samples showed that the sample of water above was in fair condition and not polluted while the same water from below was badly polluted with an intestinal type of bacteria.

One of the witnesses testified that during the summer matter from the disposal plant collected at the outlet turns to a brownish color, then to a bluish black, which settles on the bottom of the creek and for rods below the outlet the stuff varies from two to ten inches deep, that he could trace the same all the way across his farm. That the substance broke loose from the bottom of the creek, came to the top and at times great quantities of it stayed on top of the water and green flies collected on it in great numbers during the hot weather. He said there was nothing of this kind above the disposal plant, toward the town. That the effect of this sewage in the water was such upon the milk stock and the production of milk from his farm that he would not dare to use it.

It was shown on behalf of the appellees by an expert, who was called to explain the method of the operation and maintenance of the sewerage system that the sewage from the city passed into a large tank where the natural

process of decay and decomposition goes on, liberating ammonia, carbon bisulphide and other gases which escape through a vent in the top of the tank. Says this witness: "The liquid part of the sewage passes out into troughs which are suspended in the air, from which the liquid (also containing particles held in suspension) sprays onto a comparatively shallow bed of stone, liberating more gases into the air as it does. The solid part of the sewerage settles in the bottom of the large tank and by the means of valves is thrown into a shallow, open tank to be dried in the sun. The plant generates very noxious odors which can be smelled on all of the farms of the plaintiffs." The witness described the smells as follows: "These gases not only have the pungent and disagreeable smell of ammonia and sulphur compounds but in addition there is a sickening, nasty odor that has on more than one occasion made me sick at my stomach when I was more than one-half a mile from the plant. This witness further testified that the liquid part of the sewage contained matter in solution and also particles held in suspension mechanically is discharged in the creek, and furnished food for the growth of the organisms in the water." He stated that animals drinking the water from the creek would become poisoned from the great quantity of bacteria present, and that the water nitrates growing in the sewage so contaminated the stream that animals wishing the water would have to become very thirsty before they drank of the same, which was very hard on them. That the milk from animals having access to the contaminated stream would be unfit for food. This witness further states that he had observed millions of mosquitoes breeding into the slimy places where the sewage entered into the creek; that the community had never been bothered with mosquitoes before the construction of the disposal plant. He further testified to the deleterious effect that the drinking of the water had had on the domestic animals.

On the other hand, the testimony of the witnesses on behalf of the appellants tended to prove that the sew-

erage system was constructed under the supervision of civil and hydraulic engineers who had installed sewerage plants in towns and cities in Oklahoma and Arkansas and who had had an experience of many years in the construction and operation of sanitary sewerage systems; they adopted for the city of Siloam Springs what is designated as "the modified Imhoff design," which is declared by an eminent engineer and sanitary expert of New York City as the best device for the clarification and purification of sewage sludge in existence; that the plant at Siloam Springs was properly constructed in accordance with the latest methods of engineering of the kind.

The witness goes into detail in explaining the plans and specifications and the method of construction as well as the operation and maintenance of the plant. The plant cost $55,000. The testimony of this witness in short was to the effect that the plant had been properly constructed and was then being operated and maintained in such a manner as not to create a nuisance.

Another witness, one Baldwin, who was the chief of the fire department of Siloam Springs and the plumbing and sanitary inspector who had had charge of the sewerage plant for the last year or so stated that the plant was in good condition; that there was very little odor; that there was a crack on the west side that ran out some on the ground but that there was not a great deal of odor. He was employed by the city to see that the sewerage system was in working order and was also working for the sewerage district. He was paid by both.

The testimony of the members of the board of the sewerage improvement district was all to the effect that the plant was constructed according to the most approved, up-to-date methods, and that it was being operated and maintained in such a manner as not to create a nuisance.

One of the members of the board testified that the board of the sewerage improvement district was not then operating the plant, but his testimony further showed

that there had been no action by the board turning the plant over to the city, and that the board had in its employ a man by the name of Baldwin to keep the plant in working order.

Many witnesses for the appellants corroborated the testimony of the engineer and of the members of the board of the improvement district to the effect that the plant was constructed and was being operated in such a manner that no nuisance was created.

The testimony on behalf of the appellees and of the appellant is in such decided conflict, and there were so many witnesses testifying both for the appellees and appellants, that we have had great difficulty in determining where the preponderance lies. A majority of the court has reached the conclusion that the findings of fact by the chancellor are not against the clear preponderance of the evidence.

The law applicable to the facts as thus found is announced by this court in the case of *Jones* v. *Sewerage Improvement District No. 3 of Rogers,* 119 Ark. 169, where the facts were quite similar to the facts of this case.

There is no essential difference between the facts of the above case and the case at bar, which calls for the application of a different rule. That was a thoroughly considered case and announces the sound doctrine. We there said: "The right to construct sewers and drains implies no right to create a nuisance, public or private. It is the duty of the commissioners of the sewer district to construct the sewer so that it will not become a nuisance to any neighborhood or to any particular inhabitant thereof; and it is the duty of the city after the sewer has been turned over to it to avoid the same result by properly maintaining and repairing the sewer after it is constructed. * * *"

"After a careful consideration of the whole record we are of the opinion that the clear preponderance of the evidence shows that the sewer system was operated and maintained in such a way as to constitute a nuisance.

Our statute authorizing cities and towns to form improvement districts for the construction of a system of sewers did not intend to authorize the creation of a nuisance. * * *"

"The action of the defendants in negligently maintaining the sewer approximately and efficiently contributed to the nuisance. Thus the fundamental basis of all equity jurisdiction in tort manifests itself and the right of the plaintiffs to equitable relief is clear and indisputable."

In addition to the authorities there cited, see the following to which our attention has been directed in brief of counsel for appellees. These we have examined and find that they sustain the doctrine announced in *Jones* v. *Sewer Imp. Dist. No. 3 of Rogers, supra:* 1 Wood, Nuisances (3 Ed.), § § 434-5; *Suffolk Gold Mining & Mill Co.* v. *San Miguel Consol. Min. & Mill Co.*, 9 Col. App. 407, 48 Pac. 828; *Platt Bros. & Co.* v. *Waterbury,* 48 L. R. A. 691, and notes; *State of Kansas* v. *City of Concordia,* 20 L. R. A. (N. S.) 1050, and case notes.

The trial court, therefore, was also correct in overruling the demurrer to appellees' complaint. The complaint stated facts which, if true, showed that appellants had created and were maintaining a nuisance. The appellees, after stating such facts, then averred that appellants, without exercising the right of eminent domain, were taking and damaging the property of the appellees without due process of law.

It might be stated in passing that it was developed in the proof at the hearing that one of the appellees had sought to recover against appellants damages in an action at law which appellants successfully resisted.

The complaint further alleged that the acts complained of as constituting the nuisance were continuous and recurring and that appellees had no complete and adequate remedy at law. The demurrer as well as the answer of appellants show that their whole defense was bottomed upon the theory and contention that they were authorized by law to construct the sewerage system,

which they had done according to the best methods, and that same was being properly maintained; that as thus constructed and maintained no nuisance to appellees was in fact created, but that, even if the appellees, or some of them, were subjected to the inconvenience, annoyance, and discomfort of which they complained, appellees' sole and only remedy is at law where such remedy would be adequate and complete.

It is well settled that under our Constitution (article 2, section 22), private property can not be taken, appropriated or damaged for public use without just compensation therefor. *Hot Springs R. R.* v. *Williamson,* 45 Ark. 429. See also *City of Hope* v. *McLaughlin,* 107 Ark. 442; *City of El Dorado* v. *Scruggs,* 113 Ark. 239.

If the appellants were contending that the exigencies of the public health of the city of Siloam Springs required that they appropriate appellees' property to the use of the public for sewerage purposes under the authority of section 5664 of Kirby's Digest, and that in the use of such property by appellants for such purposes the appellees would necessarily be damaged, then appellants would be correct in their contention. Because, if that were the case, appellants would have a complete and adequate remedy at law. *McLaughlin* v. *City of Hope,* 107 Ark. 442; *City of El Dorado* v. *Scruggs,* 113 Ark. 239, *supra.* See also *Swaim* v. *Morris,* 93 Ark. 362. But such is not this case. The complaint alleges and the proof shows that appellants were not asserting, under the doctrine of eminent domain, any right to take or damage appellees' property for the benefit of the public. On the contrary, the appellants were proceeding entirely on the theory that in the construction and maintenance of the sewerage system it was not necessary to take or damage any of the property of the appellees, and that appellees' property in fact was neither taken nor damaged. As before stated, appellants in this case grounded their whole defense on the theory that the sewerage system was constructed and maintained so as not to create a nuisance.

The appellees, in the opinion of the majority of this court, by a preponderance of the evidence have proved that a nuisance was created. It was not incumbent upon appellees to make this proof by showing the manner in which the sewerage system was constructed, or the methods by which it was maintained. Appellees have met the burden of proof when they show by a preponderance of the evidence the existence of a nuisance and that the proximate cause of such nuisance was the sewerage system which appellants had constructed and were maintaining.

The appellants undertook to overcome this testimony on behalf of the appellees by testimony to the effect that the sewerage system had been constructed and was being maintained according to the most up-to-date and approved methods, and that as thus constructed and maintained a nuisance would not be created. It was within the province of the appellants to produce such testimony. Therefore, the issue as to whether a nuisance was in fact created and continued to exist at the time of the institution of this action was one depending upon the credibility of the witnesses and the weight to be given their testimony. It did not devolve upon appellees to point out to appellants the defects in construction or maintenance that caused the nuisance. Having proved the existence of the nuisance and that the appellants caused the same, the matter of the correction and abatement thereof must rest on the appellants.

Since the testimony showed that both the sewerage district and the city were maintaining the nuisance, the chancery court was correct in granting the relief sought both against the district and the city. In this respect the directions follow the suggestions in *Jones* v. *Sewer Improvement Dist. No. 3 of Rogers, supra,* as to the proper form of decree where both the district and the city are parties and both responsible for the maintenance of the nuisance.

The decree is affirmed.

WALES-RIGGS PLANTATIONS *v.* PUMPHREY.

Opinion delivered January 19, 1920.

1. BROKERS—AUTHORITY TO SIGN FOR BUYER.—Where an agent to sell land had authority from a purchaser to sign a contract for such purchaser, the vendor could make no objection to consummating the sale on the ground of a lack of authority in the agent to sell.
2. BROKERS—DEPOSIT IN BANK.—The vendor can not object because the initial deposit required to be paid to it was paid to a bank designated by its president, especially where the agent making the deposit directed the bank to pay the deposit to such president as soon as objection was made to the deposit in the bank.
3. BROKER—RIGHT TO COMMISSION.—Where a broker procures an agent ready, able and willing to purchase on the terms authorized and the vendor refused to convey, the broker is entitled to his commission.

Appeal from Washington Circuit Court; *W. A. Dickson,* Judge; affirmed.

STATEMENT OF FACTS.

This suit was instituted to recover commissions which J. W. Pumphrey, as a real estate agent, claimed from Wales-Riggs Plantations, a domestic corporation. The subject-matter of the suit is a farm of 128 acres which it is alleged the defendant, Wales-Riggs Plantation, authorized the plaintiff, J. W. Pumphrey, to sell for $5,126 upon a basis of 5 per cent. commissions for his services. The plaintiff effected the sale, but the defendant, claiming that it had sold the land to another party prior to plaintiff's sale and had thereby revoked the plaintiff's authority to sell, refused to pay him any commissions.

According to the testimony of John W. Pumphrey, he had known C. W. Riggs, president of the defendant corporation, for about two years before the occurrence of the transaction in controversy. Mr. Riggs made him an offer of certain commissions for selling real estate, including the 128 acres of land which is the subject-matter of this lawsuit and which is known as the Wild Turkey place. Pumphrey sold the place to L. R. Johnson for the defendant and was to receive 5 per cent. commissions

for making the sale. The firm of which Pumphrey was a member lent Johnson $1,000 with which to make the first payment, and according to the contract the balance of the purchase money was to be on deferred payments. Riggs refused to carry out the contract and afterwards sold the property to another person. The negotiations for the sale of the property were carried on in writing between C. W. Riggs, president of the defendant corporation, and J. W. Pumphrey. The correspondence commenced on June 19, 1917, and continued until September 23, 1917, when Riggs wrote Pumphrey stating that he had not made any contract for the sale of the Wild Turkey place to Johnson and had grave doubts whether he ever would make a contract with him. Subsequently he again wrote to Pumphrey declining to make a sale of the Wild Turkey place to Johnson and stated that he had sold it to another person. After several letters had passed between the parties, which we do not deem it material to set forth herein, on the 25th of August, 1917, Riggs sent to Pumphrey the following:

"Contract for Purchase and Sale of Real Estate.

"This agreement made and entered into this 25th day of August by and between Wales-Riggs Plantations, a corporation, acting herein by and through its President, C. W. Riggs, party of the first part, and J. W. Pumphrey, of Memphis, Tenn., party of the second part.

"Witnesseth: That the party of the first part hereby agrees to sell to the party of the second part, or anyone said second party may designate, and the said second party agrees to purchase, the following described real estate in the State of Arkansas and county of Cross, to-wit: East of the river the southwest quarter of Section 36, in Township 9 North, Range 5 East, containing 128.15 acres of land more or less..

The consideration shall be five thousand one hundred and twenty-six ($5,126) dollars, payable as follows: Three hundred dollars in cash upon the execution of this contract, the receipt of which is here acknowledged by the party of the first part, and the balance as

follows: Seven hundred dollars upon delivery of warranty deed, and the remainder is to be paid in twenty equal installments, consecutively, the first to be due and payable December 1, 1918, and annually thereafter.

"All or any part of the deferred payments shall be payable on or before maturity and shall bear interest at the rate of eight per cent. per annum from date until paid.

"A vendor's lien shall be retained upon the property, which shall have all the effect of a mortgage, until all deferred payments shall be made, and if any one of the deferred payments shall become due and remain unpaid for ten days, then in such case the said party of the first part shall have the option of declaring all deferred payments immediately due and payable.

"All deferred payments shall be payable at the Arkansas National Bank at Fayetteville, and shall, if demanded, be payable in United States gold coin of the present standard weight and fineness.

"The party of the first part agrees to furnish a complete abstract of title to said property, for examination only, after which said abstract shall be returned to the said party of the first part.

"The party of the second part shall have fifteen (15) days in which to examine abstract.

"The three hundred dollars this day paid us above recited shall be considered as part of the purchase price, or as a forfeit if the party of the second part fails or refuses to carry out this contract for any reason except defective title.

"The party of the first part guarantees that no taxes are now delinquent and unpaid.

"The party of the second part agrees to pay all taxes for the year 1917 and thereafter. If the title to said property is found to be not good, and cannot be made good within a reasonable time, the three hundred dollars this day paid shall be returned to the party of the second part.

"The final closing of this deal shall be subject to the examination and final approval of the attorney of the party of the first part, when a commission of $256.30 shall be payable to the party of the second part.

"Witness our hands this ..... day of ..... 1917. Defendant's exhibit No. 2."

Riggs also wrote Pumphrey a letter on that day requesting him to sign the two enclosed copies of contract and return the same with a $300 bank draft or check. Riggs further stated in the letter that if Pumphrey was afraid to put the $300 in his hands he would arrange with his bank in Kansas City, Missouri, the Fidelity Trust Company, to deposit it with them and let the bank handle his end of the deal. On September 3, 1917, a letter signed "Bailey-Ball-Pumphrey Co., by J. W. Pumphrey," was sent to the Fidelity Trust Company, Kansas City, Mo. It is as follows:

"Dear Sir: As per instructions of Capt. C. W. Riggs, dated Aug. 15th, ult., I am enclosing exchange of $300, as a deposit for earnest money and part payment in a little real estate. This money is to be held by you, and when Capt. Riggs as President of Wales-Riggs Plantations delivers a warranty showing good title to L. R. Johnson it is to be paid to him. If he fails to show title to be returned to me. If he shows good title and said Johnson refuses to carry out the trade, in that event only it is forfeited to Capt. Riggs.

"If you carry out the trade for Capt. Riggs, there is additional amount of $700 with us, $256 is to be paid to me as commission and the balance of $444 to Capt. Riggs. However, he doubtless will file a copy of contract with you giving the details.

"Yours truly."

On the same day Pumphrey wrote to Riggs at Kansas City, Mo., acknowledging the receipt of the contract for the land, stating that he had been out of the city and on that account had not answered sooner. In the letter he stated that Johnson had $1,000 deposited with his firm to make the cash payment, and that he was sending

$300 to the Fidelity Trust Company as earnest money and part payment, leaving $700 in his hands to finish the transaction when the defendant made a warranty deed after having shown good title by abstracts to be examined within fifteen days. He enclosed the duplicate contract for the purchase of the land which had been sent to him by Riggs signed "L. R. Johnson, by J. W. Pumphrey, agent." On September 7, 1917, Riggs wrote Pumphrey a letter, declining to complete the contract because it had been signed by Pumphrey and he did not know whether Pumphrey was Johnson's agent or not. He gave as an additional reason for not completing the sale that Pumphrey had not sent him the $300. On September 10, 1917, Pumphrey wrote to Riggs, if it was not satisfactory that the $300 should be deposited in the Fidelity Trust Company pending the examination of the abstract, that Riggs could call at the bank and get the $300, which he authorized the bank to pay to Riggs personally as well as president of the defendant corporation. On September 14th, Riggs wrote Pumphrey another letter in which he gives several evasive reasons for not signing the contract. On September 15, 1917, the Fidelity Trust Company returned the $300 check to Pumphrey, giving as a reason that Riggs had not called to see about it and that they could not agree to pass on the title in any event. On September 17, 1917, Pumphrey sent the $300 direct to Riggs and notified him that Johnson was prepared to complete the contract. On September 23, 1917, Riggs wrote to Pumphrey, returning the $300, and in a still later letter wrote Pumphrey that he had sold the place to another person.

The case was tried before the court sitting as a jury. The court found in favor of the plaintiff and judgment was rendered accordingly. The defendant has appealed.

J. W. Grabiel, for appellant.

The evidence shows that this is not a suit upon the ordinary broker's contract for a commission but entirely different. The entire contract and negotiations were by

written correspondence and the language is unambiguous, and plaintiff has failed to establish his right to recover, but shows that he has no right to recover, and the judgment should be reversed. The required cash payment was never put up as agreed upon in the correspondence contract, and the commission was never earned.

B. R. Davidson, for appellee.

1. Where a broker furnishes a purchaser able and willing to carry out the contract, he is entitled to his commission. 87 Ark. 506. To revoke the authority of an agent, it must be done in good faith and not for the purpose of giving another the preference. 84 *Id.* 462.

2. Good faith and strict neutrality on the part of the owner, as well as between the rival agents, is the test of the owner's liability. 112 Ark. 227-233 and cases cited. The acceptance of the terms by Pumphrey and Johnson was very much clearer than in the case in 47 Ark. 519. In the acceptance here, the length of time that the note ran and other details were stated, but the court held it binding. If a contract is drawn by one party, though not signed by him, it is admissible in evidence as to the terms of the contract. 49 Ark. 122. If a contract is signed by one party and acted upon by the other, it is binding as a written contract. 91 Ark. 162-167. If the terms are made, it will constitute a contract although the parties understood that a written contract embodying the terms should be drawn and executed. 95 Ark. 421-426; 105 *Id.* 575. To retain a check is evidence of acceptance of the variation of the terms if retained an unreasonable time, and what is a reasonable time is a question of fact. 95 Ark. 427. The case was properly decided, and there is no error.

HART, J., (after stating the facts). It is contended by counsel for the defendant that the judgment should be reversed because the parties never entered into any binding contract of sale. It will be noted that the land was properly described in the letters and that the price was agreed upon and the amount of commissions that

the plaintiff should receive in case he made the sale. Mr. Riggs first complained because Pumphrey signed the contract which Riggs had prepared and sent to him for Johnson's signature. The testimony of both Johnson and Pumphrey showed that Pumphrey had authority to sign the contract for Johnson, and hence Riggs could make no valid objections on this account. Because Riggs doubted whether or not Pumphrey had the right to sign the contract for Johnson did not in any respect lessen or take away such authority.

Again Riggs objected that the $300 had been deposited with the Fidelity Trust Company pending an examination of the abstract, instead of having been paid direct to him. In the first place, it may be stated that the deposit of this money with the bank was authorized by Riggs. He had stated in one of his letters that if Pumphrey did not wish to send the money direct to him he might deposit it with the bank. In the seond place, as soon as Pumphrey found out that Riggs objected to this plan of procedure, he wrote to Riggs directing him to take the money out of the bank, and stating that the letter would be authority for the bank to pay him the money. Riggs still declined to complete the sale because the bank did not bring the money to him. His objection in this respect was captious. The bank was the one with which he carried on his business, and was the one to which he had directed Pumphrey to send the money. The testimony of both Riggs and Johnson shows that Johnson had borrowed $1,000 from the firm of which Pumphrey was a member for the purpose of completing his contract for the purchase of the Wild Turkey place. He was prepared to complete his purchase and was only prevented from doing so by Riggs failing to carry out the contract on the part of the defendant corporation.

The evidence shows that Pumphrey found a purchaser in a situation and prepared to complete the purchase on the terms agreed upon. The law is, that when the agent procures a person who is ready, able and willing to purchase the property upon the terms under which

the agent is authorized to negotiate the sale, and the owner refuses to convey, the agent is entitled to his commission. *Poston* v. *Hall,* 97 Ark. 23, and cases cited, and *Reeder* v. *Epps,* 112 Ark. 566.

It follows that the judgment must be affirmed.

CORCORREN v. SHARUM.

Opinion delivered January 19, 1920.

1. VENDOR AND PURCHASER—EXECUTORY CONTRACT.—One purchasing land by an executory contract became the equitable owner.
2. VENDOR AND PURCHASER—ASSIGNMENT OF CONTRACT.—An executory contract for the purchase of land is assignable in equity and under Kirby's Dig., § 509, making all agreements in writing for the payment of money or property or both assignable.
3. DOWER—LAND PURCHASED UNDER EXECUTORY CONTRACT.—A widow is not entitled to dower in land purchased by her husband by executory contract, as against his vendor.
4. VENDOR AND PURCHASER—LIEN AS MORTGAGE.—A vendor's lien is treated in equity as a mortgage and enforced as such.

Appeal from Lawrence Chancery Court, Eastern District; *Lyman F. Reeder,* Chancellor.

STATEMENT OF FACTS.

T. J. Sharum brought this suit in equity against C. O. Corcorren, Bettie Corcorren, Lizzie Burel and A. P. Hager, to foreclose a vendor's lien on certain lands.

In his complaint the plaintiff states that in February, 1913, he sold to the defendant, C. O. Corcorren, a certain tract of land for $3,900 and received three notes of said Corcorren in payment therefor; that the first note, which was for $900, has been paid; but that the remaining two notes for $1,500 each are now due and unpaid; that in addition he has paid taxes on the land since the sale at the request of C. O. Corcorren, in the sum of $42.51.

The plaintiff also states that the defendant, Bettie Corcorren, the wife of C. O. Corcorren, and the defendants, Lizzie Burel and A. P. Hager, claim some interest

in the lands by purchase from C. O. Corcorren. The plaintiff tenders a warranty deed for said lands to said C. O. Corcorren, or to the said Lizzie Burel and A. P. Hager, as their interest may appear, and asks judgment against C. O. Corcorren for the balance of the purchase money due on said lands and that the same be declared a lien on the lands.

The prayer of his complaint is that, in default of the payment of the purchase money, the lands be sold in payment thereof, and that all possibility of dower of said Bettie Corcorren be barred, and that the interest of Lizzie Burel and A. P. Hager be sold.

Bettie Corcorren filed an answer in which she admitted that her husband, C. O. Corcorren, purchased the lands described in the complaint from the plaintiff for the price stated in the notes and that a vendor's lien was retained in said notes to secure the balance of the purchase price.

Her answer further alleges that Lizzie Burel and A. P. Hager purchased said lands from her husband and induced him to execute a quitclaim deed to said lands to them for the sum of $1,000; that she did not relinquish her right of dower in said deed and did not join in its execution. She admits that the lands should be sold in satisfaction of the indebtedness for the purchase money, but she alleges that the lands are very valuable and their value is greatly in excess of the amount due on the purchase money notes. She prayed the court to protect her inchoate right of dower in the lands.

The plaintiff, T. J. Sharum, filed a demurrer to the answer. The other defendants failed to answer or demur. The court found the issues in favor of the plaintiff, and it was decreed that in default of the payment of the purchase money the lands should be sold in satisfaction thereof and that if they sold for more than sufficient to satisfy the judgment for the purchase money, the residue be paid to Lizzie Burel and A. P. Hager.

The defendant Bettie Corcorren alone has appealed.

E. H. Tharp, for appellant.

1. The court erred in sustaining the demurrer, thus wiping away the inchoate right of dower of appellant in her husband's equitable estate in the land. Her husband was the owner of the equitable fee in the land, and his widow was entitled to dower. 100 Ark. 543; 101 *Id.* 301; 26 *Id.* 368. She did not join in the deed and was entitled to dower. Kirby's Digest, § 2702; 9 R. C. L. 582; 21 U. S. (L. Ed.) 830.

2. The value of her dower right can be computed by the annuity tables, aided by evidence as to health, bodily vigor of herself and husband. 9 R. C. L. 583; 5 L. R. A. 519; 3 L. R. A. (N. S.) 1068.

3. Marriage and seizin are essential to the inchoate right of dower. 14 Cyc. 926; 47 Md. 359; 3 Barb. (N. Y.) 319. The inchoate right of dower is a subject of judicial protection and can not be defeated or impaired by any act of the husband or by any title emanating from him. 9 R. C. L. 584; *Ib.,* p. 501, § 34.

The inchoate right of dower is a subject of judicial protection. 44 Am. Rep. 740; 51 Atl. 216; 87 Pa. St. 521; 13 Am. Rep. 523; 13 N. J. Eq. 231; 18 Barb. (N. Y.) 561; 8 *Id.* 618; 67 N. Y. Sup. 548; 7 Paige (N. Y.) 386. See also 32 Ohio St. 210.

Beloate & Anderson, for appellee.

As against T. J. Sharum the vendor's wife, appellant had no dower rights. 25 Ark. 52. The vendor's interst was *personalty,* and the vendee can sell free of any dower right, as dower follows the legal title and such rights go to the assignees. 16 A. & E. Enc. of L. (2 Ed.) 726.

If the vendee, Corcorren, had died before deed, his widow would have had no dower until the debt was paid, and the legal title as well as the equitable was vested in the vendee. 25 Ark. 52; 10 A. & Eng. Enc. of Law (2 Ed.) 164.

The wife has no dower rights until the death of the husband. Kirby's Digest, § 2716; 5 Ark. 608. A sale of

the land under judicial process divests all dower rights, especially for lien debts. 31 Ark. 576. The inchoate right of dower during husband's life is not a vested right, but after death may relinquish to the heirs, or one holding the legal title under the husband. 53 Ark. 280; 55 *Id.* 225.

HART, J., (after stating the facts). Corcorren made an executory contract with Sharum for the purchase of the land and executed three notes therefor for the sum of $3,900. He paid one of these notes which was for $900. He transferred his claim to the land to Lizzie Burel and A. P. Hager for the sum of $1,000, and they agreed to complete his contract for the purchase of the land. Upon default being made in the payment of the notes, the vendor brought this suit to recover judgment for the balance of the purchase money and to foreclose his vendor's lien on the land. Corcorren executed a quitclaim deed to Lizzie Burel and A. P. Hager, but his wife did not relinquish her dower in said deed. She claims that she has an inchoate right of dower in any surplus after discharging the vendor's lien and that is the sole issue raised by this appeal.

Corcorren became by his purchase the equitable owner of the land, and his executory contract for the purchase of the land was assignable in equity. 5 C. J. 852. Then, too, his contract for the purchase of the land was assignable under section 509 of Kirby's Digest, providing that all bonds, bills, notes, agreements, and contracts in writing for the payment of money or property, or for both money and property, shall be assignable. See C. J. 852, and the following cases where it has been held that executory contracts for the sale and purchase of land are assignable in equity and under statutes similar to our statute just referred to. *Skinner* v. *Bedell,* 32 Ala. 44; *Brown* v. *Chambers,* 12 Ala. 697; *Russell* v. *Petree,* 10 B. Mon. (Ky.) 184; *Melton* v. *Smith,* 65 Mo. 315, and *Cowart* v. *Singletary* (Ga), 47 L. R. A. (N. S.) 621, Ann. Cas. 1915 A., p. 1116.

The obvious intention of section 509 of Kirby's Digest was to vest the entire interest in the assignee, and this act would be defeated if there was an interest existing in the wife which could not be transferred. The same reason would apply if the contract is assignable in equity. So it has been held that a widow is not entitled to dower in land purchased by her husband and sold during his lifetime to enforce a vendor's lien thereon for unpaid purchase money, although she is not a party to the action to enforce the lien. *Sarver* v. *Clarkson,* 156 Ind. 316, 59 N. E. 933; *Schaeffer* v. *Purviance,* 160 Ind. 63, 66 N. E. 54; *Bisland* v. *Hewett,* 11 Sm. & M. (Miss.) 164; *Wilson* v. *Davisson,* 2 Rob. (Va.) 384; *Robinson* v. *Shackett,* 29 Gratt. 99; *Miller* v. *Stump,* 3 Gill. 304; *Hamilton* v. *Hughes,* 6 J. J. Marsh (Ky.) 581; *Heed and Wife* v. *Ford* (Ky.), 16 B. Mon. 114, and Scribner on Dower (2 Ed.), vol. 1, secs. 45-47, and cases cited. This view is in accord with the decisions of this court on the question.

In *Thorn* v. *Ingram,* 25 Ark. 52, the court held that a widow has no right of dower in lands purchased and occupied by her husband for which a deed of conveyance was executed and delivered in the lifetime of the husband, where the purchase money remains unpaid, as against the equitable lien of the vendor. In discussing the question the court said:

"In a case, upon a point similar to the one now before us, the Court of Appeals of Virginia, says: 'A wife's right of dower is an emanation from the ownership of her husband and subject to all its qualifications though not to his alienations or incumbrances during the coverture, without her consent, declared in the mode prescribed by law. Her right is dependent upon his, as existing at the inception of the coverture, or as acquired by him during its continuance. If he mortgage his land before marriage, her claim to dower is subordinate to the mortgage, and, if that be foreclosed, is completely divested. So if she unite with the requisite solemnity in his mortgage, made after the marriage, the effect of

a foreclosure is the same. If, during the coverture, he purchase mortgaged land, her title, like his, is subject to the incumbrance, and foreclosure of it destroys both. The result is the same where an incumbrance is created by the very act of purchasing; for if the purchase money be unpaid, and not secured, an equitable mortgage is embodied in the transaction itself, and if that be foreclosed by a sale of the property, under the decree of a court of equity, the wife's right of dower is completely extinguished.' *Wilson* v. *Davisson*, 2 Robinson's Va. Rep. 405. See also *Kirby & Dalton*, 1 Dev. 195; *Elliott* v. *Welch*, 2 Bland 242; *Warner* v. *Van Alstyne*, 3 Paige 513; *Nazareth, etc., Inst.* v. *Lowe*, 1 B. Mon. 257.''

Again in *Langley* v. *Langley*, 45 Ark. 392, the husband during his lifetime had made an executory contract for the purchase of lands and had received a bond for title thereto and the land was payable in installments. After he had paid part of the money he became affected with paralysis and transferred and assigned all his right and interest in the bond for title to his son. After the husband's death his widow claimed dower in the land, and that the deed from her husband to his son was in fraud of her dower rights. The court held that she must defer her proceedings for dower until the invalidity of the deed to the son had been established, and that until that was done she could not successfully defend in an action of ejectment against the holder of the legal title.

In the case at bar the wife does not claim that the deed from her husband to Lizzie Burel and A. P. Hager was procured by fraud. The effect of the holding in *Langley* v. *Langley, supra,* was that the widow was not entitled to dower as against the grantee of the husband, and this holding is in accordance with the general rule that if the husband during his lifetime disposes of any equitable estate he may have in the lands, the dower right of his wife therein will be defeated. This holding is not in conflict with sections 2691 and 2692 of Kirby's Digest, but is in conformity to them.

Section 2691 provides, in effect, that where a husband shall purchase land during coverture and shall mortgage his estate in such lands to secure the payment of the purchase money, his widow shall not be entitled to dower out of such lands as against the mortgagee.

Section 2692 provides that when the mortgagee, after the death of the husband of such widow, shall cause the land to be sold under the mortgage and if any surplus shall remain, the widow shall be entitled to dower in the surplus.

A vendor's lien is treated in equity as a mortgage and enforced as such. *Priddy & Chambers* v. *Smith,* 106 Ark. 79, and cases cited. Under the statute if Corcorren had died without having transferred his equitable interest in the land, his widow would have been entitled to dower in any surplus remaining after discharging the vendor's lien. Having parted with his equitable interest prior to his death by conveying the land to Lizzie Burel and A. P. Hager, he has no beneficial interest in the land, and at his death his widow would not be entitled to dower therein.

It follows that the decision of the court below was correct and the decree will be affirmed.

MALONEY v. MERCHANTS' BANK OF VANDERVOORT.

Opinion delivered January 19, 1920.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—Where the evidence in a case was such that reasonable minds might find for either party, the jury's verdict will not be set aside for insufficiency of evidence.

2. BANKS AND BANKING—BURDEN OF PROVING NEGLIGENCE.—In an action against a bank as gratuitous bailee of securities for their loss by burglary, an instruction that if they were deposited for safe-keeping and the bank on demand failed to return them, the burden was on it to show that it had made some disposition of them authorized by plaintiff, or that they were lost without its fault, correctly stated the burden of proof; but it was error to instruct that the burden was on the plaintiff of proving that the bank had not exercised common prudence in caring for the bonds.

3. BANKS AND BANKING — NEGLIGENCE — INSTRUCTION.—An instruction that a bank that had received bonds for safe-keeping was only bound to care for the bonds the same as it cared for bonds belonging to itself or its officers was incorrect, as the bank might have been grossly negligent in the care of its own property.

4. BANKS AND BANKING—NEGLIGENCE—EVIDENCE.—Proof that a bank receiving bonds for safe-keeping gave them the same care as it gave to bonds belonging to it or to its officers was competent to rebut the presumption of gross negligence arising from the loss of the bonds by burglary.

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

Lake & Lake, for appellant.

1. The undisputed facts of this case show gross negligence, and the verdict is therefore contrary to the law. 137 U. S. 604; 39 Am. St. Rep. 172.

2. Instruction No. 3 is not a correct statement of the law. 5 Cyc. 187.

3. Instruction No. 5 does not state the law correctly, because it makes the sole standard to measure the degree of care required of the bank, the same care given to bonds or other valuable papers belonging to the bank or its officers. It ignores the proposition that the bailee might have been negligent in keeping its own property. 6 C. J. 1161.

3. Instruction No. 14 is abstract, as there was no evidence to support it. 117 Ark. 593; 88 *Id.* 454; 63 *Id.* 177; 70 *Id.* 441; 74 *Id.* 19; 78 *Id.* 177; 80 *Id.* 260.

4. The court erred in rejecting competent testimony. 80 Ark. 587; 52 *Id.* 273; 34 *Id.* 480; 136 *Id.* 16; 1 Rice on Ev., 333; 62 Ark. 510; 108 *Id.* 387; 70 *Id.* 423; 91 *Id.* 427; 17 Cyc. 212.

Prickett & Pipkin, for appellee.

No negligence whatever was proved on the part of the bank. The burden was on the bailor. 68 Ark. 284, and negligence was a question for the jury. 23 *Id.* 61. The question was submitted to a jury, and their verdict is conclusive. The evidence fails to show any negligence

whatever on part of appellee. None of the objections to the evidence or instructions were called to the attention of the court. Only general objections were made, and no proper exceptions saved.

SMITH, J. The testimony in this case is substantially identical with that in the case of *Merchants' Bank of Vandervoort* v. *Affholter*, 140 Ark. 480, as the litigation in both cases arose out of the same burglary, except that in the former case there was, in addition to the question of negligence, the further question of agency in regard to certain bonds stolen at the same time.

The testimony is summarized as follows: "The bank kept a large iron safe with a combination lock on it, and inside of this safe was a compartment which was burglar-proof and was used for the safe-keeping of money. Liberty bonds of the third and other issues belonging to appellant and other persons, including officials of the bank, were not kept in the burglar-proof compartment but were kept inside 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 ax 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 on the part of the bank was to the effect that all the bonds, 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 of keeping bonds. The bank was a gratuitous bailee.

In the former case there was a finding for the plaintiff, the owner of the bonds, and we said the testimony was legally sufficient to support a finding of gross negligence on the part of the bank. In the instant case the finding was in favor of the bank, and as the testimony is not such that all reasonable minds must conclude from

the testimony stated that the bank was grossly negligent, we are, therefore, constrained now to hold the testimony legally sufficient to support that verdict. In other words, as reasonable men might differ upon the testimony stated as to whether there was gross negligence or not, we would not disturb a finding either way because of insufficient evidence to support it.

Without objection the court told the jury that if appellant had deposited five hundred dollars in United States bonds for safe-keeping with the bank, and that thereafter the bank, upon demand made therefor, failed to return them to appellant, the burden is cast upon the bank to show that it made some disposition of them authorized by appellant, or that they were lost without fault on its part. This instruction is a correct declaration on the question of burden of proof; but an instruction numbered 6, given at the bank's request, told the jury that it was sufficient if the bank had exercised such care as common prudence would dictate, and that the burden of proving that it did not exercise such common prudence is upon appellant, who was the plaintiff. The effect of this instruction was to impose the burden of proof upon appellant to show that the bank had not exercised common prudence in losing the bonds, and should not, therefore, have been given.

Over appellant's objection the court gave instruction No. 5, which reads as follows: "You are instructed that the defendant, through its officers or agents as ordinary prudent men, was under no greater obligation in the care of plaintiff's bonds than to care for the same as it cared for bonds or other valuable papers belonging to the bank or its said officers; and unless you find from a preponderance of the evidence that it did not so care for said bonds, then you should find for the defendant."

This instruction is objected to upon the ground that it made the standard of care required of the bank the same care given to bonds or other valuable papers belonging to the bank or its officers, whereas the bank

might have been negligent in keeping its own valuable papers; and, if so, that fact would be no excuse for negligence in keeping valuable papers belonging to others. It is true the instruction does say that if the officers or agents of the bank "as ordinary prudent men" did this, there would be no liability; but we do not agree with learned counsel for the bank that this instruction required a finding that the officers of the bank had acted as ordinarily prudent men. On the contrary, it declares the law to be that as ordinarily prudent men they were under no greater obligation to care for appellant's bonds than they were for their own, and that if they took the same care of appellant's bonds that they took of their own then the bank would not be liable.

This instruction does not correctly declare the law. Proof of this degree of care is, of course, competent to rebut the presumption of gross negligence arising from the loss of the bonds, but it is not conclusive of the fact, as the bank might have been grossly negligent in the care of its own property. A learned discussion of this subject is contained in the charge of Sharswood, J., to the jury in the case of *Erie Bank* v. *Smith, Randolph & Co.,* 3 Brewster (Pa.) 9. See, also, *Griffith* v. *Zipperwick,* 28 Ohio 388; *Patriska* v. *Kronk,* 109 N. Y. Supp. 1092; *Ray* v. *Bank of Kentucky,* 10 Bush 344.

Other assignments of error are discussed, but in none of them is it made to appear that there was error prejudicial to appellant.

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

PHILLIPS *v.* PHILLIPS.

Opinion delivered January 19, 1920.

1. DEEDS—EVIDENCE OF DELIVERY.—In a suit by a husband to cancel a deed of his homestead to his wife as not having been delivered and accepted and as having no consideration, a finding in favor of the wife will be sustained on appeal where it conveyed a beneficial interest to her and was recorded by him and it does not appear that it was wholly without consideration.
2. HUSBAND AND WIFE—CONVEYANCE TO WIFE.—A deed from a husband to wife conveys the beneficial interest to her.
3. HUSBAND AND WIFE—WHEN WIFE'S TITLE QUIETED.—Where a husband conveyed land to his wife and placed the deed on record, and thereafter claimed the property as owner, it was proper for the court to grant to the wife affirmative relief and quiet the title.

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

McKay & Smith, for appellant.

1. There was no delivery of the deed. This is shown by the uncontradicted evidence. The recording is only *prima facie* evidence of delivery and this is overcome here by the evidence. 98 Ark. 466; 18 C. J. 207; 18 U. S. (L. Ed.), 262; 132 Ark. 438.

2. The court erred in quieting the title as against appellant. The legal title was in appellant and not in appellee. 98 Ark. 30; 60 *Id.* 70; 86 *Id.* 150; 196 S. W. 476.

3. The deed was void for want of consideration. 14 Wall. 570; 196 S. W. 476.

4. A conveyance of a homestead could not be fraudulent as to creditors as they had no lien. 33 Ark. 762.

A. S. Kilgore and *Joe Joiner,* for appellee.

1. There was sufficient delivery of the deed. 77 Ark. 89. The case in 98 Ark. 466 is not in point, as the facts are entirely different.

2. The court properly quieted the title, as appellee asked affirmative relief and appellant did not object. He held the legal title as trustee for his wife, and a trust

may be revoked. Ann. Cases B 1918, p. 1043; 32 Cyc. 1308.

3 There was sufficient consideration to support the deed. 196 S. W. 476. The chancellor so found, and his findings are not against the evidence.

SMITH, J. This suit was brought by appellant against appellee, who is his wife, to cancel a certain deed executed by him to her. It was alleged—and appellant testified—that he could neither read nor write; that he executed the instrument for the purpose of conveying to his wife certain personal property, without knowledge of the fact that the instrument was a deed and conveyed land, and that the instrument was without consideration, and had never in fact been delivered.

Appellant also testified that the instrument was executed to defeat the collection of an unjust demand which was being asserted against him by one Crumpler for $70, but which demand does not appear to have been reduced to judgment.

The deed recited a consideration of a dollar, and was executed and acknowledged on November 5, 1906, but was not filed for record until October 7, 1907. After its execution, and before it was recorded, the deed was kept in a trunk to which Mrs. Phillips had access. Phillips took the deed to the clerk and filed it for record with instructions—which were complied with—to hold the deed subject to his order when it had been recorded, and that the deed had never been out of his possession, or that of his attorney.

The land conveyed constituted Phillips' homestead, and he stated that he knew it was exempt from the claims of any creditor and that he would not have conveyed the land to place it beyond the reach of his creditor, because he knew it was unnecessary to do so. Appellant further testified that no change of any kind took place in the possession of the land; that he continued to cultivate and manage it and to pay the taxes thereon in his own name, until he went to Texas.

Phillips deserted his wife and went to Texas, where he remained for about five months and a half, leaving his wife in the possession of the farm. During his absence his wife brought suit for divorce, which was dismissed when he returned and filed an answer. Thereafter Phillips brought this suit.

Mrs. Phillips admitted that she had stated to one Cheatham, after the separation had occurred, that she was willing for her husband to deed her and each of their children a forty-acre tract and for him to keep a forty for himself; but she explained that she had never admitted that she did not have a deed and title to all the land, and that she made this proposition as a matter of fairness, and by way of compromise, and that the plan proposed expressed her idea of how that purpose could be effectuated, and that she expected to sign the deed to the children. Mrs. Phillips also testified that on the morning the deed was executed Phillips brought it in and held it up and said: "I don't own a thing this morning, everything is yours. This is no good until I have it recorded, but as soon as that is done it will hold. You will have to pay a dollar," and that she paid the dollar. That the deed was afterwards recorded and that she thereafter regarded the land as her own. A grown son, who lived with his mother, testified that his father could read print and that he heard the conversation in which his father told his mother that the land was hers and that he no longer had an interest in it, and that he remembered when his father brought the deed to town to have it recorded.

The notary who prepared the deed and took the acknowledgment was a son of the man who sold the land to Phillips and resided on the same section of land. He testified that he had no independent recollection of preparing the deed, or taking the acknowledgment, except that it was in his handwriting and had been acknowledged before him. This witness testified that if he wrote the description of the land in the deed—as he appears to have done—he did so upon the information

and at the request of Phillips. This witness appears to be entirely disinterested, and there is no intimation that he had connived to practice any fraud upon Phillips.

It was adjudged and decreed in the court below that the complaint be dismissed for want of equity, and that the title of Mrs. Phillips be quieted and confirmed as against her husband; and upon this appeal it is now insisted that the court erred in refusing to set the deed aside, and also in granting the affirmative relief of quieting Mrs. Phillips' title.

We think the chancellor's finding is not clearly against the preponderance of the evidence. The presumption of acceptance, arising out of the beneficial interest there conveyed, is reinforced by the affirmative testimony of Mrs. Phillips and her son; and a delivery of the deed is shown by the fact that it was recorded pursuant to his statement to his wife that he would have this done, after having kept it in his possession for about a year. *Stephens* v. *Stephens,* 108 Ark. 53. And it does not appear that the deed was wholly without consideration.

We think no prejudicial error was committed by the court in quieting the title of Mrs. Phillips against her husband. It is true that this court has several times held that a conveyance from a husband to wife carries simply the equitable title to the land, he retaining the legal title as her trustee; but the trust is wholly passive. However, such deed does convey the beneficial interest, and the ownership of this interest formed the subject-matter of this litigation. Phillips was not attempting to assert title as trustee, but as owner. His asserted interest was inconsistent with his trusteeship, and it was not improper, therefore, to grant affirmative relief against that claim by quieting the title in Mrs. Phillips.

Decree affirmed.

CRANFORD v. HODGES.

Opinion delivered January 19, 1920.

1. APPEAL AND ERROR—INCONSISTENT POSITIONS.—Where, in a suit to compel the conveyance of land, the court decreed that plaintiff pay a specified amount into court and that title be divested out of defendants, the receipt of the money by one of the defendants was inconsistent with her right to appeal, though she gave a bond for its return in case of reversal.
2. COSTS — NONPERFORMANCE OF CONTRACT. — Where defendants agreed to convey land in which a minor had an interest as soon as an order could be obtained from a court of competent jurisdiction authorizing him to convey his interest, and, being unable to obtain such order, tendered a deed for their own interests, reciting that a note was to be executed for the minor's share of the price, the costs of a suit by the purchaser for specific performance in which they were decreed to convey their own interests were properly assessed against them, as the provision for a note was not in accordance with the contract.

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

C. L. Pearce and *Miller & Yingling,* for appellants.

The decree is inequitable in this: (1) There was a mutual mistake as to the thing bought and sold; (2) the written contract was mutually rescinded and a subsequent parol contract made; (3) there is no evidence that appellants breached either the written or parol contract, but there is ample evidence that appellee breached both, and (4) appellants repeatedly offered and were willing to do the very things the court decreed they should do and their not doing so was on account of appellants' default, and it was error to adjudge costs against them. 5 Pom. Eq. Jur. (4 Ed.), 4972-3; 25 R. C. L. 335; 13 U. S. (Law Ed.), 921; 18 *Id.* 435; 27 *Id.* 940; 118 *Id.* 283.

Brundidge & Neelly, for appellee.

1. The appeal should be dismissed because, in accordance with the order of the court, appellee paid into court $1,600, the amount of the purchase price remaining unpaid, and this amount was paid to the attorneys of ap-

pellants, and they are estopped. 136 Ark. 348. The acceptance of the money was a bar to the appeal, but if not the decree is correct and is sustained by the evidence. After the question of the minor's age came up, the parties still agreed to sell their interest in the land, which is all that appellee asked, *i. e.,* specific performance of the contract as made. The minor was not a party to the suit.

2. As to the costs, they were in the sound discretion of the chancellor and were properly adjudged.

SMITH, J. Mary F. Grant died intestate, and was survived by her husband, C. H. Grant, and two minor children, Emma and Fred Grant. At the time of her death she was the owner of the town lots involved in this litigation. Emma attained her majority and married. Her name is now Emma Cranford. Fred Grant is still a minor. In March, 1919, the father and daughter decided to sell their interest in the property and, after consulting with the boy, they offered the property to appellee for three thousand dollars. The offer was accepted, and a contract in writing was executed and signed by Grant and his daughter, who were there designated as parties of the first part. As to the interest of Fred Grant, the minor, it was provided that, as soon as an order could be obtained from a court of competent jurisdiction authorizing him to convey his interest, the parties of the first part bound themselves to execute a warranty deed conveying their respective interests, it being recited that the consideration for all three interests should be three thousand dollars, and that the parties of the first part would make between themselves and with the said Fred Grant "a division of the purchase money according to their own agreement." The parties of the first part acknowledged the payment of $700 to Emma Cranford to be applied as payment on her portion of the total consideration.

There appears to have been no question about the good faith of the parties to this contract, but they were unable to obtain the order removing the disabilities of

Fred Grant because he was under eighteen years of age. Thereafter there were negotiations between the parties, as to the details of which they differed, but no agreement was reached, and this suit was brought.

Before the institution of this suit Grant and Mrs. Cranford sold the lots to Mrs. Mabel O. Pearce, who bought with full knowledge of the prior contract, and she was made a party to this litigation. The deed to Mrs. Pearce recited the payment of $2,300 to Grant and Mrs. Cranford and the execution of a note for $700, payable to the order of Fred Grant in five years, bearing interest at the rate of eight per cent.

On the final hearing the court decreed that the plaintiff Hodges should pay into the registry of the court the sum of $1,600, being the amount of purchase money unpaid, and that upon the payment of said sum all title should be divested out of Mrs. Cranford, Grant and Mrs. Pearce and vested in plaintiff, and that the deed to Mrs. Pearce should be set aside and held for naught, and that Mrs. Pearce is the owner of the said sum of $1,600 so ordered paid, and the clerk of the court was directed to pay the same to her and to have the same receipted for upon the margin of the decree.

It was further recited that the rights of the minor, Fred Grant, were not to be in any manner affected by the decree.

The defendants were ordered to pay all costs, and have prosecuted this appeal. This decree was rendered June 9, 1919.

Thereafter on July 5th, Mrs. Pearce received said sum from the clerk and executed a bond containing the following recitals: "And the defendants desiring to appeal from said decree and further desiring to refrain from jeopardizing any of their rights herein, here offer to conditionally accept said sum of sixteen hundred dollars, to be returned, however, to the clerk of the chancery court in the event that said decree is reversed by the Supreme Court of Arkansas.

"Therefore, we hereby undertake and bind ourselves that, in the event the Supreme Court of Arkansas reverses the decree of the White Chancery Court, in the above entitled cause of action, that the defendant, Mabel O. Pearce, will pay into court the sum of sixteen hundred dollars, whenever directed, to be subject to the further orders of the court upon a final determination of said cause of action, and that she will obey all other orders and decrees made by said court in the premises."

Appellee has moved to dismiss this appeal because of the action of Mrs. Pearce in withdrawing this money from the registry of the court; and we think that motion is well taken so far as she is concerned. Appellants say, however, that Mrs. Pearce's acceptance of this money was conditional, and that they have given a bond, the solvency of which is undisputed and which has been approved, which requires the return of this money if appellants prevail upon their appeal. This action is inconsistent, however, with Mrs. Pearce's right to appeal. The use of this money pending this appeal is itself a benefit and one which Mrs. Pearce has the right to enjoy only because her deed was canceled, and it is inconsistent for her to enjoy the use of money to which she is only entitled because her deed has been canceled and, while using the money thus obtained, prosecute a suit to reverse the very decree under which that right is enjoyed. *Jones* v. *Hall,* 136 Ark. 348.

It is apparent that the real parties in interest are now appellee and Mrs. Pearce, as Fred Grant's rights have not been affected by either the contract of sale or the deed to Mrs. Pearce or by the decree in this cause and that Mrs. Cranford and Grant get $2,300 for the land whether the title vests in appellee or in Mrs. Pearce.

The other appellants say, however, that the appeal should not be dismissed, not only because Mrs. Pearce's acceptance of the money was conditional, but because they have taken no action inconsistent with their right of appeal, and it is insisted by them that if the appeal is dismissed they are made liable for the costs of this

proceeding, whereas they would be entitled to a reversal of the decree if the cause were heard on its merits. We do not agree with them in this contention. This suit was not defended upon the ground that the defendants' performance was impossible because of the minority of Fred Grant. Upon the contrary, it is asserted that appellants have at all times offered to perform the contract, and as a reason for not now assessing the costs against them it is asserted that they offered to do substantially what the decree directs done. In reply to this contention, it is pointed out that, while Grant and Mrs. Cranford did tender to appellee a warranty deed to the property in question, conveying their respective interests therein for the sum of $2,300, that deed also recited the existence of a note to be executed to Fred Grant by appellee for the sum of $700, due in five years and bearing interest at the rate of eight per cent. As has been stated, this is the kind of a deed Mrs. Pearce accepted, but it does not conform to the contract of sale here sought to be specifically enforced, because of the provision for a five-year note at eight per cent.

Appellants elected to defend upon the ground that they had made no default in the performance of their contract. But the terms of sale recited in the deed constituted a substantial variance, and the court was, therefore, warranted in finding against appellants on the issue presented by the pleadings and the testimony. The decree of the court below is therefore affirmed.

WATSON v. DAVIDSON.

Opinion delivered January 19, 1920.

1. HUSBAND AND WIFE—ALIENATION OF WIFE—EVIDENCE.—In an action by a husband for alienating his wife's affections, the gist of the action is the loss of *consortium*, and therefore the defendant is entitled to cross-examine the husband as to the cohabitation between him and his wife after the alleged separation.

2. APPEAL AND ERROR—HARMLESS ERROR.—In an action by a husband for criminal conversation and alienation of affections, the refusal of the court to allow defendant to cross-examine plaintiff as to whether he had not cohabited with his wife after the separation was erroneous but harmless where defendant made plaintiff his own witness on that issue, and was permitted to contradict his denial of cohabitation.

3. EVIDENCE—LETTERS OF THIRD PERSON.—In an action by a husband for alienation of a wife's affections, a letter written by the wife to defendant, containing a denial of adulterous relations between them was properly excluded, being in the nature of a self-serving declaration, and not admissible as *res gestae* or to establish good motive on part of defendant in responding to it.

4. EVIDENCE—DECLARATION OF CONSPIRATOR.—It is only where a conspiracy has been established by other evidence that the declaration of a co-conspirator in furtherance of the conspiracy is admissible against his associate or associates.

Appeal from Clay Circuit Court, Eastern District; *R. H. Dudley,* Judge; affirmed.

Davis, Costen & Harrison, for appellant.

1. The court erred in refusing to allow defendant to cross-examine plaintiff relative to his living and cohabiting with his wife subsequent to the alleged separation and in instructing the jury that defendant had made plaintiff his witness and was bound by his action. The gist of the action was the loss of the comfort, society and assistance of the consort, and in order to show this it was necessary to show that defendant wrongfully and maliciously by words, conduct and act deprived plaintiff of the comfort, society and assistance of his wife, and the evidence was competent and a complete defense to the action for alienation of affections. 105 Iowa 279; 75 N. W. 100; 94 Iowa 598; 63 N. W. 341; 99 Me. 161; 58 Atl. 774; 99 N. W. 1985; 21 R. I. 270; 43 Atl. 67; 64 Vt. 432; 25 Atl. 438.

2. The testimony was material and important as showing condonement of the wife's adultery. 2 Shaw's Digest, 842; 30 L. J. Mit. Cas. 111; L. R. 1 Pr. & D. 333; 35 N. H. 22.

3. The evidence was important to defendant as tending to show conspiracy alleged to exist between plaintiff and his wife. 101 N. W. 207; 109 Iowa 288. See also Jones, Com. on Ev., vol. 2, § 254, pp. 436-7.

4. The verdict is clearly against the preponderance of the evidence. It is clear that this action was the result of an arrangement between plaintiff and the wife.

HUMPHREYS, J. Appellee instituted suit against appellant in the Eastern District of the Clay Circuit Court to recover, under sufficient and appropriate allegations, damages in a total sum of $10,000 for criminal conversation with, and alienation of the affections of, his wife.

Appellant answered denying each and every material allegation of the complaint and charging a conspiracy between appellee and his wife, Ruth Davidson, to wrongfully and wickedly institute suit against appellant upon false allegations and obtain a judgment against him, after which time they would reunite and live together as husband and wife.

The cause was submitted to a jury upon the pleadings, instructions of the court and the evidence upon which a verdict was returned and judgment rendered in favor of appellee in the sum of $500. From that judgment an appeal has been duly prosecuted to this court.

It is suggested that the verdict is contrary to a fair preponderance of the evidence, but not insisted that the evidence is insufficient to support the verdict, so it is unnecessary to give a history of the case in order to determine the points at issue presented by the appeal. Suffice it to say that the evidence adduced by appellee tended to show that appellant and Ruth Davidson were guilty of adultery during the time she resided with appellee as his wife, and that, through the contriving of appellant, the affections of Ruth Davidson for her husband, the appellee, were alienated, which resulted in a separation and divorce; and the evidence adduced by appellant tended to show that no adulterous relationship

existed between appellant and Ruth Davidson, and that he did not by seductive words, promises or in any other manner alienate the affections of Ruth Davidson from her husband.

The first assignment of error insisted upon for reversal is the refusal of the court to allow appellant to cross-examine appellee relative to his having cohabitated with his wife at Marmaduke and Paragould, in Lake County, Tennessee, subsequent to the alleged separation. The loss of *consortium* being the gist of the action, it was proper on cross-examination of appellee to inquire concerning the relationship that existed between him and his wife after the alleged separation. The refusal of the court to permit the inquiry did not prejudice appellant, because he was permitted to prosecute the inquiry by using appellee as his own witness. It is urged, however, that he was permitted to prosecute the inquiry upon the condition that he would be bound by the answers of appellee made to the inquiries which proved to be negative answers; that, had he been permitted to prosecute the inquiry on cross-examination or without the imposition of the condition, he would not have been bound and therefore not prejudiced by the negative answers of appellee. It appears in the record that subsequent to this incident appellant was permitted to prove by other witnesses that appellee had consorted with his wife after the separation at the times and places mentioned with ample opportunity for sexual intercourse. So it seems quite clear that in the course of the trial the court departed from the ruling and did not hold appellant bound by the answers of appellee in reference to his relationship with his wife after the separation; else why did he permit appellant to establish the relationship existing between appellee and his wife after the separation by other witnesses? The admission of the subsequent evidence amounts to a reversal of the ruling insisted upon as prejudicial.

It is insisted that the court committed reversible error in refusing to admit the following letter written by

Ruth Davidson to appellant a short time before the separation:

"Well, Riley, Greenie is cursing you and me being on the bed, and you know and I know God in Heaven knows that it is a lie, and I have taken more trouble today over that than I can put up with, and I give him the dam lie about it and he choked me and slapped me three times, and, Riley, if you don't care, please let me have enough money to leave on, for I can't put up with the mistreatment that I have put up with, and I want to get me a place to stay."

Appellant was permitted to testify, when charged with writing to appellee's wife, that it was in response to a note written to him by her, and to testify to the contents of his note in answer. It is true that appellant's motive in writing to appellee's wife became an issue in the case, but he was allowed to fully explain the occurrence. The letter offered in explanation of his motive is objectionable, because a denial of the act of adultery by the adultress to the adulterer, and therefore in the nature of a self-serving declaration. We do not think the letter competent to establish the good motive of appellant nor as a part of the *res gestae*. The mere fact that it was written near about the time of the separation would not necessarily make it a part of either the adulterous act or acts or the alienation of the affections of the wife.

Lastly, it is insisted that the court erred in refusing to admit the declaration of appellee's wife to Sadie Austin and Mary Bell Clark to the effect that she and appellee had entered into a conspiracy to feign a separation and sue appellant upon false charges of adultery and alienation of affections. It is only where a conspiracy has been established by other evidence that the declaration of a co-conspirator in furtherance of the conspiracy is admissible against his associate or associates. A conspiracy between appellee and his wife was not sufficiently established by other evidence to render her declarations admissible in support of the conspiracy.

No error appearing, the judgment is affirmed.

MARTINEAU v. CLEAR CREEK OIL & GAS COMPANY.

Opinion delivered January 19, 1920.

1. TAXATION — EQUITABLE RELIEF AGAINST ASSESSMENT.—While a mere mistake in judgment, fixing the value of the property to be taxed by a taxing board or commission, from which no appeal lies, can not be relieved against in equity, that court will restrain illegal taxes assessed by such boards, induced by fraud, gross mistake, discrimination, nonuniformity or the adoption of a fundamentally erroneous method.
2. TAXATION—VALUATION OF NATURAL GAS COMPANY'S PROPERTY.—The Tax Commission can not fix the valuation of the property of a natural gas company by ascertaining the net earnings of the company and then fixing an amount as the valuation which would produce the net earnings at the rate of 6 per cent. per annum. The commission could take into consideration the net income of the property as affecting its value, but it should likewise consider the probable producing life of the gas wells, the increased cost of developing them, and the per cent. of the capitalization of the concern included in the net income.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; affirmed.

John D. Arbuckle, Attorney General, and *C. A. Starbird* and *C. M. Wofford,* for appellants.

The court erred in overruling the demurrer and enjoining the collection of taxes, as the facts alleged and conceded by the demurrer amount in substance to an honest mistake only on the part of the Tax Commission as to the value of appellee's property. Chancery has jurisdiction to correct excessive assessments, but the complaint alleges grounds sufficient, at most, if at all, to support an overvaluation, an error in judgment on the part of the Tax Commission.

The commission derives its power from act 257, Acts 1909, and act 251, Acts 1911. Its powers are broad —unlimited—and are made to depend upon the statement furnished by plaintiff as therein required and which it did furnish as alleged in the complaint. In determining the issues the facts alleged in the complaint are taken as true, but the conclusions of law are not so taken. The

determination of the Legislature is conclusive unless it is arbitrary and without foundation in justice and reason. 98 Ark. 113-117; 94 *Id.* 217.

There is no right of appeal from assessments by the Tax Commission. 2 Cooley on Taxation, p. 1382; 1 Desty on Taxation, p. 605; 49 Ark. 518; 90 *Id.* 413; 63 *Id.* 576. The legal presumption is that the Tax Commission performed its duty. 96 Ark. 477. No appeal being provided, the action of the assessing body is conclusive. 52 Ark. 529. See also 90 Ark. 413; 106 *Id.* 248; 110 *Id.* 34; 63 *Id.* 576-588; 154 U. S. 421; 164 *Id.* 599, 611; 204 *Id.* 585, 593-6; 174 U. S. 739, 754. An overvaluation or mistake of judgment in assessments can not be received by the courts. *Supra.* When the commission made its assessment it acted fairly, justly and according to law and the method pursued was correct and the cause should be reversed.

Hill & Fitzhugh, for appellee.

1. The method adopted by the Tax Commission for ascertaining the value of appellee's property was fundamentally wrong, and resulted in excessive valuation. The commission followed some method of its own based on capitalization of earnings as reflecting the value of the property. The method is contrary to the Constitution and our statutes, and the method erroneously refused to allow as operating expenses the *cost* of drilling wells and interest on indebtedness incurred for development, thereby swelling the apparent earnings and producing an excessive valuation. The capitalization of earnings is not in common use and is not recognized as a proper basis of ascertaining value, but is condemned as radically wrong and contrary to our law. 164 Penn. St. 284; 119 Ark. 362; 166 Pa. St. 453; 214 Fed. Rep. 180; 239 U. S. 234. These authorities conclusively settle the proposition that an assessment on a basis of capitalization of earnings is illegal.

2. The proper remedy is in equity. 49 Ark. 518; 110 *Id.* 34; 63 *Id.* 588; 204 U. S. 585; 244 *Id.* 499-522; L.

R. A. 1916 A, 972. The action of the Tax Commission is not conclusive, and if a mistake or error has been made equity can correct cases. *Supra.*

HUMPHREYS, J. Appellee institued suit against appellants in the Fort Smith District of the Sebastian Chancery Court to enjoin a taxation of its personal property in excess of $1,599.55 in Crawford County, and $1,292.95 in Sebastian County.

The jurisdiction of the court over the subject-matter and parties and the sufficiency of the bill were challenged by demurrer. The court overruled the demurrer, to which ruling appellants excepted and elected to stand on their demurrer. The court thereupon rendered a decree in accordance with the prayer of the bill, from which an appeal has been prosecuted to this court.

The bill alleged, in substance, that appellee is a private corporation, producing and selling natural gas; that it is domiciled in Fort Smith and owns a plant and equipment consisting of pipe lines, etc., of the value of $140,222.71, gas wells of the value of $29,950.73, gas leases of the value of $10,000, and supplies of the value of $11,682.18, or assets in a total value of $191,855.62; that it owns no intangible property; that in accordance with the requirements of the law, it returned the value aforesaid of all the property owned by it of date June 1, 1918, to the Tax Commission of the State of Arkansas, and, in addition, upon request furnished said commission with an auditor's report of its business in detail, including its gross receipts, gross operating expenses and net results from operation; that the corporate stock of appellee is $45,000, $15,000 of which was exchanged for leases on land, a large part of which was relinquished as being unprofitable territory; $15,000 sold at par value, and $15,000 at five for one; that its investments consisted of $105,000 derived from sales and exchange of stock, $97,000 borrowed, for which it bonded its property, $30,000 borrowed and treated as a floating debt; that the value of the corporate stock, including franchises, etc., was less

than the value placed upon its property returned as of date June 1, 1918; that the amount paid in by the stockholders and borrowed, which had been invested in the plant, including pipe lines, etc., and in developing gas wells, was $232,700, but that the unpaid investment was of less value than the amount actually invested, because about $40,000 of said sum represented dry holes and unprofitable leased territory which had been surrendered; that the stockholders had received no dividends and the bonded and floating indebtedness had not been paid; that the Kibler gas field, in which appellee's wells are located, were discovered in 1915, but, since that time, have gradually decreased in the profitable production of gas, on account of the decline of rock pressure, the natural pressure propelling gas; that the value of its plant and other assets is dependent on its present and prospective supply of gas, a large part of which has been exhausted in the operation of the business; that the Tax Commission established a basis of fifty per cent. of the actual value of property for assessment purposes and upon that basis, appellee's property should have been assessed at $95,927.91, according to its actual and returned value; that, instead of so assessing appellee's property, the commission arrived at the value thereof upon the basis of a capitalization of its net earnings, and, in applying the rule so adopted, refused to allow as operating expenses the cost of drilling wells and interest paid upon the bonded and floating indebtedness; that the rule adopted resulted in swelling the value of the property of appellee from its actual and returned value of $191,855.62 to $439,592, for taxation purposes, in fraud of the rights of appellee, and in arbitrarily extending an unjust and grossly erroneous tax against the property of appellee in the sum of $3,488.22 in Crawford County, and $2,812.77 in Sebastian County, contrary to section 5, article 16, of the Constitution of the State of Arkansas, and the Fourteenth Amendment to the Constitution of the United States.

Appellants insist that the court erred in overruling the demurrer and enjoining the collection of taxes from

appellee in excess of $1,599.55 in Crawford County, and $1,292.95 in Sebastian County, for the reason that the facts alleged in the complaint and conceded by the demurrer amount, in substance, to an honest mistake of judgment only on the part of the Tax Commission as to the value of appellee's property. Learned counsel for appellant are eminently correct in their contention, if they have correctly measured the extent and effect of the allegations of the bill. The authorities seem to be agreed that a mere mistake in judgment fixing the value of property to be taxed by a taxing board or commission, from which no appeal lies, can not be relieved against in a court of equity. The rule is aptly stated by Mr. Cooley in his work on Taxation, volume 2, page 1382, in the following language: "The courts either of common law or of equity are powerless to give relief against the erroneous judgments of assessing bodies, except as they may be specially empowered by law to do so." See also Desty on Taxation, vol. 1, p. 605; *Wells Fargo & Co. Express* v. *Crawford County,* 63 Ark. 576; *State ex rel. Norwood, Atty. Gen.,* v. *K. C. & Memphis Ry. & Bridge Co.,* 106 Ark. 248; *Pittsburgh, Cinn., Chicago & St. L. Ry. Co.,* v. *Backus,* 154 U. S. 421; *Maish* v. *Arizona,* 164 U. S. 599; *San Diego Land & Town Co.* v. *National City,* 174 U. S. 739. While these authorities uphold the doctrine that courts of equity will not interfere with the values placed upon property by taxing boards, from which no appeal lies, when the value is dependent upon a difference of opinion, unless authorized to do so by statute, yet most of the authorities above cited, as well as many others, recognize the doctrine that courts of equity will restrain illegal taxes assessed against property by such boards induced by fraud, gross mistake, discrimination, non-uniformity or the adoption of a fundamentally erroneous method. *Green* v. *L. & I. R. R. Co.,* 244 U. S. 499; *Chicago, B. & Q. Rd. Co.* v. *Babcock,* 204 U. S. 585; *Mudge* v. *McDougal,* 222 Fed. Rep. 562; *Johnson* v. *Wells Fargo & Co.,* 239 U. S. 234. It was said in our own case of *Wells Fargo & Co. Express* v. *Crawford County, supra,*

that, "The assessment of the property of this express company having been committed by law to the Board of Railroad Commissioners, a complaint for relief in equity is insufficient which only alleges that the valuation by the board is excessive; for, in the absence of fraud, intentional wrong or error in the method of assessment, the finding by the board can not be overturned by evidence going only to show an error of judgment in the valuation of the property." We think counsel for appellant have mistaken the tenor and effect of the allegations contained in the appellee's bill. The gist of the petition is to the effect that a grossly excessive valuation was placed upon the property in question by the application of the rule known as the capitalization of the net earnings of the concern. It is alleged that the Tax Commission ascertained the net earnings of the concern and fixed an amount as the valuation of the property which would produce the net earnings at the rate of six per cent. per annum. We find no warrant either in our Constitution, Act No. 257 of the General Assembly of 1909, or Act 251 of the General Assembly of 1911, from which the commission derived its authority, for ascertaining values based upon any arbitrary rule of this kind or character. It is true that the powers conferred upon the Tax Commission by the General Assembly are very broad, and much latitude is extended it in the exercise of its judgment in fixing tax values. The power and authority conferred upon the Tax Commission by the Constitution and statutes of this State, in reference to assessing the tangible or intangible personal property of private corporations owning and operating pipe lines, require the board to assess same at its value on a per cent. basis equal and uniform with the assessment of other personal property of the same species throughout the State. Necessarily, there are many elements entering into the value of a gas plant, developing and selling natural gas on the market. It is manifest, under the allegations of the bill in the instant case, that in marketing the gas, which is the chief capital of such a concern, its capital is largely con-

sumed in the operation of the plant. That being the case, net profits could not accurately be ascertained by a deduction of the gross cost of production from the gross amount of sales. The difference between the gross amount of sales and the gross cost of production necessarily includes the capital of the concern, because it is alleged that gas is its chief capital and that in the field in which appellee is operating the gas is being rapidly exhausted. So the rule alleged to have been applied by the Tax Commission in order to ascertain the value of appellee's property is an arbitrary one, and, according to the allegations of the complaint, swells the true value of the property many times. In arriving at the value it was clearly within the province of the Tax Commission to take into consideration the net income of the property as a fact affecting its true value, but it should likewise have taken into consideration the probable producing life of the gas wells, as well as the increased cost of developing them and the per cent. of the capitalization of the concern, included in the net income. To take the net income alone of the property as a basis for fixing the value of the property is fundamentally wrong. This court said in the case of *American Bauxite Co.* v. *Bd. of Equalization,* 119 Ark. 362, that "property is assessed in this State whether it produces income or not, and property is not taxed according to its income, and, indeed, the question of income is of importance only as it relates to and affects the market value." This was said in reference to assessment of real estate, but the language is also appropriate in reference to ascertaining the value of personal property.

The method adopted by the Tax Commission for ascertaining the value of appellee's property being fundamentally wrong, and resulting in an excessive valuation thereof, the decree of the chancery court is affirmed.

LUCK v. MAGNOLIA-MCNEIL ROAD IMPROVEMENT DISTRICT NO. 1.

Opinion delivered January 19, 1920.

1. HIGHWAYS—PROCEEDING TO FORM DISTRICT.—The organization of a road improvement district under Acts 1915, page 1400, is in the nature of a public proceeding *in rem* against all the land within the district upon notice to all property owners, who are accorded an opportunity to appear and defend against organization of the district, and any party not appealing from the order of the county court within the time fixed by the act will be deemed to have relinquished any right to question the same.
2. HIGHWAYS — MISREPRESENTATIONS — RIGHT TO OBJECT.—Property owners who have failed to appeal from an order organizing a road district, and to withdraw their names from the petition, can not attack the organization of the district in equity upon the ground of fraud, deceit or misrepresentations as to the cost of the improvement made by persons circulating petitions for the improvement.

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

Gaughan & Sifford, for appellants.

1. The court erred in dismissing the bill, as the allegations constitute a fraud upon the rights of appellants which should be relieved against in equity and the fraud was not discovered until after the order was made in county court and the time elapsed for appeal.

The misrepresentations set forth, if made, and they were, constituted a fraud upon the rights of plaintiffs. Freeman on Judg. (3 Ed.), ch. 6, p. 99; 107 Ark. 136; 194 S. W. 499; 90 Ark. 591, 261, 166; 75 *Id.* 415.

2. The chancery court had jurisdiction. Cases *supra.* Under Act 338, Acts 1915, both notice and bond requisites were complied with. No motion was made to give bond and it was waived. The demurrer should have been overruled and the cause heard upon its merits.

McKay & Smith, for appellee.

1. The chancery court was without jurisdiction. The petition was presented after notice had been given as

required by law and the order made and no appeal was taken. 19 S. W. 220. No bond was filed.

2. The alleged misrepresentations if made were not sufficient to constitute fraud for which the order establishing the district could be annulled. 15 R. C. L., par. 329. No fraud was practiced on the court in procuring the order. 75 Ark. 416; 90 *Id.* 167; 68 *Id.* 492; 73 *Id.* 440; 107 *Id.* 136. The fraud must be in stating existing facts, not mere promises as to future acts. 20 Cyc. 20; 180 S. W. 333; 95 Ark. 375; 2 Pom. Eq. Jur. 878. Petitioners had no right to rely on the statements or promises made. 185 S. W. 268; 196 *Id.* 801. The means of information were equally open to all the parties. 95 Ark. 523. The misrepresentations did not relate to any matter of inducement to the making of the contract, etc. If appellants, with all the information before them, relied upon statements made with inquiry or attention they must abide the consequences. 95 Ark. 375; 71 *Id.* 91; 46 *Id.* 245; 2 Pom. Eq. Jur. 891.

HUMPHREYS, J. Appellants instituted suit against appellee in the Columbia Chancery Court to dissolve the district and enjoin its commissioners from selling bonds, letting the contract and constructing a road or improvements. It was alleged, in substance, in the bill that appellants, land owners in the district, were induced to sign the original petition for the organization of the district upon the representation that the contemplated improvement would not cost more than four or five cents an acre per year, covering a period of twenty years, on the lands embraced in the district, and that more than seven cents an acre per annum for that period would not be assessed against said lands embraced within said district; that their signatures were necessary to form the district; that, after the formation of the district and assessment of benefits and the time had expired for taking an appeal provided in the act, under which the district was created, appellants discovered that the improvements contemplated would cost and an assessment required of twenty-five cents an acre per annum for twenty years on the

lands embraced in the district; that the misrepresentation as to the cost of the improvement and maximum assessment that would be made on their lands constituted a fraud upon the rights of appellants.

Appellee challenged the sufficiency of the complaint on demurrer.

The court sustained the demurrer, and, appellants refusing to plead further, dismissed the bill for want of equity, from which action of the court an appeal has been duly prosecuted to this court.

It is insisted by appellant that the court erred in dismissing the bill for the reason that the allegations in the bill constitute a fraud upon the rights of the appellants which should be relieved against by the chancery court. The organization of an improvement district under the act in question is in the nature of a public proceeding before the county court *in rem* against all the real estate within the limits of the proposed district upon notice to all the property owners therein. Every property owner within the boundaries of the district is accorded an opportunity to appear and defend against the organization of the district at the time fixed for hearing in the order and notice. The penalty prescribed for not appealing from the order within the time fixed by the act is set forth in section 3 of said act and is as follows: "Any party not appealing within the time prescribed shall be deemed to have waived any objections he may have had to said order, and to have relinquished all rights he may have had to question same."

It is urged that the fraud alleged was not discovered until after the order was made and the time had elapsed for taking an appeal, and that, for this reason, relief may be had in a court of equity. The contention is not sound, for, in matters of a public nature, the parties required to determine them must inform themselves in advance and at the proper source. The doctrine invoked by appellants for the cancellation of private contracts upon discovery of fraud has no application in matters of this character. It was alleged in appellants' bill that the mis-

representations were made to them by parties circulating the petitions. Even if appellants were not precluded from attacking the district under the general rule announced above, their allegations would be insufficient because they obtained their information from the wrong source under the act in question and had no right to rely upon it. Under act 338 of the Acts of the General Assembly of 1915, under which the district was organized, it is provided that before petitions are circulated for signatures of land owners in a proposed district, in order to determine the feasibility and cost of any road improvement district therein, there shall be filed in the county court of said county preliminary surveys, plans, specifications and estimates of the cost of the proposed road or improvement. The purpose of this requirement in the act, as said in the case of *Lamberson* v. *Collins,* 123 Ark. 205, was "to provide an appropriate scheme for advising the land owners of the character of the improvements to be undertaken, and the cost thereof, so that they could act upon the petitions intelligently." The act itself protects the property owners from such frauds as are alleged in the bill, if taken advantage of at the proper time. It is provided in section 2 of said act that persons who sign the original petition for the formation of an improvement district may withdraw their names from the petition for valid reasons, if made in writing at the time the petition is presented to the county court for hearing. This court construed what valid reasons were within the meaning of the act in the case of *Echols* v. *Trice,* 130 Ark. 97, saying that they consist of fraud, deceit, misrepresentation or duress.

Appellants having failed to appeal from the order creating the district within the time prescribed by the act, and having failed to withdraw their names from the petition for valid reasons at the time fixed by the act, are now without a remedy in any other court to attack the creation of the district on the ground of fraud, deceit or misrepresentation, as alleged in their complaint.

No error appearing, the decree dismissing the bill for want of equity is affirmed.

CAMERON v. ROBBINS.

Opinion delivered January 26, 1920.

1. FIXTURES—RIGHT TO REMOVE—PREMATURE ACTION.—Where appellee conveyed timber to a lumber company to be removed in seven years, with a stipulation that buildings erected by the company on lands leased from others, on expiration of the time allowed for removing timber should be left on appellee's land, and belong to him, and such buildings were erected on land leased from others under contracts stipulating that they should remain the property of the lumber company, removable at the end of the lease, *held* when a claim to such buildings was asserted by the judgment creditor of the lumber company's successor appellee could assert his rights to them prior to expiration of the seven years.
2. FRAUDS, STATUTE OF—FIXTURES.—Houses erected by a lumber company on leased land which, under written contract, were to remain the property of the company as trade fixtures never became part of the realty, but remained personal property, and the only provision of the statute of frauds applicable thereto would be that which relates to the sale of chattels.
3. FRAUDS, STATUTE OF—AGREEMENT FOR REMOVAL OF FIXTURES.—Where the grantor of timber to a lumber company and the company contracted in writing that houses erected on the grantor's land by the company should belong to the grantor at the end of the period allowed for removal of the timber, a subsequent verbal contract that buildings erected by the company on lands of a third person should also belong to the grantor above named, the part of the contract not in writing was one not within the statute of frauds.
4. FRAUDS, STATUTE OF—AGREEMENT NOT TO BE PERFORMED WITHIN YEAR.—Where a contract for the sale of timber agreed that the timber should be removed within a period of time not exceeding seven years, and that at the expiration of the time allowed for removing the timber the seller should own the buildings erected by the buyer, the contract was not within Kirby's Digest, subdivision 6, relative to agreements not to be performed in a year.

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

Geo. M. LeCroy, for appellant.

No right or cause of action was shown in appellee and the court erred in holding otherwise and directing a verdict for him. The law can not incorporate into an in-

strument what the parties have left out, even though the omission was by mistake. 94 Ark. 130. By reason of our execution lien we have the right to invoke whatever defense F. H. Shackelford might set up as against Robbins, and appellee can not rely upon both his written contract and an oral one engrafted thereon also. If the title notes, together with the contracts, amounted to a chattel mortgage and not subject to levy or sale, as to the houses there at the time of the sale and conditionally sold to Shackelford by Wilson, yet this construction could not apply to those later built. It was a chattel mortgage and unrecorded, and not good as against creditors. 97 Ark. 436. The houses, being on leased land with the express right of removal and for trade purposes only, were trade fixtures and may be seized and sold under execution. 19 Cyc. 1365-6. Appellant or Shackelford had such a property right as was subject to execution and sale. Kinnard received his money back, as he was paid $300, which went to Mrs. Shackelford. This defense was pleaded and was well taken, and appellant should have judgment for the amount of his execution and penalty. Kirby's Digest, § § 3267-3272.

Neill C. Marsh, for appellee.

1. There is no conflict in the evidence. It shows conclusively that it was the intention and the agreement of the parties that all houses built there were to be and were the property of H. F. Robbins; that they were built of his timber; that the mill company had only the right to use them so long as it operated and not longer than January 9, 1921. The transfer to Josephine Shackelford was a conditional one, a conditional sale, the lumber company retaining the title to everything sold until all the purchase money was paid. The houses were appurtenant to the mill—a part of the plant—and necessary to its operation so long as it operated. The sale to Mrs. Shackelford conveyed appurtenances burdened with the conditions and obligations and the agreement between the lumber company and Robbins as to these houses

was one of the burdens and conditions. The court was right in instructing a verdict.

2. It is clear that the houses built were to be the property of H. F. Robbins, but it was agreed that the right to the houses should pass to the grantor, Robbins, in the timber deed the same as if the mill operation would have been placed upon the property as first agreed and this was of record long before Shackelford made the conditional purchase and long before Cameron sued Shackelford. Shackelford never had the right to remove the houses, nor did he own the land. Appellant had no right whatever to the houses. The facts are undisputed and the court properly directed a verdict.

McCULLOCH, C. J. The facts in this case are undisputed. Appellee owned a tract of timber land in Union County, and conveyed the timber by deed to the Hardwood Dimension Lumber Company, there being a stipulation in the deed that the timber should be removed expeditiously within a period of time not exceeding seven years, and that the grantee should erect a saw mill on the land for the purpose of manufacturing the timber into lumber. A few months subsequent to the execution of the timber deed, and when the lumber company was about to begin performance, it was found desirable to erect the mill and the appurtenant houses and other buildings just across a creek from appellee's tract of land on another tract owned by one Culpepper, it having been expressly agreed between appellee and the lumber company that the buildings should be left on appellee's land at the expiration of the time allowed for removing the timber and thus become the property of appellee, and an additional written contract was then entered into between appellee and the lumber company whereby it was agreed that the houses to be built on the Culpepper land should, at the expiration of the lease, become the property of appellee the same as if the houses had been built as originally intended on appellee's land. The lumber company leased the land from

Culpepper under a written contract which stipulated that the houses built on the land should be and remain the property of the lessee and removable at the end of the lease.

Subsequently it was found necessary for the lumber company to lease an adjoining tract of land from one Wysinger to build houses on, and a contract was entered into between the lumber company and Wysinger whereby Wysinger leased the land to the lumber company with a stipulation concerning the removal of the houses similar to that contained in the Culpepper contract. There was a verbal agreement between appellee and the lumber company with respect to the houses to be built on the Wysinger land to the effect that they should become the property of appellee in accordance with the original contract concerning the construction of the mill plant on the land of appellee. The lumber company, after putting the mill into operation and building numerous houses on the Culpepper and Wysinger lands to be used in connection with the mill plant, sold the mill machinery conditionally to Mrs. Josephine Shackelford and transferred the leases from Culpepper and Wysinger. Mrs. Shackelford subsequently assigned her interest to her husband, F. H. Shackelford.

Appellant is a judgment creditor of Shackelford and caused process to be levied on the houses on the Culpepper land and on the Wysinger land for the purpose of obtaining satisfaction of the judgment. Appellee intervened, and the controversy arises over the priority of their rights in and to these houses which were constructed on the lands aforesaid.

The time for removal of the timber had not expired and the first contention of appellant is that appellee's assertion of the right to the houses is premature. It is true that appellee could await the time of the expiration of the timber contract and then remove the houses as against the claims of all persons, but he was not bound to do so when a conflicting claim was asserted by another person. The houses have not become a part of

the realty on which they were built, but remain the personal property of the builder pursuant to the contract which reserved the right to remove them as trade fixtures. The title, as well as the immediate right to possession is involved in this controversy, and appellee can assert his rights now. If the property belonged to appellee, it is not subject to execution under a judgment against Shackleford, for the latter had at most only a right to occupy the houses while operating the mill under his purchase from the lumber company.

The next contention is that appellant's contract, at least as to the houses on the Wysinger land, is within the statute of frauds and void. The contract between Wysinger and the lumber company, as well as the Culpepper contract, was in writing, and, according to its terms, the houses were to remain the property of the lumber company as trade fixtures. The houses never became a part of the realty, but remained the personal property of the lumber company, which were, under the contract with appellee, to pass to the latter. Now, the contract between appellee and the lumber company with respect to the houses on the Culpepper land was in writing, and there can be no question of the statute of frauds being involved in the controversy concerning those houses. The only question that arises on that subject relates necessarily to the houses on the Wysinger land. Those houses, not being a part of the realty, the statute of frauds concerning the sale or lease of lands does not apply. The houses constituted personal property and the only statute which could, under any circumstances, apply would be that which relates to the sale of chattels. Kirby's Digest, section 3656.

The verbal agreement between the lumber company and appellee did not, however, constitute a contract for the sale of the houses. The original contract in writing between the parties provided for the sale of the houses which were appurtenant to the mill plant, and the verbal agreement referred to merely concerned the change of the contract from building the houses on appellee's land

or on the Culpepper land to building some of them on the Wysinger land. The verbal contract, in other words, relates merely to the place where the houses were to be built, instead of a contract with respect to the ownership of the houses themselves at the time of the expiration of the lease, for, according to the original contract, the houses were to become the property of appellee. That part of the contract not in writing was one which was not within the statute of frauds.

The same answer may be given to the contention that the case falls within the clause of the statute which provides that a "contract, promise or agreement that is not to be performed within one year" must be in writing. Kirby's Digest, sec. 3654, subdiv. 6.

We are of the opinion, therefore, that, the facts being undisputed, and the principles of law being favorable to appellee's claim, the court was correct in giving a peremptory instruction. The judgment is therefore affirmed.

JOHNSON v. PINKLEY.

Opinion delivered January 26, 1920.

1. STATUTES—EXTENSION BY REFERENCE TO TITLE.—Constitution, article 5, section 23, providing that no law shall be revived, amended or its provisions extended by reference to its title only, has no application to repeals of statutes, wholly or in part.
2. STATUTES—EXEMPTING TOWNSHIP FROM STOCK LAW.—General Acts 1919, page 390, exempting a certain township from a stock law district created by a prior act *held* not violative of Constitution, article 5, section 23, as an amendment of the stock law by reference to title only.
3. ANIMALS—EXEMPTING TOWNSHIP FROM STOCK LAW.—Acts 1919, page 390, exempting a certain township from a previously created stock district *held* not unconstitutional as attempting to grant to a class of citizens privileges and immunities not accorded to others; the exemption in favor of "qualified electors and citizens" residing in the township being surplusage, as the entire township is removed without the district.

4. ANIMALS — TOWNSHIP EXEMPTED FROM STOCK DISTRICT BY SPECIAL ACT.—Where a stock district was formed by vote of the electors pursuant to a statute, the Legislature may exempt one of the townships of the district therefrom by a subsequent special act.

Appeal from Carroll Chancery Court, Western District; *B. F. McMahan,* Chancellor; reversed.

C. A. Fuller, for appellants.

The court erred in failing to sustain the demurrer to subdivision B. C and D of paragraph 5 and act No. 517, Acts 1919, is not unconstitutional for the reasons set forth in said subdivisions of paragraph 5. The act in no way violates article 5, section 23, of our Constitution, as it does not attempt to revive, amend or extend the provisions of any former law. It is more of a repeal of a formeer law enacted in 1915 and known as Act 156, and does not violate the Constitution. 133 Ark. 157. It is easy to ascertain that the act is complete on its face and sufficiently shows what the Legislature intended. It shows that it attempted to exempt Winona Township from the stock law of 1915 and seeks to repeal the former act thus far. 133 Ark. 157; 109 *Id.* 556. See also 13 Mich. 481; 120 Ark. 169; 47 *Id.* 481; 49 *Id.* 134. Neither of the subdivisions of paragraph 5 state a cause of action, and there was error in failing to sustain the demurrer as to subdivisions B, C and D of paragraph 5.

Andrew J. Russell, for appellees.

The only question raised is the constitutionality of Act 517 of Acts 1919. The act violates the constitutional provision. Article 5, section 23. The lower court properly upheld the provisions of paragraph 5 and it had jurisdiction. 84 Ark. 170; Cooley, Const. Law, p. 391; 18 Cyc., p. 1368.

McCULLOCH, C. J. The General Assembly of 1915 enacted a statute, approved March 19, 1915 (Acts 1915, p. 676), which provided for stock-law districts to be formed upon vote of the qualified electors of three or more townships in any county. The statute provided

that an election shall be ordered by the county court upon petition of twenty-five per centum of the qualified electors of three or more townships, and that if a majority of the electors in all of the area mentioned in the petition shall vote in favor of the adoption of the statute the district shall be formed.

A stock-law district was duly formed in Carroll County, composed of ten townships, Wynona Township being one of the number. This was done prior to the regular session of the General Assembly of 1919, at which session a special statute was enacted as follows, (omitting the title and the enacting clause, and the emergency clause):

"Hereafter Wynona Township in Carroll County, Arkansas, and the qualified electors and citizens residing therein, are hereby declared exempt from the provisions and effects of the act of 1915 of the General Assembly of the State of Arkansas, approved March 19, 1915, and adopted in said townships, prohibiting or restraining horses, mules, asses, cattle, goats, sheep and swine from running at large in said township." Act No. 517, Gen. Acts 1919, p. 390.

Appellant and other inhabitants of Wynona Township, treating the special statute as being valid, and as releasing them from the operation of the stock law regulations, proceeded to permit their stock to run at large, and appellees instituted this action in the chancery court of Carroll County to restrain the running at large of stock in Wynona Township.

The contention of appellees was that the special statute exempting Wynona Township was void on numerous grounds. The chancery court sustained the attack on three grounds and rendered a decree enjoining appellants from permitting their stock to run at large. There is no question raised as to the jurisdiction of the chancery court.

One of the grounds on which the court sustained the attack on the validity of the statute is that it is in con-

flict with section 23, article 5 of the Constitution, which reads 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."

It will be observed that the constitutional inhibition is not directed against the repeal of statutes, either wholly or in part. *Vance* v. *Austell,* 45 Ark. 400; *White River Lumber Co.* v. *White River Drainage District, ante,* p. 196. Its sole operation is against reviving or amending a law or extending or conferring the provisions of a law by reference to title only. The statute now under consideration is plainly not one to revive a law or to extend its provisions. If it comes within the inhibition of the Constitution, it must be as an amendment to the former statute. It does, in fact, operate as an amendment of the act of 1915, *supra,* by exempting Wynona Township from the operation of the former statute, but we do not think that it constitutes an attempt to do so merely by reference to the title of the former statute. The title to the old statute is not in fact mentioned in the amendatory statute at all, which refers to the old statute merely by reference to the date of approval, and does not refer to its title for identification. If that was all to be found in the new statute, we would readily declare it to be too vague for identification, but the amendatory statute goes further and refers to the exemption as one to apply to the act of March 19, 1915, "adopted in said township, prohibiting or restraining horses, mules, asses, cattle, goats, sheep and swine from running at large in said township." Now, this language makes the exemption refer not to the title of the former statute, but to an area definitely described as Wynona Township wherein a statute had been adopted "prohibiting or restraining horses, mules, asses, cattle, goats, sheep or swine from running at large in said township." The adoption of this statute in Wynona Township is a matter of public

notoriety, and the reference to it is sufficient to identify the particular thing from which the township is to be exempted. That mode of identification being sufficient, it is unnecessary to resort to the title of the statute for that purpose, and, inasmuch as the identification does not depend upon the reference to the title of the act, it does not come within the inhibition of the Constitution.

The case is ruled, we think, by the decision of this court in *Hermitage Special School District* v. *Ingalls Special School District,* 133 Ark. 157, and it does not fall within the rule announced in *Rider* v. *State,* 132 Ark. 27, where the terms of a statute were amended or extended merely by reference to title.

The next contention on which the lower court based its decision in sustaining the attack on the validity of the statute is that the exemption in favor of "qualified electors and citizens residing" in Wynona Township constituted an attempt to grant to a class of citizens certain privileges or immunities which were not accorded to others. In other words, the contention is that the statute is void because it grants the exemption merely to electors and citizens, and not to others who may reside there or rightfully have property interests there. This attack is unfounded for the reason that the exemption applies to the area mentioned, that is to say to Wynona Township, and takes it out of the operation of the stock law; therefore, the employment of the succeeding term "and the qualified electors and citizens residing therein" is a matter of surplusage. Since the whole area is excluded, there remains no prohibition against the running at large of stock in that territory, and the exemption inures to the benefit of everybody.

The court also sustained the attack on the ground that it is not within the power of the Legislature to dismember a district created under a valid statute by vote of the electors in accordance with the terms of the statute. The answer to this is that the statute, when put into operation, is a police regulation and is entirely subject to legislative control. The organization of the dis-

trict is dependent upon the legislative will, and it is entirely within the power of the lawmakers to either repeal or amend the statute, or to abolish the district, or to exclude any territory from it. In other words, the power of the Legislature over the subject is supreme, there being no vested right in a mere police regulation.

Our conclusion, therefore, upon the whole case is that the chancellor erred in declaring the statute to be void. The decree is reversed, and the cause remanded with directions to dismiss the complaint for want of equity.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* PAYNE.

Opinion delivered January 26, 1920.

1. MASTER AND SERVANT—ASSUMED RISK QUESTION FOR JURY.—A carpenter, who was injured by the head of a maul used by his helper flying off, did not as matter of law assume the risk of such injury where the defective condition of the maul was not discoverable without taking the maul off the handle.
2. MASTER AND SERVANT—INSPECTION OF TOOLS.—A servant is bound to exercise ordinary care in the use of tools furnished him by the master; but no affirmative duty of inspection is required of him to discover defects in appliances that are not so open and obvious that the servant, in putting them to the use for which they are intended, would, in the exercise of ordinary care, naturally discover the defects.
3. MASTER AND SERVANT—DEFECTIVE TOOLS—ASSUMED RISK.—It is the duty of the master to exercise ordinary care to furnish the servant with appliances reasonably safe for the purpose for which they are intended; and where he fails to do so, the servant does not assume the risk of danger unless this defect is so open and obvious that any man of ordinary prudence would discover it on casual observation.
4. DAMAGES—EXCESSIVENESS.—A verdict for $5,000 for personal injuries *held* not excessive.

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

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

1. The evidence was not sufficient to justify the court in submitting to the jury the question as to whether or not the hernia was caused by the accident in which plaintiff was struck by a maul. The only witness was Doctor Reed, and his testimony is not definite enough to justify the jury in saying the hernia resulted from the accident. 123 Ark. 124.

2. The release was binding and prevented a recovery. 102 Ark. 616; 115 *Id.* 123; 119 *Id.* 95; 117 *Id.* 524.

3. No negligence was proved warranting a recovery. It requires no skill, experience or judgment to do such an act as putting a handle in a maul, and it was not incumbent on the master to have someone to examine the maul every few minutes to see whether the handle was on tight or not. The plaintiff could readily ascertain the safety of the maul as a tool by examination and the master was not an insurer as to ordinary tools in everyday use. 66 S. E. 134; 199 S. W. 1074; 57 Ark. 503; 108 *Id.* 377; 130 *Id.* 486.

4. The court erred in its instructions.

5. The verdict is excessive. 147 N. W. 279, and cases *spra.*

Fred A. Isgrig and Fred A. Snodgress, for appellee.

1. The evidence is sufficient to show that the hernia was caused by being struck by the maul.

2. The instructions as to the release follow our law. 93 Ark. 589; 193 S. W. 791.

3. Negligence was proved, and the verdict is not excessive. 170 N. W. 279; 8 R. C. L. 673; 78 S. W. 744; 5 Current Law 931; 85 S. W. 669; *Id.* 785; 78 Pac. 866; 9 N. E. 453; 27 Id. 607; 38 Id. 358; 13 Cyc. 123; 58 S. W. 923; 20 L. R. A. (N. S.) 458; 15 Id. 779.

Wood, J. The appellee instituted this action against the appellant for damages for personal injuries.

The appellee, a carpenter and cabinet maker, was in the employ of the appellant at its shops in North Little

Rock. He was engaged in safety appliance work and was in charge of such work. He had an assistant, usually called a knocker or helper. Safety appliance work requires the climbing up on cars, the fixing of grab irons, running boards, and things of that kind. Appellee was engaged in putting steel plates as a partial equipment on one of appellant's cars, and while so engaged he was severely injured.

Appellee describes the circumstances of the occurrence as follows: "At the time I received my injuries, Dewey Dees was my helper. I went to the second car, and Jess Bargle was holding the chisel board. It was a long board about six or seven feet long that holds the bore, while Dees takes the rivet, you know, and cuts the rivets off. It is a chisel bar, made like a cold chisel. He cuts the rivets with a large maul, weighing about eight or ten pounds. Dewey Dees was striking it and Jess Bargle was holding it. The first or second lick he struck his chisel bar it broke, and we had to write a requisition in for a new one. I told Jess to take the old one back and return it back for a new one, and bring the new one back with you. In the meantime, well, there was a fellow worker right close by and he said, 'I will lend you mine, it is all right,' and to keep from detaining the company's work, I picked the bar up, which I had a right to do in the absence of my helper. Dewey Dees was cutting these steel rivets off about five or six licks to the rivet; he was putting in good licks, and the maul slipped off of the handle, and flew directly as he had made his full lick. He couldn't have done otherwise, and it struck me in my groin right in there. * * * Those mauls are made with a small side and a large side, and you put the handle on from the small side and wedge it over the wide side, and that flared the handle on from the large side, and wedged it on to the small side, and, therefore, as soon as that was used, it slipped off and flew off of the handle. I did not have an occasion to examine the handle at all because I had the utmost confidence in the man who put them on. Mr. Cleveland was

the man who saw after putting the handles on. He was in the employ of the Rock Island, and has been for a number of years. Mr. Cleveland had put this handle on the day before the maul came off and struck me. I did not examine the maul to see that the handle was in right or not. The fact of the business is if we had examined it we could not have told unless we took the maul off to see."

Witness Dewey Dees testified on behalf of the appellant as follows: "I quit the Rock Island in November, 1917, and have not worked there since. I have no connection with the Rock Island now. I was working for the Rock Island when Payne got hit with a maul. I was using the maul when it came off the handle and hit him. I never examined the maul. The wedge was still in the maul. The handle had just been put in there the day before. Payne and myself looked at the maul before we started to using it to see whether the handle was in the maul right or not. The maul had become loose once or twice before. The reason we examined it was because it had come loose and we examined it to see if it was on tight. Sometimes when they were new they would come off, so we looked at the maul, but it came off anyhow."

Another one of appellant's witnesses testified in part as follows: "I examined the maul and the handle as to how it was put on. The handle was properly put on, but the wedges came out. It does not make any difference from what side the handle is put in. The eye of the maul is the same size all the way through. This was a new handle. It frequently happens that the maul will slip off of the handle, not as soon as you put them on, but after they are used a while. The use of the maul sometimes causes wedges to fly out. You can use the iron or wood, either one, and they will come out."

The appellee in his complaint alleged that the appellant had furnished the appellee with the maul which had been negligently and carelessly repaired and that he, appellee, did not know and could not have known that

the maul was in the condition described until after his injury.

Appellant in its answer denied all the material allegations of the complaint and alleged as affirmative defenses that the appellee assumed the risk and that appellant had settled with the appellee and had obtained a general release from appellee for all damages, if any, which he had sustained by reason of the injury.

The above are substantially the facts upon which the appellee predicated his cause of action and upon which he recovered judgment against the appellant in the sum of $5,000. From which is this appeal.

The court at the request of the appellant instructed the jury "that when the plaintiff undertook to work for the defendant he assumed the risk of any and all injuries ordinarily incident to the work and that might result, without negligence of the defendant, from the character of work he was doing."

The issues of negligence and of assumed risk were submitted to the jury under proper instructions and there was substantial evidence to sustain the verdict.

The testimony on behalf of the appellee tended to prove that the mauls were made with a small side and a large side; that the handle should be put on from the small side and wedged over the wide side; that when so put on the handle is flared so that it will not slip off, but that in the present case the handle was put on from the large side and wedged on to the small side which caused it to slip off the handle.

It was the duty of a man by the name of Cleveland, an employee of the appellant, to put on the handles.

The above testimony tends to prove that the handle of the maul was negligently put on and that this negligence was the proximate cause of the appellee's injury.

It can not be said as a matter of law that appellee assumed the risk. While the testimony of the appellee tends to prove that there was a large side and small side to the maul and that the handle was put on from the large side, when it should have been put on from the small side,

yet this was not discovered by him before he was injured, for the reason, as he states, he did not examine the maul to see whether the handle was put in properly or not because he had the utmost confidence in the man whose duty it was to look after the handles. His testimony further tends to prove that, even if he had examined the maul, he could not have told whether the handle was properly placed unless he took the maul off. This testimony that the defect could not have been discovered without taking the maul off was corroborated by testimony of one of the witnesses of the appellant to the effect that it did not make any difference from what side the handle was put on, as the eye of the maul is the same all the way through.

While one of the witnesses for the appellant stated that he and the appellee had examined the maul before using it to see whether the handle was in right or not, his testimony tended to show they did not discover any defect, that the handle was new and came off anyway.

The above testimony made it an issue for the jury as to whether the risk was one which the appellee assumed.

It cannot be said under the above testimony that the defective method of putting in the handle was so obvious that it could have been discovered by casual observation of those whose duty it was to use the same, or that it was such a defect that the servant in the use of it would naturally be the first one to discover it.

The servant is bound to exercise ordinary care for his own protection in the use of the tools furnished him by the master, but no affirmative duty of inspection is required of him to discover defects in appliances that are not so open and obvious that the servant in putting them to the use for which they are intended would, in the exercise of ordinary care for his own protection, naturally discover the defects. It is the duty of the master to exercise ordinary care to furnish the servant with appliances that are reasonably safe for the purpose for which they are intended, and where he fails to exercise such

care and thus negligently furnishes the servant with a tool or implement that is unsafe the servant does not assume the risk of the danger of using such tool unless the defect is so open and obvious that any man of ordinary prudence in going about his work would discover the defect upon a mere casual observation of the same.

In the case of *Chicago, Rock Island & Pac. R. R. Co.* v. *Smith,* 107 Ark. 512, the plaintiff was a car repairer and was injured by a defective eight-pound sledge hammer furnished him by the defendant while in the discharge of his duties. The hammer had an imperfect striking surface which prevented it from striking true, and caused it to glance off, and strike the plaintiff thereby injuring him.

In *Arkansas Central R. Co.* v. *Goad,* 136 Ark. 467, the plaintiff was injured by the defective condition of a lining bar used in raising the railroad ties for the purpose of spiking the rails to the ties. The bar furnished the plaintiff in that case was about five or six feet long with a small tip at the lower end with a knuck on the under side. A new bar has a long tip and turns up a little at the end. The bar furnished plaintiff was worn on the end which was inserted under the tie and the knuck was worn until it was round when it should have been flat. After putting the bar in position the plaintiff lifted up the tie supporting the rail, the bar slipped and plaintiff was injured.

In the above cases we held that it could not be said as a matter of law that the servant assumed the risk, for the reason that the defect was not one which the servant would naturally discover in the use of the tool by such casual observation as he would be required to make in the exercise of ordinary care for his own protection in performing the duties required of him.

The doctrine of those cases is applicable to the facts of this record, and it is ruled by them rather than by *Fordyce Lumber Co.* v. *Lynn,* 108 Ark. 377; *Arnold* v. *Doniphan Lumber Co.,* 130 Ark. 486, and other cases relied on by the appellant.

The present case is differentiated by the facts from the cases upon which appellant relies.

The appellant contends that there was no testimony tending to prove that the blow which the appellee received from the maul caused inguinal hernia, the injury of which he complains. But the appellee's testimony and the testimony of his family physician made this also an issue for the jury.

It could serve no useful purpose to set out and discuss in detail the testimony bearing on this issue.

We are also convinced that the nature of appellee's injury, as described by him, and also by his family physician, was such that the sum of $5,000 was not an excessive amount as compensation for the damages which appellee sustained.

There is nothing in the record to justify the conclusion that the verdict of the jury was the result of passion or prejudice. Nothing that would cause them to turn aside from a consideration of the just amount to which they believed appellee was entitled, when the evidence is given its strongest probative force in his favor, which we must give it. *Wells* v. *Sheppard,* 135 Ark. 466-70.

It was an issue for the jury under the evidence as to whether the appellee was bound by the release which he executed in favor of appellant for the consideration of $1. The court submitted this issue upon an instruction which declared the law in conformity with the decisions of this court in *St. L., I. M. & S. R. R. Co.* v. *Carter,* 93 Ark. 589; *C., R. I. & P. Ry. Co.* v. *Smith,* 128 Ark. 224.

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

Kansas City Southern Railway Company *v.* Griffin.

Opinion delivered January 26, 1920.

1. Railroads—presumption of negligence from killing animal.—The *prima facie* presumption of negligence arising from Kirby's Digest, section 6607, from the killing of an animal by a train is not overcome by testimony of the engineer that there was no negligence and that he did everything in his power under the circumstances to avoid the injury, unless such testimony can be said as matter of law to be consistent, reasonable, and uncontradicted.
2. Railroads—killing stock—evidence.—In an action for damages for mules killed on a railroad track, evidence *held* sufficient to sustain a finding of negligence on the part of the railroad company.

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

James B. McDonough, for appellant.

A directed verdict should have been given for defendant. No negligence whatever was proved and the evidence of the engineer was not contradicted but corroborated by other witnesses. The presumption of negligence was clearly overcome. 78 Ark. 234; 66 *Id.* 439; 67 *Id.* 514; 89 *Id.* 120; 53 *Id.* 96; 69 *Id.* 659; 122 *Id.* 445.

Pratt P. Bacon, for appellee.

The evidence shows that the engineer was not keeping a proper lookout and that no stock alarm was sounded. 118 Ark. 580; 68 *Id.* 32. It was raining very hard and the train was running at a high rate of speed. 111 Ark. 137; 117 *Id.* 462. The judgment is right.

Wood, J. This action was brought by the appellee against the appellant to recover damages which the appellee alleged he sustained by reason of the negligence of the servants and employees of appellant in running one of its trains over the mules of appellee, thereby killing same.

The answer denied the material allegations of the complaint.

The appellee testified that on the morning of the 16th of January, 1919, he found two of his mules dead

on the right-of-way of the appellant, just one-quarter of a mile north of the town of Ravana, between the mile posts 12 and 13 in Miller County, Arkansas. They were killed on the 15th. He saw where the tracks were and where the mules had skidded on both sides of the railroad track. They were going south. He tracked them upon the right-of-way something like 100 feet. They were knocked something like 50 feet before they struck the ground. The mules were worth $500. Where the mules were killed the track was straight three-quarters of a mile each way.

Other witnesses testified on behalf of the appellee to the effect that they saw the tracks of the mules on the railroad of the appellant, going south, at the place where the mules were killed, a distance of 30 or 40 steps; that the railroad track at that place was straight for a distance of one-half or three-quarters of a mile. One witness stated it was straight from three-quarters to a mile; that from the appearance of the tracks the mules were running.

It was shown by the appellee, who lived about a quarter of a mile from the place where the mules were killed, that he did not hear any stock alarm given by the appellant's train on the night that the mules were killed. Another witness, who lived a half mile distant, stated that he "heard the train whistle for the station, on the night that the mules were killed, at the place where they usually blow the whistle. The stock were killed about that place." He "heard the long blow of the whistle but no stock alarm. It was the south-bound passenger which was supposed to have killed the mules, which passed Ravana on that night about the usual time. The train did not stop there. It was the night of January the 15th. The train was due about 8:30 p. m. It was raining a light rain at the time the train came along."

Another witness, who lived a half mile distant, did not hear the train sound the stock alarm as it passed that night.

Other witnesses corroborated the testimony of the appellee as to the value of the mules.

The engineer who was operating the locomotive pulling appellant's train, which killed appellee's mules, testified as follows: "We were going down on No. 3 that night and just while I was whistling for Ravana, some mules jumped up the bank right in front of the train, right on the track. It was raining very hard. We were having an awfully heavy rain at the time, and I could not see them until they got on the track. I had my head out of the window. I was looking for a signal at the station, to see whether I got a stop flag. Ravana is a flag station for No. 3, and unless you get a signal, you don't stop. The mules first got in sight as they were getting on the track. They came from the right side, the engineer's side. They were probably 400 or 500 feet, not to exceed 500 feet, ahead of the engine. I was going 40 miles an hour, had a passenger train of five cars. I could have stopped it in about 1,200 or 1,500 feet at that rate of speed. It was impossible to stop the train from the time that the animals came into view so as to avoid killing them. I could not do it. I was running within my speed limit. When I first saw them, I put the air on, tried to slacken the speed all I could. I made a service application. I did not make the emergency application, because with the emergency application you are liable to injure the passengers. I used the whistle as the alarm to scare the animals off. The head light was in proper condition. I do not think the mules ran over 150 feet before I caught up with them. When I struck them I was probably running 30 miles an hour. In a slow, general rain you will probably see on both sides of the right-of-way from 900 to 1,000 feet. If it had just been a general rain there was nothing to keep me from seeing these animals. The right-of-way was clear and the track was straight, but this was a hard rain."

The fireman, who was on the engine at the time the mules were killed, testified that it was raining very hard that night. He couldn't see 700, 800, to a 1,000 feet ahead.

He didn't know whether he could see 500 or 600 feet. On cross-examination he stated he didn't know whether they hit any mules on the 15th of January or not. All he knew about it was what somebody told him.

In rebuttal witnesses testified that at about the time the train in controversy went south it was raining a little, but not a great deal. One witness said: "It was just a sort of a light sprinkle." Another stated that "it was just an ordinary rain or shower."

From a judgment in favor of the appellee in the sum of $500 is this appeal.

The appellant contends that there was no evidence to sustain the verdict. This is the only question for our consideration.

The testimony of the engineer was contradicted in at least two important particulars. First, he stated that he used the whistle to scare the animals off; second, he stated it was raining very hard, "an awfully heavy rain" at the time. These statements are contradicted by the testimony of the witnesses for the appellee. The testimony of the engineer shows that the headlight of the engine was in good condition and that in a slow general rain, he could probably have seen on both sides of the right-of-way a distance of "from 900 to 1,000 feet." He further stated "if it had been just a general rain there was nothing to keep him from seeing these animals." The testimony of the witnesses for the appellee tended to show it was a general rain. There was testimony also tending to show that no stock alarm was sounded.

The case, therefore, under the evidence does not fall within the doctrine announced in *Railway* v. *Shoecraft,* 53 Ark. 96; *K. C., F. S. & M. Ry. Co.* v. *King,* 66 Ark. 439; *St. L., I. M. & S. Ry. Co.* v. *Landers,* 67 Ark. 514; *St. L., I. M. & S. Ry. Co.* v. *Cline,* 69 Ark. 659; *Lane* v. *K. C. S. Ry. Co.,* 78 Ark. 234; *St. L. S. W. Ry. Co.* v. *O'Hare,* 89 Ark. 120.

But the case under the facts falls within the rule announced by this court in the recent case of *K. C. So. Ry. Co.* v. *Whitley,* 139 Ark. 255, where we held that a

prima facie presumption of negligence arising under the statute (6607 Kirby's Digest) from the killing of an animal by a train is not overcome by the testimony of the engineer unless his testimony, to the effect that there was no negligence and that he had done everything in his power under the circumstances to avoid the injury, can be said as a matter of law to be consistent, reasonable, and uncontradicted.

Another recent case is that of *Lusk v. Cooper,* 130 Ark. 241. Other cases are *St. L., I. M. & S. Ry. Co.* v. *Erwin,* 118 Ark. 580; *St. L. & S. F. Rd. Co.* v. *Minor,* 85 Ark. 121; *K. C. So. Ry. Co.* v. *Cash,* 80 Ark. 284; *St. L., I. M. & S. Ry. Co.* v. *Kimberlain,* 76 Ark. 100; *St. L. S. W. Ry. Co.* v. *Costello,* 68 Ark. 32.

There was evidence to sustain the verdict, and the judgment is therefore correct, and is affirmed.

LAUGHLIN *v.* FISHER.

Opinion delivered January 26, 1920.

1. TAXATION — ADVERTISEMENT OF DELINQUENT TAX LIST.—The requirement of Kirby's Digest, section 7085, that the list of delinquent lands be advertised for two weeks between the second Monday in May and the second Monday in June in each year is a prerequisite to the authority of the collector to sell the lands or to forfeit them to the State.
2. TAXATION—DELINQUENT LIST—INSUFFICIENT PUBLICATION.—Under the above statute a tax sale made only ten days after publication of the notice was void.
3. TAXATION—DELINQUENT TAX LIST—CERTIFICATE OF PUBLICATION.—Under Kirby's Digest, section 7086, requiring county clerk to record a list of delinquent lands with a notice and a certificate stating in what newspaper notice was published, the date of publication, and for what length of time notice was published, where the record showed that the certificate was made on the day of the sale, and there was no proof to show whether the certificate was made before or after the hour of sale, the sale will be held void.
4. TAXATION—TAX RECEIPTS AS EVIDENCE OF PAYMENT.—Tax receipts are the best evidence of the payment of taxes.

5. TRIAL—SECONDARY EVIDENCE—OBJECTION.—Though parol evidence of the payment of taxes is not the best evidence, it is sufficient if no objection is made.

6. TAXATION—PAYMENT OF TAXES AS AVOIDING FORFEITURE.—Where taxes were in fact paid, a forfeiture for their nonpayment was void, and a purchase from the State based on such forfeiture was void.

Appeal from Mississippi Chancery Court, Osceola District; *Archer Wheatley,* Chancellor; affirmed.

STATEMENT OF FACTS.

H. E. Fisher brought this suit in equity against John Laughlin to cancel, as a cloud on his title, a tax deed from the State to Laughlin to certain land in the Osceola District of Mississippi County, Arkansas.

The land in question was granted to the State of Arkansas under an act of Congress known as the Swamp Land Grant. The plaintiff derived his title by *mesne* conveyances from the State of Arkansas. Fisher and his predecessor in title were both witnesses in the case and testified that they had paid the taxes on the land for the past thirty years. The record shows that the land was forfeited to the State in 1913 for the non-payment of the taxes of 1912. The land was not redeemed within the time prescribed by the statute, and on the 2nd day of March, 1916, the State of Arkansas, through its Commissioner of State Lands, duly executed a deed to said lands to Harvey Laughlin and he in turn executed a deed to John Laughlin to said land.

The records of the county clerk's office show that the county clerk advertised the land for sale as delinquent land on June 9, 1913, by the county collector at the court house in the city of Osceola, in Mississippi County, Arkansas. The notice was published in the Osceola Times for two weeks. The first publication was on the 30th day of May, 1913, and the last day was on the 6th day of June, 1913, and the proof of publication was entered of record on the 9th day of June, 1913. All these matters are shown by the records of the county clerk.

The chancellor found the issues in favor of the plaintiff and a decree was entered accordingly. The defendant has appealed.

W. J. Driver, for appellant.

The deed under which appellant claims vests in him a *prima facie* title. There is no proof that the tax title was void, and the decree should be reversed. The burden was on appellee, and he must rely on the strength of his own title and not upon the weakness of defendant's. 90 Ark. 190-420; 97 *Id.* 365. The deed from the land commissioner is regular on its face and vests a *prima facie* title. Kirby & Castle's Digest, § 8757; 90 Ark. 420; 95 *Id.* 445. The record is without proof that the tax sale was void.

J. T. Coston, for appellee.

1. The answer did not controvert the facts; it merely denied that Fisher was the owner of the land, which raised no issue at all. 83 S. W. 947. It only states a legal conclusion. 128 *Id.* 351; 76 *Id.* 813. There was no issue before the court. Kirby & C. Dig., § 7573; 120 S. W. 393.

2. While the recitals in the commissioner's deed are *prima facie* evidence of a valid sale, yet here the facts admitted in the answer show that the deed was invalid. The deed was moreover incompetent. The allegata and probata must strictly correspond. 11 Ark. 135; 24 *Id.* 382.

The chancellor is presumed to have disregarded all incompetent testimony and the case should be decided only on competent testimony. 88 S. W. 916; 200 *Id.* 1031. See also 37 Ark. 663; 46 *Id.* 136. The allegations of the cross-complaint are deemed to be controverted. K. & C. Digest, § 7576. Defendant went to trial without asking for affirmative relief on his cross-complaint. 103 S. W. 609; 94 S. W. 612. The allegations of the complaint showing the invalidity of defendant's tax sale were not put in issue and the decree is right, as the tax sale was void.

HART, J., (after stating the facts). Section 7085 of Kirby's Digest, provides that the county clerk shall cause a list of the delinquent lands to be published weekly for two weeks between the second Monday in May and the second Monday in June each year. The advertisement is for the purpose of notifying the owner of the land that the taxes are unpaid and that the land will be sold for the taxes unless paid before the sale; and also to bring together competing bidders at the sale. The advertisement is a prerequisite of the authority of the officer to sell, and must be made in substantial accordance with the requirements of the statute.

Our previous decisions are uniform to the effect that the failure to give the notice for the length of time prescribed by the statute is prejudicial to the owner's interest and will avoid the sale. *Thweatt* v. *Howard,* 68 Ark. 426; *Townsend* v. *Martin,* 55 Ark. 192, and *Martin* v. *McDiarmid,* 55 Ark. 213.

In *Thweatt* v. *Howard, supra,* publication for eleven days was held to be insufficient and avoided the sale. In the case at bar the records of the county clerk's office show that the first publication was on the 30th of May, 1913, and that the sale commenced on the 9th of June, 1913. Hence the notice of the sale upon which the forfeiture to the State is based was not published for the full period of time, and for this reason the sale is void.

The sale is void for another reason. In *Hunt* v. *Gardner,* 74 Ark. 583, it was held that under Kirby's Digest, section 7086, requiring the county clerk to record the list of delinquent lands with a notice and a certificate stating in what newspaper said notice was published, the date of publication and for what length of time the same was published, failure of the clerk to record such list with notice and certificate before the day of sale invalidates all sales made by the collector on such day.

There, as here, the record showed that the certificate was made on the day of the sale, and there was no proof to show whether the certificate was made before or after the hour of sale. Other decisions to the effect that

the certified record must be made before the day of sale are the following: *Magness* v. *Harris,* 80 Ark. 583; *Townsend* v. *Penrose,* 84 Ark. 316, and *Frank Kendall Lumber Co.* v. *Smith,* 87 Ark. 360.

Counsel for appellant also relies upon a tax forfeiture to the State for the year 1910 and claims that his deed from the State is based upon this forfeiture.

H. E. Fisher testified that he had owned the land since January 1, 1907, and had paid all the State and county taxes continuously since that time. While his tax receipts would have been the best evidence that he had paid the taxes, still no objection was made to him testifying to that fact.

It follows, therefore, that the forfeiture in 1910 for taxes was void and that appellant obtained no title to the land by virtue of his purchase alone from the State based on this forfeiture. *Lonergan* v. *Baber,* 59 Ark. 15, and *Knauff* v. *Nat. Coop. & Woodenware Co.,* 99 Ark. 137.

It follows that the decree will be affirmed.

HIGGINS *v.* STATE.

Opinion delivered January 26, 1920.

1. FALSE PRETENSES—REPRESENTATIONS.—The charge of false pretenses can not be predicated upon false representations made to induce the mortgagee to release his mortgage where the indebtedness secured by such mortgage had been paid.
2. FALSE PRETENSES—DEFINITION.—A "false pretense" is such a fraudulent representation of an existing or past fact by one who knows it to be false as is adapted to induce the person to whom it is made to part with something of value.
3. FALSE PRETENSES—PARTING WITH SOMETHING OF VALUE.—False pretenses can not be predicated on a false representation to a mortgagee of land that his mortgage is the only one on the land made to induce him to release it and to take a new mortgage where his old mortgage was unrecorded, and therefore subordinate to the later recorded mortgage of a third person, since the holder of the mortgage prior in time, in executing a release of his security, parted with nothing of value.

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

J. Allen Eades, for appellant.

No mortgage was shown except the one given in March, 1914, for $25, and the goods furnished defendant during the year up to November 15 *and was absolutely restricted to that* year and the mortgage could not be stretched to cover any other than the year 1914 without an agreement in writing. It could not be extended by parol. 30 Ark. 745. The mortgage of 1914 was paid off and it got on record by mistake. It is competent for parties to limit the operation of the security and the instrument secures no advances made after the expiration of the time. 50 Ark. 259. It was the wife's land and not Higgins' at all, and Mrs. Higgins should have been allowed to testify. The court erred in its instructions. 2 Ark. 326. No. 9 was purely abstract and prejudicial.

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

The mortgage executed in 1914 was not paid off. An unrecorded mortgage is good between the parties. 71 Ark. 505. There were no errors in the instructions given or refused nor in the remarks of the State's attorney. The evidence sustains the verdict.

HART, J. N. H. Higgins prosecutes this appeal to reverse the judgment of conviction against him for the crime of obtaining money or other valuable thing by false pretenses

According to the testimony of G. C. Martin, the prosecuting witness, N. H. Higgins had worked land for him for several years and Higgins owed him for supplies which had been furnished him. In the fall of 1913 Higgins was indebted to Earl Bros., and by agreement with Martin, the latter paid off Higgins' indebtedness and took a mortgage on his stock and forty acres of land owned by his wife. The mortgage was duly signed and acknowledged by the wife of Higgins, but was not recorded until

some time in May, 1917. Higgins and his wife gave other mortgages to Martin on the forty acres of land owned by the wife, but these mortgages were never filed for record. On the 24th of June, 1918, Higgins represented to Martin that there was no lien upon the land except the mortgage of Martin, and Higgins' wife at the same time made the same representations. These representations were made by Higgins for the purpose of inducing Martin to release the old mortgage and to accept a new one on the same land. At that time the indebtedness of Higgins to Martin amounted to about $800. Upon the faith of the representations made by Higgins, Martin accepted a new note from Higgins for the amount of his indebtedness and a new mortgage on the same land signed by Higgins' wife. On April 2, 1918, Higgins and wife gave a mortgage on the same forty acres to Clifton Moose to secure an indebtedness of $331. Martin did not know that this mortgage had been executed at the time Higgins told him that the new mortgage which he proposed to execute to Martin would be the first lien on the land. Martin admitted in his testimony that Higgins, at the time of the execution of the new mortgage, had more than paid him enough to cover the amount of his indebtedness at any time during the year 1914. Higgins denied having made the representations in questions.

The evidence was not sufficient to support the verdict. According to Martin's own testimony, at the time of the execution of the mortgage on June 24, 1918, Higgins had already paid him more than enough to satisfy any indebtedness he owed Martin during the year 1914. Hence no false pretenses could be predicated upon the mortgage which was executed in 1914, because the amount of the indebtedness secured by it had been paid before the mortgage upon which the false pretenses are based was executed. The charge could not be predicated upon any of the subsequent mortgages; for, while Martin testified that Higgins and his wife executed to him mortgages on the land at a later date to secure his sub-

sequent indebtedness, the undisputed evidence showed that these mortgages were never filed for record. The mortgage to Moose was filed for record and under our statute became a first lien upon the land. It is true the prior unrecorded mortgages of Higgins and his wife to Martin constituted a valid lien upon the land as between the parties, but that was subject to the lien of the bank which, although subsequent in point of time, was a prior lien because it had been filed for record as prescribed by the statute.

A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it to be false, as is adapted to induce the person to whom it is made to part with something of value. *State* v. *Vandimark,* 35 Ark. 396, and *Morgan* v. *State,* 42 Ark. 131.

In the case at bar Martin had an unrecorded mortgage which was subject to the mortgage given to Moose. The mortgage of June 24, 1918, was upon the same property and signed by the same parties as the first mortgage and was given to secure a renewal of the same indebtedness. It is true it was subject to the mortgage given to Moose, but the prior unrecorded mortgage was also subject to the Moose mortgage. Hence the representations of Higgins did not cause Martin to part with anything of value.

But it is insisted that the case at bar is ruled by *Judkins* v. *State,* 123 Ark. 28. The facts in the two cases, however, are materially different. There the defendant induced his creditor to surrender a note and chattel mortgage and to accept a new note secured by a mortgage on land upon representations that the land was unencumbered, when in truth and in fact a third party also held a mortgage on the land for a large sum. There the creditor was induced by the false pretense to surrender his note and release his mortgage lien on the personal property, and this constituted the offense. It is true it was also said in that case that it is no defense that the prosecutor was not injured. In other words, one who obtains money by false pretenses is

liable to punishment, although it may turn out that the prosecutor suffered no financial loss thereby. In the application of this principle it was held in that case that the crime was complete, although the original debt secured by the surrendered mortgage was void on account of being usurious. So, too, it would be no defense if it turned out that the property covered by the new mortgage was of sufficient value to satisfy the original indebtedness, which was secured by the surrendered mortgage.

It follows that the judgment must be reversed and the cause remanded for a new trial.

KILGO *v.* CONTINENTAL CASUALTY COMPANY.

Dissenting opinion delivered February 2, 1920.

For majority opinion, see 140 Ark. 336.

MCCULLOCH, C. J., (dissenting). It must be and is conceded that under the principles of law heretofore announced by this court appellant was not required, as a condition to the maintenance of this action to refund the money paid for the release. *St. L., I. M. & S. Ry. Co.* v. *Smith,* 82 Ark. 105.

The requirement that money paid for a release must be refunded and the requirment that suit to rescind be brought within a reasonable time go hand in hand, and where one is applicable the other is likewise, and for the same reason, applicable. The reason, as I understand it, is that where the contract of settlement and release is merely voidable on account of fraud the dissatisfied party must make his election within a reasonable time after discovery of the fraud, either to abide by the contract or to repudiate it and return the consideration received. The return, or offer to return, of the consideration constitutes the overt act of rescission and the suit to compel rescission can be begun at any time during the statutory period of limitations. It therefore seems clear to me that in all cases where the

circumstances are such that the consideration need not be returned as a prerequisite to a suit on the original cause of action, such suit may be instituted at any time within the statutory period of limitation and not necessarily within what may be found to be a reasonable time. This is so because the release contract is void, not merely voidable, and it does not change the time allowed by law for bringing suit. Neither formal repudiation of the release nor cancellation of it by judgment or decree of court is, under such circumstances, essential to the maintenance of suit on the original cause of action, which proceeds in disregard of the void release, the amount paid being treated as a credit on the sum due. I fail to comprehend the logic of this court's position in holding that, while repudiation or rescission of the release contract is not essential, action on the original claim must commence within a reasonable time.

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